THE MODERN LAWYER'S TOOLKIT

ETHICS, TECH, & OPPORTUNITY

2025 GENTRY LOCKE CLE

Tuesday September 9, 2025

Town Point Club, Norfolk

THE MODERN LAWYER'S TOOLKIT

ETHICS, TECH, & OPPORTUNITY

2025 GENTRY LOCKE CLE

Tuesday September 9, 2025
Town Point Club, Norfolk

AGENDA

1:00 PM	[ETHICS] Beyond Schadenfreude: Artificial Intelligence and Legal Ethics Jessiah Hulle
1:30 PM	The Current State of Punitive Damages in Virginia Josh Lepchitz
2:00 PM	The Data Breach Lawsuit: Strategies for Avoiding and Winning Cyber Litigation John Danyluk
2:30 PM	Break
2:45 PM	What to Know About Raising Money Through Private Placements Mike Moro
3:15 PM	Five Common Legal Issues in Federal Government Contracting: Issue Spotting for Non-Government Contract Specialists Paul Hawkins
3:45 PM	[ETHICS] Strategies and Tips for Avoiding Legal Malpractice Claims and Bar Complaints Guy Harbert
4:15 PM	Reception

GENTRY LOCKE
Attorneys

John M. Scheib

Partner

- Office: 757.916.3511
- Fax: 540.983.9400
- Email: scheib@gentrylocke.com

John Scheib is a partner in Gentry Locke's General Commercial Practice Group. He is the former Chief Legal Officer and a former senior executive of Norfolk Southern Corporation, and has extensive deal-making, legislative, regulatory, and business experience. The majority of John's career has been spent working in the legal aspects of the transportation and railroad industries. He has experience in strategic communications and strategic planning as well as in managing internal teams across a variety of practice areas. He is adept at managing administrative tasks as well as identifying and implementing process improvements.

John has served on the advisory board of several companies and previously served on the board of directors for Conrail. He served as President of two captive insurance companies. John also served on the board of directors for the United States Chamber of Commerce from 2018 to 2020 and is an active member of the Virginia Bar Association's Transportation section. He currently serves on the Virginia Bar Association Board of Governors, on the Virginia Small Business Financing Authority, and as President and Chair of the Board of Scouting America.

Education

- Villanova University School of Law, J.D. magna cum laude with honors: Order of the Coif; Law Review; Hyman-Goodman Award; Leonard Levin Memorial Award; Wapner, Newman & Wigrizer Award
- University of Virginia, B.A.

Experience

Legal Counsel

Recognized legal elite with more than twenty years practicing law and leading and evolving a law department based on four pillars – quality legal advice timely, position for positive outcomes, cost effectiveness, and develop people. Extensive experience in commercial, litigation, regulatory, and antitrust law.

Government Relations and Communications Leader

Developed comprehensive media, political, and legal strategies to position NS as thought leader. Led multiple government relations campaigns to advance or oppose legislation or regulations. Led legal and public relations efforts to fight off takeover attempt. Coordinated cohesive public relations campaign called "Reimagine Possible" to position company as industry thought leader on technology in transportation, which was awarded Silver Bull Dog award for Best Public Relations campaign.

Vision/Strategy

Leveraged data analytics to drive vision, direction, and culture change in Legal, Government Relations, Corporate Communications, Human Resources, and Labor Relations functions. Innovates with new tools, systems, and processes to streamline business operations, improve efficiencies, and reduce costs. Redesigned and focused organization around lowering the effort for customers to interact with the company, which is proven to be the key driver of customer loyalty.

Board Member and Advisor

Served on for-profit and not-for-profit boards and advisory boards to refine strategies and test management assumptions and plans.

Fundraiser and Trainer in Civic Roles

Chaired and worked 2020 Friends of Scouting campaign that is second best in Southern Region of BSA and finished at ~180% of 2019 campaign.

Professional Experience

- Provided legal support to and worked with clients on a broad range of issues, including regulatory, legislative, and government relations issues; commercial contracts; business and transactional matters; antitrust issues; litigation strategy; and board issues.
- Has worked with companies of all sizes to advance their business interests through effective lawyering.
- Representative clients include Class I railroad that was target of takeover, including advising the Board of Directors; Class I railroad in regulatory proceeding to gain approval of acquisition of another Class I railroad; commercial vacuum company in commercial contract drafting; and a consulting firm in agreement drafting and negotiation.
- Served as Executive Vice President and Chief Strategy Officer at Norfolk Southern Corporation, one of the nation's premier rail transportation companies with $11.5B in revenues and operating ~19,500 route miles in 22 states and the District of Columbia. Prior to this, John served as General Counsel/General Attorney, then Senior Vice President of Law and Corporate Relations, then Executive Vice President of Law and Administration/Chief Legal Officer for Norfolk Southern Corporation.

Affiliations

- Advisory Board, AttorneyLive (2020-present)
- Advisory Board member, Telegraph, "Early stage startup transforming the rail industry through category-defining software" (2020- present)
- Conrail, Board of Directors (2018); Benefits Committee (2016-2018)
- General American Insurance Company (NSC Vermont captive), President (2017-2018)
- General Security Insurance Company (NCS Bermuda captive), President (2017-2018)
- Railroads Subcommittee, Public Utilities and Railroads Section, American Bar Association, Vice Chairman (2009-2020)
- United States Chamber of Commerce, Board of Directors (2018-2020)
- Association of American Railroads, Policy and Management Committee or its subcommittees (2005-2020)
- Virginia Bar Association, member of Transportation Section; past Chair Corporate Counsel Section (present)
- Tidewater Council, BSA, Executive Board (2010-present)
  - President (2024)
  - Executive Vice President (2023)
  - 2020 Chairman of Friends of Scouting Fundraising Campaign, doubling campaign size. Southern Region. 2020 campaign finished at ~180% of 2019 campaign.
  - Vice President of Membership (2015-2017)
  - Silver Beaver Award (2020)
  - Council Alumnus of the Year (2020, first in Tidewater Council)
  - NESA Outstanding Eagle Scout (2023)

Admissions

- Admitted to Bar in Virginia
- Eastern District of Virginia
- United States Court of Appeals for the Fourth Circuit

Executive Education

- Harvard Business School, Cambridge, Massachusetts
  Certificate: General Management Program (2015)
  Honors: Strategy Competition Finalist
- University of Virginia Darden School of Business, Charlottesville, VA
  Executive Education for Norfolk Southern Employees (2007)

Awards

- Listed in Best Lawyers in America for Corporate Law (2024 – 2026)
- Named to the Leaders in the Law List by Virginia Lawyers Weekly (2023)
- Named a Virginia Legal Elite, Virginia Business Magazine (2011-2013, 2018, 2023-2024)
- Awarded the Surface Transportation Board Award for Excellence (2003)
- Received the Secretary's Team Award, from Secretary of Transportation, Norman Y. Mineta (2005)
- Named Outstanding Young Virginian of the Year, awarded by the Virginia Jaycees (2002)
- Eagle Scout

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 20, 2025 — **Port Commission Oversteps Its Authority in Pursuing Railroad**
- May 20, 2024 — **Railroad's Track Cannot Be Taken by Local Development District**
- Nov 17, 2023 — **STB Holds That Town Can't Thwart Development of Rail Facilities**

GENTRY LOCKE
Attorneys

Jessiah S. Hulle

Associate

- Office: 540.983.9416
- Mobile: 540.798.5716
- Fax: 540.983.9400
- Email: hulle@gentrylocke.com

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

Josh E. Lepchitz

Associate

- Office: 757.916.3526
- Fax: 540.983.9400
- Email: jlepchitz@gentrylocke.com

Josh Lepchitz is a member in the firm's Civil Defense Litigation practice group. Josh's practice focuses on defense litigation, primarily on workers compensation, personal injury and insurance defense. He handles complex cases both in the General District and Circuit Courts throughout the Commonwealth.

