2025 Gentry Locke Seminars

TEE UP YOUR PRACTICE

be the G.O.A.T.

RICHMOND

Thursday, October 2, 2025

Topgolf

2025 Gentry Locke Seminars

TEE UP YOUR PRACTICE

Richmond

1:00 p.m. **[ETHICS]** Beyond Schadenfreude – Artificial Intelligence and Legal Ethics
Jessiah Hulle and Ryan Starks

1:30 p.m. Anatomy of a Trademark: Helping Clients Fortify their Brands and Avoid Infringement
Kevin Holt & Jake Bryant

2:00 p.m. The Data Breach Lawsuit: Strategies for Avoiding and Winning Cyber Litigation
John Danyluk

2:30 p.m. Break

2:45 p.m. Gentry Locke Consulting Legislative Update
Greg Habeeb, Carlos Hopkins, and Abigail Thompson

3:15 p.m. Only Clients Die. Lawyers Live Forever – Succession Planning for Lawyers
Matthew W. O'Toole

3:45 p.m. **[ETHICS]** Strategies and Tips for Avoiding Legal Malpractice Claims and Bar Complaints
Guy Harbert

4:15 p.m. Reception and Golf

Total CLE Credit Hours: 3.00 hours, 1.0 hour of which are Ethics

GENTRY LOCKE
Attorneys

K. Brett Marston

Managing Partner

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

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

Education

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

Experience

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

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

Affiliations

- Virginia State Bar: President (2025); President-Elect (2024); Bar Council representing the 23rd Judicial Circuit (2016-2022); Construction and Public Contracts Section Chair (2012-2013); Board of Governors (2003-2014), Treasurer (2009-2010), Secretary (2010-2011)
- Serving on the Virginia State Bar's Budget & Finance Committee, Professionalism Committee, and Standing Committee for Legal Ethics
- Roanoke Regional Partnership (Economic Development), Board of Directors and Executive Committee (2019-2024); President (2021-2024)
- Virginia Transportation Construction Alliance Board of Directors (2023)
- Roanoke Symphony Orchestra Board of Directors (2013-Present)
- Hidden Valley High School Athletic Boosters, Board member (2012-2017), President (2014-2017)
- The Ted Dalton American Inn of Court, Executive Committee Member, (2009-2011); Member (2006-2014)
- Roanoke Bar Association, President (2006-07); Board of Directors (2001-2008); Chair, Young Lawyers Committee (1999-2001); President-Elect and Chair of Programs (2005-2006); Member (1994-Present)
- Roanoke Bar Association Foundation, Chair of Trustees (2007-2008)
- Roanoke Division of Associated General Contractors of Virginia, Board Member, (2003-2006); Safety Alliance Steering Committee (2005-2007)
- Roanoke Regional Chamber of Commerce Board Member, (2007-2009)
- The Virginia Bar Association Construction and Public Contracts Law Section, Executive Council Member (2004-2006)
- Virginia State Bar Young Lawyers Conference Board of Governors representative for 8th District (1997-2001)
- Law Clerk to the Honorable J. Calvit Clarke, Jr., Senior United States District Judge, Eastern District of Virginia, Norfolk, Virginia (1993-94)
- George Mason University Law Review (1992-93)
- Cave Spring National Little League, President (2008, 2009)
- Roanoke Regional Forum, member of founding steering committee (2009-2014)

Awards

- Recognized by Chambers USA in Band 4 for Construction Law (2023 – 2025)
- Named "Roanoke Lawyer of the Year" for Construction Law (2013, 2015, 2017, 2024, 2026) by The Best Lawyers in America, and noted in the areas of Construction Law (2006-2026) and Construction Litigation (2011-2026)
- Fellow, Virginia Law Foundation (inducted 2019)
- Named one of the "Leaders in the Law" by Virginia Lawyers Weekly (2018)
- Elected a Top Attorney: Construction by Roanoke-area attorneys surveyed by The Roanoker magazine (2007, 2009, 2012)
- Designated one of the "40 & Under Movers and Shakers" by The Roanoker magazine for the field of Law (2008)
- Named to Virginia Super Lawyers for Construction Litigation (2009-2025), to the Top 10 List (2015-2017), the Top 100 List (2014-2019, 2020-2025), to Super Lawyers Business Edition US in the area of Construction Litigation (2012-2014), and was previously named a Virginia Super Lawyers Rising Star for Construction Litigation (2007)
- Designated one of the "Legal Elite" by Virginia Business magazine in Construction law (2007-2024) and the Young Lawyer category (2004-2006)
- Named a "Legal Eagle" for Construction Law and Litigation – Construction by Virginia Living magazine (2012)
- Named a "Top Rated Lawyer" for Construction law by American Lawyer Media (2013)
- Roanoke Bar Association President's Volunteer Service Award, Silver level, for 249-500 hours of community service (2006, 2007)

- R. Edwin Burnette, Jr. Young Lawyer of the Year Award, Virginia State Bar (2004)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

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

Ryan J. Starks

Partner

- Office: 804.956.2062
- Fax: 540.983.9400
- Email: starks@gentrylocke.com

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

Education

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

Experience

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

Affiliations

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

Awards

- Named to *Best Lawyers in America* for Commercial Litigation (2026)
- Named to Best Lawyers "Ones to Watch" List for Commercial Litigation (2025)
- Named to Virginia Lawyers Weekly "Up & Coming Lawyers" List for the Class of 2024
- Named a "Legal Elite" by Virginia Business Magazine for Young Lawyers (2024)
- Named a Virginia *Super Lawyers* "Rising Star" in Business Litigation (2025)

GENTRY LOCKE
Attorneys

Kevin Walker Holt

Partner

- Office: 540.983.9377
- Fax: 540.983.9400
- Email: holt@gentrylocke.com

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

Education

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

Experience

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

Affiliations

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

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

Awards

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

Published Work

- Co-author, **Your Client Has Been Named as a Defendant in a Civil Lawsuit Filed More Than a Year Ago: Now What?** (January 2023).
- **Interpleader and ERISA: More Complicated (and Interesting) Than You May Think**, DRI – The Voice of the Defense Bar, Volume 11, Issue 2 (August 2016).
- Co-author, A "Day" is a Day Again: Proposed New Rule 6 and Other Important Changes to the Federal Rules of Civil Procedure, VSB Litigation News, Volume XIV, No. III (Fall 2009).
- **Virginia Supreme Court Decides New Case Concerning the Dead Man's Statute**, VSB Litigation News, Volume XV, Number III (Fall 2010).

