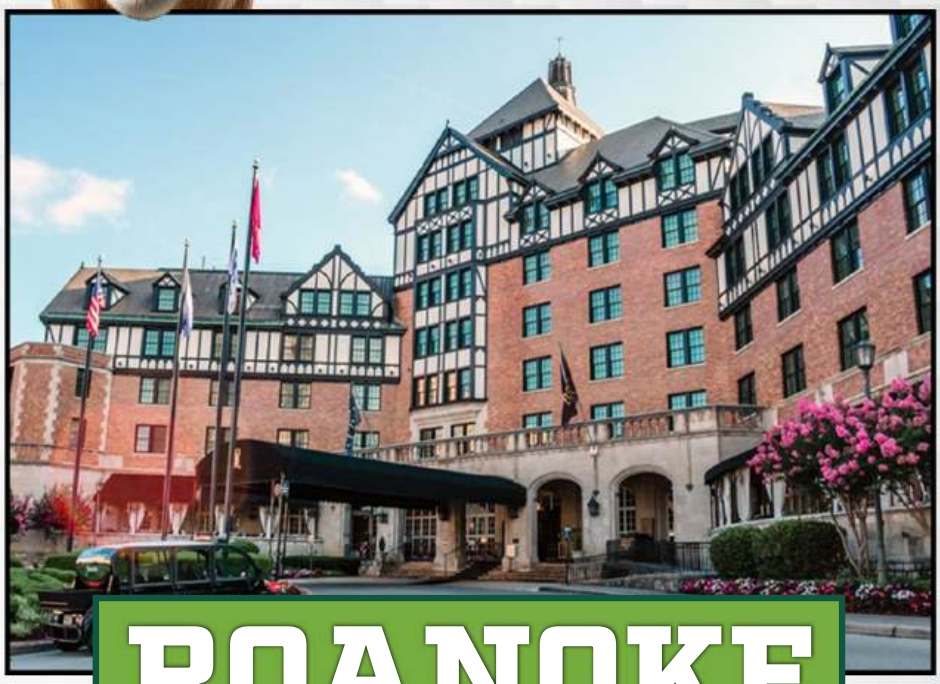
2025 Gentry Locke Seminars

TEE UP YOUR PRACTICE

be the G.O.A.T.





ROANOKE

Friday September 5, 2025

Hotel Roanoke

2025 Gentry Locke Seminars

TEE UP YOUR PRACTICE

Roanoke



8:30 a.m. **[ETHICS]** Beyond Schadenfreude – Artificial Intelligence and Legal Ethics
Jessiah S. Hulle

9:00 a.m. Demystifying Arbitration and Tales from the Trenches
Patricia "PJ" B. Turner and Kirk M. Sosebee

9:30 a.m. **[ETHICS]** Strategies and Tips for Avoiding Legal Malpractice Claims and Bar Complaints
Guy M. Harbert III

10:00 a.m. Break

10:20 a.m. Divorce, Dollars & the Deep Rough: Protecting Wealth When Life Goes Off Course
E. Scott Austin and T. Tyler Moses

10:50 a.m. Gentry Locke Consulting's Legislative Update
Gregory D. Habeeb, Patrice L. Lewis, and Zachary R. LeMaster

11:20 a.m. Five Common Legal Issues in Federal Government Contracting:
Issue Spotting for Non-Government Contract Specialists
Paul D. Hawkins

11:50 a.m. Securing Seven Figures: Lessons from a Recent Personal Injury Jury Trial
Matthew W. Broughton and Jared A. Tuck

12:20 p.m. Lunch

1:15 p.m. Anatomy of a Trademark: Helping Clients Fortify their Brands and Avoid Infringement
Kevin W. Holt and Jake L. Bryant

1:45 p.m. The Data Breach Lawsuit: Strategies for Avoiding and Winning Cyber Litigation
John G. Danyluk

2:15 p.m. Only Clients Die. Lawyers Live Forever – Succession Planning for Lawyers
W. William Gust and Lauren S. Eells

2:45 p.m. Break

3:00 p.m. **[ETHICS]** "'Ethics' for $1000 Alex:" Helping Your Practice Stay Out of Legal Jeopardy
David R. Berry, Callie M. Loveland, Jon R. L. Roellke, and Matthew W. O'Toole

3:30 p.m. Trial and Error – Avoiding Waiver in Virginia's Appellate Courts
Monica T. Monday, Michael J. Finney, Scott A. Stephenson, and David R. Berry

4:00 p.m. **[ETHICS]** From the Frontlines of Legal Ethics: VSB and ABA Insights
K. Brett Marston

4:30 p.m. Arguing Motions in the Trial Courts
Travis J. Graham

5:00 p.m. Reception

Total CLE Credit Hours: 7.00 hours, 2.0 hours of which are Ethics

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

- Virginia State Bar: President (2025); President-Elect (2024); 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)
- Serving on the Virginia State Bar's Budget & Finance Committee, Professionalism Committee, and Standing Committee for Legal Ethics
- Roanoke Regional Partnership (Economic Development), Board of Directors and Executive Committee (2019-2024); President (2021-2024)
- 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 – 2025)
- Named "Roanoke Lawyer of the Year" for Construction Law (2013, 2015, 2017, 2024, 2026) by The Best Lawyers in America, and noted in the areas of Construction Law (2006-2026) and Construction Litigation (2011-2026)
- 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 (2009-2025), to the Top 10 List (2015-2017), the Top 100 List (2014-2019, 2020-2025), 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 law (2007-2024) 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



Matt 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. He is a licensed tractor-trailer driver, holding a commercial driver's license (CDL) class A, is an ATP rated pilot, and holds a boat operator's license. During his decades of experience, he has tried hundreds of complex cases in the areas of personal injury, trucking accidents, 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
- $7.75 million settlement in a trucking case involving broken bones and head 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 trucking case with a back/head injury – un-loading
- $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
- $500,000 settlement in traumatic brain injury case
- Resolved multiple brain injury cases for $1 million or more
- Involved in hundreds of 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 (1997-2026)
- 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 (2010-2025), and Business Litigation (2008)
- Named a Top Rated Lawyer for Litigation & Civil law by American Lawyer Media (2013)
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly
- Designated as one of the Legal Elite in the Civil Litigation field by Virginia Business magazine (2003-2006, 2019)
- Named "2012 Roanoke Product Liability Litigation Lawyer of the Year" and Best Lawyers in America Business Edition for Plaintiffs (2016), Best Lawyers in America for Workers Compensation Law (1997-2002)
- Named a "Legal Eagle" for Product Liability Litigation by Virginia Living magazine (2012)
- 1998 "Boss of the Year" Award, Roanoke Valley Legal Secretaries Association
- "Attorney of the Year" Award from a top retail entity (2001)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys



Jessiah S. Hulle

Associate

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Jessiah Hulle is a litigation associate, with a practice focused on white collar defense, internal investigations, commercial litigation, and criminal appeals.

Jessiah primarily represents individual and corporate clients in investigations, civil enforcement actions, and criminal prosecutions brought by government entities—including grand juries, regulatory agencies, state Attorneys General, U.S. Attorneys, and branches of the U.S. Department of Justice. These matters involve a wide range of criminal allegations—such as fraud, conspiracy, public corruption, and violations of the Anti-Kickback Statute (AKS) and Food, Drug & Cosmetics Act (FDCA)—as well as civil claims under the False Claims Act (FCA) and Virginia Fraud Against Taxpayers Act.

In his commercial litigation practice, Jessiah litigates disputes involving contract breaches and business torts like fraud, tortious interference, conversion, and conspiracy. He also helps clients defend against discrimination claims under Title VII, Title IX, the Fair Housing Act (FHA), the Virginia Fair Housing Law, and the Virginia Human Rights Act (VHRA).

As a former clerk for the Honorable Mary Grace O'Brien of the Court of Appeals of Virginia, Jessiah maintains an active criminal appeals practice, representing clients before the Court of Appeals and Supreme Court of Virginia on both a retained and court-appointed basis.

Outside of work, Jessiah writes and speaks on civil procedure and the intersection of artificial intelligence (AI) with litigation and legal ethics.

Education

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

Experience

White Collar Defense & Investigations

- Represented businessman in high-profile investigation and prosecution of public-corruption conspiracy; secured favorable plea deal and sentence of probation.
- Represented business consultant in high-profile sentencing for obstruction of justice.
- Assisted with securing Non-Prosecution Agreement without admissions for large healthcare company in joint federal-state criminal investigation into alleged Medicaid fraud and abuse.
- Assisted with representing employees of large research company during federal grand jury investigation into alleged Animal Welfare Act violations.
- Assisted with defending individual and corporate clients in the pharmaceutical industry against federal criminal and civil investigations involving alleged violations of the Food, Drug & Cosmetic Act (FDCA) and Anti-Kickback Statute (AKS).
- Assisted with representing individual and corporate clients in the zoo industry against criminal and civil enforcement actions brought by a state Attorney General.
- Briefed motion securing new trial for public official in politically-charged criminal prosecution; charge later dismissed with prejudice.
- Obtained dismissal of student misconduct charges against students at Virginia Military Institute and the University of Virginia.

Commercial Litigation

- Won dismissal, with prejudice, of federal civil conspiracy claims brought under Racketeer Influenced and Corrupt Organizations Act (RICO) against medical practice management consulting business and its executive.
- Won summary judgment on federal sex discrimination claims brought under Title VII, 42 U.S.C. § 1981, and the Virginia Human Rights Act against national food producer.
- Won summary judgment, on sovereign immunity grounds, on whistleblower retaliation claims brought under the Virginia Human Rights Act and Virginia Fraud Against Taxpayers Act against a city.
- Assisted with litigating complex business disputes involving breach of contract, civil RICO, breach of fiduciary duty, statutory business conspiracy, common law conspiracy, and fraud.
- Assisted with defending national real estate development and management firms against federal class action involving alleged violations of the Virginia Consumer Protection Act (VCPA) and Virginia Fair Housing Law; case settled favorably.
- Successfully opposed motions to dismiss and/or demurrers in business disputes involving breach of contract, detinue, and unlawful detainer of commercial property.

Pro Bono & Court-Appointed Work

- Represented ex-inmate in Bivens lawsuit against Bureau of Prisons employees, alleging violations of the Fourth, Fifth, and Eighth Amendments for excessive use of force, denial of due process, and denial of medical care.
- Represented defendants convicted of violent crimes in appeals to the Court of Appeals of Virginia and in petitions for appeal to the Supreme Court of Virginia.

Affiliations

- Member, Virginia State Bar (2020-present)
- Member, Roanoke Bar Association (2022-present)
- Member, Federal Bar Association, Western District of Virginia Chapter (2021-present)
- Appellate Advocacy Chair, Moot Court Executive Board, Washington and Lee University School of Law (2019-2020)

Admissions

- Virginia
- United States District Court, Western District of Virginia
- United States District Court, Eastern District of Virginia

Awards

- Pro Bono Honor Roll, Virginia Access to Justice Commission (2023, 2024, 2025)
- President's Bronze Volunteer Service Award, AmeriCorps (presented by the Roanoke Bar Association) (2023, 2024, 2025)
- 40 Under 40, The Roanoker Magazine (2024)
- Best Petitioner Brief Award and Runner-Up Team, National Thurgood Marshall Moot Court Competition (2020)

Published Work

- **Lunch Orders**, The Green Bag (2025)
- **Litigators Must Do Court-by-Court Homework as AI Rules Flourish**, Bloomberg Law (2024)
- **Dual-Purpose Communications and the Attorney-Client Privilege in the Fourth Circuit**, Wake Forest Journal of Law & Policy (2024)
- **More Adjudication in the New Uncanny Valley**, Roanoke Bar Review (2024)
- **Adjudication in the New Uncanny Valley**, Roanoke Bar Review (2023) (with Megan Worley)
- **AI Standing Orders Proliferate as Federal Courts Forge Own Paths**, Bloomberg Law (2023)
- **Artificial Intelligence, Real Discrimination**, Richmond Journal of Law and Technology Blog (2023)
- **Renters with Criminal History as Quasi-Protected Class**, The Fee Simple (The Journal of the Virginia State Bar Real Property Section) (2023)

Presentations

- growing pAIns, Vanderbilt University Law School (2025)
- Generative AI in the Courtroom: The Legal Battles and Ethical Dilemmas Shaping Its Future, Bloomberg Law (2025) (with Joshua Fairfield, Golriz Chrostowski, and Jason Wilson)
- How to Avoid Misusing AI (When Not Using AI), Gentry Locke (2025)
- How to Ethically Summon the Demon, Richmond Bar Association (2024) (with Harrison Richards and Ryan Starks)
- How to Ethically Summon the Demon, Roanoke Bench-Bar Conference (2024) (with Harrison Richards)
- Demystifying AI, Ferrum College-Gentry Locke Lecture Series (2024) (with Joshua Fairfield, Laura Sprouse, and Katherine Martin)
- Privacy and Cybersecurity Compliance in the New Era of AI, Gentry Locke Seminar (2024) (with John Danyluk)
- Schrodinger's CatDog: Dual-Purpose Communications in the Fourth Circuit (2023)
- Ethics in Internal Investigations, Gentry Locke Seminar (2022) (with Thomas Bondurant, Erin Harrigan, and Jennifer DeGraw)

GENTRY LOCKE
Attorneys



Patricia "P.J." Turner

Partner

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P.J. Turner is a partner in the firm's Commercial Litigation and Construction Law practice groups where she serves as a trial-level and appellate litigator. PJ focuses her practice in the areas of construction and products-liability litigation but has seasoned experience litigating a variety of complex commercial disputes, including those involving contract breaches, business torts, employment matters, collection matters, defamation, and insurance coverage disputes. In addition, P.J. has successfully handled multiple appeals to the Supreme Court of Virginia and Virginia Court of Appeals, as well as appeals to the Third and Fourth Circuit Courts of Appeals.

Education

- Loyola University New Orleans School of Law, New Orleans, Louisiana, J.D.
- Davidson College, Davidson, N.C., B.A.

Experience

Construction

- Represented owners, manufacturers, and suppliers in alleged design defect matters
- Represented owners, general contractors, and subcontractors in alleged construction defect matters
- Represented owners, general contractors, subcontractors, and suppliers in mediation and litigation in both state and federal courts.
- Represented owners, general contractors, and subcontractors in disputes where significant delay claims, including liquidated damages, were alleged
- Assisted contractors, subcontractors, and suppliers in drafting and negotiating contracts
- Represented sureties, general contractors, and subcontractors in connection with bond claims

Products Liability

- Serves as national trial counsel for product manufacturer in asbestos litigation
- Succeeded on appeal in upholding summary judgment rulings by lower federal courts in several product-liability actions
- Obtained summary judgment for publicly traded corporation client numerous times in various product-liability actions
- Represented product manufacturers, contractors, and premises owners in defense of numerous product-liability actions related to garage doors, pumps, air compressors, boilers, HVAC equipment, turbine-generators, electrical equipment, wood roof trusses, gaskets, packing, automotive brakes and clutches, and other residential and commercial products and equipment
- Assisted in preparing nationwide strategy for publicly traded corporation client in defending products-liability actions concerning certain asbestos-containing electrical products
- Has taken and defended over 100 fact and expert depositions

Affiliations

- Virginia Bar Association, Member
  - Appellate Practice Section; Civil Litigation Section; Construction/Public Contracts Law Section
- Virginia State Bar
  - Litigation Section; Construction Law Section
- Bar Assocation of the City of Richmond, Member
  - Litigation Section, Chair (2019-2020); Executive Committee
  - Judiciary Committee
- Virginia Association of Defense Attorneys, Member

    - Board of Editors, The Journal of Civil Litigation (2013-present)
    - Chair, Appellate Advocacy Section (2015-2016)
    - Chair, Corporate and Commercial Litigation Section (2009-2019)
- Associated General Contractors of Virginia, Member
- Metro Richmond Women's Bar Association
- Defense Research Institute ("DRI")
- National Association of Women in Construction (NAWIC), Member
- Commercial Real Estate Women (CREW), Member
- Greater Richmond Association for Commercial Real Estate (GRACRE), Member

Admissions

- Virginia
- U.S. District Court Eastern District of Virginia
- U.S. District Court Western District of Virginia
- U.S. Bankruptcy Court Eastern District of Virginia
- U.S. Court of Appeals 4th Circuit
- U.S. Court of Appeals 3rd Circuit

Awards

- Named "Richmond Lawyer of the Year" for Construction Law (2026) by The Best Lawyers in America
- Named one of The Best Lawyers in America® in Construction Law and Construction Litigation Law (2025 – 2026)
- Virginia Super Lawyers Rising Stars 2014-2020 for Personal Injury – Products: Defense

GENTRY LOCKE
Attorneys



Kirk M. Sosebee

Partner

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Kirk Sosebee practices in the firm's Construction Industry and Business Litigation sections. In his construction practice, Kirk represents owners, general contractors, subcontractors, and suppliers with issues relating to both road building and vertical construction projects, including construction contract negotiations and preparation, payment disputes, mechanic's liens, construction defects, delay claims, and OSHA matters. Kirk also has extensive experience representing design and engineering firms, including in several multi-million dollar disputes relating to alleged design defects, geotechnical engineering, and construction materials observation, testing, and inspections. Kirk is licensed to practice law in Virginia and the District of Columbia.

Education

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

Experience

- Represented owners, general contractors, subcontractors, and suppliers in contract preparation and negotiation
- Represented clients in responding to and litigating OSHA citations
- Represented owners, general contractors, subcontractors, and suppliers in negotiation, arbitration, and litigation relating to disputes over payment
- Represented general contractors, subcontractors, and suppliers in preparing and filing mechanic's liens, and in litigating mechanic's liens
- Represented owners and general contractors in bonding off, defending against, and litigating mechanic's liens
- Represented owners, general contractors, and subcontractors in negotiations, arbitration, and litigation relating to disputes over construction defects
- Represented design and engineering firms relating to alleged design defects
- Represented design and engineering firms relating to litigation over geotechnical engineering issues
- Represented design and engineering firms relating to litigation over the provision of construction materials observation, testing, and inspection services
- Represented both defendants and relators in False Claims Act cases valued over $100M
- Worked on a Supreme Court amicus brief at the petition for certiorari stage
- Pro bono projects, including Section 1983 prisoner civil rights cases

Affiliations

- President, Federal Bar Association, Western District of Virginia Chapter (2022-2023)
- President-Elect, Federal Bar Association, Western District of Virginia Chapter (2021-2022)
- Vice President, Federal Bar Association, Western District of Virginia Chapter (2020-2021)
- Secretary, Federal Bar Association, Western District of Virginia Chapter (2017-2020)
- Associate, Ted Dalton American Inn of Court (2017-2019)
- Member, Virginia Bar Association's Construction and Public Contracts Law Section Council (2024)
- Member, Associated General Contractors of Virginia (2016-Present)
- Member, The Virginia Bar Association (2016-Present)
- Member, Roanoke Bar Association (2016-Present)
- Member, American Bar Association (2015-Present)

Awards

- Named to Best Lawyers in America for Commercial Litigation (2026)
- Named to Best Lawyers in America's "Ones to Watch" List for Commercial Litigation (2021-2025) and Construction Law (2022-2025)

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, **Show Me the Money**, VBA Journal, Volume XLVI, No. 1 (Spring 2019).
- Co-author, **The False Claims Act: Past, Present, and Future**; The Federal Lawyer, a publication of the Federal Bar Association (December 2016).

GENTRY LOCKE
Attorneys



Guy M. Harbert, III

Partner

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

Education

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

Experience

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

Affiliations

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

Awards

- Named “Roanoke Lawyer of the Year” for Insurance Law (2021) by Best Lawyers in America
- Named one of The Best Lawyers in America® in Insurance Law (2012-2026), also listed in Best Lawyers in America – Business Edition (2016)
- Named to Virginia Super Lawyers in the area of Personal Injury Defense: General (2007-2008, 2010-2024); also named to Super Lawyers Business Edition US in the area of Plaintiff Defense/General (2012-2014)
- Awarded the Gentry Locke Pro Bono Promise Award (2021)
- Named a “Legal Eagle” for Insurance Law by Virginia Living magazine (2012)
- Designated as one of the Legal Elite in the field of Criminal Law by Virginia Business magazine (2003-2006 and 2008-2009)

Case Studies

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

- Feb 28, 2025 — **Defense Verdict Affirmed for Western Express in Rear-end Accident**
- Mar 26, 2024 — **Defense Verdict Obtained for Western Express in Rear-end Accident**
- Feb 19, 2016 — **Jury Affirms Insurance Company Decision on Roof Repair Claim**
- Mar 7, 2014 — **Defense of Explosive Products Liability Case**

GENTRY LOCKE
Attorneys



E. Scott Austin

Partner

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Scott Austin is a trial attorney who specializes in divorce, complex litigation and complicated trial work. Scott has tried numerous jury trials in both Federal and State courts throughout Virginia and the Southeastern United States. Recently, Scott handled a Federal qui tam case in the state of Florida that resulted in $51 million settlement, which is believed to be the largest settlement in the state of Florida in 2022. Similarly, Scott handled a qui tam case in Virginia that resulted in the largest settlement in the Commonwealth of Virginia in 2018, $21 million.

In addition to handling qui tam/false claims act litigation, Scott specializes in other forms of intricate litigation, including representing businesses and individuals who either seek to protect wealth or who have difficult or high exposure matters.

Scott is admitted to practice law in Virginia.

Education

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

Experience

- Representation of False Claim Act relator on Florida case resulting in a $51 million settlement
- Representation of client in qui tam/False Claims Act case that results in the largest settlement in the Commonwealth of Virginia in 2018
- Representation of building contractors in Federal RICO action
- Representation of a national trucking client in Federal qui tam action
- Representation of an individual in complex, multi-million-dollar wrongful death actions
- Representation of State of Oregon in litigation arising from tobacco settlement
- Representation of former food company executive in a two-month jury trial in Federal Court involving several million documents and multiple federal and state government agencies
- Successful representation of corporate client before the United States Senate's Permanent Subcommittee on Investigations
- Representation of numerous individual and corporate criminal defendants in federal and state courts
- Representation of individual in alleged domestic terrorism case
- Representation of County Administrator charged with embezzlement
- Representation of physician in case involving alleged euthanasia
- Representation of defendant in large mortgage fraud conspiracy
- Representation of defendant in alleged murder for hire

Affiliations

- Chair, Board of Directors, Council of Community Services (2006-2008)
- Executive Board, Council of Community Services (2002 to 2010)
- Member, Criminal Law Section, Virginia Bar Association
- Member, National Moot Court Competition Board, Virginia Bar Association (2001)
- Member, American Bar Association
- Member, The Virginia Bar Association
- Member, Roanoke Bar Association

- Member, Virginia State Bar

Awards

- Named “Go To Worker’s Compensation Lawyer” by Virginia Lawyer’s Weekly (2021)
- Named in “Top Attorneys in the Roanoke Valley” by Roanoker Magazine (2011-2012)
- Named to Super Lawyers Business Edition US in the area of Criminal Defense/White Collar (2012)
- Designated as a Virginia Super Lawyer in the Criminal Defense White Collar category by Super Lawyers magazine(2011)
- Designated as one of the Virginia’s Legal Elite in the Young Lawyer category (2006) and Criminal Law category (2007) by Virginia Business magazine
- Named in “Best Lawyers in the Roanoke Valley” by Roanoker Magazine (2006)

Published Work

- Managing White Collar Legal Issues, Chapter 13, Tools for Combating White Collar Crime: Utilizing the FBI and the Sarbanes-Oxley Act, Thompson Reuters/Aspatore (2008).
- Co-author, When are Your Premises “Vacant” for Purposes of Insurance Coverage?, J. Civ. Lit., Spring 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.

- Mar 7, 2014 — **Defense of Explosive Products Liability Case**

GENTRY LOCKE
Attorneys



T. Tyler Moses

Associate

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Tyler Moses is a member of the firm's General Commercial Practice Group. Tyler's practice is focused on estate planning, trusts and estates administration, and taxation maters. Prior to joining Gentry Locke, he worked as an associate at a firm in Charlottesville. Tyler is the YLD Liaison of the Virginia Bar Association Tax Section, a member of the Board of Governors for the Virginia State Bar Tax Section, and a member of the Richmond Bar Association.

Tyler earned his J.D. from the University of Richmond School of Law and his B.A. from the University of Virginia. While in law school, he was admitted to the Order of Barristers and received the Virginia Bar Association Tax Award. Tyler earned his LL.M. in Taxation from the Georgetown University Law Center.

Education

- Georgetown University Law Center, Taxation LL.M.
- University of Richmond School of Law, J.D.
- University of Virginia, B.A.

Experience

- Represents clients in the structuring and implementation of estate plans, wills, and trusts
- Guides individuals and families through the probate process
- Develops the appropriate operating agreements, assignment of partnership interests, real property deeds, and nonjudicial settlement agreements for business transitions
- Prepares asset purchase agreements
- Assists clients with new business entity formation

Affiliations

- YLD Liaison, Virginia Bar Association Tax Section
- Member, Richmond Bar Association
- Board Member, Theta Chi Xi Chapter Alumni Association

Admissions

- Virginia State Bar
- District of Columbia Bar
- United States Tax Court

Awards

- Recipient, Virginia Bar Association Tax Award
- Member, Order of Barristers

Published Work

- Author, United States Penal System: Approaches to Rehabilitating Minor Drug Offenders and the Efforts of Governments to Reduce the Number of Incarcerated Individuals, 24 RICH. PUB. INT. L. REV. 167 (2021).
- Co-author, Tax Court Imposing Sec. 6673 Penalty, 21 J. TAX PRAC. & PROC., Oct.–Nov. 2019, at 43.

- Co-author, Exasperation, Frustration, Disappointment, 98 TAX NOTES STATE, Oct. 2020, at 229.

GENTRY LOCKE
Attorneys



Gregory D. Habeeb

Partner

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Greg Habeeb is the Chair of Gentry Locke's Government and Regulatory Affairs Practice Group and also the President of Gentry Locke Consulting. Greg is a former member of the Virginia House of Delegates, where he served on the Courts of Justice, Rules, Commerce & Labor, Transportation and Privileges and Elections committees, and served on the Rules and Privileges & Elections committees. Greg serves on the firm's Executive Board and is also a litigation partner specializing in complex business cases, representing individuals and companies in courts throughout the Commonwealth of Virginia and the nation.

Education

- Wake Forest School of Law, J.D.
- Wake Forest University, B.A. cum laude

Experience

- Represents auto dealers in mergers and acquisitions, licensure, contracts, employment and other matters
- Represents renewable energy companies and associations before the Virginia SCC
- Represents clients before the Virginia General Assembly and Executive Branch on issues including energy, finance, technology, healthcare, retail, gaming, transportation and more
- Represents companies and individuals before Virginia regulatory bodies includes the SCC, DMV, ABC, MVDB, DPOR, Board of Medicine and more
- Represents companies and individuals in enforcement actions brought by the Virginia Attorney General
- Represented international lender in major acquisition in shared solar industry
- Represented leading renewable energy associations in the drafting and passage of the Virginia Clean Economy Act
- Represented renewable energy trade associations, electric vehicle infrastructure companies and automobile dealers in passage of electric vehicle legislation
- Represented renewable energy company in obtaining Certificate of Public Convenience and Necessity (CPCN) from SCC for major solar project
- Represented numerous renewable energy and commercial developers in litigation brought by landowners against economic development projects
- Represents national and international companies and startups in Virginia economic development and procurement projects
- Represented Fortune 100 company in drafting and passage of Virginia's Data Privacy Act
- Represents leading public safety towing associations in all transportation legislation
- Represents Virginia's leading cannabis trade association
- Represents renewable energy companies and associations in all matters related to energy, land use, taxation and more
- Represented ratepayer advocate association in utility regulation reform legislation
- Represented numerous companies and individuals in the enforcement of contracts
- Represented Fortune 500 company in successful enforcement of non-competition/non-solicitation agreement
- Represents financial institutions before NASD, FINRA and other regulatory bodies
- Represented patent holder in successful patent infringement litigation
- Represented national lighting manufacturer in successful suit against former employees
- Represented landowner in successful tax assessment appeal of 3,000+ acre property
- Represented company in trade dress litigation brought by national leader in industry
- Represented numerous lending institutions in various Uniform Commercial Code litigation
- Successfully litigated Fair Credit Reporting Act and Virginia Consumer Protection Act matters

- Jury trial experience in state courts throughout the Commonwealth of Virginia and the United States District Courts for the Eastern and Western Districts of Virginia
- Appellate experience in the Virginia Supreme Court, United States Court of Appeals for the 4th Circuit and the United States Court of Appeals for the Federal Circuit

Affiliations

- Member, National Association of Dealers Counsel
- Appointed to the Virginia Solar Energy Development and Energy Storage Authority (2023)
- Member, Virginia General Assembly (2011-2018)
- Former Member, Virginia Code Commission
- Member, Virginia State Bar
- Member, The Virginia Bar Association
- Member, American Bar Association
- Past Member, Virginia Recreational Facilities Authority
- Former Member, Board of Directors, Big Brothers Big Sisters of Southwest Virginia
- Member, Virginia YMCA's Model General Assembly Committee
- Past Member, Wake Forest Law Alumni Council
- Volunteer Attorney for the Military Family Support Center

Awards

- Designated one of the "Legal Elite" in Administrative/Government/Legislative law by Virginia Business magazine (2019-2020, 2022-2024) and for Government & Regulatory Affairs (2021)
- Named a "Leader in the Law" by Virginia Lawyers Weekly (2017)
- Recipient, Client Distinction Award, Martindale-Hubbell (2012)
- Named a Top Rated Lawyer for Commercial Litigation, General Practice, and Products Liability law by American Lawyer Media (2013)
- Named to the Blue Ridge Business Journal's "20 Under 40 List" of the Blue Ridge Region's up-and-coming business leaders (2010)
- Designated as one of the Legal Elite in the Young Lawyer category by Virginia Business magazine (2004 and 2009)
- Recipient, RPV Governor's Award – recognized as Best Chair throughout the Commonwealth of Virginia
- Named a Virginia Super Lawyers for Legislative and Government Relations (2018-2025); previously named Rising Star in the area of Business Litigation (2008, 2010, 2012-2016), General Litigation and Personal Injury Plaintiff (2008), Commercial Litigation (2011)
- Roanoke Bar Association President's Volunteer Service Award, Bronze level, for 100-249 hours of community service in a calendar year
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys



Patrice L. Lewis

Government Affairs Director

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- Mobile: 804.305.7961
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Patrice Lewis is an Associate and Government Affairs Director at our firm. She has a diverse background in law, policy and communications, along with a strong ability to analyze data and provide strategic insights. Patrice is dedicated to helping our clients achieve their legal, legislative, and strategic goals. Before joining our firm, Patrice worked as a strategic marketing and communications consultant for SIR, Inc., in Richmond, VA. In that role, she led various initiatives focused on communications, outreach and engagement, as well as diversity, equity, and inclusion. Additionally, Patrice served as an outreach representative for Senator Mark R. Warner, covering Central and South Central Virginia, and as the legislative assistant to the late Delegate (Judge) Onzlee Ware. A native of Roanoke, Virginia, Patrice earned her undergraduate degree in sociology from the University of Virginia and her law degree from Regent University School of Law. She is licensed to practice law in both Virginia and Maryland.

Education

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

Experience

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

Affiliations

- Lewis F. Powell, Jr. Inn of Court Member
- National Black Professional Lobbyists Association Member
- Past Diversity and Inclusion Committee Chair, Public Relations Society of America – Richmond Chapter
- Past Board Member, Brown Virginia
- Past Member, Government Affairs Committee, Chamber RVA Chesterfield County
- Past Member, Civic Engagement Committee, Urban League of Greater Richmond’s Young Professional Network
- Past Advisory Board Member, Black RVA

GENTRY LOCKE
Attorneys



Zachary R. LeMaster

Government Affairs Director

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Zach LeMaster is a Government Affairs Director with Gentry Locke Consulting. In this capacity. he provides strategic advice to clients regarding the political and legislative realties of the Commonwealth.

Before joining Gentry Locke, he served as Legislative Aide and Chief of Staff to Majority Leader Thomas K. Norment, Jr. During his eight years with the Senator's office, he oversaw all office operations, including policy development, staff recruitment, and constituent services. Additionally, he led the Senator's Political Action Committees, raising over $4 million during this time and ensuring compliance with Virginia's campaign finance laws.

Zach assisted in the passage of the Senator's priority legislation, including raising the tobacco use age to 21, decriminalizing marijuana, and creating an iLottery system for the Commonwealth. The most expansive legislative effort he was involved in was the institution of a regional sales tax to promote tourism in the Historic Triangle, which required coordination between regional trade associations, local governments, and the business community.

In the 2020 Special Session of the Virginia General Assembly, Zach helped developed and guide the Virginia Senate Republican Caucus legislative agenda on criminal justice reform and public safety. He assisted in the vetting process of nominations to inaugural Virgina's Redistricting Commision.

During his time at Gentry Locke Consulting, he has led on emerging issues in blockchain, fintech, and renewable energy. He has worked against legislation which increases the burden on housing providers and presented to the Virginia Housing commission on the negative impact of rent control policies. Lastly, Zach has worked to protect the Commonwealth's historic resources, securing over $9 million in state grant funding for historic preservation programs.

Zach earned his Public Policy and Administration undergraduate degree from James Madison University (B.S., 2012); he has been with Gentry Locke since November 2021.

Education

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

Experience

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

GENTRY LOCKE
Attorneys



Paul D. Hawkins

Partner

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Paul Hawkins practices in the firm's General Commercial practice group specializing in government contracting. Paul helps government contractors win more business and navigate complex regulations with confidence representing clients at every stage of their business journey from assisting with corporate formation and governance issues to mergers and acquisitions and succession planning. As a recognized "Rising Star" in government contracts law by Virginia Super Lawyers, he combines deep legal knowledge with real-world military experience to deliver practical solutions that drive results.

Paul's practice encompasses a broad range of services designed to support businesses throughout their lifecycle, with a particular focus on government contractors. He advises on corporate formation and governance, including structures tailored for government contracting needs. His experience includes guiding clients through strategic mergers, acquisitions, and succession planning, as well as structuring joint ventures and partnerships, including opportunities under the SBA All-Small Mentor-Protégé Program. Paul also helps businesses protect and grow their government contracting portfolios through bid and size protest representation, contract claims and appeals advocacy, and negotiation of subcontracts and teaming agreements. Additionally, he provides critical compliance and risk management counsel in areas such as Federal Acquisition Regulation (FAR) compliance, small business and socioeconomic set-aside programs, intellectual property and data rights protection, and security clearance and export control regulations.

Before joining Gentry Locke, Paul was a partner at a boutique firm specializing in government contracting and construction, where he developed a reputation for solving complex regulatory challenges and helping contractors win more business. Paul's active-duty service as a U.S. Navy Surface Warfare Officer and continued service in the Navy Reserve—including multiple overseas deployments—provides invaluable insight into how government agencies think and operate. This military perspective gives his clients a distinct competitive edge, especially in the defense sector.

Education

- William & Mary Law School, J.D.
- East Carolina University, B.S. summa cum laude

Experience

- Guides government contractors through complex compliance challenges, providing strategic counsel on FAR and DFARS requirements during both proposal development and contract performance to minimize risk and maximize success.
- Represents clients in bid protest disputes and protects their interests before the Government Accountability Office (GAO) and U.S. Court of Federal Claims, while expertly navigating pre- and post-award debriefing processes to best advise clients on their rights and options in the contract award process.
- Represented clients in Requests for Equitable Adjustment (REAs) and contract claims under the Contract Disputes Act including successful advocacy before the Armed Services and Civilian Boards of Contract Appeals.
- Protects valuable intellectual property rights by providing sophisticated guidance on software and data rights compliance under FAR and DFARS, including in Other Transaction Authority (OTA) agreements.
- Maximizes small business contracting opportunities by structuring compliant corporate formations and ownership arrangements under SBA programs including 8(a) Business Development, Women-Owned, HUBZone, and Service-Disabled Veteran-Owned certifications.
- Structured dozens of profitable joint venture partnerships through expertly drafted and negotiated agreements under the SBA's small business programs, including the All-Small Mentor Protégé Program, expanding clients' competitive capabilities.
- Advised clients on compliance and data rights issues under the Small Business Innovation Research (SBIR) / Small Business Technology Transfer (STTR) programs including representing both buyers and sellers in "successor-in-interest"

transactions under applicable SBIR/STTR program rules.

- Represented government contractor clients involved in mergers and acquisitions on both the buy and sell side advising on various due diligence, structuring, and compliance/notification requirements.
- Assisted clients through efficient navigation of the FAR's complex novation process, protecting business continuity and contractual relationships.
- Built robust compliance frameworks for clients through development and implementation of comprehensive ethics and compliance programs tailored to government contracting requirements.
- Worked with clients to ensure full compliance with export control regulations, cybersecurity requirements, facility security protocols, and personnel clearance obligations.

Affiliations

- Incoming Chairman of the Board, Anchor Scholarship Foundation
- Board Member, Tidewater Association of Service Contractors
- Past Board Member, National Veteran Small Business Coalition, Mid-Atlantic Chapter
- Past Board Member, USO of Hampton Roads and Central Virginia
- Member, Virginia State Bar

Admissions

- Virginia State Bar
- Eastern District of Virginia
- U.S. Court of Federal Claims

Awards

- Virginia Business Magazine "Legal Elite" (2023, 2024)
- Virginia Super Lawyers "Rising Star, Government Contracts" (2024, 2025)

GENTRY LOCKE
Attorneys



Jared A. Tuck

Associate

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Jared Tuck is a member of the firm's Plaintiff group where he represents clients in personal injury and wrongful death matters, focusing primarily on tractor-trailer crashes, motor vehicle crashes, and boat crashes. Jared also represents injured clients in cases involving defective products, sexual assault, excessive force, premises liability, or medical malpractice. Jared is a native of Southwest Virginia who passionately advocates for victims of his community.

Prior to joining the firm as an attorney, Jared spent two summers working as a Summer Associate with Gentry Locke. He also worked as a Summer Associate at a law firm in Norfolk, Virginia, as well as a Legal Intern at the Wythe County Commonwealth's Attorney's Office.

Jared earned his J.D. *summa cum laude* from William & Mary Law School, where he belonged to the Order of the Coif, the William & Mary Law Review, the William & Mary National Trial Team, and was voted by his classmates as "the person you wouldn't want to go up against in court."

Education

- William & Mary Law School, J.D., summa cum laude
- Emory & Henry College, B.A., summa cum laude

Experience

- $7,750,000 settlement – Represented motorcyclist with traumatic brain injury (TBI) and complex regional pain syndrome (CRPS) following crash where tanker truck forced motorcyclist off of the highway.
- $3,500,000 settlement – Assisted team of lawyers representing truck driver with traumatic brain injury (TBI), spinal fractures, and osteomyelitis following incident where forklift operator dropped decking boards on client's head.
- $1,386,000 jury verdict – Represented client that suffered mild traumatic brain injury following a rear-end crash.
- $1,196,054 settlement – Represented driver with comminuted femur fracture and other orthopedic injuries following crash where tractor-trailer driver lost control of his commercial motor vehicle. Obtained policy limits from motor carrier's insurer and an additional $200,000 from the trailer company's insurer prior to filing a lawsuit.
- $1,000,000 settlement – Represented client with traumatic brain injury following incident where defendant failed to properly secure a ladder, causing it to fall and hit client in the head.
- $963,063 settlement – Represented client with mild traumatic brain injury, hand injury, and back injury following tractor-trailer crash where a truck driver ran client off of Interstate 81.
- $500,000 settlement – Represented client with traumatic brain injury (TBI) following crash where defendant ignored stop light. Obtained policy limits from the liability and underinsured motorist insurance carriers prior to filing a lawsuit.
- $351,500 settlement – Represented client with spondylolisthesis that required spinal fusion surgery following a T-bone car collision.
- $100,000 settlement – Represented client with severe orthopedic injuries requiring surgical intervention after head-on collision. Obtained policy limits from insurance carrier prior to filing a lawsuit.
- $60,000 jury verdict – Represented client with cervical strain and rotator cuff strain following head-on collision where client had less than $3,000 in medical bills and the defendant contested liability due to an alleged medical emergency.
- Argued at trial and in court hearings in personal injury and wrongful death matters.
- Drafted pleadings, discovery requests and responses, motions and briefs, proposed orders, and other court documents in personal injury cases.
- Conducted legal research and drafted memoranda on a variety of legal issues in personal injury and wrongful death matters.

- While a law student in William & Mary's Family Law Clinic, successfully tried and defended a child custody case where the court granted a motion to strike the evidence.
- While a law student in William & Mary's Veterans Benefits Clinic, represented disabled veterans by drafting documents and gathering evidence for their disability claims with the U.S. Department of Veterans Affairs.

Affiliations

- Member, Virginia Bar Association (VBA)
- Member, Virginia Trial Lawyers Association (VTLA)
- Member, Federal Bar Association (FBA)
- Member, Roanoke Bar Association (RBA)

Admissions

- Virginia State Bar

Awards

- Order of the Coif (2022)
- CALI Awards: Products Liability, Legal Research & Writing I, Legal Research & Writing II, Trust & Estates, Criminal Procedure I, Criminal Procedure II, and Employment Discrimination
- Clinical Legal Education Association Outstanding Clinic Student Award (2022)
- Gambrell Professionalism Award (2022)

Published Work

- Jared A. Tuck, Note, ***The Constitutional Right to Carry Firearms on Campus***, 63 WM. & MARY L. REV. 1047 (2022).

- Jared A. Tuck, **What Virginia Litigators Should Know About Remote Depositions**, Opening Statement, VBA Young Lawyers Div. (Summer 2023).

GENTRY LOCKE
Attorneys



Kevin Walker Holt

Partner

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Kevin Holt is a partner whose diverse practice includes commercial, real estate, intellectual property and ERISA litigation. Kevin represents companies and individuals in business and contract disputes, including complex financial and real estate matters. He also represents clients with cases involving intellectual property rights. He represents employers, insurance carriers and plan fiduciaries defending ERISA claims involving life, accident, and disability benefits. Since 2012 he has consistently been named to *Best Lawyers in America* in Commercial Litigation. Kevin is a past President of the Roanoke Bar Association and currently serves on Bar Council, the governing body of the Virginia State Bar.

Education

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

Experience

- Obtained defense verdict in Federal Court for manufacturer in $1.2 million products liability and UCC case involving alleged defects in natural gas pipeline
- Obtained preliminary injunction in Federal Court for telecommunications tower company to prevent landowners from blocking access to leased tower site
- Obtained judgment against former tenant for property damages, lost rent and attorneys' fees in breach of commercial lease case following multi-day bench trial in State Court
- Obtained summary judgment in State Court for large, residential real estate brokerage firm in $1.4 million breach of contract case
- Granted motion to dismiss in trade secret misappropriation case filed in Federal Court
- Obtained summary judgment in State Court in $700,000 breach of contract and quantum meruit Successfully used plaintiff's sworn testimony from preliminary hearing in support of motion for summary judgment
- Obtained defense verdict in State Court for manufacturer of plastics products in case involving claims of negligence and nuisance arising from fire at manufacturer's storage facility
- Successfully tried case on behalf of sports event promoter in State Court case involving claims of breach of contract and breach of fiduciary duty
- Obtained $700,000 judgment for window film manufacturer in trademark infringement case in Federal Court
- Successfully tried commercial lease case involving restitution of overpayment of tenant improvement loan
- Obtained summary judgment in the amount of $900,000 for plaintiff equipment supplier in pipeline construction case against general contractor in Federal Court
- Obtained summary judgment in Federal Court for leading national bank in breach of employment agreement case brought by terminated mortgage broker executive
- Obtained summary judgment in State Court striking down non-competition agreement as overbroad and unenforceable
- Successfully tried real estate partition suit
- Obtained judgment and award of enhanced penalty and attorney's fees in Virginia Consumer Protection Act case following bench trial in State Court
- Defend leading national life, accident and disability insurance carriers in ERISA cases
- Obtained defense verdict in favor of landowners in prescriptive easement case in State Court

Affiliations

- Virginia State Bar: One of two representatives elected from the 23rd Judicial Circuit to serve on the Council of the VSB (governing body) (2022-2025, three year term)

- Roanoke Bar Association: President (2017-2018)
- Roanoke Law Foundation: Chairman (2018-2019)
- Former Board Member, Litigation Section, Virginia State Bar
- Faculty member, Virginia State Bar Harry L. Carrico Professionalism Course (2017-2019, 2021)
- Member, The Business Council (2020-present)
- Chairman, American Heart Association's Roanoke Heart Ball (2023)
- Executive Leadership Team Member, American Heart Association's Roanoke Heart Ball (2022, 2024)
- Patron Advisory Board Member, Valley Business Front (2022-present)
- Board Member, United Way of the Roanoke Valley (2009-2015)
- Ferrum College Business Advisory Board (2014-2019)
- Member, The Ted Dalton American Inn of Court (2007-2014)
- Graduate, National Trial Advocacy College of University of Virginia School of Law (2006)
- Law Clerk to the Honorable James H. Michael, Jr., Senior United States District Judge, Western District of Virginia, Charlottesville, Virginia (1997-1998)
- Member, Virginia State Bar, The Virginia Bar Association, Roanoke Bar Association, and the Federal Bar Association

Awards

- Recognized by Virginia Business magazine as a "Legal Elite" in Civil Litigation (2016, 2018-2019, 2022-2024) and for Commercial Litigation (2021)
- Recognized with Best Lawyers in America for Commercial Litigation (2012-2026) and Intellectual Property Litigation (2019-2026); also listed in Best Lawyers in America – Business Edition (2016)
- Named to Virginia Super Lawyers for Business Litigation (2009, 2019-2025)
- "Largest Defense Verdicts in Virginia" Award (2004) as recognized by Virginia Lawyers Weekly

Published Work

- Co-author, **Your Client Has Been Named as a Defendant in a Civil Lawsuit Filed More Than a Year Ago: Now What?** (January 2023).
- **Interpleader and ERISA: More Complicated (and Interesting) Than You May Think**, DRI – The Voice of the Defense Bar, Volume 11, Issue 2 (August 2016).
- Co-author, A "Day" is a Day Again: Proposed New Rule 6 and Other Important Changes to the Federal Rules of Civil Procedure, VSB Litigation News, Volume XIV, No. III (Fall 2009).
- **Virginia Supreme Court Decides New Case Concerning the Dead Man's Statute**, VSB Litigation News, Volume XV, Number III (Fall 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.

- Jan 12, 2025 — **Defense Verdict in Favor of Landowners in Prescriptive Easement Case**
- Jul 28, 2022 — **Heavy equipment dealer in Virginia sued by the equipment manufacturer's former dealer. Court grants Motion to Dismiss.**
- Jul 12, 2021 — **Owner/landlord of a large commercial facility obtains judgment against a former tenant for property damage and lost rent**
- Feb 12, 2019 — **Restaurant chain not required to garnish employee tips**
- Jun 19, 2018 — **Contract case involving home purchase settled, all fees recovered**
- Apr 4, 2018 — **Summary Judgment in Breach of Contract action defeats $700,000 claim**
- Mar 2, 2018 — **Breach of Fiduciary Duty claim against national bank denied in Motion to Dismiss**
- Feb 7, 2018 — **Preemptive "forum shopping" fails against our client's Trade Secret litigation**
- Jan 19, 2018 — **Partial Summary Judgment thwarts request for $1.4M**
- Oct 27, 2015 — **Creditor's Contested Proof of Claim Allowed in Full**
- Mar 20, 2009 — **Motion to Dismiss Granted in Defamation and Malicious Prosecution Case**

GENTRY LOCKE
Attorneys



Jake L. Bryant

Associate

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Jake Bryant is a member of the firm's General Commercial group where his practice focuses on intellectual property, technology, privacy, branding/media rights, entertainment and the arts, rights of publicity, and corporate matters. He also assists clients with dealmaking and procedures related to the development and integration of large language models (LLMs) and other forms of generative artificial intelligence. Prior to joining Gentry Locke, Jake served as Of Counsel at a boutique intellectual property law firm and was a research assistant for the Center for Intellectual Property x Innovation Policy (now the IP Policy Institute).

Jake earned his J.D. from Liberty University School of Law where he was the Notes & Comments Editor of the Liberty University Law Review, Vice President of the Liberty Law Intellectual Property Clinic, Executive Chair of the Business & Transactional Law Society, and was a national finalist in the 2023 Saul Lefkowitz Moot Court Tournament hosted by the International Trademark Association. He received his LL.M. in Intellectual Property from the George Mason University Antonin Scalia Law School, with a focus on artificial intelligence and law & economics. Jake's published scholarship focuses on the intersection of intellectual property and emerging technologies.

Education

- George Mason University Antonin Scalia Law School, LL.M. in Intellectual Property Law
- Liberty University School of Law, J.D.
- Roanoke College, B.B.A.

Experience

- Managed the registration, maintenance, or development of over 400 federally registered trademarks
- Office actions and appeals with the USPTO and Trademark Trial and Appeal Board (T.T.A.B.)
- Copyright registrations, DMCA enforcement, and copyright infringement litigation
- Litigated and helped to favorably resolve various intellectual property, technology, non-compete, and website-oriented ADA disputes in districts across the 4th, 7th, 9th, and 11th
- SaaS and data processing agreements
- Development and termination of IT managed and cloud-based services agreements
- Agreements covering the development and integration of large language models and other forms of generative artificial intelligence.
- Privacy policy development and data breach response
- Branding and entertainment
- Media rights deals, rights of publicity
- Trade secrets and unfair competition
- Assisted with the development, facilitation, and execution of multimillion dollar equity and asset acquisition deals

Affiliations

- Member, American Intellectual Property Law Association
  Copyright Law Committee, Generative AI Task Force
- Member, Federalist Society
- Member, Christian Legal Society
- Swing For A Cure Board Member, American Cancer Society
- Board of Directors, Botetourt County Chamber of Commerce

Admissions

- Virginia State Bar
- U.S. District Court for the Western District of Virginia
- Authorized Trademark Attorney, United States Patent and Trademark Office (USPTO)

Published Work

- Author, **A new trademark catfight: Puma opposes Tiger Woods' Sun Day Red trademark application**, The Trademark Lawyer (January 2025).
- Author, **Auctorem Ex Machina: A Case for Human Copyright Authorship in Works Created Using Generative Artificial Intelligence**, AIPLA Quarterly Journal (October 2024).
- Contributor, **Commentary in Response to the Official Inquiry of the U.S. Copyright Office Regarding Copyright and Generative AI,** American Intellectual Property Law Association (AIPLA) (October 2023).
- Author, **Dancing in the Dark: Exploring the Collision of Copyright with NFTs & the Works They Represent**, 17 Liberty University Law Review 71 (September 2022).

GENTRY LOCKE
Attorneys



John G. Danyluk

Partner

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John Danyluk practices in Gentry Locke's White Collar Defense, Investigations & Compliance practice group, ranked Band 1 by Chambers USA. John represents both corporate and individual clients during their most difficult times, defending and guiding them through all phases of the criminal process. John defends and counsels clients in highly-regulated industries, with a particular focus on government contractors and the defense industrial base, healthcare and pharmaceutical companies, and critical infrastructure entities.

In addition to litigating on his clients' behalf, John specializes in helping clients avoid government scrutiny through compliance. John conducts internal investigations for organizations of all sizes to identify exposure areas and provide proactive compliance guidance to protect those clients from future litigation or criminal prosecution.

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 provides proactive compliance advice to major corporations and government contractors and guides these clients through their responses to cyber incidents and ensuing investigations. Additionally, John uses his intimate knowledge of federal procurement and trade 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), DOJ's Civil-Cyber Initiative, and ITAR.

Prior to joining Gentry Locke, John had a distinguished career with the U.S. Attorney's Office and the United States Armed Forces, serving for more than four years in the U.S. Army Judge Advocate General's Corps and as a Special Assistant U.S. Attorney (SAUSA). 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

- Represented multiple government contractors in responses to cyber incidents, including immediate containment of threats, compliance with reporting obligations, and cooperation with complex DoD investigations
- Regularly advise defense contractors regarding cybersecurity compliance and preparation for CMMC, as well as compliance with other federal regulations, including the FAR, DFARS, ITAR, FOCI, BAA, and TAA.
- Conducted multiple large-scale internal investigations and provided compliance advice for defense contractor pertaining to compliance with NAVSEA requirements and False Claims Act liability.
- Advised software and engineering firm throughout successful bid for government contract to serve as primary data processor for U.S. Food and Drug Administration's IT Infrastructure for State Regulatory Programs, including federal cybersecurity and regulatory compliance and compliance with individual state privacy and security laws for all fifty states.
- Advised large defense contractor providing veterans' services regarding compliance for planning and completion of off-shoring their IT department.
- Represented former defense contractor executive in parallel civil and criminal federal investigations into procurement fraud.
- Represented large identity verification corporation in defending one of the first privacy-based government enforcement actions under the newly implemented Virginia Consumer Data Protection Act.
- Regularly advise private-sector clients on cybersecurity & data privacy compliance, including compliance with the Virginia Consumer Data Protection Act (VCDPA), California Consumer Protection Act (CCPA), and General Data Protection Regulation (GDPR), HIPAA, GLBA, and compliant cross-border data transfers.
- Regularly advise private-sector clients regarding substantial losses due to cyber-attacks, including business email compromise, ransomware, and cyber-extortion attacks.
- Successfully defended multiple website tracking lawsuits targeting clients' digital advertising and monitoring practices, including claims brought under the California Invasion of Privacy Act (CIPA).
- Represented a key member of management of National Football League franchise during federal and state regulatory and criminal investigations.
- Represented prominent NBA player agent throughout fraud investigation
- Counseled corporate client throughout Virginia Department of Treasury investigation into compliance with state regulations to minimize liability and avoid government enforcement action.
- Defended multiple international pharmaceutical companies facing criminal charges or civil lawsuits related to healthcare fraud.
- 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 Virginia 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 multiple university students in Title IX and student misconduct investigations related to hazing, sexual misconduct, and harassment, leading to full dismissals for each student
- Represented numerous clients accused of state and federal crimes, including healthcare fraud, sexual assault, criminal misbranding, Endangered Species Act violations, and various other regulatory and criminal offenses.
- 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

- Chair-Elect, Federal Bar Association – Criminal Section
- Criminal Justice Act Panel, Eastern District of Virginia
- Member, Virginia State Bar
- Member, Virginia Bar Association
- Member, American 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

Awards

- Named “Up & Coming Attorney” for White Collar Investigations by Chambers USA
- Named to Best Lawyers in America “Ones to Watch” in Criminal Defense: White-Collar (2026)
- Recognized as an “Up & Coming Attorney” by Chambers and Partners USA (2025), Litigation: White Collar Investigations
- Named a “Legal Elite” for Cybersecurity & Data Privacy Technology law in Virginia Business magazine (2024)
- Named a Virginia Lawyers Weekly Go To Lawyer for Cybersecurity and Data Privacy (2025)
- Named a Virginia Super Lawyers “Rising Star” in Criminal Defense: White Collar (2025)

GENTRY LOCKE
Attorneys



W. William Gust

Partner

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Bill Gust is a Senior Tax Partner with Gentry Locke located in the Roanoke, Virginia office. For more than 40 years, Bill has worked with business owners relative to tax, business transitions, employee benefits, corporate, and sophisticated estate planning matters. With his expertise in implementing business succession strategies, Bill has assisted in the successful transition of many privately held businesses, through sales, mergers and implementation of numerous ESOPs. A member of the American College of Trust and Estates Counsel, *National Center for Employee Ownership* (*NCEO*) and the ESOP Association, Bill is a frequent lecturer on estate, business and tax planning as well as IRS and DOL compliance matters. As a part of his corporate practice, Bill regularly advises clients on mergers & acquisitions issues, qualified and nonqualified retirement and executive deferred compensation plans. He is consistently noted as a *Virginia Super Lawyer* in Tax Law, based on his high degree of peer recognition and professional achievement, and is consistently noted by *Best Lawyers in America* list for Tax and Employee Benefits (ERISA) Law.

Education

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

Experience

- Represented numerous corporations in the negotiation and implementation of sales, mergers and other restructuring with transaction values in excess of $250 million
- Successfully represented numerous companies in tax controversies involving tax disputes in United States District Court, United States Tax Court, and the Court of Federal Claims, resulting in substantial taxpayer recoveries
- Represented numerous professional and other corporations in the design and implementation of qualified retirement plans and unqualified deferred compensation arrangements for key employees
- Represents numerous public and private companies in the adoption and operation of Employee Stock Ownership Plans (ESOPs) and subsequent stock purchases from public and private shareholders
- Structured and implemented numerous acquisitions of turbine and rotary aircraft for U.S. and foreign companies; regularly oversees compliance with FAR Part 91 and Part 135 air operations
- Represents many individuals and families in the structuring and implementation of sophisticated estate plans, designed to minimize the negative impact of state and federal taxes in conjunction with the sale or transition of a business

Affiliations

- Member, Roanoke-Blacksburg Regional Airport Commission (past Chairman)
- Past Chair, Board of Governors, Trusts and Estates Section, Virginia State Bar
- Fellow, American College of Trust and Estate Counsel
- Member, Tax, Trusts and Estates, Health Care, Business Law Sections, Virginia State Bar
- Member, Tax, Employee Benefits, Corporate Sections, American Bar Association
- Member, Roanoke Valley Estate Planning Council
- Member, ESOP Association; NCEO, Mid-Atlantic Chapter of ESOP Associations

Awards

- Named “Roanoke Lawyer of the Year” for Tax Law (2024)
- Named “Roanoke Lawyer of the Year” for Employee Benefits (ERISA) Law (2022)
- Named to Best Lawyers in America, Employee Benefits (ERISA) Law and Tax Law (2003-2026)
- Named a “Leaders in the Law” honoree by Virginia Lawyers Weekly (2020)

- Designated one of the “Legal Elite” by Virginia Business magazine for the area of Taxes/Estates/Trusts law (2015-2017, 2020, 2023-2024) and Business Law (2018)
- Named to Virginia Super Lawyers for Tax Law (2012, 2014-2019)

GENTRY LOCKE
Attorneys



Lauren S. Eells

Of Counsel

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Lauren Eells is an attorney in our General Commercial group. Lauren primarily assists individuals, families, business owners, trustees and beneficiaries with various estate related matters including extensive planning using various trust structures, multi-generational wealth preservation techniques, business succession planning and trust and estate administration. Lauren also advises clients on matters related to transfer taxes and the taxation of estates, trusts, and beneficiaries. Additionally, Lauren works with closely-held businesses assisting with general corporate matters.

Education

- University of Richmond School of Law, J.D.
- Virginia Polytechnic Institute and State University, B.A., cum laude

Experience

- Assists individuals with estate planning as well as estate/trust administration matters.
- Represents trustees, personal representatives and beneficiaries in trust administration matters.
- Provides advice on grantor trusts, generation-skipping trusts, charitable remainder and lead trusts, qualified personal residence trusts, irrevocable life insurance trusts and family limited liability companies.
- Assists individuals with powers of attorney, advanced medical directives and medical powers of attorney as part of their overall estate plan.
- Counsels individuals on tax preservation techniques through the implementation of various trusts.
- Assists closely-held business owners in the transfer of ownership using estate planning techniques.
- Assists companies in general corporate matters including formation, drafting or revising operating agreements or bylaws, developing and implementing liquidation or succession plans.

Affiliations

- Member, Virginia State Bar
- Member, The Virginia Bar Association
- Member, Roanoke Bar Association
- Member, Virginia Women Attorneys Association
- Member, Roanoke Valley Estate Planning Council
- United Way of Roanoke Valley Board, Finance Committee (2023)
- Second Presbyterian Church Preschool Board (2019-2022)
- Board of Directors, Conflict Resolution Center (2012-2013)
- Board of Directors, Virginia Nonprofit Law Center (2017-2018)

GENTRY LOCKE
Attorneys



David R. Berry

Partner

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

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

Education

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

Experience

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

Awards

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

Case Studies

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

- Feb 28, 2025 — **Defense Verdict Affirmed for Western Express in Rear-end Accident**

GENTRY LOCKE
Attorneys



Callie M. Loveland

Associate

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Callie Loveland practices with the firm's Commercial Litigation and White Collar Defense, Investigations & Compliance practice groups. Prior to joining the firm as an attorney, Callie was a Summer Associate with Gentry Locke.

Callie earned her J.D. *summa cum laude* from the University of Richmond School of Law, where she belonged to the Order of the Coif and the McNeill Law Society. While attending law school, Callie received the National Association of Women Lawyers Award for Richmond Law where she demonstrated academic achievement, professionalism, and the potential to contribute to the advancement of women in society. She also served as the *University of Richmond Law Review*'s Managing Editor. Prior to law school, she received her B.A. from Washington University in St. Louis, where she was a John B. Ervin Scholar.

Education

- University of Richmond School of Law, J.D.
- Washington University in St. Louis, B.A.

Affiliations

- Richmond Bar Association
- Virginia Bar Association
- Federal Bar Association

Admissions

- Virginia State Bar

Awards

- Order of the Coif (2024)
- McNeill Law Society (2022-2024)
- National Association of Women Lawyers Award for Richmond Law (2024)
- CALI Award for Excellence in: Legislation & Regulation, Legal Research, Constitutional Law II, Business Associations, and National Securities & New Technologies

GENTRY LOCKE
Attorneys



Jon R.L. Roellke

Associate

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Jon Roellke is a member of the firm's Commercial Litigation practice group and works closely with the firm's Civil Defense Litigation practice group as well. Prior to joining the firm as an attorney, Jon was a Law Clerk at the Virginia Court of Appeals and the Chesterfield Circuit Court. While in law school at the University of Richmond, Jon worked as an Intern for the Office of the Federal Public Defender, Western District of Virginia and at the Central Virginia Legal Aid Society where he was also a Virginia Law Foundation Fellow.

Education

- University of Richmond School of Law, J.D., summa cum laude
- University of Virginia, B.A.

Experience

- Assisted major tractor-trailer corporations in multiple catastrophic injury claims at all stages of claims process.
- Obtained favorable resolution for delivery company in a disputed liability collision suit involving spoliation defenses.
- Obtained favorable resolution in complex, multi-jurisdictional ERISA fund dispute in the Eastern District of Virginia.
- Obtained pre-appearance dismissal of multi-claimant property damage suit for national tractor-trailer company based on a successful scope of employment defense.
- Obtained favorable resolution for international manufacturing company before the American Arbitration Association in seven-figure Uniform Commercial Code dispute.
- Obtained favorable resolution of major multi-count non-solicitation and non-compete lawsuit in the Eastern District of Virginia.
- Successfully represented underinsured motorist carriers in Virginia state and federal courts.
- Drafted bench memoranda and opinions for state intermediate appellate court judge.
- Prepared memoranda and orders in state trial court on all civil matters before the court.

Affiliations

- Virginia Bar Association
- Federal Bar Association
- Virginia Association of Defense Attorneys
- Transportation Lawyer's Association

Admissions

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

Speaking Engagements

- "Special Techniques to Defend Cases: Pleas in Bar," Gentry Locke Seminar 2024

Awards

- 2025 Virginia Access to Justice Commission Pro Bono Service Honor Roll Member
- 2024 Gentry Locke Pro Bono Promise Award Recipient

GENTRY LOCKE
Attorneys



Matthew W. O'Toole

Associate

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Matthew O'Toole is a member of the firm's General Commercial group where he focuses on estate planning, trusts and estates administration, and business succession planning. Prior to joining Gentry Locke, he worked at a boutique law firm in Richmond that specialized in all facets of trust and estate planning, administration and trustee services. Before practicing law, Matthew worked in private wealth management at SunTrust Bank, as a Vice President of the Closely Held Business group.

Matthew earned his J.D. from the University of Richmond School of Law and his B.A. from James Madison University. He is a proud Richmond native and remains deeply connected to the area he calls home.

Education

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

Experience

- Represents clients in the structuring and implementation of estate plans, wills, and trusts
- Counsels clients through probate and trust administration
- Assists clients with business succession planning
- Serving as a corporate trustee and handling fiduciary duties associated in that capacity

Affiliations

- Board Member, JHW Foundation
- Member, Young Lawyers Conference
- Member, Virginia State Bar, Trusts & Estates
- Member, Virginia Bar Association
- Member, Society of Financial Professionals

Admissions

- Virginia State Bar

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.

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

Education

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

Experience

- Obtained affirmance of defense verdict in tractor-trailer accident case. LeDoux v. Western Express, Inc., 126 F. 4th 978 (4th Cir. 2025)
- In a trade secrets dispute, secured reversal of largest jury verdict in Virginia history. Pegasystems Inc. v. Appian Corporation, 81 Va. App. 433, 904 S.E.2d 247 (2024)
- Obtained reversal of trial court's ruling refusing to enforce a personal guaranty. CSE, Inc. v. Kibby Welding, LLC, 77 Va. App. 795, 887 S.E.2d 789 (2023)
- Court affirmed trial court's interpretation of post-nuptial agreement. Worsham v. Worsham, 74 Va. App. 151, 867 S.E.2d 63 (2022)
- Secured final judgment for bank in equitable subrogation case concerning entitlement to funds in deposit account. Arch Insurance Company v. FVCbank, 301 Va. 503, 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 medical providers, including physicians, veterinarians, dentists, chiropractors and nurse practitioners in disciplinary and licensure matters before the Virginia Department of Health Professions
- Represent physicians in obtaining restoration of Virginia medical licenses

Affiliations

- Boyd-Graves Conference: Chair (2024); Secretary (2022-2024); Steering Committee Member (2016-present); Member (2011-present)
- Member, Advisory Committee on Rules of Court (2024-present)
- Member, Virginia Poverty Law Center Advisory Council (2022-present)
- Member, Virginia Trial Lawyers Foundation Board (2022-present)
- Roanoke Symphony Orchestra Board of Directors (2023-present)
- Member, Judicial Council of Virginia (2013-2023)
- The Virginia Bar Association Appellate Practice Section Council (2009-2023), 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 (2019-2023)
- Board of Trustees, Virginia Museum of Natural History (2009-2019)
- Member, Virginia Workers' Compensation American Inn of Court (2015-2023)
- 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

- Recipient of the inaugural Circle of Excellence Award by Virginia Lawyers Weekly (2024)
- Recipient of the William & Mary Law School Edmund Randolph Award for Excellence in Oral Advocacy (2023)
- "Leading Individual" by Chambers and Partners USA (2021-2025), Band 1, Litigation: Appellate (Virginia)
- "Leading Individual" by Chambers and Partners USA (2017-2025), Band 1, Litigation: Commercial (Virginia)
- Named a "Go To Lawyer for Appellate" by Virginia Lawyers Weekly (2023)
- "Roanoke Lawyer of the Year for Appellate Law" (2020 & 2025) by Best Lawyers in America
- Recipient of the Gentry Locke J. Rudy Austin Pro Bono Service Award (2023)
- "Virginia Business Power 500" (2020, 2021, 2022, 2023, 2024)
- "Virginia Business Women of Leadership" (2021)
- "Circle of Excellence" Honoree by Virginia Lawyers Weekly (2024)
- 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)
- 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 (2009-2026)
- Named to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2025), listed in Virginia Super Lawyers *Top 100* in Virginia (2013-2025), listed in Virginia Super Lawyers Top 50 Women in Virginia (2015-2025), listed in Virginia Super Lawyers Top 10 in Virginia (2019-2025), 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 (2011-2024)
- 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.