Prior to joining Gentry Locke, Josh was an associate at a boutique law firm in Norfolk. He also served as Assistant Commonwealth's Attorney for the city of Norfolk, prosecuting criminal offenses. Josh is a native of Southwest Virginia.

Education

- University of Richmond School of Law, J.D.
- The College of William & Mary, B.A.

Experience

- 150 and counting cases handled involving workers compensation matters
- Defended against multi-million dollar personal injury and premise liability claims
- Handled cases involving complex employment matters, personal injury claims, criminal defenses, and insurance claims
- Prosecuted misdemeanor and felony offenses ranging from traffic infraction appeals to murder while serving as Assistant Commonwealth's Attorney for the city of Norfolk
- Served as a domestic violence prosecutor while serving as Assistant Commonwealth's Attorney for the city of Norfolk

Affiliations

- Board Member, Norfolk Portsmouth Bar Association, Young Lawyers Division
- Member, PRISM Society of Young Professionals, Virginia Opera
- Member, Virginia Museum of Contemporary Art
- Board Member, GenZoo, Virginia Zoo

Admissions

- Virginia State Bar
- U.S. District Court, Eastern District of Virginia

Awards

- Named a Virginia Rising Star in Workers' Compensation, Civil Litigation by Super Lawyers (2025)

GENTRY LOCKE
Attorneys

John G. Danyluk

Partner

- Office: 804.956.2066
- Mobile: 804.205.0157
- Fax: 540.983.9400
- Email: danyluk@gentrylocke.com

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

Michael V. Moro, II

Partner

- Office: 757.916.3513
- Mobile: 757.635.3983
- Fax: 540.983.9400
- Email: mmoro@gentrylocke.com

Mike Moro is a partner in the firm's General Commercial Practice Group. Mike advises business owners and business organizations on matters concerning mergers and acquisitions, corporate governance, corporate finance, and all manner of commercial transactions. He assists clients in connection with the preparation of governing documents, shareholder agreements, and operating agreements. He negotiates commercial contracts, including software license agreements and cloud computing agreements, handles all aspects of mergers and acquisitions transactions, and advises clients in connection with the negotiation of commercial lease agreements.

Prior to joining Gentry Locke, Mike served as Of Counsel at a boutique business law firm and prior to that, served as Corporate Counsel for a NASDAQ-listed financial services company. Previously, Mike served as Senior Counsel for a global sports and entertainment technology provider and also worked at law firms in Miami, FL and Rome, Italy. Mike speaks Italian, Spanish, and Portuguese.

Education

- University of Miami School of Law, J.D.
- University of Massachusetts Amherst, B.A.

Experience

- Represented publicly traded company in multiple mergers and acquisitions transactions, including acquisitions in Europe and South America.
- Represented publicly traded company in multiple renegotiations of its syndicated credit facility.
- Represented solar developer in negotiation of credit facility.
- Represented management team and investors in leveraged management buyout of specialized recruiting company.
- Represented real estate investment firm in connection with multiple Regulation D private placements.
- Represented health care technology company in connection with Regulation D private placement of convertible notes.
- Represented multinational sports media company in the negotiation of complex IT service agreements with global sports federations and broadcasters.
- Represented security solutions company in the negotiation of software license agreements and cloud services agreements with national retailers.
- Served as Virginia counsel to real estate developer in refinancing transaction.
- Represented real estate developer in negotiations with multiple telecommunications providers.
- Represented private equity firms, strategic buyers, target companies and target company shareholders in M&A transactions.
- Acted as general counsel to the US subsidiaries of foreign companies.

Affiliations

- American Bar Association, Business Law Section, Mergers & Acquisitions Committee, Federal Regulation Committee
- Virginia Bar Association, Business Law Section
- Veterans Business Outreach Center, Consulting Attorney
- Virginia Beach Bar Association
- Virginia State Bar, Business Law Section
- Past Member, Sandler Center Foundation Giving Circle
- Hampton Roads Community Foundation Community Leadership Partners, Membership Committee
- Board Member, Association of Corporate Growth (ACG 757)

Admissions

- Virginia State Bar
- The Florida Bar

Awards

- Named to Coastal Virginia Magazine’s 2025 Top Lawyers list for Business Law, Corporate Finance and Mergers & Acquisitions.

GENTRY LOCKE
Attorneys

Paul D. Hawkins

Partner

- Office: 757.916.4405
- Fax: 540.983.9400
- Email: phawkins@gentrylocke.com

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

Guy M. Harbert, III

Partner

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

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

Education

- Washington and Lee University School of Law, J.D. cum laude
- 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

Beyond Schadenfreude
Artificial Intelligence and Legal Ethics

Jessiah S. Hulle
540.983.9416
hulle@gentrylocke.com

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]

---

[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]

---

[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.

---

[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

---

[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

---

[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.

---

[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 $y_K pa\ddot{i}_H$. 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 Lookout. 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.**

79

- 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&Refld=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]

---

[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)

GENTRY LOCKE
Attorneys

2

The Current State of Punitive Damages in Virginia

Josh E. Lepchitz
757.916.3526
jlepchitz@gentrylocke.com

The Current State of Punitive Damages in Virginia

Joshua E. Lepchitz

Gentry Locke Norfolk Seminar – September 9, 2025

Punitive damages are damages that can be awarded in a civil litigation if the prevailing party can meet its burden of proof and show that the defendant's conduct was deliberate, or reckless to the point that it shows a conscious disregard for the safety of others. Punitive damages are often referred as "exemplary damages" because they are intended to send a message that such conduct will be more severely punished, in an effort to deter any such conduct in the future—not simply for the defendant involved in the lawsuit, but for society at large.

For punitive damages, Virginia courts are looking for, at a minimum, willful and wanton conduct which reflects the defendant knew or should have known that an injury would have likely resulted from their actions. Willful and wanton is the highest level of negligence. Punitive damages can also be awarded for intentional tortious conduct. The burden of proof a plaintiff must carry to justify punitive damages is the preponderance of the evidence. 1 Virginia Model Jury Instructions – Civil Instruction No. 9.080 (2025).

The degrees of negligence:

- Simple Negligence
    - Lowest degree of negligence.
    - The failure to exercise the ordinary care of a reasonable person in the same situation.
    - Requires a duty, breach of that duty, harm/injury, and causal connection between breach of duty and the harm/injury suffered.
    - Compensatory damages are recoverable, not punitive damages.
- Gross Negligence
    - Negligence that shows complete indifference and disregard for the safety of others.
    - Gross negligence refers to negligence that would be shocking to reasonable fair minded people.
    - Gross negligence is a question of indifference. A claim for gross negligence fails when the defendant exercised some degree of care. The slightest consideration towards the safety of others should defeat a claim for gross negligence.
    - A plaintiff need not prove whether a defendant knew or should have expected the consequences of their actions, but rather that the defendant disregarded any such consideration pertaining to the consequence of its actions.

    - Generally, the burden of proof for gross negligence is a preponderance of the evidence. Virginia has particular carve outs for certain claims that will elevate the burden of proof from preponderance of the evidence to clear and convincing.[1]
    - Compensatory damages are recoverable while punitive damages are not recoverable.
- Willful and Wanton Negligence
    - This is the highest degree of negligence.
    - This describes actions taken by a defendant that are executed either with malice, intent, or a conscious disregard for the safety of others.
    - A finding of willful and wanton negligence requires sufficient evidence that the defendant(s) knew from the exiting circumstances that their conduct would probably result in someone getting injured. Intent to harm or ill will is not a required showing, but is quite helpful in establishing a deliberate disregard for the safety of others.
    - The burden of proof for willful and wanton negligence is by a preponderance of the evidence. Much like gross negligence, statutory carve outs and exceptions can shift the burden of proof to clear and convincing evidence. These carve outs typically apply to sovereign and charitable entities, and will apply to particular claims such as defamation.
    - Compensatory and punitive damages are recoverable.