Case Studies

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

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

GENTRY LOCKE
Attorneys

Jake L. Bryant

Associate

- Office: 540.983.9376
- Fax: 540.983.9400
- Email: jbryant@gentrylocke.com

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

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

Education

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

Experience

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

Affiliations

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

Admissions

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

Published Work

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

GENTRY LOCKE
Attorneys

John G. Danyluk

Partner

- 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

Gregory D. Habeeb

Partner

- Office: 804.297.3702
- Fax: 540.983.9400
- Email: habeeb@gentrylocke.com

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

Education

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

Experience

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

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

Affiliations

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

Awards

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

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Carlos L. Hopkins

Partner

- Office: 804.297.3707
- Mobile: 804.920.3928
- Fax: 540.983.9400
- Email: chopkins@gentrylocke.com

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

Education

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

Experience

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

Affiliations

- Fellow, Virginia Law Foundation (2025)
- Member, Virginia State Bar
- Member, The National Black Lawyers Top 100
- Board of Directors, Richmond Ambulance Authority
- Board of Directors, Virginia Voice
- Board of Directors, Richmond Public Schools Education Foundation
- Richmond Steering Committee for Just the Beginning (JTB) Program
- Life Member, The Citadel Alumni Association
- Member, Alpha Phi Alpha Fraternity
- Chairman, Virginia Military Advisory Council (2017-2022)
- Member, Virginia Code Commission (2014-2017)
- Board of Directors, Virginia Association of Criminal Defense Lawyers (2010-2013)

Admissions

- Commonwealth of Virginia
- The Fourth Circuit Court of Appeals
- The United States Court of Appeals for Veterans Claims
- The United States District Court for the Eastern District of Virginia
- The United States District Court for the Western District of Virginia

Awards

- Designated one of the “Legal Elite” in Administrative/Government/Legislative law by Virginia Business magazine (2023-2024)

Published Work

- Author, **Woulda, Coulda, Shoulda: How Virginia’s Everchanging Politics Creates “Missed) Opportunities for Major Policy Decisions**, Richmond Public Interest Law Review, 2023

GENTRY LOCKE
Attorneys

Abigail E. Thompson

Government Affairs Manager

- Office: 804-489-0933
- Fax: 540.983.9400
- Email: athompson@gentrylocke.com

Abigail serves as Gentry Locke's Government Affairs Manager where she combines her love for public policy, data analysis, and writing to help support and deliver thoughtful legislative and communications strategies for clients. Before coming to Gentry Locke in 2019, Abigail served under Virginia Senator Frank Ruff where she aided the Senator and staff during the legislative session and assisted in coordinating his re-election campaign. Abigail currently serves as a mayoral appointee to the City of Richmond's Sustainability & Resilience Commission and is a member of the Virginia Public Access Project's Partners Board. She received her Bachelor of Arts from the College of William & Mary where she studied Government and Arabic and recently completed the University of Virginia's Sorensen Institute Emerging Leaders Program.

Education

- College of William & Mary, Bachelor of Arts in Government and Arabic
- University of Virginia Weldon Cooper Center for Public Service: Sorensen Institute, Emerging Leaders Program

Experience

- Developed materials to advance major legislative strategies, including issue briefs, public testimony, research summaries, visualizations, and messaging documents.
- Led coalition building and grassroots advocacy efforts.
- Participated in numerous stakeholder roundtables and workgroups for renewable energy policy following the Virginia Clean Economy Act (VCEA)
- Wrote and published op-eds to advance clients' legislative and regulatory interests.
- Representation of clients in various regulatory work groups.
- Developed and executed multi-million dollar contribution plans for political action committees.
- Planned and organized fundraisers, legislative forums, and community events on behalf of clients.
- Developed marketing materials and presentations for regional business conferences.
- Created and maintained social media, newsletters, and web content for grassroots campaigns and legal blogs.

Affiliations

- Mayoral appointee to the City of Richmond's Sustainability & Resilience Commission.
- Partners Board, Virginia Public Access Project (VPAP)
- Junior League of Richmond.
- Virginia Renewable Energy Alliance.

Published Work

- Author, **Woulda, Coulda, Shoulda: How Virginia's Everchanging Politics Creates "Missed) Opportunities for Major Policy Decisions**, Richmond Public Interest Law Review, 2023
- Author, A Legal Update on Environmental Justice in Virginia: Where are We Now?, University of Richmond Public Interest Law Review, 2022

GENTRY LOCKE
Attorneys

Matthew W. O'Toole

Associate

- Office: 804.956.2064
- Mobile: 804.929.4616
- Fax: 540.983.9400
- Email: motoole@gentrylocke.com

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

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

Education

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

Experience

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

Affiliations

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

Admissions

- Virginia State Bar

GENTRY LOCKE
Attorneys

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

Ryan J. Starks
804.956.2062
starks@gentrylocke.com

BEYOND SCHADENFREUDE

Gentry Locke Seminar 2025

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/appKUCriCQDI1BxIV/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

Anatomy of a Trademark: Helping Clients Fortify their Brands and Avoid Infringement

Kevin Walker Holt
540.983.9377
holt@gentrylocke.com

Jake L. Bryant
540.983.9376
jbryant@gentrylocke.com

2025 Gentry Locke Seminar

Anatomy of a Trademark: Helping Clients Fortify their Brands and Avoid Infringement

Kevin W. Holt
Jake L. Bryant

Anatomy of a Trademark:
Helping Clients Fortify their Brands and Avoid Infringement

Kevin W. Holt & Jake L. Bryant

I. INTRODUCTION

This presentation provides an overview of the basics of Federal trademark law, including the nature of trademark protection, Federal registration, and infringement.

II. WHAT IS A TRADEMARK?

A. Definitions

Trademark means any word, name, symbol, device, or any combination of those elements used, or intended to be used, in commerce to identify and distinguish one's goods from those manufactured or sold by others and to indicate the source of the goods. A trademark can apply to goods, services (service mark), certifications (certification marks), and collectives. Trademarks can be words, phrases, symbols, colors, sounds, or even smells if they act as an indicator of source in commerce. Generally, trademark protection is limited only to the use of that mark (or marks likely to cause confusion with the protected mark) in connection with the goods or services offered under it.

Examples: ROLEX for watches; NIKE for athletic shoes

Example of Industry Limitation: DOVE for chocolate and DOVE for soap. Both marks are registered for different classes of goods and services. Dove chocolate's protection does not extend to soap products and vice versa.

Service mark means any word, name, symbol, device, or any combination of those elements used, or intended to be used, in commerce to identify and distinguish the services of one person from the services of others and to indicate the source of the services.

Examples: FEDEX for delivery and logistics services; HILTON for hotel services

Certification mark means any word, name, symbol, device, or any combination thereof used, or intended to be used, by a person other than its owner in commerce to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that members of a union or other organization performed the work or labor on the goods or services.

Examples: Energy Star for energy efficiency standards in appliances; GROWN IN IDAHO for potatoes grown in the State of Idaho

Collective mark means a trademark or service mark used or intended to be used by the members of a cooperative, an association, or other collective group or organization; includes marks indicating membership in a union, an association, or other organization.

Examples: FTD for membership in the Florists' Transworld Delivery Association; GIRL SCOUTS for branded cookie sales and member activities;

Trade Dress refers to the commercial image and overall appearance of a business or product. Trade dress may include elements, such as the size, shape, and color of packaging or the overall visual impression or concept of a product, its packaging, and/or decor. Trade dress still requires that the aesthetic elements of the packaging or visual concept act as an indicator of source.

Examples: the golden foil wrapping on FERRERO ROCHER chocolates; the distinctive REALEMON juice container shaped like a lemon

B. Core Functions of a Trademark

1. Source Identification

   At their core, trademarks function as identifiers of origin. They enable consumers to easily and reliably identify the source of goods and services and distinguish them from those offered by competitors in the marketplace.