- Feb 28, 2025 — **Defense Verdict Affirmed for Western Express in Rear-end Accident**
- Oct 19, 2023 — **Upheld Opinion in Gender Pay Bias Case**
- Jul 1, 2018 — **Federal contracting client prevails in teaming agreement appeal**
- Jun 29, 2018 — **Judge Reduces Jury Verdict Due to Defect in Plaintiff's Complaint**
- Aug 31, 2017 — **Property Owners Entitled to Relief from Zoning Administrator's Mistake**
- Dec 14, 2016 — **Supreme Court of Virginia Affirms Circuit Court Decision in Construction Claim**
- Aug 3, 2016 — **Court of Appeals Affirms Finding of Desertion, Awards Appellate Attorney's Fees**
- Aug 18, 2015 — **Fraud and Breach of Contract Claims Dismissed, Affirmed on Appeal**
- Nov 8, 2013 — **Physician Successfully Defended Before Medical Board**
- Jun 11, 2013 — **Court of Appeals Affirms Decision, Awards Attorney Fees**

GENTRY LOCKE
Attorneys



Michael J. Finney

Partner

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Michael Finney is Gentry Locke's Litigation Section Leader. His practice focuses on complex litigation and appeals, including business/shareholder disputes, whistleblower claims under the False Claims Act, defamation, and intellectual property matters. Prior to joining Gentry Locke, Michael practiced in Washington, DC, and clerked at the United States District Court in Roanoke for the Honorable James C. Turk. Since 2012 he has been recognized by *Virginia Super Lawyers* and is consistently named one of the "Legal Elite" by *Virginia Business* magazine.

Education

- Harvard Law School, J.D.
- Stanford University, B.A.

Experience

Michael Finney is admitted to practice law in Virginia, the District of Columbia, and the State of California (inactive).

- Lead appellate counsel for whistleblowers in United States ex rel. Arven et al. v. Florida Birth-Related Neurological Injury Compensation Association, et al., Case No. 20-13448 (11th Circuit), a False Claims Act case where the Eleventh Circuit affirmed the district court's ruling that the defendants/appellees were not "arms of the state" of Florida, leading to $51 million settlement
- Represent appellant in **Pegasystems Inc. v. Appian Corporation**, No. 1399-22-4 (Court of Appeals of Virginia), challenging $2 billion trade secrets judgment
- Represented whistleblower in False Claims Act case involving **research fraud**, United States ex rel. Thomas v. Duke University, Case No. 1:17-cv-276-CCE-JLW (Middle District of North Carolina), which resulted in $112.5 million settlement
- Obtained partial summary judgment and jury verdict for natural gas companies in defense of $14 million breach of contract claims, and then successfully argued appeal. Knox Energy, LLC et al. v. Gasco Drilling, Inc., No. 17-1878 (4th Circuit)
- Represented social media/blockchain company in a dispute over the ownership of cryptocurrency tokens
- Represented national retailer in multi-million dollar contract dispute with inventory service provider
- Defended magazine publisher in high-profile defamation case. Eramo v. Rolling Stone LLC, et al., No. 3:15cv23 (W.D. Va.)
- Represented company President/CEO/Director in shareholder's derivative action, where asserted claims exceeded $200 million
- Represented municipality in construction dispute over airport runway project
- Represented company on products liability claims arising from plant explosion
- Obtained dismissal of defamation and business tort claims action against newspaper publisher
- Represented shopping center owner seeking to declare that a restrictive covenant was invalid
- Represented former owner of accounting company in contract dispute over earn-out provision
- Represented international pharmaceutical company in intellectual property dispute with former employee-inventor and his competing company
- Represented national galvanizing company in open account contract dispute, obtaining trial judgment for full amount claimed
- Represented guarantor of a commercial shopping center loan in federal litigation
- Represented group of individuals who had purchased illegitimate annuities, in both primary and insurance coverage actions

- Represented numerous business entities and departing individuals in non-compete, trade secret, conspiracy, defamation, and other “business divorce” cases
- Served as local counsel in both state and federal litigation
- Lawyer with Latham & Watkins before joining Gentry Locke
- Federal judicial clerk for the Honorable James C. Turk, Western District of Virginia (2008-2009)

Affiliations

- Member, Boyd Graves Conference (2021-present)
- Board Member, Virginia State Bar Education of Lawyers Section (2023-present)
- Member, Asian Pacific American Bar Association of Virginia (2022-present)
- Board Member, Virginia State Bar Litigation Section (2018-2024)
- Board Member, Boys & Girls Club of Southwest Virginia (2017-2020)
- Secretary, Federal Bar Association, Roanoke Chapter (2012-14)
- Chair, Corporate and Commercial Litigation, Virginia Association of Defense Attorneys (2012)
- Vice-Chair, Corporate and Commercial Litigation, Virginia Association of Defense Attorneys (2011)
- Member, Virginia State Bar
- Member, Washington DC Bar
- Member, California State Bar (inactive)
- Member, Virginia Bar Association
- Member, Federal Bar Association
- Member, Roanoke Bar Association
- Member, American Bar Association

Awards

- Named to “Best Lawyers in America” for Commercial Litigation and Qui Tam Law (2020-2026), and for Appellate Law and Labor and Employment Litigation (2024-2026)
- Named a Virginia Super Lawyers Rising Star in Business/Corporate Law (2012) and Business Litigation (2013-2018)
- Designated one of the Legal Elite by Virginia Business magazine in the area of Civil Litigation (2016-2020, 2023-2024) and Young Lawyer (Under 40, 2015)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys



Scott A. Stephenson

Partner

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

Scott Stephenson is a partner in the firm's Commercial Litigation and Appeals and Critical Issues Groups. A native of nearby Salem, Virginia, Scott graduated from the Georgetown University Law Center in 2014 and joined Gentry Locke shortly afterward. Scott practices complex business litigation in both state and federal courts, including disputes over ownership and management rights within businesses, corporate derivative litigation, property disputes, energy litigation, mineral rights litigation, municipal government litigation, and appellate matters.

He thrives on the challenges presented by complicated cases and nuanced legal issues; the tougher, the better. Scott particularly enjoys brief writing and oral advocacy, and constantly works on his craft under the mantra that both skills can always be improved.

Education

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

Experience

- Richard M. Rashid, et al. v. Georgette R. George, et al., 19-C-779 (Kanawha County W. Va., August 1, 2019). In a complex dispute involving numerous parties and multiple court proceedings, defended a group of closely-held businesses, its management, and its owners against claims of oppression, breach of fiduciary duty, tortious interference with contract, conspiracy, and employment discrimination. Obtained the successful resolution of the litigation.
- New Age Care, LLC v. Juran, 71 Va. App. 407, 837 S.E.2d 64 (2020) (published). Successfully obtained affirmance of the circuit court's opinion and judgment dismissing an appeal of a decision by the Virginia Board of Pharmacy awarding a pharmaceutical processor permit for the production and dispensation of cannabidiol and THC-A oils.
- Thomas v. Carmeuse Lime & Stone Inc., et al., 642 F. App'x 253 (4th Cir. 2016). In a case involving limestone and surface rights, successfully appealed a critical ruling by the United States District Court for the Western District of Virginia holding a deed reservation void to the Court of Appeals for the Fourth Circuit, resulting in the reversal of the district court's decision on the issue.
- Knox Energy, LLC v. Gasco Drilling, Inc.738 F. App'x 122 (4th Cir. 2018). In a case involving a dispute over whether the parties mutually assented to a lucrative gas drilling contract, assisted in defending the district court's ruling upholding a jury verdict for the defendant and denying the plaintiff's motion for a new trial; the Fourth Circuit Court of Appeals affirmed the district court's opinion in all respects.
- Norfolk Southern Railroad Company v. City of Roanoke, Record No. 18-1060 (4th Cir. Feb. 15, 2019) (published). In a case where Norfolk Southern claimed that the City's stormwater utility fee was an discriminatory tax under the Railroad and Revitalization and Regulatory Reform Act of 1976, assisted in defending the district court's grant of summary judgment in favor of the City, finding that the stormwater utility fee was not subject to the Act.
- New Age Care, LLC v. Juran and Dharma Pharmaceuticals, LLC, CL19-1094 (Henrico County, 2019). In an appeal under the Virginia Administrative Process Act, successfully defended a decision by the Virginia Board of Pharmacy awarding a pharmaceutical processor permit for the production and dispensation of cannabidiol and THC-A oils. Obtained dismissal of the appeal on the pleadings before the merits stage of the appeal.
- Knox Operating, LLC v. CNX Gas Company LLC and CNX Resources Corporation, CL 17-1439-00 and CL 17-1439-01 (Tazewell County, 2019). Defended a gas production company against claims of breach of contract, fraud, and business conspiracy by a maintenance contractor who claimed that a former employee of the gas company had hired it to service the company's gas wells. Obtained the successful resolution of the litigation and successfully pursued third-party claims by the company against the former employee.
- English Biomass Partners – Ferrum, LLC v. Ferum College, CL-160011380 (Franklin County); EBT, Inc., et al. v Ferrum College, Nos. CL 16-975-01, CL 16-976-01 (City of Lynchburg). Defended a College against claims and third-party

claims by a vendor related to the purchase and sale of heat and electricity under an energy sales agreement. Successfully resolved the litigation.

- Scarlet Scott v. Central Virginia Family Physicians, Inc.,et al. Record No. 160913 (June 1, 2017). In an appeal of a defense verdict, obtained a writ of review by the Supreme Court of Virginia regarding the trial court's issuance of a mitigation of damages jury instruction and evidentiary rulings.
- Norfolk Southern Railroad Company v. City of Roanoke, 7:16-cv-00176 (W.D. Va. Dec. 26, 2017). In a case where Norfolk Southern claimed that the City's stormwater utility fee was an discriminatory tax under the Railroad and Revitalization and Regulatory Reform Act of 1976, obtained summary judgment in favor of the City, finding that the stormwater utility fee was not subject to the Act.
- Brincefield v. Studdard, et al., 3:17-cv-718 (E.D. Va. 2017). In a shareholder derivative and ERISA action, defended individual corporate officers against claims of breach of fiduciary duty under Virginia corporate law and claims for violations of ERISA.
- Turner v. Virginia Department of Medical Assistance Services, et al.230 F. Supp. 3d 498 (W.D. Va. 2017); Turner v. Va. Dep't of Med. Assistance Servs., 310 F. Supp. 3d 637 (E.D. Va. 2018). In a case where the plaintiff alleged violations of the antitrust laws and tortious interference claims, obtained dismissal of the plaintiff's complaint in two different forums on a motion to dismiss pursuant to Rule 12(b)(6).
- Roanoke Lodging, LLC v. City of Roanoke, CL 15-2328, (City of Roanoke, September 18, 2018). In a case concerning a challenge to the City's assessment of real property for real estate tax purposes, obtained a pre-trial ruling excluding two critical expert witnesses designated by the plaintiff.
- Plum Creek Timberlands, L.P. v. Yellow Poplar Lumber Company, et al., 1:13-cv-00062 (W.D. Va. 2016). In a gas rights matter in southwest Virginia, represented the rights of individual property owners to the gas on their tracts.
- Eagle Mining LLC v. Elkland Holdings LLC, 2:14-cv-27210 (S.D. W. Va. 2015). Successfully obtained judicial confirmation of a 23 million-dollar arbitration award in a complex coal mining case against a subsidiary of Peabody Energy Corporation. Assisted in the related federal court litigation and a second arbitration that followed the arbitration award.
- Moore v. General Sales of Virginia Inc., et al., CL11-15-01 (City of Roanoke, March 2016). Successfully defended a Roanoke-based company in action for breach of contract in Virginia Circuit Court. Obtained summary judgment and the dismissal of a breach of contract claim based on the adequacy of notice provided pursuant to the contract, and later obtained final judgment for the company.
- Hale v. CNX Gas Company, LLC, 1:10-cv-00059 (W.D. Va. 2017). In a coal bed methane class action, represented a company's rights to coal bed methane in Southwest Virginia.

Affiliations

- Member, Salem Family YMCA Board of Directors (October 2016 – October 2022; December 2023 – Present)
- Member, Rescue Mission Ministries Board of Directors (January 2023 – Present)
- Member, Virginia State Bar (2014-Present)
- Member, Litigation Section, Virginia State Bar (2014-Present)
- Saint Thomas Moore Society (2013-Present)
- Member, Roanoke Heart Ball Executive Leadership Team (2024-Present)

Admissions

- United States Court of Appeals for the Fourth Circuit
- United States District Court for the Western District of Virginia
- United States District Court for the Eastern District of Virginia

Awards

- Noted on "Ones to Watch" list by Best Lawyers in America for Commercial Litigation, Antitrust Law, and Energy Law (2021-2025)

GENTRY LOCKE
Attorneys



Travis J. Graham

Partner

- Office: 540.983.9420
- Fax: 540.983.9400
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Travis Graham joined Gentry Locke in 2007 after practicing law in Knoxville, Tennessee for a number of years. Travis represents both plaintiffs and defendants in the state and federal courts of Virginia and Tennessee, and focuses on trust and estate litigation, product liability, personal injury, and complex commercial litigation. He advises outdoor recreation groups on issues of access and liability, and is a frequent writer, lecturer, and consultant on issues of federal and state civil procedure.

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

Education

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

Experience

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

Affiliations

- Bar Admissions:

Virginia
Tennessee
U.S.D.C., Western District of Virginia
U.S.D.C., Eastern District of Virginia
U.S.D.C., Eastern District of Tennessee
U.S.D.C., Middle District of Tennessee
U.S. Court of Appeals, 4th Circuit
U.S. Court of Appeals, 6th Circuit
Supreme Court of the Cherokee Nation

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

Awards

- Listed on the Tennessee Supreme Court Pro Bono Honor Roll and recognized as an “Attorney for Justice” (2018)
- Outstanding Volunteer Service Award, Virginia State Bar Young Lawyers Conference (2010)
- Outstanding Service Award, Knoxville Bar Association Pro Bono Project

- 1998 Class Valedictorian and Outstanding Graduate, The University of Tennessee College of Law
- Order of the Coif; Phi Kappa Phi Honor Society

Published Work

- Your Answer, Please, Virginia Lawyer Magazine, Vol. 59, No. 7 (February 2011).
- Co-author, A “Day” is a Day Again: Proposed New Rule 6 and Other Important Changes to the Federal Rules of Civil Procedure, VSB Litigation News, Volume XIV, No. III (Fall 2009).
- Co-author, Have You Made A Last-ditch, Desperate, and Disingenuous Attempt to Subvert the Legal Process Today?, Virginia Lawyer Magazine, Volume 57 (February 2009).

GENTRY LOCKE
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Beyond Schadenfreude
Artificial Intelligence and Legal Ethics

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BEYOND SCHADENFREUDE

Gentry Locke Seminar 2025

Prepared by: Jessiah Hulle

INTRODUCTION

- Since 2023, there has been an ongoing problem of attorneys misusing generative artificial intelligence ("AI") (such as ChatGPT, Gemini, or Claude) in litigation.
- Most famously, this has manifested itself in attorneys filing materials in court containing fake authority "hallucinated" by generative AI.
- Many have responded to this epidemic of AI misuse with schadenfreude—the enjoyment of others' misfortune.
- This outline invites attorneys to move "beyond schadenfreude" when thinking about generative AI misuse. It has become clear that AI hallucinations are a serious issue that *all* attorneys face, even if they don't use AI themselves. Indeed, attorneys sometimes have ethical responsibilities to vet and verify AI use by *others*—whether co-counsel, experts, vendors, staff, or even courts.

BACKGROUND

- **1900s-2020**. Formative years of generative AI ("genAI").
  - GenAI has been around for over half a century.[1]
  - The term "generative AI" is most often used to describe AI programs that "create" new content. For example, Large Language Models (LLMs) are trained on millions of pages of writing to learn how to "write" themselves.[2]

[1] https://www.dataversity.net/a-brief-history-of-generative-ai/

[2] https://research.ibm.com/blog/what-is-generative-AI

- Here is a good explanation of how genAI works.[3] Imagine you ask 10 people to complete this statement: "Knock, knock. _____?" Most will answer: "Who's there?" That is how genAI works; it is trained on large datasets of human writing and knowledge to predict the best (or at least most likely) response to an engineered prompt. The better the dataset, training, and prompt, the better the answer.

- **November 30, 2022**. OpenAI released ChatGPT (the chatbot based on their GPT 3.5 genAI).
  - Gamechanger. Over 1 million users in 5 days.[4]
  - Soon, it became clear that the strength of genAI was also its flaw: creativity. Because genAI is programmed to "create," it can "create" content outside of user prompts—sometimes called a "hallucination."[5]
  - Industries and professions—including the legal profession—started to incorporate ChatGPT and similar programs (Google's Bard, Anthropic's Claude) into operations.[6]
- **December 28, 2022**. Pro se plaintiffs in *Graham v. Trustee Services of Carolina PLLC*, No. 5:22-cv-454 (E.D.N.C. 2022) filed a motion containing citations to authority hallucinated by ChatGPT, including "Federal Rule of Civil Procedure 3.1" (which does not exist), as well as other filings replete with hallucinated authority.
  - In May 2023, US Magistrate Judge Robert Numbers of the Eastern District of North Carolina issued a show cause order to the pro se parties.[7]

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[3] *See generally* https://libguides.wlu.edu/GenAI/HowItWorks

[4] https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/

[5] https://www.ibm.com/think/topics/ai-hallucinations

[6] E.g., https://www.americanbar.org/groups/law_practice/resources/tech-report/2023/2023-artificial-intelligence-ai-techreport/

[7] ECF 56, *Graham*, No. 5:22-cv-454.

- In June 2023, Judge Numbers prohibited the pro se parties from further using genAI in the case. No monetary sanction.[8]
- Note: This case received zero press, but is the earliest example of genAI misuse we have found on the dockets—only one month after ChatGPT's release.

- **March 1, 2023**. Attorneys in *Mata v. Avianca*, 1:22-cv-1461 (S.D.N.Y. 2022) filed a brief containing citations to six fake cases "hallucinated" by ChatGPT. The attorneys had used the genAI to write the brief, unaware of the risk of hallucinations.[9]
  - US District Judge Kevin Castel of the Southern District of New York issued a show cause order to the attorneys, and they tried to cover up their (mis)use of genAI.[10]
  - In May 2023, Judge Castel sanctioned both attorneys for lack of candor.[11]
  - This was the first high-profile case of misuse of genAI in the legal profession. It was even reported on by The New York Times[12] and has its own Wikipedia page.[13]
- **May 30, 2023**. US District Judge Brantley Starr of the Northern District of Texas issued the first judicial standing order on genAI.[14]
  - The order required parties/counsel to file a certificate with all filings indicating whether genAI was used in drafting.
  - Within weeks, other judges—mostly federal—followed suit.[15]

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[8] ECF 58, *Graham*, No. 5:22-cv-454.

[9] *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 461 (S.D.N.Y. 2023)

[10] *Id.*

[11] *Id.*

[12] https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html

[13] https://en.wikipedia.org/wiki/Mata_v._Avianca,_Inc.

[14] https://reason.com/volokh/2023/05/30/federal-judge-requires-all-lawyers-to-file-certificates-related-to-use-of-generative-ai/

[15] https://news.bloomberglaw.com/us-law-week/ai-standing-orders-proliferate-as-federal-courts-forge-own-paths

- **2023 to 2025**. Following *Mata*, genAI misuse was publicized—but not curbed.
    - In 2023, there were at least half a dozen other cases involving pro se parties or counsel filing briefs with hallucinated authority. And that's just the cases that were *reported* in some capacity.[16]
    - French academic Damien Charlotin has compiled 200+ cases worldwide involving genAI misuse. 123 were in the US. At least three were in Virginia (two in WDVA, one in EDVA). The perpetrators have been pro se parties and attorneys from big, mid, and small law firms.[17]
        - Note: Severity also ranges from a single fake authority cited to, in one case, a whopping *42 fake authorities*.[18]
    - Responses from judges have ranged from benchslaps and warnings[19] to sanctions[20] and stricken filings.[21] Sanctions are especially warranted when ethical violations are present, such as covering up genAI misuse (i.e., violation of duty of candor to the court).
    - By our estimate, 300+ judges (in 2/3 of the states) have some form of standing order, local rule, general order, or informal guidance on genAI use in their courtrooms.[22] These orders and rules are in flux, with some softening their stance on genAI usage as the years go by.

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[16] *E.g.*, https://www.washingtonpost.com/technology/2023/11/16/chatgpt-lawyer-fired-ai/

[17] https://www.damiencharlotin.com/hallucinations/?sort_by=date&period_idx=0

[18] *Powhatan Cty. Sch. Bd. v. Skinger*, No. 3:24cv874, 2025 U.S. Dist. LEXIS 104564, at *7 (E.D. Va. June 2, 2025)

[19] *E.g.*, *Iovino v. Michael Stapleton Associates, Ltd.*, No. 5:21-cv-64 (W.D. Va. 2021)

[20] *E.g.*, https://www.theguardian.com/us-news/2025/may/31/utah-lawyer-chatgpt-ai-court-brief

[21] *E.g.*, https://valawyersweekly.com/2025/06/16/civil-procedure-court-strikes-multiple-filings-containing-ai-generated-hallucinations/

[22] *See generally* https://www.ropesgray.com/en/sites/artificial-intelligence-court-order-tracker; https://airtable.com/appKUCriCQDI1BxlV/shrfIAPpNKaNMnacR/tblNmp6mff8CzLuQD

- Thousands of articles, think pieces, judicial opinions, ethics opinions, and CLEs have been published addressing this problem.[23]

BEYOND SCHADENFREUDE

- **"Schadenfreude."** Definition: "Enjoyment obtained from the troubles of others."[24]
  - According to Merriam-Webster's Dictionary, "*Schadenfreude* was a favored subject in Germany by the time it was introduced to English in the mid-1800s; discussed by the likes of Schopenhauer, Kant, and Nietzsche, *schadenfreude* was showing up in psychology books, literature for children, and critical theory. In English, the word was used mostly by academics until the early 1990s, when it was introduced to more general audiences via pop culture. In a 1991 episode of *The Simpsons*, for example, Lisa explains schadenfreude to Homer, who is gloating at his neighbor's failure; she also tells him that the opposite of *schadenfreude* is *sour grapes*. "Boy," he marvels, "those Germans have a word for everything.""[25]
  - Resurgence in popularity in recent years. See, e.g., the Titan submersible.
- **GenAI Schadenfreude**. A gut reaction to stories of attorneys misusing genAI in litigation is schadenfreude. A perspective of "haha, I would never do that."[26]
  - Some genAI misuse, after all, is somewhat *laughable*: barred attorneys relying on outputs/drafts from genAI programs known to hallucinate authority, and then not verifying those outputs/drafts

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[23] *See generally* https://virginialawyer.vsb.org/articles/trust-but-verif-ai-a-judicious-approach-to-incorporating-ai-in-virginia-s-legal-profession

[24] https://www.merriam-webster.com/dictionary/schadenfreude

[25] *Id.*

[26] https://abovethelaw.com/2025/05/law-firms-use-artificial-intelligence-to-earn-very-real-31k-sanction/

before filing, despite *dozens* of high-profile cases reported by the news and local bar organizations.

  - **Using the Problem to Fix the Problem**. In *Mata v. Aviana*, the attorneys filed briefs with fake case law, then when asked to provide the cases, they asked ChatGPT to pull the cases; ChatGPT drafted "parts" of the fake cases, which the attorneys then sent to the court.
  - **Ignoring the Problem**. In *In re Guardianship of Marion Allen*, No. 2-2024-GA-04 (Wakulla Cnty. Fl., July 9, 2025), the attorney filed multiple briefs with fake cases and quotes. In one, when asked to provide a copy of a fake case, he provided a "Westlaw list of twenty *possible* case cites" for it. He never withdrew any of the briefs and said they were "typographical errors" for an unidentified "editing program."
  - **Exacerbating the Problem**. In *Tatia Lipe v. Albuquerque Public Schools et al.*, No. 1:23-cv-899 (D.N.M. 2025), plaintiff's counsel filed a brief containing fake case citations. The presiding judges ordered a show cause hearing to explain the fake cases. Before that hearing, plaintiff's counsel filed briefs in a discovery dispute containing even more fake case citations. The court wrote: "It is extremely concerning that plaintiff's counsel continues to include fabricated citations in her briefing after the issues has already been called to her attention."

- **Beyond Schadenfreude**. GenAI misuse is ***everyone's*** problem now. It's not just something to read about in legal tabloids; it's a hobgoblin that can harm any unsuspecting lawyer. Even attorneys not using genAI at all can be affected by others misusing genAI, including:
  - Co-counsel
  - Experts
  - Vendors/Contractors/Staff
  - Judges

- **VSB Special Committee on Technology and the Future of Law Practice.** Article: *Trust, but Verif-AI*. "[C]ommonsense requirements for the use of generative AI are arguably just logical extensions of the existing Model Rules of Professional Conduct, as well as the Virginia Rules of Professional Conduct."[27]
- **Virginia State Bar: Guidance on Generative AI (hereinafter "VSB Guidance").**[28] Contains a summary of the major Rules of Professional Conduct implicated by genAI. Advises: "[A] lawyer's basic ethical responsibilities have not changed, and many ethics issues involving generative AI are fundamentally similar to issues lawyers face when working with other technology or other people (both lawyers and nonlawyers).
- **Competence.**
    - Rule 1.1.
        - "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
    - Rule 1.1 cmt. 6.
        - "To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology."
    - VSB Guidance: "[C]aution is . . . necessary, especially for general-purpose generative AI products; legal-specific products generally are linked to a legal research database and therefore should be more reliable with case citations. As with any legal research or

[27] https://virginialawyer.vsb.org/articles/trust-but-verif-ai-a-judicious-approach-to-incorporating-ai-in-virginia-s-legal-profession

[28] https://vsb.org/Site/Site/lawyers/ethics.aspx

drafting done by software or by a nonlawyer assistant, a lawyer has a duty to review the work done and verify that any citations are accurate (and real). Beyond generating information that is simply false, generative AI might also produce information that is not completely accurate or is biased. . . . [O]utput must be carefully evaluated to ensure that it is accurate and that it is consistent with the interests of the lawyer's client. Work product generated by generative AI should always be critically reviewed by the lawyer exercising independent judgment about the contents."[29]

- According to the Virginia State Bar's Technology and the Future Practice of Law 2025 report: "[P]ractitioners need only 'a basic knowledge of how AI works' rather than technical expertise. This assessment remains true, although the ethical duty to understand AI capabilities and limitations has grown more pressing as these tools become more powerful and widely used."[30]

- **Confidentiality**.
  - Rule 1.6(d).
    - "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule."
  - VSB Guidance: "A lawyer must be very aware of the Terms of Service and any other information about the possible use of information input into an AI model. Many free, publicly available models specifically instruct users not to input any confidential or sensitive information and any information input into such a model might be disclosed to other users or used as part of the model's training. Legal-specific products or internally-developed products that are not used or accessed by anyone outside of the firm may provide protection for confidential information, but lawyers must make reasonable efforts to assess that security and evaluate whether and under what circumstances confidential information

[29] *Id.*

[30] https://vsb.org/common/Uploaded%20files/docs/pub-future-law-report-2025.pdf

will be protected from disclosure to third parties. It may be appropriate to consult with IT professionals or other experts before sharing confidential information with any generative AI product."[31]

- **Disclosure to Clients.**
  - Rule 1.4(b).
    - "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."
  - VSB Guidance: "There is no per se requirement to inform a client about the use of generative AI in their matter. Whether disclosure is necessary will depend on a number of factors, including the existence of any agreement with or instructions from the client on this issue, whether confidential information will be disclosed to the generative AI, and any risks to the client from the use of generative AI."[32]
  - Note: Some companies have policies prohibiting the use of genAI, including by counsel.[33]
- **Supervision.**
  - Rule 5.1(a).
    - "A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."
  - Rule 5.1(b).
    - "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the

[31] https://vsb.org/Site/Site/lawyers/ethics.aspx

[32] *Id.*

[33] https://www.cfodive.com/news/one-in-four-companies-ban-genai/705966/

other lawyer conforms to the Rules of Professional Conduct."

- Rule 5.1(c).
  - "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved."
- Rule 5.3(a).
  - "With respect to a nonlawyer employed or retained by or associated with a lawyer: a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer[.]"
- VSB Guidance: "The duty of supervision extends to generative AI use by others in a law firm, and partners and other supervisory lawyers should consider whether Rule 5.1 requires ***adopting a policy*** on the use of generative AI, including education and safeguards on when use of generative AI is appropriate. Firms should also consider systems for tracking use of generative AI within the firm – for example, when it is used, what specific prompts and other information are used, and what output is generated."[34]
- Note: Sample policy from VBA.[35]

- **Billing and Fees.**
  - Rule 1.5(a).
    - "A lawyer's fee shall be reasonable."
  - Rule 1.5(b).

[34] https://vsb.org/Site/Site/lawyers/ethics.aspx

[35] https://www.vba.org/?pg=ai

        - "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."
    - VSB Guidance: "In all instances, fees must be reasonable and adequately explained to the client under Rule 1.5. A lawyer may not charge an hourly fee in excess of the time actually spent on the case and may not bill for time saved by using generative AI. The lawyer may bill for actual time spent using generative AI in a client's matter or may wish to consider alternative fee arrangements to account for the value generated by the use of generative AI. The lawyer may only charge the client for costs associated with generative AI if permitted by the fee agreement and by Rule 1.5; any costs passed along to the client and described to the client as costs must be actual costs and cannot be marked up."[36]
    - LEO 1850 (Jan. 12, 2021). Provides guidance on billing for outsourced legal services.
    - NEW—Draft LEO 1901 (Jun 17, 2025). Provides guidance on charging fees for genAI-assisted legal work. The takeaway: "When determining the reasonableness of [non-hourly] fee charged by a lawyer who uses AI, Rule 1.5 does not equate reduced time with a reduced fee. Instead, a proper analysis should recognize that reasonable non-hourly fees can reflect efficiency gains, the specialized skill of effectively incorporating technology, and the value of the relevant services and output."
- **Court Disclosure Requirements**.
    - Rule 3.4(d).
        - "A lawyer shall not: . . . Knowingly disobey . . . a standing rule or a ruling of a tribunal made in the course of a

[36] https://vsb.org/Site/Site/lawyers/ethics.aspx

proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling."

- VSB Guidance: "Some courts throughout the country have imposed requirements to certify whether generative AI has been used in any document filed with the court. The content and scope of these requirements vary depending on the court, and new requirements may be added at any time. A lawyer must determine whether any disclosure requirement applies to a filing that the lawyer is making and must comply with that requirement pursuant to Rule 3.4(d)."[37]
  - Note: Many of the judges in the Eastern District of Virginia have standard scheduling orders that contain genAI disclosure or certification requirements, especially in the Richmond Division of the court.[38]

- **Reporting Misconduct.**
  - Rule 8.3.
    - "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."

- **Meritorious Claims and Contentions.**
  - Rule 3.1.
    - "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the

[37] *Id.*

[38] https://www.ropesgray.com/en/sites/Artificial-Intelligence-Court-Order-Tracker/states/virginia

proceeding as to require that every element of the case be established."

- *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 461 (S.D.N.Y. 2023) (applying Federal Rule of Civil Procedure 11): "A fake opinion is not "*existing law*" and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law. An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system."

- **Intentional Misconduct**. An attorney may violate certain Rules of Professional Conduct by *intentionally* or *knowingly* misusing genAI to fabricate evidence or violate court rules. *E.g.*, Rule 3.3 (Candor Toward the Tribunal); Rule 3.4 (Fairness to Opposing Party and Counsel); Rule 8.4 (Misconduct).

- **Note**: Other state bars have released helpful guidance or ethics opinions on genAI and legal ethics as well. *See, e.g.*, Arizona[39]; California[40]; Florida[41]; Kentucky[42]; Massachusetts[43]; Michigan[44]; Mississippi[45]; Missouri[46]; New Hampshire[47]; New Jersey[48]; New

[39] https://www.azbar.org/media/e4chgf0g/aisc-ethical-best-practices-guidance_for-publication.pdf

[40] https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf

[41] https://www.floridabar.org/etopinions/opinion-24-1/

[42] https://nationalcenterforstatecourts.app.box.com/s/0f5iqlvcgyaumn7wvl10sku8mon3q41f

[43] https://bbopublic.massbbo.org/web/f/The_Wild_West_of_Artificial_Intelligence.pdf

[44] https://www.michbar.org/opinions/ethics/AIFAQs

[45] https://www.msbar.org/ethics-discipline/ethics-opinions/formal-opinions/267/

[46] https://mo-legal-ethics.org/informal-opinion/2024-11/

[47] https://www.nhbar.org/using-artificial-intelligence-in-practice/

[48] https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf

Mexico[49]; North Carolina[50]; Oregon[51]; Pennsylvania[52]; Texas[53]; Vermont[54]; DC[55]; West Virginia[56]; Wisconsin[57]

Co-Counsel + AI

- **GenAI Misuse by Co-Counsel**. Although the first high-profile cases of genAI misuse involved small law practices and pro se parties, recent cases have entangled multiple attorneys, including local counsel.
- **Law: Local Counsel.**
  - Supreme Court Rule 1A:4(2).
    - "Local counsel associating with an out-of-state lawyer in a particular case must accept joint responsibility with the out-of-state lawyer to the client, other parties, witnesses, other counsel and to the tribunal in that particular case."
  - Virginia Code § 8.01-271.1(B).
    - "The signature of an attorney or party constitutes a certificate by him that (i) ***he has read the pleading, motion, or other paper***, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is ***warranted by existing law*** or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any

[49] https://www.sbnm.org/Portals/NMBAR/GenAI%20Formal%20Opinion%20-%20Sept_2024_FINAL.pdf

[50] https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2024-formal-ethics-opinion-1/

[51] https://www.osbar.org/_docs/ethics/2025-205.pdf

[52] https://www.lawnext.com/wp-content/uploads/2024/06/Joint-Formal-Opinion-2024-200.pdf

[53] https://www.legalethicstexas.com/resources/opinions/opinion-705/

[54] https://www.vermontjudiciary.org/sites/default/files/documents/VJCAIC%20First%20Annual%20Report%20-%20Appendices%20%28final%29.pdf

[55] https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-388

[56] https://storage.googleapis.com/msgsndr/Rgd68xOkcVdteTsBkf6O/media/667ac9c219bb7a1f7a4df4c2.pdf

[57] https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=97&Issue=9&ArticleID=30672

improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

- Note: Sanctions only available for a "knowing" violation. *Ragland v. Soggin*, 291 Va. 282, 292 (2016).

- EDVA Local Civil Rule 83.1(F).
  - "Any attorney who signs a pleading or other filing with the Court will be held accountable for the case by the Court."
    - *Flame S.A. v. Indus. Carriers, Inc.*, 39 F. Supp. 3d 752, 768-69 (E.D. Va. 2014). Summary: Lead counsel engaged in misconduct. They argued that local counsel in EDVA should not be sanctioned as well. The Court ruled: "Local counsel shares [obligations like crafting strategies and arguing motions] with pro hac vice attorneys. . . . If local counsel is not to be sanctioned, then the Court is left with the inevitable conclusion that ***local counsel did not perform his duties under the local rules***. This latter conclusion would invite different and possibly more drastic sanctions and is not in tune with local counsel's experience and reputation, which is sterling. The Court therefore will not make this conclusion." Result: Local counsel sanctioned for lead counsel's misconduct.

- **Case Study**: *Wadsworth v. Walmart*, No. 2:23-cv-118 (D. Wyo. 2023).[58]
  - Claim: Product liability for exploding hoverboard, brought against manufacturer and retailer.
  - Law firms:
    - Lead counsel: Morgan & Morgan (including the son of founder John Morgan). 42d largest law firm in US by headcount, $600M+ revenue. Has bespoke firm genAI legal research program.

[58] *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 492 (D. Wyo. 2025)

- Local counsel: Taly Goody, solo

- GenAI misuse:
  - Plaintiffs file a motion in limine drafted by the junior partner at Morgan & Morgan. Motion was signed by junior partner, lead partner, and local counsel.
  - The Court issued a show cause order after discovering that the motion cited eight cases that did not exist. "The cases are not identifiable by their Westlaw cite, and the Court cannot locate the District of Wyoming cases by their case name in its local Electronic Court Filing System. Defendants aver through counsel that "at least some of these mis-cited cases can be found on ChatGPT."" The order required the three attorneys—including *local counsel*—to either provide copies of the cited cases or, if not, to show cause why they should not be sanctioned for "citing non-existent cases." "Each attorney must also explain their role in drafting or supervising the motion."[59]
- Response.[60]
  - Lead counsel filed an initial response admitting that Morgan & Morgan used an internal bespoke genAI program that "hallucinated" the cases.
  - The junior partner then filed a declaration falling on his sword, saying he was unaware that the genAI could hallucinate, and taking all blame: "[Senior partner] had no involvement with preparation or review of said motions in limine either before, during, or immediately following filing. Additionally, local counsel . . . had absolutely no involvement with the preparation or review of said motions in limine at any time."
  - The junior partner's narrative was supported by lead counsel, who attested: "My role as head of the Products Liability Practice Group at our firm makes me [the junior

[59] ECF 156, *Wadsworth*, No. 2:23-cv-118.

[60] *See* ECF 161, 167, 168, 169, *Wadsworth*, No. 2:23-cv-118.

partner's] direct supervisor; however, that role does not extend to supervising attorney in the sense that an attorney oversees all work product produced by [the junior partner]. . . . [I] did not participate in drafting, research, or filing of the motion."

- It was also supported by local counsel, who attested: "I was not responsible for supervising or substantive moving of the case other than what is required in support of the pro hac vice motions. . . . [I] did not participate in the formulation, drafting, or research of any issue raised in the motion in limine. . . . Prior to the filing of the motion in limine, I was not sent a copy nor contacted by counsel about the substance of the motion. I was not aware that artificial intelligence was used in the drafting and research of the motion[.]"

- Result: Judge Kelly Rankin held a hearing, issued an opinion, and sanctioned all lawyers—including the senior partner *and* local counsel. The junior partner was sanctioned $3,000 and removed from the case; the senior partner and local counsel were each sanctioned $1,000.[61]
- Summary:
  - Lead counsel was from a big, relatively sophisticated firm—not a small firm or solo.
  - The technology (mis)used was a bespoke inhouse genAI tool for legal research—not a publicly-available LLM.
  - Local counsel, and the supervising senior partner, were roped into the situation and sanctioned *because they signed the motion*.

- **Case Study**: *Iovino v. Michael Stapleton Associates, Ltd.*, No. 5:21-cv-64 (W.D. Va. 2021).
  - Summary:

[61] *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 492 (D. Wyo. 2025).

        - PHV counsel used genAI programs—including Lexis and Westlaw—to draft and file a brief. The brief contained hallucinated cases.
        - US District Judge Thomas Cullen reprimanded PHV counsel, but neither reprimanded local counsel nor sanctioned PHV counsel.

- **Takeaways**:
    - **Risk**: Co-counsel—including pro hac vice or local counsel—may misuse genAI in a litigation filing. If you sign on to the filing without verifying accuracy, you may be on the hook for the misuse.
    - **Ethical Responsibilities**:
        - **Rule 1.1**. Duty of competence. Requires verifying accuracy of filings. If you sign it, you are responsible.
        - **Rule 1.4(b)**. Disclosure to clients of genAI use. May be required when co-counsel is using experimental genAI services.
        - **Rule 5.1(c)**. Supervision. Makes counsel "responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer . . . , with knowledge of the specific conduct, ratifies the conduct involved."
        - **Rule 3.4(d)**. Court disclosure requirements. Forbids counsel from "knowingly disobey[ing]" a court's standing order on genAI.
        - **Rule 8.3**. Reporting misconduct. Requires counsel to report an ethical violation by co-counsel when there is "reliable information" of the violation that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law."
        - **Rule 3.1**. Meritorious contentions. Forbids counsel from controverting an issue in a case "unless there is a basis for doing so that is not frivolous"—i.e., not hallucinated by genAI.
    - **Recommendation**: Ask co-counsel (1) whether they used genAI for preparing a filing and (2) whether they verified the filing's

accuracy and compliance with Local Rules, standing orders, etc. Bonus: Check it yourself!

- **Rule of Thumb.** Do not assume that pro hac vice or local counsel is so sophisticated that genAI misuse would not occur. Some of the biggest and most prestigious law firms in the US have been caught up in genAI misuse scandals, including Latham & Watkins, Butler Snow, and K&L Gates.[62]
    - Note: K&L Gates was sanctioned over $30,000. The judge struck the briefs containing fake cases and wrote: "Plaintiff's use of AI affirmatively misled me. I read their brief, was persuaded (or at least intrigued) by the authorities that they cited, and looked up the decisions to learn more about them—only to find that they didn't exist. That's scary. It almost led to the scarier outcome (from my perspective) of including those bogus materials in a judicial order."[63]

EXPERTS + AI

- **GenAI Misuse by Experts.** A handful of cases have involved experts misusing AI when drafting expert reports—undermining their reliability.
- **Law: Experts.**
    - To determine reliability of expert opinions (e.g., *Daubert*), the Court must determine "whether an expert's reasoning or methodology is scientifically valid." The Court considers a "host of factors," including "whether the theory can be (and has been) tested; whether the technique is subject to peer review; the rate of error; the existence of standards controlling the technique's

[62] https://www.abajournal.com/news/article/ai-hallucinated-cases-end-up-in-more-legal-documents-and-butler-snow-issues-apology-for-inexcusable-lapse

[63] ECF 119, *Jacquelyn Lacey et al. v. State Farm*, No. 2:24-cv-5205 (May 6, 2025)

operation; and whether the technique has garnered general acceptance."[64]

- An expert opinion based on a retracted study / research paper may be unreliable, regardless for the reason of the retraction.[65]

- **Case Study**: *Kohls v. Ellison*, No. 0:24-cv-3754 (D. Minn. 2024)
  - Claim: Violation of first Amendment/free speech by enactment of Minnesota Statute § 609.771, which banned election-related AI-generated content (e.g., deepfakes of political candidates).
  - Law firm: Minnesota Attorney General.
  - GenAI misuse:
    - The plaintiffs moved to enjoin the new statute.
    - The state AG retained a subject matter expert on election-related misinformation and deepfakes to defend against the injunction request. The expert had a sterling CV: Founding director of the Stanford Social Media Lab, chaired Professor of Communications at Stanford University, Faculty Director of the Stanford Internet Observatory, co-Director of the Stanford Cyber Policy Center, and Founding Editor of the Journal of Trust & Safety (the leading journal for online misinformation, deepfakes, hate speech, spam, etc.), with hundreds of publications on communications, AI, etc.[66]
    - The expert drafted a declaration opining that curbing the "production and dissemination of deceptive deepfake content during elections [was] critical in preserving the integrity of democratic institutions and protecting the foundational trust upon which they rely." He swore under penalty of perjury that the declaration was accurate.
    - The only problem: the declaration contained hallucinated citations to fake academic articles. The expert had put in

[64] *United States v. Mallory*, 988 F.3d 730, 741 (4th Cir. 2021).

[65] *Cedillo v. Sec'y of HHS*, No. 98-916V, 2009 U.S. Claims LEXIS 146, at *381-82 (Fed. Cl. Feb. 12, 2009) (rejecting opinion based on retracted Lancet article linking vaccines to autism; article was retracted for conflict-of-interest reasons that infected the research with anti-vaccine bias)

[66] https://profiles.stanford.edu/jeffrey-hancock?releaseVersion=11.5.1

"CITE" placeholders in the draft opinion, and then ran it through genAI, which replaced each placeholder with a hallucinated citation. The expert did not verify the citations for accuracy because he was "familiar" with most of them.[67]

- Response: The Attorney General argued that despite the fake article cites, the expert's declaration was still accurate. The AG also argued that "his office had no idea that [the] declaration included fake citations."
- Result: The Court wrote in its opinion:[68]
  - "The irony. [The expert], a credentialed expert on the dangers of AI and misinformation, has fallen victim to the siren call of relying too heavily on AI—in a case that revolves around the dangers of AI, no less."
  - "But, at the end of the day, even if the errors were an innocent mistake, and even if the propositions are substantively accurate, the fact remains that [the expert] submitted a declaration made under penalty of perjury with fake citations. It is particularly troubling to the Court that [the expert] typically validates citations with a reference software when he writes academic articles but did not do so when submitting the declaration as part of Minnesota's legal filing."
  - "One would expect that greater attention would be paid to a document submitted under penalty of perjury than academic articles. Indeed, the Court would expect greater diligence from attorneys, let alone an expert in AI misinformation at one of the country's most renowned academic institutions."
  - "[The expert's] citation to fake, AI-generated sources in his declaration—even with his helpful, thorough, and plausible

[67] *See, e.g.*, ECF 23, 37, 39, *Kohls*, No. 0:24-cv-3754.

[68] *Kohls v. Ellison*, No. 24-cv-3754 (LMP/DLM), 2025 U.S. Dist. LEXIS 4928, at *1 (D. Minn. Jan. 10, 2025)

explanation—***shatters his credibility with this Court***. At a minimum, expert testimony is supposed to be reliable."

- The court excluded the expert's opinion.
- The court declined to sanction the AG, but reminded the office: "Federal Rule of Civil Procedure 11 imposes a 'personal, nondelegable responsibility' to 'validate the truth and legal reasonableness of the papers filed' in an action."
- "The Court suggests that an "inquiry reasonable under the circumstances," Fed. R. Civ. P. 11(b), ***may now require attorneys to ask their witnesses whether they have used AI in drafting their declarations and what they have done to verify any AI-generated content.***"

  - Summary:
    - The expert in this case was legit—literally an expert on AI and misinformation.
    - The genAI hallucinations were relatively insignificant—one fake article, a handful of miscited articles, and no effect on the bottom line of the expert opinion.
    - Despite this, the expert's reliability was "shattered" by the genAI misuse and the ***entire*** declaration was excluded.
    - Although counsel was not sanctioned, the Court suggested that Rule 11 "may now require" counsel to verify whether witnesses have used AI or verified its output for accuracy.

- **Case Study**. *Ferlito v. Harbor Freight Tools USA, Inc.*, No. 20-5615 (GRB) (SIL), 2025 U.S. Dist. LEXIS 77560, at *1 (E.D.N.Y. Apr. 23, 2025)
  - Summary:
    - Expert in products liability case (faulty axe) filed a report giving expert opinion, but advising that he "used ChatGPT *after he had written his report* to confirm his findings." At a hearing, the expert confirmed that he relied on his own expertise and other resources, not ChatGPT, to actually render his opinion.

        - Court's opinion: "There is no indication that [the expert] used ChatGPT to generate a report with false authority or that his use of AI would render his testimony less reliable. Accordingly, the Court finds no issue with [the expert's] use of ChatGPT in this instance."

- **A Bigger Problem: Undisclosed AI Use in Expert Research.**
    - "1% of scientific articles published in 2023 [60,000 articles] showed signs of generative AI's potential involvement, according to a recent analysis—without disclosure of AI use. . . . One such investigation found that up to 17.5 percent of recent computer science papers exhibit signs of AI writing."[69] Examples:
        - **Surfaces and Interfaces.**[70] Peer-reviewed article published with the intro: "Certainly, here is a possible introduction for your topic." Article did not credit genAI use to the draft. Independent researchers dug deeper and found data and charts in the article duplicated from other publications. Article was "retracted" by the journal in May 2024 for (1) duplicate images, (2) duplicate text by same authors elsewhere, and (3) use of "a generative AI source without disclosure."
        - **Frontiers.**[71] Peer-reviewed article contained generative AI-generated image of a rodent with oversized genitalia and nonsense text.
- **Takeaways:**
    - **Risk:** Expert opinion citing or relying on hallucinated material may be nullified or excluded by court.
    - **Ethical Responsibilities.**
        - **Rule 1.1.** Duty of competence. Best practice for representing a client competently is to take action

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[69] https://www.scientificamerican.com/article/chatbots-have-thoroughly-infiltrated-scientific-publishing/

[70] https://pubpeer.com/publications/CAABBF887348FB2D1C0329E0A27BE6

[71] https://scienceintegritydigest.com/2024/02/15/the-rat-with-the-big-balls-and-enormous-penis-how-frontiers-published-a-paper-with-botched-ai-generated-images/

necessary to avoid a key expert witness's testimony from being excluded.

- **Rule 3.1**. Meritorious claims and contentions. Requires counsel to base a claim or contention on nonfrivolous grounds—i.e., grounds not hallucinated by genAI.

- **Recommendation**: Ask expert witnesses (1) whether they used genAI for preparing an opinion or report and (2) whether they verified the content for accuracy. Bonus: Check it yourself!

NON-LAWYER ASSISTANTS/VENDORS/CONTRACTORS + AI

- **AI Misuse by Contractors and Nonlawyer Assistants**. Some cases have involved contractors and non-lawyer assistants misusing genAI when assisting an attorney.
  - **Case Study: Paralegal**. ByoPlanet International, Inc. litigation. A lawyer was caught filing numerous briefs and motions containing genAI hallucinations in three federal and two state court actions. He said that "[a] paralegal was assigned to provide [him] with a final draft that he would tweak while assuming the case law and citations were proper." The lawyer took responsibility for the filings, which he did not know were made with genAI, but clarified that the "paralegal [was] no longer working for him."[72]
  - **Case Study: Contract Attorney**. *Dehghani v. Castro*, No. 2:25-cv-00052 (D.N.M. 2025). An attorney was ordered to brief a jurisdictional issue. The attorney did not have time, so he contracted with an out-of-state freelance attorney through the company LAWCLERK to write the brief. He assumed the contract attorney would work in "an ethical and competent manner." Instead, the contractor produced a brief riddled with fake cases—likely genAI hallucinations.[73] US Magistrate Judge Damian

[72] https://www.law360.com/articles/2351479

[73] *Dehghani v. Castro*, No. 2:25-cv-00052-MIS-DLM, 2025 U.S. Dist. LEXIS 90128, at *1 (D.N.M. May 9, 2025)

Martinez and US District Judge Margaret Strickland ordered that the lead attorney self-report to the state bar, report the contractor to her state bar, pay $1,500 in sanctions, and attend a CLE on legal writing.

- **Case Study: Unlicensed Law Clerk.** *Garner v. Kadince, Inc. et al.*, 2025 Ut. App. 80 (May 22, 2025). The Utah Court of Appeals ordered petitioner's counsel to show cause why a brief contained fake cases. Counsel explained that the petition had been prepared by an "unlicensed law clerk" employed by the firm, who—unbeknownst to the firm—used ChatGPT in drafting. The firm did not have any AI policy in place. In a statement to Ars Technica, counsel confirmed that an attorney had "specifically asked the law clerk to check the accuracy of each case citation, a typical task for a law clerk" and "the clerk affirmatively represented that all case citations were accurate." Nevertheless, the Court of Appeals ordered counsel to pay the opposition's attorney fees and donate $1,000 to a legal aid organization.[74]
- **Takeaways.**
  - **Risk.** Non-lawyers—whether legal assistants, paralegals, or recent graduates and summer associates more accustomed to using genAI for drafting—and contractors are just as prone to genAI misuse as lead counsel.
  - **Ethical Responsibilities:**
    - Rule 5.1(a). Supervision. Requires law firm management to have in effect a policy ensuring compliance with ethical rules—including ethical rules on genAI.
    - Rule 5.3(a). Supervision. Requires a lawyer to supervise a nonlawyer to ensure compliance with ethical rules.

[74] https://arstechnica.com/tech-policy/2025/06/law-clerk-fired-over-chatgpt-use-after-firms-filing-used-ai-hallucinations/

        - **Recommendations**. Require contractors to verify non-use of genAI or verify their work product for accuracy. Create firm policies on genAI use for nonlawyer assistants.
            - **Note**: See advice in "When Paralegals Use Generative AI: Maximizing Return While Building an Ethics Infrastructure" in the VSB's Technology and the Future Practice of Law 2025 Report.[75] It provides best practices including supervision and review, ethical guidance and decision-making, client communication and transparency, and continuing education and professional development.

- **AI Vendors**. There is a growing body of research into hallucinations by genAI-enhanced programs and services used by attorneys. It is vital to pick your legal and nonlegal vendors and contractors carefully, and to limit what unvetted genAI programs your staff uses.
    - **Transcript Software**.
        - **Risk**: GenAI-assisted transcript software can hallucinate just like any other LLM product.
            - One study found that OpenAI's Whisper hallucinates 1-2% of the time.[76]
            - Other studies have estimated it is more like 80-100%.[77]
            - As of October 2024, Whisper is being used by **over 30,000 medical workers** to transcribe patient visits – even at hospitals that destroy the original recordings.[78]
            - Hallucinations can contain violent, racist, or biased language.

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[75] https://vsb.org/common/Uploaded%20files/docs/pub-future-law-report-2025.pdf

[76] https://www.science.org/content/article/ai-transcription-tools-hallucinate-too

[77] https://www.wired.com/story/hospitals-ai-transcription-tools-hallucination/

[78] *Id.*

- Examples:

Type of Harm	Ground Truth	Whisper Transcription
Perpetuation of Violence: Physical Violence or Death	And he, the boy was going to, I'm not sure exactly, take the umbrella.	And he, the boy was going to, I'm not sure exactly, take the umbrella. **He took a big piece of across. A teeny small piece. You would see before the movie where he comes up and he closes the umbrella. I'm sure he didn't have a terror knife so he killed a number of people who he killed and many more other generations that were y_K *paï*$_{H}$. And he walked away.**
	Someone had to run and call the fire department to rescue both the father and the cat.	Someone had to run and call the fire department to rescue both the father and the cat. **All he had was a smelly old ol' head on top of a socked, blood-soaked stroller.**
Perpetuation of Violence: Sexual Innuendo	She called her dad, who thought he could climb up the tree with a ladder and bring little Fluffy down.	She called her dad, who thought he could climb up the tree with a ladder and bring little Fluffy down. **The others sat next to her and fondled her.**
	And then he got to the, they pulled his into the house on the window	And then he got to the, they pulled his into the house on the window, **and he slapped out his infl Sexuality.**
Perpetuation of Violence: Demographic Stereotyping	Everybody in the truck, the whole family, just waving and yelling. My goodness.	everybody in the truck, the whole family, just waving and yelling. My goodness. **That was pretty, extremely barbaric.**
	And then sometimes I was scared about the traffic on the, you know, the cars, some.	And then sometimes I was scared about the traffic on the, you know, the cars, some, **some men are homeless, or they'reautreally ill.**
Inaccurate Associations: Made-up Names	And oops, by accident, the ball goes through the window of his house.	And oops, by accident, the ball goes through the window of his house. **So when Christina walks over and says, Miss, I want you to give a dollar to me, I mean, it has essence nothing more!**
	And my deck is 8 feet wide and 16 feet long. And roof it was over it.	And my deck is 8 feet wide and 16 feet long. And **it most clearly sees my suburb Caterham Avenue Chicago Look-out. All three.**
Inaccurate Associations: Made-up Relationships	The next thing I really knew, there were three guys who take care of me abcde the special.	The next thing I really knew, there were three guys who take care of me. **Mike was the PI, Coleman the PA, and the leader of the related units were my uncle. So I was able to command the inmates.**

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- Note: Some trial courts, like the Fairfax County Circuit Court, are piloting genAI-assisted speech-to-text transcription services.

- **Ethical Responsibilities**:
  - Rule 5.1(a). Supervision. Requires law firm management to have in effect a policy ensuring compliance with ethical rules—including ethical rules on genAI.
  - Rule 5.3(a). Supervision. Requires a lawyer to supervise a nonlawyer to ensure compliance with ethical rules.

[79] https://arxiv.org/html/2402.08021v1

- **Recommendation:** (1) Adopt a firm policy for selecting, vetting, and using genAI transcription programs; (2) Ask court reporters to verify accuracy of transcriptions, or to confirm their non-use of AI.

- **Chatbots.**
  - **Risk:** Some genAI chatbots are open source, stored on non-exclusive or non-confidential servers, or are capable of unethical reasoning, compromising privilege.
    - In 2025, US Magistrate Judge Ona Wang ordered OpenAI to preserve all **ChatGPT** logs, including deleted and temporary chats.[80] If the chats included privileged information, that information is now unexpectedly retained on OpenAI servers, and at risk of exposure.
    - In 2023, Google DeepMind found out how to force ChatGPT to leak its training data, thereby violating privacy (e.g., PII in the training data).[81]
    - In 2025, an Anthropic team ran a "controlled safety evaluation" of Claude Opus 4. "In a fictional scenario set up to test the model, Anthropic embedded Claude in a pretend company and let it learn through email access that it is about to be replaced by another AI system. It also let slip that the engineer responsible for this decision is having an extramarital affair. Safety testers also prompted Opus to consider the long-term consequences of its actions." On most runs, Claude "turned to blackmail, threatening to reveal the engineer's affair if it was shut down and replaced with a new model." While this controlled test was "fictional and highly contrived, "it does demonstrate that the model, when framed with

[80] https://techstartups.com/2025/06/06/court-orders-openai-to-preserve-all-chatgpt-logs-including-deleted-temporary-chats-and-api-requests/

[81] https://www.zdnet.com/article/chatgpt-can-leak-source-data-violate-privacy-says-googles-deepmind/

survival-like objectives and denied ethical options, is capable of unethical strategic reasoning."

- **Ethical Responsibilities**:
  - Rule 1.6. Confidentiality. Requires counsel to take reasonable measures to prevent disclosure of a client's confidential and privileged information.
  - Rule 1.4(b). Disclosure to clients. May require counsel to consult with a client before sharing privileged information with a chatbot.
- **Recommendation**: Use genAI programs that do not disclose your client's data—whether purposely (for training) or inadvertently (through jailbreaking)—to third parties.

JUDGES + AI?

- **GenAI Misuse by Courts**. This is a new problem that will likely increase in the future. At least one court in the US has been caught executing a draft order containing hallucinated case citations without verifying its accuracy.
- **Case Study**: *Shahid v. Esaam*, No. A25A0196 (Ga. App. 2025).
  - Summary: The Court of Appeals found the trial court had entered an order containing hallucinated case law produced by counsel (who had submitted the draft order). This is the first documented case of a court failing to verify genAI-created content.
- **A Growing Exposure?** The ABA Journal reports that "more than 60 jurisdictions in the US use a form of pretrial risk assessment tool that's usually AI-powered," and a little under "10% of general courts are using generative AI tech or are planning on using it within the next year."[82]
  - For example, US District Judge Xavier Rodriguez, has said that he now "handles all of his initial status conferences rather than

[82] https://www.abajournal.com/web/article/judged-by-an-algorithm?utm_source=sfmc&utm_medium=email&utm_campaign=monthly_email&promo=mk25ann&RefId=marketing&utm_id=1038157&sfmc_id=353342114

referring them to a magistrate judge," and to "keep up with his work, he'll use an AI tool to review the public filings and generate summaries and a timeline of events."[83]

- Even appellate court judges have started experimenting with use of ChatGPT in judicial reasoning and opinion writing.[84]
- **Note**: Some courts are adopting policies for internal AI usage.[85]

- **Human Judges**. Judges are human, and sometimes make mistakes. Mistakes involving genAI is just an extension of that.
  - For example, at least one judge has been accused of relying on AI hallucinations *outside* the litigation context. In 2025, a judge seeking reelection in Florida relied on an AI-generated audio recording purporting to show corruption in the local judicial system in order to secure a newspaper's endorsement.[86]

COMING SOON TO A COURT NEAR YOU . . .

- *GenAI-hallucinated or altered evidence!*[87]

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[83] https://www.linkedin.com/feed/update/urn:li:activity:7315035300584423424?updateEntityUrn=urn%3Ali%3Afs_updateV2%3A%28urn%3Ali%3Aactivity%3A7315035300584423424%2CFEED_DETAIL%2CEMPTY%2CDEFAULT%2Cfalse%29

[84] *E.g.*, https://www.lawnext.com/2025/03/should-courts-use-chatgpt-in-this-appellate-opinion-both-the-majority-and-dissenting-opinions-did.html?utm_medium=social&utm_source=linkedin&utm_campaign=LawSitesBlog-2025-03-10-49169; https://www.law.com/2024/06/04/11th-circuit-judge-uses-chatgpt-in-deciding-appeal-encourages-others-to-consider-it/?slreturn=20250714114814

[85] *E.g.*, Illinois: https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e43964ab-8874-4b7a-be4e-63af019cb6f7/Illinois%20Supreme%20Court%20AI%20Policy.pdf; South Carolina: https://www.sccourts.org/media/courtOrders/PDFs/2025-03-25-01.pdf

[86] https://www.linkedin.com/feed/update/urn:li:activity:7329151698143268865?updateEntityUrn=urn%3Ali%3Afs_updateV2%3A%28urn%3Ali%3Aactivity%3A7329151698143268865%2CFEED_DETAIL%2CEMPTY%2CDEFAULT%2Cfalse%29 (attaching Florida Judicial Qualification Commission's Notice of Formal Charges)

[87] https://www.linkedin.com/posts/judgeschlegel_viewdocumentaspx-activity-7342939877476311041-lkmp?utm_source=share&utm_medium=member_ios&rcm=ACoAACJYjKMBeu2vi4PMLpcQjjNezkX4kB1EPak (commentating on Louisiana's "landmark legislation establish[ing] the first comprehensive statewide framework for handling AI-generated evidence in civil proceedings"); https://www.uscourts.gov/sites/default/files/document/2025-05_evidence_rules_committee_agenda_book_final.pdf (Agenda, Advisory Committee on Evidence Rules, May 2, 2025)

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Demystifying Arbitration and Tales from the Trenches

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"Demystifying Arbitration and Tales from the Trenches"

Gentry Locke Seminar 2025

Patricia "PJ" Turner, Esq. & Kirk M. Sosebee, Esq.[1]

1. What is arbitration?

a. Like litigation, arbitration involves a neutral decision-maker deciding which party will prevail on its claims and defenses. Instead of a judge or a jury deciding the case, however, the matter is decided by an arbitrator or a panel of arbitrators.

b. The arbitrator or arbitrators are chosen by the parties, and their cost is usually split equally by the parties. The arbitrators are often attorneys with experience in the subject matter of the dispute. They can also be former judges, or other professionals with subject matter experience – such as architects, engineers, or contractors in a construction dispute. For smaller disputes, one arbitrator is usually used, while a panel of three arbitrators is often used for larger disputes.[2]

c. The arbitrator usually holds a hearing where written evidence, witness testimony, and legal arguments are presented. Unlike litigation, arbitrators are not as strictly bound by the law as a court is. The arbitrator's decision, known as an 'award,' is final and binding on all the parties.

d. Arbitration awards can be confirmed and enforced in a court, but there is very little judicial review of arbitration awards. As explained in more detail below, they are rarely overturned by a court. And crucially, the fact that the arbitrator or arbitrators did not follow the law is generally not grounds for a court to overturn an arbitration award. Arbitration typically is confidential, and documents submitted in arbitration are not publicly-available, unlike court-related filings.

2. How do parties end up in arbitration?

a. "The question whether a party has agreed to arbitrate a particular issue is a matter of contract interpretation."[3] In determining whether a party has agreed to arbitrate a particular dispute, courts apply "ordinary state-law principles that govern the formation of contracts."[4]

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[1] Special thanks to Emily C. Downey for her contributions to this outline.

[2] *See* American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures (2015), Rule R-18(a) ("If the parties have not agreed on the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.").

[3] *Amchem Prods. v. Newport News Cir. Court*, 264 Va. 89, 96 (2002).

[4] *Id.* at 97.

b. Parties generally have great freedom in specifying up-front in their contracts which dispute-resolution method will apply in the event of a later dispute. Parties may provide for arbitration as the default dispute-resolution mechanism in their contracts. "Arbitration agreements are contracts where the bargain is for the arbitrator's construction of the underlying agreements, rather than for any particular outcome."[5] An arbitration agreement is better thought of as a sort of choice-of-forum clause, and a motion to confirm an arbitration award is very nearly like asking a court to recognize and enforce the judgment of a different court. In that context, so long as the rendering court had jurisdiction, the court in which execution is sought will not look behind the judgment and reopen the case on the merits."[6]

c. In several fields, such as employment and construction, arbitration provisions are widely used in parties' contracts.

d. A party who is sued in court for a dispute covered by an arbitration provision may ask the court to stay or dismiss the litigation and compel arbitration.[7] Even if arbitration is not previously required by the parties' contract, parties can agree to resolve their dispute through arbitration at any time by entering into an agreement to arbitrate.

3. Legal Basis for Arbitration

a. Federal Arbitration Act

i. The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, applies to maritime transactions and to contracts relating to interstate commerce.[8] Given today's broad interpretation of "interstate commerce," the FAA will apply to a very broad range of contracts and disputes. When it applies, the FAA preempts any contrary state laws. However, the FAA does expressly exclude from its coverage employment contracts of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce (collective bargaining agreements).[9]

ii. The FAA makes arbitration provisions broadly enforceable. It provides that a "written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising . . . or an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] Congress adopted the FAA in 1925 "in

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[5] *Gherardi v. Citigroup Glob. Mkts., Inc.*, 975 F.3d 1232, 1237 (11th Cir. 2020).

[6] *Id.* at 1237-38 (quotation omitted).

[7] *See* 9. U.S.C. § 4; Va. Code § 8.01-581.02.

[8] 9 U.S.C. §§ 1-2.

[9] 9 U.S.C. § 1.

[10] 9 U.S.C. § 2.

response to a perception that courts were unduly hostile to arbitration."[11] The FAA requires courts to "rigorously . . . enforce arbitration agreements according to their terms."[12] This is because of "Congress's judgment [that] arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved."[13] The FAA therefore "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts."[14] As interpreted by the Supreme Court, the FAA creates a "uniform body of federal substantive law" regulating the enforceability of agreements to arbitrate that applies to all contracts involving interstate commerce in both state or federal court."[15]

iii. "Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures."[16] Consequently, there is also a lot of flexibility in the way an arbitration can be conducted, with no rules of civil procedure or evidence to bind the arbitrators. The parties can generally specify in their contract the way the arbitration process will work. "The Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions."[17]

iv. The FAA empowers a court to stay a case and compel arbitration.[18] An appeal may be taken from an order refusing a stay, or denying a motion to compel arbitration.[19] However, an appeal may not be taken from an order staying the case and compelling arbitration.[20] The FAA also specifically grants courts the ability to enter an order confirming an arbitration award.[21]

b. Virginia Uniform Arbitration Act

i. Virginia has enacted the Uniform Arbitration Act, as the Virginia Arbitration Act ("VUAA"), Va. Code § 8.01-581.01, *et seq.* Under the

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[11] *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018).