The level of negligence is a fact driven inquiry, and considers the entirety of the evidence, circumstances, and reasonable inferences that can be made. For example, a professional in their field with significant training will be expected to have a higher knowledge base and understanding of potential consequences than a lay person.

Punitive damages are not without limitations in Virginia. There is a cap to how much a party can receive in punitive damages of $350,000. Va. Code § 8.01-38.1. While it is not a reason to forego the pursuit of punitive damages, they are subject to being taxed. The reason punitive damages are taxable as "other income" is because punitive damages serve a purpose outside of making an injured party whole.

Statutes to keep in mind regarding punitive damages.

[1] 1 Virginia Model Jury Instructions – Civil Instruction No. 4.010 (2025), states that the "plaintiff has the burden of proving by the greater weight of the evidence that the defendant was [negligent; grossly negligent; willfully or wantonly negligent] and that the defendant's negligence was a proximate cause of the accident and any injuries to the plaintiff." The evidentiary burden to be carried by a plaintiff can shift to clear and convincing evidence depending upon the claim being alleged, or the defendant being accused. Sovereign and charitable immunities protect against negligence, but not gross negligence or willful or wanton negligence and can shift the burden of proof to clear and convincing evidence. *See Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.3.2d 798 (1996). An accusation of common law fraud must be sustained by evidentiary proof that is "clear, cogent, and convincing." *Patrick v. Summers*, 235 Va. 452, 369 S.E.2d 162 (1988).

- Va. Code § 8.01-38.1 – Limitations on recovery of punitive damages

    - Limits the value of punitive damages recoverable in any action. The cap is $350,000. Va. Code § 8.01-38.1. The parameters of the $350,000 cap are discussed in more detail below with case law examples.
    - "In any action accruing on or after July 1, 1988, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed $350,000. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section." Va. Code § 8.01-38.1
    - There has been no change in statute since it was originally written. An amendment was attempted in 2020 to secure a carve out exception in cases involving opioid related deaths.

- Va. Code § 8.01-38

    - This section governs tort liability for hospitals in the Commonwealth.
    - A hospital under this section is defined in Va. Code § 32.1-123.
    - Only hospitals that exclusively render charitable medical services with no billing to the patient are immune from negligence or tortious conduct. Va. Code § 8.01-38.
    - A hospital that admits a patient under an express written agreement delivered at the time of admission—with the terms that all medical services are to be supplied on a charitable basis without financial liability—will be immune from negligence or any other tort.
    - A Virginia hospital that is non-profit, but not exclusively a charitable service, that carries liability insurance for negligence and other tortious conduct for an amount that is less than $500,000, shall not be liable to another party in excess of the liability policy they carry. Va. Code § 8.01-38.

- Va. Code § 8.01-44.5 – Punitive damages for persons injured by intoxicated drivers

    - The same standard of willful and wanton negligence is applied for defendants that are intoxicated drivers. A defendant is deemed sufficiently willful or wanton if they produce a BAC of .15 or higher, knew or should have known his ability to operate a motor vehicle was impaired, and intoxication was a proximate cause to injury incurred by plaintiff. Refusal to submit to a BAC test is deemed sufficiently willful and wanton if the other two elements are met.
    - A lawsuit centered around a DUI does not require a BAC of .15 or higher for punitive damages. A court will look at the totality of circumstances to determine

whether or not a defendant acted with willful and wanton negligence. A BAC of .15 or higher creates a rebuttable presumption.

- Va. Code § 38.2-227 – Public policy regarding punitive damages.

    - "It is not against the public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of person as the result of negligence, including willful an wanton negligence, but excluding intentional acts." This statute was first enacted in in 1983 and has remained unchanged. It is a codification of the Commonwealth's public policy. This policy is applicable to death and injury of person. It does not apply to property damages. *United States Fire Ins. Co. v. Aspen Bldg. Corp.*, 235 Va. 263, 367 S.E.2d 478 (1988).

- Punitive Damages in Other 4th Circuit Jurisdictions

    - North Carolina – $250,000 or 3X the compensatory damages, whichever is greater. The standard of proof for an award of punitive damages in North Carolina is clear and convincing evidence.
    - South Carolina – Requires clear and convincing evidence to show willful and wanton negligence. Damages are capped at $500,000 or 3X compensatory damages and the burden of proof is by clear and convincing evidence.
    - Maryland – there is no statutory cap or limit on punitive damages, but very rare to see amounts that exceed 4X compensatory damages. The burden of proof for punitive damages in Maryland is clear and convincing evidence.
    - West Virginia requires clear and convincing evidence of actual malice or "conscious, reckless and outrageous indifference." Punitive damages are capped in West Virginia at $500,000 or 4X the compensatory damages, whichever is greater.

Case Law Examples

Wakenhut Applied Technologies Center, inc. v. Sygnetron Protection Systems, Inc., 979 F. 2d. 980 (4th Cir. 1992).

In *Wakenhut Applied Technologies Center, Inc. v. Sygnetron Protection Systems, Inc.*, the plaintiff was awarded punitive damages against only one of the defendants for $1,000,000. 979 F.2d 980, 984 (4th Cir. 1992). This case was a claim of breach of contract and tortious interference. Plaintiff, a contractor, agreed to supply a building security system for a government facility. Pursuant to Virginia Code § 8.01-38.1, the district court reduced the punitive damages awarded to $350,000. *Id.* The plaintiff appealed this decision, advancing several arguments as to why the district court erred in reducing the punitive damages. *Id.* First, the plaintiff argued that the legislative history demonstrates the General Assembly's intent for the punitive damages cap to only apply to "unintentional tort actions." *Id.* Plaintiff further argued that applying the cap to

intentional tort actions would be inconsistent with other laws of the Commonwealth. *Id.* Finally, it argued that "applying the cap to action such as [is] involved in this case would violate the due process clause of the Fourteenth Amendment … and of the Virginia Constitution." *Id.*

The Fourth Circuit held that these arguments were without merit and affirmed the district court's decision. *Id.* First, the Court interpreted the statute's plain meaning, finding inclusion of the language "any action" to mean that the punitive damages cap applied to any action, and further reasoned that no definition section provided any other meaning. *Id.* Next, as to the plaintiff's legislative history argument, the Court agreed that one of the original purposes of the provision may have been "to limit recovery of noneconomic damages in personal injury actions." *Id.* However, during the drafting process, "noneconomic damages" was replaced by "punitive damages," indicating the intent was to include any action. *Id.* (citing Journal of the Va. Senate, 1987 Sp. Sess. 801-02 (Feb. 27, 1987)).

The plaintiff further argued that Virginia Code § 38.2-227 prohibited "the purchase of insurance which would provide coverage for an award of punitive damages for intentional acts," which conflicted with § 8.01-38.1. *Id.* at 985. The Court reasoned that no inconsistency existed and that both provisions support the purpose of punitive damages, which is "to punish and deter." *Id.* (citing *Kamlar Corp. v. Haley*, 224 Va. 699 (1983)). Further, the court reasoned that § 38.2-227 ensured that the defendant paid its penalty, and that § 8.01-38.1 ensured that this penalty was not excessive. *See id.* Finally, the Court reasoned that the provision did not run afoul of due process because it was "an economic regulation," and due process "requires only that an economic regulation bear a rational relation to a proper governmental purpose." *Id.* (quoting *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83-84 (1978)). In conclusion, the Court disagreed with the plaintiff on its many arguments and affirmed the district court's decision.