   Example: The Coca-Cola name and logo allow consumers to instantly distinguish its products from those of competitors like Pepsi or Dr. Pepper.

2. Marketing and Communication Tool

   Trademarks are powerful branding tools that capture consumer attention, increase visibility in crowded markets, and convey messages about the company's reputation, values, and identity. Over time, a well-established mark can represent not just the source of a product, but a lifestyle or ethos associated with the brand.

   Example: The Nike Swoosh conveys concepts of athleticism, motivation, and performance.

3. Brand Image and Reputation

Trademarks are integral to shaping and reinforcing a company's brand identity. Consumers begin to associate a mark with specific attributes, such as quality, reliability, innovation, or safety, based on their personal experiences and the brand's broader public perception. These associations foster emotional loyalty, strengthen consumer trust, and contribute to long-term goodwill.

Example: ROLEX has cultivated a prestigious reputation as a luxury Swiss watchmaker, creating unique movements in-house. Trademark protection allows ROLEX to protect its own goodwill from free riders and counterfeiters.

4. Consumer Protection

Trademarks protect consumers by signaling a consistent standard of quality and performance. In the event of product defects or dissatisfaction, the mark also provides a means to identify and hold the manufacturer accountable.

Example: If a consumer receives a defective North Face jacket, the recognizable trademark helps direct him or her to the source for repair, refund, or customer support. If multiple North Face brands existed in the market for outdoor apparel, consumers would likely have difficulty distinguishing which brand was the source of the products they purchased.

5. Business Asset

Trademarks are long-term, valuable assets. A well-established mark can generate licensing revenue, support expansion, and increase a company's valuation during mergers or acquisitions.

Example: Google is estimated to be the world's most valuable brand with a value over $229 billion.

6. Protection Against Unfair Competition

Trademarks provide companies with a legal framework to prevent others from using confusingly similar marks or engaging in unfair market practices that may harm a brand's reputation or mislead consumers.

Example: Louis Vuitton can stop counterfeiters from selling fake bags bearing its signature monogram.

C. Case Example

1. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916)

"Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, others are debarred from applying the same mark to goods of the same description, because [that] would … represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy."

III. TYPES OF TRADEMARKS

Trademark protection extends across various formats, from traditional word and design marks to non-traditional marks that rely on sensory elements.

A. Traditional Marks

1. Word Marks

A work mark consists of words, letters, numbers, or a combination of these elements, without reference to any particular font, style, size, or color.

Example: LEGO is registered as a plain word (U.S. Reg. No. 1018875)

2. Design Marks

A design mark includes stylized text, logos, images, or a combination of these elements. Unlike word marks, protection for design marks is limited to the specific visual representation. Any substantial modification to the design may require a new registration.

a. Stylized Word Marks (Design + Words)

These marks include unique fonts, layouts, colors, and other artistic elements combined with text. They are used when a brand wants to protect not only the wording, but also the presentation of the brand name.

Example: LEGO is also registered in a stylized manner (U.S. Reg. No. 1026871)

b. Purely Figurative Trademarks (Logo without Words)

These marks consist entirely of graphic elements or symbols, without any text. They are often used where a visual identity has become strongly associated with a brand.

Example: Outline of the LEGO minifigure (U.S. Reg. No. 4534561)

c. Composite Marks (Combination of Words and Design)

These marks combine both textual and figurative components. Even when the words may not be registrable on their own, a distinctive design can render the overall mark eligible for protection.

Example: LEGO stylized logo featuring the word "EDUCATION" (U.S. Reg. No. 6078384)

B. Non-Traditional Marks

In addition to conventional work and design marks, non-traditional marks include marks based on a single color, appearance, shape, sound, smell, taste, or texture. These marks are generally subject to heightened scrutiny and often require a showing of acquired distinctiveness.

1. Color: A single color, without additional design elements, may function as a trademark if it has acquired distinctiveness and is non-functional.

   Examples: Canary yellow for Post-It notes; Pink for T-Mobile

2. Sound: Short, distinctive sound sequences or musical tones may be registered as trademarks when they function as source identifiers and are not merely ornamental or functional.

   Examples: NBC three-tone chime sequence; MGM lion's roar

3. Scent: A scent may be protectable if it is distinctive and non-functional. Functional or naturally occurring product smells, such as the scent of a perfume, are generally not registrable.

   Examples: Plumeria-scented sewing thread; signature scent of Play-Doh

4. Shape: The configuration of a product or its packaging can function as a trademark if it is distinctive and not essential to the product's use or affect cost or quality.

   Examples: Coca-Cola bottle shape; Toblerone chocolate bar packaging

C. Case Examples

1. *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995)

2. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992)

IV. STRENGTH OF TRADEMARKS

A. Distinctiveness Spectrum

Trademark protection is fundamentally tied to the distinctiveness of the mark. The more distinctive the mark, the greater its ability to serve as a source identifier and the more likely it is to withstand legal challenges. In *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976), the Second Circuit established a framework that categorizes trademarks along a spectrum of distinctiveness, ranging from inherently distinctive to entirely unprotectable. Proposed trademarks generally fall into one of the following categories:

	Description	Examples	Strength of Mark
Fanciful	Invented words	KODAK for camera film HULU for subscription streaming service	Inherently Distinctive
Arbitrary	Words that have no association with the underlying goods or services	APPLE for computers PENGUIN for books	Inherently Distinctive
Suggestive	Words that suggest some quality of the goods or services	COPPERTONE for sun-tanning products GREYHOUND for transportation services	Inherently Distinctive
Descriptive	Words that describe some aspect of the goods or services	SEATTLE COFFEE CO. for coffee products or services based in Seattle, Washington AMERICAN AIRLINES for flight services	Requires a demonstration of "acquired secondary meaning"
Generic	Common names for the goods or services	Aspirin, cellophane, escalator, thermos, cereal	Never protectable

Fanciful, arbitrary, and suggestive marks are considered *inherently distinctive* and are entitled to immediate protection once used in commerce. These marks function clearly as source identifiers and are the strongest types of trademarks.

In contrast, descriptive marks are not inherently distinctive and are only registrable on the Principal Registry after acquiring distinctiveness, also known as secondary meaning. The applicant must demonstrate that consumers have come to associate the descriptive term with a particular source.

Generic terms are never protectable. A term is generic if the public understands it to refer to the product itself, not its producer. Even a once-strong trademark may lose protection through genericide.

B. Case Examples

1. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976)

2. *Zatarain's, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786 (5th Cir. 1983)

3. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000)

4. *Bayer Co. v. United Drug Co.*, 272 F. 505 (2d Cir. 1921)

5. *Seabrook foods, Inc. v. Bar-Well Foods Ltd*, 568 F.2d 1342 (C.C.P.A. 1977) (setting forth a four-factor analysis for design mark distinctiveness)

V. ACQUIRING AND REGISTERING A TRADEMARK

Trademark rights in the United States can be acquired either through actual use in commerce (common law rights) or formal registration. While both methods confer legal protection, the scope, strength, and enforceability of those rights different substantially.