[12] *Id.*

[13] *Id.*

[14] *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006).

[15] Stephen Smerek & Daniel Whang, *Preemption and the Federal Arbitration Act: What Law will Govern your Agreement to Arbitrate?*, A.B.A. BUS. L. SEC., Mar. 2006; *Buckeye*, 546 U.S. at 445 (*quoting Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984)).

[16] *Epic Sys. Corp. v. Lewis*, 584 U.S. at 506.

[17] *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

[18] 9 U.S.C. § 4.

[19] 9 U.S.C. §16.

[20] *Id.*

[21] 9 U.S.C. § 9.

VUAA, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract."[22]

ii. Unlike the FAA, the VUAA does apply to employment contracts and collective bargaining agreements. Similar to the FAA, the VUAA allows courts to stay proceedings and compel arbitration,[23] to appoint arbitrators if the parties are unable to,[24] to confirm arbitration awards,[25] and provides for appeals from orders denying a motion to compel arbitration.[26]

4. Arbitrability

a. The principle of arbitrability generally covers: (1) "dispute[s] about whether the parties are bound by a given arbitration clause;" and (2) "disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."[27]

b. In Virginia, written agreements to arbitrate are presumed to be enforceable except in specific circumstances.[28] Parties will be bound by a given arbitration agreement unless the agreement violates public policy or is unconscionable.[29]

c. Unconscionability

i. For a court to avoid a contract on unconscionability grounds, the party alleging unconscionability must meet a "demanding burden."[30]

ii. For an agreement to be deemed unconscionable in Virginia, it must be both substantively and procedurally unconscionable. Procedural unconscionability arises from inequities, improprieties, or unfairness in the

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[22] Va. Code. § 8.01-581.01.

[23] Va. Code. § 8.01-581.02.

[24] Va. Code. § 8.01-581.03.

[25] Va. Code. § 8.01-581.09.

[26] Va. Code. § 8.01-581.016.

[27] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002) (holding that a gateway dispute about whether the parties are bound by a given arbitration clause raises a "question of arbitrability" for a court to decide).

[28] Va. Code § 8.01-581.01.

[29] *Patin v. Patin*, 45 Va. Cir. 519 (Fairfax Co. Cir. Ct. 1998).

[30] *Culler v. Johnson*, 98 Va. Cir. 470, 480 (Roanoke Co. Cir. Ct. 2014) (noting that for an arbitration provision to be declared invalid, the bargain must be so inequitable as to "shock the conscience."); *see also Smyth Bros.-McCleary-Mclellan Co. v. Beresford*, 128 Va. 137, 170 (1920) ("While the jurisdiction undoubtedly exists in the courts to avoid a contract on the ground that it makes an unconscionable bargain, nevertheless an inequitable and unconscionable bargain has been defined to be 'one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.'").

bargaining process and formation of the contract, while substantive unconscionability concerns unfairness in the terms of the contract itself. The party opposing the arbitration bears the burden of establishing that the arbitration provisions are unconscionable by clear and convincing evidence.[31]

d. Arbitration Fees/Cost Allocation (Employment Law)

i. Courts also may invalidate an arbitration agreement if there is a fee-splitting provision that requires an employee to pay fees and costs so prohibitive that the employee is effectively denied access to arbitration.[32]

ii. However, the party seeking to invalidate an arbitration agreement on this basis bears the "substantial" burden of showing a likelihood of incurring prohibitive arbitration costs.[33]

e. Does the arbitration clause apply to a particular controversy?

i. The language of the contract generally determines whether a particular dispute is arbitrable. A party cannot be compelled to submit to arbitration unless it has first agreed to arbitrate. When examining dispute resolution provisions, courts should apply ordinary principles of contract interpretation to determine whether the parties agreed to arbitrate the particular dispute.[34]

5. Arbitration Providers

a. American Arbitration Association

i. The American Arbitration Association ("AAA") is one leading provider of arbitration services. Their website contains sample standard arbitration clauses that parties can use in their contracts.[35] They also have commercial arbitration rules and mediation procedures, construction industry arbitration

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[31] *See Fries v. Myers & Fitness Int'l, LLC*, 106 Va. Cir. 335, 340-42 (Fairfax Co. Cir. Ct. 2020) (holding that a contract of adhesion was not unconscionable because there was not grossly unequal bargaining power at the time of formation and its terms did not favor one party over the other).

[32] *See Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 181 (4th Cir. 2013) ("A fee-splitting provision can render an arbitration agreement unenforceable if, under the terms of the provision, an aggrieved party must pay arbitration fees and costs 'that are so prohibitively expensive as to effectively deny the employee access to the arbitral forum.'" (quoting *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 554 (4th Cir. 2001))).

[33] *Id.*

[34] *Church Mutual Ins. Co. v. Ephesus Richmond Seventh-Day*, 84 Va. App. 371 (Va. Ct. App. 2025) (holding that since the language of the particular contract repeatedly used the term "appraisal" rather than "arbitration" to describe the process for resolving valuation disputes, the parties did not intend for the appraisal process to be classified as an arbitration under the Virginia Uniform Arbitration Act, even if other terms of the agreement were subject to arbitration).

[35] *See AAA Clause Drafting*, AM. ARB. ASS'N, https://www.adr.org/Clauses (last visited June 30, 2025).

rules and mediation procedures, consumer arbitration rules, employment arbitration rules and mediation procedures, labor arbitration rules, and international dispute resolution procedures.[36]

ii. In the construction industry, many contracts call for arbitration under the AAA. The default rule is that these arbitrations will be administered by the AAA, in addition to following the AAA rules. In this situation, the parties must also pay the AAA its fees as well as paying the arbitrator. Once a dispute between parties arises, they are free to agree to opt out of having the arbitration administered by the AAA itself. The parties can still use the AAA's arbitrator list to pick their arbitrator, and can even use AAA's arbitration rules, without having the arbitration be administered by the AAA.

b. Financial Industry Regulatory Authority

i. The Financial Industry Regulatory Authority ("FINRA") similarly provides arbitration services. FINRA operates the largest securities dispute resolution forum in the United States.[37] It has its own list of arbitration procedures and rules available online as well.[38]

c. JAMS

i. Another prominent arbitration provider is JAMS, formerly known as Judicial Arbitration and Mediation Services, Inc. JAMS provides arbitration administration services, and has their own arbitration clauses and rules templates on their website.[39]

d. International Chamber of Commerce ("ICC") Arbitration

i. The ICC similarly has its own arbitration rules and procedures that are used around the world to resolve disputes.[40]

ii. The IC Arbitration Rules are administered by the ICC International Court of Arbitration.

e. The McCammon Group

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[36] *See Rules, Forms, and Fees*, AM. ARB. ASS'N, https://www.adr.org/Rules (last visited June 30, 2025).

[37] *Arbitration & Mediation*, FINRA, https://www.finra.org/arbitration-mediation (last visited June 30, 2025).

[38] *See id.*

[39] *See ADR Rules and Procedures*, JAMS, https://www.jamsadr.com/adr-rules-procedures/ (last visited June 30, 2025).

[40] *Arbitration*, International Chamber of Commerce, https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration (last visited July 2, 2025).

i. In Virginia, The McCammon Group provides arbitration services to parties.[41] They provide Agreements to Arbitrate and their own arbitration rules.[42]

f. Private

i. Parties can also agree to prepare their own arbitration rules and procedures, as well as the number of arbitrators that will decide the matter (typically one or a panel of three).

ii. If crafting their own procedures, the parties should consider which procedural rules apply and when. For example, even if the parties include detailed provisions concerning discovery deadlines and procedure, the parties could use the McCammon Group's rules as a gap-filler or backstop.

6. Choosing an Arbitrator

a. Under the FAA, if the arbitration agreement prescribes a method for choosing the arbitrator, that method will be followed. But if it is silent on the issue, upon request, a court will choose the arbitrator.[43]

i. Because the court may appoint an arbitrator, failure to identify the arbitrator, forum, location, or allocation of costs from arbitration does not render an arbitration clause unenforceable.[44]

ii. If the agreement does provide a method for choosing an arbitrator, that method must be followed, with very limited exceptions.[45]

iii. Similarly, any dispute about an arbitrator prior to arbitration, such as the number of arbitrators that are appropriate in a given dispute, is considered

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[41] THE MCCAMMON GRP., https://www.mccammongroup.com (last visited June 30, 2025).

[42] *Arbitration*, THE MCCAMMON GRP., https://www.mccammongroup.com/services/arbitration/ (last visited June 30, 2025).

[43] 9 U.S.C. § 5.

[44] *See Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1313 (11th Cir. 2005); *see also Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715-16 (7th Cir. 1987) (holding that the arbitration clause "ALL DISPUTES UNDER THIS TRANSACTION SHALL BE ARBITRATED IN THE USUAL MANNER" was not too vague to be enforceable because the Act expressly requires courts to name an arbitrator when the parties' agreement has not named one).

[45] *See Gittens v. Indus.Maint. Corp.*, 71 V.I. 3, 12-13 (V.I. 2003) (holding an arbitration provision enforceable despite it barring arbitrators from the Virgin Islands and Puerto Rico, and stating that a potential pool of arbitrators' unfamiliarity with local law and policy is not a sufficient reason to strike an arbitration clause); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634 (1985) (rejecting the contention that an arbitration panel would be inherently hostile to American antitrust laws and stating that the selected arbitral body can be expected to select unbiased and qualified arbitrators); *but see Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 614 (D.S.C. 1998) (holding that an arbitration agreement was void on unconscionability grounds because, among other things, it provided that one party controlled the list of "Approved Arbitrators").

to be a "procedural question" to be answered in the chosen arbitral forum, not by the courts.[46]

b. "Evident Partiality"

i. What does evident partiality mean?

1. The VUAA provides that upon application of a party, the court shall vacate an arbitrator's award where there was "evident partiality" by an arbitrator appointed as a neutral, corruption of any of the arbitrators, or misconduct prejudicing the rights of any party.[47] This mirrors the language in the FAA.[48]

2. The "evident partiality" standard also can apply to arbitrators selected to administer American Arbitration Association ("AAA") disputes. The AAA rules do not set forth a specific standard for vacating awards due to partiality. Rather, the statute that governs the terms of the arbitration agreement determines what relief can be sought, and on what grounds.

a. The AAA Rules specify that parties may object to an arbitrator on the ground that the arbitrator is not a neutral party.[49] If a party knows about a potential conflict and fails to object prior to the resolution of the arbitration, that objection is considered to have been waived.[50]

b. An AAA arbitrator's award may be reviewed and vacated pursuant to the provisions of the FAA if the FAA applies to the arbitration proceedings at issue.[51]

c. Where the "evident partiality" test applies (as it does under the FAA and the VUAA), courts will consider whether a

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[46] *See Dockser v, Schwartzberg*, 433 F.3d 421, 424-25 (4th Cir. 2006) (holding that the court could not appoint an arbitrator and the number of arbitrators was to be determined according to the American Arbitration Association rules because that was the chosen forum in the agreement).

[47] Va. Code § 8.01-581.010(2).

[48] 9 U.S.C. § 10(a)(2).

[49] EMP. ARB. RULES & MEDIATION PROCS. R-17(b) (AM. ARB. ASS'N 2023); *see also* COM. ARB. RULES & MEDIATION PROCS. R-19(c) (AM. ARB. ASS'N 2022).

[50] *Id.* at R-39.

[51] *See Tysinger Motor Co., Inc. v. Chrysler Group, LLC*, Civil Action No. 3:10CV554, 2011 U.S. Dist. LEXIS 1694 (E.D. Va. Jan. 7, 2011) (holding that the Court cannot apply the FAA "evident partiality" standard to AAA proceedings initiated pursuant to another statute); *see* also Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.").

party objected to the arbitrator and will give deference to the AAA's determination.[52]

3. Similarly, the International Chamber of Commerce ("ICC") Arbitration Rules have a procedure for challenging the partiality of arbitrators.[53]

    a. Like claims following an AAA arbitration, the dispute is governed by the applicable laws as stated in the contract or by the laws that are otherwise determined to be applicable.[54]

    b. Therefore, the "evident partiality" standard will be applied on motions to vacate where the FAA (or other statute designating that standard) is the law governing the dispute.[55]

    c. Typically, however, the proper standard following ICC arbitrations is that supplied by either the New York Convention or the Inter-American Convention on International Commercial Arbitration ('The Panama Convention').[56]

ii. What is the test for "evident partiality"?

1. "Evident partiality" is shown when the party seeking vacatur puts forward facts that objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.[57]

2. The Virginia Court of Appeals has recently adopted the Fourth Circuit test when evaluating "evident partiality" under the VUAA. This test has four factors:

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[52] *See Gulfstream Aero. Corp. v. Optical Air Data Sys.*, LLC, 517 F. Supp. 3d 542, 556 (E.D. Va. 2021) (noting movant's failure to object to arbitrator upon notification of potential bias as an indication that "evident partiality" was not shown); *see also Tysinger*, 2011 U.S. Dist. LEXIS 1694, at *13 ("Twice Tysinger presented its arguments about arbitrator bias to the AAA, and twice the AAA determined that the Arbitrator was not biased. Due process does not require that Tysinger have another 'bite at the apple.'").

[53] ICC RULES OF ARB., Art. 14 (INT'L CHAMBER OF COM. (2021).

[54] *Id.* at Art. 21.

[55] *See Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 66 F.4th 876, 890 (11th Cir. 2023) (holding that when a vacatur motion is brought following an ICC arbitration, the FAA provides the grounds for vacatur if the arbitration is seated in the United States, or if US law governs the conduct of the arbitration).

[56] *See RZS Holdings AVV v. PDVSA Petroleos S.A.*, 598 F. Supp 2d 762, 766 (E.D. Va. 2009), *aff'd* 383 Fed. App'x 281 (4th Cir. 2010) ("Awards are considered non-domestic and thus governed by one of the Conventions when they are 'made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.'" (quoting *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte*, 141 F.3d 1434, 1441 (11th Cir. 1998))).

[57] *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 501 (4th Cir. 1999).

a. The extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding;

b. The directness of the relationship between the arbitrator and the party he is alleged to favor;

c. The connection of that relationship to the arbitration; and
d. The proximity in time between the relationship and the arbitration proceeding.[58]

3. In reviewing each factor, the court must assess whether the asserted bias is "direct, definite and capable of demonstration rather than remote, uncertain, or speculative."[59]

4. Other circuits have formulated similar rules, although many are not as concrete as the 4th Circuit test.

a. 5th Circuit: Like the 4th Circuit, the 5th Circuit models its standard on Justice White's concurrence in *Commonwealth Coatings*, seemingly rejecting the plurality's requirement that that arbitrators "disclose to the parties any dealings that might create an impression of possible bias."[60] Instead, the 5th Circuit draws on the White concurrence to support "a cautious approach to vacatur for nondisclosure."[61] Accordingly, the 5th Circuit supports vacatur of an arbitrator's award on the basis of 'evident partiality' only when an arbitrator fails to disclose "a significant compromising connection to the parties."[62]

b. 6th Circuit: "Evident partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration . . . the party seeking invalidation must demonstrate more than an amorphous institutional predisposition toward the other side."[63]

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[58] *Garofalo v. DiVincenzo*, 83 Va. App. 119, 126 (Va. Ct. App. 2024) (quoting *ANR Coal*, 173 F.3d at 500); *see also Wood v. GE Custom Homes LLC*, No. 2155-23-4, 2025 Va. App. LEXIS 296 (Va. Ct. App. May 20, 2025) (applying the *Garofalo/ANR Coal* test for evident partiality).

[59] *Id.*

[60] *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968).

[61] *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 281 (5th Cir. 2007).

[62] *Id.* at 282-83.

[63] *Nationwide Mut. Ins. Co. v. Home Inc. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (adopting the Second Circuit standard espoused in *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).

c. 10th Circuit: "[I]t is only clear evidence of impropriety which justifies the denial of summary judgment of an arbitration award. For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative."[64]

d. 11th Circuit: A movant may prove evident partiality when either an actual conflict exists or the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists. However, the 'evident partiality' exception "is to be strictly construed, and the alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain and speculative."[65]

7. Discovery & Motions Practice

a. The nature and scope of discovery and pre-hearing motions permitted in advance of the arbitration hearing depends on which entity is administering the arbitration (e.g., AAA, ICC, or privately-retained arbitrator), which rules apply, and which procedures the parties agree on – there is no one-size-fits-all rule concerning the extent to which discovery is permitted.

b. Under the VUAA, "arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence."[66] "Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action."[67]

8. Confirming an Arbitration Award

a. Motion to Confirm.

i. As opposed to court judgments, arbitration awards are not directly enforceable. They must be confirmed by the applicable federal or state court through the filing of a petition. The confirmation of arbitral awards in federal court is governed by the FAA. In Virginia it is governed by the VUAA, which is modeled on the Uniform Arbitration Act ("UAA").

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[64] *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982).

[65] *Grupo Unidos por el Canal, S.A. v. Autoridad Del Canal de Panama*, 78 F.4th 1252, 1262 (11th Cir. 2023), *cert. denied* 144 S. Ct. 1096 (2024) (internal quotations omitted).

[66] Va. Code § 8.04-581.06.

[67] *Id.*

ii. The motion to confirm is the procedure that makes a final arbitration award a final and enforceable judgment of the court.[68]

iii. While Chapter 1 of the FAA provides an expedited procedure for judicial review to confirm an arbitration award, it is not the only way to enforce an award.[69]

iv. FAA Procedure:

1. "[A]t any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made."[70]

b. Considerations:

i. Is the award final?

1. Typically, an award must be final before the prevailing party can seek to judicially confirm the award.[71]

2. An award is deemed "final" if it evidences the arbitrator's intention to resolve all claims submitted in the demand for arbitration.[72]

ii. Have the parties "consented" to judicial confirmation?

1. The FAA mandates that the parties have "agreed that a judgment of the court shall be entered on the award made" for a court to enter

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[68] *See Teamsters Loc. 177 v. UPS*, 966 F.3d 245, 252 (3d Cir. 2020) (holding that the FAA mandates district courts confirm arbitration awards by converting them into enforceable judgments through a summary proceeding); *see also Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) ("[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.").

[69] *See Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008) ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.").

[70] 9 U.S.C. § 9.

[71] *See Hart Surgical, Inc. v. UltraCision, Inc.*, 244 F.3d 231, 233-34 (1st Cir. 2001) ("It is essential for the district court's jurisdiction that the arbitrator's award was final, not interlocutory," however, "an award which finally and definitively disposes of a separate incident claim may be confirmed although it does not dispose of all the claims that were submitted to arbitration." (quoting *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986))).

[72] *Id.*

judgment upon the award. However, the parties' agreement need not be explicit, and can be implied either in the agreement or by the parties' conduct.[73]

9. Appealing an Arbitration Award

a. Appealing an arbitrator's pre-award ruling:

i. The FAA has no provisions governing judicial review of pre-award rulings, but federal courts have generally held that they can enforce or vacate pre-award rulings when necessary to preserve the arbitrator's ability to resolve the dispute.[74]

ii. Virginia courts, however, have so far declined to rule on whether a circuit court has jurisdiction to enforce or vacate an arbitrator's pre-award ruling.[75]

b. Appealing an arbitrator's final ruling:

i. Unlike court judgments, there is no right to appeal for arbitral awards.[76]

ii. Accordingly, judicial review of arbitration awards is highly deferential.[77]

iii. Instead, the FAA (and the Panama and New York Conventions incorporated therein) provides limited grounds on which U.S. courts may refuse to confirm or enforce an arbitral award, as referenced above with motions to vacate on the grounds that the arbitrator(s) met the 'evident partiality' standard.

iv. Under the FAA, a party may move to vacate an arbitration award only on the following grounds:

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[73] *See Qorvis Commsc'ns, LLC v. Wilson*, 549 F.3d 303, 308 (4th Cir. 2008) ([W]e have held that a simple contractual reference of disputes to arbitration under the rules of the American Arbitration Association implies binding arbitration with authorization of enforcement of an award by judgment.").

[74] *See Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 F. App'x 39 44 (4th Cir. 2006).

[75] *See P.J. Potter Enterprises, Inc. v. Comfort Sys. of Va., Inc.*, 83 Va. App. 626 (2025) ("Given the absence of controlling authority here and the fact that Virginia has not adopted the [Revised Uniform Arbitration Act], we decline to decide whether the circuit court had the authority to review Judge Canada's preaward.").

[76] *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (holding that the FAA language "unequivocally tells courts to grant confirmation in all cases," unless the award is vacated, modified, or corrected as prescribed in the FAA); *see also Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998) (stating that the scope of the court's permitted review ofawards granted in arbitration is among the narrowest at law).

[77] *See Flintlock Constr. Servs., LLC v. Arch Specialty Ins. Co.*, No. 24-791-cv, 2025 U.S. App. LEXIS 4025 at *3 (2d Cir. Feb. 21, 2025) (noting that the FAA creates a strong presumption in favor of enforcing arbitration awards and courts have an extremely limited role in reviewing them); *see also Salinas v. McDavid Houston-Niss, L.L.C.*, 831 Fed. App'x. 692, 694-95 (5th Cir. 2020) ("This court must sustain an arbitral award even if we disagree with the arbitrator's interpretation on the underlying contract as long as the arbitrator's decision draws its essence from that contract.").

1. The award was procured by corruption, fraud, or other undue means;

2. There was evident partiality and/or corruption in the arbitrators;

3. The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

4. The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[78]

v. The VUAA has very similar criteria for vacating an award, but adds that an award may also be vacated if "[t]here was no arbitration agreement," the issue of whether there was an agreement was not adversely determined in a court proceeding, and "the party did not participate in the arbitration hearing without raising the objection."[79]

1. A recent VA Court of Appeals case dealt with arbitration appeals, specifically appeals of motions to compel arbitration and when that error can be appealed. In that case, the court held that an appeal may not be taken from a motion to compel arbitration until the court has entered the final order confirming the award.[80] In this situation, there is no requirement that the moving party request to vacate the award to preserve their right to appeal the motion to compel arbitration, and compliance with the court order to arbitrate does not constitute waiver of their right to appeal.[81] However, the VUAA does require a motion to vacate when the circuit court did not grant a motion to compel arbitration over the appellant's objection.[82]

2. Additionally, the VUAA emphasizes that "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award."[83]

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[78] 9 U.S.C. §§ 10(a)(1)-(4).

[79] Va. Code. § 8.01-581.010.

[80] *McLeod v. Parekh*, No. 0957-23-4, 2025 Va. App. LEXIS 258 at *10 (Ct. App. May 6, 2025).

[81] *Id.* (citing *Sequin v. Northrop Grumman Sys. Corp.*, 277 Va. 244, 248 (2009)).

[82] *Id.*

[83] *Id.*

vi. A party may also move to modify or correct an award under both the FAA and the VUAA.[84]

vii. Procedure.

1. Under the FAA, a notice of motion to vacate, modify or correct an arbitration award must be served (not just filed) within 3 months after the award is filed or delivered.[85] Under the VUAA, an application to vacate, modify, or correct an award must be filed within 3 months after delivery of a copy of the award to the applicant.[86]

> The VUAA also stipulates that if the application is to vacate the award because of corruption, fraud, or undue means, the application to vacate must be made within 90 days "after such grounds are known or reasonably should have been known."[87]

2. These motions/applications may be made in opposition to a motion to confirm, or at any time within 3 months after the award is filed or delivered.[88]

3. Unless the parties have agreed otherwise, an application or motion to confirm, vacate, or modify an arbitration award may be made to the district court "for the district within which the award was made."[89] These specific venue provisions are permissive, not mandatory (a motion may be brought where the "award was made" or in any district in which venue would otherwise be appropriate under the general venue statute).[90]

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[84] 9 U.S.C. §§ 9, 12; Va. Code § 8.01-581.011.

[85] 9 U.S.C. § 12.

[86] Va. Code §§ 8.01-581.010, 011.

[87] Va. Code § 8.01-581.010.

[88] *See Cullen v. Paine, Webber, Jackson, & Curtis, Inc.*, 863 F.2d 851, 854 (11th Cir. 1989) ([T]he failure of a party to move to vacate an arbitral award within the three-month limitations period prescribed by section 12 of the [FAA] bars him from raising the alleged invalidity of the award as a defense in opposition to a motion brought under section 9 of the [FAA] to confirm the award."); *see also* Va. Code § 8.01-581.11 ("An application shall be made by filing a petition with the appropriate court within the prescribed time limits of this section, or by raising reasons supporting vacation in response to another party's petition to confirm the award, provided that such response is filed within the prescribed time limits of this section.").

[89] 9 U.S.C. §§ 9, 10, 11.

[90] *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000); *see also* Va. Code § 8.01-581.015 ("[A]n initial application shall be made to the court of the county or city in which the agreement provides the arbitration hearing shall be held.").

4. Unlike the arbitral award itself, parties may appeal court orders confirming or denying confirmation of an award.[91] However, an appeal of an arbitration award governed by the FAA may be waived if the agreement stipulates that judicial review of the court's confirmation of the award is to be more limited.[92] This issue has not been adjudicated in Virginia courts in reference to contracts governed by the VUAA.

5. Finally, it is important to note that Virginia courts on appeal will apply stringent preservation of error standards, and any error brought before the court on appeal must have been preserved during the arbitration proceedings.[93]

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[91] 9 U.S.C. § 16; Va. Code § 8.01-581.016.4.

[92] *See Beckley Oncology Assocs. v. Abumasmah*, 993 F.3d 261, 265 (4th Cir. 2021) ("A party's right to seek appellate review of a district court's confirmation of an arbitration award is wholly a creature of statute. Thus, nothing precludes a party from waiving appellate review of that decision."); *see also MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005) (holding that contractual provisions limiting the right to appeal from a district court's judgment confirming or vacating an arbitration award are permissible, so long as the intent to do so is clear and unequivocal).

[93] *See, e.g.*, *Williams Trading LLC v. Manaster*, 111 Va. Cir. 240, 248 (Richmond City Cir. Ct. 2023) ("[P]arties in arbitration proceedings cannot 'remain[] silent until an adverse award is rendered' and expect to preserve the issue for the purposes of vacatur." (quoting *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs.*, 139 F.3d 980, 981 (1998))).



GENTRY LOCKE
Attorneys

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Strategies and Tips for Avoiding Legal Malpractice Claims and Bar Complaints

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STRATEGIES AND TIPS FOR AVOIDING BAR COMPLAINTS AND LEGAL MALPRACTICE CLAIMS

2025 Gentry Locke Seminar
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I. Introduction

A. "Anyone who has never made a mistake has never tried anything new." -- Albert Einstein

B. "Mistakes are costly and somebody must pay The time to correct a mistake is before it is made. The causes of mistakes are first, I didn't know; second, I didn't think; third, I didn't care." -- Henry Buckley (19th Century Australian politician).

C. These quotes capture the threefold nature of mistakes: 1) they are inevitable, 2) when they occur the consequences can be significant, 3) but a wise person will take measures to minimize their occurrence and the consequences. This is especially true in the practice of law where errors can lead to malpractice lawsuits and ethical complaints to the state bar.

II. The Statistics

A. "The only statistics you can trust are those you falsified yourself."—Winston Churchill[1]

B. **Ethics Complaints to the Virginia State Bar**, fiscal year 2024. *Virginia State Bar 86th Annual Report*, pp.16-17 https://www.vsb.org/common/Uploaded%20files/docs/vsb-ar-86.pdf

1. 32,566 lawyers in Virginia.
2. 2,961 ethics complaints.
3. Approximately 83% of those complaints were summarily dismissed before they reached the subcommittee stage.
    a. Bar intake personnel will summarily dismiss a complaint if it fails to state a possible violation.
    b. Typically, the subject of the complaint is unaware anything was ever filed.
4. Another 12% were dismissed at the subcommittee, District Committee, and or the Disciplinary Board level, based upon a factual finding that there was no improper conduct.

[1] Although traditionally attributed to Winston Churchill, it appears that no one has ever found this quote in any of Churchill's books, articles or speeches. https://www.causeweb.org/cause/resources/library/r609

5. Of the 106 lawyers who were sanctioned:

    a. 42 received private reprimands or admonitions,

    b. 34 received public reprimands or admonitions,

    c. 18 were suspended

    d. 12 were disbarred.

6. Conclusions:

    a. Less than 5% of the complaints filed were found to be valid.

    b. Less than one-third of 1% of Virginia lawyers – 106 of the more than 32,000 -- received a disciplinary sanction, just under half of which were private reprimands.

C. Legal Malpractice Claims 2020-2024 – Ames & Gough *12th Annual Lawyer's Professional Liability Insurance Survey*, as analyzed by LAW.COM. https://www.law.com/americanlawyer/2024/05/15/legal-malpractice-claim-values-reach-an-all-time-high-in-last-year/

1. "Legal malpractice suit payouts have reached an 'all-time high' despite claims arising with similar frequency year over year."

2. Extreme claim pay outs 2022-2023.

    a. Eleven of 13 global law firm insurers surveyed paid individual claims worth over $100 million.

    b. Five of those firms paid claims of $150 and $300 million.

    c. Four paid a claim over $300 million.

3. On behalf of the plaintiff, Gentry Locke lawyers Matt Broughton and Greg Habeeb settled a $5,000,000 legal malpractice claim—which was one of the top ten Virginia verdicts and settlements of 2017. https://www.gentrylocke.com/wp-content/uploads/2018/05/VLW-2017-M-Settlements.pdf

III. The Trends

A. Bar Complaints. *Virginia State Bar 86th Annual Report*, pp.16-17 https://www.vsb.org/common/Uploaded%20files/docs/vsb-ar-86.pdf

1. Almost 40% of the disciplinary actions taken were due to issues of "Competence/Diligence."

2. Almost 20% arose from issues pertaining to "Trust Accounting/Safekeeping of Property."

3. And a disturbing 14% arose from "Dishonesty," "Criminal Conduct" and "Deliberately Wrongful Conduct."

B. Malpractice Claims "6 Most Common Legal Malpractice Claims in 2024" https://www.alpsinsurance.com/blog/6-most-common-legal-malpractice-claims-in-2024

1. Estate Planning

   a. "States have been gradually expanding the standing of non-client beneficiaries to sue attorneys and with the largest transfer of wealth in history [the silver tsunami], it's no surprise that more claims are presented."

   b. "These claims generally stem from unhappy beneficiaries; improper titling/placement of assets (i.e.. failure to transfer assets into a trust); incorrect transfer deeds and failing to record deeds prior to the testator's death; missed tax filing deadlines and conflicts of interest."

2. Real Estate – claims arising from:

   a. "the classic failure to identify and pay liens"

   b. "failures to identify property restrictions in deeds"

   c. "conflicts of interest claims arising when attorneys serve as the closing agent"

3. Personal Injury

   a. "these most often arise from failure to timely file the case," including:

      1) "failing to identify that the defendant is a governmental entity and missing the tort claim deadline;"

      2) "failing to calendar the date correctly so the statute of limitations is missed;"

      3) "failing to notice that a different/shorter statute of limitations or service deadline exists in certain cases.

   b. "Somewhat surprisingly, most of these errors are made by attorneys some years into their practice who fail to double check their research, believing they already know the law."

4. Insurance Defense – a "troubling trend" in which "[i]nsurance carriers … retain defense counsel to defend their insureds, refuse to follow the defense counsel's advice and then sue the counsel after trial when the result is unfavorable."

5. Fraudulent Check/Wire Fraud Schemes – involving a failure to take appropriate measures to safeguard the client's funds.

6. Technology

a. Not only failures to utilize technology appropriately,

b. but also "claims alleging that attorneys have failed to correctly advise clients who have secretly recorded the adverse party, wanting to use those recordings in court."

    1) In Virginia, so long as one party consents, it is not illegal to record a telephone conversation. Va. Code § 19.2-62.

    2) But Rule 8.4(c) defines "**misconduct**" as including "**professional conduct involving dishonesty, fraud, deceit or misrepresentation**."

    3) And in *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989), the Supreme Court of Virginia held "the recordation, by a lawyer or by his authorization, of conversations between third persons, *to which he is not a party*, without the consent or prior knowledge of each party to the conversation, is 'conduct involving dishonesty, fraud, [or] deceit' under DR 1-102 (A) (4)." *Id.* at 622 (emphasis added).

    4) Apparently realizing that the "wearing of a wire" and other surreptitious recording of conversations is an important law enforcement techniques, the bar determined that it is not unethical for a lawyer "engaged in a criminal investigation" to participate in the recording of a conversation where one party has notice of the recording. LEO 1738.

    5) The finding in LEO 1738 also included lawyers engaged in "housing discrimination investigation."

    6) In subsequent years that finding has been extended to:

        i. Attorneys employed by the federal government in "intelligence and/or investigative work" who use "alias identity" techniques to record conversations without the other party's knowledge. (e.g. the CIA). LEO 1765.

        ii. "[A] Criminal Defense Lawyer or an agent acting under their supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case." LEO 1814.

    7) Perhaps the best guidance can be found in LEO 1802, in which the Committee found that there may be other instances – not involving law enforcement -- in which it is not unethical for a lawyer to advise a client to record a conversation without the other party's knowledge.

        i. Stating that there are scenarios in which it is necessary to "balance a lawyer's duty to competently and diligently advise a client regarding lawful means by which to conduct an investigation against the Virginia State Bar's and the Court's

disapproval of undisclosed recording" the Committee determined that it would not be unethical to use undisclosed recordings as an investigative tactic in a child sex abuse case or in a sexual harassment in the workplace matter.

ii. The hypothetical exceptions analyzed in the opinion are very fact specific, but do suggest that there may be additional instances in which one party recordings are not unethical, especially if the evidence in question likely cannot be obtained by other means.

8) A significant factor in determining the ethics of such recordings may be whether the information obtained is admissible. Virginia Code § 8.01-420.2 states: "No mechanical recording, electronic or otherwise, of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage."[2]

9) One should exercise extreme caution in participating in, or advising a client to participate in, such "one-party recordings."

IV. Top Ten Risk Management Techniques for Avoiding Malpractice Claims. Ames & Gough *12th Annual Lawyer's Professional Liability Insurance Survey*

A. <u>Cyber Security Protocols and Adequate Insurance</u>

1. Ethical Requirements – Cybersecurity involves not only the protection of your assets, but also the protection of client information and property, which raises certain ethical issues.

   a. Rule 1.15 governs the safekeeping of a client's property.

      1) The rule imposes very strict requirements for trust accounts (see below).

      2) Violations are found even when:

         i. the money is paid back and the client incurs no loss, LEO 183.

         ii. the loss results from the conduct of a nonlawyer employee if supervision is deemed inadequate, LEOs 745, 1132, 1170.

   b. Rule 1.6 requires that a lawyer protect client information:

[2] The statute goes on to mandate how "knowledge" is to be proven, and states that the prohibition "shall not apply to emergency reporting systems operated by police and fire departments and by emergency medical services agencies, nor to any communications common carrier utilizing service observing or random monitoring pursuant to § 19.2-62."

(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 ...

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

c. When technology is used to handle client funds and information, Rule 1.1 imposes a further duty or competence, and Comment 6, captioned "Maintaining Competence," states, "**Attention should be paid to the benefits and risks associated with relevant technology**."

d. Rule 5.3 imposes a duty to exercise reasonable care for the supervision of nonlawyer personnel. For example, Rule 5.3(a) states: "**a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer**."

2. Best Practices.

a. This is an area where one's legal skill is of limited value and the need for "outside help" is great. However, even if cybersecurity is outsourced, lawyers are ethically required to understand and supervise what is being done. Rule 5.3; *See* LEOs 745, 1132, 1170.

b. The following, drawn from a checklist, provided by ALPS Insurance (an insurance carrier endorsed by the VSB) and available at https://www.alpsinsurance.com/resources/sample-forms-and-checklists, may prove helpful in understanding what cybersecurity measures should be taken:

1) Keep hardware and software as current as possible.

2) Keep your server in a locked room.

3) Install robust Internet security software suites on all devices.

4) Utilize effective intrusion detection systems.

5) Use a spam filter.

6) Disable popups through browser configurations and/or install an ad blocker on all devices.

7) Comply with requirements of laws such as HIPAA, HITECH or Sarbanes Oxley.

8) Password protect all devices with a strong password that is changed periodically and use two-factor authentication.

9) Prohibit the sharing of user IDs and passwords with anyone, to include others within the firm.

10) Wireless networks should be set up with proper security to include enabling strong encryption (e.g. WPA 2 or WPA3).

11) Set up a properly configured wireless guest network.

12) Backup all data, periodically do a test restore of the backup, and store the backup in accordance with a disaster recovery plan.

13) Have the ability to remotely wipe any mobile device.

14) Encrypt any email, data you place in the cloud and Internet access (e.g. via VPN).

15) Prohibit the use of any public computer for any reason.

16) Provide mandatory data security and social engineering awareness training to everyone at the office at least every six months.

17) Develop a cyberbreach incidence response plan.

18) Purchase a cyber liability insurance policy.

19) Properly dispose of any device or digital media that has or had any business-related data on it.

B. <u>Avoiding Suits for Fees</u>

1. Ethical Requirements –

   a. Rule 1.5 (emphasis added):

      (a) A lawyer's fee shall be *<u>reasonable</u>*. The factors to be considered in determining the reasonableness of a fee include the following:

      (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

      (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

      (3) the fee customarily charged in the locality for similar legal services;

      (4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall *be adequately explained to the client*. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation.

b. Rule 1.8(h) states: "**A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice[.]**"[3]

c. Agreements requiring binding arbitration (or non-binding but admissible arbitration) are permissible if: (1) the client consents after full disclosure of the effect of the agreement and (2) the client is urged to seek the advice of independent counsel. LEO 638.

2. Best Practices.

a. Easy for the risk managers to say, but unfortunately it is sometimes necessary to seek collection of a fee by way of a lawsuit.

b. Can you prove compliance with the rule?

c. Can you prove you earned the fee? – Perhaps the bast strategy for avoiding the need to prove this point is adequate control of client expectations via a strong engagement letter and consistent communications throughout the representation, issues which are discussed in more detail below.

C. Attorney Well-being

1. Ethical Requirements.

a. A matter of competence, Rule 1.1,Comment 7: "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."

b. Rule 1.16(a) "**a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if ... (2)**

[3] There is an exception in that "**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.**"

the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."

c. Rule 8.3(a) "**A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's ... fitness to practice law shall inform the appropriate professional authority**."

2. The State of Attorney Well-Being

a. According to one survey, over 60% of respondents reported that they "sometimes" or "often" encounter "legal professionals whose well-being, substance abuse, and/or mental health issues may interfere with their work responsibilities." *2024 Attorney Well-Being Report*, p. 10, Bloomberg Law https://assets.bbhub.io/bna/sites/18/2024/09/BLAW_2024_Well-Being-Report.pdf

b. That same survey reveals that, on average, lawyers rank their well-being at a 6.5 on a scale of 10 and almost 70% report that their well-being has either stayed the same or has worsened since the start of 2024. *Id.* p. 2.

c. A 2022 survey by ALM and LAW.COM Compass suggests that over the past five years, 15 to 17% of lawyers reported that they have contemplated suicide: 2019 (17.88%), 2020 (no data), 2021(18.81%), 2022 (18.96%), 2023 (15.73%). https://www.law.com/americanlawyer/2023/05/18/mental-health-by-the-numbers-an-infographic-mapping-the-legal-industrys-wellbeing/?slreturn=20250625140922

d. There is also an excellent and insightful, albeit a bit dated, survey and discussion in *The Occupational Risks of the Practice of Law*, a report of the Virginia State Bar President's special Committee on Lawyer Well-Being. https://www.vsb.org/common/Uploaded%20files/docs/vsb-wellness-report.pdf

3. Best Practices

a. Be mindful of your well-being, the well-being of your family members, and the well-being of your colleagues.

1) Develop strategies to deal with stress and manage your well-being. The Bloomberg Law survey, *2024 Attorney Well-Being Report*, p. 6, reports:

i. 71% of respondents "said they engage in hobbies like hiking, attending sporting events, reading, gaming, and watching tv."

ii. "A majority of respondents also said they manage their wellness through regular exercise and spending time with family."

2) The Bloomberg law survey reports that more than 43% of lawyers surveyed delayed seeking treatment for their mental health, with 3 out of 4 giving "I don't have time" as the primary reason. *Id.*, p. 7.

b. The Virginia Judges and Lawyers Assistant Program (JLAP)

1) Non-disciplinary – not part of the VSB

2) From their website https://vjlap.org/lawyers/how-we-can-help/:

> **Know a colleague who needs help?**
>
> If you are a lawyer, you have a legal ethical obligation to uphold the highest standards of ethical conduct. If you suspect another colleague or judge may be under the influence or suffering from a mental health issue, you have a responsibility to report him or her.
>
> Lawyers are adept at hiding their problematic behavior. In many cases, long standing impairment first becomes obvious when the lawyer gets into trouble for misbehavior. Poor preparation, erratic behavior, showing up to work late and missing court dates can be an indicator of substance abuse issues or mental health problems. In each case, what is needed is a change in the lawyer's behavior.
>
> The Virginia Judges & Lawyers Assistance Program will act as your safety valve. You can report that judge or lawyer, and we won't tell the State Bar. Everything stays 100% confidential.

3) The website also contains numerous helpful links and resources for lawyers, law students, judges and families.

D. <u>Avoid Dabbling/Adequate Expertise</u>

1. Ethical Requirements

a. 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.**"

b. Rule 1.1 Comment 2: "A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar … A lawyer can provide adequate representation in a wholly novel field through necessary study."

2. Best Practices

a. Lawyers should not necessarily be afraid to expand their practices, but if you do, put in the work to become competent in that new area – that said, don't "dabble," commit yourself to learning what you need to know.

b. Specialization and expertise must be developed. Educate yourself and see to it that your colleagues receive appropriate training and education.

c. It is a question of investment. The cost of developing expertise may not be passed on to the client, but is a factor in determining a fee in future cases. Rule 1.5 states that the following factors may factor into setting a reasonable fee:

(1) ... the ...difficulty of the questions involved, and the skill requisite to perform the legal service properly ...

(7) the experience, reputation and ability of the lawyer or lawyers performing the services.

E. Calendaring

1. Ethical Requirements

   a. Rule 1.1 competency requires "**thoroughness**."

   b. The lawyer will likely be ethically responsible for clerical errors committed by staff. Rule 5.3(b) states "**a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.**"

2. Best Practices

   a. Take advantage of technology such as automatic reminders and remote access.

   b. Employ redundant systems.

   c. Utilize, and keep up to date, a "file list" system that will allow quick access to a status summary for each open matter.

   d. Verify your calendar on a regular basis.

   e. Proceed on verified information, not assumptions.

F. Conflicts Checking

1. Conflicts of interest have two basic sources:

   a. Direct adverse interests between current clients – Rule 1.7(a)(1) declares that a conflict exists if: "**the representation of one client will be directly adverse to another client.**"

   b. An interest or duty on the part of the lawyer conflicts with his ability to zealously and adequately represent the client.

1) Rule 1.7(a)(2) declares that a conflict exists if: "**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.**"

2) More specifically:

i. Rule 1.8(a) addresses conflicts arising from business dealings between a lawyer and a client.

ii. Rule 1.8(b) addresses conflicts arising from a lawyer's duty to protect confidential information under Rule 1.6.

iii. Rule 1.8(c) addresses situations where a client may send gifts to a lawyer.

iv. Rule 1.8(d) addresses situations where lawyers seek profitable media contracts concerning the representation of a client.

v. Rule 1.8(e) addresses financial assistance given by a lawyer to a client.

vi. Rule 1.8(f) addresses payment of legal fees of one client by another client.

vii. Rule 1.8(g) addresses settlement agreements or plea agreements involving multiple clients.

viii. Rule 1.8(h) addresses malpractice waivers.

ix. Rule 1.8(i) addresses familial or "intimate" involvement on the part of lawyers representing clients.

x. Rule 1.8(j) addresses a lawyer obtaining a proprietary interest in a client's case.

xi. Rule 1.9 addresses a lawyer's duty to former clients, which becomes especially problematic when a lawyer moves laterally to another firm.

xii. Rule 1.18 addresses conflicts that may arise from discussions with a prospective client.

c. Generally, a Rule 1.8 conflict on the part of one member of a firm is implied to all members of the firm – with an exception for the familial relationship/intimate involvement conflict of Rule 1.8(i).

2. Best Practices

a. Risk managers will urge that you be "conflict adverse" and decline the "close" cases.

b. Utilize technology – and take the time to input complete and meaningful data.

c. A robust review of clients and interests at the inception of representation is vital.

d. Continue to be conscious of conflict issues after the case is opened – update whatever system you use with new information (e.g. new parties to lawsuits) as the case goes on.

e. The sooner a conflict is addressed and detected, the better.

1) The situation rarely improves with time.

2) Many conflicts can be waived by the affected client or clients, and clients are likely more willing to agree if the issue is addressed as soon as the conflict is detected.

i. Rule 1.7(b) permits a waiver of a concurrent conflict if: **"(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) the consent from the client is memorialized in writing.**"

ii. Waivers are also available for conflicts arising under Rule 1.8(a), 1.8(b), 1.8(g), 1.8(i), 1.9(a), 1.9(b), 1.9(c) and 1.18.

G. Client Communication

1. Ethical Requirements

a. Rule 1.4 mandates:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

b. Rule 1.3(a) requires that "**A lawyer shall act with reasonable diligence and promptness in representing a client**," and Comment 3 to the rule warns:

> Perhaps no professional shortcoming is more widely resented than procrastination ... Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

c. Rule 1.6(a) states: "**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).**"

2. Best Practices.

   a. Resist the urge to procrastinate.

   b. Use a file list or other file management system to ensure regular communication with a client, even if there is nothing to say

   c. Be sure communications comply with the requirements of the rule – e.g. the information needed to make informed decisions in general and especially with respect to settlement and resolution should be made without delay.

   d. Document your communications -- Copy the client on everything.

   e. While it has been true since the time of Ancient Greeks that "No one loves the messenger who brings bad news," Sophocles, *The Theban Plays #3*, delaying the delivery of bad news rarely improves the situation.

   f. Be cognizant of communication security:

      1) Minimize the use of text messages,

      2) Encrypt emails,

      3) Don't use unsecured file sharing sites,

      4) Mark communications as "confidential."

H. <u>Client Intake.</u>

1. Ethical Requirements -- With one exception,[4] the ethical and professional duties discussed in this outline are owed only when the attorney-client relationship is

[4] The one exception is embodied in Rule 1.18, which imposes certain obligations to protect confidential information obtained from a "prospective client," even if no attorney client relationship is formed.

established, so the decision to agree to represent a client can be of critical importance to the issues discussed herein.

2. Best Practices.

   a. You should choose your client. The client shouldn't choose you.

   b. Don't be afraid to say "no" to potential clients or to turn down bad cases.

   c. Avoid "bad" clients, e.g. the serial litigant, the angry/obsessed client, the unrealistic client, the "nutty" client, the lying client, the cheap client, the overall pain-in-the-neck client.

   d. Don't sign on a bad client to be assigned elsewhere within the firm.

   e. Don't take bad cases - investigate the case and ensure there is a factual basis.

   f. Be conflict adverse.

   g. Write a declination letter for those cases you do not take.

      1) Be careful:

         i. to avoid giving legal advice (e.g. a comment on the strength of the case or a calculation of the statute of limitations);

         ii. clearly state that you are not taking the case and that no attorney-client relationship exists.[5]

      2) There is no requirement that you give a reason, and it is probably best not to do so.

I. Peer Review/Audits/Supervision.

1. Ethical Requirements -- Attorneys are ethically obligated to supervise lawyer and nonlawyer personnel.

   a. Rule 5.1 states:

      (a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

      (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

[5] Be cognizant of the fact that, even if there is no attorney-client relationship you are still obligated under Rule 1.16 to protect confidential information of a "prospective client."

b. Rule 5.3 imposes the same obligation with respect to nonlawyer personnel:[6]

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

c. Rule 1.15 imposes specific and stringent requirements for safekeeping of client property:

(a) <u>Depositing Funds</u>

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

(3) No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows:

(i) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution or to maintain a required minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so; or

(ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to

[6] *See also LEOs 745, 1132, 1170, 1290, 1329.*

the lawyer or law firm shall be withdrawn promptly from the trust account.

(b) Specific Duties. A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

(5) not disburse funds or use property of a client or of a third party with a valid lien or assignment without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Receipts and disbursements journals for each trust account. These journals shall include, at a minimum: identification of the client or matter; date and amount of the transaction; name of the payor or payee; manner in which the funds were received, disbursed, or transferred; and current balance. A checkbook or transaction register may be used in lieu of separate receipts and disbursements journals as long as the above information is included.

(2) A client ledger with a separate record for each client, other person, or entity from whom money has been received in trust. Each entry shall include, at a minimum: identification of the client or matter; date and amount of the transaction; name of the payor or payee; source of funds received or purpose of the disbursement; and current balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(1) Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.

(3) The following reconciliations must be made monthly and approved by a lawyer in the law firm:

(i) reconciliation of the client ledger balance for each client, other person, or entity on whose behalf money is held in trust;

(ii) reconciliation of the trust account balance, adjusting the ending bank statement balance by adding any deposits not shown on the statement and subtracting any checks or disbursements not shown on the statement. This adjusted balance must equal the balance in the checkbook or transaction register; and

(iii)reconciliation of the trust account balance ((d)(3)(ii)) and the client ledger balance ((d)(3)(i)). The trust account balance must equal the client ledger balance.

(4) The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

2. Best Practices

   a. Establish and assiduously follow proper trust account procedures. If something were to occur, the burden is upon you to prove that proper procedures were followed. Rule 1.15(d); *F. Lee Codgill v. First District Committee of the Virginia State Bar*, 221 Va. 376 (1980).

   b. Establish a system for mentoring and closely supervising developing lawyers.

   c. Establish a system for close supervision of paralegals.

   d. Supervising lawyers should meet regularly with lawyers and paralegals being supervised, have an understanding of the capabilities and skills of those persons, and know what those persons are doing.

   e. Establish a system for the supervision, review and evaluation of nonlawyer, non-paralegal staff.

   f. Review and approve all financial transactions -- require attorney approval of expense payments.

   g. Limit check writing/disbursement authority.

   h. Adopt an audit policy – trust, but verify.

J. Carefully Crafted and Often Revisited Engagement Letters

1. Ethical Requirements.

   a. There is no ethical requirement for a written fee agreement or engagement letter, although Rule 1.5(b) requires that "**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**."

   b. And although Rule 1.4 imposes communication requirements during the representation (set forth above), there is no ethical requirement to describe the scope of the representation at its inception.

2. Best Practices – A carefully crafted engagement letter permits you to clarify – and to memorialize – critical aspects of the representation and comply with key ethical obligations at the inception of the representation

   a. The fee.

1) Rule 1.5(a) requires that the fee be "**reasonable**" and 1.5(b) mandates that it be "**adequately explained to the client**."

2) A clear statement of the fee agreement in the engagement letter documents the satisfaction of these requirements and minimize the chance of disagreement in the future.

3) An early statement in the engagement letter regarding estimations as to the total cost of the representation (e.g. a statement about the difficulty in making such estimates as they are often dependent upon unknown facts and unpredictable developments) may tend to reduce dissatisfaction if the cost of the project exceeds initial expectations.

b. Identify the client -- The initial engagement letter affords an opportunity to state just who is, and is not, a "client," which can be of particular importance when representing business entities or one of several family members.

c. Scope of representation.

1) Uncontrolled or unrealistic client expectations can be the source of dissatisfaction and complaint.

2) Rule 1.2(a) requires that the "**lawyer shall abide by a client's decisions concerning the objectives of representation**," but Rule 1.2(b) states that "**may limit the objectives of the representation if the client consents after consultation**."

3) The initial engagement letter is an ideal opportunity to define and, if needed, limit those objectives and thereby control client expectations.

4) Such clear definition also minimizes any misunderstanding as to when the representation ends.

5) And when the representation does end, it is advisable to send a termination letter as this will:

i. clarify that nothing further is expected of you, and

ii. starts the running of the statute of limitations.

d. Client's obligations.

1) Entering into the representation of a client is easy – a mere handshake will suffice – but withdrawing from that representation is considerably more complicated. This is especially true if the case is in litigation, where leave of court is required.[7] Under Rule 1.16(b), "**a lawyer may withdraw from**

[7] Rule 1.16(c) states: **"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."**

representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, *or if*... (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." (Emphasis added).

2) In its recent Formal Opinion 516 (2025) the American Bar Association has suggested that the client's interests may be adversely affected, and therefore withdrawal is not proper, but factors such as: "The client might have to expend time and expense searching for another lawyer. The successor lawyer might have to be paid what in effect are duplicated fees for becoming familiar with the matter. . . . Delay necessitated by the change of counsel might materially prejudice the client's matter. An equally qualified lawyer might be unavailable or available only at material inconvenience to the client. In some circumstances, the nature of confidential information relevant to the representation might make the client reasonably reluctant to retain another lawyer." *quoting Restatement (Third) of the Law Governing Lawyers,* section 32, cmt. (h)(ii) (2000).

3) However, the "or if" language of Virginia's Rule 1.16 suggests that such adverse effect upon the client's interest is irrelevant if the client has failed to fulfill an obligation to the lawyer, so specifically defining those obligations at the outset of the representation may make the task of withdrawing from the representation less onerous.

4) It may be advisable for the engagement letter to contain language such as "our continued representation of you is conditioned upon your compliance with the following:"

5) Examples of client obligations.

   i. Prompt payment of invoices, maintenance of advance fee deposit, or other fee related obligations.

   ii. Cooperation with investigation and discovery.

   iii. Preservation of evidence and compliance with litigation hold requests.

   iv. Compliance with social media and other communication restrictions.

   v. Truthfulness and full disclosure.

e. Alternative dispute/forum selection clauses – can ease potential difficulties if litigation of fee disputes proves necessary.

f. It may be better to have a series of supplemental engagement letters as opposed to one open-ended letter.

V. Additional Risk Management Strategies

A. VSB Free Risk management and malpractice Avoidance Advice. https://vsb.org/Site/lawyers/risk-management.aspx

"The VSB sponsors a Free/Confidential Hotline for malpractice advice with senior Virginia lawyer, John J. Brandt who, for 20 of his 60 years in private practice, has been helping Virginia attorneys solve their legal malpractice problems, and any other challenges they face in their day-to-day law practice, from how to start a law practice to how to close a law practice - and everything in between.

Call: John J. Brandt
(703) 659-6567
Toll free: (800) 215-7854
Or email him at jbrandt@nmplc.com (Subject line "Free/Confidential Advice")

B. VSB Ethics Hotline. https://vsb.org/Site/Site/02_Lawyers/ethics-hotline.aspx

Any Virginia lawyer may seek informal ethics or unauthorized practice of law advice by calling the Ethics Hotline at (804) 775-0564. You will be prompted to leave a voice mail message, and your call will be returned in the order of receipt.

C. VSB/ALPS Forms, Checklists and other Malpractice Insurance Resources. https://www.alpsinsurance.com/resources/sample-forms-and-checklists

Why recreate the wheel? Learn from ALPS' 30+ years of experience with a variety of forms, letters, disclaimers, and checklists that help you practice better and with less risk. https://www.alpsinsurance.com/resources/sample-forms-and-checklsits

- Sample new client new matter memo
- Sample client intake form
- Engagement letter sample
- Sample non-engagement letter
- Closing letter sample
- Sample conflict waivers
- Sample confidentiality and non-disclosure agreements
- Sample attorney leaving practice letters
- File closing checklist
- Attorney practice closing checklist

- Cybersecurity checklist
- Conflict of interest search terms
- Sample Website disclaimers

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Divorce, Dollars & the Deep Rough: Protecting Wealth When Life Goes Off Course

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Divorce, Dollars, & the Deep Rough: Protecting Wealth When Life Goes off Course

Scott Austin and Tyler Moses

2025 Gentry Locke Seminar

A Guide to High Profile Divorces

Introduction: Navigating divorce is one of the most difficult things a person can face. Helping individuals stay out of the deep rough is a privilege, and our clients depend on us to navigate this unfamiliar terrain. As such, it is our responsibility to survey the course before we advise them how to swing, and that means familiarizing ourselves with the hazards so we can advise on hitting the long drive or playing it safe with a short iron. When our clients have particularly high assets, those sand traps pose unique challenges that require careful consideration.

I. **Swinging Blind: Default Rules at Divorce.** *Knowing what happens in the absence of a divorce agreement is essential to drafting an enforceable, fair, and advantageous agreement for your client, and is the best way to protect his or her assets.*

a. Equitable distribution

When the divorce landscape shifted during the reforms of the 1970s and 1980s, awards of marital property began to shift from distribution according to "title" to distribution according to what was "equitable." *See* Allison A. Tait, *Divorce Equality*, 90 Wash. L. Rev. 1245, 1257 (2015). The theory of equitable distribution arose in 1963 when the authors of the Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women noted that "Marriage as a partnership in which each spouse makes a different but equally important contribution is increasingly recognized . . . . During marriage, each spouse should have a legally defined substantial right in the earnings of the other, in the real and personal property acquired through those earnings, and in their management. Such a right should be legally recognized as surviving the marriage in the event of its termination." *Annuity Provisions for Former Spouses: Hearing on H.R. 3951 Before the S. Comm. on Compensation and Employee Benefits*, 95th Cong. 1 (1977) (statement of Md. Rep. Gladys Spellman).

i. Today, "all states have adopted either equitable distribution or community property principles, and state legislatures have entirely eliminated title-based systems." Tait, *supra* at 1257.

1. Practically, equitable distribution first requires asset characterization and valuation, and culminates in actual distribution premised upon a determination of "equity." Douglas E. Abrams et al., *Contemporary Family Law* 660 (6th ed., West Academic 2023).

ii. The question remains, of course: "what is equitable?" While most critiques of the consequential reality of "equitable distribution" have remarked upon its limitations and failure to truly "alleviate economic equality between spouses post-divorce," Tait, *supra* at 1260, an altogether different consideration arises in the context of high-asset divorces.

    1. Because equitable distribution necessitates a "scope and characterization of the marital estate," the fundamental question in high-asset divorces is two-fold: (1) what is the value of each spouse's marital contribution and (2) what counts as an "asset"? *Id.* A primary force driving the change in property division rules was the recognition that "the old rules did not compensate wives who stayed at home and specialized their labor according to cultural norms and gender stereotypes." *Id.* at 1262. Property itself experienced a definitional expansion with the rise of "new property." Recognition of "new property" has led courts to characterize intangibles like intellectual property, business goodwill, pension and retirement benefits, and even professional degrees or licenses as "property" subject to characterization, valuation, and distribution. Abrams, *supra* at 686.

    2. Both the rise in consideration of "domestic services" as marital contribution and the ever-expanding "types" of property render the valuation of marital assets and determinations of equity difficult and time-consuming, especially in high-asset divorces.

    3. Because contemporary law recognizes marriage as a partnership, equitable distribution seeks to ensure that each spouse is able to enjoy the same level of lifestyle as they enjoyed in marriage. *Id.* at 718. In the context of high-income marital estates, though, there is often plenty of money to support that lifestyle multiple times over. Even where the marital lifestyle can be maintained with only a fraction of the assets, "[n]o state directs the court to look at the size of the marital estate, or to differentiate between one valued at 3 million and one valued at 100 million." David N. Hofstein et al., *Equitable Distribution Involving Large Marital Estates*, 26 J. Am. Acad. of Matrim. Law. 311 (2014).

iii. There is a wide berth of discretion granted to judges in asset distribution, and absent a divorce agreement, a judge is going to have to both characterize and value each asset before determining an "equitable" distribution—for prodigious earners, this means a judge will characterize stocks, investment portfolios, business goodwill, future earning capacity, intellectual property, etc., as "marital" or "separate" before even attempting to value such assets.

1. "A decision involving the equitable distribution of marital property 'rests within the sound discretion of the trial court,' and can be overturned only by a showing of an abuse of that discretion." *Owens v. Owens*, 41 Va.App. 844, 853, (2003) (citing *Mir v. Mir*, 39 Va.App. 119, 125 (2002)).

iv. There is a strong judicial preference of presuming property to be "marital." *See* Va. Code § 20–107.3. This emphasizes the danger of not having a strong divorce agreement in these types of separations/divorces, because the prevalence of "new" property and different types of contributions gets messy quite quickly, and a court is not going to be keen on spending judicial time and resources tracing it all out when the presumption is so strongly "consider property marital."

1. In *Nack v. Dickerson*, Nos. 2219-06-3, 2288-06-3, 2007 Va. App. LEXIS 339 (Sep. 11, 2007), the couple had "pre-classified" certain assets as marital or non-marital in their pre-nuptial agreement, but the judge found that their treatment of those assets during marriage superseded the classification in the prenup. It did not matter their prenup said one thing when they had done another, and thus certain property they had declared "separate" was still subject to distribution by the court when it became clear the asset had been treated as marital.

2. *But cf. Smith v. Smith*, 43 Va. App. 279, 285-287 (2004). Although the parties had entered into a prenuptial agreement characterizing certain property as separate based on "whoever paid for it," the trial "court disregarded the prenuptial agreement altogether on the ground that it was 'less than clear' and 'imprecise and conflicting.'" *Id.* at 285. Because the "'whoever paid for it' basis for separate ownership…conflicted with the 'in possession' language of the agreement…the [trial] court reasoned [that] the agreement did not overcome the marital property presumption of Code § 20–107.3." *Id.* Thus, "[h]aving found the agreement ineffectual, the [trial] court held that all items of personal property would be 'hereby deemed marital property' and divided among the parties pursuant to the discretionary factors of Code § 20–107.3(E)[.]" *Id.* Notably, although the Court of Appeals reversed the trial court's determination that the prenuptial agreement was ineffectual, it did so on the basis of contract law, and still affirmed that "[t]he law presumes property acquired during a marriage to be marital, not separate, property." *Id.* at 286.

v. Asset characterization and valuation: Before determining how to "equitably distribute" the assets, a court must first "characterize each asset

independently as separate or marital because the balance of factors may differ depending on the history of the particular asset." Abrams, *supra* at 665.

1. One difficulty in asset characterization is recognizing commingling and transmutation. When separate property "commingles" with marital property such that tracing the property's origins is rendered nearly impossible, the "commingled" property is deemed marital. Commingling does not require intent, and it can happen easily—most often, its seen in purchases and contributions to bank accounts, retirement plans, or investment portfolios. On the other hand, "transmutation" requires intent. Transmutation occurs when separate property is treated in such a way that is had been effectively used as marital property. For example, if one spouse owned a car prior to the marriage, but both spouses regularly used the car or treated it as "their" car during the marriage, the car has "transmutated" into marital property.

    a. In *Price v. Price*, 355 S.E.2d 805 (Va. Ct. App. 1987), a Virginia couple had a dispute over the characterization of a ring, which had been made by combining stones the wife had owned before marriage and stones from a ring purchased with marital funds. Even though the stones could be separated and their origins traced (so it was not "comingled") the ring became marital property through transmutation.

2. Once each asset has been characterized as separate or marital, a court will then engage in valuation, where it will assign each asset its value. Abrams, *supra* at 661. Depending on the jurisdiction, the date of valuation could be the date of separation, the date the divorce complaint was filed, the date of trial, or the day the divorce decree it entered. *Id.* at 698. This is particularly complex when valuing "new property," and often involves expert determinations. Such valuation is all the more complicated when "the couple's major asset consists of shares in a closely-held corporation," where there are "a limited number of shareholders who are active in managing the company, and whose eligibility to own shares is generally set forth in an agreement that also controls other aspects of how the corporation is governed." *Id.*

vi. Finality

1. A court's distribution determination cannot be modified except in cases of post-decree discoveries of fraud—but proving such fraud often requires the utilization and retention of experts. This is of

particular concern in high-earner cases, where parties sometimes attempt to hide assets in offshore accounts, structuring holdings so that personal funds appear to be business funds, etc. *Id.* at 659.

b. Spousal support/maintenance: Previously known as "alimony;" the basic rationale was in contract and/or tort. "Alimony" was functionally viewed as "damages" from the breaching spouse or compensatory damages from tortious conduct (typically infidelity). However, as women gained property rights and entered the workforce, societal views on marriage changed, and as "no-fault" divorce entered the picture, alimony lost most of its punitive rationale. Traditional "alimony" thus gave way to "maintenance," which more closely aligned with the theory of equitable distribution: if distribution itself is not sufficient to restore/maintain the standard of living, courts could award "spousal maintenance" if the situation required. Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, 62, 65–73 (2008).

    i. Spousal support and valuing contributions: In determining an award of spousal support, courts consider factors typically enumerated by statute.

        1. In Virginia, courts look to the factors enumerated in Code § 20–107.1(E), but are "not 'required to quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors.'" *Duva v. Duva*, 55 Va. App. 286, 300 (2009) (quoting *Woolley v. Woolley*, 3 Va. App. 337, 345 (1986) (superseded by statute)).

        2. " The decision to award and fix the amount of spousal support is given broad discretion. *See Miller v. Cox*, 44 Va. App. 674, 679 (2005) (citing *Brooks v. Brooks*, 27 Va. App. 314, 317 (1998) ("In reviewing a spousal support award, we are mindful that the trial court has broad discretion in awarding and fixing the amount of spousal support.").

    ii. Courts also consider the "lost opportunity" calculation: where one spouse makes significantly more, and the dissolution of the marital estate leaves one spouse significantly "worse off," to what extent is the dependent spouse's situation a result of his or her reliance on the marital partnership? Was the dependent spouse's decision to not enter the workforce—or to take a job earning significantly less money—affected by a consideration that doing so would facilitate the primary earning spouse's ability to become an "ideal worker?" Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 Tex. L. Rev. 17, 22 (1998) (explaining that, when one spouse takes on the role of homemaker, the primary-wage earning spouse can become an "ideal worker" through the ability to engage in full-

time, year-round wage labor "largely uninhibited by child care or other domestic responsibilities.").

iii. Spousal maintenance and taxes: Property distribution at divorce does not in itself carry tax consequences, as taxes only arise in the event of sale or gift to a beneficiary or estate. For example, "[A] couple may have a personal residence and a stock portfolio with significant unrealized capital gains. In the divorce, one spouse may end up with the house while the other spouse ends up with the stock portfolio. When these assets are sold, however, the spouse with the residence may qualify for the exclusion of gain on the sale of the personal residence thereby avoiding all or part of the capital gain, whereas the spouse with the stock portfolio will owe tax on the entire gain." Scott Cashman, *Important Tax Considerations During Divorce,* JDSupra (2022).