Alfonso v. Robinson, 257 Va. 540 (1999).

In *Alfonso v. Robinson*, the Virginia Supreme Court was asked to determine whether "the trial court erred in instructing the jury on the issue of willful and wanton negligence." 257 Va. 540, 542 (1999). The defendant had been driving his tractor-trailer at night on the interstate when it then became disabled; he managed to "steer the truck into the right-hand lane of the highway near a rest area," deciding to run to the rest area immediately and telephone for assistance (leaving the truck unattended for about 10 to 15 minutes). *Id.* While away from the truck, the plaintiff's van collided with the trailer's rear end at a speed of roughly 60 miles per hour. *Id.* The plaintiff and another witness testified that the "truck's flashing hazard lights were not activated" and that "no flares or reflective triangles had been placed in the roadway behind the truck before the collision." *Id.* at 543.

The plaintiff brought a claim for "willful and wanton negligence … exhibit[ing] a total disregard for the safety of the traveling public." *Id.* The plaintiff's case established that the defendant had received training within a year, where he learned that "deployment of warning flares or reflective triangles was the first thing you should do after securing a truck that had become disabled." *Id.* (quotations omitted). Further, the plaintiff established that the defendant knew of federal regulations requiring him to take such action and that these safety measures aimed to "warn people who are coming up from behind and let them know that you're stopped." *Id.* at 543–44

(quotations omitted). The trial court overruled the defendant's motion to strike the claim for willful and wanton negligence and submitted the case to the jury. *Id.* The jury found in favor of the plaintiff, and the defendant appealed the trial court's decision to submit "the issue of willful and wanton negligence to the jury." *Id.*

The Virginia Supreme Court affirmed the trial court's decision, holding that "the cumulative evidence of [defendant]'s knowledge and conduct raised a question of willful and wanton negligence for the jury's determination." *Id.* The Court reasoned that "[w]illful and wanton negligence is action taken … with reckless indifference to consequences that the defendant is aware, from his knowledge of existing circumstances and conditions, would probably result from his conduct and cause injury to another." *Id.* at 545 (citing *Harris v. Harman*, 253 Va. 336, 340–41 (1997)). The Court agreed with the defendant that an "intentional violation of a traffic law, without more," does not constitute willful and wanton negligence. *Id.* However, it disagreed that such a conclusion answered this case as a matter of law. *Id.* It further reasoned that the defendant was a "professional driver" having received "specialized safety training," and that "[d]espite this training and knowledge, [defendant] consciously elected leave the disabled truck in a travel lane … without placing any warning devices behind it." *Id.* Thus, the Court stated that the defendant's "knowledge and omissions were factors to be considered in the context of the other evidence." *Id.*

The jury awarded $550,000 in damages. That award was reduced to $450,000 on the defendant's motion and supported by the Plaintiff's Amended Motion for Judgment. *Id.* Unfortunately the case law does not address how much of the award was for punitive damages, but *Alfonso* is often cited in cases involving professionals with specialized training or knowledge where punitive damages are sought.

Al-Abood v. El-Shamar, 217 F.3d 225 (4th Cir. 2000).

In *Al-Abood v. El-Shamar*, the plaintiff had prevailed on its claims for "fraud, breach of fiduciary duty, and conversion." 217 F.3d 225, 229 (4th Cir. 2000). At the district court level, "[t]he jury awarded punitive damages in excess of $4 million." The trial court reduced that figure pursuant to Virginia Code § 8.01-38.1. The district court reduced the punitive damages to $700,000. *Id.* at 236–37. The Court found that punitive damages were applciable "as a per-defendant cap" and, thus, awarded $350,000 per each of the two defendants totaling the $700,000 awarded. *Id.* On appeal to the Fourth Circuit, the defendants challenged the district court's interpretation of this provision and the amount awarded.

The Fourth Circuit held that "the statute mandates that the entirety of the punitive damages awarded in the action amount to no more than $350,000" and remanded this part of the case back to the district court to reduce the amount awarded. *Id.* at 237. The Court reasoned that no Virginia decisions have addressed whether this provision was to be applied on a per-defendant basis. *Id.* The Court then cited conflicting opinions but stated that neither had addressed this issue head-on. *Cf. Advanced Marine Enterprises, Inc. v. PRC Inc.*, 256 Va. 106 (1998) (affirming a circuit court decision in which the lower court applied the punitive damage cap against each defendant), with *Huffman v. Beverly Calif. Corp.*, 42 Va. Cir. 205 (Rockingham Co., 1997) (applying the statutory cap to the action as a whole rather than per defendant).

Next, the Court reasoned that it must apply the statute's plain meaning. *Id.* (citing *Bray v. Brown*, 258 Va. 618 (1999)). The Court found the first sentence of the provision persuasive, which reads "the total amount awarded for punitive damages against *all* defendants[.]" *Id*. (quoting Va. Code § 8.01-38.1)(emphasis added). The language "total amount awarded" and "in any action" supported the Court's finding that the total amount could not exceed the statutory cap. *Id*. (citing Va. Code 8.01-38.1). The Court ultimately concluded that the statute's plain meaning mandated that the cap is not applied on a per-defendant basis, but rather on the action as a whole. *Id*. This decision left the door open for *Sines v. Hill*, stating in a footnote that it "express[ed] no opinion on how the cap would be applied in a case involving multiple plaintiffs." *Id.* at n.10.

<u>*Doe v. Isaacs*</u>, 265 Va. 531 (2003).

In *Doe v. Isaacs*, the plaintiff and his wife had been hit from behind by an unknown driver. 265 Va. 531, 533–35 (2003). The driver rear-ended them at a traffic light, stumbled out of his vehicle, showed signs of intoxication, requested that the plaintiff not call the police, and then left the scene of the accident. *Id.* The plaintiff's wife suffered severe injury as a result of the accident. *Id.* At trial, the jury found the defendant negligent and awarded the plaintiff and his wife each $175,000 in punitive damages. *Id.* The plaintiffs argued that punitive damages were proper because the defendant knew of the seriousness of the injuries, did not assist with mitigating the injuries, and committed a felony hit-and-run by leaving the scene of the action. *Id.* The defendant appealed, assigning error to the trial court's decision to allow the jury to consider punitive damages in this case. *Id.*

The Supreme Court of Virginia held that based upon the facts, punitive damages in this case "are not recoverable as a matter of law." *Id.* The Court stated that the purpose of punitive damages was to protect the public, punish the defendant, and deter the defendant "and others from committing like offenses." *Id.* at 536 (quoting *Baker v. Marcus*, 201 Va. 905 (1960)). Thus, punitive damages are only warranted when "misconduct or malice, or such recklessness or negligence as evinces a *conscious* disregard for the rights of others." *Id.* (quoting *Baker*, 201 Va. at 909) (emphasis in original). The Court reasoned that the "objective facts" must show that punitive damages are proper and then analyzed several cases to illustrate further. *Id.* at 537; *cf. Baker*, 201 Va. 905 (overruling the award of punitive damages when an intoxicated driver caused a rear-end collision on a city street), with *Booth v. Robertson*, 236 Va. 269 (1998) (reversing trial court's decision not to allow evidence to be heard on punitive damages where the defendant drove his vehicle at night, severely intoxicated, the wrong way down the highway, had other vehicles swerving, honking, and flashing their lights, and hit the plaintiff head-on). Ultimately, it was concluded that in this case, the "defendant's behavior was not so willful or wanton as to show a conscious disregard for the rights of others." *Id.* at 538.

<u>*Cowan v. Hospice Support Care, Inc.*</u>, 268 Va. 482 (2004).