A. Common Law Rights

Common law trademark rights arise automatically through the actual use of a mark in commerce in connection with specific goods or services. These rights are geographically limited to the areas where the mark is used and where consumers associate the mark with the source. The scope of protection also includes a "reasonable zone of expansion" for both geography and collateral goods and services that consumers might reasonably expect to be within the normal expansion of a markholder's business. *See Maid to Perfection Corp. v. Hyman*, 1996 U.S. App. LEXIS 10328, *6 (4th Cir. 1996) (stating factors to be considered in determining a geographic zone of expansion). Common law protection is likely sufficient for localized businesses operating within a narrow market or defined geographic region. Most businesses do not have a registered trademark, and many enforcement actions rely on common law rights.

B. State Registration

Registering a trademark with a State confers rights only within that State's borders. While this approach may be appropriate for businesses operating exclusively within a single jurisdiction, State registration has several limitations, including:

1. Geographic Scope: Scope of protection is limited to the registering State. The mark is not protected in other States unless separately registered or supported by common law use.

2. Lack of Public Notice: Not all States maintain comprehensive or publicly accessible trademark databases, which may reduce the deterrent effect of registration.

3. Limited Remedies: State registration generally does not provide access to Federal courts or nationwide enforcement mechanisms.

4. Expansion Consideration: If a business expands across State lines, the owner must either seek registration in each additional State or pursue Federal registration to obtain nationwide rights.

C. Federal Registration

Registering a trademark with the United States Patent and Trademark Office provides the strongest and broadest protection available. Federal registration provides critical legal and commercial advantages, including:

1. Nationwide Exclusivity: Federal registration grants the owner the exclusive right to use the mark in connection with the registered goods or services throughout the entire United States and its territories, regardless of the actual geographic scope of use.

2. Public Notice and Deterrence: Federal registration places the mark in the USPTO's public database, serving as constructive notice to others of the owner's claim of rights. This deters others from adopting confusingly similar marks and helps avoid costly legal disputes.

3. Legal Presumptions and Enforcement: Federal registration confers several procedural and substantive advantages, including a legal presumption of ownership, the exclusive right to use the mark nationwide in connection with the registered goods or services, and access to Federal courts and customs enforcement.

4. Use of ® Symbol: Only Federally registered trademarks are entitled to use the ® symbol, which signals to consumers and competitors that the mark is registered and legally protected under Federal law.

5. International Expansion: Federal registration provides a foundation for international trademark filings under the Madrid Protocol and similar treaties.

D. Case Example

1. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985).

VI. FEDERAL REGISTRATION PROCESS

A. Prepare and Submit the Application

To register a trademark with the USPTO, applicants must complete and submit an application. Application requirements include:

1. Contact information for the trademark owner;

2. A clear representation of the mark (word, design, or both)

3. A listing of goods and/or services categorized by international class(es)

4. Basis for filing (e.g., "use in commerce" or "intent to use")

5. Required filing fees

B. Examination

The USPTO examines the application to ensure it complies with formal requirements, such as proper classification, completeness of information, and fee payment. An examining attorney evaluates whether the mark is registrable (e.g., not merely descriptive or generic) and whether it conflicts with existing registrations or pending applications. Common grounds for refusal include:

1. Likelihood of confusion with a previously registered or applied-for mark;

2. Merely descriptive of the goods or services;

3. Geographically descriptive of the origin of the goods or services;

4. Failure of the specimen to show actual use of the mark in commerce for the listed goods or services; and

5. Ornamental use, where the mark appears as a decorative feature rather than a source identifier.

The examiner may issue an Office Action if objections arise, requiring a timely response from the applicant.

Publication and Opposition

If approved, the mark is published in the *Official Gazette* for a 30-day opposition period, during which third parties may file objections to the registration. If no oppositions are filed (or if any are resolved), the application proceeds.

C. Registration

For use-based applications, the mark proceeds directly to registration. For intent-to-use applications, the USPTO issues a Notice of Allowance, and the applicant must later file a Statement of Use to receive a registration.

D. Renewal and Maintenance

A registration is valid for 10 years, but it must be maintained by filing a Declaration of Use between the 5th and 6th year. It may then be renewed indefinitely in 10-year increments, provided the mark remains in use and maintenance filings are submitted on time. Failure to use the mark in commerce or file timely documents may result in cancellation of the registration.

VII. CANCELLATION OF REGISTRATION

Under 15 U.S.C. § 1064, a third party may petition to cancel a trademark registration under certain circumstances.

A. Within Five Years of Registration

For the first five (5) years following the date of registration, a petition to cancel may be filed for any reason.

B. After Five Years of Registration

Once a registration has been on the Principal Register for more than five (5) years, it is eligible for a declaration of incontestability, immunizing the mark from certain challenges. However, cancellation of an incontestable mark is still permitted on limited grounds, including if:

1. The mark has become generic;

2. The registration was obtained through fraud;

3. The mark has been abandoned;

4. The mark is functional; or

5. The mark was registered contrary to the provisions of § 1052(a), (b), or (c), such as for being deceptive or falsely suggesting a connection with a person, institution, belief, or national symbol.

Cancellation proceedings are generally filed with the Trademark Trial and Appeal Board (TTAB).

VIII. INFRINGEMENT AND ENFORCEMENT

Trademark law protects not only the rights of trademark owners but also the interests of consumers by preventing confusion about the source of goods or services. Effective enforcement ensures that marks retain their distinctiveness and commercial value.

A. What Constitutes Trademark Infringement

Trademark infringement is the unauthorized use of a mark on or in connection with goods or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods or services.

1. Confusion-Based Infringement

Trademark infringement occurs when a defendant uses a protected mark that he/she/it does not own or a mark similar to a protected mark in a way that is likely to cause consumer confusion as to the source, sponsorship, affiliation, or approval of goods or services. *See* 15 U.S.C. § 1114. The marks at issue do not need to be identical. Instead, confusion could arise from similarities in sound, appearance, meaning, or commercial impression.

Notably, a finding of confusing similarity between marks is not sufficient on its own. The relatedness of the goods or services also plays a critical role. Even identical or nearly identical marks may coexist without conflict if they are used for unrelated products or services. For example:

- DOVE is registered for both soap and ice cream bars; and
- DELTA is registered for both airline services and plumbing fixtures.

To evaluate whether there is a likelihood of confusion, all Federal circuit courts apply multi-factor tests that typically include variations of the same factors. The Fourth Circuit has illustrated the factors commonly examined when evaluating likelihood of confusion:

- the strength or distinctiveness of the mark;
- the similarity of the two marks;
- the similarity of the goods/services the marks identify;
- the similarity of the facilities the two parties use in their businesses;
- the similarity of the advertising used by the two parties;
- the defendant's intent;
- actual confusion.

Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984) (stating that the court applies "these factors, but we do so with the caution expressed in *Modular Cinemas of America, Inc. v. Mini Cinemas Corp.*, 348 F. Supp. 578, 582 (S.D.N.Y. 1972), that "not all these [factors] are always relevant or equally emphasized in each case").

2. Trademark Dilution

Dilution protects famous marks from uses that impair their distinctiveness or reputation, even in the absence of confusion or competition. There are two primary forms:

a. Blurring: Occurs when the use of a similar mark weakens the distinctiveness of a famous mark, diminishing its ability to identify and distinguish its source.

b. Tarnishment: Arises when a mark is used in a way that harms the reputation of the famous mark, often through association with inferior or unsavory products or services.