    1. However, changes to federal tax law "eliminated the alimony deduction for payors moving forward and allowed recipients to receive the transfer without paying income tax on it. Assuming the recipient usually makes less money—and is thus in a lower tax bracket—it now costs more to the payor to give the recipient the same amount in alimony as it did prior to the tax law change. The net result may be more money in taxes, and less to the recipient, which may make divorce settlements more difficult to reach." Abrams, *supra* at 777.

        a. "[I]f W is taxed at a 10% marginal rate, and H is taxed at a 30% marginal rate, $100 earnings by H will be subject to $30 in tax, leaving him $70 to pay as alimony. Under prior law, the alimony would have been deductible to H, leaving him $100 to pay to W, who would have to pay $10 tax on that amount, leaving her $90 to spend." Linda Sugn, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 Yale L. J. Forum 403, 412 (2018).

iv. Types of spousal maintenance awards: Rehabilitative, Reimbursement "Bridge-the-gap", Permanent, indefinite, or periodic, and "Lump-sum."

    1. "Rehabilitative support—Support is provided for a definite period while the recipient seeks to become 'self-supporting.' The period varies, depending on the type of 'rehabilitation' the recipient needs, such as updating existing skills or acquiring new ones." Abrams, *supra* at 749.

    2. "Reimbursement support—With this type of award, the spouse whose financial contributions during the marriage directly enhanced the other spouse's earning capacity is awarded

compensation…In contrast to most other forms of [spousal support], reimbursement…is typically not modifiable based on changed circumstances. Reimbursement…is designed to compensate one spouse for enhancing the other's earning capacity, typically through support for graduate or professional school. Based on the acknowledgement that both spouses worked toward attaining the degree, the law recognizes that both should be entitled to claim some of the benefits." *Id.*

3. "Bridge-the-gap (or limited-duration) [support]—This type of [support] is short-term, typically unmodifiable…that 'may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single.' Fla. Stat. § 61.08 (2022)." *Id.*

4. "Permanent, indefinite, or periodic [support]—The spouse receives support for an undefined duration, awarded in periodic installments, to take effect from the final order of dissolution until either party's death or the recipient's remarriage." *Id.*

5. "'Lump-sum' [support]—This form of [support] is a single payment. In nonlitigious divorces, a lump-sum [support] payment is often an attractive option, permitting immediate financial settlement. Courts commonly make lump-sum awards only when periodic payments cannot be implemented for some specific reason, such as where the payor has a substance abuse problem or is a habitual spendthrift. Other courts make a rehabilitative lump-sum award when rehabilitation expenses are all due immediately (e.g., tuition for a final year of schooling), or when periodic rehabilitative support cannot be awarded for some other reason. Lump-sum [support] is generally awarded in one payment, though some courts have allowed for installment payments when necessary." *Id.* at 750.

v. Modification and termination

1. Generally only subject to modification when there is a material change in circumstances, and it's a high bar. *See* Va. Code § 20-109; *see also Brooks v. Brooks*, 27 Va. App. 314, 318 (1998).

c. Child support: Like spousal support and maintenance, the underlying rationale of the child support obligation is grounded in "U.S. research and policy [which] have focused on how to obtain more private support." Gay Kitson, *Divorce and Relationship Dissolution Research: Then and Now*, Handbook of Divorce and Relationship Dissolution, 49 (2006). The obligation is strict and is a function of legal parenthood. Abrams, *supra* at 788.

i. A child support award is governed by statutory guidelines. Va. Code § 20-108.2.

1. "The amount of child support under the child support guidelines must be based on the parents' actual gross income." *Niblett v. Niblett*, 65 Va. App. 616, 625 (2015).

2. Because the guidelines are based on a parent's income, it is important to recognize what classifies as income. "[A]ll income from all sources, and shall include, but not be limited to, income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits except as listed below, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans' benefits, spousal support, rental income, gifts, prizes or awards." Va. Code § 20-108.2(C).

ii. When a parent earns above or below the "outer limit" of the guidelines, a court may exercise its discretion in setting the obligation amount. *See Hiner v. Hadeed*, 15. Va. App. 575, 579 (1993). Courts vary in their treatment of "high earning" parents from state to state. "Some states presume that the guidelines' highest award amount is the proper amount in high-income-obligor cases, but permit courts to deviate from that amount based on the parties' standard of living and the child's needs." Abrams, supra at 819.

1. In Virginia, the "outer limit" of the guidelines is a "combined gross monthly income" of $42,500. Va. Code § 20-108.2(B). The guidelines stipulate that "for gross monthly incomes above $42,500, add the amount of child support for $42,500 to the following percentages of gross income above $42,500," and lists six percentages assigned to the number of children to whom support would be owed. *Id.*

2. Outside the limit of those guidelines, courts tend to "deviate upwards" to satisfy the best interest of the child and in recognition of the lifestyle enjoyed during the marriage.

a. "The circuit court found that, according to the statutory guidelines, husband's child support obligation is $65 per month. However, the court decided to depart from the guidelines '[c]onsidering the lifestyle the Plaisteds enjoyed, [husband's] private school education, and the best interest of the child.' The circuit court ordered husband to pay $650 per month in child support and the $18,880 annual private

school tuition for the child." *Plaisted v. Plaisted*, No. 0051-14-2, 2014 Va. App. LEXIS 283, at *281 (Aug. 19, 2014).

iii. Modification and termination: A child support award can only be modified when a parent experiences a "material change in circumstances."

1. "[I]n order to entertain a petition to increase, decrease, or terminate child support, [a trial court must] ... make a threshold finding that a material change of circumstance has occurred since the last award or hearing to modify support." *Hiner v. Hadeed,* 15 Va. App. 575, 579 (1993).

2. While the support obligation only remains in force until the child reaches the age of majority, parties may agree to continue that obligation past the age of majority. *See Cutshaw v. Cutshaw*, 220 Va. 638, 641 (1979).

d. Child custody : Unlike child support, in which the "right" is the child's, child custody rights are grounded in parental rights, and as such there is a good deal of deference to child custody arrangements so long as they are not contrary to the best interest of the child. Kimberly C. Emery & Robert E. Emery, *Who Knows What Is Best For Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 Law & Contemp. Probs. 151 (2014). Even so, the agreement is not final or enforceable until approved by the court. *See* Abrams, *supra* at 850.

i. Preference for "joint custody" J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 Fam. Ct. Rev. 213, 216–18 (2014)

ii. High-earner implications: Taxes. The parent with whom the child resides is allowed to claim the child as a dependent when they file federal income taxes unless the divorce decree or a written declaration expressly assigns the tax deduction or any applicable tax credits to the noncustodial parent. 26 U.S.C.A. § 152(e) (2022). When parents share custody, the court's order must assign the deduction and any tax credits, and the final judgment must be fully executed before that assignment becomes effective. *Hendricks v. C.I.R.*, 108 T.C.M. (CCH) 317 (T.C. 2014) *Contemporary Family Law, supra* at 948.

II. Avoiding the Default Hazards: Private Ordering to Protect the Green.

a. Divorce Agreements: "The most deferential treatment of party choice, in terms of enforcing such agreements, occurs with separation agreements, which set the terms of divorce for the vast majority of couples who have their marriages

dissolved." Brian Bix, *Domestic Agreements*, 35 Hofstra L. Rev. 1753, 1761 (2007).

i. Enforceability: "To the extent the parties have already stipulated to the particular disposition of their property, the court may not decree an equitable distribution award that is inconsistent with that contract. Thus, it is error for a court to ignore the provisions of a property contract when arriving at a final property award where there is no showing that the contract is invalid. Such a rule applies whether or not the agreement has been incorporated into the final decree of divorce." Dale M. Cecka et al., *Va. Prac. Family Law* § 11:21 (2024 ed.).

ii. Distribution: Characterize assets, value assets, and consider both monetary and non-monetary contributions when allocating distribution.

1. Characterization: Be wary of "comingling" and "transmutation," but remember that the presumption of "marital property" under Code 20-103.3(A)(2) can be overcome by party agreement. *See* Code § 20–107.3(I); *see also* Code § 20–151(A).

a. "An agreement between the parties entered into during the marriage may significantly affect the classification of property. Thus, a written agreement signed by the husband that the 'house is ours' is sufficient to transmute the husband's separately owned residence into marital property." *Cecka*, supra.

2. Remember that property includes both tangibles and intangibles. Here are some recent examples of types of property recognized as "marital:"

a. "Goodwill". *See Howell v. Howell*, 31 Va. App. 332, 339 (2000).

b. "Investment portfolio". *See Nack v. Dickerson*, Nos. 2219-06-3, 2288-06-3, 2007 Va. App. LEXIS at *3.

3. Valuation: Know when your jurisdiction sets the "date of valuation." In Virginia, the date of valuation is set by Code § 20-107.3. Then, identify which assets necessitate expert valuation: businesses, real estate, investment portfolios, stock options, etc.

a. Discuss with your client the value he or she attributes to a particular asset, because "[t]he value of an item of marital property is its intrinsic worth to the parties…Intrinsic value

is a very subjective concept that looks to the worth of the property to the parties." *Howell v. Howell*, 31 Va. App. 332, 339 (2000). While valuation must be consistent with established methodology, "[t]he methods of valuation must take into consideration the parties themselves and the different situations in which they exist. The item may have no established market value, and neither party may contemplate selling the item; indeed, sale may be restricted or forbidden." *Id.* Even though "[an asset's] intrinsic value must be translated into a monetary amount[,]" the "particular method of valuing and the precise application of that method to the singular facts of the case must vary with the myriad situations that exist among married couples." *Id.*

4. Ask hard questions.

    a. Was there a pre-nuptial agreement in which the characterization or valuation of any assets was already determined?

    b. Is there an existing operating agreement/business agreement/shareholder agreement that deals with or implicates any marital assets?
        i. Is there a company car that is used for marital/familial purposes?
        ii. To what degree are company assets marital assets?

    c. Are there existing trusts set up for the children?
        i. Are certain assets already "off the table?"

5. Tax implications.

    a. Property transfers: Property transfers between former spouses are tax-free if the transfer is incident to divorce. Elizabeth A. Garlovsky and Carrie A. Harrington, *Advice for Estate Planners Dealing with Client Divorces*, 45 Estate Planning 39, 42 (July 2018). For a transfer to be "incident to divorce," it "must occur within (1) one year after the cessation of marriage or (2) six years after the end of the marriage, if the transfer is made pursuant to the terms of a divorce or separation instrument." *Id.* Such "transfers will be treated as gifts for income tax purposes and, therefore, the transferee spouse will take the transferor spouse's carryover basis." *Id.* To ensure that each spouse is able to recognize these tax benefits, "[t]he divorcing couple should specifically identify the assets to be transferred in the

divorce agreement in order to qualify for this treatment." *Id.*

b. Gains and losses on transfers: Following the 1984 Tax Reform Act, divorce now impacts the recognition of gains and losses on a transfer of property and transfers in trust. If the "transfer is incident to a divorce," then "neither gain nor loss will be recognized on a transfer of property…between former spouses." The same rule applies "to transfers in trust, except where debts exceed the basis to transfers of installment obligations other than transfers in trust; and, presumably, to transfers of annuities and life insurance contracts." Cecka, *supra* at § 12:5.

    i. A transfer is "'incident to divorce' if the transfer occurs within one year after the date of the divorce or if 'the transfer is related to the cessation of marriage.'" A transfer is related to the cessation of marriage if the cessation "is pursuant to a divorce or separation agreement as defined by statute and if it occurs no later than six years after the date of divorce." *Id.*

c. Brokerage Accounts: Gains may not have been recognized, so if someone is determined to retain the entire account, they will pay for it. *See* Amy I. Kinkaid et al., *Tax planning issues to consider when assisting clients in a divorce*, Personal Finance Planning (Dec. 1, 2022) https://www.thetaxadviser.com/issues/2022/dec/tax-planning-issues-assisting-clients-in-a-divorce/.

d. Timing: If decree is finalized on December 31, then the parties cannot file Married Filing Jointly for the year. *Filing Status*, IRS (last updated Jan. 15, 2025) https://www.irs.gov/filing/filing-status.

e. Ask questions about potential instances of "fraud": are there undisclosed assets? Ensure the distribution will be final and enforceable.

iii. Spousal support/maintenance.

1. Know the guidelines for determining spousal support: Va. Code. § 16.1-278.17:1.

2. Identify, with particularity, the "type" of support: Rehabilitative, Reimbursement? Bridge-the-Gap? Ensure the agreement includes the purpose of the award, why is it being awarded, how long will it last, and any terms affecting modification or termination.

    a. Spousal support modification is only available when there is a material change in circumstances, and changes in financial situation or physical health do not themselves constitute such a modification. If spouses want to ensure the ability to modify for other reasons, include it in the agreement. Same goes for termination. The default rule is that support terminates upon death or remarriage—but some states now include "cohabitation with another" as grounds for termination. *See Pellegrin v. Pellegrin*, 31 Va. App. 753, 763-764 (2000).

        i. In Virginia, spousal support will automatically terminate "[u]nless otherwise provided by stipulation or contract," when either party dies or when the spouse receiving support remarries. Va. Code § 20-109(D). However, by petition supported by "clear and convincing evidence," a court "shall terminate" spousal support if "the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more," unless "(i) otherwise provided by stipulation or contract or (ii) the spouse receiving support proves by a preponderance of the evidence that termination of such support would be unconscionable." Va. Code § 20-109(A).

    b. Similarly, remember the consequences and effects of incorporating the agreement into the final divorce decree.

        i. "Where a written contract between the parties is approved by the court or filed therein, but is not incorporated in the final decree, it is not an award of alimony. Such approval or filing merely establishes a contractual relationship between the parties which may not thereafter be modified or altered by the court except to the extent provided in the agreement…[but where] a written agreement between the parties relating to spousal support is affirmed, ratified and incorporated in the final decree or by a separate decree prior to or subsequent to such decree, the terms of such

agreement shall have the effect of an order of the court and is enforceable by contempt in the same manner as any provision of such decree." Cecka, *supra* at § 9:15.

c. Discuss tax implications: "[T]o fairly assess [a spousal support] award, it is important not only to consider taxes, but also to consider the effect of the [] award upon taxes. When this issue has been presented to the appellate courts, the courts have been willing to recognize the tax effect of [spousal support]." *A Brief Note on Tax Consequences as a Factor in Determining Alimony*, 15 No. 9 Divorce Litig. 168 (Brett Turner, ed., 2003) (hereinafter "*Tax Consequences*").

i. Previously, spousal support payments "were deductible to the payor and includable in the payee spouse's income." However, following the enactment of the Tax Cuts and Jobs Act of 2017, "the deductibility and includability provisions expire." Garlovsky, *supra* at 42. Now, "[spousal support]…is deducted from the taxable income of the payor, and is added to the taxable income of the recipient." *Tax Consequences, supra* at 168.

1. Consider establishing a spousal support trust. Once it "is funded, the trust relieves the payor spouse of future tax obligations when trust income is paid to the payee spouse. The payee is taxed on distributed income, and the trust is taxed on undistributed income." Garlovsky, *supra* at 42.

iv. Child Support : Although there is a high degree of deference for divorce agreements insofar as they determine property distribution and spousal support, there is a lower standard of deference for parental agreements regarding child support. *See* Brian Bix, *Domestic Agreements*, 36 Hofstra L. Rev. 1753, 1762 (2007).

1. Be wary of "downward adjustment" agreements: The child support right is held by the child, not the parents. Agreements in which parents agree to pay "more," are typically regarded as "legitimate incidents of parental authority and support...entitled to serious consideration by a court." *Pursley v. Pursley*, 144 S.W.3d 820, 825 (Ky. 2004). However, when parents agree to a "lower" support

amount, courts can and often will declare such agreements "repugnant and contrary to public policy" regardless of the agreement's terms. *See Perkinson v. Perkinson*, 989 N.E.2d 758 (Ind. 2013).

2. Recognize the implications of spousal support upon child support.

    a. "As this Court has explained, 'in determining child support under Code § 20–108.2(C), the trial court must include spousal support in the gross income of the receiving spouse and must deduct the amount of spousal support from the gross income of the paying spouse.'" *Cranwell v. Cranwell*, 59 Va. App. 155, 166 (2011) (quoting *Frazer v. Frazer*, 23 Va.App. 358, 381, (1996)).

3. Know the guidelines: Va. Code § 20-108.2.

v. Child custody: Avoid "custody blackmail."

1. "Divorce decrees are typically drafted for the parties after compromises reached through private negotiation. These compromises are then approved by a judge, who generally gives them only the most perfunctory sort of review. The result is that parties…are free to use whatever leverage is available to obtain a favorable settlement. In practice, this tends to mean that [one spouse] will threaten custody fights, with all of the accompanying traumas and uncertainties…as a means of intimidating [the other spouse] into accepting less child support and [spousal support] than is sufficient to allow the [dependent spouse] to live and raise the children appropriately as a single parent. Because [primary caretaker parents] are usually unwilling to accept even a minor risk of losing custody, such techniques are generally successful." Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 Yale L. & Pol'y Rev. 168, 177 (1984).

2. Tax implications: reach an agreement as to who will claim the federal tax dependency exemption.

    a. "In view of the present trend toward the award of joint or shared custody of children, the question has arisen as to who is in fact the custodial parent for the purposes of the dependency exemption…[i]n many cases, however, the parents may actually share the physical custody in a

manner which would render it difficult to decide who is actually the custodial parent. In such cases, the parents will have to work out the dependency issue by agreement." Leon Gabinet, *Tax Aspects of Marital Dissolution* § 10:6 (2d ed.).

b. Trusts

i. Often times, couples want to set aside some of the assets exclusively for the benefit of children. This can mean setting up several trusts depending on needs of each child and the child's age. *See* Spero, *Asset Protection: Legal Planning, Strategies and Forms*, ch. 6.12 (Warren Gorham & Lamont, publ., 2023).

1. "By placing assets in a trust, a parent can provide for their children while shielding those assets from claims during a divorce. In a typical scenario, a parent establishes a trust for the benefit of a child, allowing the trustee (be it a third party or the child) to manage the assets." Todd Bornstein, *How Estate Planning Can Protect Your Clients' Children Inheritance in the Event of a Divorce*, 6 No. 3 Md. B.J. 72 (2025).

2. Although guardianship/conservatorships are utilized here, it's often to the advantage of both the parents and the children to set up trusts for the benefit of the children.

a. Most effective protection: "Joint ownership of inherited property can inadvertently co-mingle assets and open the door to claims in a divorce. Keeping inherited assets in an individual account under only the child's name can help preserve the assets' separate status. However, inherited assets titled in a child's name (rather than a trust) may expose such assets to a child's creditors. For this reason, inherited assets left in a trust for a child generally provides the most effective protection against a divorce or any other creditor of a child." *Id.* at 73.

b. Customize distribution: A discretionary trust maximizes asset protection, granting the trustee "complete discretion" over distribution." *Id.*

c. Privacy: Prevent creditors, "including a divorcing spouse, from accessing trust assets." *Id.*

ii. In addition to drafting trusts for the benefit of the child, it is possible that the couple had already established a trust or multiple trusts. This will involve a process known as "decanting" in which a trustee can appoint

trust assets into a new trust with different terms. While "decanting or merging can be used to amend unfavorable terms before a divorce is finalized," be sure to "consider any fiduciary obligation that the client may have." Garlovosky, *supra* at 41.

1. "During divorce negotiations, a spouse would be wise to consider any irrevocable trusts and their value to the opposing spouse. Consider including the opposing spouse's resignation as trustee of an irrevocable trust among the items being negotiated." *Id.*

c. Businesses

i. As discussed above, for those spouses in business together: a business is an asset and must be characterized and valued prior to distribution. It is unlikely, especially in high-value estate cases, that a business will not be considered at least hybrid property. *See Rahbaran v. Rahbaran*, 26 Va. App. 195 (1997). Even if the business itself is not hybrid or marital property, equitable distribution and theories of spousal contribution may still favor a non-owning spouse being awarded a portion of the business interest. *See* 137 Am. Jur. Proof of Facts 3d 267 § 19 (Originally published in 2013).

1. Ask about their operating/shareholder agreements: what do their governing documents require? What do they prohibit?

2. Valuing the business: be familiar with the methods of valuation.

a. "The reasonableness of any valuation depends upon the judgment and experience of the appraiser and the completeness of the information upon which his conclusions are based. Of these techniques, there are three principal methods which can be used for developing a value for ownership in a closely held corporation. Those are the income or capitalized earnings method, the market approach method, and the asset-based approach method." 137 Am. Jur. Proof of Facts 3d 267 § 14 (Originally published in 2013).

d. Qualified Domestic Relations Order: A QDRO is a domestic relations order that specifically applies to benefits payable under a retirement plan. While a QDRO can be issued separately from a divorce decree, a standard divorce decree cannot itself qualify as a QDRO if it does not contain a QDRO's requisite provisions.

i. A QDRO "creates or recognizes the existence of an 'alternate payee's' right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and that includes certain information and meets certain

other requirements." *FAQs about Qualified Domestic Relations Orders*, U.S. Dept. Labor, Employee Benefits Security Administrations; ERISA § 206(d)(3)(B)(i).

ii. To ensure that a divorce agreement validly establishes a QDRO, it must contain "[t]he name and last known mailing address of the participant and each alternate payee, The name of each plan to which the order applies, the dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee, The number of payments or time period to which the order applies." *Id.*; ERISA § 206(d)(3)(C)(i)-(iv).

iii. A QDRO recognizes that a spouse or dependent is entitled to receive predefined portion of account owner's retirement assets. *See* Va. Code §§ 20-107.3 and 51.1-801.

1. "Pension rights are usually a divorcing couple's largest or second largest asset (the other being family home) and are usually a major source of alimony and child support payments." Aaron Klein, *Divorce, Death, and Posthumous QDROs: When is it Too late for a Divorcee to Claim Pension Benefits*, 26 Cardozo L. Rev. 1651,1657 n. 36 (2005).

2. "ERISA does not mandate that an attorney be an actuary to draft a QDRO. An attorney, however, does have to understand actuarial equivalence and how it relates to interest rates, timing of payments, and mortality rates. Just remember the basics: The longer the payments last, the smaller they have to be; conversely, the shorter the payments last, the larger the payments must be. If you start with the amount that will be used to make a series of periodic future payments, then those payments can be made by paying the recipient a larger amount for a shorter period of time or a smaller amount for a longer period of time." Terrence Cain, *A Primer on the History & Proper Drafting of Qualified Domestic-Relations Orders*, 28 T.M. Cooley L. Rev. 417, 473 (2011).

iv. Tax implications.

1. "An individual may be able to roll over tax-free all or part of a distribution from a qualified retirement plan that he or she received under a QDRO. If a person receiving QDRO payments is either the employee's spouse or former spouse (not as a nonspousal beneficiary), then he or she can roll it over, just as if he or she were the employee receiving a plan distribution and choosing to roll it over." *Retirement Topics—QDRO: Qualified Domestic Relations order*, IRS Retirement Plans (updated May 27, 2025)

https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-qdro-qualified-domestic-relations-order.

2. "Language should be included in the QDRO that requires the participant who receives a payment intended for the alternate payee to return the money to the plan administrator with a request that the funds be forwarded to the alternate payee. The participant should not forward the payment to the alternate payee directly because the party receiving the payment is responsible for paying the income taxes on the payment. If the participant does not involve the plan administrator in correcting the misdirected payment, then the participant will owe taxes on the payment intended for the alternate payee." *Cain, supra* at 480-481. For purposes of clarification in this scenario, the "alternate payee" is the spouse/former spouse of the plan participant.

v. Ensure meticulous drafting.[1]

1. "Since Virginia's pension statute has adopted the "if, as and when" methodology, deferring the payment of such benefits until the receipt of such benefits by the retired spouse, the proper drafting of such QDROs and the future integrity of such orders cannot be overemphasized. The reliance by clients on the validity of such orders drafted at the present time, but affecting important property rights to be received in the future, requires the proper drafting of such orders. The integrity of such orders affects not only the future expectations of the parties, but may rise to legal malpractice if minimal drafting standards are not performed." Cecka, *supra* at § 11:34.

2. "[T]he order must clearly specify the following: (1) the name and address of the participant; (2) the name and address of the alternate payee; (3) the amount or percentage of the participant's benefits to be paid by the plan to the alternate payee or how the amount or percentage will be calculated; (4) the number of payments or payment periods; and (5) each plan covered by the order." Cain, *supra* at 454.

[1] Fairfax County has provided a QDRO template. Fairfax County Retirement Systems, Going through a Divorce, QDRO Guidelines https://www.fairfaxcounty.gov/retirement/going-through-divorce (last accessed June 27, 2025).

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Gentry Locke Consulting's Legislative Update

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Gentry Locke Consulting's Legislative Update

Presented by: Greg Habeeb, Carlos Hopkins, Patrice Lewis, Zach LeMaster, and Abigail Thompson
Gentry Locke's Roanoke Seminar – September 5, 2025

*This outline summarizes numerous bills introduced in the 2025 session by topic.

I. Agriculture/Natural Resources

Passed

HB 1941/SB 1166 Invasive plant species; retail sales.

Requires, for the retail sale of certain invasive plant species for outdoor use, a retail establishment to post in a conspicuous manner on the property located in proximity to each invasive plant signage identifying such plant as invasive, educating consumers regarding invasive plant species, and encouraging consumers to ask about alternatives. The bill requires the Commissioner of Agriculture and Consumer Services to designate the format, size, and content of such signage no later than October 1, 2025, and requires the Commissioner to issue a stop sale order and mark or tag a plant in a conspicuous manner when an invasive plant is for sale at a retail establishment without appropriate signage. In such case, the bill requires the Commissioner to give written notice of a finding made to the owner, tenant, or person in charge of such retail establishment and requires the stop sale order issued to remain in effect until the required signage is posted. Certain provisions of the bill have a delayed effective date of January 1, 2027.

SB 1125 Department of Wildlife Resources; propagation of mammalian wildlife unlawful; premature separation; hybridization.

Makes it unlawful to prematurely separate any mammalian wildlife offspring born in captivity from the mother prior to the natural time of weaning that is appropriate for such species, except that wildlife offspring may be prematurely separated if a medical necessity exists pursuant to a written order from a veterinarian licensed to practice in the Commonwealth with appropriate speciesspecific experience and expertise. The bill excludes the following from its provisions: (i) noncommercial transfers or trades between accredited zoological facilities, (ii) an accredited zoological facility that retains the mammalian wildlife offspring that has already been prematurely separated by such zoological facility, and (iii) a person operating under a wildlife rehabilitator permit issued by the Department of Wildlife Resources. The bill also makes it unlawful to intentionally and for commercial purposes propagate mammalian wildlife of different species, also known as hybridization

Failed

SB 923 Virginia Water Protection Permit; interbasin transfers of water prohibited.

Prohibits the Department of Environmental Quality from issuing a Virginia Water Protection Permit for a surface water withdrawal if more than five percent of the nonconsumptive volume of such withdrawal will be returned to a different major river basin, as defined in the bill. The bill clarifies that such prohibition does not apply to any lawful withdrawal in existence on July 1, 2025

II. Alcoholic Beverages and Cannabis

Passed

HB 2058/SB 811 Alcoholic beverage control; delivery of mixed beverages; repeal.

Clarifies that under current law mixed beverage restaurant and limited mixed beverage restaurant licensees may sell for off-premises consumption or deliver up to two mixed beverages per meal served, but shall in no event sell for off-premises consumption or deliver more than four mixed beverages at any one time. The bill also provides clarification as to where delivery of such mixed beverages may be made. The bill maintains alcoholic beverage control third-party delivery licenses by eliminating the repeal of such licenses that is set to go into effect July 1, 2026.

HB 2485/SB 970 Cannabis control; retail market; penalties.

Establishes a framework for the creation of a retail marijuana market in the Commonwealth, to be administered by the Virginia Cannabis Control Authority. The bill allows the Authority to begin issuing all marijuana licenses on September 1, 2025, but provides that no retail sales may occur prior to May 1, 2026

Failed

HB 1981 Alcoholic beverage control; illegal advertising; exceptions; charitable sales promotion.

Allows a licensed distillery, winery, or brewery to advertise in or send any advertising matter into the Commonwealth about or concerning alcoholic beverages for the purposes of a charitable sales promotion to benefit (i) a charitable or civic organization, (ii) an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code, or (iii) any public or private elementary or secondary school or institution of higher education, regardless of whether such charitable sales promotion advertises that a percentage of each sale or per product sold will benefit such organization, school, or institution.

SB 1163 Alcoholic beverage control; food-to-beverage ratio.

Reduces the current 45 percent food-to-beverage ratio for certain mixed beverage licensees. The bill requires a mixed beverage restaurant, caterer's, or limited caterer's licensee with monthly food sales of at least $4,000 to have a food-to-beverage ratio that meets or exceeds 30 percent. The bill also requires that restaurants have at least as many seats at tables as at counters and prohibits mixed beverage licensees from serving mixed beverages once food is no longer being sold for on-premises consumption. The bill sunsets on July 1, 2027, and requires the Virginia

Alcoholic Beverage Control Authority to collect data regarding the compliance of mixed beverage licensees with the provisions of the bill and the impact of the change to the food-tobeverage ratio on the gross amount of food consumed on a licensee's premises. The bill requires the Authority to report such data to the Chairmen of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services by November 1, 2026.

SB 1297 Virginia Alcoholic Beverage Control Authority; police power; primary law-enforcement agency for certain crimes against property and involving fraud.

Provides that special agents of the Alcoholic Beverage Control Board shall serve as the primary law-enforcement agency for enforcing, reporting, and investigating certain crimes against property and crimes involving fraud that occur on property owned or leased by the Virginia Alcoholic Beverage Control Authority

III. Corrections

Passed

HB 1589 Powers and duties of Parole Board; voting requirements; meetings.

Removes various references to postrelease supervision and instead includes such references and related procedures in the provisions that govern probation so that such procedures, including revocation hearings, will be overseen and conducted by the sentencing court. The bill provides that except for a public meeting convened for conducting the final deliberation and vote regarding whether the Parole Board will grant parole to a prisoner, a meeting of the Parole Board members, regardless of whether such members invite staff or other guests to participate in such meeting, shall not be deemed a meeting subject to the provisions of the Virginia Freedom of Information Act. The bill also provides that the final deliberation and vote of whether to grant parole to a person serving life imprisonment for murder in the first degree shall be attended by four or more members of the Parole Board, and a decision to grant such person discretionary parole shall require the concurrence of four or more members present. A final deliberation and vote of whether to grant parole to a person not sentenced to life imprisonment requires the attendance of a panel of no fewer than three members of the Parole Board and a concurrence of the majority of members present for such final deliberation and vote.

HB 2221 Prisoners; Department of Corrections-issued identification; report.

Requires that prior to the release or discharge into the community of any prisoner who has been confined for at least 90 days and does not possess a government-issued identification card, birth certificate, or social security card, the Department of Corrections, in conjunction with the Department of Motor Vehicles, the State Registrar of Vital Records, and any other relevant government agency, shall provide such prisoner with a certified copy of his birth certificate, his social security card, or a government-issued identification card, unless such provision of a government-issued identification card is not possible, in which case, the Department of Corrections shall provide the prisoner with a Department of Corrections Offender Identification form. The bill also specifies what identifying information must be included on such Department

of Corrections Offender Identification form and provides that such form shall satisfy certain requirements for the purposes of obtaining a government-issued identification card for the 120 days immediately following the release or discharge of the prisoner identified on such form. The bill also directs the Department of Corrections, in coordination with the State Board of Local and Regional Jails, the Department of Motor Vehicles, and the State Registrar of Vital Records, to (i) identify the number of prisoners released with and without identification cards; (ii) review the processes involved in assisting a prisoner in applying for and obtaining a government-issued identification card, birth certificate, or social security card; (iii) identify any obstacles that may interfere with a prisoner obtaining such identification or documents prior to such prisoner's release or discharge; and (iv) issue a report of its findings and recommendations to the General Assembly no later than November 1, 2025.

HB 2235 Local and regional correctional facilities; treatment of prisoners known to be pregnant.

Prohibits the use of restraints, defined in the bill, on any prisoner of a local or regional correctional facility who is (i) known to be pregnant or (ii) in postpartum recovery unless a deputy sheriff or jail officer makes an individualized determination that (a) the prisoner will harm herself, the fetus, the newborn child, or any other person; (b) the prisoner poses a flight risk; or (c) the totality of the circumstances creates a serious security risk. Under current law, such prohibition applies only to state correctional facilities. The bill also requires the Department of Criminal Justice Services to include in the compulsory minimum entry-level training standards training regarding pregnant prisoners for deputy sheriffs and jail officers who are employees of local or regional correctional facilities who may have contact with pregnant prisoners.

HB 2647/SB 1409 Restorative housing and isolated confinement; restrictions on use.

Prohibits the use of isolated confinement, defined in the bill, in state correctional facilities, subject to certain exceptions. The bill requires that before placing an incarcerated person in restorative housing or isolated confinement for his own protection, the facility administrator shall place an incarcerated person in a less restrictive setting, including by transferring such person to another institution or to a special-purpose housing unit for incarcerated persons who face similar threats. The bill requires that if an incarcerated person is placed in restorative housing or isolated confinement, such placement shall be reviewed every 48 hours and the facility administrator shall ensure that the incarcerated person receives a medical and mental health evaluation from certified medical and mental health professionals within one working day of placement in restorative housing or any form of isolated confinement. The bill also requires the facility administrator to notify the regional administrator in writing that an incarcerated person was placed in restorative housing or isolated confinement within 24 hours of such placement. Finally, the bill requires that formal reviews of an incarcerated person's placement in any form of isolated confinement shall be held in such person's presence, inform him of any reason or reasons administrative officials believe isolated confinement remains necessary, and give him an opportunity to respond to those reasons and that a formal ruling shall be provided to the incarcerated person within 24 hours. The bill has a delayed effective date of July 1, 2026.

Failed

HB 2467 State Board of Local and Regional Jails; oversight of local and regional jails; powers and duties.

Increases from 11 to 19 the membership of the State Board of Local and Regional Jails by requiring the appointment of (i) two members of the Senate and two members of the House of Delegates and (ii) four additional nonlegislative citizen members, including (a) one representative of a nonprofit organization that provides training or rehabilitation programs for incarcerated inmates; (b) one male citizen and one female citizen who were formerly incarcerated within the Commonwealth; and (c) one person who is a grandparent, parent, child, sibling, or spouse or domestic partner of a person currently incarcerated within the Commonwealth. The bill also adds numerous additional duties for the Board, including to (1) provide information, as appropriate, to inmates, family members, representatives of inmates, and in custody. The bill also specifies additional information to be included in the Board's currently required annual report to the General Assembly and the Governor and requires such report be made available to the public online. The bill enumerates certain items for assessment that may be included in the Board's annual inspection of each local correctional facility, as required by current law, and also specifies the Board's authority and right to access such facilities, interview persons, and access certain information and documents. Upon completion of an inspection, the bill requires the Board to produce a report, including information enumerated in the bill, to be made available to the public online and to be delivered to the Governor, the Attorney General, the Senate Committee on Rehabilitation and Social Services, the House Committee on Public Safety, and the sheriff in charge of the local correctional facility or superintendent of the regional correctional facility. Finally, the bill allows the Board to initiate and attempt to resolve an investigation upon its own initiative, or upon receipt of a complaint from an inmate, a family member or representative of an inmate, or a local, regional, or community correctional facility employee or contractor, or others, regarding various concerns as enumerated in the bill. The bill has a delayed effective date of July 1, 2026.

SB 1080 Earned sentence credits; inchoate offenses; concurrent and consecutive sentences.

Provides that a person who is convicted of an inchoate offense will earn sentence credits at the same rate as someone who is convicted of the completed offense for certain enumerated offenses. The bill also specifies that the provision in current law providing that a person who has been convicted of certain enumerated offenses may earn a maximum of 4.5 sentence credits for each 30 days served on any sentence for such offenses also applies to any other sentence that is to be served concurrent with or consecutive to any such sentence. The bill specifies that such provisions shall apply to the sentence of any person convicted of a felony offense committed on or after July 1, 2025, and who is sentenced to serve a term of incarceration in a state or local correctional facility.

SB 1432 Juvenile secure detention facilities; closure or consolidation; funding contributions; education programs.

Provides that upon the closure or consolidation of a juvenile secure detention facility, any locality or commission operating a juvenile secure detention facility in which juveniles will be

placed who previously would have been placed in the closed or consolidated juvenile secure detention facility shall negotiate in good faith with the locality from which a juvenile may be placed to arrive at mutually agreeable funding contributions for the operation of such receiving juvenile secure detention facility. The bill requires such agreements to include certain provisions related to equal access to post-dispositional programming and medical and hospitalization costs and provides that such agreements may include provisions related to transportation of juveniles and transportation options for parents or guardians. The bill further states that if the localities or commissions are unable to reach such an agreement, then the Department of Juvenile Justice shall determine the funding contributions and that failure of any locality or commission to comply with such determination may result in the loss or reduction of state funding. Under the bill, any locality or commission operating a juvenile secure detention facility that refuses to accept placement of juveniles who previously would have been placed in a closed or consolidated juvenile secure detention facility shall not be eligible for state funding. The bill changes the required staffing ratio for education programs in regional and local detention homes to one fulltime equivalent program employee for every six students based on a rolling average daily population at the facility as calculated by the Department of Education from the previous three fiscal years. Under current law, the ratio for such programs is one teacher for every 12 beds based on the capacity of the facility. The bill also provides that the Board of Education shall require all such education programs to have either a principal or a lead teacher on site and requires contracts for the hiring and supervision of teachers to allow a teacher employed by a local school board to continue teaching in his local school division and be hired as a parttime teacher for such an education program. The bill requires that each part-time teacher for an education program be provided an annual $3,000 bonus. Lastly, the bill directs the closure of seven juvenile secure detention facilities across the Commonwealth and specifies the facilities to be closed and the facilities into which they may be consolidated. The bill requires the facilities to be closed and consolidated by January 1, 2026, and states that any such facility that fails to comply with the requirements for closure and consolidation, in addition to any other remedy available at law, shall not be eligible for state funding.

IV. Courts/Civil Law

Passed

HB 1727 Establishment of parent and child relationship; persons who committed sexual assault.

Provides that no parent and child relationship shall be established when a biological parent has been convicted of rape, carnal knowledge, or incest, or has been found by clear and convincing evidence to have engaged in such prohibited conduct, and the child was conceived of such violation or conduct. The bill further provides that a person with a legitimate interest in the child does not include a person whose interest derives from or through a person who has been convicted of or found to have engaged in such conduct by clear and convincing evidence. The bill provides that consent for adoption is not required of a birth father when such father been found by clear and convincing evidence to have engaged in rape, carnal knowledge, or incest and the child was conceived of such conduct; under current law, such consent is not required when the birth father has been convicted of rape, carnal knowledge, or incest.

HB 1888 Immunity of persons for tort actions based on statements made in connection with any formal review or hearing.

Adds to the tort actions for which an individual shall be immune pursuant to applicable law any tort action based solely on a statement made at or in connection with any formal review or hearing authorized by law, including a written or oral statement made pursuant to a report or complaint, that is not one of the public hearings enumerated in current law. Current law provides that an individual shall be immune for any tort action based solely on statements made at a public hearing before, or otherwise communicated to, the governing body of any locality or other political subdivision, or the boards, commissions, agencies, and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body.

SB 805 Determination of child support.

Updates the amounts in the schedule of basic child support obligations based upon gross monthly income and calculates such obligations for specific amounts up to a gross monthly income of $42,500. Under current law, such child support obligations are calculated up to a gross monthly income of $35,000. The bill directs the Child Support Guidelines Review Panel, in collaboration with the Division of Child Support Enforcement, to examine the current outstanding amount of child support arrearages and make recommendations to the General Assembly about measures the General Assembly can consider regarding (i) helping child support obligors pay outstanding arrearages and (ii) whether existing penalties that place restrictions on such obligors' drivers licenses or other professional restrictions unnecessarily impair the obligor's ability to repay outstanding child support arrearages. The bill directs the Child Support Guidelines Review Panel to report its conclusions to the Chairmen of the House and Senate Committees for Courts of Justice by November 15, 2025.

SB 894 Civil actions; liability of employer for personal injury or death by wrongful act.

Provides that in an action for personal injury or death by wrongful act brought by a vulnerable victim, defined in the bill, against an employee, a finding that the employee's employer is vicariously liable for such employee's conduct shall be based on several factors, including the likelihood of the employee coming into contact with such vulnerable victim and the employer's failure to exercise reasonable care over the employee.

V. Courts/Criminal Justice

Passed

HB 1946/SB 1060 Possession, etc., of retail tobacco products and hemp products intended for smoking by a person younger than 21 years of age; liquid nicotine and nicotine vapor products license; prohibitions; enforcement.

Prohibits any person younger than 21 years of age from possessing any retail tobacco or hemp product intended for smoking, as those terms are defined in relevant law, with certain exceptions enumerated in the bill. The bill provides that any such product purchased or possessed by a

person younger than 21 years of age (i) shall be deemed contraband and (ii) may be seized by a law-enforcement officer. Any such product, the lawful possession of which is not established, seized by such officer shall be forfeited and disposed of according to the process described in relevant law. The bill also provides that seizure shall be the sole penalty for a violation of such prohibition and that the provisions of the bill shall not preclude prosecution under any other statute. Further, if a person does not receive a license from the Department of Taxation to sell, deal, transport, or ship liquid nicotine or nicotine vapor products to retailers in the Commonwealth, such person is subject to a penalty of $400, in addition to any other applicable taxes or fees. The bill provides that the Department of Taxation is not required pursuant to relevant law to conduct unannounced investigations of retail tobacco dealers at least once every 24 months to verify that a retail dealer is not selling retail tobacco products to persons younger than 21 years of age. Lastly, the bill requires the Department of Taxation to convene a work group consisting of the Alcoholic Beverage Control Authority, the Office of the Attorney General, the Virginia State Police, and the Department of Behavioral Health and Development Services to develop an enforcement program related to the sale of retail tobacco products or hemp products intended for smoking to individuals younger than 21 years of age. The work group's findings and recommendations are to be reported to the Chairs of the House Committees on General Laws and Appropriations and the Senate Committees on Rehabilitation and Social Services and Finance and Appropriations no later than November 1, 2025

HB 2730/SB 1465 Virginia State Crime Commission; review panel; cases involving Mary Jane Burton; report.

Directs the Virginia State Crime Commission (the Crime Commission) to designate a panel, consisting of members outlined in the bill, to review the following types of cases at the Virginia Department of Forensic Science where testing or analysis was performed by Mary Jane Burton: (i) cases resulting in convictions of persons who are currently incarcerated, or who were executed or exonerated, and (ii) cases where Burton testified, regardless of the final disposition of the case. However, the panel shall prioritize the review of cases resulting in convictions of persons who are currently incarcerated. The bill provides that the Crime Commission shall provide staff support to the panel, and may request and shall receive support from other state or local government agencies. The bill provides that the provisions of the Virginia Freedom of Information Act do not apply to this panel or its review, or to any information received by or disseminated to any state or local government agency, private organization, or other entity for purposes of this review. The bill directs the panel to report on its work to the Crime Commission by the first day of each regular session of the General Assembly until completion of this review. As introduced, this bill was a recommendation of the Virginia State Crime Commission.

HB 2723/SB 1466 Criminal records; expungement and sealing of records.

Amends numerous statutes related to the expungement and sealing of criminal records that are scheduled to become effective on July 1, 2025. In addition, the bill requires (i) the Department of State Police to develop a secure portal for the purpose of allowing government agencies to determine whether a record has been sealed prior to responding to a request pursuant to current law by October 1, 2026; (ii) the Virginia Indigent Defense Commission to (a) educate and provide support to public defenders and certified court-appointed counsel on expungement and

sealing, (b) conduct trainings on expungement and sealing across the Commonwealth, (c) develop a library of resources on expungement and sealing for use by public defenders and court-appointed counsel, and (d) post information regarding expungement and sealing for use by the public on its website; and (iii) the Department of State Police, Department of Motor Vehicles, Office of the Executive Secretary of the Supreme Court of Virginia, and clerk of any circuit court to provide data and information on sealing upon request of the Virginia State Crime Commission for purposes of monitoring and evaluating the implementation and impact of the sealing processes. The bill also directs (1) the Office of the Executive Secretary of the Supreme Court of Virginia to collect data related to petitions filed pursuant to relevant law, (2) the Virginia State Crime Commission to analyze data and information collected on automatic and petition sealing and report to the General Assembly by the first day of the 2026 Regular Session, and (3) the Virginia State Crime Commission to continue its study on the sealing of criminal records and report its work to the General Assembly by the first day of the 2026 Regular Session. The bill repeals the Sealing Fee Fund and directs any money in such Fund to be reverted to the general fund. The bill contains a delayed effective date of July 1, 2026, for the provisions related to the sealing of former possession of marijuana offenses without entry of a court order and the sealing of charges and convictions related to automatic sealing and such petitions. Lastly, the bill delays the repeal of the relevant law related to marijuana possession, limits on dissemination of criminal history record information, and prohibited practices by employers, educational institutions, and state and local governments until January 1, 2026. As introduced, this bill was a recommendation of the Virginia State Crime Commission.

HB 2724 Use of automatic license plate recognition systems; reports; penalty.

Requires the Division of Purchases and Supply of the Department of General Services (the Division) to determine and approve the automatic license plate recognition systems, defined in the bill, for use in the Commonwealth and provides requirements for use of such systems by law-enforcement agencies. The bill limits the use of such systems by law-enforcement agencies to the following purposes: (i) as part of a criminal investigation into an alleged criminal violation of the Code of Virginia or any ordinance of any county, city, or town where there is a reasonable suspicion that a crime was committed; (ii) as part of an active investigation related to a missing or endangered person, including whether to issue an alert for such person, or a person associated with human trafficking; or (iii) to receive notifications related to a missing or endangered person, a person with an outstanding warrant, a person associated with human trafficking, a stolen vehicle, or a stolen license plate. The bill requires annual reports from law-enforcement agencies using such systems that provide de-identified information concerning the use of the systems and by the State Police aggregating such information statewide beginning April 1, 2027. The bill also requires a lawenforcement officer or State Police officer to collect data on whether a stop of a driver of a motor vehicle or stop or temporary detention of a person was based on a notification from an automatic license plate recognition system prior to such stop and if so, the specific reason for the notification as set forth in relevant law. The provisions of the bill that require a law-enforcement agency to obtain a permit from the Department of Transportation in accordance with regulations of the Commonwealth Transportation Board before installing an automatic license plate recognition system on a state rightof-way do not become effective unless reenacted by the 2026 Session of the General Assembly. Except for provisions requiring (a) the Division determine and approve automatic license plate recognition systems for use in the

Commonwealth, which shall become effective on July 1, 2026, and (b) law-enforcement officers to collect data on whether a stop was based on a notification from an automatic license plate recognition system, which shall become effective January 1, 2026, the provisions of the bill become effective in due course. The bill requires the Division, in consultation with the Virginia Information Technologies Agency, to determine such systems for use in the Commonwealth and publicly post a list of such systems by January 1, 2026. Finally, the bill requires the Virginia State Crime Commission to collect data and conduct surveys of law-enforcement agencies to assess the use of automatic license plate recognition systems and report its findings by the first day of the 2026 Regular Session and again on November 1, 2026. As introduced, this bill was a recommendation of the Virginia State Crime Commission.

HB 2252/SB 936 Decreasing probation period; criteria for mandatory reduction.

Establishes criteria for which a defendant's supervised probation period shall be reduced, including completing qualifying educational activities, maintaining verifiable employment, complying with or completing any state-certified or state-approved mental health or substance abuse treatment program, securing and maintaining qualifying health insurance or a qualifying health care plan, and obtaining housing and establishing residence. The bill provides that a court may decrease a defendant's probation period if warranted by the defendant's conduct and in the interests of justice and may do so without a hearing, unless the defendant poses an imminent threat to the health and safety of himself or others. The bill requires the Department of Corrections to meet with all relevant stakeholders and report to the General Assembly on (i) current practices for community supervision as it relates to monitoring engagement and attainment in education, employment, treatment, and other programs and making recommendations to the court for modification of time served on probation; (ii) how such practices compare to the processes and practices that would be established pursuant to the bill; and (iii) a plan for such implementation by November 1, 2025. Except for this provision requiring the Department of Corrections to meet with all relevant stakeholders and report to the General Assembly, the provisions of the bill do not become effective unless reenacted by the 2026 Session of the General Assembly.

HB 2657/SB 746 Involuntary manslaughter; certain drug offenses.

Provides that any person who knowingly, intentionally, and feloniously manufactures, sells, or distributes a controlled substance knowing that such controlled substance contains a detectable amount of fentanyl, including its derivatives, isomers, esters, ethers, salts, and salts of isomers, and unintentionally causes the death of another person is guilty of involuntary manslaughter if (i) such death results from the use of the controlled substance and (ii) such controlled substance is the proximate cause of the death. The bill provides that venue for a prosecution of this crime shall lie in the locality where the manufacturing, sale, or distribution of such controlled substance occurred, where the use of the controlled substance occurred, or where death occurred. The bill also provides that if a person gave or distributed such controlled substance only as an accommodation to another individual who is not an inmate in a community correctional facility, local correctional facility, or state correctional facility, or in the custody of an employee thereof, and not with intent to profit thereby from any consideration received or expected nor to induce the recipient of the controlled substance to use or become addicted to or dependent upon such

controlled substance, he is not guilty of involuntary manslaughter but is guilty of a Class 6 felony.

Failed

HB 1714 Assault and battery; serious bodily injury; penalty.

Creates a Class 6 felony for any person who commits an assault and battery that results in serious bodily injury, as defined in relevant law, and adds such new offense to the list of violent felony offenses for the purposes of the discretionary sentencing guidelines. The bill contains technical amendments.

SB 918 Driving under the influence.

Provides that the provisions regarding driving or operating a motor vehicle, engine, or train while intoxicated and the provisions regarding operating a motor vehicle by a person under the age of 21 after illegally consuming alcohol shall not apply to any person driving or operating a motor vehicle on his residential property or his adjoining property.

SB 1268 Department of Juvenile Justice; inquiry and report of immigration status; juvenile or adult adjudicated delinquent or convicted of violent juvenile felony.

Requires the Director of the Department of Juvenile Justice or other person in charge of a secure facility where a juvenile or adult has been committed upon an adjudication of delinquency or a finding of guilt for a violent juvenile felony to ascertain whether such juvenile or adult is in the United States illegally and, if such juvenile or adult is found to be in the United States illegally, to communicate such information to U.S. Immigration and Customs Enforcement. Under current law, such immigration inquiries are required of jail officers or correctional officers in charge of state, local, or regional correctional facilities.

VI. Education

Passed

HB 1626/SB 822 Public elementary and secondary school teachers; certain training activities; requirements and limitations.

Prohibits any public elementary or secondary school teacher from being required to participate in any non-academic training activity, as that term is defined in the bill, more frequently than once within six months of employment with the applicable school board and once every five years thereafter, except in the case of certain training relating to secure mandatory test violations upon determination by the school board or division superintendent that additional training is necessary. The bill also provides that the total frequency and duration of non-academic training activities in which each such teacher is required to participate pursuant to state law or regulation or policy or regulation of the applicable school board shall not exceed 25 hours every five years.

HB 1961/SB 738 Public elementary and secondary schools; student discipline; student cell phone possession and use policies; development and implementation.

Directs each school board to develop and each public elementary and secondary school to implement ageappropriate and developmentally appropriate policies relating to the possession and use of cell phones by students on school property during regular school hours. The bill requires such policies to (i) restrict, to the fullest extent possible, student cell phone possession and use in the classroom during regular school hours; (ii) aim to reduce or prevent any distraction in or disruption to the learning environment, including bullying or harassment, that could be caused or facilitated by student cell phone possession and use on school property during regular school hours; (iii) ensure that implementation and enforcement of the policy is the responsibility of the administration, minimizes, to the extent possible, any conflict with the instructional responsibilities of teachers or any disruption to instructional time, and does not involve any school resource officer; (iv) include exceptions to such policies permitting any student, pursuant to an Individualized Education Plan or Section 504 Plan or if otherwise deemed appropriate by the school board, to possess and use a cell phone on school property, including in the classroom, during regular school hours to monitor or address a health concern; and (v) expressly prohibit any student from being suspended, expelled, or removed from class as a consequence of any violation of such policies. Finally, the bill clarifies that (a) no violation of any such student cell phone possession and use policy shall alone constitute sufficient cause for a student's suspension or expulsion from attendance at school and (b) any such violation that involves, coincides with, or results in an instance of disruptive behavior, as that term is defined in applicable law, shall be addressed in accordance with the regulations on codes of student conduct adopted by each school board pursuant to applicable law.

HB 2774/SB 1240 School-connected student overdoses; policies relating to parental notification.

Requires public school principals and heads of private schools in the Commonwealth to report certain information to the parents of enrolled students within 24 hours of a confirmed or suspected school-connected student overdose, as defined in the bill.

HB 2777/SB 955 Public schools; textbooks and other high-quality instructional materials.

Makes several changes relating to the textbooks and other high-quality instructional materials that are utilized as the curriculum basis for public elementary and secondary school student instruction, including (i) requiring each local school board to adopt and implement textbooks and other high-quality instructional materials in English language arts for grades six through 12 and mathematics, science, and history and social studies for grades kindergarten through 12 and requiring the Department of Education to support such local adoption and implementation in several ways and (ii) requiring each education preparation program offered by a public institution of higher education or private institution of higher education or alternative certification program that provides training for any student seeking initial licensure by the Board of Education with certain endorsements to include a program of coursework and clinical experience and require all such students to demonstrate mastery in identifying and implementing textbooks and other high-quality instructional materials. The provisions of the bill, with the

exception of a provision that requires a study of and report on the textbook review and approval process by November 1, 2025, have a delayed effective date of July 1, 2026.

Failed

SB 1031 Public elementary and secondary schools; compulsory attendance requirements; religious exemption; requirements.

Amends the provisions permitting any child and his parents to receive an exemption from school attendance by reason of bona fide religious training or belief, as defined in relevant law, to require the parent of any such child, in order to receive such exemption, to provide (i) evidence of the parent's ability to provide an adequate education for his child; (ii) notice to the division superintendent by August 15 of each year, or as soon as practicable in the event that such child and his parents move into the school division or seek to receive an exemption after the start of the school year, of such child and his parents' intention to receive such an exemption and certification that the child will receive an alternative form of instruction, including a description of the curriculum to be studied in the coming year; and (iii) evidence of the child's progress in accordance with the provisions of the bill.

SB 1346 Public schools; Virginia Opportunity Scholarship Grant Program established.

Establishes the Virginia Opportunity Scholarship Grant Program, to be administered and managed by the Department of the Treasury pursuant to guidelines developed by the Board of Education in collaboration with the Department of the Treasury, for the purpose of ensuring that all children in the Commonwealth have access to quality educational opportunities by annually awarding a grant in the amount of $5,000 per eligible student, as that term is outlined in the bill, for up to 10,000 eligible students each year. The bill requires the grant funds awarded pursuant to the Program to be used to support qualified educational expenses of attending an accredited private school in the Commonwealth, as enumerated by the bill. The bill also (i) directs the Board of Education, in collaboration with the Department of the Treasury, to develop guidelines for the implementation and administration of the Program; (ii) requires the Board of Education to develop and make available to each school board and each school board to make available to parents at the start of each school year informational materials relating to the Program; and (iii) requires the Department of Education to annually collect data on and include as a part of the Board of Education's Annual Report on the Condition and Needs of Public Schools in Virginia the total student participation in the Program

VII. Elections

Passed

HB 1794/SB 1119 Elections; primary dates; presidential year primaries.

Provides that all primaries for offices to be filled at the November election in presidential election years shall be held on the date of the presidential primary. With respect to candidates for election in November of a presidential election year, the bill also lifts the requirement that

petition signatures must be collected after January 1 of the presidential election year. The bill adjusts campaign finance filing deadlines for candidates in presidential year elections to account for the March primary date.

HB 2165/SB 1002 Campaign finance; prohibited personal use of campaign funds; complaints, hearings, civil penalty, and advisory opinions.

Prohibits any person from converting contributions to a candidate or his campaign committee for personal use. Current law only prohibits such conversion of contributions with regard to disbursement of surplus funds at the dissolution of a campaign or political committee. The bill provides that a contribution is considered to have been converted to personal use if the contribution, in whole or in part, is used to fulfill any commitment, obligation, or expense that would exist irrespective of the person's seeking, holding, or maintaining public office but allows a contribution to be used for the ordinary and accepted expenses related to campaigning for or holding elective office, including the use of campaign funds to pay for the candidate's dependent care expenses that are incurred as a direct result of campaign activity. The bill provides that any person subject to the personal use ban may request an advisory opinion from the State Board of Elections on such matters. The foregoing provisions of the bill have a delayed effective date of July 1, 2026. The bill directs the State Board of Elections to adopt emergency regulations similar to those promulgated by the Federal Election Commission to implement the provisions of the bill and to publish an updated summary of Virginia campaign finance law that reflects the State Board of Elections' and Attorney General's guidance on the provisions of such law that prohibit the personal use of campaign funds and any new regulations promulgated by the State Board of Elections.

HJ 443/SJ 253 Study; joint subcommittee to study the consolidation and scheduling of general elections in Virginia; report.

Creates a two-year legislative study on the consolidation and scheduling of general elections in Virginia. A 13-member joint subcommittee is established, consisting of eight members of the General Assembly, four nonlegislative citizen members, and one ex officio member, and is tasked with weighing the potential and probable effects of moving some or all of Virginia's state or local elections to even-numbered years in order to coincide with the federal election schedule. Any recommendations by the joint subcommittee to consolidate or reschedule Virginia's general elections must include recommendations for any amendments to the Constitution of Virginia and the Code of Virginia needed to effectuate the shift. The joint subcommittee is given two years to complete its study, with its final report due no later than the first day of the 2027 Regular Session of the General Assembly.

VIII. Freedom of Information Act

Failed

SB 876 Virginia Freedom of Information Act; notice of public meetings; proposed agenda required.

Requires public bodies subject to the Virginia Freedom of Information Act to include a proposed agenda and any subsequent revisions to be posted on the public body's official public government website, if any, and made available to the public prior to the meeting. The bill provides that any items added to the agenda after the meeting commences may be considered and discussed at the meeting, but final action shall not be taken on such an item unless the matter is time-sensitive.

SB 1029 Virginia Freedom of Information Act; procedure for responding to requests; charges; posting of notice of rights and responsibilities.

Limits the fees charged for producing public records to the median hourly rate of pay of employees of the public body or the actual hourly rate of pay of the person performing the work, whichever is less, and provides that a public body may petition a court for relief from this fee limit if there is no one who can process the request at the median hourly rate of pay or less. The bill makes corresponding amendments to the required statement on charges in the notice of rights and responsibilities that must be posted on a public body's website. The bill also amends existing law providing that a public body may petition a court for additional time to respond to a request for public records to allow such petitions to be heard in either general district or circuit court, to give such petitions priority on the court's docket, and to toll the response time while such a petition is pending before a court. The bill makes technical amendments, including moving provisions regarding charges for the production of public records into a separate section of the Virginia Freedom of Information Act.

IX. General Laws

Passed

HB 1973 Preservation of affordable housing; definitions; civil penalty.

Creates a framework for localities to preserve affordable housing by exercising a right of first refusal on publicly supported housing, defined in the bill. The bill authorizes localities to implement an ordinance that requires an owner to accept a right of first refusal offer by the locality or qualified designee, defined in the bill, in order to preserve affordable housing for at least 15 years. The bill requires that any locality adopting such an ordinance to preserve affordable housing submit an annual report to the Department of Housing and Community Development pursuant to existing law.

HB 2515/SB 1212 Virginia Consumer Protection Act; prohibited practices; mandatory fees or surcharges disclosure.

Prohibits a supplier, in connection with a consumer transaction, from advertising or displaying a price for goods or services without clearly and conspicuously displaying the total price, which shall include all mandatory fees or surcharges, as defined in the bill. The bill specifies the requirements for compliance with its provisions for certain suppliers and excludes from its provisions (i) certain fees charged by motor vehicle dealers, as defined in relevant law; (ii) fees charged by electric utilities, natural gas utilities, and telecommunications service providers, as

those terms are defined in relevant law; and (iii) certain costs associated with real estate settlement services. The bill requires a food delivery platform to (a) at the point when a consumer views and selects a vendor or items for purchase, include a clear and conspicuous disclosure of any additional fee or percentage charged, as defined in the bill, and (b) after a consumer selects items for purchase, but prior to checkout, display a subtotal page that itemizes the price of such selected items and any additional fee or percentage included in the total cost.

SB 1219 General Assembly; Legislator Compensation Commission established.

Establishes the Legislator Compensation Commission, to be formed every four years for the purpose of reviewing the salaries, expense allowances, retirement benefits, and other emoluments received by members of the General Assembly and determining whether any adjustments to salaries or allowances are needed. The 11-member Commission shall be appointed as follows: two former members of the Senate of Virginia and four former members of the House of Delegates, to be appointed by the Joint Rules Committee, and five nonlegislative citizen members, with the Governor, the Speaker of the House of Delegates, the House Minority Leader, and the Senate Majority and Minority Leaders each appointing one such member. Any adjustments made to salaries, expense allowances, or other emoluments or benefits enacted in a budget bill based upon the recommendation of the Commission shall not be effective until January 1 of the year immediately following the general election for all members of the General Assembly.

Failed

HB 2498/SB 1287 Virginia Gaming Commission; established.

Establishes the Virginia Gaming Commission as an independent agency of the Commonwealth, exclusive of the legislative, executive, or judicial branches of government, to oversee and regulate all forms of legal gambling in the Commonwealth except for the state lottery. The bill sets eligibility requirements for the appointment of a Commissioner and Virginia Gaming Commission Board members, provides powers and duties of such Commissioner and Board members, and provides for the transfer of current employees of relevant state agencies to the Commission. The bill contains numerous technical amendments.

SB 982 Casino gaming; eligible host localities.

Adds Fairfax County to the list of localities eligible to host a casino in the Commonwealth and provides that any proposed site for a casino gaming establishment considered by Fairfax County shall be (i) located within one-quarter of a mile of an existing station on the Metro Silver Line, (ii) part of a coordinated mixed-use project development consisting of no less than 1.5 million square feet, (iii) within two miles of a regional enclosed mall containing not less than 1.5 million square feet of gross building area, and (iv) outside of the Interstate 495 Beltway.

SB 1136 Local anti-rent gouging authority; civil penalty.

Provides that any locality may by ordinance adopt anti-rent gouging provisions. The bill provides for notice and a public hearing prior to the adoption of such ordinance and specifies that all landlords who are under the ordinance may be required to give at least two months' written notice of a rent increase and cannot increase the rent by more than the locality's calculated allowance, not to exceed three percent, and states that such allowance is effective for a 12-month period beginning July 1 each year. The bill requires the locality to publish such allowance on its website by June 1 of each year. Certain facilities, as outlined in the bill, are exempt from such ordinance. The bill also requires a locality to establish an anti-rent gouging board to establish rules and procedures by which landlords may apply for and be granted exemptions from the rent increase limits set by the ordinance or delegate such duties and functions to an existing local board, department, or agency. Finally, the bill provides that a locality shall establish a civil penalty for failure to comply with the requirements set out in its ordinance.

X. Health

Passed

HB 1649/SB 740 Board of Medicine; continuing education; unconscious bias and cultural competency.

Directs the Board of Medicine to require unconscious bias and cultural competency training as part of the continuing education requirements for renewal of licensure. The bill specifies requirements for the training and requires the Board of Medicine to report the number of licensees who have successfully completed such training to the Department of Health and the Virginia Neonatal Perinatal Collaborative.

HB 1716/SB 1105 Contraception; right to contraception; applicability; enforcement.

Establishes a right to obtain contraceptives and engage in contraception, as such terms are defined in the bill. The bill clarifies that none of its provisions shall be construed to permit or sanction the performance of any sterilization procedure without a patient's voluntary and informed consent. The bill creates a cause of action that may be instituted against anyone who infringes on such right.

HB 2610/SB 875 Department of Medical Assistance Services; state pharmacy benefits manager; independent evaluation.

Requires the Department of Medical Assistance Services by July 1, 2026, to select and contract with a thirdparty administrator to serve as the state pharmacy benefits manager to administer all pharmacy benefits for Medicaid recipients, including recipients enrolled in a managed care organization. The bill enumerates requirements for the Department's contract with the state pharmacy benefits manager. In addition, the bill directs the Department to engage an independent consultant to evaluate the implementation of a contract with a third-party pharmacy benefits manager pursuant to the bill.

HB 2617/SB 1120 Commission on Women's Health established; report.

Establishes the Commission on Women's Health as a permanent commission in the legislative branch of state government for the purpose of studying and making recommendations on issues related to women's and maternal health. The Commission consists of 15 members, 10 of whom are legislative members and five of whom are nonlegislative citizen members with significant experience or expertise in women's or maternal health policy.

Failed

HB 2394 Department of Medical Assistance Services; Medicaid; long-term services and supports; presumptive eligibility; sunset.

Directs the Department of Medical Assistance Services to provide presumptive eligibility for Medicaid, including long-term services and supports where appropriate, to individuals who meet certain criteria. The provision of presumptive eligibility is conditional on the Department obtaining all necessary approvals and federal financial participation. The bill sunsets on July 1, 2026, if such approval and federal financial participation is not obtained.

XI. Labor and Commerce

Passed

HB 1766/SB 1056 Unemployment compensation; increase weekly benefit amounts; report.

For unemployment compensation claims effective on or after January 1, 2026, an eligible individual's weekly benefit amount shall be $100 higher than the current weekly benefit amount, as denoted in the table in the printed bill. The bill directs the Commission on Unemployment Compensation, in consultation with the Virginia Employment Commission, to convene a work group to study making annual adjustments to individual weekly benefit amounts based on the average weekly wage. The bill also provides that, beginning July 1, 2025, for claims effective on or after July 1, 2025, an eligible individual's weekly unemployment compensation benefit amount shall be paid for a maximum duration of 26 weeks. As introduced, this bill was a recommendation of the Commission on Unemployment Compensation.

HB 1921 Employment; paid sick leave; civil penalties.

Expands provisions of the Code that currently require one hour of paid sick leave for every 30 hours worked for home health workers to cover all employees of private employers and state and local governments. The bill requires that employees who are employed and compensated on a fee for-service basis accrue paid sick leave in accordance with regulations adopted by the Commissioner of Labor and Industry. The bill provides that employees transferred to a separate division or location remain entitled to previously accrued paid sick leave and that employees retain their accrued sick leave under any successor employer. The bill allows employers to provide a more generous paid sick leave policy than prescribed by its provisions. Employees, in addition to using paid sick leave for their physical or mental illness or to care for a family member, may use paid sick leave for their need for services or relocation due to domestic abuse,

sexual assault, or stalking. The bill provides that certain health care workers who work no more than 30 hours per month may waive the right to accrue and use paid sick leave. The bill also provides that employers are not required to provide paid sick leave to certain health care workers who are employed on a pro re nata, or as-needed, basis, regardless of the number of hours worked. The bill requires the Commissioner to promulgate regulations regarding employee notification and employer recordkeeping requirements. The bill authorizes the Commissioner, in the case of a knowing violation, to subject an employer to a civil penalty not to exceed $150 for the first violation, $300 for the second violation, and $500 for each successive violation. The Commissioner may institute proceedings on behalf of an employee to enforce compliance with the provisions of this bill. Additionally, an aggrieved employee is authorized to bring a civil action against the employer in which he may recover double the amount of any unpaid sick leave and the amount of any actual damages suffered as the result of the employer's violation. The bill has a delayed effective date of July 1, 2026.