In *Cowan v. Hospice Support Care, Inc.*, the Virginia Supreme Court was called upon to determine whether the doctrine of charitable immunity barred claims of willful and wanton negligence. 268 Va. 482, 484 (2004). The plaintiff's mother had been placed in the care of a charitable temporary care facility. *Id.* While there, the decedent's leg was broken while being

improperly lifted out of her bed; she received pain medication but was not "provided any other medical treatment" during her week-long stay at the facility. *Id.* When the plaintiff discovered her mother's injuries, she took her mother to a hospital, where her leg had to be amputated. *Id.* The decedent ultimately died due to "complications resulting from the surgery." *Id.* The circuit court dismissed the plaintiff's claims against the charitable organization, holding that "the charitable immunity doctrine bar[s] recovery for acts or omissions of gross negligence and willful and wanton negligence." *Id.* at 485.

The plaintiff appealed, arguing that "because gross negligence and willful and wanton negligence are different in degree and kind from simple negligence, the charitable immunity doctrine should not be defined as including immunity for those more extreme acts." *Id.* Plaintiff further argued that "the public's interest in encouraging charitable activities is outweighed by the need to deter such acts of reckless and harmful behavior." *Id.* (citations omitted). The defendant argued that "the absence of such immunity would discourage [charities] from performing their beneficial activities." *Id.* The defendant further argued that courts had never previously distinguished between simple and gross negligence when applying the doctrine of charitable immunity and that doctrine should be extended to all degrees of negligence. *Id.* The last argument the defendant made was that the plaintiff was not without remedy and could pursue an action against the individual tortfeasors rather than charitable organization. In support of their argument, defendant asserted that Virginia Code § 8.01-226.4[2] "effectively subjects hospice volunteers to liability for acts of gross negligence and willful and wanton negligence, [and] is evidence of the General Assembly's intent to shield charities from similar liability by providing a remedy against the individuals who actually commit such acts." *Id.* at 485-86.

The Virginia Supreme Court held that "the public policy rationale that shields a charity from liability for acts of simple negligence does not extend to acts of gross negligence and willful and wanton negligence." *Id.* at 488. The Court reasoned that the doctrine of limited charitable immunity was based upon public policy considerations because "the services charities extend to their beneficiaries also benefit the public by alleviating a public burden." *Id.* at 486. The Court then stated that "there are fundamental distinctions separating acts or omissions of simple negligence from those of gross negligence and willful and wanton negligence." *Id.* at 487 (defining each degree of negligence). The Court's reasoning was that simple negligence does "not involve an extreme departure from the charity's routine action in conducting its activities." *Id.* at 487–88. In contrast, the other "two levels of negligence are characterized by conduct that represents an unusual and marked departure from the routine performance of a charity's activities." *Id.* The Court concluded that the defendant's argument was inapplicable because conduct by the charitable organization that amounted to a higher level of negligence than simple negligence could "never be characterized as…carry[ing] out the mission of the charity to serve its beneficiaries." *Id.*

[2] Va. Code § 8.01-225.4 provides immunity for individuals who act in "good faith, without compensation, and in the absence of gross negligence or willful misconduct" that render care to terminally ill patients under a hospice program that's sole purpose is to provide care to terminally ill people so long as the hospice provides services to all members of the community.

Bavely v. Geneva Enters., Inc., 112 Va. Cir. 323 (Fairfax Co., 2023).

In *Bavely v. Geneva Enters., Inc.*, the Court was called upon to determine whether the Virginia Code § 8.01-38.1 punitive damages cap applied on a per-claim or per-lawsuit basis. 112 Va. Cir. 323 (Fairfax Co. 2023). The Court held that "[r]emarkably" the cap applies on a per-lawsuit basis, not allowing the plaintiff to "stack multiple punitive damage caps per claim within the same lawsuit." *Id.* In *Bavely*, the parties consolidated several lawsuits into one. *Id.* at 325. One of the prevailing parties received $750,000 in punitive damages between two separate claims. *Id.* They advanced three main arguments for why their punitive damages should not be reduced: (1) there is no controlling case law on the question presented, (2) the facts of the case were such that the maximum amount of punitive damages should be levied, and (3) they objected to consolidation of their claims and thus equity required they receive maximum punitive damages for each claim. *Id.*

The Court agreed that "[n]o controlling legal authority directly address[ed] the per-lawsuit versus per-claim issue." *Id.* at 326. However, it reasoned that the "plain language of the statute is clear and unambiguous." *Id.* at 327. Finding the leading phrase of the statute authoritative, the Court stated "In any *action*," means that punitive damages may not exceed $350,000 for the action as a whole. *Id.* (emphasis in original). The Court further reasoned that § 8.01's definition statute states that "action" and "suit may be used interchangeably and shall include all civil proceedings … in circuit courts or district courts." *Id.*; Va. Code § 8.01-2(1). The Court also found persuasive the Virginia Supreme Court's interpretation of the word "action" in Virginia's nonsuit statute, Virginia Code § 8.01-380(A), defining the word as "comprised of the claims and parties remaining in the case[.]" *Id.* (quoting *Dalloul v. Agbey*, 255 Va. 511 (1998)). Finally, the Court pointed out the difference between "action" and "cause of action," stating that an action may include multiple causes of action. *Id.* at 328. The Court found none of the prevailing party's arguments persuasive.

Sines v. Hill, 106 F.4th 341 (4th Cir. 2024).

The City of Charlottesville, like many municipalities, decided to remove Confederate monuments. This included a statute of Robert E. Lee in downtown Charlottesville. In August of 2017, protesters descended on Charlottesville. What unfolded became known as the Unite the Right Rally or the Battle for Charlottesville. Among the protestors were white nationalists, white supremacists, and neo-Nazis. The cavalcade of groups and individuals that came to Charlottesville to protest the removal of the Robert E. Lee statue were present to "defend western civilization and white men against perceived enemies – specifically Jewish persons, Black persons, and white gentile traitor allies." *Sines v. Hill*, 106 F.4th 341, 344 (4th Cir. 2024) (citing *Sines v. Kessler*, No. 3:17-cv-00072, 2022 U.S. Dist. LEXIS 233715, 2022 WL 18026336, at *23 (W.D. Va. Dec. 30, 2022)). The protestors that came to Charlottesville planned for violence, sought violence, and did engage in violent activity. Afterwards the violence that unfolded was glorified by the protestors. *Id.*

A jury trial was held. At the conclusion of the evidence the jury deliberated for three days. *Sines*, 106 F.4th at 347. The jury found all of the named defendants guilty and awarded $2,000,000 in compensatory damages and $24,000,000 in punitive damages. *Id.* Both the plaintiffs and defendants filed many post-trial motions, including the defendants' motion to seek a reduction in

the jury's award. *Id*. The defendants argued that that the punitive damages were statutorily capped at $350,000, and that the district court erred in holding them jointly and severally liable for compensatory and punitive damages. The district court ultimately reduced the total punitive damages to $350,000. *Id*.

A group of the plaintiffs appealed the district court's reduction of punitive damages from $24,000,000 to $350,000. *Id*. There were multiple arguments raised by the plaintiffs to support this appeal. Among them was that the statutory cap was not applicable to cases involving hate crimes, and that statutory cap provided by Va. Code 8.01-38.1 does not apply to the entire action, but rather on a per plaintiff basis. This was a question of first impression for the Fourth Circuit, and was not an issue that had been raised to the Virginia Supreme Court. *Id.* at 349.

A group of the defendants also filed appeals. Their basis was that the district court erred in holding them jointly and severally liable for counts that did not specifically name them, and that the punitive damages were disproportionate to the compensatory damages. *Id*.