3. Cybersquatting

Cybersquatting involves registering, trafficking in, or using a domain name that is identical or confusingly similar to a trademark with bad-faith intent to profit. The Anticybersquatting Consumer Protection Act (ACPA), codified at 15 U.S.C. § 1125(d), provides a cause of action for trademark owners to seek transfer or cancellation of infringing domain names and, in some cases, monetary damages.

B. Case Example

1. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 736 F.3d 198 (2d Cir. 2013) (analyzing a trademark infringement and dilution action related to the defendant's use of the mark "MR. CHARBUCKS" for the name of a dark roast coffee).

C. Other Actions and Enforcement Options Against Third Parties

1. False Designation of Origin/False Description Claims (Section 43(a) of the Lanham Act)

    a. These relate to actions against third parties who use another's trademark or name, regardless of whether the trademark is registered, as a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact." 15 U.S.C. §1125(a)(1).

2. Cancellation and Opposition proceedings at the USPTO

IX. REMEDIES

If the trademark owner is able to prove infringement, available remedies may include:

- Injunctive relief ordering that the defendant stop using the accused mark;
- An order requiring the destruction or forfeiture of infringing articles;
- Monetary relief, including disgorgement of profits generated from the infringement, any damages sustained by the plaintiff; and
- In the court's discretion, an order that the defendant, in certain cases, pay the plaintiffs' attorneys' fees

X. COMMON DEFENSES TO INFRINGEMENT

1. No Likelihood of Confusion - the facts fail to satisfy the "likelihood of confusion factors");

2. Fair Use;

    a. Nominative Fair Use – "the defendant uses the famous mark to identify or compare *the trademark owner's* product." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 169 (4th Cir. 2012).

        i. Example: A Mechanic's garage features a sign that states "We fix BMWs."

    b. Descriptive Fair Use – "applies when the defendant is using a trademark in its primary, descriptive sense to describe the defendant's goods or services." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 169 (4th Cir. 2012).

        i. Example: One coffee shop has a registered trademark for its name, SEATTLE COFFEE CO. Another coffee shop, PERFECT LATTE, includes on its "About Us" website page, the following phrase: "We are a Seattle coffee company."

3. Laches – "Courts apply laches to address the inequities created by a trademark owner who, despite having a colorable infringement claim, has unreasonably delayed in seeking redress to the detriment of the defendant." *Ray Communs., Inc. v. Clear Channel Communs., Inc.*, 673 F.3d 294, 300 (4th Cir. 2012);

4. Abandonment – If the owner of a registered trademark fails to continue to use the mark in commerce or police its licensees, the owner may be deemed to have abandoned their rights to that mark;

5. Genericide – Otherwise valid trademarks can lose protection if they become ubiquitous to the public and become more commonly used as a descriptor of the good or service than as a source indicator; and

6. Priority – The defendant began using the trademark in commerce prior to the plaintiff.

    a. In priority cases where a plaintiff is a junior user but holds a Federal registration and the defendant has priority but no registration, the parties will often be permitted to engage in "concurrent use," whereby the defendant will have exclusive rights to the trademark in its geographic zone of expansion and the plaintiff will retain exclusive rights to the mark everywhere else.

TRADEMARK LAW WITHIN THE LARGER SCHEME OF INTELLECTUAL PROPERTY

	Trademark	Copyright	Patents
Protectable Subject Matters	A word, phrase, design, or a combination that identifies goods or services and distinguishes them from the goods or services of others	Original works of authorship fixed in a tangible medium, such as novels, music, movies, photographs, or paintings	Technical inventions, mechanical processes, or machine designs that are novel, useful, and non-obvious
Example	TIDE for laundry detergent	Song lyrics to "Let It Be" by the Beatles	A new type of hybrid engine
Benefits	Prevents others from using a confusingly similar mark for a related goods or services	Grants exclusive rights to reproduce, distribute, perform, or display the work	Gives owner the ability to prevent others from making, using, selling, or importing the invention without permission
Constitutional Basis	Commerce Clause	Intellectual Property Clause	Intellectual Property Clause
Statutory Basis	Lanham Act (15 U.S.C. § 1051, et seq.)	Copyright Act (17 U.S.C. § 101, et seq.)	Patent Act (35 U.S.C. § 101, et seq.)
Terms of Protection	Perpetually renewable if renewed and used continuously in commerce	Life of the author plus 70 years (for individual works)	20 years from the date of filing (for utility patents); 15 years from date of grant (for design patents)

XI. ADDITIONAL RESOURCES

For further guidance on trademark law, registration procedures, and enforcement strategies, consult the following resources:

United States Patent and Trademark Office (USPTO)

Trademark Manual of Examining Procedure (TMEP)

USPTO Trademark Basics Video Series

Trademark Trial and Appeal Board (TTAB)

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

Gentry Locke Consulting Legislative Update

Gregory D. Habeeb
804.297.3702
habeeb@gentrylocke.com

Carlos L. Hopkins
804.297.3707
chopkins@gentrylocke.com

Abigail E. Thompson
804.489.0933
athompson@gentrylocke.com

Gentry Locke Consulting's Legislative Update

*This outline summarizes numerous bills introduced in the 2025 session by topic.

I. Agriculture/Natural Resources

Passed

HB 1941/SB 1166 Invasive plant species; retail sales.

Requires, for the retail sale of certain invasive plant species for outdoor use, a retail establishment to post in a conspicuous manner on the property located in proximity to each invasive plant signage identifying such plant as invasive, educating consumers regarding invasive plant species, and encouraging consumers to ask about alternatives. The bill requires the Commissioner of Agriculture and Consumer Services to designate the format, size, and content of such signage no later than October 1, 2025, and requires the Commissioner to issue a stop sale order and mark or tag a plant in a conspicuous manner when an invasive plant is for sale at a retail establishment without appropriate signage. In such case, the bill requires the Commissioner to give written notice of a finding made to the owner, tenant, or person in charge of such retail establishment and requires the stop sale order issued to remain in effect until the required signage is posted. Certain provisions of the bill have a delayed effective date of January 1, 2027.

SB 1125 Department of Wildlife Resources; propagation of mammalian wildlife unlawful; premature separation; hybridization.

Makes it unlawful to prematurely separate any mammalian wildlife offspring born in captivity from the mother prior to the natural time of weaning that is appropriate for such species, except that wildlife offspring may be prematurely separated if a medical necessity exists pursuant to a written order from a veterinarian licensed to practice in the Commonwealth with appropriate speciesspecific experience and expertise. The bill excludes the following from its provisions: (i) noncommercial transfers or trades between accredited zoological facilities, (ii) an accredited zoological facility that retains the mammalian wildlife offspring that has already been prematurely separated by such zoological facility, and (iii) a person operating under a wildlife rehabilitator permit issued by the Department of Wildlife Resources. The bill also makes it unlawful to intentionally and for commercial purposes propagate mammalian wildlife of different species, also known as hybridization

Failed

SB 923 Virginia Water Protection Permit; interbasin transfers of water prohibited.