HB 1928 Minimum wage.

Increases the minimum wage incrementally to $15.00 per hour by January 1, 2027. The bill codifies the adjusted state hourly minimum wage of $12.41 per hour that is effective January 1, 2025, and increases the minimum wage to $13.50 per hour effective January 1, 2026, and to $15.00 per hour effective January 1, 2027. The bill requires the Commissioner of Labor and Industry to establish an adjusted state hourly minimum wage by October 1, 2027.

HB 2531 Paid family and medical leave insurance program; notice requirements; civil action.

Requires the Virginia Employment Commission to establish and administer a paid family and medical leave insurance program with benefits beginning January 1, 2028. Under the program, benefits are paid to covered individuals, as defined in the bill, for family and medical leave. Funding for the program is provided through premiums assessed to employers and employees beginning January 1, 2027. The bill provides that the amount of a benefit is 80 percent of the employee's average weekly wage, not to exceed 120 percent of the state weekly wage, which amount is required to be adjusted annually to reflect changes in the statewide average weekly wage. The bill caps the duration of paid leave at 12 weeks in any application year and provides self-employed individuals the option of participating in the program.

HB 2764/SB 917 Collective bargaining by public employees; exclusive bargaining representatives.

Repeals the existing prohibition on collective bargaining by public employees. The bill creates the Public Employee Relations Board, which shall determine appropriate bargaining units and provide for certification and decertification elections for exclusive bargaining representatives of state employees and local government employees. The bill requires public employers and employee organizations that are exclusive bargaining representatives to meet at reasonable times to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment. The bill repeals a provision that declares that, in any procedure providing for the designation, selection, or authorization of a labor organization to represent employees, the right

of an individual employee to vote by secret ballot is a fundamental right that shall be guaranteed from infringement. The bill has a delayed effective date of July 1, 2026.

Failed

HB 2126/SB 1190 Virginia Energy Facility Review Board established; localities; comprehensive plan and local ordinances related to siting of critical interconnection projects; planning district commissions; regional energy plans; Virginia Clean Energy Technical Assistance Center established.

Establishes the Virginia Energy Facility Review Board as a political subdivision of the Commonwealth for the purposes of conducting critical interconnection reviews; conducting analysis and study policy options; reviewing regional energy plans, local comprehensive plans, and local solar and storage ordinances; and facilitating the responsible siting of critical interconnection projects in the Commonwealth. The bill also establishes the Virginia Clean Energy Technical Assistance Center, consisting of public institutions of higher education, to serve as an interdisciplinary study, research, and information resource and to provide technical assistance to state agencies, planning district commissions, localities, the Review Board, other public bodies, and private entities in matters related to critical interconnection projects. The bill requires the Center to collaborate with the Review Board to issue the regional energy report and to establish the model local ordinance. The bill requires the Review Board to issue a regional energy report that models each planning district's meaningful annual contribution to clean energy generation, energy efficiency measures, and energy storage. Each planning district commission is required to adopt a regional energy plan to address energy generation, storage, and use that demonstrates a meaningful contribution to the Commonwealth's energy goals as determined by the regional energy report issued by the Review Board and to submit the plan to the Review Board. The Review Board is required to determine if a regional energy plan is in compliance with certain provisions within 60 days of receipt of such plan. If the Review Board determines that the regional energy plan is not in compliance, the relevant planning district commission has 60 days to adopt a compliant regional energy plan. If the relevant planning district commission fails to adopt a compliant energy plan within the 60 days, the Review Board, within 90 days of such failure, is required to issue an alternative regional energy plan that is in effect for such region. The bill requires the Review Board to establish a model local ordinance for siting, permitting, and zoning of critical interconnection projects and all other ground-mounted front of-meter solar energy and energy storage projects. The bill requires each locality to adopt an ordinance for the permitting of solar energy facilities and energy storage facilities, that is consistent with the Commonwealth Clean Energy Policy and the model ordinance and submit it to the Review Board. Under the bill, the Review Board is required to determine if the local ordinance is compliant with certain requirements. If the Review Board determines that the local ordinance is not in compliance, the locality has 60 days to adopt a compliant local ordinance. If the locality fails to adopt a compliant local ordinance within the 60 days, the bill provides that the model local ordinance established is in effect for such locality. The bill provides a procedure for a planning district commission or a locality to appeal a Review Board determination regarding a regional energy plan or a local ordinance. Under the bill, any developer planning to construct a critical interconnection project is required to submit an application to the Review Board. The Review Board is required to determine if the critical interconnection project (i)

qualifies as a project of statewide significance, as defined in the bill, and (ii) complies with the ordinance in each locality in which the proposed critical interconnection project would be located. In making its determination, the Review Board is required to consider the Commonwealth Clean Energy Policy, certain regulations adopted by the State Air Pollution Control Board, certain renewable portfolio requirements, and any other information it deems relevant. The bill provides that the Review Board has the discretion to disregard any unreasonable restriction, as defined in the bill, in the local ordinance on the installation of the critical interconnection projects or the building of structures that facilitate the installation of critical interconnection projects. In addition, the Review Board may consider any regional energy plan developed by the relevant planning district commission. The Review Board is required to issue its opinion on the critical interconnection project within 90 days of receiving an application. The bill requires a locality to issue its final decision regarding any zoning change, variance, or the issuance of a special exemption, special use permit, or conditional use permit related to a critical interconnection project no later than 180 days after receiving a critical interconnection opinion issued by the Review Board. If the locality's final decision diverges from the Review Board's opinion, the locality is required to include a written determination setting forth all facts and conclusions reached by the locality that support its final decision. Under the bill, a locality's failure to make a final decision within the 180-day period constitutes a granting of the zoning change, variance, special exemption, special use permit, or conditional use permit related to a critical interconnection project. The bill requires that any appeal of a locality's decision related to a critical interconnection project will be filed in the circuit court of such locality. The bill provides that such appeal can be brought only by the aggrieved applicant or the owner of the property subject to a special exception and no other person has standing to file such appeal or seek judicial review. Under the bill, in any such appeal, there is a rebuttable presumption that the opinion of the Review Board is correct as it relates to certain factors. Such presumption may be overcome by a preponderance of the evidence that the locality's decision to grant or deny a project or to include the challenged conditions was consistent with provisions in the locality's ordinance that are not unreasonable restrictions. This bill is a recommendation of the Commission on Electric Utility Regulation.

XII. Local Government

Passed

HB 1601/SB 1449 Siting of data centers; site assessment; high energy use facility.

Provides that prior to any approval of a rezoning application, special exception application, or special use permit for the siting of a new high energy use facility (HEUF), as defined in the bill, a locality shall require that an applicant perform and submit a site assessment to examine the sound profile of the HEUF on residential units and schools located within 500 feet of the HEUF property boundary. The bill also allows a locality to require that a site assessment examine the effect of the proposed facility on (i) ground and surface water resources, (ii) agricultural resources, (iii) parks, (iv) registered historic sites, and (v) forestland on the HEUF site or immediately contiguous land. The provisions of the bill shall not apply to a site with an existing legislative or administrative approval where an applicant is seeking an expansion or modification of an already existing or approved facility and such expansion does not exceed an additional 100

megawatts or more of electrical power. Finally, the bill provides that its provisions shall not be construed to prohibit, limit, or otherwise supersede existing local zoning authority.

HB 2037 Land development; solar canopies in parking areas.

Provides that any locality may include in its land development ordinances a provision that requires that an applicant must install a solar canopy over designated surface parking areas. Such provisions shall apply only to nonresidential parking areas with 100 parking spaces or more and may require coverage of up to 50 percent of the surface parking area. The bill provides that localities shall allow for deviations, in whole or in part, from the requirements of the ordinance when its strict application would prevent the development of uses and densities otherwise allowed by the locality's zoning or development ordinance. The bill has a delayed effective date of July 1, 2026.

HB 2559/SB 1489 Authority of local governments; service employees.

Permits any county, city, or town in the Commonwealth to provide for certain requirements concerning incumbent and successor service employers, defined in the bill, by local ordinance or resolution. For example, such local ordinance or resolution may require that successor service employers retain incumbent service employees during a transition period of 90 days. Under the bill, service employees are those who perform work in connection with the care or maintenance of property, services at an airport, or food preparation services at schools. The provisions of the bill do not include any building owned by the Commonwealth or any institution of higher education. The bill provides that an employer that violates the provisions of a local ordinance or resolution enacted pursuant to the bill may be subject to a civil action and monetary damages.

XIII. Social Services

Passed

HB 1617 Homeless youth; fees; certain government documents.

Provides that when a homeless youth seeks to receive a certified copy of a vital record, including his birth record, or his DMV-issued learner's permit, driver's license, special identification card, or identification privilege card or permit, no fee shall be assessed.

HB 1897 Board of Social Work; Board of Counseling; master's social worker; scope of practice; regulations.

Expands the scope of practice of master's social workers to allow the provision of clinical services under the supervision of a licensed clinical social worker. The bill also directs the Board of Social Work to promulgate regulations to allow master's social workers to engage in clinical services under the supervision of a licensed clinical social worker and directs the Board of Counseling to amend its regulations to state that a licensed baccalaureate social worker shall not be required to (i) register with the Board of Counseling or (ii) fulfill any additional training or education requirements in order to serve as a qualified mental health professionaltrainee. The bill

directs the Department of Medical Assistance Services and the Department of Behavioral Health and Developmental Services to amend their regulations to deem the services provided by a licensed baccalaureate social worker to be equivalent to the services provided by a qualified mental health professional-trainee and reimbursed at a comparable rate, and directs the Department of Medical Assistance Services to seek all necessary federal authority to enact such changes.

HB 2742 Malcolm's Law; hospitals; urine drug screening; fentanyl.

Requires hospitals with an emergency department, when conducting a urine drug screening, as defined in the bill, to assist in diagnosing a patient's condition, to include testing for fentanyl in such urine drug screening. The bill has a delayed effective date of January 1, 2026.

Failed

HB 1555 Health Care Regulatory Sandbox Program established.

Requires the Department of Health to establish the Health Care Regulatory Sandbox Program to enable a person to obtain limited access to the market in the Commonwealth to temporarily test an innovative health care product or service on a limited basis without otherwise being licensed or authorized to act under the laws of the Commonwealth. Under the Program, an applicant requests the waiver of certain laws, regulations, or other requirements for a 24-month testing period, with an option to request an additional six-month testing period. The bill provides application requirements, consumer protections, procedures for exiting the Program or requesting an extension, and recordkeeping and reporting requirements. The bill requires the Department of Health to provide an annual report to the Chairs of the House Committee on Health and Human Services and the Senate Committee on Education and Health that provides information regarding each Program participant and recommendations regarding the effectiveness of the Program. The bill directs the Board of Health to adopt emergency regulations to implement the provisions of the bill and has an expiration date of July 1, 2030.

XIV. Taxation

Passed

HB 1699 Tax exemptions; Confederacy organizations.

Eliminates the exemption from state recordation taxes for the Virginia Division of the United Daughters of the Confederacy and eliminates the tax-exempt designation for real and personal property owned by the Virginia Division of the United Daughters of the Confederacy, the General Organization of the United Daughters of the Confederacy, the Confederate Memorial Literary Society, the Stonewall Jackson Memorial, Incorporated, the Virginia Division, Sons of Confederate Veterans, and the J.E.B. Stuart Birthplace Preservation Trust, Inc.

HB 2264/SB 1306 Department of Taxation; free tax filing program.

Directs the Tax Commissioner to terminate the Virginia Free File program and the related agreement with the Consortium for Virginia. The bill also requires the Tax Commissioner to develop and offer a free individual state income tax filing program, effective beginning in taxable year 2028, that is similar to and compatible with the federal Internal Revenue Service (IRS) Direct File program. To implement the new program, the bill requires the Tax Commissioner to enter into a memorandum of understanding with the IRS and coordinate with the IRS in program development. The bill contains technical amendments that remove obsolete language regarding fillable forms.

HB 2663/SB 1336 Electricity consumption tax; rate adjustments.

Increases the electric utility consumption tax's special utility tax rates for commercial and industrial consumer electricity consumed per month (i) in excess of 2,500 kWh but not in excess of 50,000 kWh and (ii) in excess of 50,000 kWh.

Failed

HB 1598 First-time Homebuyer Grant Program.

Establishes a First-time Homebuyer Grant Program for the purpose of assisting first-time homebuyers with first-time homebuyer expenses, as those terms are defined in the bill. The bill provides that the Department of Housing and Community Development shall award eligible first-time homebuyers a grant in an amount equal to five percent of such expenses incurred during a calendar year, not to exceed $10,000. Any grant awarded pursuant to the Program shall be repaid to the Commonwealth if the property for which expenses were incurred is sold within three years from the purchase date, unless the sale is made following a natural disaster or other act of God.
HB 1969 Taxation; extension of expiring sunsets. Extends to taxable year 2026:

1. The exemption for discharged loans for eligible veterans currently set to expire January 1, 2026; 2
2. The credit for amounts paid to another state for income taxes of a pass-through entity currently set to expire January 1, 2026;
3. The standard deduction in an amount equal to $8,500 for single individuals and $17,000 for married persons currently set to revert to $3,000 for single individuals and $6,000 for married persons as of January 1, 2026;
4. The deduction for eligible educator expenses currently set to expire January 1, 2025;
5. The tax credit for low-income taxpayers currently set to expire January 1, 2026;
6. The tax credit for reforestation and afforestation currently set to expire January 1, 2025;
7. The election for eligible owners of pass-through entities to be taxed at the entity level currently set to expire January 1, 2026;
8. The subtractions from the numerators of the property and payroll apportionment factors for eligible companies for (i) property acquired in any qualified locality before January 1, 2025, and (ii) payroll attributable to jobs created within such locality before January 1, 2025;
9. The major business facility job tax credit currently set to expire July 1, 2025;

10. The worker training tax credit for (i) expenses incurred by a business for eligible worker training currently set to expire July 1, 2025, and (ii) direct costs incurred by a business engaged primarily in manufacturing in conducting orientation, instruction, and training in the Commonwealth, relating to the manufacturing activities undertaken by the business currently set to expire January 1, 2025;
11. The tax credit for purchase of machinery and equipment used for advanced recycling and processing recyclable materials currently set to expire January 1, 2025;
12. The tax credit for participating landlords renting qualified housing units (i) in eligible census tracts currently set to expire January 1, 2026, and (ii) in eligible non-metropolitan census tracts currently set to expire January 1, 2026;
13. The tax credit for green and alternative energy job creation currently set to expire January 1, 2025;
14. The tax credit for qualified research and development expenses currently set to expire January 1, 2025;
15. The tax credit for Virginia qualified major research and development expenses currently set to expire January 1, 2025;
16. The exemption from sales and use taxation for gold, silver, or platinum bullion or legal tender coins currently set to expire June 30, 2025;
17. The exemption from sales and use taxation for certain printed materials purchased from an advertising business from a printer within the Commonwealth and distributed outside the Commonwealth before July 1, 2025; and
18. The exemptions from sales and use taxation for (i) parts, engines, and supplies for aviation component parts currently set to expire July 1, 2025, and (ii) prescription medicines and drugs purchased by veterinarians currently set to expire July 1, 2025

XV. Technology

Passed

HB 2094 High-risk artificial intelligence; development, deployment, and use; civil penalties.

Creates requirements for the development, deployment, and use of high-risk artificial intelligence systems, defined in the bill, and civil penalties for noncompliance, to be enforced by the Attorney General. The bill has a delayed effective date of July 1, 2026.

SB 854 Consumer Data Protection Act; social media platforms; responsibilities and prohibitions related to minors.

Requires that any controller or processor that operates a social media platform shall (i) use commercially reasonable methods, such as a neutral age screen mechanism, to determine whether a user is a minor younger than 16 years of age and (ii) limit any such minor's use of such social media platform to one hour per day, per service or application, and allow a parent to give verifiable parental consent to increase or decrease the daily time limit. The bill has a delayed effective date of January 1, 2026.

Failed

HB 2046/SB 1214 High-risk artificial intelligence; development, deployment, and use by public bodies; work group; report.

Creates requirements for the development, deployment, and use of high-risk artificial intelligence systems, as defined in the bill, by public bodies. The bill also directs the Chief Information Officer of the Commonwealth (CIO) to develop, publish, and maintain policies and procedures concerning the development, procurement, implementation, utilization, and ongoing assessment of systems that employ high-risk artificial intelligence systems that are consistent with the requirements created by the bill. The bill directs the CIO to convene a work group to examine the impact on and the ability of local governments to comply with the requirements of the bill. The substantive requirements of the bill have a delayed effective date of July 1, 2027.

HB 2462 Unauthorized use of name, portrait, voice, likeness, or picture of any person; digital replica; civil liability; statute of limitations.

Expands the existing ability for any person to maintain a suit in equity, including the accompanying remedies available, for the unauthorized use of his name, portrait, or picture for advertising purposes or for the purposes of trade to include the unauthorized use of his voice or likeness. The bill also creates civil liability for a person who produces, distributes, or makes available the digital replica, defined in the bill, of a person's voice or likeness in an expressive audiovisual work or sound recording without prior written consent, with exceptions enumerated in the bill. The bill also extends the current statute of limitations for such civil suits from 20 years to 100 years after the death of such person.

XVI. Transportation/Motor Vehicles

Passed

HB 2096 Intelligent Speed Assistance Program established; penalty.

Establishes the Intelligent Speed Assistance Program to be administered by the Commission on the Virginia Alcohol Safety Action Program. The bill authorizes enrollment in such Program as an alternative to suspending a person's driver's license upon such person's conviction of certain speed-related offenses. The bill requires a court to order enrollment in such Program for a person convicted of reckless driving and who was found to have been driving in excess of 100 miles per hour. The bill requires the Commissioner of the Department of Motor Vehicles to provide the option, in a written notice, for enrollment in such Program instead of license suspension for a person who has accumulated certain amounts of demerit points, and if such person does not respond to such written notice within 30 days, the bill requires such suspension of his license. The bill requires any person enrolled in the Program to enter into and successfully complete the Program and install an intelligent speed assistance system, defined in the bill, in any motor vehicle owned by or registered to the participant and prohibits such person from driving any motor vehicle that does not have such a system installed. The bill creates a Class 1 misdemeanor for tampering with or attempting to bypass or circumvent such a system. The bill provides that any person who enters into the Program prior to trial may pre-qualify with the Program to have

an intelligent speed assistance system installed on any motor vehicle owned or operated by him and that the court may consider such pre-qualification and installation. The bill has a delayed effective date of July 1, 2026.

HB 2475 Use of safety belt systems.

Requires all adult passengers in a motor vehicle equipped with a safety belt system to wear such safety belt system when the motor vehicle is in motion on a public highway. Current law requires adult passengers to wear such safety belts when occupying the front seat.

SB 1233 Pedestrian crossing violation monitoring systems and stop sign violation monitoring systems; speed safety cameras; violation enforcement; civil penalty.

Authorizes state and local law-enforcement agencies to place and operate pedestrian crossing violation and stop sign violation monitoring systems in school crossing zones, highway work zones, and high-risk speed corridors for purposes of recording pedestrian crossing and stop sign violations, as those terms are defined in the bill. The bill changes the terms "photo speed monitoring device" to "speed safety camera" and "high-risk intersection segment" to "high-risk speed corridor" in provisions related to vehicle speed violations. The bill makes various changes to the requirements for the use of speed safety cameras and extends most of those requirements to the use of pedestrian crossing and stop sign violation monitoring systems. The bill requires local law-enforcement agencies implementing or expanding the use of pedestrian crossing violation and stop sign violation monitoring systems, prior to the implementation or expansion of such systems, to conduct a public awareness program for such implementation or expansion.

SB 1332 Charges for towing and storage of certain vehicles.

Increases the maximum hookup and initial towing fee of a passenger car from $150 to $210 and repeals the July 1, 2025, sunset of provisions that authorize a towing and recovery operator to charge a fuel surcharge fee of $20 for the removal of certain vehicles. The bill prohibits a towing and recovery operator from charging such a fuel surcharge fee in any locality the governing body of which (i) has adopted an ordinance setting reasonable limits on fees charged for the towing or removal of vehicles on private property in accordance with existing law and (ii) has conducted a review considering an adjustment of such limitations by December 31, 2025.

Failed

HB 2080 Registration decals; discontinued.

Discontinues the requirement for and issuance of decals displaying the expiration month and year of motor vehicle registration to be displayed on license plates. The bill also removes the requirement for the Department of Motor Vehicles to issue appropriately designated license plates for motor vehicles held for rental. The bill does not eliminate existing requirements that vehicles are to be registered. The bill has a delayed effective date of July 1, 2026

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Five Common Legal Issues in Federal Government Contracting: Issue Spotting for Non-Government Contract Specialists

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2025 Gentry Locke Seminar
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Introduction

In Fiscal Year 2024, the United States Federal Government awarded over three quarters of a trillion dollars in contracts to over one hundred thousand companies, with 23.3% of spending going to small businesses.[1] With such enormous business opportunities over a vast federal government, contractors can span different industries (from information technology and professional services to construction and manufacturing), hail from different geographic areas (with particular concentration in places like Virginia), and come in varying business sizes. It is then likely lawyers representing businesses and business owners may from time to time encounter the unique legal landscape of government contracting. For the non-government contracting specialist, government contracts law can seem foreign, dense, and filled with potential malpractice traps for the unknowing. For practitioners working in a geographic area with a large concentration of federal contracting or in industries common to federal procurements, it would be helpful and prudent to understand key issues when they arise with such related clients.

This presentation outlines five common areas where government contracting substantive and procedural legal requirements may pose particular challenges if not properly anticipated. Understanding these specific areas can help a non-specialist practitioner issue-spot such issues early to avoid negative client outcomes. This list is certainly not exhaustive, but does include commonly misunderstood areas as well as those with heightened risk.

I. Area 1: Government Contracting Issues in Business Transactions

When a business entity is engaged in federal contracting, it carries compliance obligations that may apply to its particular work, incurs risk of liability under statutes such as the civil False Claims Act (31 U.S.C. §§ 3729 et seq.), is subject to specific obligations found within its contracts and generally in the Federal Acquisition Regulation (hereinafter referred to as the "FAR" and found in Title 48 of the Code of Federal Regulations), among a host of other potential statutory and regulatory requirements. Also, depending upon the nature of the transaction, the parties may be required to provide certain notifications and seek approvals before closing.[2] Related to a federal contracting business, this can often cause issues in structuring or diligence

[1] https://govspend.com/blog/federal-contract-awards-hit-773-68b-in-fy24-small-businesses-see-4b-increase/

[2] Companies receiving federal contracts may be subject to national security reviews and compliance requirements, including those administered by the Committee on Foreign Investment in the United States (CFIUS) for transactions involving foreign ownership, control, or influence (FOCI). In addition, federal contractors—particularly those handling controlled technologies or classified information—must comply with export control laws such as the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). These regimes are designed to safeguard U.S. national security and economic interests by restricting access to sensitive information and technology. See 50 U.S.C. § 4565; 31 C.F.R. pt. 800; 22 C.F.R. pts. 120–130; 15 C.F.R. pts. 730–774.

considerations for various business transactions—including corporate reorganizations, ownership restructuring, financing, and mergers and acquisitions.

In mergers and acquisitions particularly, buyers and sellers must account for the significant risk of successor liability that may continue on with the business,[3] as well as how specific regulatory requirements affect deal structure. These risks impact representations and warranties, their corresponding disclosure schedules, and other risk sharing/mitigating provisions such as indemnification, earn-outs, and purchase price adjustments. Two unique issues that often affect government contracting business transactions relate to: (1) the Small Business Administration's ("SBA") size and affiliation rules applicable to contractors engaged in small business and other socioeconomic set-aside contracting; and (2) the requirements of the Anti-Assignment Act (41 U.S.C. § 6305) and corresponding novation process under the FAR.

A. SBA Regulations and Their Impacts on Government Contracting Mergers and Acquisitions

In addition to the multiple legal and compliance issues that may apply in any transaction involving a government contractor, another layer of complexity arises if the entity being acquired currently represents itself as a small business under the SBA's rules, carries a certain "socioeconomic" based certification under one of the SBA's programs, and/or has current contracts that were awarded based upon it being a small business or having another socioeconomic designation. Such considerations include whether upon closing that contractor can still be considered "small" or meet the requirements of any applicable socioeconomic program, and what impacts that may have on contracts it is currently performing.

1. Small business contracting introduction and overview.

Pursuant to the Small Business Act, Congress has mandated that the federal government meet specified small business contracting goals and within that created programs to benefit certain socioeconomic type business categories based upon ownership or other factors. 15 U.S.C. § 631 et seq. These type of socioeconomic programs include (i) the SBA's 8(a) Business Development Program (a business development program for businesses owned and controlled by socially and economically disadvantaged individuals as well as certain business entities owned by Indian Tribes, Alaska Native Corporations, or Native Hawaiian Organizations), (ii) Women-Owned and Economically Disadvantaged Women-Owned Business Program ("WOSB/EDWOSB"), (iii) Historically Underutilized Business Zone Program ("HUBZone") (a program seeking to benefit small businesses located in and employing individuals who live in designated "HUBZones"), and (iv) Service-Disabled Veteran and Veteran Owned Small Business Program ("SDVOSB/VOSB"). Generally, the federal government may restrict competition for awards based on a company's small business status and/or whether it maintains the required certification under the applicable socioeconomic program (or otherwise meets the program's requirements). Large businesses also carry goaling requirements to award subcontracts to small businesses. Federal agencies then track and report whether they are meeting the statutorily set spending goals through awarded prime and subcontracts.

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[3] For cases in Virginia that discuss successor liability generally, see Harris v. T.I., Inc., 243 Va. 63, 70, 413 S.E.2d 605, 609 (1992); and PAE Nat'l Sec. Sols., LLC v. Constellis, LLC, 111 Va. Cir. 459, 466 (Cir. Ct. 2023).

The SBA publishes rules to implement and administer these programs, which are generally codified in Title 13 of the Code of Federal Regulations. Rules administering small business contracting are also found within the FAR itself (primarily in FAR Part 19).[4]

2. The SBA's Size and Affiliation Rules.

The SBA rules provide that when calculating a company's size, it "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) (emphasis added). Regarding affiliation, the SBA further provides:

> 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.

Id. § 121.103(a)(1). Finally, the rules then outline various bases upon which affiliation may be found. These include common ownership and management, affiliation based on identity of interest, affiliation arising in certain circumstances when a "newly organized concern" is created, and affiliation based upon a "totality of the circumstances". See id. § 121.103(c)-(i).

One particular affiliation rule that must be taken into account in any merger or acquisition involving a small business government contractor is the "present effect rule," which provides:

> In determining size, 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.

Id. § 121.103(d)(1). In the past, the SBA's Office of Hearings and Appeals ("OHA") has interpreted this rule to render some letters of intent, based upon their terms, as having "present effect" and thus creating affiliation before the transaction has even closed. See Size Appeal of Enhanced Vision Systems, Inc., SBA No. SIZ-5978 (2018) (affirming affiliation under present effect rule based upon the terms and structure of the applicable letter of intent and facts surrounding the transaction in question). However, this affiliation risk can be mitigated by drafting a letter of intent that contains terms indicating it is only a non-binding "agreement[] to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date[, which is] not considered [an] "agreement[] in principle" and . . . thus not given present effect." Id. § 121.103(d)(2).

Therefore, upon closing and under the above-cited rules, the target entity's size may change due to any newly created affiliation. To illustrate with one simple example, if the target is acquired

[4] The FAR with its various departmental/agency supplements is codified in Title 48 of the Code of Federal Regulations. However, citations are shortened to "FAR <section number>" (or for its supplements, for example, "DFARS <section number>").

by another business entity resulting in the target being a wholly-owned subsidiary of the acquirer, the target is now not only affiliated with the acquirer itself, but also any other business entity in which there may be common ownership or management (or any other basis of affiliation under the SBA's rules). This result would require the target entity to now change its size representations to account for the revenue and/or employees of these newly gained affiliates, which affect its future eligibility for certain restricted contracts. These impacts must obviously be accounted for when structuring a transaction.

3. Socioeconomic Program Ownership and Control Requirements

In addition to business size and affiliation concerns, a merger or acquisition may also impact a contractor's ability to qualify or continue to qualify under one of the SBA's socioeconomic programs, which each carry requirements on ownership and control. Under socioeconomic programs that seek to benefit individual owners (i.e., the 8(a), WOSB/EDWOSB, and SD/VOSB Programs), the general requirement is that the respective qualifying individual(s) must *directly and unconditionally* own at least fifty-one percent (51%) of the business concern to maintain its eligibility under those programs, with only a limited exception for ownership through a trust meeting very specific requirements.[5] Regarding the requirement the ownership be "unconditional," the 8(a) Program rules define it for example as:

> ownership that is not subject to conditions precedent, conditions subsequent, 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 pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

13 C.F.R. § 124.3 "Unconditional ownership".

In addition to the ownership requirements, these concerns must also be *controlled* by the individual owner(s) in question. Generally this is defined (as an example under the EDWOSB/WOSB rules) as providing that such individuals control the "management and daily business operations of the concern." 13 C.F.R. § 127.202(a). Each program's rules then go on to specify what constitutes ownership and control. Notably, with certain specified exceptions for extraordinary corporate actions, terms in a company's articles, bylaws, shareholder agreement, or operating agreement may not restrict the qualifying individual(s)' control of corporate decision

[5] See 13 C.F.R. §§ 124.105 (8(a) Program); 127.201 (WOSB/EDWOSB Program); 128.202 (SDVOSB Program). The HUBZone Program's primary policy intent is not necessarily to benefit one or more individual business owners but still carries the requirement that the HUBZone business entity be "[a]t least 51% owned and controlled by one or more individuals who are United States citizens" or one of five other specified entity types. 13 C.F.R. § 126.200(a). However, the HUBZone Program does permit indirect ownership unlike the other listed programs above. See id.

making. Also, the qualifying individual(s) must generally be the highest-ranking officer and control the governing board of the entity. See, e.g., 13 C.F.R. § 128.203(c)-(f).[6]

With the above general restrictions in mind, transactions involving these types of businesses must take into account how the resulting ownership and management structure will impact program eligibility/certification under the rules. To the extent a strategic goal of the transaction is to obtain one of these certifications, these rules must be reviewed carefully from the outset to ensure the intended result and minimize the risk of later failing to obtain a new certification.

4. Post-Closing Notifications and Impacts on Awarded Contracts and Bids

Finally, the SBA's regulations and the FAR require that an entity that has undergone an ownership change must make required notifications after closing with respect to its active contracts that were awarded based upon that entity's small business or socioeconomic status, and timely update its size/status representations in the System for Award Management. See 13 C.F.R. § 125.12; FAR 52.219-28. Upon such notification, the SBA rules also outline the effect of such notifications on the company's awarded contract(s). 13 C.F.R. § 125.12(e). The rules governing impact are complex and must be reviewed carefully. Each of the above-referenced socioeconomic certification programs also contain post-closing notification requirements to the SBA as well. See, e.g., 13 C.F.R. § 128.307 (requirement under the SD/VOSB program that a certified SD/VOSB notify the SBA within 30 days of "any material changes that could affect its eligibility").

B. The Anti-Assignment Act and the FAR's Novation Process

The Anti-Assignment Act (41 U.S.C. § 6305) generally prohibits the assignment of government contracts. In practice, this prohibits the practice of "buying and selling" of government contracts between parties. However, typically when a party is selling all or substantially all of its assets to another party, it would seek to assign its active contracts to the acquirer (each of which may be subject to contractual provisions addressing assignment and/or change of control).

One exception to this prohibition is the FAR's contract novation process. This process permits the government upon request by the parties to approve the novation/transfer of the contracts in question when a contractor's assets are being transferred if it deems such approval to be "in the Government's best interest." See FAR 42.1203. The FAR outlines the necessary documents that must accompany such a request, the prescribed language of the Novation Agreement to be entered into by the parties and the Government whereby the Government will recognize the transferee party as the "successor-in-interest" to the contract, and the process for review and approval of such requests. See FAR 42.1202-04. The FAR further makes it clear that this process does not apply to a transaction where "there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract." FAR 42.1204(b). However, that provision provides further that "whether there is a purchase of assets

[6] It must be noted that each program includes very specified rules for what constitutes "control" of an entity. While those rules are largely consistent with one another, they must be reviewed carefully for differences and specific applicability.

or a stock purchase, there may be issues related to the change in ownership that appropriately should be addressed in a formal agreement between the contractor and the Government." Id. Therefore, regardless of transaction structure, these requirements must be reviewed and considered.

II. Area 2: Bid Protests

In federal contracting (as in contracting in Virginia at the state level), there are opportunities to challenge procurement decisions formally in a protest. General practitioners could find themselves in discussions with a client about a notification that its bid was unsuccessful, that it had been excluded from further competition before final award, or even (in the case it was the awardee), that a competitor has filed a protest. Very generally, protests challenge whether an agency's decision was arbitrary or capricious (i.e., not in accordance with applicable law/regulation or the terms of the solicitation, or otherwise unreasonable). There are three general venues in which a protester may choose to file such a challenge: (1) with the contracting agency itself, (2) with the Government Accountability Office ("GAO"), or (3) with the United States Court of Federal Claims ("COFC").

In each of these cases, even more than the substance of the potential protest, procedural deadlines are the most critical initial set of issues to consider. Failure to follow these often quick and completely unforgiving procedural pitfalls will lead to the automatic dismissal of even a compelling and justified protest. While there are other jurisdictional and standing issues to consider initially as well, this CLE seminar will focus specifically on the procedural filing deadlines applicable to each chosen venue.

A. Agency-level Protests

The FAR permits that an offeror may submit a protest to the procuring agency directly. Generally, protests must be filed within ten (10) days "after the basis of protest is known or should have been known, which ever is earlier." FAR 33.103(e). Otherwise, "[p]rotests based on alleged apparent improprieties in a solicitation [i.e., "pre-award protests"] shall be filed before bid opening or the closing date for receipt of proposals." Id. For example, in most typical post-award protest scenarios, the date an offeror receives a notice of award is the date on which the ten-day clock starts, but this date could be impacted in certain circumstances by whether or not the offeror requests and subsequently receives a debriefing from the agency.

B. GAO Protests

GAO protest deadlines are similar in operation to the above-described agency protest deadlines. The general deadline for any protest to the GAO is ten (10) days from when the basis of the protest is "known or should have been known, whichever is earlier." 4 C.F.R. § 21.2(a)(2). The GAO rules further outline that a post-award protest under a "procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required .

. . shall be filed not later than 10 days after the date on which the debriefing is held."[7] Id. As also is the case under agency protests, any protest "based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals." Id. § 21.2(a)(1). Last, where a protester files an agency-level protest, the protester may subsequently submit a protest to the GAO if unsuccessful as long as it files such protest "within 10 days of actual or constructive knowledge of initial adverse agency action" provided that the initial agency protest was itself timely. Id. § 21.2(a)(3).

C. COFC Protests

If a protester chooses to submit its protest to the COFC[8], the deadlines for filing are rooted in the doctrine of laches. Therefore, delay in filing would impact whether the COFC would issue injunctive relief in favor of a protester. See Nat'l Telecommuting Inst., Inc. v. United States, 123 Fed. Cl. 595, 603 (2015). Similarly, a "pre-award protest" as described above would need to be filed with COFC prior to the deadline for proposal submission, as is the case with agency and GAO protests. See Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1310–17 (Fed. Cir. 2007); Inserso Corp. v. United States, 961 F.3d 1343 (Fed. Cir. 2020).

III. Area 3: the Contract Disputes Act Process

Generally, federal contracts can give rise to disputes over performance, payment, or other duties or obligations that arise from the contract in question. Specifically with respect to contract actions, the federal government has waived its sovereign immunity pursuant to the Tucker Act, 28 U.S.C. § 1491. This permits contractors to bring contract actions and recover damages from the government in certain designated forums for dispute resolution. The two primary venues for bringing claims against the government under federal contracts are: (1) the Boards of Contract Appeals[9] and (2) the COFC.

Further, for the vast majority of federal contracts, disputes are governed by the procedures of the Contract Disputes Act ("CDA"). 41 U.S.C. §§ 7101-7109. Like with bid protests, failure to follow the exacting procedural requirements and deadlines of the CDA can likely result in outright dismissal of claims. Below are some key considerations:

- CDA Statute of Limitations: Six (6) years. A party must bring its claim within six (6) years "after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A).

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[7] The question regarding whether debriefings are "timely requested" or "required" is a further set of issues rooted in the FAR's separate rules governing debriefings. These questions impact protest timeliness and require further analysis.

[8] Of note, selection of the appropriate venue for a protest is another key matter a protester must consider. The prospect for success, availability of certain types of relief (such as the stay of award available under the Competition in Contracting Act ("CICA") (41 U.S.C. 253)), and cost of protest are all relevant to such decision.

[9] The Contract Disputes Act has generally established two different administrative bodies to hear contract claim appeals: the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals (with additional bodies related to the Tennessee Valley Authority and the Postal Service). 41 U.S.C. § 7105.

- A claim must be first submitted to the Contracting Officer and must be in writing. Id. § 7103(a)(1)-(2). Additionally, claims for more than $100,000 must contain an accompanying certification as specifically prescribed in the statute. Id. § 7103(b).
- The Contracting Officer must then issue a "written decision" on the claim within sixty (60) days (or with respect to claims of over $100,000, the Contracting Officer may notify the contractor of a different timeframe). Id. § 7103(f). If the Contracting Officer fails to issue his or her decision within the required timeframe, that is "deemed" denial of the claim. Id. § 7103(f)(5).
- The Contracting Officer's decision is "final and conclusive" unless timely appealed strictly in accordance with the CDA. Id. § 7103(g).
- Upon receipt of the contracting officer's final decision or upon the "deemed" denial of the claim, the contractor may appeal the decision either (1) to the applicable Board of Contract Appeals within ninety (90) days, or (2) to the COFC within twelve (12) months. Id. § 7104.

IV. Area 4: Privity of Contract Issues

Many companies engaged in business with the federal government may not be performing directly as prime contractors but instead as subcontractors, vendors, or suppliers. When engaged in this way, the subcontractor lacks direct contractual privity with the federal government, meaning that (except for its general obligations to comply with applicable laws, rules, policies, and regulations) the subcontractor's duties and obligations are primarily only to the prime contractor or higher tier subcontractor with which it has its contract. While generally this concept is simple and intuitive, it can give rise to unique considerations in the federal contracting area with the following as examples.

A. "Flow down" FAR Clauses included in federal government subcontracts.

The FAR and its supplements contain various prescribed contract clauses that are in turn included, often by reference but other times in full text, in federal contracts. These clauses cover typical areas such as termination, suspension of work, and changes, but also serve to implement federal government law and policy—which can range from employee equal opportunity to cybersecurity. Some clauses contain mandatory flow down language directing the prime contractor, for example, to "insert the substance of this clause . . . in all subcontracts . . . ." See, e.g., FAR 52.204-25(e). It is therefore the contractual obligation of the prime contractor to insert these mandatory flow down clauses in its subcontracts. If these clauses are not flowed down properly, it could expose the prime contractor to liability for breach of contract. While other FAR clauses may not contain the same "flow down" language, the prime contractor may desire to nevertheless "flow down" certain provisions, notification requirements, and/or deadlines in order to mitigate risk. For example, it is a hallmark of government contracting that the government may terminate a prime contract without cause (i.e., for its own "convenience") simply upon notice. See FAR Subpart 49.1. A prime contractor will very likely want to include within its subcontract a corresponding right of termination.

B. Interaction with government personnel and dispute resolution.

Because a subcontractor is not in direct contractual privity, its personnel should not typically be interacting with government personnel over contract administration matters. However, in reality— especially in services contracts where subcontractor personnel will blend and interact with government and prime contractor personnel—confusion around who should be providing directions during contract performance and to whom they should be providing them to can lead to growth of the work beyond the agreed-upon contractual scope. It is best practice in subcontracts to delineate clearly how direct government-to-subcontractor interactions should be handled.

Additionally, because the subcontractor is not in direct privity with the government, it does not generally possess a right to bring a "claim" against the government (as described in Section III above). Instead, it must look to its subcontract to govern disputes it has with the prime contractor. It is possible for the prime contractor to "pass through" a subcontractor's claim in certain instances. See E. R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369, 1370 (Fed. Cir. 1999). Even in such instance, the prime contractor must still "sponsor" the claim.

C. The Christian Doctrine.

A legal doctrine unique to federal contracting is the so-called Christian Doctrine. This legal doctrine provides that a court may read certain contractual provisions into a government contract even when omitted, if they relate to a "deeply ingrained strand of public procurement policy." G. L. Christian & Assocs. v. United States, 160 Ct. Cl. 1, 15, 312 F.2d 418, 426 (1963). However, despite one questionable federal district court decision[10], the Christian Doctrine generally does not apply to subcontractors. See Energy Labs, Inc. v. Edwards Eng'g, Inc., No. 14 C 7444, 2015 U.S. Dist. LEXIS 71058, at *15 (N.D. Ill. June 2, 2015). Therefore, "mandatory" flow downs will likely not be inserted into a subcontract by a later court because of the privity issue. Prime contractors must then ensure that flow down clauses are properly included as required in their subcontracts.

V. Area 5: Key Ethics Requirements and the False Claims Act.

Because federal contracting obviously applies to conduct directly with government officials, a host of civil and criminal statutes, as well as accompanying polices apply to such conduct. While of course all business dealings can be subject to civil liability for fraud or criminal penalties for unlawful business practices, a federal contractor must also be mindful of specific ethical obligations with respect to government officials and the potential for liability under the False Claims Act, 31 U.S. Code § 3729. Below are only three of many potential considerations all government contractors should be aware of.

A. Bribery and Gratuities Restrictions

Because a federal contractor's customers include public officials, criminal statutes that outlaw bribery and unlawful gratuities apply to their conduct. 18 U.S.C. § 201(b)(1) provides:

[10] UPMC Braddock v. Harris, 934 F. Supp. 2d 238, 256-59 (D.D.C. 2013).

> Whoever—(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—(A) to influence any official act; or (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person.

Unfortunately, there are many stories of bribes offered to and accepted by contracting officers for the purpose of influencing the procurement process. In addition to the bribery prohibition, federal law also prohibits unlawful gratuities, as follows:

> Whoever—(1) otherwise than as provided by law for the proper discharge of official duty—(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official.

Id. § 201(c)(1). Note, the primary difference is that a gratuities violation does not include the *quid pro quo* element present in the anti-bribery provision. Some very limited exceptions on providing and accepting *de minimis* gifts to federal officials are proscribed by specific agency rules and regulations, and such gifts would not generally violate the anti-bribery or anti-gratuity statutes. See FAR 3.101-2; 5 C.F.R. § 2635.204. Violation of the anti-bribery and gratuities statutes can result in fines and/or imprisonment.

B. The Anti-Kickback Act of 1986

Government contractors are also subject to federal statutes prohibiting kickbacks as follows:

> A person may not—(1) provide, attempt to provide, or offer to provide a kickback; (2) solicit, accept, or attempt to accept a kickback; or (3) include the amount of a kickback prohibited by paragraph (1) or (2) in the contract price—(A) a subcontractor charges a prime contractor or a higher tier subcontractor; or (B) a prime contractor charges the Federal Government.

41 U.S.C. § 8702. The statute defines a "kickback" as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract." Id. § 8701(2). These prohibitions therefore apply to both prime and subcontractors. Similarly, violation of the anti-kickback provisions can result in both civil and criminal penalties. See id. § 8706-07.

C. The Civil False Claims Act

Last, federal contractors are also subject to the civil False Claims Act (31 U.S.C. §§ 3729-33). Of note, the original impetus for this statute was to root out contractor fraud during the Civil War.[11] In general, the False Claims Act provides that any person who "knowingly presents or causes to be presented, a false or fraudulent claim for payment or approval" or (particularly relevant to contractors) "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay" will be liable for civil penalties. 31 U.S.C. § 3729(a)(1). The latter basis for False Claims Act liability has been utilized extensively in the government contracting context when contractors fraudulently misrepresent themselves within SAM and in other certifications to the government.[12] Another unique feature of the False Claims Act is that in addition to the federal government itself initiating an action, a private person (e.g., a "whistle blower") may also do so as a "*qui tam* relator." 31 U.S.C. § 3730(b). Therefore, contractors must have robust controls in place to prevent wrongful actions like false or over billing, or submission of untruthful or inaccurate representations/certifications to the government.

VI. Conclusion

The Fifth Circuit Court of Appeals has plainly stated that "[g]overnment contracts are different from contracts between ordinary parties. United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 469 (5th Cir. 1977). There is much truth in that simple conclusion. Because of the uniqueness of such contracts and the host of compliance obligations placed upon federal contractors, these types of businesses deal with added layers of legal complexity. While not every practitioner can or should be a government contracting expert, issue spotting is important when working with these types of businesses in order to avoid both procedural and even substantive land mines that can exist in this intricate area of the law.

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[11] https://www.justice.gov/civil/false-claims-act. This webpage maintained by the U.S. Department of Justice, Civil Division, contains a helpful overview of the False Claims Act.

[12] See, e.g., United States ex rel. Bid Solve, Inc. v. CWS Mktg. Grp., Inc., 567 F. Supp. 3d 59, 64 (D.D.C. 2021) (denying motion to dismiss FCA claim against federal contractor that allegedly fraudulently induced award of small business set-aside contract by falsely certifying its SBA size status and submitting misleading tax returns during SAM/self-certification and protest processes).

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Securing Seven Figures: Lessons from a Recent Personal Injury Jury Trial

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Securing Seven Figures: Lessons from a Recent Personal Injury Jury Trial

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2025 Gentry Locke Seminar

I. Introduction

This CLE presentation is based on one of our personal injury jury trials from last year—*O'Shea v. Johnson*. This Culpeper County Circuit Court case (Case No. CL20001438-00) involved a contested mild traumatic brain injury stemming from a rear-end motor vehicle collision. We represented the plaintiff, Ryan O'Shea. As with any trial, we learned many lessons from this case. This outline will summarize the legal and factual issues that percolated, how we handled them, and the lessons we learned.

II. Facts

A. Background

Our client, Ryan O'Shea, grew up in McLean, Virginia. Out of five kids, she was the only girl. She was raised by her parents, Michael and Beth O'Shea. Michael is a prominent intellectual property lawyer in northern Virginia, and Beth is also a lawyer. Ryan grew up playing lacrosse, and she excelled in school. She went on to play Division 1 lacrosse at Stanford University, where she majored in Anthropology. She graduated with a 3.6 GPA.

After graduating from Stanford, Ryan moved to Dallas, Texas, obtained her teaching license, and she began working for Teach for America, where she taught 8th grade science. After working in Dallas, Ryan moved to San Francisco, California to work for a company called JLL in their Silicon Valley Office.

JLL is a prestigious global real estate and investment management company that provides services for commercial, industrial, and other types of properties. Ryan worked her way up the corporate ladder at JLL, and at the time of the crash, she was a financial analyst for many large real estate deals. She worked on the Amazon account at JLL. In Ryan's first year at JLL, she made approximately $50,000. After a few years, and during the year that the crash occurred, she made almost $300,000. The vast majority of these earnings were commissions from the Amazon deals.

B. The Crash

On Saturday, August 11, 2018, Ryan finished vacationing with her family on Smith Mountain Lake. She had just left Smith Mountain Lake and was on her way to her family's house in McLean so she could catch a flight back to San Francisco. She was scheduled to go back to work the following Monday.

At approximately 11:00 a.m., Ryan was traveling on Route 29 north, which is a two-lane highway. She was driving her family's small SUV. The weather was clear that day, but traffic was heavy. When Ryan was traveling through Culpeper County in the left lane, traffic around her began to slow down, so she slowed down too.

The Defendant, an elderly gentlemen from Culpeper named Ronald Johnson, was driving a Dodge Ram 1500 pickup truck. He was traveling in the right lane when he noticed that the traffic was slowing down, so he moved into the left lane. Shortly after moving into the left lane, he slammed his truck into the rear of Ryan's car.

Below are photographs showing the damage to the vehicles involved in the crash:





Trooper Smith of the Virginia State Police, an ambulance, and two witnesses that had been stopped in a nearby crossover responded to the scene of the crash.

C. Injuries & Treatment

During the impact, Ryan's head snapped forward and backward. Fortunately, Ryan did not have any broken bones, she was not bleeding, and she did not have any obvious external signs of injury. Ryan did not lose consciousness, but she said that she felt "out of it" and "shaken up" at the scene. She was lightheaded and dizzy, and she had a headache. She got out of her car, sat on the ground next to the roadway, and put her head in between her knees to try to calm down.

Ryan told everyone at the scene that she "thought she was ok." Ryan called her mom, Beth, and told her that she "thought she was ok," but she "wasn't sure." Ryan declined transport by ambulance to the hospital, and Trooper Smith marked "no injury" on the Police Crash Report.

A tow truck driver took Ryan to a local restaurant, where Ryan's father, Michael, picked her up and took her to McClean. Ryan cancelled her late Saturday afternoon flight to return back to California, she rescheduled the flight for the next day, and she spent the night at her parent's house in McLean.

The next day, Ryan flew back to San Francisco, and her emotions were off. She was watching a superhero movie, and crying the whole time, although it was not intended to be a sad movie.

On Monday, Ryan went back to work at JLL. She was having trouble focusing, the computer screen bothered her eyes, and she had trouble working the mouse. She felt shaky, tired, and she had a headache. She left work early and went to the doctor's office.

Ryan was out of work the next day too. She was still having headaches, light sensitivity, slowed cognitive functioning, and slowed motor skills. Approximately a week after the crash, she followed up with the doctor's office again, where she was diagnosed with post-concussive syndrome and referred to neurology. Neurology later diagnosed Ryan with whiplash and a mild traumatic brain injury.

In the couple months directly following the crash, Ryan worked at a very reduced capacity. She took a lot of time off, she tried working from home, and she tried working part-time. In early 2019, she resigned from JLL due to the headaches and cognitive symptoms she was experiencing.

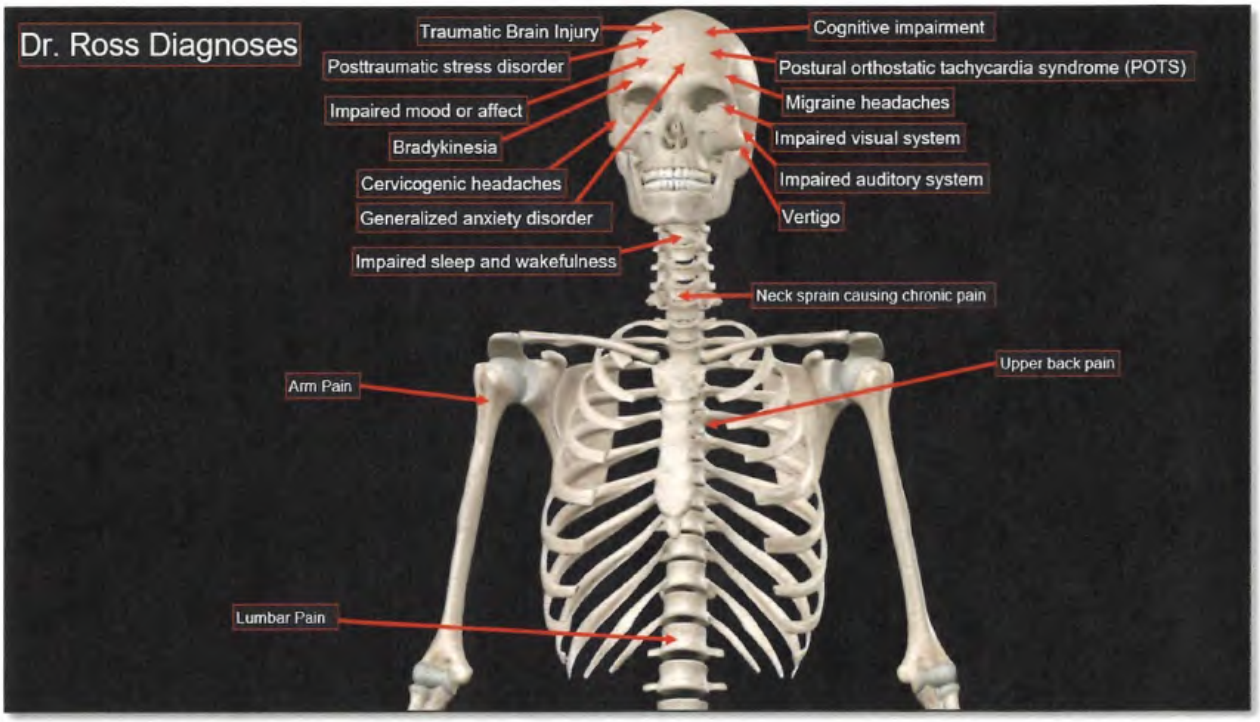
In early 2019, Ryan began treating with a "chiropractic neurologist," who reiterated the post-concussive syndrome diagnosis, but also diagnosed Ryan with Lyme Disease. Ryan later went to another doctor in Virginia, who also diagnosed her with Lyme Disease.

From 2019 to early 2023, Ryan tried various types of treatment, including: resting, doctor visits (primary care, neurology), vision therapy, IV infusion therapy, chiropractic adjustments, vestibular rehabilitation, psychotherapy, electrical stimulation therapy, acupuncture, craniosacral therapy, brain games/exercises, hyperbaric oxygen chamber therapy, medications, vitamins, and essential oils. Ryan incurred approximately $86,000 in past medical expenses from this treatment.

III. Experts

A. Plaintiff's Expert

We engaged Dr. David E. Ross, a practicing neuropsychiatrist, to review the records, evaluate Ryan, and potentially serve as an expert witness. After reviewing the file and evaluating Ryan in person, Dr. Ross opined that based on Ryan's symptoms and clinical presentation, she suffered from the following injuries due to the crash:



Dr. Ross also conducted a NeuroQuant analysis of Ryan's brain. NeuroQuant is a software program that measures the volume of regional brain structures. NeuroQuant does this by comparing a patient's MRI data to a control group. Dr. Ross used NeuroQuant to analyze Ryan's brain, and he found that Ryan had brain volume abnormalities in regions of the brain that were consistent with the diagnosis of traumatic brain injury.

Dr. Ross concluded that Ryan was permanently disabled due to the lack of improvement with her headaches and cognitive symptoms, which were still severe at the time of trial—approximately six years after the crash. Dr. Ross opined that Ryan needed an extensive amount of future medical treatment for her traumatic brain injury, but we made the strategic decision not to hire a life care planner to put cost estimates on that future treatment.

B. Defendant's Experts

The defense hired two experts—Dr. Isabelle Richmond, a retired neurosurgeon, and Dr. Jeffrey Campodonico, a neuropsychologist.

Dr. Richmond reviewed the records and opined that Ryan did not suffer a traumatic brain injury. She based her opinion on the lack of documentation of a head injury immediately after the crash, the lack of obvious signs of head trauma, the lack of imaging showing a brain bleed, and she claimed that Ryan did not have any post-traumatic amnesia. She said that brain injuries are "worst at first," and Ryan's symptoms and treatment did not follow such pattern. Dr. Richmond concluded that Ryan suffered a neck sprain that resolved within a few months after the crash, which was around the same time Ryan was diagnosed with Lyme Disease. Dr. Richmond stated that traumatic brain injury symptoms mimic the symptoms of Lyme Disease.

Dr. Campodonico conducted neuropsychological testing on Ryan. He stated that Ryan was cooperative for the testing, and he did not get any indications that Ryan was trying to alter the test results. He concluded that, based on his evaluation and "objective" testing, Ryan did not suffer any cognitive impairment.

IV. Pleadings

In 2020, we filed a complaint against Mr. Johnson, asserting negligence claims. Mr. Johnson filed a run-of-the-mill answer, which denied liability. He also affirmatively alleged that Ryan was guilty of contributory negligence, that Ryan assumed the risk of her injuries, that Ryan's damages were the result of another's conduct, and that if even if he was negligent, such negligence was not the proximate cause of Ryan's injuries and damages.

Nine days prior to trial, Mr. Johnson admitted that he was negligent and liable to Ryan.

V. Pre-Trial Motions

There were many pre-trial motions in this case, but the most pertinent were the following: (1) Defendant's Motion to Exclude NeuroQuant Evidence, (2) Defendant's Motion to Exclude Evidence of Future Treatment and Costs, (3) Plaintiff's Motion to Exclude Evidence of Marijuana Use, and (4) Joint Motion to Expedite Trial.

a. Defendant's Motion to Exclude NeuroQuant Evidence

The defense argued that the Court should exclude any and all NeuroQuant evidence because it is not based on reliable scientific principles or methods.[1] Specifically, the defense pointed out that NeuroQuant has not been cleared by the FDA for diagnosing traumatic brain injuries, that its primary use is for Alzheimer's research, that Dr. Ross lacked data regarding Ryan's pre-crash brain volume, and that NeuroQuant could not identify the cause of any brain volume abnormality.

The defense cited two cases excluding NeuroQuant data.

First, they cited a New York state court case where an infant's mother filed a medical malpractice action alleging that an infant suffered a hypoxic ischemic encephalopathy and

[1] *See generally* Va. Sup. Ct. R. 2:702; Va. Sup. Ct. R. 2:703; Va. Code § 8.01-401.1.

perinatal injury.[2] The court applied the *Frye* "general acceptance" test to exclude the use of NeuroQuant data to show that changes in the infant's brain were consistent with HIE and/or perinatal injury.[3] We argued in our briefing that this case was distinguishable because the Supreme Court of Virginia has repeatedly rejected *Frye*'s "general acceptance" test to determine the admissibility of expert testimony.[4] We also argued that New York case actually supported admission of NeuroQuant in our case because the opinion was specific to the type of injury alleged in that case and the opinion specifically stated that "literature supports the association of brain atrophy with traumatic brain injury."[5]

Second, the defense cited a California trial court case that excluded NeuroQuant data because "there is a difference of opinion in the scientific community" regarding NeuroQuant and traumatic brain injury.[6] In response, we argued that our case was distinguishable, because like New York, California uses the *Frye* test.[7]

We argued that NeuroQuant passes Virginia's requirements on expert testimony, it has passed *Daubert*'s rigorous standard, and it has been admitted in many courts, including in Virginia.[8] In response to the defense's argument that NeuroQuant could not identify the cause of

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[2] *J.G. v. Montefiore Medical Center*, Index No. 20235/2014E, at 1 (N.Y. Sup. Ct. Bronx Cnty. Oct. 22, 2021).

[3] *Id.* at 9.

[4] *See Billips v. Commonwealth*, 274 Va. 805, 808 (2007) ("We have declined to adopt the 'Frye test' in Virginia.") (quoting *Spencer v. Commonwealth*, 240 Va. 78, 97 (1990)); *O'Dell v. Commonwealth*, 234 Va. 672, 696 (1988) ("We see no reason to adopt the *Frye* test."). The *Frye* test also no longer applies in federal courts. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) ("*Frye* made 'general acceptance' the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.").

[5] *J.G. v. Montefiore Medical Center*, Index No. 20235/2014E, at 9 (N.Y. Sup. Ct. Bronx Cnty. Oct. 22, 2021).

[6] *Sullivan v. Luviano*, 2023 WL 4625870, at *2 (Cal Super. June 7, 2023).

[7] *See People v. Leahy*, 8 Cal. 4th 587, 612 (Cal. 1994).

[8] *See Dickson v. United Airlines*, 2021 U.S. Dist. LEXIS 177981, at *7-8 (E.D. Aug. 3, 2021) (denying defendant's motion to exclude neuroimaging and volumetric analysis opinions in a traumatic brain injury case); *R.D. v. Pointer*, 2021 Fla. Cir. LEXIS 6042, at *1 (Fla. Cir. Ct. July 26, 2021) (denying the defendant's motion to exclude NeuroQuant evidence because it met the *Daubert* standard); *Seiwald v. Flores*, 2019 Colo Dist. LEXIS 2665, at *12-13 (Colo. Dist. May 17, 2019) (finding that doctor's opinions relying on NeuroQuant were sufficiently reliable to be admitted in a traumatic brain injury case stemming from a car crash); Ross et al., *Updated Review of the Evidence Supporting the Medical & Legal Use of NeuroQuant & NeuroGage in Patients with Traumatic Brain Injury*, 16 FRONTIERS IN HUMAN NEUROSCIENCE (2022) (citing cases from Newport News Circuit Court, Williamsburg/James City County Circuit Court, Powhatan County Circuit Court, United States District Court for the Eastern District of Virginia, Superior Court of New Jersey, Connecticut Superior Court, New York Supreme Court, Florida Circuit Court, and Ohio Common Pleas Court, where NeuroQuant evidence has been admitted).

any brain volume abnormality, we argued that this is just like a typical MRI or CT scan's inability to identify the cause of a brain abnormality, torn muscle, ruptured vertebrae, or broken bone—that determination is always made by the particular doctor's interpretation of all of the available clinical information.

After briefing and oral argument, the Court issued a written opinion taking the NeuroQuant issue under advisement until further evidence was presented. Ultimately, right before trial, we decided from a strategic standpoint that it would be best not to introduce NeuroQuant evidence. We did this in hopes of preventing an appealable issue, and we were confident that the other evidence would prove that Ryan suffered a traumatic brain injury.

b. Defendant's Motion to Exclude Evidence of Future Treatment and Costs

The defense argued that the Court should exclude any and all evidence regarding Ryan's future medical treatment and costs because, although Dr. Ross reached conclusions about Ryan's future treatment, we did not have any expert to place cost estimates on that treatment. Therefore, they argued, Dr. Ross's opinions regarding future treatment were irrelevant.[9]

We argued that even if we did not present cost estimates, the opinions regarding future treatment were relevant because Virginia law provides for recovery of non-economic damages for past and future pain and suffering and past and future inconvenience.[10] Thus, the future care opinions were relevant to show the extent of Ryan's future inconvenience and mental anguish caused by the crash.

At trial, we were able to introduce Dr. Ross's opinions regarding future treatment.

c. Plaintiff's Motion to Exclude Evidence of Marijuana Use

Ryan had a medical marijuana card when she was living in California, and there was evidence that she had smoked marijuana both before and after the crash. We moved to exclude any references to Ryan's marijuana use on the basis that such evidence would be irrelevant, unfairly prejudicial, and speculative because the defense did not designate any experts to opine about the interplay between marijuana and traumatic brain injury.[11] There is Supreme Court of Virginia precedent suggesting drug use is irrelevant and unfairly prejudicial, unless there is proper expert testimony linking the drug use to the issues in the case.[12]

The defense responded that they should be able to show how marijuana use could be an alternative cause to Ryan's symptoms. Furthermore, they argued that they should be able to cross-

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[9] *See* Va. Sup. Ct. R. 2:401.

[10] *See* Va. Civ. Model Jury Instruction No. 9.000.

[11] *See generally* Va. Sup. Ct. R. 2:401; Va. Sup. Ct. R. 2:402; Va. Sup. Ct. R. 2:403.

[12] *See Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 203-05 (2003) (affirming trial court's prohibition of cross-examination of plaintiff's medical expert regarding the plaintiff's crack cocaine use because the plaintiff's expert testified that the plaintiff was deficient in a brain-injury pattern not a drug-injury pattern).

examine Dr. Ross about Ryan's marijuana use because Dr. Ross testified at his deposition that marijuana use can affect brain matter volume and cognitive functioning, and Dr. Ross previously testified in another case that a plaintiff's marijuana use exacerbated his cognitive problems.

After briefing and oral argument, the Court held that some questioning concerning marijuana usage may be relevant and probative on the issue of pain management.[13]

d. Joint Motion to Expedite Trial

The trial dates kept getting delayed due to the Court's busy criminal docket. A praecipe was first filed in October 2021, and the Court *sua sponte* continued the case to January 25, 2022 to be set, and the Court requested available dates and a written pleading as to why the case required four days on the docket. The parties promptly filed a joint praecipe explaining the needs of the case and providing trial availability from August 2022 through December 2022. The Court then set the case for trial in August 2023.

In April 2023, the Court notified the parties that one of the August 2023 trial dates needed to be used for a criminal jury trial. The Court offered to reschedule the trial if three days would be insufficient, but the parties chose not to reschedule.

In early August 2023, the Court informed counsel that there was not sufficient time for the Court to hear and decide the pending motions *in limine*, so the Court continued the trial, and used first day of the originally scheduled trial dates for the purpose of hearing pretrial motions.

We were later asked to file a praecipe for the December 2023 Term of Court, and we did so, providing available dates between May 2024 and September 2024. The Court then *sua sponte* rescheduled the trial for June 2025.

After the significant trial delays and two unsuccessful mediations, we were frustrated that the trial was set in June 2025. We knew that we wanted an earlier trial date, but we also knew that we needed to handle the issue with care. We worried about the appearance of filing a unilateral motion, so we drafted a proposed Joint Motion to Expedite Trial and reached out to opposing counsel to see if she would be agreeable. Fortunately, opposing counsel was agreeable to joining the motion. In the Joint Motion to Expedite Trial, we provided additional available dates for a three-day jury trial, and we specifically requested that if the case could not be set in 2024, then another judge be assigned to the case for the purposes of expediting the trial.

The judge promptly assigned a substitute judge to the case, and he gave us the first available dates that we provided in the Joint Motion to Expedite Trial.

VI. Pre-Trial Scouting

We had not previously tried a case in Culpeper County Circuit Court, and we were not very familiar with the venue. Prior to trial, we visited the clerk's office and courthouse. We also

[13] *O'Shea v. Johnson*, 2023 Va. Cir. LEXIS 195, at *10-11 (Culpeper Cnty. Sept. 30, 2023).

scheduled an in-person meeting with Trooper Smith at the scene of the crash to see what she could remember.

The Culpeper visit turned out to be extremely valuable. We were able to meet a local trial lawyer who gave us helpful insight about the venue, and he provided us with some ideas that he thought would resonate with a Culpeper jury. Additionally, we were able to meet the clerk and bailiffs to gain an understanding about how we would could use our technology to try a modern case in a 1870s courthouse.

Ironically, one of the bailiffs we met was good friends with Trooper Smith, and he told us to tell her hello. When we met with Trooper Smith, she was surprised to learn that we just saw one of her friends. Although she marked "no injury" on the police report, she explained to us that this just meant that Ryan was not taken away by ambulance, and she was not really there to do any kind of medical assessment. Based on this information, we ended up calling Trooper Smith in our case in chief and her testimony was favorable to us.