The Fourth Circuit agreed with the plaintiffs that the punitive damages statue applied on a per plaintiff basis. The Fourth Circuit disagreed with the plaintiffs' other contention regarding the applicability of the punitive cap to hate crimes. The Court of Appeals agreed that the defendants waived their arguments for not timely raising them at trial with the district court.

The Defendants argued that being held jointly and severally liable was error, because they had not been named in all of the claims. The court disagreed. Civil conspiracy is a mechanism for spreading liability among co-conspirators for damages stemming as a result of the underlying act that is itself wrongful and tortious. It was not an error to include the unnamed defendants in counts IV and V. *La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC*, 805 S.E.2d 399, 406 (Va. 2017).

The objective of conspiracy is to spread liability to persons other than the primary tortfeasor. Persons conspiring to commit one or more unlawful acts may be held liable for the injuries that result from that conspiracy.

The court ultimately ruled the Virginia punitive damages statute applied generally **to all claims**, and was applicable on a per plaintiff basis.

The Court considered certifying this question to the Virginia Supreme Court but opted not to based on the federal questions within the lawsuit and the challenges on the merits of the jury verdict.

The outcome of this appeal raises several questions, including how Va. Code § 8.01-38.1 awards and caps punitive damages. The plain language of the statute reads, "in any action." While many would agree that this ruling serves justice towards these plaintiffs (and generally), it does cloud the application of Va. Code § 8.01-38.1.

In *Al-Abood*, the Fourth Circuit concluded that the statute's plain meaning mandated that the cap is not applied on a per-defendant basis, but rather on the action as a whole. *Id*. The opinion,

however, was silent on how the cap applied in cases involving multiple plaintiffs because *Al-Abood* was a single plaintiff litigation. *Sine* holds the $350,000 cap should be applied on a per plaintiff basis

The district court in *Sine* relied on *Al-Abood* in order to differentiate and potentially stretch the limits of the punitive damages statue. The Fourth Circuit reasoned that the statute specifically refers to "all defendants," but does not have any language regarding plaintiffs. But in any event, the statute refers to the "total amount awarded" "[i]n any action." This suggests the inclusion of "all defendants" in the statute, should not affect the total amount awarded for multiple plaintiffs.

GENTRY LOCKE
Attorneys

The Data Breach Lawsuit: Strategies for Avoiding and Winning Cyber Litigation

John G. Danyluk
804.956.2066
danyluk@gentrylocke.com

The Data Breach Lawsuit: Strategies for Avoiding and Winning Cyber Litigation

John Danyluk
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.

GENTRY LOCKE
Attorneys

What to Know About Raising Money Through Private Placements

Michael V. Moro, II
757.916.3513
mmoro@gentrylocke.com

The D Brief:
Regulation D and Private Capital Markets
Michael Moro

I. Introduction

Regulation D ("Reg D") was adopted by the U.S. Securities and Exchange Commission (SEC) in 1982 to simplify and clarify existing exemptions for private offerings under the Securities Act of 1933. Its primary purpose is to provide a safe harbor for issuers to raise capital without registering securities with the SEC, thereby reducing compliance burdens for startups and small businesses while maintaining investor protection. Reg D consolidates and refines several statutory exemptions, particularly those in § 4(a)(2) of the Securities Act, which exempts "transactions by an issuer not involving any public offering" from registration. See *SEC v. Ralston Purina Co*., 346 U.S. 119, 126 (1953).

Regulation D created specific exemptions—Rules 504, 505 (now repealed), and 506—codified at 17 C.F.R. §§ 230.504–.506. Rule 506(b) has become the most relied-upon exemption for private placements. Regulation D continues to play a central role in modern securities law, facilitating over $1 trillion in annual capital formation while allowing issuers to avoid the costs and delays associated with public offerings. Legal counsel is critical to navigating Reg D compliance, including advising on investor eligibility, disclosure requirements, and state and federal filing obligations. Lawyers may also help evaluate risk, prepare subscription documents, and coordinate with placement agents or broker-dealers where applicable. 17 C.F.R. §§ 230.501–508.; SEC.gov, Securities Act Rules,https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/securities-act-rules (last visited July 1, 2025).

II. Defining Securities in the Context of Private Placements

The existence of multiple statutory definitions of the term "security" is significant because it reflects the differing purposes and scopes of the federal securities laws. While the definitions found in the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 largely overlap, each statute frames "security" slightly differently to serve distinct regulatory goals—whether protecting investors during offerings, regulating trading markets, overseeing pooled investment vehicles, or governing the conduct of investment advisers.

These definitional nuances can affect how an instrument is classified and whether a transaction is subject to specific regulatory requirements. 15 U.S.C. § 77b(a)(1). Understanding which definition governs a particular instrument or transaction is critical,

as it determines whether the offering qualifies for an exemption and what disclosure, filing, or antifraud obligations may apply under Reg. D.

A. Definitions

1) Securities Act of 1933

"The term 'security' means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security… or, in general, any interest or instrument commonly known as a 'security.'" Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1).

2) Securities Exchange Act of 1934

"The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement… investment contract… or in general, any instrument commonly known as a 'security'... and any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10).

3) Investment Company Act of 1940

"'Security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement… investment contract… or, in general, any interest or instrument commonly known as a 'security.'" Investment Company Act of 1940 § 2(a)(36), 15 U.S.C. § 80a–2(a)(36).

4) Investment Advisers Act of 1940

"'Security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement… investment contract… or, in general, any interest or instrument commonly known as a 'security.'" Investment Advisers Act of 1940 § 202(a)(18), 15 U.S.C. § 80b–2(a)(18).

III. <u>Key Provisions of Regulation D</u>

A. General Rule

Section 4(a)(2) of the Securities Act provides the statutory basis for exempting private offerings, stating that registration is not required for "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(a)(2). Regulation D provides a safe harbor to ensure compliance with this exemption, and legal counsel must assess whether the facts and structure of a particular offering satisfy its criteria. Not all offerings are straightforward; many raise nuanced issues about integration, the nature of investor relationships, and communications that could be deemed general solicitation. Lawyers must tailor their advice based on the client's offering size, audience, and strategy.

B. Rule 504

Rule 504 permits offerings up to $10 million in a 12-month period. 17 C.F.R. § 230.504(b)(2). This exemption is typically used by smaller issuers such as early-stage companies that may lack access to institutional investors. Rule 504 allows for both accredited and non-accredited investors. *Id.* However, its broader accessibility comes with greater state-level oversight. Because it does not preempt state securities laws, issuers must comply with Blue Sky requirements, including notice filings and fee payments.

Some states have adopted uniform exemptions or simplified filings for Rule 504 offerings, while others impose detailed disclosure and qualification standards. Legal counsel must evaluate each jurisdiction's laws to avoid inadvertent violations.

C. Rule 506(b)

Rule 506(b) allows issuers to raise an unlimited amount of capital without registering with the SEC, provided they comply with the specific investor and disclosure requirements. 17 C.F.R. § 230.506(b)(2)(i). Issuers may include up to 35 non-accredited investors, but those investors must have sufficient knowledge and experience in financial and business matters to evaluate the investment. 17 C.F.R. § 230.506(b)(2)(ii). Additionally, issuers cannot use general solicitation or advertising to market the securities. 17 C.F.R. § 230.506(b)(1).

Where non-accredited investors are involved, the issuer must provide extensive disclosure documents that are comparable to those used in registered offerings, including financial statements prepared in accordance with U.S. GAAP. This adds a layer of complexity and cost to the offering and heightens the need for accurate, timely, and complete disclosures. Legal counsel is crucial in drafting and reviewing these materials to ensure compliance and avoid liability under the Securities Act's anti-fraud provisions.