Prohibits the Department of Environmental Quality from issuing a Virginia Water Protection Permit for a surface water withdrawal if more than five percent of the nonconsumptive volume of such withdrawal will be returned to a different major river basin, as defined in the bill. The bill clarifies that such prohibition does not apply to any lawful withdrawal in existence on July 1, 2025

II. Alcoholic Beverages and Cannabis

Passed

HB 2058/SB 811 Alcoholic beverage control; delivery of mixed beverages; repeal.

Clarifies that under current law mixed beverage restaurant and limited mixed beverage restaurant licensees may sell for off-premises consumption or deliver up to two mixed beverages per meal served, but shall in no event sell for off-premises consumption or deliver more than four mixed beverages at any one time. The bill also provides clarification as to where delivery of such mixed beverages may be made. The bill maintains alcoholic beverage control third-party delivery licenses by eliminating the repeal of such licenses that is set to go into effect July 1, 2026.

HB 2485/SB 970 Cannabis control; retail market; penalties.

Establishes a framework for the creation of a retail marijuana market in the Commonwealth, to be administered by the Virginia Cannabis Control Authority. The bill allows the Authority to begin issuing all marijuana licenses on September 1, 2025, but provides that no retail sales may occur prior to May 1, 2026

Failed

HB 1981 Alcoholic beverage control; illegal advertising; exceptions; charitable sales promotion.

Allows a licensed distillery, winery, or brewery to advertise in or send any advertising matter into the Commonwealth about or concerning alcoholic beverages for the purposes of a charitable sales promotion to benefit (i) a charitable or civic organization, (ii) an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code, or (iii) any public or private elementary or secondary school or institution of higher education, regardless of whether such charitable sales promotion advertises that a percentage of each sale or per product sold will benefit such organization, school, or institution.

SB 1163 Alcoholic beverage control; food-to-beverage ratio.

Reduces the current 45 percent food-to-beverage ratio for certain mixed beverage licensees. The bill requires a mixed beverage restaurant, caterer's, or limited caterer's licensee with monthly food sales of at least $4,000 to have a food-to-beverage ratio that meets or exceeds 30 percent. The bill also requires that restaurants have at least as many seats at tables as at counters and prohibits mixed beverage licensees from serving mixed beverages once food is no longer being sold for on-premises consumption. The bill sunsets on July 1, 2027, and requires the Virginia

Alcoholic Beverage Control Authority to collect data regarding the compliance of mixed beverage licensees with the provisions of the bill and the impact of the change to the food-tobeverage ratio on the gross amount of food consumed on a licensee's premises. The bill requires the Authority to report such data to the Chairmen of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services by November 1, 2026.

SB 1297 Virginia Alcoholic Beverage Control Authority; police power; primary law-enforcement agency for certain crimes against property and involving fraud.

Provides that special agents of the Alcoholic Beverage Control Board shall serve as the primary law-enforcement agency for enforcing, reporting, and investigating certain crimes against property and crimes involving fraud that occur on property owned or leased by the Virginia Alcoholic Beverage Control Authority

III. Corrections

Passed

HB 1589 Powers and duties of Parole Board; voting requirements; meetings.

Removes various references to postrelease supervision and instead includes such references and related procedures in the provisions that govern probation so that such procedures, including revocation hearings, will be overseen and conducted by the sentencing court. The bill provides that except for a public meeting convened for conducting the final deliberation and vote regarding whether the Parole Board will grant parole to a prisoner, a meeting of the Parole Board members, regardless of whether such members invite staff or other guests to participate in such meeting, shall not be deemed a meeting subject to the provisions of the Virginia Freedom of Information Act. The bill also provides that the final deliberation and vote of whether to grant parole to a person serving life imprisonment for murder in the first degree shall be attended by four or more members of the Parole Board, and a decision to grant such person discretionary parole shall require the concurrence of four or more members present. A final deliberation and vote of whether to grant parole to a person not sentenced to life imprisonment requires the attendance of a panel of no fewer than three members of the Parole Board and a concurrence of the majority of members present for such final deliberation and vote.

HB 2221 Prisoners; Department of Corrections-issued identification; report.

Requires that prior to the release or discharge into the community of any prisoner who has been confined for at least 90 days and does not possess a government-issued identification card, birth certificate, or social security card, the Department of Corrections, in conjunction with the Department of Motor Vehicles, the State Registrar of Vital Records, and any other relevant government agency, shall provide such prisoner with a certified copy of his birth certificate, his social security card, or a government-issued identification card, unless such provision of a government-issued identification card is not possible, in which case, the Department of Corrections shall provide the prisoner with a Department of Corrections Offender Identification form. The bill also specifies what identifying information must be included on such Department

of Corrections Offender Identification form and provides that such form shall satisfy certain requirements for the purposes of obtaining a government-issued identification card for the 120 days immediately following the release or discharge of the prisoner identified on such form. The bill also directs the Department of Corrections, in coordination with the State Board of Local and Regional Jails, the Department of Motor Vehicles, and the State Registrar of Vital Records, to (i) identify the number of prisoners released with and without identification cards; (ii) review the processes involved in assisting a prisoner in applying for and obtaining a government-issued identification card, birth certificate, or social security card; (iii) identify any obstacles that may interfere with a prisoner obtaining such identification or documents prior to such prisoner's release or discharge; and (iv) issue a report of its findings and recommendations to the General Assembly no later than November 1, 2025.

HB 2235 Local and regional correctional facilities; treatment of prisoners known to be pregnant.

Prohibits the use of restraints, defined in the bill, on any prisoner of a local or regional correctional facility who is (i) known to be pregnant or (ii) in postpartum recovery unless a deputy sheriff or jail officer makes an individualized determination that (a) the prisoner will harm herself, the fetus, the newborn child, or any other person; (b) the prisoner poses a flight risk; or (c) the totality of the circumstances creates a serious security risk. Under current law, such prohibition applies only to state correctional facilities. The bill also requires the Department of Criminal Justice Services to include in the compulsory minimum entry-level training standards training regarding pregnant prisoners for deputy sheriffs and jail officers who are employees of local or regional correctional facilities who may have contact with pregnant prisoners.

HB 2647/SB 1409 Restorative housing and isolated confinement; restrictions on use.

Prohibits the use of isolated confinement, defined in the bill, in state correctional facilities, subject to certain exceptions. The bill requires that before placing an incarcerated person in restorative housing or isolated confinement for his own protection, the facility administrator shall place an incarcerated person in a less restrictive setting, including by transferring such person to another institution or to a special-purpose housing unit for incarcerated persons who face similar threats. The bill requires that if an incarcerated person is placed in restorative housing or isolated confinement, such placement shall be reviewed every 48 hours and the facility administrator shall ensure that the incarcerated person receives a medical and mental health evaluation from certified medical and mental health professionals within one working day of placement in restorative housing or any form of isolated confinement. The bill also requires the facility administrator to notify the regional administrator in writing that an incarcerated person was placed in restorative housing or isolated confinement within 24 hours of such placement. Finally, the bill requires that formal reviews of an incarcerated person's placement in any form of isolated confinement shall be held in such person's presence, inform him of any reason or reasons administrative officials believe isolated confinement remains necessary, and give him an opportunity to respond to those reasons and that a formal ruling shall be provided to the incarcerated person within 24 hours. The bill has a delayed effective date of July 1, 2026.