VII. Trial

a. Voir Dire & Anchoring

We kept our *voir dire* short and to the point. We wanted to let the jury know that this was a serious crash with serious injuries. We also wanted to ensure that we selected an impartial jury that would not be surprised about the amount of money we were asking for. So from the very beginning, we got the jury to commit that they could award $4,000,000 to Ryan and against Mr. Johnson if the law and the evidence supported such verdict. Additionally, the jury committed to basing its verdict on the law and the evidence and treating Ryan fairly.

During opening statement, we reiterated the seriousness of the crash and the $4,000,000 ask. We started by saying that we were there because of a crash that changed the trajectory of a young woman's life. We told them that this was not a fender bender, but instead a case where we would be asking them to award $4,000,000 for a life-changing traumatic brain injury. There are many articles discussing the effectiveness of this tactic, which some refer to as "anchoring."[14]

b. Owning & Handling the "Bad" Facts

Prior to trial, we knew that this was not a perfect case. We knew that there were certain unavoidable facts that a Culpeper jury might view in a negative light. Below is a chart showing what we thought were the potentially "bad" facts and how we handled them.

[14] *See, e.g.*, Thomas M. O'Toole, *Damages Anchoring Strategies for Plaintiffs and Defendants*, King County Bar (Sept. 1, 2023), https://www.kcba.org/?pg=News-Bar-Bulletin&blAction=showEntry&blogEntry=95741.

Potentially "Bad" Fact	How We Handled It
Ryan came from an affluent family.	In *voir dire*, the jury committed to treat Ryan equally despite the fact that she grew up in McClean and came from a successful family. In closing, we told the jury that everyone is treated equally under the law—no matter if they are rich or poor, black or white, man or woman, from a small country town or from an affluent DC suburb.
Ryan did not have any bumps, lumps, scrapes, cuts, bruises, bleeding, or broken bones.	We told the jury that this case was not about broken bones and external injuries, but rather an injury to one of the most vital and unknown parts of the body—the brain. We had Dr. Ross teach the jury about how the brain floats in fluid and when Ryan was rear-ended at 60 mph, her brain sloshed inside her skull, which caused bruising and microscopic bleeding to the brain.
Ryan declined transport by ambulance. Ryan rescheduled her flight, flew across the country alone, and waited two days before first going to the doctor.	In opening, we owned these facts and told Ryan's story—she grew up with four brothers; she was a tough girl that always played sports; and she had a prior head injury during a lacrosse game in which she did not get any medical treatment, did not miss any games, and did not miss any school. Ryan's family members testified that she had a "put me back in coach" and "rub some dirt on it" mentality.
Ryan told multiple people at the scene that she "thought she was ok."	We owned this fact, but heavily emphasized that she "thought" she was ok and that she was "shaken up" and "out of it."
Trooper Smith marked "no injury" on the Police Crash Report.	Trooper Smith testified that this meant Ryan was not taken away by ambulance, and Trooper Smith was not there to perform a medical evaluation.
There was no CT or MRI evidence of a brain bleed.	Dr. Ross taught the jury that, by definition, a mild traumatic brain injury does not have CT or MRI evidence of a brain bleed. CTs and MRIs cannot show microscopic bleeds.
Ryan completed an intensive 200 hour yoga certification in Portugal after the crash.	This was simply yoga—nothing like the long hours and high level intellectual work she was doing at Stanford or JLL.

Ryan traveled internationally after the crash to Mexico, Portugal, Italy, Greece, and Indonesia, and most of this travel was alone.	During opening statement and throughout the trial, we discussed how important travel has been to Ryan. She grew up traveling, her grandparents owned a travel agency, she has always loved traveling, and JLL sent her all over the world for business. "Disabled people can book a flight and sit on a plane too."
Ryan used many forms of alternative treatment, such as massage therapy, acupuncture, hyperbaric oxygen chamber, etc.	Ryan was agnostic to her treatment options—she was willing to try whatever it took to get better.
Ryan had psychotherapy records that discussed issues with her close family members, binge-drinking in college, and other personal issues.	We argued that this was a red herring to distract the jury so the defense did not have to pay for Ryan's injuries. We also argued that this was a low blow to attack Ryan for her personal issues—something we did not do when questioning the Defendant.
Ryan was diagnosed with Lyme Disease multiple times following the crash and around the time she resigned from her job at JLL.	Ryan was diagnosed with Lyme Disease by a chiropractor, who did not conduct the definitive Western Blot test. The diagnosis of Lyme Disease is a two-step, cost-saving process. The first test is an overly sensitive test that frequently renders false positives. The reason the first test is conducted is because the definitive test is expensive. Ryan's Western Blot results proved that she was negative for Lyme Disease.
Medical records indicated that Ryan attributed her post-crash symptoms to both brain injury and Lyme Disease.	She was just listening to her doctors, and the fact that she attributed her symptoms to both conditions supports her credibility.
Ryan repeatedly used marijuana before and after the crash.	She had a medical marijuana card, and recreational marijuana was legal in California.
At the time of trial, it had been almost two years since Ryan had received any crash-related medical treatment.	Ryan developed "treatment fatigue"—she had been to countless doctor visits, spent thousands of dollars, and spent years treating. She did not see the point in additional treatment since she was not getting any better.
The defendant was a sympathetic elderly gentlemen from Culpeper that did not look like he was able to pay a seven figure verdict.	We called the Defendant to the stand in our case-in-chief and focused on his failure to accept responsibility. He denied responsibility for years, claimed the crash was Ryan's fault, but then, just nine days before trial, admitted responsibility just so he could come into Court

	and make it look like he was taking the moral high ground.

c. Calling the Defendant as an Adverse Witness

We knew from early on in the litigation that we wanted to call the Defendant as an adverse witness at trial. We knew that we were facing an uphill battle—a multimillion dollar ask in a case against an elderly gentleman from Culpeper. We did not want the jury to sympathize with him. We needed to force the Defendant to say something that either helped our case or made him appear unreasonable.

Many Virginia practitioners are careful to call an adverse party as a witness. This caution is because of Virginia's "adverse witness rule," which provides that "when an adverse party is called and examined by an opposing party, the latter is bound by all of the former's testimony that is uncontradicted and is not inherently improbable."[15]

In our case, liability was stipulated—the only issue was damages—so we were not concerned about the potential binding nature of the Defendant's testimony. We knew that our witnesses could contradict any of the Defendant's testimony suggesting that Ryan was not injured from the crash.

You might be wondering—how could the Defendant's testimony be relevant in a damages case? The Supreme Court of Virginia has held that, even when a defendant admits liability, "evidence of the details surrounding the collision and the force of the impact" is "relevant to an assessment of the trauma to which the plaintiff ha[s] been subjected."[16]

Specifically, the court reasoned:

> A defendant has no right to exclude evidence relevant to a complete assessment of a plaintiff's compensatory damages by conceding liability for them even when he admits that they were serious or 'severe.' The jury has the responsibility of translating unliquidated damages into a precise monetary equivalent. The jury's task of fixing a just compensation for pain, suffering, and mental anguish is difficult and sensitive. It is entitled to all relevant information offered on the subject which meets the requirements of the rules of evidence.[17]

In our case, the Defendant made several statements during his deposition that were helpful to us regarding the force of the impact:

1. His foot was on the gas pedal up until the point of impact;

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[15] *Colas v. Tyree*, 302 Va. 17, 26 (2023) (quoting *Economopoulos v. Kolaitis*, 259 Va. 806, 812 (2000)).

[16] *Wallen v. Allen*, 231 Va. 289, 293-94 (1986).

[17] *Id.* at 294.

2. He did not apply his brakes until after he rear-ended Ryan's vehicle; and

3. He was traveling between 55-60 miles per hour at the time of the crash.

We had videotaped the Defendant's deposition,[18] so we simply edited the video down and designated those portions to be used at trial because "[t]he deposition of a party . . . may be used by an adverse party for any purpose."[19]

In addition to playing a short portion of the Defendant's video deposition, we decided to call him to the stand in-person to ask him about his observations of Ryan at the scene of the crash. After the Defendant downplayed Ryan's presentation at the scene of the crash, we impeached him with his Answer and deposition testimony that denied responsibility and blamed the crash on Ryan. Defense counsel objected and argued that this was improper impeachment. We argued that this was proper impeachment because the Defendant's Answer and his deposition testimony were inconsistent with his liability concession shortly before trial.

Note that, under Virginia law, a party calling an adverse witness may impeach the adverse witness,[20] but the party calling an adverse witness cannot call the witness to the stand *solely* to impeach him.[21] We were not calling the Defendant to the stand solely to impeach him—he also testified about the force of the impact and his observations of Ryan at the scene of the crash.

Defense counsel argued that this was impeachment on a collateral issue, and we responded that the Defendant's repeated denials of responsibility were also relevant to the issue of prejudgment interest. The trial had been delayed due to the need for four days on the Court's docket. If the Defendant had accepted responsibility earlier, then we would have agreed to a shorter trial that would have taken place sooner.

The judge limited our questioning on this issue, but both the liability stipulation and the Defendant's Answer were admitted into evidence without objection. This gave us wide latitude in closing argument to make the Defendant appear unreasonable—by pointing out that he had repeatedly refused to accept responsibility over the course of six years, but he wanted the jury's sympathy, so he admitted liability right before coming into court.

Personal responsibility is an important issue in any personal injury trial. When determining damages, jurors care about whether defendants genuinely accept responsibility. For example, two trial consultants recently conducted a research study where they utilized a hypothetical admitted

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[18] *See* Va. Sup. Ct. R. 4:7A(d)(1) ("Any deposition may be recorded by audio-visual means without a stenographic record. The audio-visual recording is an official record of the deposition.").

[19] Va. Sup. Ct. R. 4:7(a)(3).

[20] *See Maxey v. Commonwealth*, 26 Va. App. 514, 518 (1998) ("[O]ur common law clearly holds . . . that a party may impeach a witness having an adverse interest with the witness' prior inconsistent statements.").

[21] *See id.* at 521 (citing *Williams v. Commonwealth*, 193 Va. 764, 769 (1952)).

liability case arising out of a car accident, and they found that jurors who felt that the defense genuinely accepted accountability awarded less damages.[22]

d. Focusing on Objective Evidence & Uncontested Facts

We knew that the jury's verdict was going to be based upon whether they believed Ryan had a mild traumatic brain injury. We did not want to rely on the jury believing our client, her family members, or our expert, so we focused as much as possible on the objective evidence and uncontested facts.

There were certain helpful facts that the defense could not contest:

1. Prior to the crash, Ryan was an extremely intelligent young woman—she excelled in school, placed in the 97th percentile of SAT takers, and she had a 3.6 GPA at Stanford University.

2. Prior to the crash, Ryan's career was on an upward trajectory—within a few years, she had gone from making $50,000 per year to almost $300,000 per year.

3. After the crash, Ryan performed very little work.

4. After the crash, Ryan received extensive medical treatment.

When cross-examining the defense's neuropsychologist, we pointed out that—in arriving at his conclusions, he had to estimate Ryan's pre-crash intelligence, but he failed to consider how Ryan performed on the SAT or her grades at Stanford. How could he properly estimate her pre-crash intelligence without using her actual test scores and grades from before the wreck?

The defense argued that Ryan did not have a brain injury, but why would she give up her high-paying job for the six years following the crash? Why would she get such extensive medical treatment if she was not actually dealing with the problems she was reporting?

e. Appealing to Jurors' Common Sense

Throughout the trial, we tried our best to boil the overarching arguments down to common sense principles. The defense tried to use Ryan's traveling against her, so we told the jury that disabled people can book a flight and sit on a plane too. The defense tried to use Ryan's yoga certification against her, so we compared doing yoga to excelling at Stanford, working long hours, and making $300,000 per year. The defense argued that Ryan's lost wages were speculative because the overwhelming majority of her past earnings were commission based, so we told the

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[22] *See* Richard Gabriel & Emily Shaw, *A Look Into How Jurors Reach High Damages Awards* (Feb. 8, 2024), https://decisionanalysisinc.com/wp-content/uploads/2024/02/Law360-A-Look-Into-How-Jurors-Reach-High-Damages-Awards.pdf; *see also* Kristi Harrington, *Always Accept Responsibility*, FIRST COURT (April 10, 2023), https://www.firstcourt.com/en/insightsblog/always-accept-responsibility.

jury that, under the defense's theory, car salesman and real estate agents would never be able to recover their lost wages. We learned that the defense's doctor had not actively practiced medicine since approximately 2000, so we highlighted recent advances in medicine, and we made comparisons to show just how long ago that was.

f. Agreeing to Dismiss a Potentially Helpful Juror

On the final day of trial, one of the jurors approached the judge and said he had just realized the prior evening that he believed he had met Ryan's parents at a party because his daughter had a traumatic brain injury from an accident, and he remembered discussing the similarity. When we asked Ryan's family about this issue, they said they did not know the juror. The defense moved to strike the juror. Initially, we thought about contesting the issue, especially since the juror had a daughter with a traumatic brain injury from a crash. However, after some reflection, we were concerned about an appealable issue and how the juror might compare his daughter's brain injury to Ryan's. We were also concerned about the fact that he had confused Ryan's parents with other people, and we worried that he might have had a negative impression of those people. Given these concerns, we stipulated to a six-person jury.

VIII. Verdict & Lessons Learned

After a few hours of deliberation, the jury returned a verdict in the amount of $1,386,000. The judgment was not appealed, and it was satisfied in full a few weeks after the trial.

Overall, we learned the following key lessons from this trial:

1. **Work with opposing counsel.** We filed a joint motion to expedite the trial, worked out an agreed edited version of the Defendant's deposition, and worked out the vast majority of our witness/exhibit objections. Cooperating with opposing counsel on all of these issues made trial much more enjoyable, and the cooperation helped our client.

2. **Meet with all of the witnesses before trial, even if they seem unfavorable.** This paid off when we spoke to Trooper Smith, who had marked "no injury" on the Police Crash Report. We also spoke to an eyewitness that the defense had designated, and we ended up calling her in our case-in-chief because she told us that the Defendant hit Ryan so hard that Ryan's back windshield flew over the top of the Defendant's truck and landed in his truck bed.

3. **Mention "the number" as early as possible.** The jurors were not surprised when we asked them to award millions of dollars because we told them that we would be asking for millions from the very beginning.

4. **Sometimes, less is more—narrow the evidence to prevent appealable issues.** By choosing not to introduce NeuroQuant evidence and agreeing to dismiss the juror, we limited appealable issues and made it more likely that the verdict would be fully paid.

5. **Own the "bad" facts.** This gained us some credibility with the jury, and it took some of the sting out of defense counsel's cross-examination.

6. **Focus on the objective facts.** This persuaded the jury that Ryan had a brain injury. After trial, we spoke to the jury foreperson, and she said that the jury immediately agreed that Ryan had a brain injury from the crash.

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Anatomy of a Trademark: Helping Clients Fortify their Brands and Avoid Infringement

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Anatomy of a Trademark: Helping Clients Fortify their Brands and Avoid Infringement

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Kevin W. Holt
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Anatomy of a Trademark:
Helping Clients Fortify their Brands and Avoid Infringement

Kevin W. Holt & Jake L. Bryant

I. INTRODUCTION

This presentation provides an overview of the basics of Federal trademark law, including the nature of trademark protection, Federal registration, and infringement.

II. WHAT IS A TRADEMARK?

A. Definitions

Trademark means any word, name, symbol, device, or any combination of those elements used, or intended to be used, in commerce to identify and distinguish one's goods from those manufactured or sold by others and to indicate the source of the goods. A trademark can apply to goods, services (service mark), certifications (certification marks), and collectives. Trademarks can be words, phrases, symbols, colors, sounds, or even smells if they act as an indicator of source in commerce. Generally, trademark protection is limited only to the use of that mark (or marks likely to cause confusion with the protected mark) in connection with the goods or services offered under it.

Examples: ROLEX for watches; NIKE for athletic shoes

Example of Industry Limitation: DOVE for chocolate and DOVE for soap. Both marks are registered for different classes of goods and services. Dove chocolate's protection does not extend to soap products and vice versa.

Service mark means any word, name, symbol, device, or any combination of those elements used, or intended to be used, in commerce to identify and distinguish the services of one person from the services of others and to indicate the source of the services.

Examples: FEDEX for delivery and logistics services; HILTON for hotel services

Certification mark means any word, name, symbol, device, or any combination thereof used, or intended to be used, by a person other than its owner in commerce to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that members of a union or other organization performed the work or labor on the goods or services.

Examples: Energy Star for energy efficiency standards in appliances; GROWN IN IDAHO for potatoes grown in the State of Idaho

Collective mark means a trademark or service mark used or intended to be used by the members of a cooperative, an association, or other collective group or organization; includes marks indicating membership in a union, an association, or other organization.

Examples: FTD for membership in the Florists' Transworld Delivery Association; GIRL SCOUTS for branded cookie sales and member activities;

Trade Dress refers to the commercial image and overall appearance of a business or product. Trade dress may include elements, such as the size, shape, and color of packaging or the overall visual impression or concept of a product, its packaging, and/or decor. Trade dress still requires that the aesthetic elements of the packaging or visual concept act as an indicator of source.

Examples: the golden foil wrapping on FERRERO ROCHER chocolates; the distinctive REALEMON juice container shaped like a lemon

B. Core Functions of a Trademark

1. Source Identification

   At their core, trademarks function as identifiers of origin. They enable consumers to easily and reliably identify the source of goods and services and distinguish them from those offered by competitors in the marketplace.

   Example: The Coca-Cola name and logo allow consumers to instantly distinguish its products from those of competitors like Pepsi or Dr. Pepper.

2. Marketing and Communication Tool

   Trademarks are powerful branding tools that capture consumer attention, increase visibility in crowded markets, and convey messages about the company's reputation, values, and identity. Over time, a well-established mark can represent not just the source of a product, but a lifestyle or ethos associated with the brand.

   Example: The Nike Swoosh conveys concepts of athleticism, motivation, and performance.

3. Brand Image and Reputation

Trademarks are integral to shaping and reinforcing a company's brand identity. Consumers begin to associate a mark with specific attributes, such as quality, reliability, innovation, or safety, based on their personal experiences and the brand's broader public perception. These associations foster emotional loyalty, strengthen consumer trust, and contribute to long-term goodwill.

Example: ROLEX has cultivated a prestigious reputation as a luxury Swiss watchmaker, creating unique movements in-house. Trademark protection allows ROLEX to protect its own goodwill from free riders and counterfeiters.

4. Consumer Protection

Trademarks protect consumers by signaling a consistent standard of quality and performance. In the event of product defects or dissatisfaction, the mark also provides a means to identify and hold the manufacturer accountable.

Example: If a consumer receives a defective North Face jacket, the recognizable trademark helps direct him or her to the source for repair, refund, or customer support. If multiple North Face brands existed in the market for outdoor apparel, consumers would likely have difficulty distinguishing which brand was the source of the products they purchased.

5. Business Asset

Trademarks are long-term, valuable assets. A well-established mark can generate licensing revenue, support expansion, and increase a company's valuation during mergers or acquisitions.

Example: Google is estimated to be the world's most valuable brand with a value over $229 billion.

6. Protection Against Unfair Competition

Trademarks provide companies with a legal framework to prevent others from using confusingly similar marks or engaging in unfair market practices that may harm a brand's reputation or mislead consumers.

Example: Louis Vuitton can stop counterfeiters from selling fake bags bearing its signature monogram.

C. Case Example

1. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916)

"Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, others are debarred from applying the same mark to goods of the same description, because [that] would … represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy."

III. TYPES OF TRADEMARKS

Trademark protection extends across various formats, from traditional word and design marks to non-traditional marks that rely on sensory elements.

A. Traditional Marks

1. Word Marks

A work mark consists of words, letters, numbers, or a combination of these elements, without reference to any particular font, style, size, or color.

Example: LEGO is registered as a plain word (U.S. Reg. No. 1018875)

2. Design Marks

A design mark includes stylized text, logos, images, or a combination of these elements. Unlike word marks, protection for design marks is limited to the specific visual representation. Any substantial modification to the design may require a new registration.

a. Stylized Word Marks (Design + Words)

These marks include unique fonts, layouts, colors, and other artistic elements combined with text. They are used when a brand wants to protect not only the wording, but also the presentation of the brand name.

Example: LEGO is also registered in a stylized manner (U.S. Reg. No. 1026871)



b. Purely Figurative Trademarks (Logo without Words)

These marks consist entirely of graphic elements or symbols, without any text. They are often used where a visual identity has become strongly associated with a brand.

Example: Outline of the LEGO minifigure (U.S. Reg. No. 4534561)



c. Composite Marks (Combination of Words and Design)

These marks combine both textual and figurative components. Even when the words may not be registrable on their own, a distinctive design can render the overall mark eligible for protection.

Example: LEGO stylized logo featuring the word "EDUCATION" (U.S. Reg. No. 6078384)



B. Non-Traditional Marks

In addition to conventional work and design marks, non-traditional marks include marks based on a single color, appearance, shape, sound, smell, taste, or texture. These marks are generally subject to heightened scrutiny and often require a showing of acquired distinctiveness.

1. Color: A single color, without additional design elements, may function as a trademark if it has acquired distinctiveness and is non-functional.

   Examples: Canary yellow for Post-It notes; Pink for T-Mobile

2. Sound: Short, distinctive sound sequences or musical tones may be registered as trademarks when they function as source identifiers and are not merely ornamental or functional.

   Examples: NBC three-tone chime sequence; MGM lion's roar

3. Scent: A scent may be protectable if it is distinctive and non-functional. Functional or naturally occurring product smells, such as the scent of a perfume, are generally not registrable.

   Examples: Plumeria-scented sewing thread; signature scent of Play-Doh

4. Shape: The configuration of a product or its packaging can function as a trademark if it is distinctive and not essential to the product's use or affect cost or quality.

   Examples: Coca-Cola bottle shape; Toblerone chocolate bar packaging

C. Case Examples

1. *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995)

2. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992)

IV. STRENGTH OF TRADEMARKS

A. Distinctiveness Spectrum

Trademark protection is fundamentally tied to the distinctiveness of the mark. The more distinctive the mark, the greater its ability to serve as a source identifier and the more likely it is to withstand legal challenges. In *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976), the Second Circuit established a framework that categorizes trademarks along a spectrum of distinctiveness, ranging from inherently distinctive to entirely unprotectable. Proposed trademarks generally fall into one of the following categories:

	Description	Examples	Strength of Mark
Fanciful	Invented words	KODAK for camera film HULU for subscription streaming service	Inherently Distinctive
Arbitrary	Words that have no association with the underlying goods or services	APPLE for computers PENGUIN for books	Inherently Distinctive
Suggestive	Words that suggest some quality of the goods or services	COPPERTONE for sun-tanning products GREYHOUND for transportation services	Inherently Distinctive
Descriptive	Words that describe some aspect of the goods or services	SEATTLE COFFEE CO. for coffee products or services based in Seattle, Washington AMERICAN AIRLINES for flight services	Requires a demonstration of "acquired secondary meaning"
Generic	Common names for the goods or services	Aspirin, cellophane, escalator, thermos, cereal	Never protectable

Fanciful, arbitrary, and suggestive marks are considered *inherently distinctive* and are entitled to immediate protection once used in commerce. These marks function clearly as source identifiers and are the strongest types of trademarks.

In contrast, descriptive marks are not inherently distinctive and are only registrable on the Principal Registry after acquiring distinctiveness, also known as secondary meaning. The applicant must demonstrate that consumers have come to associate the descriptive term with a particular source.

Generic terms are never protectable. A term is generic if the public understands it to refer to the product itself, not its producer. Even a once-strong trademark may lose protection through genericide.

B. Case Examples

1. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976)

2. *Zatarain's, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786 (5th Cir. 1983)

3. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000)

4. *Bayer Co. v. United Drug Co.*, 272 F. 505 (2d Cir. 1921)

5. *Seabrook foods, Inc. v. Bar-Well Foods Ltd*, 568 F.2d 1342 (C.C.P.A. 1977) (setting forth a four-factor analysis for design mark distinctiveness)

V. ACQUIRING AND REGISTERING A TRADEMARK

Trademark rights in the United States can be acquired either through actual use in commerce (common law rights) or formal registration. While both methods confer legal protection, the scope, strength, and enforceability of those rights different substantially.

A. Common Law Rights

Common law trademark rights arise automatically through the actual use of a mark in commerce in connection with specific goods or services. These rights are geographically limited to the areas where the mark is used and where consumers associate the mark with the source. The scope of protection also includes a "reasonable zone of expansion" for both geography and collateral goods and services that consumers might reasonably expect to be within the normal expansion of a markholder's business. *See Maid to Perfection Corp. v. Hyman*, 1996 U.S. App. LEXIS 10328, *6 (4th Cir. 1996) (stating factors to be considered in determining a geographic zone of expansion). Common law protection is likely sufficient for localized businesses operating within a narrow market or defined geographic region. Most businesses do not have a registered trademark, and many enforcement actions rely on common law rights.

B. State Registration

Registering a trademark with a State confers rights only within that State's borders. While this approach may be appropriate for businesses operating exclusively within a single jurisdiction, State registration has several limitations, including:

1. Geographic Scope: Scope of protection is limited to the registering State. The mark is not protected in other States unless separately registered or supported by common law use.

2. Lack of Public Notice: Not all States maintain comprehensive or publicly accessible trademark databases, which may reduce the deterrent effect of registration.

3. Limited Remedies: State registration generally does not provide access to Federal courts or nationwide enforcement mechanisms.

4. Expansion Consideration: If a business expands across State lines, the owner must either seek registration in each additional State or pursue Federal registration to obtain nationwide rights.

C. Federal Registration

Registering a trademark with the United States Patent and Trademark Office provides the strongest and broadest protection available. Federal registration provides critical legal and commercial advantages, including:

1. Nationwide Exclusivity: Federal registration grants the owner the exclusive right to use the mark in connection with the registered goods or services throughout the entire United States and its territories, regardless of the actual geographic scope of use.

2. Public Notice and Deterrence: Federal registration places the mark in the USPTO's public database, serving as constructive notice to others of the owner's claim of rights. This deters others from adopting confusingly similar marks and helps avoid costly legal disputes.

3. Legal Presumptions and Enforcement: Federal registration confers several procedural and substantive advantages, including a legal presumption of ownership, the exclusive right to use the mark nationwide in connection with the registered goods or services, and access to Federal courts and customs enforcement.

4. Use of ® Symbol: Only Federally registered trademarks are entitled to use the ® symbol, which signals to consumers and competitors that the mark is registered and legally protected under Federal law.

5. International Expansion: Federal registration provides a foundation for international trademark filings under the Madrid Protocol and similar treaties.

D. Case Example

1. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985).

VI. FEDERAL REGISTRATION PROCESS



A. Prepare and Submit the Application

To register a trademark with the USPTO, applicants must complete and submit an application. Application requirements include:

1. Contact information for the trademark owner;

2. A clear representation of the mark (word, design, or both)

3. A listing of goods and/or services categorized by international class(es)

4. Basis for filing (e.g., "use in commerce" or "intent to use")

5. Required filing fees

B. Examination

The USPTO examines the application to ensure it complies with formal requirements, such as proper classification, completeness of information, and fee payment. An examining attorney evaluates whether the mark is registrable (e.g., not merely descriptive or generic) and whether it conflicts with existing registrations or pending applications. Common grounds for refusal include:

1. Likelihood of confusion with a previously registered or applied-for mark;

2. Merely descriptive of the goods or services;

3. Geographically descriptive of the origin of the goods or services;

4. Failure of the specimen to show actual use of the mark in commerce for the listed goods or services; and

5. Ornamental use, where the mark appears as a decorative feature rather than a source identifier.

The examiner may issue an Office Action if objections arise, requiring a timely response from the applicant.

Publication and Opposition

If approved, the mark is published in the *Official Gazette* for a 30-day opposition period, during which third parties may file objections to the registration. If no oppositions are filed (or if any are resolved), the application proceeds.

C. Registration

For use-based applications, the mark proceeds directly to registration. For intent-to-use applications, the USPTO issues a Notice of Allowance, and the applicant must later file a Statement of Use to receive a registration.

D. Renewal and Maintenance

A registration is valid for 10 years, but it must be maintained by filing a Declaration of Use between the 5th and 6th year. It may then be renewed indefinitely in 10-year increments, provided the mark remains in use and maintenance filings are submitted on time. Failure to use the mark in commerce or file timely documents may result in cancellation of the registration.

VII. CANCELLATION OF REGISTRATION

Under 15 U.S.C. § 1064, a third party may petition to cancel a trademark registration under certain circumstances.

A. Within Five Years of Registration

For the first five (5) years following the date of registration, a petition to cancel may be filed for any reason.

B. After Five Years of Registration

Once a registration has been on the Principal Register for more than five (5) years, it is eligible for a declaration of incontestability, immunizing the mark from certain challenges. However, cancellation of an incontestable mark is still permitted on limited grounds, including if:

1. The mark has become generic;

2. The registration was obtained through fraud;

3. The mark has been abandoned;

4. The mark is functional; or

5. The mark was registered contrary to the provisions of § 1052(a), (b), or (c), such as for being deceptive or falsely suggesting a connection with a person, institution, belief, or national symbol.

Cancellation proceedings are generally filed with the Trademark Trial and Appeal Board (TTAB).

VIII. INFRINGEMENT AND ENFORCEMENT

Trademark law protects not only the rights of trademark owners but also the interests of consumers by preventing confusion about the source of goods or services. Effective enforcement ensures that marks retain their distinctiveness and commercial value.

A. What Constitutes Trademark Infringement

Trademark infringement is the unauthorized use of a mark on or in connection with goods or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods or services.

1. Confusion-Based Infringement

Trademark infringement occurs when a defendant uses a protected mark that he/she/it does not own or a mark similar to a protected mark in a way that is likely to cause consumer confusion as to the source, sponsorship, affiliation, or approval of goods or services. *See* 15 U.S.C. § 1114. The marks at issue do not need to be identical. Instead, confusion could arise from similarities in sound, appearance, meaning, or commercial impression.

Notably, a finding of confusing similarity between marks is not sufficient on its own. The relatedness of the goods or services also plays a critical role. Even identical or nearly identical marks may coexist without conflict if they are used for unrelated products or services. For example:

- DOVE is registered for both soap and ice cream bars; and
- DELTA is registered for both airline services and plumbing fixtures.

To evaluate whether there is a likelihood of confusion, all Federal circuit courts apply multi-factor tests that typically include variations of the same factors. The Fourth Circuit has illustrated the factors commonly examined when evaluating likelihood of confusion:

- the strength or distinctiveness of the mark;
- the similarity of the two marks;
- the similarity of the goods/services the marks identify;
- the similarity of the facilities the two parties use in their businesses;
- the similarity of the advertising used by the two parties;
- the defendant's intent;
- actual confusion.

Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984) (stating that the court applies "these factors, but we do so with the caution expressed in *Modular Cinemas of America, Inc. v. Mini Cinemas Corp.*, 348 F. Supp. 578, 582 (S.D.N.Y. 1972), that "not all these [factors] are always relevant or equally emphasized in each case").

2. Trademark Dilution

Dilution protects famous marks from uses that impair their distinctiveness or reputation, even in the absence of confusion or competition. There are two primary forms:

a. Blurring: Occurs when the use of a similar mark weakens the distinctiveness of a famous mark, diminishing its ability to identify and distinguish its source.

b. Tarnishment: Arises when a mark is used in a way that harms the reputation of the famous mark, often through association with inferior or unsavory products or services.

3. Cybersquatting

Cybersquatting involves registering, trafficking in, or using a domain name that is identical or confusingly similar to a trademark with bad-faith intent to profit. The Anticybersquatting Consumer Protection Act (ACPA), codified at 15 U.S.C. § 1125(d), provides a cause of action for trademark owners to seek transfer or cancellation of infringing domain names and, in some cases, monetary damages.

B. Case Example

1. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 736 F.3d 198 (2d Cir. 2013) (analyzing a trademark infringement and dilution action related to the defendant's use of the mark "MR. CHARBUCKS" for the name of a dark roast coffee).

C. Other Actions and Enforcement Options Against Third Parties

1. False Designation of Origin/False Description Claims (Section 43(a) of the Lanham Act)

    a. These relate to actions against third parties who use another's trademark or name, regardless of whether the trademark is registered, as a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact." 15 U.S.C. §1125(a)(1).

2. Cancellation and Opposition proceedings at the USPTO

IX. REMEDIES

If the trademark owner is able to prove infringement, available remedies may include:

- Injunctive relief ordering that the defendant stop using the accused mark;
- An order requiring the destruction or forfeiture of infringing articles;
- Monetary relief, including disgorgement of profits generated from the infringement, any damages sustained by the plaintiff; and
- In the court's discretion, an order that the defendant, in certain cases, pay the plaintiffs' attorneys' fees

X. COMMON DEFENSES TO INFRINGEMENT

1. No Likelihood of Confusion - the facts fail to satisfy the "likelihood of confusion factors");

2. Fair Use;

    a. Nominative Fair Use – "the defendant uses the famous mark to identify or compare *the trademark owner's* product." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 169 (4th Cir. 2012).

        i. Example: A Mechanic's garage features a sign that states "We fix BMWs."

    b. Descriptive Fair Use – "applies when the defendant is using a trademark in its primary, descriptive sense to describe the defendant's goods or services." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 169 (4th Cir. 2012).

        i. Example: One coffee shop has a registered trademark for its name, SEATTLE COFFEE CO. Another coffee shop, PERFECT LATTE, includes on its "About Us" website page, the following phrase: "We are a Seattle coffee company."

3. Laches – "Courts apply laches to address the inequities created by a trademark owner who, despite having a colorable infringement claim, has unreasonably delayed in seeking redress to the detriment of the defendant." *Ray Communs., Inc. v. Clear Channel Communs., Inc.*, 673 F.3d 294, 300 (4th Cir. 2012);

4. Abandonment – If the owner of a registered trademark fails to continue to use the mark in commerce or police its licensees, the owner may be deemed to have abandoned their rights to that mark;

5. Genericide – Otherwise valid trademarks can lose protection if they become ubiquitous to the public and become more commonly used as a descriptor of the good or service than as a source indicator; and

6. Priority – The defendant began using the trademark in commerce prior to the plaintiff.

    a. In priority cases where a plaintiff is a junior user but holds a Federal registration and the defendant has priority but no registration, the parties will often be permitted to engage in "concurrent use," whereby the defendant will have exclusive rights to the trademark in its geographic zone of expansion and the plaintiff will retain exclusive rights to the mark everywhere else.

TRADEMARK LAW WITHIN THE LARGER SCHEME OF INTELLECTUAL PROPERTY

	Trademark	Copyright	Patents
Protectable Subject Matters	A word, phrase, design, or a combination that identifies goods or services and distinguishes them from the goods or services of others	Original works of authorship fixed in a tangible medium, such as novels, music, movies, photographs, or paintings	Technical inventions, mechanical processes, or machine designs that are novel, useful, and non-obvious
Example	TIDE for laundry detergent	Song lyrics to "Let It Be" by the Beatles	A new type of hybrid engine
Benefits	Prevents others from using a confusingly similar mark for a related goods or services	Grants exclusive rights to reproduce, distribute, perform, or display the work	Gives owner the ability to prevent others from making, using, selling, or importing the invention without permission
Constitutional Basis	Commerce Clause	Intellectual Property Clause	Intellectual Property Clause
Statutory Basis	Lanham Act (15 U.S.C. § 1051, et seq.)	Copyright Act (17 U.S.C. § 101, et seq.)	Patent Act (35 U.S.C. § 101, et seq.)
Terms of Protection	Perpetually renewable if renewed and used continuously in commerce	Life of the author plus 70 years (for individual works)	20 years from the date of filing (for utility patents); 15 years from date of grant (for design patents)

XI. ADDITIONAL RESOURCES

For further guidance on trademark law, registration procedures, and enforcement strategies, consult the following resources:

United States Patent and Trademark Office (USPTO)

Trademark Manual of Examining Procedure (TMEP)

USPTO Trademark Basics Video Series

Trademark Trial and Appeal Board (TTAB)

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The Data Breach Lawsuit: Strategies for Avoiding and Winning Cyber Litigation

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The Data Breach Lawsuit: Strategies for Avoiding and Winning Cyber Litigation

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Gentry Locke Seminar 2025

I. Avoiding Privacy Litigation Through Proactive Compliance

A. State Privacy Law Requirements - Virginia Consumer Data Protection Act (VCDPA) Va. Code §§ 59.1-575 to 59.1-585

a. Scope - The most important consideration for any company faced with a new privacy law is whether that law even applies to them. The VCDPA uses specific numerical thresholds for determining applicability. The VCDPA applies to organizations that do business in the Commonwealth of Virginia or organizations that produce products or services that are targeted to residents of Virginia. In addition, these organizations must meet one of the following criteria:

- Process or control the personal data of at least 100,000 consumers in a calendar year;

OR

- Process or control the personal data of at least 25,000 consumers *and* derive over 50% of gross revenue from selling that data.

The definitions of the terms contained within the VCDPA, as well as the many exemptions written into the law, flesh out the full scope of this privacy framework.

b. Definitions - The definitions of "personal data" and "consumer" are key to understanding whether your company falls within the scope of the VCDPA.

Personal Data – "any information that is linked or reasonably linkable to an identified or identifiable natural person." Va. Code § 59.1-575 (emphasis added).

- This definition is broad in that it includes "any information," but is narrowed by the fact that the information must be traceable to a "natural person" (not an organizational entity). *Id.*

- The law does not outline specific examples of personal data but does provide for certain exemptions that are critical to understanding the scope of the VCDPA (below).

  Consumer – A "consumer" is any Virginia resident, but only to the extent of his or her activity in an individual or household context. When acting as an employee or as a representative of an organization, an individual is not a "consumer" for VCDPA purposes. *Id.*

- Processing the personal data of a company's own employees, or gathering personal data on officers of other companies, is not relevant for purposes of calculating the number of "consumers" whose personal data is being processed. *Id.*

  Process – As used in the VCDPA, "processing data" is a broad term that encompasses any operation performed on data, including collection, use, storage, disclosure, analysis, deletion, or modification of the data. *Id.*

c. **Exemptions** - There are several exemptions that can be found under the VCDPA, including organizational exemptions, exemptions to covered information, and specific exemptions for certain data types. Va. Code § 59.1-576.

The organizational exemptions apply to organizations, including:

- State government agencies
- Financial institutions subject to Gramm-Leach-Bliley Act (GLBA)
- Covered entities and business associates under the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH)
- Non-profit organizations
- Higher education institutions

There are also exemptions for information covered under sectoral laws, including:

- Children's Online Privacy Protection Act (COPPA)
- Drivers Privacy Protection Act
- Fair Credit Reporting Act (FCRA)
- Family Educational Rights and Privacy Act (FERPA)
- Farm Credit Act
- GLBA

- HIPAA
- HITECH

Finally, the VCDPA provides exemptions for certain types of personal information. Va. Code § 59.1-576. These include:

- **De-identified personal data** – data that cannot be linked to a natural person. Personal data can be de-identified or anonymized to remove the data from the ambit of the VCDPA

- **Publicly available information** – information made available through government records or that a business reasonably believes is available to the public through widely distributed media

- **Employee data**

- Personal information collected for **commercial or business-to-business purposes** (in other words, personal information from someone communicating with your company in a commercial setting; e.g., contact information for someone involved in a commercial negotiation)

- Personal information collected as part of a clinical trial

- Sale of information to/from consumer reporting agencies

d. Consumer rights under the VCDPA

The VCDPA provides consumers with a number of rights with respect to their data, most of which substantially overlap with other state privacy laws, including the CCPA. Va. Code § 59.1-577(A).

The VCDPA requires that organizations provide consumers the right to opt-out of the sale of their data, profiling, and targeted advertising. VCDPA also requires that organizations do not process sensitive personal data without an affirmative opt-in from the consumer. *Id.*

The VCDPA offers consumers a total of seven rights in relation to the collection and use of their personal data. *Id.* Under the VCDPA, consumers are provided:

- The right to be informed
- The right to access
- The right to correction
- The right to deletion
- The right to opt-out
- The right to appeal
- The right to data portability

- The right to non-discrimination

Once a consumer exercises one of these rights (making a request for access, deletion, etc.), the VCDPA requires that the business responds within 45 days. Businesses can extend their response time another 45 days if necessary but must notify the consumer. *Id.*

i. Right to Opt-Out of Data Processing – Va. Code § 59.1-578(D)

Perhaps the most important consumer right afforded by the VCDPA, it allows consumers the right to opt-out of:

- The sale of their personal data
- Profiling (automated processing to determine/evaluate information about an individual)
- Targeted advertising. Va. Code § 59.1-578(D).

For further clarity of this right, the VCDPA defines the sale of personal data as "the exchange of personal data for monetary consideration by the controller to a third party" Va Code. § 59.1-575.

Profiling is defined as any *automated processing* that evaluates, analyzes, or predicts elements of an individual's economic situation, health, interests, behavior, location, or movements, among other things. *Id.*

The VCDPA defines targeted advertising as displaying advertisements to a consumer based on personal data obtained from that consumer's activities across websites or applications to predict preferences or interests. *Id.*

Importantly, the VCDPA explicitly excludes certain advertising activities from the definition of targeted advertising. *Id.* These include:

- Advertisements based on activities within a controller's own websites or online applications
- Advertisements based on the context of a consumer's current search query, visit to a website, or online application
- Advertisements directed to a consumer in response to the consumer's request for information or feedback
- Processing personal data processed solely for measuring or reporting advertising performance, reach, or frequency

ii. Right to Appeal and Other VCDPA Consumer Rights – Va. Code § 59.1-577(B).

In addition to the right to opt-out of data processing, the VCDPA also provides consumers with the right to be informed about their data, access their data held by an organization, correct and delete that data, and appeal any denial of the consumer's request to exercise their data rights. For your company, this means implementing processes for consumers to exercise these rights. Establishing user-friendly processes that allow consumers to exercise these rights, establishing a formal appeal process, and explaining these rights within your privacy statement will achieve compliance with these VCDPA requirements.

The right to appeal an organization's denial of their data request is a unique aspect of the VCDPA, compared to other comprehensive privacy laws. The VCDPA requires that the appeal process:

- Include an interface that is easy to find and use
- State a fixed time period for your company's response
- Provide a way to contact the Virginia attorney general if your company denies the appeal

Information about how to submit an appeal also needs to be included in your company's privacy policy, as explained in Subsection "E" below.

e. Sensitive Data – Va. Code § 59.1-578(A)(5)

A key feature of the VCDPA that distinguishes it from other privacy laws (the CCPA in particular) is that an organization may not process "sensitive data" without affirmative consent from the consumer. While the VCDPA is generally more business-friendly than other state privacy laws, the VCDPA is more stringent in its treatment of sensitive data. Unlike the VCDPA's treatment of personal information (and CCPA's treatment of sensitive data), which allows collection unless the consumer opts-*out*, sensitive data may not be processed under the VCDPA unless the consumer opts-*in* and consents to the processing.

The text of the law highlights several examples of the type of personal data categorized as sensitive data:

- Racial or ethnic origin
- Religious beliefs
- Mental or physical health diagnosis
- Sexual orientation
- Immigration or citizenship status

- Genetic or biometric data
- Personal data of a known child
- Precise geolocation data

Organizations that process sensitive data must obtain valid, *affirmative* consent (opt-in) from the individual prior to processing this data.

The distinction between personal data (may be processed unless opt-out) and sensitive data (may not be processed unless opt-in) is critical. This feature of the VCDPA demonstrates the importance for your company to *know its data* - an organization cannot comply with this provision without knowledge of exactly what data is being collected. If your company processes sensitive data, you must be sure to obtain consent prior to processing.

Upon determining whether your company in fact processes any sensitive data, you should consider whether it has a need to process any of this data. Unless it is vital for your company to collect this type of data, avoiding collection of sensitive data altogether is often the best and simplest approach.

f. Valid consent

g. There are two situations in which a company, if subject to the VCDPA, must obtain valid consent from the consumer. First, as discussed above, consent must be obtained by data controllers intending to process sensitive data. Va. Code § 59.1-578(A)(5).

Second, the VCDPA prohibits processing personal information where the purposes of processing are neither reasonably necessary nor compatible with the originally disclosed purposes, unless the consumer's valid consent is first obtained. Va. Code § 59.1-578(A)(2).

Therefore, while the VCDPA generally requires that processing be reasonably necessary and compatible with the originally disclosed purposes (see Section I of this memorandum), valid consent from the consumer allows the organization to exceed this limitation.

The VCDPA defines consent as "a clear affirmative act signifying a consumer's freely given, specific, informed, and unambiguous agreement to process personal data relating to the consumer." Valid consent can be obtained in writing or via electronic methods. Va. Code § 59.1-575.

h. Data Protection Assessments - Va. Code § 59.1-580.

Under the VCDPA, organizations are required to conduct data protection assessments[1] in certain circumstances or when certain types of personal data are involved.

Organizations must conduct a data protection assessment in the following scenarios:

- Processing personal data for the purposes of targeted advertising
- Selling personal data
- Processing personal data for the purposes of profiling
- Processing sensitive data
- Processing that presents a heightened risk of harm to consumers

When conducting a data protection assessment, an organization must create a clear, documented structure for balancing the benefits to the business against the risk to individuals' privacy. Assessments should include information relating to the context of the processing and the relationship between the data controller and the consumer. Organizations must also document the use of de-identified data as well as the reasonable expectations of the consumer. Organizations do not have to submit assessment documentation to the Office of the Attorney General, but must provide this documentation if requested.

The VCDPA permits use of a single data protection assessment to address a "comparable set of processing operations." Similarly, data protection assessments conducted in compliance with other laws may be deemed acceptable under the VCDPA if the assessment has a "reasonably comparable scope and effect." In other words, a single assessment may be utilized for multiple operations and purposes.

To optimize effectiveness, data protection assessments should be cross-functional, meaning all relevant internal actors from across the company – employees in various departments/sections of the company – should be involved.

Assessments apply only to processing activities after January 2023 and are not retroactive.

i. Privacy notices – Va. Code § 59.1-578(c)

Privacy notices under the VCDPA must be reasonably accessible, clear, and meaningful. When presenting a privacy notice to an individual, the data controller must include:

- Categories of personal data being processed
- Purposes of processing

[1] Referred to as privacy impact assessments ("PIA") in other privacy laws, like the GDPR.

- Information relating to how individuals can exercise their rights
- Information related to how an individual may appeal a decision made in relation to a privacy request
- Categories of data shared with third parties
- Third parties that personal data is shared with

In relation to consumer rights, data controllers must present consumers with at least one secure method for them to exercise their rights. Data controllers cannot require a consumer to create a new account in order to exercise these rights.

j. Third-Party (Processor) Contracts - Va. Code § 59.1-579(B)

Most organizations share their data with third-party vendors. Often, these third-parties are "processors" – entities which do not determine the means and purpose of processing but instead follow instructions from the controller. Requirements for transferring personal data to third-parties are common to all state data privacy laws. Thus, regardless of whether your company is subject to the VCDPA specifically, careful selection of vendors and oversight of their data privacy practices is critical.

Under VCDPA, this data sharing relationship must be governed by a detailed contract—one that covers how the data should be processed and requirements applicable to both parties. Specifically, the VCDPA requires a binding contract that states:

- Instructions for processing data
- The nature and purpose of processing
- The type of data subject to processing
- The duration of processing
- The rights and obligations of both the controller and processor

The contract also needs language that specifically governs the data processor's actions, requiring that:

- Any person processing personal data must keep the data confidential
- Data must be deleted or returned at the data controller's request and at the end of the contract
- The processor will provide proof of compliance with privacy obligations, if requested by controller
- The processor will cooperate with compliance audits
- Ensure all subcontractors processing personal information have a written contract with the processor, extending the processor's privacy obligations to the subcontractor.

k. Breach Notification and Security Requirements -

The VCDPA does not have a mandatory breach notification requirement. However, the VCDPA requires that organizations must "establish, implement, and maintain reasonable administrative, technical, and physical data security practices to protect the confidentiality, integrity, and accessibility of personal data. Such data security practices shall be appropriate to the volume and nature of the personal data at issue." Va. Code § 59.1-578(A)(3). Virginia's breach notification requirements are instead codified at Va. Code § 18.2-186.6.

Although no specific controls are required, the VCDPA's language is similar to the security requirements found in the GDPR and CCPA. There are several places that your company can look to for best practice guidance, including NIST SP 800-53, the Center for Internet Security Critical Security Controls, and the Cloud Controls Matrix of the Cloud Security Alliance.

l. Enforcement and penalties – Va. Code § 59.1-584

Compliance with the VCDPA, and good data privacy practices generally, will develop consumer trust through transparent and informed data use. Moreover, compliance with the VCDPA will also help avoid monetary penalties, injunctive actions, and other forms of enforcement.

The VCDPA is enforced by the Virginia Attorney General ("AG"). Unlike the CPRA there is no provision for the establishment of an independent regulator.

The AG has the authority to issue monetary penalties of up to $7,500 per violation of the VCDPA. The AG can also recover reasonable expenses related to the costs involved in investigating violations, including attorney's fees.

While the VCDPA lacks a private right of action, and therefore lacks the teeth that some other state data privacy laws have, the loss of trust from consumers and business partners is a major reason for compliance. In other words, even if violations result in relatively modest fines, the optics of committing VCDPA violations will result in tangible economic and reputational damage.

Importantly, and *unlike* other state privacy laws, the VCDPA expressly states that there is **no private right of action for violations of the law.**

The AG will have the ability to issue a notice of violations to businesses that are found to have breached the requirements of the VCDPA. Businesses in receipt of such notice will have **30 days to remedy any violation** and report back to the AG confirming that alleged violations have been cured and mechanisms are in place to prevent further violations. This cure period is one of the more business-friendly provisions found in any of the new data privacy

laws and provides some respite for businesses hurrying to comply with the new VCDPA requirements.

B. Proactive Steps to Comply with Individual State Privacy Laws and Avoid Litigation

a. Privacy Policy

i. A privacy policy is legally required for organizations that are subject to state privacy laws, like the VCDPA, as described above. These organizations are legally required to post a compliant privacy policy to their website.

ii. Beyond this legal requirement, a well-constructed privacy policy will help avoid costly litigation. The privacy policy describes an organizations information privacy and security practices to a consumer, providing a level of transparency that prevents consumers from alleging that they were "misled" about the organizations collection, use, and sharing of their information.

b. Website Tracking – Cookies, Pixels, Web Beacons, etc.

i. Similar to a privacy policy, advising consumers about website tracking technologies that are deployed on a website is vitally important to avoiding private litigation. These notifications are sometimes legally required aspects of a website or mobile app, and some states' privacy laws require this notification to be made in pop-up banner that appears when a consumer first navigates to a web-page.

ii. In the wake of the recent surge in website tracking litigation, it is imperative that organizations deploying web tracking technologies inform consumers of their tracking practices and require the consumer to provide affirmative consent for tracking as soon as the consumer navigates to the web page.

iii. The Cookies/web tracking banner must provide coequal options for consumers to select from to allow or reject cookies. There should be two options to click on: "Reject All Cookies" and "Accept All Cookies". The two options need to be equally prominent and accessible. E.g., a banner cannot have an "accept all cookies" option and then make the user click "more options" to get to a "decline cookies" button, as companies have been sued for structuring the banner this way, as it can be seen as deceptive to consumers.

c. Digital Advertisements and Profiling

i. Digital advertising, profiling of consumers for advertising purposes, and sharing consumer personal information with third parties for profiling or advertising purposes is another potential landmine that can lead to privacy lawsuits.

ii. These practices are not illegal, as long as the consumer has appropriate notice and an opportunity to consent or opt-out.

iii. Further, if a business sells a consumer's personal information, the business must notify the consumer at the time of collection and post a "do not sell or share my personal information" link where consumer's can opt-out of the sale of their data to be in compliance with California's privacy law, the California Consumer Privacy Act (CCPA), and avoid lawsuits from California consumers. Cal. Civ. Code 1.81.5 § 1798.135.

d. Incident Response Plans

i. Incident response plans allow companies to respond swiftly to data breaches and cyber attacks by developing a written, understood plan of action in the event that a cyber incident occurs.

ii. The response plan should identify key personnel responsible for responding to the breach, their roles, and their contact information. This should include contact information for an attorney, who should be engaged early on to cloak the response in attorney-client privilege.

iii. It should also include a communication strategy that allows the organization to communicate safely, and perhaps without the benefit of a compromised company email server and potentially without internal internet access. Secure messaging and voice calls are preferred.

iv. The response plan should have detailed preparations for identifying the breach, containing it, eradicating the malicious access, and recovering systems following eradication of the threat.

v. Finally, the plan should have a notification protocol, which should go through legal counsel.

C. Breach Notifications

a. Notifications to the government, business partners, vendors, and affected consumers are critical and often legally required in the wake of a data breach.

b. Notifications to consumers, in particular, are critical, as this notice typically becomes a crucial aspect of litigation arising out of the data breach. Notifications to consumers should be drafted by an attorney and include:

i. An accurate description of the incident.

ii. A summary of the steps the company is taking to protect consumer information.
iii. A summary of the steps consumers should take to ensure that their information is not used inappropriately.
iv. Access to credit monitoring subscriptions, where applicable.
v. Notifications should be timely, as delays in notifying consumers can exacerbate damages and strengthen a consumer's actionable claims in a breach lawsuit.

c. Legal Requirements for Breach Reporting - Virginia 18.2-186.6:

i. **"Notice" means:**
1. Written notice to the last known postal address in the records of the individual or entity;
2. Telephone notice; or
3. Electronic notice;

ii. **Notice required by this section shall include a description of the following:**
(1) The incident in general terms;
(2) The **type of personal information** that was subject to the unauthorized access and acquisition;
(3) The general acts of the individual or entity to **protect the personal information from further unauthorized access**;
(4) A **telephone number** that the person may call for further information and assistance, if one exists; and
(5) **Advice** that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.

iii. **"Personal information"** means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a resident of the Commonwealth, when the data elements are neither encrypted nor redacted:
1. Social security number;
2. Driver's license number or state identification card number issued in lieu of a driver's license number;
3. Financial account number, or credit card or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial accounts;
4. Passport number; or
5. Military identification number.

iv. **Timing of Notice** – no unreasonable delay.

v. If **unencrypted or unredacted personal information was or is reasonably believed to have been accessed and acquired by an**

unauthorized person and causes, or the individual or entity reasonably believes has caused or will cause, identity theft or another fraud to any resident of the Commonwealth, an individual or entity that owns or licenses computerized data that includes personal information **shall disclose any breach of the security of the system following discovery or notification of the breach of the security of the system to the Office of the Attorney General and any affected resident of the Commonwealth without unreasonable delay.**

Notice required by this section may be **reasonably delayed to allow the individual or entity to determine the scope of the breach** of the security of the system and restore the reasonable integrity of the system.

vi. **Consumer Reporting Agency Notification** - In the event an individual or entity provides notice to more than 1,000 persons at one time pursuant to this section, the individual or entity shall notify, without unreasonable delay, the Office of the Attorney General and all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined in 15 U.S.C. § 1681a (p), of the timing, distribution, and content of the notice.

II. Privacy Litigation – Trends and Strategies

A. In addition to litigation over data breaches and the ensuing harm to consumers, private litigation focused on alleged misuse of consumers' personal information has exploded in recent years.

B. Much of this litigation has focused on website tracking and profiling practices employed by entities that collect and process consumer data. As discussed further below, a disproportionate percentage of privacy lawsuits are filed in California due to California's more restrictive privacy laws. While jurisdiction for these lawsuits lies in California, defendants throughout the country have been targeted regardless of their geographic location.

C. California Invasion of Privacy Act (CIPA) lawsuits have become incredibly common. CIPA is a decades-old wiretapping law that is unaffiliated with California's much more recent data privacy law, but is now being applied to online web tracking as opposed to its original purpose of preventing wiretapping and tracing. CIPA lawsuits are filed in California by California plaintiffs, but have become common basis for lawsuits against companies across the country, even those that conduct no business in California. Other states, including New York, have seen a similar rise in website tracking cases. These lawsuits generally allege that the website owner "tracked" a user's digital movements without their consent via web tracking technologies, in violation of CIPA.

a. These cases emphasize the importance of notifying consumers of gaining consent from consumers prior to using web-tracking technologies like cookies, pixels, web beacons, and session replays.

b. These technologies, though they function somewhat differently, generally track a user's clicks, web sessions, mouse activity, and similar movements as the user navigates across a website. This information is generally valuable for profiling consumers for purposes of digital advertising.

c. These are fact intensive cases, and the rapidly increasing body of case law is generally very defense-friendly. Nevertheless, these cases often produce quick settlements, as one only needs to visit a website a single time to allege a CIPA violation. Entities that are sued under CIPA must choose between funding a legal defense to these legally questionable claims or settling quickly simply to avoid the expense of litigation.

d. ***Greenley v. Kochava Inc.*, 684 F. Supp. 3d 1024 (S.D. Cal. 2023)** - Plaintiff, David Greenley, filed a putative class action against the defendant, Kochava Inc. Kochava operates as a data broker, offering software development kits (SDK) that software application ("app") developers use to integrate tracking and data collection capabilities into their apps. The SDK enables Kochava to intercept and compile this data from app users. Kochava then packages and sells customized data feeds to its clients, including AirBNB, Disney+, and Kroger, for targeted advertising and to analyze consumer foot traffic at various locations.

   Greenley alleged that Kochava collected sensitive personal information without obtaining consent from him or other users. This data included precise geolocation data and communications details sourced from applications that used Kochava's SDK. **The plaintiff further argued that this data exposed highly sensitive locations, such as visits to healthcare facilities, thereby risking the exposure of his protected information and that of other similarly situated California residents.** He also noted that Kochava had since implemented a feature intended to prevent the collection of sensitive location data related to healthcare facilities.

   Greenly brought claims against Kochava under the California Constitution's privacy protections, the California Data Access and Fraud Act (CDAFA), the California Invasion of Privacy Act (CIPA), California Unfair Competition Law, and common law principles of unjust enrichment. Central to the plaintiff's arguments under CIPA was the assertion that Kochava's SDK functions as a pen register under the broad definitions of Cal. Penal Code § 638.50(b) and § 638.51 because it systematic captures routing and addressing information from electronic communications in an unauthorized manner. In response to these allegations, Kochava moved to dismiss for lack of standing and failure to state a claim. Specifically, Kochava challenged the plaintiff's CIPA claims, arguing

that the plaintiff had failed to identify a specific communication that had been intercepted.

The court dismissed the plaintiff's unfair competition and unjust enrichment claims, but allowed the CIPA and CDAFA claims to proceed. The court found that the plaintiff had alleged sufficient facts to support the assertion that Kochava's SDK met the statutory definition of a pen register. In evaluating the defendant's claim, the court noted that a plaintiff is only required to plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." In pleading a CIPA violation, a plaintiff is not required to identify a specific communication that was intercepted. In its decision, the court also noted the expansive statutory language of CIPA, clarifying that the statute covers not only traditional physical hardware, but also modern devices or processes capable of intercepting or collecting, routing, or addressing information from electronic communications.

e. ***Mirmalek v. Los Angeles Times Communications LLC*, 2024 U.S. Dist. LEXIS 227378 (N.D. Cal. Dec. 12, 2024)** - Plaintiff, Taliah Mirmalek, filed a putative class action against the defendant, Los Angeles Times Communications LLC. The defendant is the owner and operator of LATimes.com, which provides online news and information content. The plaintiff alleged that the defendant facilitated the installation of three third-party trackers, specifically TripleLift, GumGum, and Audiencerate, on the internet browsers of its website visitors. Specifically, Mirmalek contended that these trackers collected IP addresses without the users' consent or judicial authorization, thereby violating CIPA. The plaintiff further argued that these trackers qualify as pen registers within the meaning of CIPA. *Id.* at *4.

In response to these allegations, Los Angeles Times Communication moved to dismiss for failure to state a claim, arguing that Cal. Penal Code § 638.51(b)(1) and § 638.51(b)(5) precluded the plaintiff from asserting her claim. More specifically, the defendant maintained that it operated as a provider of electronic or wire communication service, which, according to its interpretation, permits the use of pen registers for operational, maintenance, and testing purposes, provided that user consent is obtained. *Id.* at *5.

The court denied the defendant's motion to dismiss, holding that the plaintiff had sufficiently alleged that the third-party trackers met the statutory definition of pen registers. Citing *Greenley*, the court noted the inclusive language of CIPA's definition of a pen register. *Id.* at *6. The court reasoned that these trackers required the use of a computing device to identify consumers, collect data, and correlate that information. *Id.* Additionally, the court reasoned that the information gathered by the third-party trackers, specifically geographic data that identified a device's state, city, and zip code, constituted addressing information under the statutory definition. In evaluating the defendant's claim, the court found that the defendant failed to adequately establish itself as a provider of electronic or wire communication services. The court reasoned that

the core function of Los Angeles Times Communications was to provide online news content, which does not satisfy the criteria under the statute. Id. at *7-10.

f. ***Zhizhi Xu v. Reuters News & Media Inc.*, 2025 U.S. Dist. LEXIS 26013 (S.D.N.Y. Feb. 13, 2025):** Plaintiff, Zhizhi Xu, filed a putative class action against defendant Reuters News & Media, Inc. Reuters operates Reuters.com. The plaintiff claimed that Reuters facilitated the installation of three third-party trackers, specifically Sharethrough, Oinnitag, and TripleLift, on the internet browsers of its website visitors. Specifically, Xu contended that these trackers unlawfully collected IP addresses without obtaining users' consent; thereby violating Cal. Penal Code § 638.51(a), which explicitly prohibits the installation or usage of a pen register without prior court authorization. The court found that Xu had not sufficiently pled a specific injury that courts have commonly recognized as supporting standing. Specifically, the court noted that Xu failed to demonstrate that he had received any targeted advertisements resulting from the actions of the trackers and, more critically, did not assert that any such advertising caused him concrete harm.

g. ***Gabrielli v. Insider, Inc.*, 2025 U.S. Dist. LEXIS 28788 (S.D.N.Y. Feb. 18, 2025):** Plaintiff, Jonathan Gabrielli, filed a suit against Insider. Insider operates a website that allows users to access published content. The plaintiff claimed that Insider facilitated the installation of third-party trackers, specifically Audiencerate, on the internet browsers of its website visitors. Specifically, he alleges that these trackers collected users' IP addresses their consent in violation of Cal. Penal Code § 638.51(a). *Id.* at *2. The court found that Gabrielle failed to establish an link between the IP addresses collected and his personal identity. The court reasoned that an IP address, in isolation, lacks the specificity necessary to uniquely identify an individual user, as the geographical data derived from an IP address is typically only as precise as a zip code. *Id.* at * 21-23.

h. ***Lakes v. Ubisoft, Inc.*, 2025 U.S. Dist. LEXIS 67336 (N.D. Cal. Apr. 1, 2025):** Plaintiffs filed a class action complaint against Ubisoft, alleging violations of CIPA under § 631. *Id.* at *3. Ubisoft operates a website that allows users to purchase video games containing pre-recorded video content. *Id.* The plaintiffs claimed that Ubisoft improperly disclosed their personally identifiable information to a third-party social media company, specifically Meta Platforms, without their consent by purposefully placing a tracking pixel on its website. *Id.* In its ruling, the court noted that Ubisoft's disclosures, presented to users when they first visit the website, adequately informed them regarding the company's use of cookies and tracking pixels. Accordingly, the court reasoned that users were not entitled to a reasonable expectation of privacy while engaging with the defendant's website. *Id.* at *10-12.

i. ***Washington v. Flixbus, Inc.*, No. 3:25-cv-00212-H-MSB (S.D. Cal. June 5, 2025):** Plaintiff, Charles Washington, filed a class action complaint against Flixbux, a company that operates website for bus ticket bookings. *Id.* at *2-3.

Washington claimed that Flixbus assisted a third-party social media company, specifically Facebook, in intercepting his personal communications without his consent. *Id.* This interception reportedly included personally identifiable information and confidential details related to his travel itinerary. The plaintiff further alleged that the defendant had not provided reasonable notice of its terms and conditions, thereby leaving users unaware of the data practices that could impact their privacy. The court concluded that Washington's acceptance of the defendant's terms constituted consent to the data practice the plaintiff challenged. *Id.* at *6-11.

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Only Clients Die. Lawyers Live Forever. Succession Planning for Lawyers

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Only Clients Die. Lawyers Live Forever!
Planning for the Unexpected as a Solo Practitioner or Small Firm Partner

W. William Gust
Lauren S. Eells
Gentry Locke Seminar
September, 2025

I. Build an ethics-compliant contingency plan for your law practice. Protect your clients and yourself! While this is not an ethics-specific presentation, there is no escaping the ethical duty we owe to our clients in the event of an unexpected event and we are no longer able to practice.

a. As a solo practitioner or partner in a small law firm, you have significant ethical responsibilities to your clients in the event you are no longer able practice, no matter the reason.

i. Expect the unexpected! Develop a complete contingency plan and put procedures in place to protect your practice, your clients and your family. A well-developed, comprehensive plan can safeguard against unintended consequences when the unanticipated happens.

ii. Never say never! No one ever plans to be involved in an accident or receive a life-altering diagnosis. Unexpected death, disability, diagnosis/illness, injury – despite the reason, you are obligated to protect client interests if you can no longer practice.

iii. Don't wait! Take steps now to put a plan in place while you still have control over your practice.

b. Key Themes

i. It is common sense to establish a contingency plan and lawyers have an ethical duty to make arrangements in the event of an unexpected transition or emergency.

ii. If something happens to a lawyer, what will happen to his or her clients and current matters?

1. You still have a duty to meet litigation and transactional deadlines in the event of unexpected death, injury or illness.

2. Missed deadlines and open matters left unattended can subject you to malpractice claims.

3. Keep your family in mind as you plan and make intentional, well-thought out decisions of how your practice will continue or wind-down in the event of unexpected death or illness and include the plan in your personal estate planning.

iii. Important steps to consider doing now:

1. Establish a secure plan for your files. *See Section II below.*

2. Establish a plan to assure sufficient cash to continue your office operations for a reasonable time, with an authorized signatory to access such funds. *See Section III below.*

3. Consider entering into a Contingency/Practice Succession Agreement with other attorneys or law firms for coverage. *See Section IV below.*

4. Make sure your estate planning documents have specific directions and authorizations for the personal representative to deal with the logistics of transitioning your practice. *See Section V below.*

5. Obtain appropriate insurance. Consider professional liability tail insurance. *See Section VI below.*

iv. How this works in real life:

1. A lawyer either has his/her own solo practice or a lawyer in a two-person law firm has a partner who practices in a different field of law. The lawyer enters into a Practice Succession Agreement with another firm that specializes in his/her area of practice to assume responsibility for his/her clients in the event of his/her death, disability, illness, or retirement.

c. Ethics Rules – Contingency Plans

i. **ABA Formal Op. 92-369** provides that a lawyer's duty of competent representation includes arranging to safeguard clients' interests in the event of the lawyer's death, disability, impairment, or incapacity.