D. Rule 506(c)

Rule 506(c) was adopted pursuant to the JOBS Act and represents a significant shift by permitting general solicitation and advertising, provided that all investors are accredited and the issuer takes "reasonable steps" to verify their status. 17 C.F.R. § 230.506(c)(2)(ii). This verification requirement goes beyond self-certification and typically includes reviewing IRS forms, bank statements, brokerage reports, or receiving written confirmation from a licensed attorney, CPA, or registered broker-dealer.

While Rule 506(c) allows broader marketing, it also introduces greater scrutiny, especially if an investor later challenges their accredited status. Proper documentation of verification procedures is essential. Lawyers should implement and document policies for accreditation checks and help issuers understand how to strike a balance between marketing reach and compliance risk.

IV. Issuer Eligibility: Who Can Offer Securities Under Regulation D?

A. Accredited Investors

Investor eligibility is a cornerstone of Regulation D compliance. The primary classification is that of an "accredited investor," as defined under 17 C.F.R. § 230.501(a). Accredited investors include individuals with a net worth exceeding $1 million, excluding the value of their primary residence, or individuals who have earned income exceeding $200,000 (or $300,000 jointly with a spouse) in each of the two most recent years, with a reasonable expectation of achieving the same income in the current year. This standard reflects the SEC's view that such investors possess sufficient financial sophistication to evaluate investment risks and bear potential losses.

Importantly, misclassification of an offering or failure to comply with investor qualification rules—especially under Rule 506(c), which requires verification of accredited status—can result in enforcement actions and potential civil liability. See 17 C.F.R. § 230.506(c)(2)(ii). Attorneys must rigorously document all steps taken in the offering process, from due diligence and investor verification to disclosures and filings, to protect clients from legal exposure.

B. Non-Accredited Investors

On the other hand, Non-accredited investors are generally excluded from many Regulation D offerings. However, under Rule 506(b), issuers may include up to 35 non-accredited investors, provided those investors, either individually or through a qualified representative, possess the financial sophistication necessary to understand and evaluate the merits and risks of the investment. 17 C.F.R. §

230.506(b)(2)(ii). This financial sophistication standard helps mitigate risk when offering unregistered securities to less experienced investors.

A non-accredited investor is considered "sophisticated" under Rule 506(b) of Regulation D if they, either alone or with a purchaser representative, possess sufficient "knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment." 17 C.F.R. § 230.506(b)(2)(ii). This standard is intended to ensure that such investors can make informed decisions despite not meeting the financial thresholds required to be deemed accredited. The company offering the securities must reasonably believe the investor meets this level of sophistication at the time of sale. See *Id.* Sophisticated investors are also entitled to receive disclosure documents that are generally consistent with those required in registered offerings, including potentially audited financial statements. See U.S. Sec. & Exch. Comm'n, *Rule 506 of Regulation D*, https://www.investor.gov/introduction-investing/general-resources/glossary/rule-506-regulation-d (last visited July 1, 2025).

The presence of non-accredited investors in a Rule 506(b) offering triggers more stringent disclosure obligations. Issuers must provide financial statements and other material disclosures that closely resemble those required in registered offerings under the Securities Act. See 17 C.F.R. § 230.502(b)(2). These include a description of the issuer's business, risk factors, management, and the use of proceeds. These disclosures serve as a critical investor protection mechanism and should be reviewed by legal counsel prior to distribution.

V. Filing Requirements And State Law Considerations

A. Filing of the Form D

Issuers must file a Form D notice with the SEC no later than 15 calendar days after the first sale of securities. 17 C.F.R. § 230.503.

Form D includes essential details such as the name and address of the issuer, the type and amount of securities offered, the exemption relied upon, and the identity and number of investors. 17 C.F.R. § 230.503(b)(1). Although Form D is a notice rather than a registration, late or inaccurate filings can result in SEC scrutiny or complicate future offerings. See *Id.*; U.S. Sec. & Exch. Comm'n, *Form D: Notice of Exempt Offering of Securities*, https://www.sec.gov/smallbusiness/exemptofferings/formd (last visited July 1, 2025).

B. Blue Sky Laws

While Regulation D provides a federal exemption from SEC registration, it does not preempt all state securities laws. See 15 U.S.C. § 77r(b)(4)(D) (2024)

(noting that offerings under Rule 506 are "covered securities" exempt from certain state laws, but subject to notice filing and fee requirements). These state-level requirements (also known as “Blue Sky” laws) may require separate notice filings, filing fees, or the use of specific disclosure forms. For instance, some states require a copy of the private placement memorandum (PPM), consent to service of process, or evidence of the exemption claimed. Noncompliance with these obligations can trigger enforcement actions by state regulators or rescission rights for investors.

C. NASAA Guidelines and Other State Security Regulations

Legal counsel must evaluate the laws of each state in which the securities are offered or sold. Some states have adopted uniform regulations under the North American Securities Administrators Association (NASAA) guidelines, while others maintain their own rules. See N. Am. Sec. Adm’rs Ass’n, *Uniform Limited Offering Exemption (ULOE)*, https://www.nasaa.org/industry-resources/corporation-finance/uniform-securities-act/ (last visited July 1, 2025). Strategic planning to determine in which states to offer securities can reduce regulatory burdens and help streamline compliance efforts. Counsel should also track deadlines for amended Form D filings, which are triggered by material changes. 17 C.F.R. § 230.503(b)(2).

VI. Advantages of Reg. D Private Placements

A. Regulation D offers a range of benefits that make it one of the most popular avenues for private capital formation in the United States. Chief among these is cost savings. Unlike public offerings, which require extensive registration, compliance, and reporting procedures, Reg D offerings minimize regulatory burden. See U.S. Sec. & Exch. Comm’n, *Regulation D Offerings*, https://www.sec.gov/smallbusiness/exemptofferings/regd (last visited July 1, 2025). This is especially advantageous for startups, closely held companies, and early-stage ventures with limited budgets and staffing. See *Concept Release on Harmonization of Securities Offering Exemptions,* Securities Act Release No. 33-10649, 84 Fed. Reg. 30,460, 30,469 (June 26, 2019) (noting that small businesses rely on Reg D for lower-cost capital raising).

B. Another critical advantage is speed and flexibility. Because Regulation D offerings are not subject to the lengthy SEC review process, they can be structured, marketed, and executed more quickly. *Id*. at 30,468 (discussing issuer flexibility and timing advantages under Reg D). Issuers also retain more control over the terms of the offering, including valuation, investor rights, and governance provisions. This flexibility allows companies to tailor offerings to

specific investor bases without having to conform to the more rigid frameworks of registered public offerings. *Id*. at 30,470.

C. Additionally, Reg D placements are subject to fewer public disclosure requirements. See U.S. Sec. & Exch. Comm'n, *Exempt Offerings*, https://www.sec.gov/education/smallbusiness/exemptofferings (last visited July 1, 2025). This confidentiality is appealing to companies that prefer to keep their financial details, ownership structures, and business strategies out of the public domain. This is especially important for companies operating in competitive or sensitive markets. By limiting exposure to public filings, companies can avoid disclosing strategic information to competitors or customers. See *Regulation D Offerings*, supra.

D. Finally, the structure of Regulation D supports long-term relationships with investors who often contribute more than just capital. Many private placements involve investors who bring strategic value—such as business expertise, networks, or advisory capabilities. See *Concept Release on Harmonization*, 84 Fed. Reg. at 30,471. Legal counsel plays an important role in crafting agreements that balance investor protections with issuer flexibility while complying with federal and state law. *Id*. at 30,468-9.

VII. Risk and Other Considerations

A. Limited Market for Private Placements

The limited market for these securities can hinder the issuer's ability to raise capital quickly or at scale. Regulation D generally restricts participation to accredited investors and, in some instances, a small number of sophisticated non-accredited investors. 17 C.F.R. §§ 230.501–506. This limitation can be particularly challenging for companies without existing investor networks.