Failed

HB 2467 State Board of Local and Regional Jails; oversight of local and regional jails; powers and duties.

Increases from 11 to 19 the membership of the State Board of Local and Regional Jails by requiring the appointment of (i) two members of the Senate and two members of the House of Delegates and (ii) four additional nonlegislative citizen members, including (a) one representative of a nonprofit organization that provides training or rehabilitation programs for incarcerated inmates; (b) one male citizen and one female citizen who were formerly incarcerated within the Commonwealth; and (c) one person who is a grandparent, parent, child, sibling, or spouse or domestic partner of a person currently incarcerated within the Commonwealth. The bill also adds numerous additional duties for the Board, including to (1) provide information, as appropriate, to inmates, family members, representatives of inmates, and in custody. The bill also specifies additional information to be included in the Board's currently required annual report to the General Assembly and the Governor and requires such report be made available to the public online. The bill enumerates certain items for assessment that may be included in the Board's annual inspection of each local correctional facility, as required by current law, and also specifies the Board's authority and right to access such facilities, interview persons, and access certain information and documents. Upon completion of an inspection, the bill requires the Board to produce a report, including information enumerated in the bill, to be made available to the public online and to be delivered to the Governor, the Attorney General, the Senate Committee on Rehabilitation and Social Services, the House Committee on Public Safety, and the sheriff in charge of the local correctional facility or superintendent of the regional correctional facility. Finally, the bill allows the Board to initiate and attempt to resolve an investigation upon its own initiative, or upon receipt of a complaint from an inmate, a family member or representative of an inmate, or a local, regional, or community correctional facility employee or contractor, or others, regarding various concerns as enumerated in the bill. The bill has a delayed effective date of July 1, 2026.

SB 1080 Earned sentence credits; inchoate offenses; concurrent and consecutive sentences.

Provides that a person who is convicted of an inchoate offense will earn sentence credits at the same rate as someone who is convicted of the completed offense for certain enumerated offenses. The bill also specifies that the provision in current law providing that a person who has been convicted of certain enumerated offenses may earn a maximum of 4.5 sentence credits for each 30 days served on any sentence for such offenses also applies to any other sentence that is to be served concurrent with or consecutive to any such sentence. The bill specifies that such provisions shall apply to the sentence of any person convicted of a felony offense committed on or after July 1, 2025, and who is sentenced to serve a term of incarceration in a state or local correctional facility.

SB 1432 Juvenile secure detention facilities; closure or consolidation; funding contributions; education programs.

Provides that upon the closure or consolidation of a juvenile secure detention facility, any locality or commission operating a juvenile secure detention facility in which juveniles will be

placed who previously would have been placed in the closed or consolidated juvenile secure detention facility shall negotiate in good faith with the locality from which a juvenile may be placed to arrive at mutually agreeable funding contributions for the operation of such receiving juvenile secure detention facility. The bill requires such agreements to include certain provisions related to equal access to post-dispositional programming and medical and hospitalization costs and provides that such agreements may include provisions related to transportation of juveniles and transportation options for parents or guardians. The bill further states that if the localities or commissions are unable to reach such an agreement, then the Department of Juvenile Justice shall determine the funding contributions and that failure of any locality or commission to comply with such determination may result in the loss or reduction of state funding. Under the bill, any locality or commission operating a juvenile secure detention facility that refuses to accept placement of juveniles who previously would have been placed in a closed or consolidated juvenile secure detention facility shall not be eligible for state funding. The bill changes the required staffing ratio for education programs in regional and local detention homes to one fulltime equivalent program employee for every six students based on a rolling average daily population at the facility as calculated by the Department of Education from the previous three fiscal years. Under current law, the ratio for such programs is one teacher for every 12 beds based on the capacity of the facility. The bill also provides that the Board of Education shall require all such education programs to have either a principal or a lead teacher on site and requires contracts for the hiring and supervision of teachers to allow a teacher employed by a local school board to continue teaching in his local school division and be hired as a parttime teacher for such an education program. The bill requires that each part-time teacher for an education program be provided an annual $3,000 bonus. Lastly, the bill directs the closure of seven juvenile secure detention facilities across the Commonwealth and specifies the facilities to be closed and the facilities into which they may be consolidated. The bill requires the facilities to be closed and consolidated by January 1, 2026, and states that any such facility that fails to comply with the requirements for closure and consolidation, in addition to any other remedy available at law, shall not be eligible for state funding.

IV. Courts/Civil Law

Passed

HB 1727 Establishment of parent and child relationship; persons who committed sexual assault.

Provides that no parent and child relationship shall be established when a biological parent has been convicted of rape, carnal knowledge, or incest, or has been found by clear and convincing evidence to have engaged in such prohibited conduct, and the child was conceived of such violation or conduct. The bill further provides that a person with a legitimate interest in the child does not include a person whose interest derives from or through a person who has been convicted of or found to have engaged in such conduct by clear and convincing evidence. The bill provides that consent for adoption is not required of a birth father when such father been found by clear and convincing evidence to have engaged in rape, carnal knowledge, or incest and the child was conceived of such conduct; under current law, such consent is not required when the birth father has been convicted of rape, carnal knowledge, or incest.

HB 1888 Immunity of persons for tort actions based on statements made in connection with any formal review or hearing.

Adds to the tort actions for which an individual shall be immune pursuant to applicable law any tort action based solely on a statement made at or in connection with any formal review or hearing authorized by law, including a written or oral statement made pursuant to a report or complaint, that is not one of the public hearings enumerated in current law. Current law provides that an individual shall be immune for any tort action based solely on statements made at a public hearing before, or otherwise communicated to, the governing body of any locality or other political subdivision, or the boards, commissions, agencies, and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body.

SB 805 Determination of child support.

Updates the amounts in the schedule of basic child support obligations based upon gross monthly income and calculates such obligations for specific amounts up to a gross monthly income of $42,500. Under current law, such child support obligations are calculated up to a gross monthly income of $35,000. The bill directs the Child Support Guidelines Review Panel, in collaboration with the Division of Child Support Enforcement, to examine the current outstanding amount of child support arrearages and make recommendations to the General Assembly about measures the General Assembly can consider regarding (i) helping child support obligors pay outstanding arrearages and (ii) whether existing penalties that place restrictions on such obligors' drivers licenses or other professional restrictions unnecessarily impair the obligor's ability to repay outstanding child support arrearages. The bill directs the Child Support Guidelines Review Panel to report its conclusions to the Chairmen of the House and Senate Committees for Courts of Justice by November 15, 2025.

SB 894 Civil actions; liability of employer for personal injury or death by wrongful act.

Provides that in an action for personal injury or death by wrongful act brought by a vulnerable victim, defined in the bill, against an employee, a finding that the employee's employer is vicariously liable for such employee's conduct shall be based on several factors, including the likelihood of the employee coming into contact with such vulnerable victim and the employer's failure to exercise reasonable care over the employee.

V. Courts/Criminal Justice

Passed

HB 1946/SB 1060 Possession, etc., of retail tobacco products and hemp products intended for smoking by a person younger than 21 years of age; liquid nicotine and nicotine vapor products license; prohibitions; enforcement.