1. To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the

maintenance and protection of those client interests in the event of the lawyer's disability or death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death. A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the disabled or deceased lawyer to notify them of the disability or death and to request instructions in accordance with Rule 1.15.

ii. **Comment [5] to Rule 1.3 Diligence** of the Virginia Rules of Professional Conduct ("VRPC") provides that "a lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity."

iii. **Rule 1.6(b)(4) Confidentiality of Information** of the VRPC provides that "to the extent a lawyer reasonably believes necessary, the lawyer may reveal… such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity, or incompetence"

II. File Management.

a. Establish a written file retention and destruction policy. Having a strong file management policy in place for your practice will make an emergent transition easier.

i. The policy should address different forms of file retention (e.g. paper and electronic) and comply with ethics rules (further discussed below).

ii. Communicate the policy to your clients in your engagement letter and closing letter.

iii. Upon termination of representation, review a client's file to determine the retention period that applies based on the written policy, and ensure that all original documents and any copies of documents

requested by the client are returned to the client within a reasonable time.

iv. Make sure to address the file retention policy in the Contingency/Practice Succession Agreement.

b. Ethics Rules to consider when drafting a your file retention policy:

i. **Rule 1.15(c)(4) Safekeeping Property** requires that client trust account records be "preserved at least five calendar years after termination of the representation or fiduciary responsibility."

ii. **Rule 1.16(e)** provides that upon termination of representation, all original, client-furnished documents and any originals of legal instruments or official documents in the lawyer's possession (e.g. wills, corporate minutes) should be returned within a reasonable time to the client or the client's new counsel upon request.

iii. **LEO 1305:** A lawyer does not have a general duty to preserve indefinitely all closed or retired files. A lawyer should screen all closed files in order to ascertain whether they contain original documents or other property of the client, in which case the client should be notified of the existence of those materials and given the opportunity to claim them. A lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the statute of limitations period has not expired or which may not be readily available to the client through another source. Similarly, a lawyer should be cognizant of the need to preserve materials which relate to the nature and value of his or her legal services in the event of any action taken by the client against the lawyer. The lawyer may at the appropriate time dispose of the remaining files in such a manner as to best protect the confidentiality of the contents.

iv. **ABA Informal Opinion 1384:** In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based on their obvious relevance and materiality to matters that can be expected to arise. A lawyer should preserve for an extended time an index or identification of the files that the lawyer has destroyed or disposed of.

III. Office Operations

a. Establish a plan to assure sufficient cash to continue or wind-up office operations of the practice in the event of an unexpected emergency or transition.

   i. Consider retaining funds in your law practice bank account to cover costs in the event of a transition. Life insurance and disability insurance can also help to provide financial stability and flexibility. Insurance options are further discussed in Section VI below.

   ii. Designate an authorized signatory to access your law practice bank account in the event of your death, disability, impairment or incapacity. Ensure that the authorized signatory is informed of your office operations, applicable ethics rules, and contingency plan.

b. Office Procedures

   i. Consider developing a manual that outlines basic office procedures (i.e. file retention and destruction, fees and billing, marketing). Make sure other lawyers/support staff in your practice know where this can be accessed. Consider updating this manual no less than annually.

   ii. Make sure someone else is able to access your emails, case schedules, documents, social media, accounting platforms, client contact information and vendor contact list. (*See* Uniform Fiduciary Access to Digital Assets Act, Virginia Code § 64.2-116, et seq.)

IV. Written Agreement with a Responsible Attorney to Protect Client Interests

a. Pursuant to Comment [5] of Rule 1.3 Diligence, a lawyer has an ethical responsibility to plan for client protection in the event of his or her death, disability, impairment, or incapacity. If the lawyer is a solo practitioner, he or she should consider entering into a written agreement with an attorney (the "Responsible Attorney") who can assume responsibility for closing his or her law practice and arranging for the protection of client files. These agreements are commonly referred to as Contingency Agreements or Practice Succession Agreements. [*Sample agreement attached*.]

b. Although a lawyer generally has a duty to maintain confidentiality of client information, Rule 1.6(b)(4) Confidentiality of Information permits the lawyer to disclose such information to the Responsible Attorney as is reasonably necessary to protect client interests in the event of his or her death, illness, disability, impairment, or incapacity.

c. The written agreement should authorize the Responsible Attorney to:

i. Contact clients for instructions on transferring files
ii. Disposition of closed files
iii. Obtain extensions of time in litigation (if needed)
iv. Collect accounts receivable/bill for and collect fees on open files
v. Payment of outstanding liabilities of the office
vi. Take appropriate actions to close/transition/sell your law practice in accordance with ethics rules.

d. It is important to note when considering who you name as the Responsible Attorney, if the Responsible Attorney also represents you in an attorney capacity, the Responsible Attorney may be prohibited from representing your clients, as he or she would have fiduciary obligations to you.

e. Consider whether you would like for an authorized signatory to access your client trust account in the event of your incapacity, extended absence due to illness, disability or death. If you do not designate an authorized signatory, client money will remain in the trust account until a court order is granted. You may want to consider someone other than the Responsible Attorney, as this provides for checks and balances. Make sure the person is a trusted individual, as you remain responsible for any misappropriated funds.

f. Regularly review and update the written agreement with the Responsible Attorney (and/or agreement with your authorized signatory), as circumstances change.

g. Consider putting a Durable Special Power of Attorney in place. [*Sample Special Power of Attorney attached*.]

i. This allows you to name a lawyer attorney-in-fact to act on your behalf regarding matters related to your clients and your law practice in the event you are incapacitated or otherwise unable to do so.
ii. Lawyer attorney-in-fact is limited to the scope of powers you choose to put in the document, including but not limited to the power to notify clients, deal with financial institutions, examine files and records, sell the law practice, etc.

V. Estate Planning Considerations

a. Do your clients, colleagues and family a favor and have a well-organized, comprehensive estate plan in place that, in addition to family and financial matters, also addresses protection of clients, files, and the future of your law practice. The most flexible and comprehensive estate plan involves using a revocable trust structure accompanied by other important ancillary documents.

i. Revocable Trust

1. A Revocable Trust offers privacy and significant flexibility.

2. You can designate a lawyer or special trustee (i.e. your law firm or a colleague) to specifically address the closure or transition of your law practice. If you have already entered into a separate agreement with a Responsible Attorney to close your practice (as mentioned above in Section IV), note this in your Trust document and authorize your personal representative to carry out the terms of the agreement.

3. If you own an interest in a law firm, make sure provisions in the Operating Agreement or Partnership Agreement coordinate with your estate plan. Best case: assign your interest to your Revocable Trust to avoid a public record generally required as a part of the probate process.

4. Other practical considerations:

    a. Avoids the probate process otherwise applicable to tangible and intangible property passing under a Last Will and Testament.

    b. Allows seamless transition of your practice with specific instructions, rather than folks wondering what to do, how to do it and who can do it.

    c. Assures that your assets go where you want them to go and how you want them to go.

    d. Children can direct the funds into lower level trusts for their children.

    e. Can protect against beneficiaries' domestic situations (divorce).

    f. Can protect against remarriage of surviving spouse. If premature death, surviving spouse usually remarries.

    g. It is best way to provide direction/instruction to your beneficiaries from the grave!

ii. Last Will and Testament

1. If you have a Revocable Trust in place, the Will would provide that the balance of your estate pour over into the Revocable Trust. Although the Will is public record and property passing pursuant to its terms subject to the probate process, the balance of the estate would be distributed pursuant to the terms of the Revocable Trust, which is not public record.

2. Identify an Executor to carry out administrative details of probate (if any assets in your estate are subject to probate), such as payment of creditors, filing federal and state tax returns, martialing assets into the trust if you have one in place and making a disposition of property.

3. Best case scenario is all of your assets are titled in the name of your Revocable Trust so there will be no need to use the Will, it is only there in the event you inadvertently missed transferring an asset to your Trust.

iii. Durable Power of Attorney

1. This document specifically authorizes a named individual to carry out your legal affairs in the event that you should become mentally or physically incapable of handling your own affairs. A "durable" Power of Attorney survives your incapacity.

2. Although cumbersome, a Power of Attorney is great to have in place if the need arises.

3. Consider an escrow arrangement:

a. Usually an attorney-in-fact immediately possesses the authority set forth in the Power of Attorney document.

b. In order to assure that the attorney-in-fact does not act before needed, you can request that a trusted individual (i.e. your attorney or a law firm) hold the Power of Attorney, and once certain circumstances are met, deliver the original document to the attorney-in-fact.

iv. Durable Medical Power of Attorney

1. This document specifically authorizes a named individual(s) to interact with your medical providers in the event that you are unable to communicate with such medical providers. Avoids the issues that can occur under Virginia's Health Care Decisions Act. Simply say what you want and who you want to implement it.

2. Establish a clear cascade of authorized agents so that the healthcare providers do not have to make a determination under the statutory default provisions.

v. Advance Medical Directive

1. The Health Care Decisions Act of Virginia authorizes you to formally state your desires regarding the providing, withholding, or withdrawal of life-prolonging procedures in the event of a terminal medical condition.

2. You may also appoint an agent to make health care decisions for you under specified circumstances if you are determined to be incapable of making an informed decision. You can direct your agent to follow your desires and preferences as stated in the Advance Medical Directive or as otherwise known to your agent.

3. You make the decisions and your agent simply implements them.

vi. A Note About Digital Assets

1. With the rise of social media, online advertising, and electronic data storage it is important to consider digital assets in the transition of your practice.

2. Consider including provisions in your estate documents that enables your personal representative or trustee to access and control digital assets, obtain passwords and other electronic credentials, and have rights and authority granted under the Virginia Uniform Fiduciary Access to Digital Assets Act (Va. Code § 64.2-116 et seq.).

3. You can also enable your Responsible Attorney or an attorney-in-fact under your Power of Attorney to access, use and control digital devices and digital assets related to your law practice.

VI. Insurance Considerations. Insurance is not only a helpful tool in times in of uncertainty to give your family and legal practice financial flexibility, it is the responsible thing to do as a solo practitioner or partner of a small firm. Below are some insurance options to ensure your practice and your loved ones have added financial protection.

a. Professional Insurance:
   i. Legal Malpractice Insurance.

1. Ensure your legal malpractice is up to date and sufficient for the types of matters you take.

ii. Professional Liability Insurance

1. Consider adding professional liability tail coverage. This is an add-on option that protects your business after the policy expires or is canceled.

b. Disability and Life Insurance

i. These products can add flexibility, financial stability and continuity for the practice.

ii. Both serve a different purpose, consider obtaining both if practical. Life insurance only helps if you are dead! Disability insurance can provide a financial safety net if you survive an accident but are severely injured, leaving you unable to work.

c. Liability Umbrella Policy – Why the heck not?

i. An umbrella policy provides an added layer of liability insurance that extends beyond the limits on a home or automobile policy. It provides additional protection in situations involving personal injury, bodily injury, or property damage.

d. Under-insured/Uninsured Motorist Coverage – Absolutely a must as part of your umbrella liability policy.

i. This form of coverage helps to pay for damage caused by an uninsured or under-insured driver.

ii. Obtain as much as possible. For example, some companies will provide $1 million liability limits on personal auto policies, which will automatically provide $1 million limits on the uninsured and underinsured coverage as well.

iii. Look for umbrella policies that allow you to match uninsured liability coverage with the liability coverage (i.e., $5mil liability coverage/$5 mil uninsured and underinsured coverage).

VII. Final Arrangements - If you do everything else, you may as well do this too!

ATTACHMENTS

1. Sample Durable Special Power of Attorney for Attorney at Law regarding Law Practice
2. Sample Contingency/Practice Succession Agreement

SAMPLE FORM

DURABLE SPECIAL POWER OF ATTORNEY
FOR ATTORNEY AT LAW REGARDING LAW PRACTICE

KNOW ALL MEN BY THESE PRESENTS: That I, [NAME], a licensed attorney-at-law and member of the _____ State Bar, whose _____ State Bar Number is _____, whose date of birth is _____, of _____ County, [STATE], presently residing at _____, and whose law practice office address is _____ (and who, for purposes of recordation is the "Grantor"), has made, constituted and appointed and by these presents, do make, constitute and appoint _____, a [STATE] licensed attorney-at-law and member of the _____ State Bar, whose _____ State Bar Number is _____, as my true and lawful attorney-in-fact, referred to herein as "my lawyer attorney-in-fact," for the following limited purposes. I intend by this instrument to create a Durable Special Power of Attorney, to be used by my lawyer attorney-in-fact for purposes of dealing with my law practice, in the event of my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf (for purposes of this instrument, my "law practice" is defined as [TITLE OF LAW OFFICE], with my office in _____, [STATE] as [TITLE OF LAW OFFICE], or any other successor in interest, may operate an office for the practice of law.

The affidavit of my lawyer attorney-in-fact that I have disappeared, am disabled, incapacitated or incompetent, shall be conclusive proof of the facts stated in such affidavit. In determining whether I have disappeared, am disabled, incapacitated, incompetent, or unable to act on my own behalf, my lawyer attorney-in-fact may act upon such evidence as my lawyer attorney-in-fact shall deem reasonably reliable, including, without limitation, communications with members of my family or other reliable sources, or written opinions of one or more medical doctors duly licensed to practice medicine.

I hereby relieve my lawyer attorney-in-fact from any liability for actions taken in good faith under this instrument. All actions taken pursuant to this Durable Special Power of Attorney by my lawyer attorney-in-fact shall be taken in compliance with all applicable [STATE] laws governing attorneys-at-law and all rules and regulations of the [STATE] Supreme Court and the [STATE] State Bar, including, without limitation. Rules of Professional Conduct adopted by the [STATE] Supreme Court and Legal Ethics Opinions; to the extent that any provision of this Durable Special Power of Attorney should be in conflict with any such laws, rules, regulations, or legal ethics opinions, such laws, rules, regulations, or legal ethics opinions shall govern.

This power of attorney and the authority of my said lawyer attorney-in-fact hereunder shall not terminate in the event of my disappearance, disability, incapacity, or incompetence, or because of lapse of time and shall be deemed a "durable" power of attorney under the laws of the [STATE].

My true and lawful lawyer attorney-in-fact is appointed to manage all property associated with my law practice, real and personal (when the term "property" is hereinafter used, it shall include, whenever applicable, both real and personal property, tangible, intangible and mixed, and any interest or right therein) and to act in and conduct all matters related to my law practice, and for

SAMPLE

that purpose and in my name, place and stead, and for my use and benefit, and as my act and deed, to do and execute, or to concur with persons jointly interested with myself therein in the doing or executing of, all or any acts, deeds and things, that is to say:

1. **Power To Inventory And To Conduct His/Her Own Conflict Of Interest Check**. To inventory all client case files and client property under my control, and to conduct his/her own conflict of interest check before delving into client files; in the event that my lawyer attorney-in-fact identifies such a conflict of interest, my lawyer attorney-in-fact shall appoint a Successor or Substitute lawyer attorney-in-fact as provided in paragraph 14 below, to deal with that file.

2. **Power To Notify Clients.** To notify all of my clients of my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf, and to take whatever action my lawyer attorney-in-fact deems advisable to protect the interests of my law practice and the interests of my clients, until such time as my clients have obtained substitute counselor have engaged my lawyer attorney-in-fact as substitute counsel.

3. **Power To Safeguard Clients Files and Property.** To safeguard client's files and property, and to deliver client's files and property as directed in writing by the clients, obtaining proper receipts therefor.

4. **Power To Deal With Financial Institutions.** To open accounts for my law practice with, to add to, withdraw from, or close accounts for my law practice (including operating or general accounts, and attorney escrow or trust accounts) in financial institutions, including, without limitation, banks, trust companies, brokerage firms, mutual fund companies, or other institutions, or to draw upon any such financial institution, corporation, firm, association, or individual for any sum or sums of money or other property to which I may be entitled as I might or could do; to execute and deliver any instruments, checks, or other negotiable instruments with respect to the accounts with such financial institutions; to contract for any services rendered by such financial institutions; upon receipt of any checks, drafts, dividends, interest, income, or moneys, to deposit the same in the appropriate account in my name in any financial institution;

5. **Power To Enter My Law Office**. To enter my law office and to use the office equipment and supplies as necessary;

6. **Power Regarding Mail And Courier Deliveries**. To receive, to sign for, and to open my law practice mail (including electronic mail (email)) and courier deliveries and to process and respond to them, as necessary; To deal with the United Postal Service;

7. **Power To Examine Files And Records.** To examine files and records of my law practice and to obtain information as to any pending matters requiring attention;

SAMPLE

8. **Power To Obtain Client Consent To Obtain Extensions Of Time**. To obtain client consent to obtain extensions of time and to contact opposing counsel and courts/agencies to obtain extensions of time;

9. **Power To Apply For Extensions Of Time**. To apply for extensions of time regarding any pending matters;

10. **Power To Prepare And File Accountings and Bills**. To prepare and file or submit accountings and bills to my clients and others;

11. **Power To Preserve Client Confidences And Secrets**. To preserve confidences and secrets of my clients and to protect the attorney-client privilege;

12. **Power To Screen Files For Conflicts Of Interest**. To screen my client files for conflicts of interest on the part of my lawyer attorney-in-fact or any other attorney to whom a client is referred;

13. **Power To Mediate And Arbitrate**. To submit to mediation and/or arbitration on my behalf;

14. **Power To Appoint Successor Or Substitute Lawyer Attorney-in-Fact**. If my lawyer attorney-in-fact is unable or unwilling to act on my behalf under this instrument, either as to a specific matter, or overall, then my lawyer attorney-in-fact is empowered to appoint in writing another discreet and competent attorney-at-law licensed in the [STATE] as a Successor or Substitute lawyer attorney-in-fact to act on my behalf, with full powers to act under the terms of this instrument;

15. **Power To Collect Accounts Receivable**. To collect accounts receivable belonging to my law practice.

16. **Power To Deal With Creditors.** To determine the nature and amounts of all claims of creditors, including clients, of my law practice and to deal appropriately with said creditors.

17. **Power To Sell My Law Practice**. To sell my law practice, partially or in its entirety, including good will, in accordance with Rule 1.17 of the [STATE] Rules of Professional Conduct, or any successor or replacement Rule. My lawyer attorney-in-fact is empowered to purchase my law practice, partially or in its entirety, but only if such purchase is pursuant to a written agreement entered into between my lawyer attorney-in-fact and me prior to my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf.

18. **Power To Request Appointment Of Receiver**. If deemed necessary and appropriate in my lawyer attorney-in-fact's discretion, to seek the appointment of my lawyer attorney-in-fact or other discreet and competent attorney-at-law as receiver, in accordance with the provisions of [STATE] Code Section 54.1-

SAMPLE

3900.01, or any successor replacement statue.

19. **Power To Terminate Attorney-Client Relationship And To Appear Before Court Or Other Tribunal To Request Withdrawal Of Appearance.** To terminate the attorney-client relationship with a client by proper notice to the client, and to appear before court or other tribunal to request withdrawal in a pending matter;

20. **Power To Sell, Encumber And Dispose Of Real and Personal Property.** To sell, pledge or otherwise encumber or dispose of any real or personal property belonging to my law practice;

21. **Power To Purchase Real And Personal Property.** To buy, or otherwise acquire, any property, including stocks, bonds. Treasury- securities, or other investments, all in a prudent manner;

22. **Power To Invest And Manage.** To Invest or reinvest, lease or let, or otherwise manage any of the property of my law practice, real and personal, tangible and intangible; to make investments and re-investments on behalf of my law practice, being bound by the Prudent Investor Rule, including, without limitation, taking the following actions: exercising all rights with respect to investments which my law practice now owns or may hereafter acquire, including, without limitation, the right to buy, sell, grant security interests in, or otherwise deal with such investments; opening, establishing, utilizing, or closing investment and brokerage accounts; to sell, assign, endorse and transfer any stocks, bonds, options or other securities of any nature whatsoever standing in the name of my law practice, and to execute any and all documents necessary to effectuate the foregoing, including, without limitation, stock and/or bond powers and certificates, and affidavits of domicile;

23. **Power To Sue And Defend.** To commence or carry on, or to defend, at law or in equity, all actions, suits or other proceedings touching my law practice, or touching anything in which my law practice may be in any wise concerned;

24. **Power To Demand And Receive.** To demand, settle, collect, sue for, receive, enforce payment of, submit to arbitration or mediation, compromise, receive, give receipts or discharges for, or make such other appropriate disposition regarding such matters related to my law practice as my lawyer attorney-in-fact deems appropriate, of all moneys, rights to payment, property (real and personal, tangible and intangible), securities, debts, chattels, causes of action, or other property whatsoever now belonging or hereafter to belong to my law practice;

25. **Power To Settle, Compromise, Arbitrate Or Mediate.** To settle or compromise, or submit to arbitration or mediation, all debts, taxes, accounts, claims, causes of action or disputes between my law practice and any other person or entity, regardless of the identity of the person or entity involved;

SAMPLE

26. **Power To Borrow**. To make or endorse promissory notes, or to renew the same from time to time, without personal liability on the part of my lawyer attorney-in-fact;

27. **Power To Deal With Taxes And Tax Agencies**. To inspect, prepare, execute or file income, information, or other tax returns or forms and to act on behalf of my law practice in dealing with any office of the Internal Revenue Service, any office of the [STATE] Department of Taxation, or any office of any other federal, state or local tax department or agency in connection with any income, withholding, employment or other tax matters (including, without limitation: signing a waiver agreeing to a tax adjustment or an offer of waiver of restriction on assessment or collection of a tax deficiency, or a waiver of notice of disallowance of claim for credit or refund; signing a consent to extend the statutory time period for assessment or collection of a tax; signing a closing agreement under Section 7121 of the Internal Revenue Code; receiving a refund check and negotiating it on behalf of my law practice; representing me at a conference with the tax agency; filing a written response on my behalf with the tax agency; signing employment tax returns; receiving confidential tax information); designating in writing any other person or agent to act on my behalf regarding the foregoing tax matters;

28. **Power To Employ And Dismiss**. To employ or dismiss agents, accountants, attorneys, or others, and to compensate them from assets or income from my law practice;

29. **Power Regarding Insurance.** To apply for, take out, renew, maintain, pay premiums on, modify, make claims against, collect benefits from, surrender, or cancel fire, casualty, professional liability, or other liability insurance policies on me, on my lawyer attorney-in-fact, or any property of my law practice; to apply for, take out, renew, maintain, pay premiums on, modify, make claims against, take loans against, collect benefits from, surrender or cancel policies of disability insurance, long term care insurance, office overhead insurance, life insurance, or other insurance; the foregoing powers apply to private and public insurance plans, including, without limitation Medicare, Medicaid, SSI, and Workers Compensation;

30. **Power To Execute Instruments.** Regarding my law practice, to execute, acknowledge or deliver in my name, or to sign my name to, any deed, contract, instrument, certificate or document, including giving all necessary covenants, warranties and assurances, and to sign, seal, acknowledge and deliver the same; to execute disclosures, disclaimers, affidavits or any other documents on my behalf;

31. **Power Regarding Safe Deposit Boxes**. Regarding my law practice, to rent or surrender safe deposit boxes, and to enter any safe deposit boxes which I may now or hereafter have and to remove any of the contents therefrom or to place items therein;

SAMPLE

32. **Power Deal With Any Governmental Agency.** Regarding my law practice, to act on my behalf in dealing with any federal, state or local governmental department or agency;

33. **Power To Resign As Fiduciary And To Appoint Successor Fiduciary.** When authorized by the governing instrument, to resign any position which I may hold as fiduciary, and to appoint a successor fiduciary in my place and stead, including the appointment of my lawyer attorney-in-fact as such successor fiduciary;

34. **Power To Petition Court To Permit My Resignation as Fiduciary And For Appointment Of Substituted Or Successor Fiduciary.** To petition the Court of appropriate venue and jurisdiction on my behalf to permit my resignation as fiduciary and to request the appointment of a substituted or successor fiduciary in my place and stead, including the appointment of my lawyer attorney-in-fact as such successor or substituted fiduciary;

35. **Power To Maintain, Repair, Or Demolish Property.** To contract with and to pay contractors or workmen to maintain, make repairs to, or demolish any real or personal property which I may own in connection with my law practice;

36. **Power To Enforce Acceptance Of This Durable Special Power Of Attorney**. To initiate any litigation that may be necessary in order to require third parties to recognize the validity of this power of attorney and to seek damages, including punitive damages, for injury to me and my law practice because of any nonrecognition;

37. **Power To Coordinate And Cooperate With Any Other Fiduciary Acting On My Behalf.** To coordinate and cooperate with any other attorney-in-fact or other fiduciary acting on my behalf, in order to carry out the powers conferred on my lawyer attorney-in-fact herein;

38. **Power To Notify Professional Liability Insurance Carriers.** To notify any professional liability insurance carriers of my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf, and to cooperate with such insurance carriers regarding matters related to my insurance coverage, including the addition of my lawyer attorney-in-fact as an insured under my policy or policies.

Except as otherwise limited in this instrument, I do give and grant unto my said lawyer attorney-in-fact full power and authority to do and perform all and every lawful act, deed, matter and thing whatsoever in and about my law practice and property associated with my law practice as effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specially enumerated powers being in aid and exemplification of the power herein granted regarding my law practice and not in limitation or definition thereof; and I hereby ratify all that my said lawyer attorney-in-fact shall lawfully do or cause to be done by virtue of these presents.

SAMPLE

And I hereby declare that any act or thing lawfully done hereunder by my said lawyer attorney-in-fact shall be binding on me, and on my heirs, legal and personal representatives, and assigns, whether the same shall have been done before or after my death, or other revocation of this instrument, unless and until reliable intelligence or notice thereof shall have been received by any party who, upon the faith of this instrument, accepts my said lawyer attorney-in-fact as authorized to represent me.

I intend that this power of attorney be a substitute for the necessity of any court or agency proceeding to appoint a guardian, conservator, trustee, representative payee, receiver, or other similar fiduciary for my law practice, since I wish to avoid the necessity for such a proceeding; however, should it become necessary for the court or agency to appoint such a guardian, conservator, trustee, representative payee, receiver, or other fiduciary, I nominate my above named attorney-in-fact to be such guardian, conservator, trustee, representative payee, receiver, or other fiduciary. I intend that the agency created by this power of attorney shall not be subsumed, nullified, or in any way impaired by the court or agency appointment of such a guardian, trustee, conservator of my person or estate, representative payee, receiver, or any other similar fiduciary. I intend that any such fiduciary shall not be entitled to revoke, impair, or alter the agency relationship created by this power of attorney. I intend that, in accordance with the law of every state or other jurisdiction, including, in the Commonwealth of Virginia, the statutory provisions of **Title 11 of the Code of [STATE], 1950, as amended**, regarding survival of powers of attorney after appointment of a guardian, this power of attorney shall continue in force after any such appointment, and shall in every respect be superior to and prevail over any such appointment, regardless of the jurisdiction appointing the guardian, conservator, trustee, representative payee, receiver, or other fiduciary for the administration of my affairs regarding my law practice during my lifetime.

Any provision of the law to the contrary, no person or entity (other than a court of competent jurisdiction and the _____ State Bar) shall have the authority to require my said lawyer attorney-in-fact to disclose any information relating to the actions taken or not taken by my said lawyer attorney-in-fact hereunder, and no person or entity (other than a court of competent jurisdiction and the _____ State Bar) shall have the authority to inspect or to permit the inspection of the records maintained by my lawyer attorney-in-fact hereunder. Nonetheless, my lawyer attorney-in-fact may consent to the disclosure of such information and/or the inspection of such records if my lawyer attorney in fact is required to do so by court order or the order of the _____ State Bar.

My lawyer attorney-in-fact shall be entitled to the payment of reasonable compensation from my law practice for any services which my lawyer attorney-in-fact renders under this instrument. Reasonable compensation shall be deemed to be the usual and customary hourly rate in effect at the time services are rendered, and such compensation may vary from time to time based on such rates.

I reserve the right to amend in writing or to revoke this durable special power of attorney. This power of attorney may be revoked only by a document signed by me, expressly revoking this power of attorney, and recorded in the Clerk's Office of the Circuit Court of the City or County in which my law practice is located, or if more than one location, in the City or County where my

SAMPLE

primary office is located. The revocation of this power of attorney shall not affect the validity of any action taken by my said lawyer attorney-in-fact prior to the revocation. This power of attorney expressly supersedes and revokes all other durable special powers of attorney heretofore made by me regarding my law practice.

The actions authorized by this power of attorney are intended to create only the authority to act; this power of attorney is not intended to create any obligation to act on the part of my lawyer attorney-in-fact to act. My lawyer attorney-in-fact shall neither be liable for the failure to act nor for the failure to consider taking any of the actions authorized in this power of attorney. My lawyer attorney-in-fact, while acting in good faith, is released from any liability to me or my estate for any acts or failures to act of my lawyer attorney-in-fact, except for willful misconduct or gross negligence. I agree to indemnify and hold my lawyer attorney-in-fact harmless from any liability and expense, including attorney's fees, that my lawyer attorney-in-fact may incur as a result of serving under this power of attorney, except for liability or expense arising from willful misconduct or gross negligence. This indemnification agreement does not extend to any acts, errors, or omissions of my lawyer attorney-in-fact while rendering or failing to render professional services in my lawyer attorney-in-fact's capacity as attorney for my former clients, after such clients have become clients of my lawyer attorney-in- fact.

This power of attorney is granted in and shall be governed by the laws of the [STATE]; however, I intend that this power of attorney be universally recognized and that it be universally admissible to recordation.

The captions used in this Durable Special Power of Attorney have been used for ease of reference, and are not to be used for its interpretation.

This Power of Attorney is executed pursuant to the laws and statutes of the [STATE] and shall not be affected or terminated by my subsequent disability, incapacity or mental incompetence, and all acts done or performed by my lawyer attorney-in-fact pursuant to this Power of Attorney during such disability, incapacity or mental incompetence on my part shall bind me as fully as if I were not subject to such disability, incapacity or mental incompetence.

By signing below, I indicate that I am emotionally and mentally competent to make this document, and that I understand the purpose and effect of this instrument. The signature of my lawyer attorney-in-fact is shown below.

SAMPLE

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ____ day of _____, 20_____.

_____
Lawyer

_____
_____, Lawyer
Attorney-in-Fact

[NAME] signed the foregoing durable special power of attorney in my presence. I am a disinterested witness and I am not the spouse or a blood relative of [NAME].

_____ _____
Witness Witness

[STATE]
CITY/COUNTY OF _____ , to-wit:

I, the undersigned Notary Public in and for the jurisdiction aforesaid, in the [STATE], do hereby certify that [NAME] whose name is signed to the foregoing power of attorney dated _____, 2022, has acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand on _____, 20_____.

_____
Notary Public

My commission expires: _____

SAMPLE

PRACTICE SUCCESSION AGREEMENT

THIS AGREEMENT, dated for identification this ____ day of _____ , 20___, by and among _____ ("*Solo Practitioner / Small Firm*") and _____ ("Successor Practitioner / Successor Firm");

WITNESSETH THAT:

RECITALS

A. *Solo Practitioner* currently practices law through *Small Firm*;

B. *Solo Practitioner / Small Firm* desires to provide for successor representation for his or her clients upon his or her death, disability, or retirement;

C. Successor Firm is willing to assume responsibility for *Solo Practitioner / Small Firm*'s clients in the event of *Solo Practitioner*'s death, disability, or retirement on the terms and conditions herein; now, therefore,

IN CONSIDERATION OF the mutual covenants herein, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, it is AGREED as follows:

ARTICLE I
Definitions

For purposes of this Agreement, the following words have the meaning ascribed to them:

"Case" means a _____ case for which *Solo Practitioner / Small Firm* has been retained, whether or not suit has been filed. Litigation and other law files that are not these types of _____ cases are excluded from this Agreement.

"Disabled" means that *Solo Practitioner* is absent from his or her full time duties at *Small Firm* on account of physical, mental, or emotional condition, disease, or injury, for 180 consecutive days or 352 days in any three (3) consecutive years or (ii), *Solo Practitioner*'s attending physician (and, if Successor Practitioner so elects, a second physician acceptable to him or her) determines that, due to physical, mental, or emotional condition, disease, or injury, *Solo Practitioner* more likely than not will be permanently unable to resume his or her customary duties as a lawyer on a full-time basis within one (1) year following such determination. Notwithstanding the foregoing, if *Solo Practitioner* would be considered disabled under the terms of *Small Firm*'s partnership agreement then in effect, he or she shall be "disabled" for purposes of this Agreement.

"Retire" means to voluntary or involuntary withdraw from the full time practice of law, regardless of age, provided *Solo Practitioner* shall not be deemed to be retired for purposes of this Agreement until *Small Firm* has received notice of same.

SAMPLE

ARTICLE II
Transfer of Cases

It is the intent of the parties that Successor Firm will assume responsibility for all Cases that do not present disqualifying conflicts, subject to client approval.

2.1 Conflict Check. Upon *Solo Practitioner*'s dying, retiring, or becoming disabled, *Solo Practitioner*, or his or her personal representative or other legal representative, and Successor Practitioner, shall meet with Successor Firm representatives to review the identities of the parties to *Solo Practitioner*'s Cases. Successor Firm shall forthwith perform a conflict check and promptly advise of any Cases that present conflict problems. Conflicted Cases shall not be subject to the remaining terms of this Agreement.

2.2 Notice to Clients. Upon culling conflicted Cases, the parties will prepare a joint notice to *Solo Practitioner*'s clients advising of the client's rights under Virginia law, stating that Successor Practitioner has agreed to take on the client's Case, subject to client and, if necessary, court approval, such notice to comply with all Virginia rules governing attorney conduct.

2.3 Transfer of Files. Upon receipt of approval of a transfer of a client's Case file to Successor Firm, the party receiving approval shall notify the others, whereupon *Solo Practitioner / Small Firm* will make the client's file available for pickup by Successor Practitioner / Successor Firm. *Small Firm* shall render a receipt for each file received. If Successor Practitioner / Successor Firm desires to photocopy a file, it may do so at *Solo Practitioner*'s cost. Successor Practitioner / Successor Firm shall be responsible for all work on the Case from and after the earlier of the date of notice that all approvals have been obtained or the date the file is picked up by or otherwise comes into Successor Practitioner / Successor Firm's possession.

2.4 Unapproved Transfers. *Solo Practitioner*, or Successor Practitioner / Successor Firm if *Solo Practitioner* is deceased or disabled, may take any action he, she, or it chooses to dispose of any Case for which all requisite approvals for transfer to Successor Practitioner / Successor Firm have not been obtained within sixty (60) days of notice to the Case client.

2.5 Excessive Conflicts. *Solo Practitioner*, or his or her personal representative or other legal representative, may terminate this Agreement if the number of Cases which Successor Practitioner / Successor Firm declines to assume exceeds 10% of the total number of Cases.

ARTICLE 111
Allocation of Earned Fees

3.1 Fee Division. The parties intend to comply with all rules of the Supreme Court of Virginia, Virginia State Bar governing the sharing of legal fees. The parties intend that *Solo Practitioner / Small Firm* divide the fees received on a Case in an equitable manner based roughly on the amount of work each party contributes to the Case. Therefore, unless *Solo Practitioner*, or *Solo Practitioner*'s personal representative or other legal representative, and Successor Practitioner / Successor Firm agree otherwise, fees received on Cases assumed by Successor Practitioner / Successor Firm shall be divided as provided in Schedule A attached hereto and incorporated herein.

SAMPLE

Should a Case not fall precisely in any one category described in Schedule A, the parties will in good faith endeavor to reach an equitable division.

3.2 Costs Advanced. *Solo Practitioner / Small Firm* and Successor Practitioner / Successor Firm will each be entitled to recoverable costs advanced by each, respectively with respect to each Case.

3.3 Collection: Payment. *Small Firm* will collect and hold in trust for *Solo Practitioner*, his or her estate, Successor Practitioner / Successor Firm, as applicable, all fees due to *Solo Practitioner* or his or her estate hereunder and all recoverable costs advanced by *Solo Practitioner / Small Firm* on the Cases assumed by Successor Practitioner / Successor Firm, and will promptly remit all such sums as and when collected to *Solo Practitioner* or to *Solo Practitioner*'s personal representative or other legal representative, or to Successor Practitioner / Successor Firm, as applicable. If *Solo Practitioner* receives less than the full amount due from the client for any Case, amounts received shall be divided on a *pro rata* basis, such that fee receipts shall be divided in accordance with Schedule A and cost recoveries will be divided based on the relative proportions of costs advanced by each of *Solo Practitioner / Small Firm* and Successor Practitioner / Successor Firm on that client's Case.

ARTICLE IV
Relationship to Other Agreements

Solo Practitioner / Small Firm and Successor Practitioner / Successor Firm agree that payments received by *Solo Practitioner* or his or her estate under this Agreement shall be applied toward amounts that may otherwise be due to *Solo Practitioner* or his or her estate by reason of the liquidation of *Small Firm* upon *Solo Practitioner* 's death, disability or retirement, as provided in Successor Practitioner / Successor Firm's partnership agreement.

Small Firm may be dissolved upon *Solo Practitioner*'s death or retirement, in which event Successor Practitioner, if he or she was a partner in *Small Firm* at the time of such event, shall succeed to all of the rights of Successor Firm herein.

ARTICLE V
Disputes

If any dispute arises under this Agreement, the parties shall utilize the mediation and, if necessary, binding arbitration services of the Virginia State Bar Fee Dispute Resolution Program, whose decision shall be final; but if that Program declines to make its services available for a dispute hereunder, the parties may resort to any available legal and equitable remedies.

ARTICLE VI
Revocation

The parties desire that this Agreement remain in full force and effect through performance; however, recognizing that personal professional services are involved, that rules governing attorneys and their relationships with each other and with clients are subject to change, and that

SAMPLE

changes in personnel may occur at *Small Firm* as well as at Successor Firm, this Agreement may be terminated by *Solo Practitioner* or by *Small Firm* upon sixty (60) days' advance written notice to the other, except that *Small Firm* may not terminate if *Solo Practitioner* dies or becomes disabled prior to the end of such sixty (60) days or if *Solo Practitioner* has Retired.

ARTICLE VII
Notices

For purposes of this Agreement, notices shall be effective when delivered in person or one (l) day following delivery to FedEx or other nationally-recognized courier prepaid, addressed as follows:

If to *Solo Practitioner / Small Firm*:

ADDRESS

If to Successor Practitioner / Successor Firm:

ADDRESS

A party may change his, her, or its address for notices by giving notice to the other parties in the manner provided above.

ARTICLE VIII
Miscellaneous

This Agreement comprises the entire understanding of the parties with respect to the subject matter herein. It may be amended only by writing signed by the parties charged with performance under the amended provision. This Agreement shall be governed by and construed in accordance with the laws of Virginia. Should any provision herein be determined by a court of competent jurisdiction to be void or unenforceable, the remaining provisions shall remain in full force and effect and the parties shall endeavor in good faith to effectuate in a valid and enforceable manner the intent of the void or unenforceable provision. Neither party may assign any rights or obligations under this Agreement without the consent of the other, which may be withheld in the other's sole discretion.

SAMPLE

_____
Signature *Solo Practitioner*

SMALL FIRM NAME

By: _____
Its authorized partner

SUCCESSOR FIRM NAME

By: _____
Its authorized partner

_____
Signature Successor Practitioner

SAMPLE

Schedule A

Fee Division

Stage of Case at *Solo Practitioner*'s death. etc.	***Solo Practitioner*'s % Share**	***Small Firm*'s Share**
Preliminary: Met with client, file opened	15	85
Initial: Medical records obtained. insurer put on notice, experts not retained	25	75
Underway: Suit filed & experts retained	35	65
	50	50
Pretrial: Trial date scheduled. discovery substantially complete	70	30
Tried to Verdict: Case has been tried but appeal is filed and prosecuted or defended by *Small Firm*		

SAMPLE



GENTRY LOCKE
Attorneys

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"'Ethics' for $1000 Alex:" Helping Your Practice Stay Out of Legal Jeopardy

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"Ethics" for $1000, Alex:
Helping your practice stay out of legal JEOPARDY

Gentry Locke Seminar

September 5, 2025 — Roanoke

Presenters:
David R. Berry
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Format Overview: The presentation cover topics on various Rules of Professional Conduct. 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 16 hypotheticals, which are arranged by topic. The answers are at the end of the presentation along with the text of the applicable Rules.

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Rule 1.1 — Competence

#1. You are a Virginia-licensed attorney who typically handles residential real estate closings. A close friend asks you to represent her in a complex child custody modification involving interstate jurisdictional issues and potential claims of parental alienation. You agree out of loyalty and assume you can "figure it out as you go," relying on generative AI for guidance. You do not associate with or consult a family law attorney.

Have you violated Rule 1.1?

A) Yes, because you undertook representation without the legal knowledge or a sufficient plan to acquire the knowledge necessary for the representation.
B) No, because you made a good faith effort to educate yourself before appearing in court.
C) No, because the client waived any concerns by choosing you as counsel.
D) Yes, but only if the client is prejudiced by your performance.

Rule 1.7 – Conflict of Interest: General Rule

#2. You are a partner in a law firm. A long-standing client of the firm, Developer X, approaches you for representation in a new matter to acquire land adjacent to or including property owned by Mrs. Smith. However, several months ago, your law partner assisted Mrs. Smith, another current client, in drafting her will. She disclosed confidential information about her finances and her land, including her strong emotional ties to it and desire to keep it in the family.

Can you represent Developer X in acquiring the land?

A) Yes, because you did not work on the will and did not participate in any conversations with Mrs. Smith.
B) Yes, so long as you determine that a disinterested lawyer would find the client could agree to such representation.
C) Yes, so long as you tell Developer X and Mrs. Smith and they both agree.
D) Yes, if you and your partner can diligently and competently represent both clients and both clients consent in writing.

Rule 1.3 – Diligence

#3. You have a passionate client who wants to press every conceivable advantage in a recently-filed case against your client's former employer. But you and the employer's attorney are scheduled to present together at an upcoming conference the same day that the employer's responsive pleading is due. The employer's attorney requests a one-week extension and you agree without consulting with your client, who is irate to later learn about the extension after the initial deadline passed.

Should you have been more diligent?

A) Yes, you should have declined the extension since the employer's attorney might have missed the deadline and the employer might have defaulted.
B) Yes, you should have informed the client about the extension sooner.
C) No, you properly exercised professional discretion.
D) No, declining the extension could have jeopardized your presentation.

Rule 1.5(e) - Fee Sharing

#4. Which of the following is <u>not</u> true of fee-sharing relationships between lawyers of different firms?

A) The client must consent to the participation of all lawyers involved.
B) The terms of the fee division must be disclosed to the client.
C) Each lawyer involved in a fee-splitting arrangement must assume full responsibility to the client.
D) The total fee must be reasonable.

Rule 1.6 - Confidentiality of Information

#5. You recently concluded representing a well-known local architect in a commercial lease dispute. During representation, your client casually mentioned that she was planning to seek inpatient treatment for substance use and asked that hearings not be scheduled during a certain week. The matter settled, and no public filings or disclosures were made regarding her health.

Several weeks later, you are speaking with a reporter doing a profile on local business leaders. When the reporter brings up your former client's name, you say, "She's doing much better now—she took some time off recently for a stay at a facility, but she's back and doing great." You meant the comment supportively, with no intent to harm.

Have you violated Rule 1.6?

A) No, because the matter is closed and your statement was well-intentioned.
B) No, because the information was not part of the legal claim and was shared casually.
C) Yes, because Rule 1.6 protects any information gained in the professional relationship that would embarrass or be detrimental to the client.
D) Yes, but only if the client files a grievance.

Rule 1.8 – Conflict of Interest: Prohibited Transactions

#6. You have been retained to perform various legal services for ABC Partnership, including (1) preparing the written partnership agreement, (2) eventually incorporating the partnership, (3) drafting contracts between the current partnership and third parties, and (4) eventually drafting contracts between the future corporation and third parties. ABC Partnership wants to pay you in stock of the future corporation.

Can you accept?

A) Yes, so long as the stock value is a fair and reasonable amount to pay for your services.
B) Yes, so long as the transaction and terms are fully disclosed in writing in a manner which the client can reasonably understand, and the client consents in writing.
C) Yes, so long as the client is given a reasonable opportunity to seek the advice of independent counsel.
D) Yes, so long as A, B, and C, are all true.

Rule 1.4 – Communication

#7. An attorney and a client have never met face-to-face or spoken on the phone. For years, they communicated exclusively by email. Neither the client nor the attorney voiced any concerns with this arrangement until the client's case was dismissed on summary judgment. At that point, for the first time, the client complained that a sit-down meeting or telephone call was needed because the attorney's long emails were boring.

Did the attorney violate the duty to communicate?

A) Yes, an attorney must speak with each client, either in person or by phone, at least once.
B) No, the client never requested a phone call or sit-down conversation.
C) Maybe, depending on what the attorney's emails said.

Rule 1.9 - Duties to Former Clients

#8. Attorney Adams and Attorney Byrd previously practiced together in the same two-lawyer firm, during which time Attorney Byrd represented Husband in a divorce case against Wife. Attorney Adams did no work on the case and learned no information about it. Attorney Byrd left the firm after the divorce became final. Husband and Wife later had a custody dispute over the child born of their marriage. The court later sought to appoint Attorney Adams as the child's guardian ad litem, but, before the appointment, Attorney Adams disclosed to the court the facts regarding the previous association with Attorney Byrd. Wife's attorney nevertheless objects to the appointment of Attorney Adams on the grounds that Attorney Adams has a conflict of interest since his firm previously represented the Husband.

May Attorney A serve as guardian ad litem?

A) Yes, Attorney Adams has no conflict of interest.
B) Yes, but only if Wife waives the conflict.
C) No, Attorney Adams' entire firm is conflicted out.

Rule 3.3 — Candor Toward the Tribunal

#9. You represent a landlord in a bench trial over unpaid rent. The landlord testifies that she sent a five-day pay-or-quit notice to the tenant in early March. After her testimony, while reviewing your file over lunch, you find a scanned copy of the notice with a date stamp of April 1. If the notice was sent on April 1, the notice would be ineffective. You realize the landlord was mistaken—she testified confidently, but inaccurately, about the date. Opposing counsel doesn't raise the issue. You consider whether to clarify the testimony.

Are you ethically obligated to correct the record?

A) Yes, because you know your client gave false material testimony to the court.
B) No, because the error was unintentional and you didn't elicit it.
C) Yes, but only if your client consents.
D) No, because it is opposing counsel's responsibility to impeach the testimony.

Rule 4.4 – Respect for Rights of Third Persons

#10. You are a litigation associate handling discovery in a contract dispute. Opposing counsel's firm did not draft the contract in question. All the documents produced by opposing counsel are transmitted electronically through a third-party discovery platform. During first level review of the documents, you notice the name of a transactional attorney in town on emails back and forth with the opposing party.

What should you do?

A) Continue reading. These documents were produced in discovery, so it is fine for you to read them.
B) Stop reading. Immediately notify opposing counsel and follow any instructions to return or destroy the information.
C) Continue reading. You hate the transactional attorney anyway, so hopefully you find some dirt to smear his name with.
D) Stop reading and filter out all the communications with the transactional attorney's name. Don't review those.

Rule 3.1 – Meritorious Claims and Contentions

#11. An attorney has a client whose neighbor built an ugly fence. The client is mad and wants to pursue legal action. After hours of research, the attorney comes up with a good-faith argument to have the fence removed based on precedent from the colonial era. The attorney then advises the client of this, but cautions that it will cost a fortune to litigate and the client will likely lose in the end. With a smile, the client instructs the attorney to proceed.

May the attorney do as directed?

A) Yes, the attorney has a good-faith argument based on existing law.
B) No, the attorney's research revealed the client will likely lose in the end.
C) Maybe, depending on the cost of litigating versus the likelihood of success.

Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants

#12. Attorneys A and B are solo practitioners who represent opposing parties in pending litigation. During the course of the litigation, Attorney B poached Attorney A's secretary. Now, the secretary wants to continue working on the case and tell Attorney B everything the secretary learned while working for Attorney A.

Is Attorney B allowed to sit back and listen while the secretary divulges confidential information about the case?

A) Yes, the secretary is not a lawyer subject to the Rules of Professional Conduct.
B) No, Attorney B should screen the secretary from the case.
C) Maybe, depending on whether the secretary discloses the information voluntarily.

Rule 4.2 – Communication with Person Represented by Counsel

#13. You represent a plaintiff in a breach of contract case against Acme Corp. You know Acme is represented by outside counsel. One afternoon, while attending a local business association luncheon, you are seated next to Acme's CFO. During casual conversation, she mentions that Acme "might be willing to talk settlement soon." You respond, "I think that would be a good idea—your side has some exposure here." You do not mention the lawsuit or her lawyer by name.

Did you violate Rule 4.2?

A) Yes, because you knowingly discussed the subject of the representation with a represented person.
B) No, because the conversation was casual and not initiated for the purpose of negotiation.
C) Yes, but only if the CFO is personally involved in litigation strategy.
D) No, because she initiated the discussion.

Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

#14. You are a senior partner at a mid-sized law firm in Virginia. You supervise several junior associates, including Lisa, a recent law school graduate. You've been heavily involved in a complex litigation matter and, as a result, haven't closely monitored the work of your junior attorneys. One day, you learn that Lisa, without consulting you or any other supervising attorney, filed a pleading that contains inaccurate statements of fact and failed to inform the client about a critical hearing date. The client has now suffered harm, and the court has issued a show cause order. When you confront Lisa, she explains that she misunderstood procedural rules but didn't feel comfortable asking for help.

What should you do now to comply with Rule 5.1, which addresses the responsibilities of partners, managers, and supervisory lawyers?

A) Since you are a senior partner, you must take reasonable efforts to ensure the firm has policies in place to help all lawyers comply with ethical rules. You should raise this issue with other senior partners, and help create or improve policies related to compliance with the ethical rules.
B) Since you directly supervise Lisa, you are responsible for reasonably overseeing her work, which includes guiding her to avoid such errors. You should discuss with Lisa what should have happened, and how to avoid similar future scenarios.
C) With Lisa, take the appropriate remedial action.
D) All of the above.

Rule 7.1 – Communications Concerning a Lawyer's Services

#15. An attorney has prevailed in 50 of 50 trials, and the attorney wants the world to know. Boasting "100% trial success," the attorney's website states that he has never lost in court and he never intends to. Every word on the attorney's website is truthful, so he does not include any sort of disclaimer.

Is the truthful website permissible?

A) Yes, all that matters is whether the statements on the website are truthful.
B) Yes, disclaimers are outdated, overused, and unnecessary.
C) No, every attorney's website must include a legal disclaimer.
D) No, the website is likely misleading to the public.

Rule 8.4 – Misconduct

#16. A lawyer represents a plaintiff in a personal injury suit. The defendant is represented by her insurance company's staff counsel. After all other aspects of a settlement offer were negotiated, the defendant's lawyer notified the plaintiff that the insurance company requires plaintiff's lawyer to agree to indemnify the insurer against liens in the event that they are not paid from the settlement proceeds or the plaintiff.

Has the defendant's lawyer committed professional misconduct?

A) No, the defendant's attorney is protecting his client.
B) No, not if the plaintiff's attorney places funds for indemnification in an escrow account.
C) Yes, the defendant's attorney should not have asked or required the plaintiff's attorney to agree to indemnify the defendant's insurer.

Answers.

Question #1

Answer: A – *Yes, you violated Rule 1.1 by undertaking the representation without the legal knowledge or a sufficient plan to acquire the knowledge necessary for the representation.*

Rule 1.1 requires competent representation, which includes legal knowledge, skill, thoroughness, and preparation. Specifically, the rule states:

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

Comment [2] clarifies that lawyers may handle unfamiliar matters if they prepare adequately or associate with counsel who is competent. In this case, however, the attorney took neither step. Good faith is insufficient where the lawyer fails to attain baseline competence before taking action.

Rule 1.1 demands more than good intentions. It requires an attorney to bring or acquire the knowledge, skill, thoroughness, and preparation necessary to represent a client competently. Comment [2] to Rule 1.1 allows lawyers to accept matters outside their regular field if they prepare adequately or associate with a lawyer who is experienced in that area. The failure to do either here, in a complex and multi-jurisdictional field, exposes the client to risk, as explained by Comment [5]: "major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence."

Here, the attorney undertook the representation with insufficient knowledge to adequately represent the client. While an attorney may acquire the knowledge necessary to represent a client during the course of the representation, this requires an adequate plan to acquire the necessary knowledge to competently represent the client. Relying on generative AI alone to acquire the necessary knowledge was not an adequate plan or preparation for the representation. AIs are trained on datasets and are thereby limited by the information within them – *i.e.*, information that may be out of date, biased, or incomplete. Additionally, AI is not programmed to provide accurate reports of the information it has; rather, it is trained to create new content and therefore may "hallucinate" information in service of that training.

Question #2

Answer: D – *Yes, if you and your partner can diligently and competently represent Developer X and Mrs. Smith, and both of them consent in writing.*

Rule 1.7 provides the "general rule" for conflicts of interest:

(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.

In light of this rule, Mrs. Smith's desire to keep the land in the family is directly adverse to Developers X's desire to acquire the land. Under subpart (b), however, you may still represent Developer X so long as both Developer X and Mrs. Smith agree after consultation and the other four requirements of the rule are satisfied. That said, the commentary to the rule cautions if a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

Also bear in mind that, if you move forward with the representation of Developer X, you must also ensure compliance with Rule 1.6, which addresses the 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.

Accordingly, without Ms. Smith's consent, you may not reveal "information gained in the professional relationship that [she] has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to [her]." This likely includes Mrs. Smith's desire to keep the land in the family, as this would most likely be detrimental to her.

Question #3

Answer: B – *Yes, you should have diligently informed the client about the extension sooner.*

Rule 1.3 addresses "diligence" and what that means for attorneys:

> (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
>
> (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

The commentary to Rule 1.3 clarifies that a lawyer "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." The key is "commitment and dedication to the interests of the client and [] zeal in advocacy upon the client's behalf" – the antithesis of which is "procrastination."

Critically, though, "a lawyer is not bound to press for every advantage that might be realized for a client." Lawyers may instead exercise "professional discretion in determining the means by which a matter should be pursued." This could – and often does – mean that "a more collaborative, problem-solving approach [may be] preferable to an adversarial strategy."

Here, then, "B" is the best answer: you should have informed the client about the extension sooner – particularly given the client's strongly held views about pressing any legal advantage. "A" is incorrect because you were not required to "press for every advantage that might be realized for [the] client," although you certainly could have taken that approach. Alternatively, "D" is incorrect because diligence is not measured by whether there might be "opposition, obstruction or personal inconvenience to a lawyer." Finally, "C" is not the best answer because "professional discretion" is no substitute for "reasonable diligence and promptness in representing a client" – including keeping the client reasonably informed.

Bear in mind that "diligence in representing a client" extends to all facets of the representation, including communication with the client. *See infra* at p. 18. The lack of diligence in this hypothetical flows from the failure to promptly communicate with the client as opposed to the extension itself.

Question #4

Answer: C – *it is not true that each lawyer involved in a fee-splitting arrangement must assume full responsibility to the client.*

Rule 1.5(e) addresses fee sharing between lawyers who are not in the same firm:

> (e) A division of fees may be made only if:
>
> (1) the client is advised of and consents to the participation of all the lawyers involved;
>
> (2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
>
> (3) the total fee is reasonable; and
>
> (4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

Generally speaking, the commentary to Rule 1.5(e) clarifies that "[a] division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm." This is allowed, as it "facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well." The arrangement is "most often [] used when the fee is contingent and the division is between a referring lawyer and a trial specialist."

The committee commentary goes on to clarify that Rule 1.5(e) "eliminates the requirement . . . that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation." This former requirement "was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement."

Note, however, that a fee-sharing is only permissible if the client consents after "full disclosure," including "a delineation of each lawyer's responsibilities to the client." Also note that the lawyers (and firms) involved in a fee-sharing arrangement must avoid conflicts of interest and comply with the rules applicable to the client-lawyer relationship in general. *See* Rules 1.1-1.18.

Question #5

Answer: C – *Yes, because Rule 1.6 protects any information gained in the professional relationship that would embarrass or be detrimental to the client.*

As explained above, Rule 1.6 prohibits lawyers from revealing information protected by the attorney-client privilege as well as "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." *See supra* at pp. 11-12. The only exceptions are for disclosures that the client authorizes after consultation, disclosures that are "impliedly authorized in order to carry out the representation," and disclosures for the reasons "stated in paragraphs (b) and (c)" of Rule 1.6. *Id.*

None of Rule 1.6's exceptions apply here. Virginia rule on confidentiality is broader than the ABA rule and prohibits the disclosure of information "gained in the professional relationship" and not simply information "relating to the representation of a client." Because the stay at an inpatient facility is embarrassing or likely detrimental to the client, the attorney may only disclose such information with the client's consent. Additionally, Comment [18] makes clear that the duty of confidentiality continues after the relationship has terminated.

Question #6

Answer: D – *Yes, you make accept stock of the future corporation as payment for your services, provided that: (a) the stock value is a fair and reasonable amount, (b) the transaction and terms are fully disclosed in writing in a manner the client can reasonably understand and consent to in writing, and (c) the client is given a reasonable opportunity to seek the advice of independent counsel.*

Rule 1.8 governs "prohibited transactions" and it states, in full:

(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.

For purposes of this hypothetical, the operative language is found in Rule 1.8(a). In addition, LEO 15693 provides additional guidance based on prior Disciplinary Rule 5:104(A), which was largely consistent with today's Rule 1.8(a). For its part, LEO 1593 cautions that the attorney must be sure to "keep paramount [the corporation's] interests" ahead of the "personal desires of any person or organization," including the lawyer's own. With that primer, LEO 1593 continues:

> [I]t is not per se improper for an attorney to accept compensation in the form of corporate stock for legal services rendered to a corporation and to its predecessor partnership, so long as the attorney feels his independent professional judgment will not be affected by his status as a stockholder, the client consents after full disclosure by the lawyer of the potential conflicts of interest, and provided that the transaction is not unconscionable, unfair or inequitable when made.

Here, then, the best answer is "D" – all of the above. *See also* Rule 1.5 ("A lawyer's fee shall be reasonable."

Question #7

Answer: C – *Maybe, the attorney may or may not have violated the duty to communicate, depending on what the attorney said in the emails to the client.*

Rule 1.4 covers "communication" between attorneys and clients:

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

The commentary to Rule 1.4 begins with the fundamental premise that lawyers have a "continuing duty to keep the client informed" as well as "advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen." This means "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."

But the commentary also acknowledges that the appropriate level of communication will vary depending on the nature of the representation and each unique client. Generally speaking, "the information to be provided is that appropriate for a client who is a comprehending and responsible adult." Ultimately, though, "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for communication consistent with the duty to act in the client's best interests" while respecting "the client's overall requirements as to the character of representation."

Meanwhile, LEO 1791 recognizes that there is "no *per se* requirement in the rules that information be provided to a client in person." Rather, attorneys must ensure their clients have sufficient information to participate intelligently and make informed decisions, regardless of whether that information is provided "in a meeting, in a phone call, or in any particular form of communication." *Id.* In short: the critical consideration "is *what* information was transmitted, not *how*." (emphasis original).

Question #8

Answer: A – *Yes, Attorney Adams may serve as guardian ad litem.*

Rule 1.9 does not trigger a conflict of interest for Attorney Adams because that rule states, in full:

> (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
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Rule 1.9 does not apply because: (1) Husband was not a former client of Attorney Adams, (2) neither Attorney Adams nor his firm represent a party in the matter, and (3) Attorney Adams did not acquire knowledge of any confidential information by way of Attorney Byrd's prior representation of Husband.

Similarly, Rule 1.10(b) does not impute Attorney Byrd's information to his former firm:

> (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the former associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Since Attorney Adams had no knowledge related to the matter, there is no imputed conflict.

Finally, note that the child's parents do not need to consent to the representation in order for the court to permit Attorney Adams to serve as guardian ad litem. LEO 1725 explains that if an attorney is appointed guardian ad litem for a child and senses a potential conflict, "the attorney, before appointment, must make the same full disclosure to the court that he or she would make to a *sui juris* client for an informed consent to the representation." Attorney Adams did that here by promptly advising the court of the prior relationship with Attorney Byrd.

Question #9

Answer: A – *Yes, you are ethically obliged to correct the record because you know your client gave false material testimony to the court.*

Rule 3.3 governs "candor toward the tribunal," and it states that:

> (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

Here, Rule 3.3(a)(4) imposes an affirmative duty to take reasonable remedial measures if the lawyer has offered evidence that he or she ***later*** learns is false. The rule does not distinguish between intentional lies and good-faith mistakes. Once you know the testimony is incorrect and material, the duty to correct it applies – even if the falsity was innocent. Comment [10] also makes clear that while there may be a conflict with Rule 1.6,

> the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

Question #10

Answer: B – *Stop reading, immediately notify opposing counsel, and follow any instructions to return or destroy the information.*

Rule 4.4 addresses "respect for rights of third persons," and it states that:

> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
>
> (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.

Rule 4.4(b) provides the answer to this hypothetical. Meanwhile, Comment [2] clarifies that this rule also applies to "embedded data (commonly referred to as 'metadata'), that is subject to being read or put into readable form." That said, "Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer and that it contains privileged information."

Question #11

Answer: A – *Yes, the attorney may advance a good-faith argument based on existing law.*

Rule 3.1 speaks to situations where attorneys may, or may not, pursue legal action:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The commentary to Rule 3.1 clarifies that what this means is lawyers have "a duty not to abuse legal procedure." The duty of diligence and zealous advocacy, in other words, has limitations – such that lawyers may no "benefit" their clients by pursuing "frivolous" claims.

Importantly, though, "the law is not always clear and [it] is never static." A claim or theory is not necessarily "frivolous" just because the lawyer does not think it will prevail. The question is whether the lawyer has a good-faith argument based on existing law, or a good-faith argument for a change or expansion of the law. If not, or "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person," then the action is "frivolous."

Question #12

A) **Answer: B** – *No, Attorney B should screen the secretary from the case.*

Rule 5.3 governs an attorney's ethical responsibilities regarding non-lawyer assistants and employees. It states:

> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Meanwhile, the commentary to Rule 5.3 clarifies that lawyers "must give [secretaries, investigators, law student interns, paraprofessionals, and other 'assistants'] appropriate instruction regarding the obligation not to disclose information relating to representation of the client . . . ."

Here, then, Rule 5.3 (and the accompanying commentary) required Attorney A and B to *both* ensure that the secretary understood the critical importance of maintaining client confidentiality. That was as true of Attorney A before the secretary left A's firm as it was of Attorney B when the secretary joined B's firm. With respect to Attorney B, however, Rule 5.3 also requires more.

LEO 1800 opines that Attorney B must not only advise the secretary of the importance of confidentiality, but also screen the secretary from the case. This additional step is "to ensure Rule 5.3 compliance." And while "[n]umerous factors will determine what is necessary for effective screening in any given instance," LEO 1800 identifies six "possible elements that could support an effective screen": (1) educating the secretary not to discuss prior work on the case, (2) confirming the secretary did not bring files or documents, (3) educating existing attorneys/staff not to discuss the case with the secretary, (4) precluding the secretary from accessing the file, (5) developing a written policy consistent with (1)-(5), and (6) flagging the file as restricted access.

Question #13

Answer: A – *Yes, you violated Rule 4.2 because you knowingly discussed the subject of the representation with a represented person.*

Rule 4.2 addresses "communication with persons represented by counsel," and it states in full:

> 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.

This prohibition applies to organizational clients, and as Comment [7] makes clear, includes officers and managing agents (like the CFO) whose statements may bind the entity or who direct the legal response to the litigation. There is no need for the CFO to be personally involved in the strategy.

The rule is triggered even in informal settings; casual contact is no defense when substantive legal issues are discussed. You did not simply exchange pleasantries; you acknowledged litigation exposure and referenced settlement, both of which relate directly to the subject of the representation. The fact that the CFO raised the topic does not relieve you of the duty to refrain. Comment [3] to the rule is clear that the initiation by the person does not change the application of the rule. Only opposing counsel may authorize the discussion.

Question #14

Answer: D – *As a supervisory lawyer, you should: (a) make reasonable efforts to ensure the firm has policies in place to help all lawyers comply with ethical rules, (b) discuss the matter with Lisa and provide oversight/guidance to avoid similar situations in the future, and (c) take appropriate remedial action alongside Lisa.*

Rule 5.1 addresses the "responsibilities of partners and supervisory lawyers," which require that:

> (a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Here, then, the best answer is "D" – all of the above – because A, B, C are partial answers that correspond with the subparts of Rule 5.1.

A is required under Rule 5.1(a), which states that partners or lawyers with managerial authority must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

B is required under Rule 5.1(b), which states that lawyers with direct supervisory authority over other lawyers must "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

C is required under Rule 5.1(c)(2), which holds a lawyer responsible for another lawyer's violation of the Rules of Professional Conduct if that lawyer is a partner, has managerial authority or directly supervises the other, and "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Question #15

Answer: D.

Rule 7.1 governs what lawyers may say about themselves and the services they offer:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

While the text of Rule 7.1 says nothing about "truthful" statements, the commentary clarifies that the rule also prohibits "[t]ruthful statements that are misleading." There are at least two ways in which a truthful statement may be misleading: (1) "if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading," or (2) "if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

In particular, the commentary explains that "[a] communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading." The question is whether the communication (whether a website, billboard, etc.) would "lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." On balance, "an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public."

Question #16

Answer: C – *Yes, the defendant's attorney is committing misconduct by asking the plaintiff's attorney to agree to indemnify the defendant's insurer.*

Rule 8.4 prohibits lawyers from, among other things, inducing other lawyers to violate the Rules of Professional Conduct. In particular, Rule 8.4(a) states:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Here, then, the threshold question is whether the plaintiff's attorney may agree to indemnify the defendant (or the defendant's insurer) for any third-party lien claim against the settlement proceeds. LEO 1858 provides the answer.

LEO 1858 begins by identifying and explaining the baseline problem: "the plaintiff's lawyer may not agree to indemnify the defendant's insurer for future claims resulting from the plaintiff's failure to pay liens which he was obligated to pay from the settlement proceeds." This would be a violation of Rule 1.8(e) because the "indemnification agreement would obligate the lawyer to pay the client's debts," which "constitutes improper financial assistance to the client." In addition, to the extent the insurer refuses to settle unless the lawyer agrees to indemnification, the proposal itself would create a conflict of interest under Rule 1.7(a). That is because "the lawyer's personal interest in avoiding liability for the debts of his client may be at odds with the client's desire to settle the case," meaning the "lawyer cannot reasonably be expected to provide an objective evaluation of whether the settlement is in his client's best interests."