B. Offerings Subject to Anti-Fraud Provisions

While Reg D offerings are exempt from registration, they are still subject to the anti-fraud provisions of federal securities laws. Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 prohibit the use of any manipulative or deceptive device in connection with the sale of securities. See 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Issuers must ensure that all materials provided to investors are complete, truthful, and free of misleading omissions. Violations may result in SEC enforcement, civil liability, or even criminal penalties.

Under Rule 10b-5, it is unlawful "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" in connection with the offer or sale of securities. 17 C.F.R. §

240.10b-5(b). Likewise, issuers may not "employ any device, scheme, or artifice to defraud" nor "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(a), (c).

These provisions apply even in exempt offerings under Regulation D, reinforcing that exemption from registration does not exempt issuers from the obligation to provide accurate, complete, and non-misleading disclosures. Accordingly, any false statement, material omission, or deceptive conduct in the course of a private placement could trigger serious consequences, including SEC enforcement actions under Section 10(b) of the Securities Exchange Act of 1934, private lawsuits under Rule 10b-5, and potential criminal prosecution for securities fraud.

C. Illiquidity of Securities

The illiquidity of securities sold under Regulation D poses challenges for investors. These offerings involve "restricted securities" that are not freely tradable. Rule 144 of the Securities Act establishes conditions for the resale of such securities, including holding periods and volume restrictions. See 17 C.F.R. § 230.144(a)(3). This lack of liquidity can deter investors who may need access to their funds in the near term and can affect pricing and demand.

These risks require careful structuring of the offering and diligent legal oversight. Issuers must work with experienced counsel to prepare compliant disclosure documents, vet investor eligibility, and ensure adherence to both federal and state requirements. Documentation, communication, and planning are essential to mitigating exposure and achieving a successful offering.

VIII. Legal Precedent and Caselaw

A. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946).

A series of key Supreme Court decisions have laid the groundwork for interpreting the definition of a "security" and determining the applicability of Regulation D exemptions. At the core of these precedents is *SEC v. W.J. Howey Co.*, in which the Court established the "Howey test" to define an investment contract. The test requires:

1) An investment of money,

2) in a common enterprise,

3) with an expectation of profits,

4) derived from the efforts of others.

This four-pronged test remains the foundation for determining whether a transaction qualifies as a security under federal law. *SEC v. W.J. Howey Co*., 328 U.S. 293, 298–99 (1946).

B. *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 851–53 (1975).

In *United Housing Foundation, Inc. v. Forman*, the Supreme Court considered whether shares in a nonprofit housing cooperative constituted securities under federal law. The purchasers were required to buy shares in order to gain access to low-cost housing in a newly constructed co-op, but they were not promised dividends, appreciation, or other investment returns. *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 840–42 (1975). Applying the Howey test The Court concluded the co-op shares were not securities because the purchasers were motivated by a desire for affordable housing, not by profit. *Id.* at 851–53.

C. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

In contrast, the Supreme Court in *Tcherepnin v. Knight* adopted a broad and flexible interpretation of "security" in holding that withdrawable capital shares in a state-chartered savings and loan association were securities under the Securities Exchange Act. *Tcherepnin v. Knight*, 389 U.S. 332, 335–36 (1967). The plaintiffs were depositors who sought federal protection for their interests after the association was placed into receivership. *Id*. at 334. The Court reasoned that the definition of "security" should be interpreted "flexibly to effectuate its remedial purposes." *Id*. at 336. The shares at issue exhibited many traditional characteristics of securities, including investment of money with the expectation of return, and thus satisfied the functional definition of a security under the Act. *Id*. at 338–39.

D. *SEC v. Joiner Leasing Corp*., 320 U.S. 344, 352–53 (1943).

In *SEC v. Joiner Leasing Corp*., the Supreme Court examined whether the sale of oil leases accompanied by promotional materials promising future profits from exploratory drilling constituted a sale of securities. *SEC v. Joiner Leasing Corp*., 320 U.S. 344, 346–47 (1943). Although the transactions were nominally sales of real property interests (oil leases), the Court held that they were in substance sales of investment contracts. *Id*. at 352. The Court found that the promotional efforts and bundled rights created a common enterprise and an expectation of profits based primarily on the efforts of the promoter. *Id*. at 352–53. Joiner Leasing established a foundational precedent for looking beyond form to economic substance when evaluating whether a transaction falls within the ambit of the securities laws. Id. at 352.

IX. Conclusion

Regulation D remains an essential tool for private capital formation in the United States, balancing efficient access to capital with meaningful investor protections. By reducing the regulatory burden associated with public offerings, Reg D enables a broad range of businesses—from startups to established private firms—to secure investment quickly and flexibly. However, these benefits are accompanied by strict compliance obligations, particularly regarding investor qualifications, disclosure standards, and filing requirements.

Legal counsel plays a vital role in navigating these offerings, ensuring adherence to federal and state laws, and advising clients on how to structure, document, and execute offerings in a manner that mitigates legal risk. Counsel must stay informed of regulatory developments, such as evolving definitions of "accredited investor," proposed changes to the exempt offering framework, and the growing use of technology in private placements.

Ultimately, Regulation D offers a powerful capital-raising alternative to the public markets. With the right planning and legal guidance, issuers can leverage its exemptions to fund innovation, expand operations, and achieve long-term strategic goals while maintaining compliance with securities laws.

GENTRY LOCKE
Attorneys

Five Common Legal Issues in Federal Government Contracting: Issue Spotting for Non-Government Contract Specialists

Paul D. Hawkins
757.916.4405
phawkins@gentrylocke.com

Five Common Legal Issues in Federal Government Contracting: Issue Spotting for Non-Government Contract Specialists

By: Paul D. Hawkins, Esq.
Partner
Gentry Locke

Introduction

In Fiscal Year 2024, the United States Federal Government awarded over three quarters of a trillion dollars 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 attorney, government contracts law can seem foreign, dense, and filled with potential malpractice traps to the unknowing. For practitioners working in a geographic area with a large concentration of federal contracting or working in particular 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 or accounted for. 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 many 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 contract 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 to arise in structuring or diligence considerations in various business transactions including corporate reorganizations, ownership restructuring, financing, and mergers and acquisitions.

[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.

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] or how specific regulatory requirements affect deal structure. This risk impacts 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 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), Women-Owned and Economically Disadvantaged Women-Owned Business Program ("WOSB/EDWOSB"), Historically Underutilized Business Zone Program ("HUBZone") (a program seeking to benefit small businesses located in and employing individuals who live in designated "HUBZones"), and 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.

[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 by another business entity resulting in the target being a wholly-owned subsidiary of the

[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>").

acquirer, the target is now not only affiliated with the acquirer itself but 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 induvial 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 making.

[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. However, it 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.

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 failure 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 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 discussing with a client 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, 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. Similarly, 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 do 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).

[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 do impact protest timeliness and require further analysis.

[8] Of note, selection for the appropriate venue for a protest is another key matter a protester must consider. 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 pursuit 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 $100,000.00 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 $100,000.00 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, the contractor's claim is a "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 work beyond the agreed-upon contractual scope. It is best practice often 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 it relates 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 often too 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 being 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 can be 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 once plainly opined 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.

[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).

GENTRY LOCKE
Attorneys

6

Strategies and Tips for Avoiding Legal Malpractice Claims and Bar Complaints

Guy M. Harbert, III
540.983.9349
harbert@gentrylocke.com

STRATEGIES AND TIPS FOR AVOIDING BAR COMPLAINTS AND LEGAL MALPRACTICE CLAIMS

2025 Gentry Locke Seminar

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. <u>Carefully Crafted and Often Revisited Engagement Letters</u>

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, *<u>preferably in writing</u>*, 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