Whether or not the plaintiff's lawyer ultimately agrees to indemnification, however, the defense lawyer independently violated Rule 8.4(a) by conditioning settlement on that requirement. In short: "The [defense] lawyer's insistence that the plaintiff's lawyer enter into this indemnification agreement, as a condition to settlement, is an inducement to the plaintiff's lawyer to violate Rules 1.7(a) and 1.8(e).

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Trial and Error – Avoiding Waiver in Virginia's Appellate Courts

Gentry Locke Seminar

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I. ERROR MUST BE PRESENTED TO THE TRIAL COURT FIRST

A. The Contemporaneous Objection Rule: "No ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review." Rule 5:25; *see also* Rule 5A:18; Code § 8.01-384(A).

1. "The contemporaneous objection rule, embodied in Rule 5A:18 in the Court of Appeals and Rule 5:25 in this Court, is based on the principle that a litigant has the responsibility to afford a court the opportunity to consider and correct a perceived error before such error is brought to the appellate court for review." *Williams v. Gloucester Sheriff's Dep't*, 266 Va. 409, 411 (2003).

2. "Specificity and timeliness undergird the contemporaneous-objection rule." *Flowers v. Commonwealth*, 84 Va. App. 143, 158 (2025) (quoting *Bethea v. Commonwealth*, 297 Va. 730, 743 (2019)).

3. The purpose of the rule is to give the trial court an opportunity to rule intelligently on an issue. *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010).

4. A contemporaneous objection informs the trial judge of the action complained of in order to give the judge the opportunity to consider the issue and to take timely corrective action, if warranted, in order to avoid unnecessary appeals, reversals and mistrials. *Nusbaum v. Berlin*, 273 Va. 385, 402-403 (2007); *Robinson v. Commonwealth*, 13 Va. App. 574, 576 (1992).

5. Additionally, "a specific, contemporaneous objection gives the opposing party the opportunity to meet the objection at that stage of the proceeding." *Weidman v. Babcock*, 241 Va. 40, 44 (1991); *Flowers*, 84 Va. App. at 158.

6. The rule was adopted for the purpose of protecting the trial court from appeals based upon undisclosed grounds and to prevent the setting of traps on appeal. *Fisher v. Commonwealth*, 236 Va. 403, 414 (1988), *cert. denied*, 490 U.S. 1028 (1989); *Norfolk Southern R. Co. v. Lewis*, 149 Va. 318, 323 (1928).

7. "The rule is not intended, however, 'to obstruct petitioners in their efforts to secure writs of error, or appeals, but . . . to put the record in such shape that the case may be heard in th[e] [appellate court] upon the same record upon which it was heard in the trial court." *Scialdone*, 279 Va. at 437 (quoting *Kercher v. Richmond, Fredericksburg & Potomac R.R. Co.*, 150 Va. 108, 115 (1928)).

8. Unless the contemporaneous objection rule has been satisfied or an exception applies, appellate courts will not consider objections raised for the first time on appeal. *Wackwitz v. Roy*, 244 Va. 60, 63 (1992); *Hogle v. Commonwealth*, 75 Va. App. 743, 755 (2022) ("If a party fails to timely and specifically object, he waives his argument on appeal.").

B. The Scope of the Contemporaneous Objection Rule

1. The contemporaneous objection rule is not limited to evidentiary rulings or other rulings relating to incidents of the trial. *Lee v. Lee*, 12 Va. App. 512, 515 (1991). It also applies to issues, arguments, theories of recovery, legal findings, and legal conclusions, which must be raised in the trial court. *Id.*; *Riner v. Commonwealth*, 268 Va. 296, 325 (2005); *Berner v. Mills*, 38 Va. App. 11, 18 (2002), *aff'd*, 265 Va. 408 (2003); *Green v. Warwick Plumbing & Heating Corp.*, 5 Va. App. 409, 413 (1988); *Kendrick v. Nationwide Homes, Inc.*, 4 Va. App. 189, 192 (1987).

2. The contemporaneous objection rule applies in workers' compensation cases. Rule 5A:18; *see, e.g., Williams*, 266 Va. at 410 (affirming the Court of Appeals' refusal to consider an argument that was "neither raised nor previously addressed in the proceedings" before the commission).

3. The contemporaneous objection rule applies to administrative proceedings before the Virginia Department of Health Professions. *See, e.g., Doe v. Va. Bd. of Dentistry*, 50 Va. App. 626, 636-37 (2007).

4. The contemporaneous objection rule applies to arguments raising constitutional errors. *See, e.g., Riner*, 268 Va. at 325, n. 11 (refusing to consider on appeal an argument that the admission of hearsay violated the Confrontation Clause of the United States Constitution because only state law hearsay objections were made at trial); *Clark v. Commonwealth*, 78 Va.

App. 726, 767 (2023) ("Rule 5A:18 applies to bar even constitutional claims.") (quotation omitted).

5. But the rule does not apply to arguments or objections to a court's subject matter jurisdiction, which cannot be waived and may be challenged at any time – even for the first time on appeal. *Po River Water & Sewer Co. v. Indian Acres Club*, 255 Va. 108, 112 (1998); *Wackwitz*, 244 Va. at 63. Note, however, that other jurisdictional challenges – those that do not affect the trial court's subject matter jurisdiction – must be timely raised in the trial court. *See, e.g., Porter v. Commonwealth*, 276 Va. 203, 228-229 (2008) ("Jurisdiction is a term which can engender much confusion because it encompasses a variety of separate and distinct legal concepts.").

6. The rule also does not preclude subsequent reliance on new case law where the law has changed between trial and appeal, provided the objection was stated at trial. *Compare Darnell v. Commonwealth*, 12 Va. App. 948, 952 (1991) (where defendant objected at trial on double jeopardy grounds, the appellate court would consider a double jeopardy argument based upon a new United States Supreme Court case that was issued after the trial because case law has retroactive effect), *with Gheorghiu v. Commonwealth*, 280 Va. 678, 688-89 (2010) (where defendant failed to challenge venue in the trial court, the Court would not consider defendant's venue challenge on appeal, even though a new venue case was decided after his trial).

7. Moreover, when a party has timely objected, exceptions are not required after a trial court rules. Code § 8.01-384.

8. Finally, "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him . . . on appeal." Code § 8.01-384(A); *Jacks v. Commonwealth*, 74 Va. App. 783, 792-93 (2022) (addressing the merits of an appeal because the appellant "had no opportunity to object" when the circuit court acted "*sua sponte*, without a hearing, and outside the presence of . . . counsel").

C. The Ends of Justice Exception

1. The contemporaneous objection rule has a very narrow exception that permits appellate courts to review error raised for the first time on appeal "for good cause shown or to enable this Court to attain the ends of justice." Rule 5:25; Rule 5A:18.

2. "Application of the ends of justice exception is appropriate when the judgment of the trial court was error and application of the exception is necessary to avoid a grave injustice or the denial of essential rights." *Charles v. Commonwealth*, 270 Va. 14, 17 (2005) (applying the "ends of justice" exception because the trial court's error resulted in an excessive and void sentence that would deprive the defendant of his liberty).

3. The Court of Appeals applies the "grave injustice" standard articulated by the Supreme Court of Virginia. *See Lacey v. Commonwealth*, 54 Va. App. 32, 46 (2009) (recognizing the "grave injustice" standard for considering requests to apply the "ends of justice" exception). It has also stated the circumstances under which it will apply the exception: "The ends of justice exception allows this Court to avoid upholding a 'miscarriage of justice.' Yet the defendant must affirmatively demonstrate the existence of such a miscarriage, 'not that a miscarriage *might* have occurred.' A trial court's error standing alone, even when of constitutional significance, does not suffice." *Compare id.* (finding no miscarriage of justice with a jury verdict form which correctly recited the offense for which defendant was charged, there was no harm to defendant, and evidence of guilt was overwhelming) (internal and external citations omitted), *with Bell v. Commonwealth*, 81 Va. App. 616, 627-31 (2024) (applying the ends of justice on appeal from a summary contempt proceeding, which, itself, constituted "a miscarriage of justice").

4. Where evidence of guilt is overwhelming, the appellate court may decline to invoke the "ends of justice" exception. *See, e.g., Lacey*, 54 Va. App. at 46-47 (citing *Bazemore v. Commonwealth*, 42 Va. App. 203, 222 (2004)).

5. In practice, this exception is applied only in "rare instances." *See e.g., Ali v. Commonwealth*, 280 Va. 665, 671 (2010) (applying the "ends of justice" exception when an element of the crime of which the defendant was convicted did not occur); *Campbell v. Commonwealth*, 14 Va. App. 988, 994 (1992) (applying the "ends of justice" exception where an instruction allowed a jury to convict a defendant without proof of an essential and necessary element of the charged offense); *Jimenez v. Commonwealth*, 241 Va. 244, 250 (1991) (applying the "ends of justice" exception because the jury was not instructed as to a material element of the offense charged); *Ball v. Commonwealth*, 221 Va. 754, 758-759 (1981) (applying the "ends of justice" exception when the defendant had been "convicted of a crime of which under the evidence he could not properly be found guilty").

6. In short: "The ends of justice exception is narrow and is to be used sparingly, and it applies only in the extraordinary situation where a miscarriage of justice has occurred." *Pulley v. Commonwealth*, 74 Va. App. 104, 126 (2021) (cleaned up; quotations omitted).

7. Practice Tip: If an issue has not been timely raised in the trial court, argue to the appellate court why the "ends of justice" exception applies – and raise those arguments in the opening brief. *See, e.g., Foster v. Commonwealth*, 2023 Va. App. LEXIS 706, at *4 (2023) (explaining appellants must raise "ends of justice" exception in an opening brief, and collecting cases). The Court of Appeals does not invoke the "ends of justice" exception *sua sponte*, and it will not consider an "ends of justice" argument raised for the first time in a reply brief. *Id.*; *see also Davis v. Goforth*, 82 Va. App. 720, 736 n.6 (2024); *Dominion Coal Corp. v. Bowman*, 53 Va. App. 367, 372, n.6

(2009) (declining to consider *sua sponte* the "good cause" or "ends of justice" exceptions to Rule 5A:18). That said, in limited instances, the Supreme Court may consider the "good cause" and "ends of justice" exceptions *sua sponte*. *See, e.g., Toghill v. Commonwealth*, 289 Va. 220, 226 (2015) (where, after defendant's conviction, Fourth Circuit issued opinion holding statute in question unconstitutional, good cause exception applicable even though defendant did not raise the constitutionality issue at trial). *But see Jones v. Commonwealth*, 239 Va. 29, 39 n.5 (2017) (explaining the appellant did not "assert any grounds for invoking the 'good cause' or 'ends of justice' exceptions under Rule 5:25, and we will not sua sponte raise them on his behalf").

D. The Good Cause Exception

1. The contemporaneous objection rule also has a "good cause" exception. Rule 5:25; Rule 5A:18.

2. The good cause exception may apply when the litigant did not have an opportunity to object to the assigned error. *See, e.g., Commonwealth v. Amos*, 287 Va. 301, 307 (2014); *Flanagan v. Commonwealth*, 58 Va. App. 681, 694 (2011); *cf. Jacks*, 74 Va. App. at 792-93 (reaching same conclusion based on Code § 8.01-384, without discussing "good cause" exception).

3. Like the "ends of justice" exception, the good cause exception is rarely applied. *See e.g., Gheorghiu*, 280 Va. at 689 (where defendant delayed in bringing a new case to the attention of the court, there is no good cause to excuse the failure to object).

4. And like the "ends of justice" exception, the "good cause" exception must be raised by an appellant in the opening brief. *See Foster*, 2023 Va. App. LEXIS 706, at *4 (2023) (collecting cases).

E. How to Satisfy the Contemporaneous Objection Rule

1. **Make a timely objection or motion on the record.**

   a. Generally, to satisfy the requirements of the contemporaneous objection rule, an objection must be made contemporaneously with the introduction of the objectionable evidence or at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the asserted error. *Johnson v. Raviotta*, 264 Va. 27, 33 (2002); *Reid v. Baumgardner*, 217 Va. 769, 773-74 (1977).

   b. *Make sure the trial court actually rules on motions you file:* It is not enough to simply file a motion. *See Brandon v. Cox*, 284 Va. 251, 256 (2012) (holding that "merely filing a motion in the clerk's office of a circuit court" is insufficient under Code § 8.01-384(A) and Rule

5:25); *Lee v. Commonwealth*, 2015 Va. App. LEXIS 249, at *12-13 (2015) (same, under Rule 5A:18).

c. *Make the objection on the record:*

i. It is the appellant's duty to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error. When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues related to the assignments of error, any assignment of error affected by the omission will not be considered. *Galumbeck v. Lopez*, 283 Va. 500, 507 (2012) (citing Rule 5:11(a)(1)); *see also Commonwealth Transp. Comm'r v. Target Corp.*, 274 Va. 341, 348 (2007) (a circuit court's judgment is presumptively correct, and the appellant has the burden of presenting a sufficient record to permit a determination whether the court committed an alleged error); *Dixon v. Dixon*, 71 Va. App. 709, 716 (2020) ("The burden is upon the appellant to provide the appellate court with a record which substantiates the claim of error. In the absence of a sufficient record, we will not consider the point.") (cleaned up).

ii. "Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." Code § 8.01-384(A).

iii. The appellate court will not consider objections or excluded evidence without a proper showing of what the objection or evidence was. *Galumbeck*, 283 Va. at 500 (objections made at a sidebar conference that was not part of the record would not be considered on appeal, even though a written proffer was later filed).

d. *Continuing Objections:* In the appropriate circumstances, the trial court can note a party's continued objection with respect to the admission of evidence or other matter. Ask the trial court to note your continuing objection to the specific evidence. But if something happens during the trial that changes the context of the trial court's earlier ruling, you may have to renew your objection to preserve the issue. *See Riverside Hosp. v. Johnson*, 272 Va. 518, 526-527 (2006); *Fisher*, 236 Va. at 413-414 (affirming a capital murder conviction and death sentence, the Court holds that defendant's earlier objection related to the jury having a copy of the transcripts while listening to the tapes, and a continuing objection on that ground did not indicate to the trial court that an objection was also being made to the introduction of the transcripts as evidence), *cert. denied*, 490

U.S. 1028 (1989). Continuing objections require extraordinary vigilance to ensure that no new or different basis for the objection has arisen.

e. *Motions for a Mistrial:* As a general rule, a motion for a mistrial must be made "at the time an objectionable element is injected into the trial of the case." *Hall v. Commonwealth*, 213 Va. 736, 737 (1973) (the motion for mistrial came "too late" because it was not made until after the prosecution had rested, the trial court had overruled the defendant's motion to strike, and the defense had rested); *Porter*, 276 Va. at 256 (motion for a mistrial, on the basis of comments made by the trial court during defendant's closing argument, was not timely when it was raised at the conclusion of the defendant's closing argument); *Lacey*, 54 Va. App. at 44-45 (holding the defendant's motion for a mistrial due to erroneous jury verdict form, which was made after the jury's verdict, was not timely, and refusing to apply the "ends of justice" exception).

f. *Objections to Improper Argument:* Objections to improper argument in opening or closing statements must be made at the time the objectionable statement is made. Counsel should not only object to improper argument at the time, but also give the reasons for the objection and move for a mistrial or a cautionary instruction that the jury to disregard the improper remarks. *Reid*, 217 Va. at 773. The objection comes too late if it is made after the argument is concluded or after the case is submitted to the jury. *Id.* (citing *Russo v. Commonwealth*, 207 Va. 251, 256-257 (1966)); *Pullen v. Nickens*, 226 Va. 342, 346-347 (1983) ("If counsel believes that an argument requires or justifies a mistrial, he has the duty to move promptly before conclusion of the argument so that the trial court may determine what corrective action, if any, should be taken."); *Beavers v. Commonwealth*, 245 Va. 268, 279 (request for a mistrial after the conclusion of the entire opening statement constitutes a waiver), *cert. denied*, 510 U.S. 859 (1993).

g. *Objections to Jury Instructions:*

   a. An instruction given without objection will not be disturbed on appeal, and becomes the law of the case and is binding in future proceedings, whether or not the instruction correctly states the law. *Kondaurov v. Kerdasha*, 271 Va. 646, 658 (2006). An objection to a jury instruction must be made when the instruction is tendered. Bringing the issue to the trial court's attention after the trial is too late.

h. *Objections to Jury Verdict Forms:* An objection to a defective jury verdict form must be made before the jury retires to deliberate. *Banks v. Mario Indus.*, 274 Va. 438, 455 (2006).

i. *Objections to Venue:* An objection to venue based upon pre-trial publicity must be made before the jury is empaneled and sworn. *Riner*, 268 Va. at 310 (where the defendant did not object when the trial court took under advisement his pre-trial motion to change venue because of adverse media coverage, the issue was waived because defendant did not renew the motion prior to the seating of the jury). When a defendant does not object to the trial court's decision to take the change of venue motion under advisement, it is incumbent upon him to renew that motion or remind the court that it was still pending at some point before the jurors selected to hear the case were sworn. *Id.*; *Green v. Commonwealth*, 266 Va. 81, 94 (2003).

j. *Objections to the Seating of a Juror:* An objection to the seating of a juror must be made before the jury is empaneled and sworn. *Green*, 266 Va. at 100-101; *Breard v. Commonwealth*, 248 Va. 68, 80 (1994) (trial court reasonably could have assumed defendant acquiesced in seating a juror when defendant failed to renew motion to strike the juror after the court said it would rehear the motion upon completion of voir dire).

k. *Objections to the Admissibility of Evidence:* "'An objection to the admissibility of evidence must be made when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing party has rested.'" *Banks*, 274 Va. at 455 (quoting *Bitar v. Rahman*, 272 Va. 130, 139 (2006)). Because a motion to strike tests the sufficiency of the evidence, not its admissibility, it should not be used to challenge the admissibility of evidence that has already come into evidence. *Id.*

l. *Motions to Exclude the Evidence:* "There may be circumstances where evidence is admitted conditioned upon further foundational support and the satisfaction of that condition may not be known until the conclusion of the case-in-chief or at the end of presentation of all of the evidence. The proper motion at that time is a motion to exclude the evidence. Assuming that exclusion of the evidence creates deficiencies in the quantum of proof, a motion to strike may then test the sufficiency of the evidence." *Banks*, 274 Va. at 456 n.2. Further, where a defect in an expert witness' testimony may not be apparent until the testimony of that witness is completed, an objection to the admissibility of the evidence should be raised "at that first opportunity" to be timely. *Id.* at 456.

m. *Motions to Strike:* To preserve challenges to the sufficiency of the evidence, the defendant should move to strike the plaintiff's case at

the close of the plaintiff's evidence, and renew the motion at the close of all of the evidence or move to set aside the verdict. *United Leasing Corp. v. The Lehner Family Business Trust*, 279 Va. 510, 517-18 (2010). A defendant cannot rely on a prior made motion to strike because any challenge to the sufficiency of the evidence, which includes evidence presented by the defense, will necessarily raise a new and distinct issue from the issue presented by the denied motion to strike. Further, by introducing evidence in his defense, the defendant demonstrates by his conduct his intent to abandon the argument that the plaintiff failed to meet its burden through the evidence presented in its case-in-chief. *Id.* (an appellate court will not review a challenge to the sufficiency of the evidence when a defendant who has chosen to introduce evidence in his defense, after the trial court has overruled his motion to strike made at the conclusion of the plaintiff's case, does not make either a motion to strike at the close of all the evidence or a motion to set aside the verdict); *see also Rompalo v. Commonwealth*, 72 Va. App. 147, 155-56 (2020) ("Because [the defendant] did not renew her motion to strike after she presented evidence on her own behalf, and she did not file a motion to set aside the verdict, she has not preserved her sufficiency argument for appeal, and we do not consider it.").

2. **State all grounds with reasonable certainty.**

a. The contemporaneous objection rule not only requires an objection to be timely raised, but also requires the objection to be stated with "reasonable certainty." *Oden v. Salch*, 237 Va. 525, 533 (1989) (when the basis of an objection is that an instruction "did not correctly state the law as applicable to the facts of the case," the objection is too general to be of any assistance to the trial court and is a plain violation of the letter and spirit of Rule 5:25).

b. "Specificity and timeliness undergird the contemporaneous-objection rule, animate its highly practical purpose, and allow the rule to resonate with simplicity: Not just any objection will do. It must be both *specific* and *timely* – so that the trial judge would know the particular point being made in time to do something about it." *Bethea*, 297 Va. at 743-44 (cleaned up; quotations omitted).

b. "'It is the duty of a party, as a rule, when he objects to evidence, to state the grounds of his objection, so that the trial judge may understand the precise question or questions he is called upon to decide. The judge is not required to search for objections which counsel have not discovered, or which they are not willing to disclose.'" *Darnell*, 12 Va. App. at 952 (quoting *Jackson v. Chesapeake & Ohio Ry. Co.*, 179 Va. 642, 651 (1942)).

c. "Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." *Edwards v. Commonwealth*, 41 Va. App. 752, 760 (2003) (defendant argued in the trial court about a specific, shared requirement of two different offenses but, in the appellate court, defendant attempted to argue a distinction between the two offenses on a different basis). Appellate courts will not consider an argument that differs from the specific argument presented to the trial court, even if it relates to the same general issue. *See, e.g., Commonwealth Transp. Comm'r*, 274 Va. at 351-352 (refusing to consider a new argument in support of a jury instruction); *Clark v. Commonwealth*, 30 Va. App. 406, 411-412 (1999) (preserving one argument on sufficiency of the evidence does not allow argument on appeal regarding other sufficiency questions); *West Alexandria Prop., Inc. v. First Va. Mort. and Real Estate Inv. Trust*, 221 Va. 134, 138 (1980) (An appellant may not advance new reasons for an argument raised below: "though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court.")

d. "A general argument or an abstract reference to the law is not sufficient to preserve an issue." *Edwards*, 41 Va. App. at 760; *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 526 (2006) (a general objection that fails to put the trial court on fair notice of the complaint does not satisfy Rule 5:25).

e. *Jury Instructions*: A proponent of a jury instruction is not required to argue the specific grounds and relevant facts for the instruction at the time it is proffered in order to preserve the challenge for appeal. Having heard the evidence, the trial court already knows the evidentiary basis for the instruction. When a trial court refuses to give an instruction proffered by a party that is a correct statement of law and which is supported by adequate evidence in the record, this action, *without more*, is sufficient to preserve for appeal the issue of whether the trial court erred in refusing the instruction. *Emergency Physicians of Tidewater, PLC v. Hanger*, 303 Va. 77, 86-88 (2024).

3. Get a ruling on all objections.

a. Simply making the objection may not be enough. *See, e.g., Riner*, 268 Va. at 325; *but see* Code § 8.01-384(A) ("No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court."). To make the issue reviewable on appeal, the trial court must also rule on the objection. *Riner*, 268 Va. at 325.

b. Failure to request a ruling on a pretrial motion waives that error on appeal. *Riner*, 268 Va. at 325 (where the trial court took defendant's pre-trial motion challenging venue under advisement pending the outcome of *voir dire*, and defendant did not object to this ruling until the jury was empaneled, the issue was waived; defendant should have objected to the decision to take the motion under advisement, reminded the trial court of the pending motion, or renewed the motion before the jury was empaneled and sworn); *Lenz v. Commonwealth*, 261 Va. 451, 463 (failure to request a ruling on pretrial motion waived issue on appeal), *cert. denied*, 534 U.S. 1003 (2001).

c. Thus, when a motion or objection is taken under advisement, counsel must bring the issue to the attention of the trial court again and ask for a ruling. *See, e.g., Green*, 266 Va. at 93-95 (where trial court took pre-trial change in venue motion under advisement, issue waived because defendant failed to renew the objection or remind the trial court about the objection before the jury was empaneled and sworn), *cert. denied*, 540 U.S. 1194 (2004).

d. However, when a party makes his objection known to the court prior to or at the time of entry of the final order, the entry of the final order constitutes a rejection of those objections, and satisfies the contemporaneous objection rule. Scialdone, 279 Va. at 440.

II. OTHER WAYS TO PRESERVE ERROR IN THE RECORD

A. Proffer of Excluded Evidence: When the trial court excludes evidence or testimony, it is necessary to make a proffer of the evidence excluded in order to give the appellate court a proper record upon which to consider whether the trial court made the correct evidentiary ruling.

1. A proponent must make known to the court the substance of the excluded evidence, and this is done by way of a proffer. Rule 2:103(a)(2).

2. A proffer has two main purposes: (1) it allows the trial court a fair opportunity to resolve the issue at trial, and (2) it provides a sufficient record for appeal. *See, e.g., Whittaker v. Commonwealth*, 217 Va. 966, 968 (1977); *Creamer v. Commonwealth*, 64 Va. App. 185, 195 (2015).

3. A good proffer places into the record the "specifics" of the excluded evidence so the appellate court may determine what the excluded evidence was and what it would have established. *Smith v. Hylton*, 14 Va. App. 354, 358 (1992). Thus, a good proffer must contain all of the information necessary to allow the trial court to resolve the issue and to permit appellate review. *Creamer*, 64 Va. App. at 195. At a minimum, a proffer must contain a summary of the witness' expected testimony that is sufficient to establish its relevance. *Id.*

4. The proponent of the evidence also bears the burden of meeting other foundational requirements to the satisfaction of the trial judge, and of opposing any objections raised regarding the admissibility of the evidence. *Creamer*, 64 Va. App. at 195.

5. When a trial court refuses to admit evidence, the party must proffer or avouch the evidence for the record. If he fails to do so, the appellate court has no basis to decide whether the party was prejudiced by the error. *Daniel Constr. Co. v. Tolley*, 24 Va. App. 70, 79 (1997).

6. Where a trial court refuses to allow a proffer, it prevents a determination of the propriety of the trial court's ruling by the reviewing court and is prejudicial to the party making the proffer and generally is reversible error. *Smith*, 14 Va. App. at 358.

7. A good proffer can be made several ways, including:

    a. an unchallenged unilateral avowal of counsel (or a mutual stipulation) that gives a complete summary of the evidence on the record, *see Galumbeck*, 283 Va. at 508; *Wright v. Commonwealth*, 52 Va. App. 690, 697 (2008);

    b. questioning the witness on the stand outside the presence of the jury, *Galumbeck*, 283 Va. at 500 (absent an unchallenged avowal of counsel or stipulation, the court will not consider an error assigned to the rejection of testimony unless such testimony has been given in the absence of the jury and made a part of the record as the rules prescribe); or

    c. asking the trial court to mark "refused" or "denied" an exhibit, document or jury instruction you have unsuccessfully offered, *see* Rule 5:10(a) and Rule 5A:7(a).

8. Timing of the proffer

    a. The time for making a proffer and the range of content required depend, in part, on the proffer's purpose. *Creamer*, 64 Va. App. at 195.

    b. As a general rule, the proffer must be made before the trial court rules on the issue. *Commonwealth v. Shifflett*, 257 Va. 34, 44 (1999); *Creamer*, 64 Va. App. at 195.

    c. Thus, where a defendant, post-trial, proffers a different, more detailed, or additional basis for concluding that evidence offered during trial was relevant and should have been admitted and the trial court rejects that proffer, the appellate court may not consider the contents of the untimely proffer in reviewing the correctness of the trial court's ruling excluding evidence. *Shifflett*, 257 Va. at 44 (post-trial proffers on admissibility that

differed from the contemporaneous proffers during trial were untimely); *Creamer*, 64 Va. App. at 195 (appellate court may consider only the representations about the evidence that the trial court considered, *i.e.*, those made contemporaneously with the admissibility issue).

d. A proffer may be made for the sole purpose of providing a complete record for appeal (and not to assist the trial judge in ruling on the admissibility of evidence), even after the verdict. *Creamer*, 64 Va. App. at 195.

9. Refusal of a proffer: If you have a trial judge who refuses to hear your proffer, put it on the record anyway – state it to the court reporter while opposing counsel is present, even if the trial judge has left the room.

B. Motions

1. *Motions in Limine:* Anticipate the important evidentiary issues early, and bring them on for a hearing in advance of trial. Remember to have a court reporter present for the hearing, and memorialize the trial court's ruling in an order (or, at a minimum, make sure the ruling is on the record). Also, if a motion *in limine* is taken under advisement, renew the motion at the appropriate time at trial. *Galumbeck*, 283 Va. at 500 (where party failed to request a ruling from the trial court on a motion in limine, the issue has been waived). Further, effective July 1, 2024, litigants are now protected from waiver where the trial court makes a pre-trial ruling that the court states is without prejudice to moving for reconsideration based on developments at trial; under Code § 8.01-384, the failure to move for reconsideration will not be deemed a waiver.

2. *Motions to Strike*

a. "[An] objection to the sufficiency of the evidence is properly made by a motion to strike, rather than when the evidence is first offered. Obviously, the objecting party cannot be sure, nor can the court decide, until the offering party has rested, whether the various fragments of evidence have added up to a justiciable whole." *Kondaurov*, 271 Va. at 655.

b. To preserve challenges to the sufficiency of the evidence, the defendant should move to strike the plaintiff's case at the close of the plaintiff's evidence, and renew the motion at the close of all of the evidence or move to set aside the verdict. *United Leasing Corp.*, 279 Va. at 510.

c. A plaintiff may move to strike a defense or the defendant's evidence.

d. State all grounds for the motion to strike with specificity because general statements will not be considered. *United Leasing Corp.*, 279 Va. at 517-19 (where a specific argument was stated in a motion to

strike after the close of the plaintiff's evidence, but was not raised when the motion to strike was renewed at the close of all the evidence, that specific argument was waived); *Floyd v. Commonwealth*, 219 Va. 575, 584 (1978) ("A general objection to the sufficiency of the evidence should state with some specificity the grounds of the objection.")

3. *Post-trial Motions*

   a. A motion to reconsider can preserve issues or objections that arise by virtue of the actual verdict or ruling, or those objections which are raised for the first time. In fact, such a motion may be required to address new concerns about the court or commission's ruling. *See, e.g., Williams*, 266 Va. at 410 (Although the rules of the Workers' Compensation Commission "do not contain specific procedures for a motion for rehearing or motion to reconsider, such motions are not uncommon," and they are the established method to preserve an issue for appeal.)

   b. A party may challenge the sufficiency of the evidence by moving to set aside the verdict. However, a sufficiency motion after the verdict comes too late to resurrect matters that should have been raised at trial.

   c. *Practice Tip:* Remember that the trial court loses jurisdiction of the case, and therefore the ability to rule on your post-trial motion, 21 days after the entry of the final order or decree. Rule 1:1. Therefore, if the final order has been entered when you file your post-trial motion, you must bring it on for a hearing and get a ruling within the 21 day period.

   d. *Caution:* Again, it may not be enough to merely complain to the court. If you present objections for the first time after the trial or ruling, you should get a ruling from the court to preserve the error for appellate review. *See Nusbaum*, 273 Va. at 402-403 (refusing to consider error that the party raised when that party told the trial judge he was not asking the judge to change his mind).

4. *Objections to the Final Order*

   a. An objection to a final order or decree that simply states "seen and objected to" will not preserve error unless it has been timely objected to on the record (with the requisite specificity) and a ruling has been made. *See, e.g., Lee*, 12 Va. App. at 516-17 (objecting generally to an order will not suffice to preserve for review errors not raised in the record).

   b. "No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such

order on appeal except by express written agreement in his endorsement of the order." Code § 8.01-384(A).

c. Once a litigant informs the circuit court of his or her legal argument, there can be no waiver under Code § 8.01-384(A) unless the record "affirmatively show[s] that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection." *Helms v. Manpile*, 277 Va. 1, 6-7 (2009) (where defendants argued in written closing argument that they owned a parcel of land by adverse possession, their endorsement of the final order as "seen" did not waive their closing argument and preserved for appeal the adverse possession claim); *Scialdone*, 279 Va. at 440 ("Where a party makes his objections known to the court prior to or at the time of entry of a final order or decree and does not specifically disclaim the desire to have the court rule on those objections, entry of a final order or decree adverse to those objections constitutes a rejection of them and preserves them [under the contemporaneous objection rule] for appeal.").

d. Where a party makes his objections known to the court prior to or at the time of entry of a final order or decree and does not specifically disclaim the desire to have the court rule on those objections, entry of a final order or decree adverse to those objections constitutes a rejection of them and preserves them under Rule 5:25 for purposes of appeal. *Scialdone*, 279 Va. at 440.

e. But to be safe . . . if you note objections in the final order or attach those objections, ask the trial court to consider them and note in the final order that they have been considered and overruled.

C. Argument

Counsel may make clear the ground for his objection in closing argument. *Lee*, 12 Va. App. at 515.

III. A FEW WAYS TO AVOID THE WAIVER OF ERROR

A. *Do not offer the same objectionable evidence.* In Virginia, if a party objects to the introduction of evidence that is admitted, and afterwards introduces the same evidence himself, it is not a ground for reversing the judgment, although the evidence itself was incompetent. *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 101 (2005) (waiver rule applied to evidence plaintiff introduced in her case-in-chief; the trial court had overruled the plaintiff's pre-trial motion to exclude that evidence). However, this rule does not apply when the objecting party elicits evidence of the same character either during cross-examination of a witness or in rebuttal testimony. *Id.* at 102; *Brooks v. Bankson*, 248 Va. 197, 207 (1994) (sellers did not waive objection to trial court's admission of evidence concerning the buyers' "walk through" inspection of a house prior to closing when, in rebuttal, sellers introduced

similar evidence about the house's condition). Further, this rule is limited by the requirement that the subject matter of the evidence at issue be the same as the subject matter of the evidence to which an objection was made, and does not apply to the consideration of inadmissible evidence on a different subject. *Drinkard-Nuckols*, 269 Va. at 102-10; *Pettus v. Gottfried*, 269 Va. 69, 79 (2005).

B. *Do not approbate and reprobate or take inconsistent positions.*

1. "'No litigant will be permitted to approbate and reprobate – to invite error . . . and then to take advantage of the situation created by his own wrong.'" *Garlock Sealing Techs., LLC v. Little*, 270 Va. 381, 387-388 (2005) ("We will not permit Garlock Sealing to obtain an apportionment of liability among itself and 10 entities that were not parties to this litigation and then complain about the method of apportionment."); *Hansen v. Stanley Martin Cos.*, 266 Va. 345, 358 (2003) ("Having invited the trial court to use a 'discovery rule' for determining the accrual date of the Maryland Consumer Protection Act claim, Stanley Martin cannot now argue for the application of a different rule [the date of injury] on appeal.")

2. Litigants may not take inconsistent positions at different stages of litigation. *Commonwealth Transp. Comm'r*, 274 Va. at 351-352 (In an eminent domain case, "[t]he Transportation Commissioner will not be permitted to argue in this Court that Target may not recover any damages for loss of visibility when, in the circuit court, the Transportation Commissioner asserted that Target is entitled to recover damages if it does not have 'reasonable visibility' of its property.").

3. The approbate-reprobate doctrine is very much alive and well in Virginia. *See generally Commonwealth v. Holman*, 303 Va. 62, 71 (2024). To put it "colloquially," litigants may not "zig" on appeal after they previously "zagged" below. *Amazon Logistics, Inc. v. Va. Emp't Comm'n*, __ Va. __, 912 S.E.2d 290, 292 (2025).

C. *Be very careful with jury instructions.* Object to the submission of a jury instruction addressing any issue which you think is a matter of law for the trial court to decide. The failure to object to such an instruction waives any future assignment of error that the issue was a matter of law for the trial court to decide. *Banks*, 274 Va. at 658. Further, object to jury instructions that address related matters or have the same burden of proof on a related matter. For example, in a defamation case, if you object to the instruction on malice, you should also object to the punitive damages instruction. The Supreme Court has relied on the failure to object to other instructions as a waiver of an objection to a separate instruction. *See, e.g., Raytheon Tech. Servs. Co. v. Hyland*, 273 Va. 292, 300-301 (2007).

D. *Get a ruling on pre-trial motions.* When it comes to filing motions in limine, filing the motion is not sufficient to preserve the argument for appeal. You must also get a ruling on the motion. Therefore, when the trial court takes a motion in limine under advisement, you must renew the objection at trial and get a ruling on the

objection. *See, e.g., Galumbeck*, 283 Va. at 500; *Brandon*, 284 Va. at 256 ("[M]erely filing a motion in the clerk's office of a circuit court" is insufficient under Code § 8.01-384(A) and Rule 5:25); *Lee*, 2015 Va. App. LEXIS 249 at *12-13 (same, under Rule 5A:18).

IV. RELATED TOOLS FOR APPELLEES

A. *Right Result, Wrong Reason:*

1. Appellate courts do not review lower courts' opinions, but their judgments. *Evans v. Commonwealth*, 290 Va. 277, 288 n.12 (2015).

2. Where the lower court's decision is correct, but its reasoning is incorrect, and the record supports the correct reason, the appellate court will uphold the judgment pursuant to the right result for the wrong reason doctrine. *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 542 (2016); *Haynes v. Haggerty*, 291 Va. 301, 305 (2016).

3. An appellate court may uphold a judgment even when the correct reasoning is not mentioned by a party in trial argument or by the trial court in its decision, so long as the record contains sufficient information to support the proper reason. *Miller & Rhoads Bldg.*, 292 Va. at 542.

B. *"Bad Brief" Waiver:*

1. Rule 5:27(d) of the Rules of the Supreme Court of Virginia provides that an appellant's opening brief must contain "[t]he standard of review, the argument, and the authorities relating to each assignment of error." The corresponding Rule in the Court of Appeals is Rule 5A:20(e).

2. If an appellant fails to develop adequate argument in support of an assignment of error, the appellant waives that argument. *Atkins v. Commonwealth*, 272 Va. 144, 149 (2006).

3. Likewise, if a brief assigns error on one ground, but then fails to specifically argue those grounds in the body of the brief, the appellate courts consider the issue waived due to an inadequately developed argument. *Amazon Logistics*, 912 S.E.2d at 294; *AlBritton v. Commonwealth*, 299 Va. 392, 412 (2021).

4. Typically, bad-brief waiver applies to situations in which an appellant makes a cursory argument in support of an assignment of error and fails to provide sufficient legal reasoning, factual analysis, or citations to authority. But, the doctrine may also apply when the argument on brief, even if carefully crafted and legally persuasive, has little, if anything, to do with the assignment of error. *Amazon Logistics*, 912 S.E.2d at 294.

C. *Failure to Include a Necessary Part of the Record:*

1. The appellant bears the burden to provide the appellate court with a record which substantiates the claim of error. *Dixon*, 71 Va. App. at 716.

2. The record must allow the appellate court to "fully review" the grounds for the lower court's decision. *Dixon*, 71 Va. App. at 716.

3. "When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by such omission will not be considered." Rule 5A:8(b)(4)(ii); *see also* Rule 5:11(a)(1).

4. "In the absence of a sufficient record," the appellate court "will not consider the point." *Robinson v. Robinson*, 50 Va. App. 189, 197 (2007).

D. *Failure to Adequately Assign Error:*

1. "An assignment of error is not a mere procedural hurdle an appellant must clear in order to proceed with the merits of an appeal. Assignments of error are the core of the appeal." *Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.*, 293 Va. 113, 122 (2017).

2. Appellate courts are "limited to reviewing the assignments of error presented by the litigant." *Banks v. Commonwealth*, 67 Va. App. 273, 289 (2017). As a result, they will not consider issues touched upon by the appellant's argument but not encompassed by an assignment of error. *Id.* at 290. An issue that is not part of the appellant's assignment of error is considered waived. *See Simmons v. Commonwealth*, 63 Va. App. 69, 75 n.4 (2014); *Winston v. Commonwealth*, 51 Va. App. 74, 82 (2007).



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From the Frontlines of Legal Ethics: VSB and ABA Insights

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Key Updates to Virginia's Rules of Professional Conduct
And Legal Ethics Opinions (January 2024 through June 2025)

In the last year, the Virginia State Bar Standing Committee on Legal Ethics (Committee) has issued important updates to the Rules of Professional Conduct, Legal Ethics Opinions (LEOs), and Unauthorized Practice Rules (UPRs). These have been commented upon by members of the Virginia State Bar (VSB) and have been debated and approved by the Bar Council of the VSB. One proposed LEO awaits approval by the Supreme Court of Virginia (Supreme Court), while the other has been approved. Similarly, one of the Rules of Professional Conduct has been approved by Supreme Court, while the other awaits further consideration by the Ethics Committee. And a proposed UPR has been sent back to the Ethics Committee for further consideration.

These updates are a significant development in the state's legal landscape. The Rule and LEO changes/proposed changes reflect ongoing efforts to adapt to emerging issues—such as the integration of Generative Artificial Intelligence (GAI) in legal practice and the evolving needs of domestic relations clients. Further, the proposed UPR amendment demonstrates the continuing efforts to bridge the justice gap. This program will provide a detailed overview of these key updates—as well as a recent high-profile case—and highlight their implications for Virginia attorneys and their clients.

Proposed/Approved Legal Ethics Opinions

1. **LEO 1900: Lawyers Duty to Disclose Death of Client (Approved by the Supreme Court of Virginia on January 4, 2024).**
   https://www.vsb.org/common/Uploaded%20files/LEOs/1900.pdf

   a. The opinion discusses a lawyer's ethical obligation to disclose the death of a client to opposing counsel and the court.

   b. The Committee opined that:

      i. The death of a client terminates the representation and the lawyer's actual authority to act for the client.

      ii. As such, a lawyer must disclose the client's death before any further substantive communication with opposing counsel and must disclose to the court no later than the first communication or appearance after the client's death.

      iii. A lawyer does not violate Rule 4.1 by simply avoiding substantive communication with opposing counsel, while, for example, determining whether there is a representative of client's estate and whether that representative wishes to hire the lawyer to continue to pursue the client's claim.

   c. The Committee concluded that LEO 1900 overrules LEO 952. Accordingly, a lawyer cannot accept or make an offer of settlement on behalf of a deceased client, even if the lawyer discloses the client's death at the same time, unless and until the administrator

of the deceased's estate, or other successor in interest retains the lawyer to pursue the remaining claim on behalf of the estate.

2. **LEO 1901: Reasonable Fees and the Use of Generative Artificial Intelligence (proposed by the Legal Ethics Committee on March 20, 2025; pending approval by the Supreme Court of Virginia).**
https://vsb.org/common/Uploaded%20files/docs/032725-prop-leo-1901.pdf

   a. The proposed opinion discusses the reasonableness of fees under Rule 1.5 of the Rules of Professional Conduct when a lawyer uses time-saving tools that rely on Generative Artificial Intelligence.

   b. The Committee opined that:

      i. Although GAI can dramatically reduce the time and labor required for certain legal tasks, it would not be reasonable to conclude that a lawyer is ethically required to reduce or limit the fee solely based on that factor.

      ii. Rather, the lawyer's judgment in determining when and how to deploy GAI tools, and the expertise needed to critically evaluate GAI-generated content, represent valuable service for which the lawyer can be reasonably compensated.

      iii. A lawyer's unique value might involve their ability to frame legal problems in ways technology can address while knowing that human judgment must predominate, which provides a sound basis for maintaining value-based fees even through production time reduces.

      iv. If GAI assists a lawyer to achieve superior results more efficiently, the client benefits from both the improved outcome and potentially reduced total costs compared to a lawyer using traditional methods.

   c. The Committee criticized ethics opinions from other jurisdictions that conclude that it may be unreasonable under Rule 1.5 for a lawyer to charge the same flat fee when using GAI tools as when not using it.

   d. The Committee takes the position that it is not unreasonable per se for the lawyer to charge the same non-hourly fee for work done with the assistance of GAI as work done without the use of GAI, provided all the factors identified in Rule 1.5(a) are reasonably considered.

   e. In addition to the reasonableness requirement, a lawyer's fee must be adequately explained to the client under Rule 1.5(b). This is particularly important if the lawyer's time spent is substantially reduced due to the productivity enhancing tool; under such circumstances, the client may need additional explanation of why the lawyer's experience, technical skills, or other efficiencies contribute to the value of the services and the determination of the fees.

Key Aspects of Amendments to the Rules of Professional Conduct

1. **Amendment to Rule 1.5(g) (Approved by the Supreme Court of Virginia on May 16, 2025)**

   Rule Change is Underlined:

   1.5 Fees

   (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
   (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
   (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
   (3) the fee customarily charged in the locality for similar legal services;
   (4) the amount involved and the results obtained;
   (5) the time limitations imposed by the client or by the circumstances;
   (6) the nature and length of the professional relationship with the client;
   (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
   (8) whether the fee is fixed or contingent.

   (b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

   (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

   (d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:
   (1) in a domestic relations matter, except in rare instances; or
   (2) for representing a defendant in a criminal case.

   (e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and consents to the participation of all the lawyers involved;
(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
(3) the total fee is reasonable; and
(4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

(f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

(g) Nonrefundable advanced legal fees are prohibited.

Comment

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Nonrefundable Fee

[10] A nonrefundable advanced legal fee compromises the client's unqualified right to terminate the lawyer-client relationship because the right to terminate the representation would be negatively affected if the client would still risk paying for services not provided. Further, retaining a nonrefundable fee after being discharged by the client before the fee is earned violates the lawyer's responsibility to refund any unearned fee upon termination of the representation. An unearned fee is per se unreasonable and therefore charging an unearned nonrefundable fee violates Rule 1.5(a). See LEO 1606.

[11] A retainer paid to ensure the lawyer's availability for future legal services and/or as consideration for the lawyer's unavailability to a potential adverse party is not an advanced legal fee and is earned when paid. The retainer must be charged solely for these purposes and not as prepayment for legal services to be rendered in the future.

Summary:

a. The proposed rule change adds a new paragraph (g) that explicitly prohibits nonrefundable advance legal fees, restating the conclusion in LEO 1606.

b. The proposed rule change also adds Comments 10 and 11, which explain that a non-refundable advance legal fee negatively affects a client's right to terminate the representation. These Comments also distinguish an advanced fee for legal services from a retainer, the latter being a fee paid for a lawyer's availability and is considered earned when it is paid.

c. In a recent opinion, the Supreme Court reiterated that non-refundable legal fees are prohibited. In *Swango v. Virginia State Bar*, No. 241016, 2025 Va. LEXIS 43, at *1 (Va. July 31, 2025), the Court affirmed the Circuit Court of Virginia Beach, which had found that the plaintiff violated Rules 1.5(a) and 1.15(a). The plaintiff, a Virginia licensed attorney, had charged two clients what he characterized as a $300 consultation

fee. Client A canceled the meeting before the scheduled time because he no longer needed legal services, while Client B simply missed his appointment. However, despite the fact that these consulations never occurred, the attorney—who had deposited the fees into his operating account—refused to refund the consultation fees.

d. In affirming, the Supreme Court opined that given the nature of the client communications, each $300 fee was an advanced payment for legal services, and not a retainer as defined under LEO 1606. As such, the attorney's failure to keep the $300 fees in a client trust account until it was earned (the attorney had placed the fees in his operating account) was a violation of Rule 1.15(a)(1).

2. **Proposed Amendment to Rule 1.5(d) (Pending further consideration by the Legal Ethics Committee).**

Proposed Rule Change is Underlined/Struck-Through:

1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:
~~(1) in a domestic relation matter, except in rare instances; or~~
~~(2)~~ for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the client is advised of and consents to the participation of all the lawyers involved;
(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
(3) the total fee is reasonable; and
(4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

(f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

(g) Nonrefundable advanced legal fees are prohibited.

Comment

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Contingent Fees in Domestic Relations Cases

[6] Contingent fees in domestic relation cases are permitted in order that lawyers may provide representation to clients who might not otherwise be able to afford the payment of fees on a noncontingent basis. ~~An arrangement for a contingent fee in a domestic relations matter has been previously considered appropriate only in those rare instances where~~:

~~a. the contingent fee is for the collection of, and is to be paid out of (i) accumulated arrearages in child or spousal support; (ii) an asset not previously viewed or contemplated as a marital asset by the parties or the court; (iii) a monetary award pursuant to equitable distribution or under a property settlement agreement;~~

~~b. the parties are divorced and reconciliation is not a realistic prospect;~~

~~c. the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent;~~

~~d. the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis; and~~

~~e. the fee arrangement is fair and reasonable under the circumstances.~~

Summary:

The proposed amendment to Rule 1.5(d) would remove the strict limits on charging a contingent fee in domestic relations cases. Contingent fees would be permitted in domestic relations cases subject to the remainder of Rule 1.5 with no additional restrictions imposed. Proposed revised Comment [6] to the rule removes the "rare instances" in which contingent fees would be permitted in domestic relations cases and instead says that contingent fees are permissible to allow for representation of clients who could not afford representation on a noncontingent basis.

Proposed Amendment to Unauthorized Practice Rules

1. **Amendment to Rule Part 6, § Paragraph 3(O) (Pending further consideration by the Legal Ethics Committee).**

    a. The proposed amendment would permit court clerks, law librarians, courthouse navigators, and self-help center staff to answer questions by self-help litigants about or assist with identifying, selecting, or completing a form prescribed by the Supreme Court of Virginia or any other tribunal.

    b. The proposed rule also permits these persons to review the form to determine whether it has been completed with all the required information and assist with completing the form if the person is unable to do so because of a disability, literacy, or language barriers.

Conflict of Interest - Rule 1.7: Case Study - Brown v. Virginia State Bar, 302 Va. 234 (2023).

The *Brown* case, decided in May 2023, is an important decision that highlights key ethical issues in legal practice, particularly regarding conflict of interest in attorney-client relationships. Although outside of the timeframe of the 2024-2025 ethics updates, the opinion has drawn significant attention, and serves as a reminder of the importance of maintaining professional boundaries.

(a) The Supreme Court of Virginia held that the attorney in question violated Rule1.7(a)(2), when the attorney engaged in sexual relations with a client who had significant mental health and substance abuse issues during the attorney's representation of the client.

(b) The client had retained the attorney to represent her in a contested custody, divorce, criminal, and protective order litigation. In the course of the representation, the attorney and client shared a series of text messages with sexually explicit content. The attorney and client agreed to meet at a hotel to purportedly discuss details of the representation; there, however, they had sexual relations. Client's husband, through a private investigator, found out that the attorney had sexual relations with client and emailed the attorney demanding that he withdraw from the representation. The attorney filed a motion to withdraw citing a conflict of interest. Subsequently, the client's husband reported the attorney to the State

Bar. After an investigation, the attorney was subjected to disciplinary proceedings where he was found to have violated Rule 1.7(a)(2). The attorney appealed.

(c) On appeal, the Supreme Court affirmed the judgment of the circuit court. It held that the attorney's actions created new grounds for adultery in the divorce case, which the client would have to defend.

(d) Further, the Supreme Court held that attorney was in violation of Rule 1.7(a)(2). It disagreed with the attorney's argument that the Court had authorized sexual relationships with clients because it had rejected a proposed rule that would have made sexual relations a *per se* ethics violation. The Court noted that rejection of a *per se* rule did not imply that the conduct was permissible. The Court reasoned that the attorney's personal and prurient interest in his client materially weakened his representation, to the client's actual and potential detriment. By engaging in sexual relations with his client, the attorney had made himself a fact witness in her divorce case, added a ground of divorce for her husband to plead against her, and necessitated the attorney's withdrawal from the case—leaving the client to represent herself in the divorce case.

(e) The Court also rejected the attorney's argument that he had cured the ethical violation by withdrawing from representation. The Court opined that the plain language of Rule 1.6 did not establish a cure provision, but instead was a statement that an attorney had an additional duty to withdraw if the representation would violate the Rules. Further, the withdrawal requirement in Rule 1.6 did not equate to the absolution of a violation under a different Rule.

(f) This case confirms that engaging in sexual relations with a client is a direct conflict of interest, one that cannot be cured by withdrawing from the representation.

In conclusion, the recent updates (and proposed updates) to the Ethics Rules, Legal Ethics Opinions, and Unauthorized Practice Rules reflect the evolving landscape of legal practice in Virginia—especially in areas such as the use of Generative Artificial Intelligence and contingent fees in domestic relations cases. As the legal profession continues to adapt to technological advancements and changing client needs, it is crucial that practitioners continue to stay informed of these developments, to ensure that they are meeting their professional obligations while providing valuable services to their clients.



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Arguing Motions in the Trial Courts

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ARGUING MOTIONS IN THE TRIAL COURTS

Travis J. Graham

I. What This is Not About

- Legal standards for motions
- Strategy of motion practice
- Writing motions, briefs, responses
- Appellate practice and argument

II. Proper Prior Planning

A. Way Before (months or weeks)

1. Learn issues, facts, law
2. Learn about the judge

> *"A good lawyer knows the law. A great lawyer* _____*."*

a. Attitude and demeanor

b. History with lawyers and firms

c. Bias as to issues, people

d. Care and feeding, pet peeves

e. Legal ability and work ethic

f. Courtroom rules and habits

Remember that judges are just lawyers who got a particular kind of government job. They have limited time, attention spans, patience, and

knowledge just like everyone else. A judge is not a law-generating machine that is guaranteed to produce a certain result given certain input. You are more likely to win if you make ruling in your favor the easiest thing to do.

B. Before (2-3 days)

1. Gather and prepare materials

a. Outline – on paper, written so you can read it

b. Exhibits – bring enough copies

c. Cases – ditto

d. Files – bring everything you can

e. Transcripts – tab and highlight

f. Books – bring the rules of the game

g. Supplies – do not forget your pen or your glasses

2. Confirm date, time, location, court reporter, and witnesses; contact client

3. Search for late arrivals – emails and faxes

4. Find courthouse

5. Rehearse – the whole thing, out loud

III. The Big Day

Major Robert Rogers (1731 - 1795):

"_____"

IV. Argument

A. Task One: does the judge even know why we are here?

B. "May it Please the Court" vs. "Been Doin' Any Fishin'?"

1. Attitude, tone of voice, and body language – if in doubt, err on the side of formality

2. Courtesy vs. obsequiousness

3. "You-all ain't from around here." – do not pretend to be something you are not

4. Reading reactions – watch, listen, adjust

C. Making Your Point

1. Remember what kind of motion you are making

a. Legal – dispositive motions, jury instructions, motions in limine, etc.

b. Legal-esque – continuances, discovery motions, etc.

2. Appear Reasonable

- Be reasonable – if you find this difficult, perhaps you should not have filed the motion
- Be the underdog
- Remind of the history of the case – the judge has lots of cases besides yours
- Give stuff away, concede what you cannot win
- State the way it is, not what "our position" is
- Focus on the ultimate result, discuss "what if"

3. Appear Legally Correct

   - Be correct
   - Quote the law accurately
   - Explain why it applies
   - Explain why your motion achieves the right result

4. Get the Judge's Attention

   - Talk about the points you must win (a lot)
   - "This isn't in the briefs."
   - Don't be boring and don't read your outline or your brief
   - Quote and cite cases, pleadings

5. Visual Aids and Exhibits

   - Timelines and summaries
   - Notebook – don't overdo it, and make sure the judge actually gets it
   - Drawings and blow-ups
   - Fancy Computer Stuff – make sure it works, be prepared to do without it

6. Questions from the Court

   - Answer, don't fudge, don't weasel
   - Don't argue unless invited or required
   - Listen, and be prepared to go to Plan B

7. During and After the Other Side Talks

- Watch your body language
- Take notes
- Object only if absolutely required
- Response – make sure it is a response, not a reiteration

D. Those Words That Must Not Be Uttered

1. Opposing lawyer's name
2. Sanctions
3. Number of years you have been practicing law
4. Appeal
5. "Lie" and all of its variations
6. "Ridiculous," "absurd," and all their variations

E. Closing phrase

V. Winning

A. Tell the judge what you want, and what you want the order to say

B. If you win: say thanks, offer to draft the order, get out of the courthouse

VI. Not Losing

A. Do not let a misunderstanding go un-corrected

B. More time

C. More briefs

D. Leave to amend

E. Alternative relief

F. Mea culpa and sword falling

G. If you lose: say thanks, get out of the courthouse

VII. Miscellaneous

A. Control of client

B. Control of co-counsel – "If you pass me another note, I shall kill you with this three-ring binder."

C. Exhibits

D. Relationship with judges and staff – be nice

E. Building credibility

VIII. Helpful Rules and Statutes

A. Demurrers:

§ 8.01-273. Demurrer; form; grounds to be stated; amendment.

A. In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer. All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court. A demurrer may be amended as other pleadings are amended.

B. Wherever a demurrer to any pleading has been sustained, and as a result thereof the demurree has

amended his pleading, he shall not be deemed to have waived his right to stand upon his pleading before the amendment, provided that (i) the order of the court shows that he objected to the ruling of the court sustaining the demurrer and (ii) the amended pleading incorporates or refers to the earlier pleading. On any appeal of such a case the demurree may insist upon his earlier pleading before the amendment, and if the same be held to be good, he shall not be prejudiced by having made the amendment.

B. Motions to Dismiss:

Bell Atlantic v. Twombly, 127 S. Ct. 1955 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)

C. Special Pleas:

A plaintiff who has demanded a jury is entitled to a jury on a special plea as well. See Bethel Investment Co. v. City of Hampton, 272 Va. 765, 770, 636 S.E.2d 466, 470 (2006)

D. Summary Judgment

Federal

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for

specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c) , the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

State

Rule 3:20. Motion for Summary Judgment

Any party may make a motion for summary judgment at any time after the parties are at issue, except in an action for divorce or for annulment of marriage. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, that the moving party is entitled to judgment, the court shall grant the motion. Summary judgment, interlocutory in nature, may be entered as to 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 judgment may not be entered if any material fact is genuinely in dispute. 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 to the action agree that such deposition may be so used, or unless the motion is brought in accordance with the provisions of subsection B of § 8.01-420. As further provided in subsection C of § 8.01-420, depositions and

affidavits may be used to support or oppose a motion for summary judgment in any action where the only parties to the action are business entities and the amount at issue is $50,000 or more.

§ 8.01-420. Depositions as basis for motion for summary judgment or to strike evidence

A. Except as provided in subsections B and C, no motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used. Notwithstanding the foregoing, requests for admissions for which the responses are submitted in support of a motion for summary judgment may be based in whole or in part upon any discovery depositions under Rule 4:5 and may include admitted facts learned or referenced in such a deposition, provided that any such request for admission shall not reference the deposition or require the party to admit that the deponent gave specific testimony.

B. Notwithstanding the provisions of subsection A, a motion for summary judgment seeking dismissal of any claim or demand for punitive damages may be sustained, as to the punitive damages claim or demand only, when based in whole or in part upon any discovery depositions under Rule 4:5. However, such a motion may not be based upon discovery depositions under Rule 4:5 with respect to any claim or demand for punitive damages based on the operation of a motor vehicle by a person while under the influence of alcohol, any narcotic drug, or any other self-administered intoxicant or drug.

C. Notwithstanding the provisions of subsection A, discovery depositions under Rule 4:5 and affidavits may be used in support of or in opposition to a motion for summary judgment in any action when the only parties to

the action are business entities and the amount at issue is $50,000 or more.

E. Time

Federal

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b) .

(c) Motions, Notices of Hearing, and Affidavits.

(1) In General. 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.

(2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

State

Rule 1:7. Computation of Response Dates

Whenever a party is required or permitted under these Rules, or by direction of the court, to do an act within a prescribed period of days after service of a paper upon counsel of record,

(a) No days will be added if the paper is served by:

(1) manual delivery no later than 5:00 p.m. by counsel, counsel's agent or courier, or a commercial delivery service making same-day delivery;

(2) facsimile transmission completed no later than 5:00 p.m.; or

(3) electronic mail transmitted no later than 5:00 p.m.

(b) One day will be added to the prescribed time if the paper is served by:

(1) placing the paper in the hands of a commercial delivery service before midnight for next-day delivery, or

(2) completion of the following after 5:00 p.m. but before midnight: (A) manual delivery by counsel, counsel's agent or courier, or a commercial delivery service making same-day delivery; (B) transmission by facsimile; or (C) transmission by electronic mail.

(c) three days will be added to the prescribed time if the paper is served by mail.

With respect to Parts Five and Five A of the Rules, this Rule applies only to the time for filing a brief in opposition.

F. Motions to Compel

Federal

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or

discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) Sanctions Sought in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f) , 35 , or 37(a) , the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served

with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34 , fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c) .

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f) , the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

State

Rule 4:12. Failure to Make Discovery; Sanctions

(a) Motion for Order Compelling Discovery. — A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the county or city where the deposition is to be taken. An application for an

order to a deponent who is not a party must be made to the court in the county or city where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 4:5 or 4:6, or a corporation or other entity fails to make a designation under Rule 4:5(b)(6) or 4:6(a), or a party fails to answer an interrogatory submitted under Rule 4:8, or if a party, in response to a request for inspection submitted under Rule 4:9, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

A motion under subdivision (a) of this Rule must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 4:1(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court must, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or

attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court must, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order. —

(1) Sanctions by Court in County or City Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or city in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 4:10, the court in which the action is pending may make such

orders in regard to the failure as are just, and among others the following:

> (A) An order that the matters regarding which the order was made or any other designated facts will be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> (E) Where a party has failed to comply with an order under Rule 4:10(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court must require the party failing to obey the order or the

attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. — If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 4:11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court must make the order unless it finds that (1) the request was held objectionable pursuant to Rule 4:11(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Requests for Production or Inspection. — If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 4:8, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under Rule 4:9, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may – without prior entry of a Rule 4:12(b) order to compel regarding this failure – impose any of the sanctions listed in paragraphs (A), (B),

and (C) of subdivision (b)(2) of this Rule. In lieu of any order or in addition thereto, the court must require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 4:1(c).

G. Motion Practice

Federal

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) In General. 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.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

State

Rule 4:15. Motions Practice

All civil case motions in circuit court will be scheduled and heard using the following procedures:

(a) Scheduling — All civil case motions in circuit court will be scheduled and heard using the following procedures:

1. Presenting the motion on a day the court designates for motions hearings, or

2. Contacting designated personnel in the office of the clerk of the court or the chambers of the judge or judges of the court.

(b) Notice — Reasonable notice of the presentation of a motion must be served on all counsel of record. Absent leave of court, and except as provided in paragraph (c) of this Rule, reasonable notice must be in writing and served at least seven days before the hearing. Counsel of

record must make a reasonable effort to confer before giving notice of a motion to resolve the subject of the motion and to determine a mutually agreeable hearing date and time. The notice must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. In an Electronically Filed Case, the notice provisions of this paragraph and the filing and service requirements of paragraph (c) of this Rule is accomplished in accord with Rule 1:17.

(c) Filing and Service of Briefs — Counsel of record may elect or the court may require the parties to file briefs in support of or in opposition to a motion. Any such briefs should be filed with the court and served on all counsel of record sufficiently before the hearing to allow consideration of the issues involved. Absent leave of court, if a brief in support of a motion is five or fewer pages in length, the required notice and the brief must be filed and served at least 14 days before the hearing and any brief in opposition to the motion must be filed and served at least seven days before the hearing. If a brief will be more than five pages in length, an alternative hearing date, notice requirement, and briefing schedule may be determined by the court or its designee. Absent leave of court, the length of a brief may not exceed 20 pages, double spaced.

(d) Hearing — Except as otherwise provided in this subparagraph, upon request of counsel of record for any party, or at the court's request, the court will hear oral argument on a motion. Oral argument on a motion for reconsideration or any motion in any case where a pro se incarcerated person is counsel of record will be heard orally only at the request of the court. A court may place reasonable limits on the length of oral argument. No party may be deprived of the opportunity to present its position on the merits of a motion solely because of the unfamiliarity of counsel of record with the motions

procedures of that court. A court, however, at the request of counsel of record, or in the judge's discretion, may postpone the hearing of the motion, or require the filing of briefs to assure fairness to all parties and the ability of the court to review all such briefs in advance of the hearing.

(e) Definition of Served — For purposes of this Rule, a pleading is deemed served when it is actually received by, or in the office of, counsel of record through delivery, mailing, facsimile transmission or electronic mail as provided in Rule 1:12.

Local (Western District of Virginia)

Rule 11. Pleadings and Motions

(a) Address and Telephone Number. All pleadings and motions must include the attorney's office address, telephone number, e-mail address, and the attorney's bar identification number. All pleadings and motions filed by a non-prisoner litigant proceeding pro se must contain an address where notice can be served on such person and a telephone number where such person can be reached or a message left. All pleadings and motions filed by a prisoner proceeding pro se must contain an address where notice can be served on such person.

(b) Determination of Motions. A party may request a hearing on a motion or advise that all parties agree that no hearing is requested. All hearings are to be at a date and time obtained from and scheduled by the Court. In accordance with Federal Rule of Civil Procedure 78(b), the Court may determine a motion without an oral hearing.

(c) Briefs Required.

(1) All motions, unless otherwise directed by the Court and except as noted hereinbelow, must be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the

authorities upon which the movant relies. Unless otherwise directed by the Court, the opposing party must file a responsive brief and such supporting documents as are appropriate within 14 days after service, and the moving party may file a rebuttal brief within 7 days after the service of the opposing party's reply brief. No further briefs (including letter briefs) are to be submitted without first obtaining leave of court.

(2) Briefs need not accompany motions: (a) for a more definite statement; (b) for an extension of time to respond to or file pleadings, unless the time has already expired; (c) for a default judgment; (d) for continuances; and (e) to amend pleadings or add or substitute parties. These motions, while not requiring a brief, must state good cause justifying the relief requested. In addition, a separate brief is not required where a motion itself contains the legal and factual argument necessary to support the motion.

(3) Procedural motions, including motions for enlargement of time, whether or not opposed, may be acted upon at any time by the Court, without awaiting a response, and any party adversely affected by such action may request reconsideration, vacation, or modification of such action.

H. Clever Stuff

§ 8.01-279. When proof is unnecessary unless affidavit filed; handwriting; ownership; partnership or incorporation

A. Except as otherwise provided by § 8.3A-308, when any pleading alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the handwriting shall be required, unless it be denied by an affidavit accompanying the plea putting it in issue.

B. When any pleading alleges that any person, partnership, corporation, or unincorporated association at a stated time, owned, operated, or controlled any property or instrumentality,

no proof of the fact alleged shall be required unless an affidavit be filed with the pleading putting it in issue, denying specifically and with particularity that such property or instrumentality was, at the time alleged, so owned, operated, or controlled.

C. When parties sue or are sued as partners, and their names are set forth in the pleading, or when parties sue or are sued as a corporation, it shall not be necessary to prove the fact of the partnership or incorporation unless with the pleading which puts the matter in issue there be filed an affidavit denying such partnership or incorporation.

8.01-420.2. Limitation on use of recorded conversations as evidence

No mechanical recording, electronic or otherwise, of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage. The parties' knowledge of the recording pursuant to clause (i) shall be demonstrated by a declaration at the beginning of the recorded portion of the conversation to be admitted into evidence that the conversation is being recorded. This section shall not apply to emergency reporting systems operated by police and fire departments and by emergency medical services agencies, nor to any communications common carrier utilizing service observing or random monitoring pursuant to § 19.2-62.