Prohibits any person younger than 21 years of age from possessing any retail tobacco or hemp product intended for smoking, as those terms are defined in relevant law, with certain exceptions enumerated in the bill. The bill provides that any such product purchased or possessed by a

person younger than 21 years of age (i) shall be deemed contraband and (ii) may be seized by a law-enforcement officer. Any such product, the lawful possession of which is not established, seized by such officer shall be forfeited and disposed of according to the process described in relevant law. The bill also provides that seizure shall be the sole penalty for a violation of such prohibition and that the provisions of the bill shall not preclude prosecution under any other statute. Further, if a person does not receive a license from the Department of Taxation to sell, deal, transport, or ship liquid nicotine or nicotine vapor products to retailers in the Commonwealth, such person is subject to a penalty of $400, in addition to any other applicable taxes or fees. The bill provides that the Department of Taxation is not required pursuant to relevant law to conduct unannounced investigations of retail tobacco dealers at least once every 24 months to verify that a retail dealer is not selling retail tobacco products to persons younger than 21 years of age. Lastly, the bill requires the Department of Taxation to convene a work group consisting of the Alcoholic Beverage Control Authority, the Office of the Attorney General, the Virginia State Police, and the Department of Behavioral Health and Development Services to develop an enforcement program related to the sale of retail tobacco products or hemp products intended for smoking to individuals younger than 21 years of age. The work group's findings and recommendations are to be reported to the Chairs of the House Committees on General Laws and Appropriations and the Senate Committees on Rehabilitation and Social Services and Finance and Appropriations no later than November 1, 2025

HB 2730/SB 1465 Virginia State Crime Commission; review panel; cases involving Mary Jane Burton; report.

Directs the Virginia State Crime Commission (the Crime Commission) to designate a panel, consisting of members outlined in the bill, to review the following types of cases at the Virginia Department of Forensic Science where testing or analysis was performed by Mary Jane Burton: (i) cases resulting in convictions of persons who are currently incarcerated, or who were executed or exonerated, and (ii) cases where Burton testified, regardless of the final disposition of the case. However, the panel shall prioritize the review of cases resulting in convictions of persons who are currently incarcerated. The bill provides that the Crime Commission shall provide staff support to the panel, and may request and shall receive support from other state or local government agencies. The bill provides that the provisions of the Virginia Freedom of Information Act do not apply to this panel or its review, or to any information received by or disseminated to any state or local government agency, private organization, or other entity for purposes of this review. The bill directs the panel to report on its work to the Crime Commission by the first day of each regular session of the General Assembly until completion of this review. As introduced, this bill was a recommendation of the Virginia State Crime Commission.

HB 2723/SB 1466 Criminal records; expungement and sealing of records.

Amends numerous statutes related to the expungement and sealing of criminal records that are scheduled to become effective on July 1, 2025. In addition, the bill requires (i) the Department of State Police to develop a secure portal for the purpose of allowing government agencies to determine whether a record has been sealed prior to responding to a request pursuant to current law by October 1, 2026; (ii) the Virginia Indigent Defense Commission to (a) educate and provide support to public defenders and certified court-appointed counsel on expungement and

sealing, (b) conduct trainings on expungement and sealing across the Commonwealth, (c) develop a library of resources on expungement and sealing for use by public defenders and court-appointed counsel, and (d) post information regarding expungement and sealing for use by the public on its website; and (iii) the Department of State Police, Department of Motor Vehicles, Office of the Executive Secretary of the Supreme Court of Virginia, and clerk of any circuit court to provide data and information on sealing upon request of the Virginia State Crime Commission for purposes of monitoring and evaluating the implementation and impact of the sealing processes. The bill also directs (1) the Office of the Executive Secretary of the Supreme Court of Virginia to collect data related to petitions filed pursuant to relevant law, (2) the Virginia State Crime Commission to analyze data and information collected on automatic and petition sealing and report to the General Assembly by the first day of the 2026 Regular Session, and (3) the Virginia State Crime Commission to continue its study on the sealing of criminal records and report its work to the General Assembly by the first day of the 2026 Regular Session. The bill repeals the Sealing Fee Fund and directs any money in such Fund to be reverted to the general fund. The bill contains a delayed effective date of July 1, 2026, for the provisions related to the sealing of former possession of marijuana offenses without entry of a court order and the sealing of charges and convictions related to automatic sealing and such petitions. Lastly, the bill delays the repeal of the relevant law related to marijuana possession, limits on dissemination of criminal history record information, and prohibited practices by employers, educational institutions, and state and local governments until January 1, 2026. As introduced, this bill was a recommendation of the Virginia State Crime Commission.

HB 2724 Use of automatic license plate recognition systems; reports; penalty.

Requires the Division of Purchases and Supply of the Department of General Services (the Division) to determine and approve the automatic license plate recognition systems, defined in the bill, for use in the Commonwealth and provides requirements for use of such systems by law-enforcement agencies. The bill limits the use of such systems by law-enforcement agencies to the following purposes: (i) as part of a criminal investigation into an alleged criminal violation of the Code of Virginia or any ordinance of any county, city, or town where there is a reasonable suspicion that a crime was committed; (ii) as part of an active investigation related to a missing or endangered person, including whether to issue an alert for such person, or a person associated with human trafficking; or (iii) to receive notifications related to a missing or endangered person, a person with an outstanding warrant, a person associated with human trafficking, a stolen vehicle, or a stolen license plate. The bill requires annual reports from law-enforcement agencies using such systems that provide de-identified information concerning the use of the systems and by the State Police aggregating such information statewide beginning April 1, 2027. The bill also requires a lawenforcement officer or State Police officer to collect data on whether a stop of a driver of a motor vehicle or stop or temporary detention of a person was based on a notification from an automatic license plate recognition system prior to such stop and if so, the specific reason for the notification as set forth in relevant law. The provisions of the bill that require a law-enforcement agency to obtain a permit from the Department of Transportation in accordance with regulations of the Commonwealth Transportation Board before installing an automatic license plate recognition system on a state rightof-way do not become effective unless reenacted by the 2026 Session of the General Assembly. Except for provisions requiring (a) the Division determine and approve automatic license plate recognition systems for use in the

Commonwealth, which shall become effective on July 1, 2026, and (b) law-enforcement officers to collect data on whether a stop was based on a notification from an automatic license plate recognition system, which shall become effective January 1, 2026, the provisions of the bill become effective in due course. The bill requires the Division, in consultation with the Virginia Information Technologies Agency, to determine such systems for use in the Commonwealth and publicly post a list of such systems by January 1, 2026. Finally, the bill requires the Virginia State Crime Commission to collect data and conduct surveys of law-enforcement agencies to assess the use of automatic license plate recognition systems and report its findings by the first day of the 2026 Regular Session and again on November 1, 2026. As introduced, this bill was a recommendation of the Virginia State Crime Commission.

HB 2252/SB 936 Decreasing probation period; criteria for mandatory reduction.

Establishes criteria for which a defendant's supervised probation period shall be reduced, including completing qualifying educational activities, maintaining verifiable employment, complying with or completing any state-certified or state-approved mental health or substance abuse treatment program, securing and maintaining qualifying health insurance or a qualifying health care plan, and obtaining housing and establishing residence. The bill provides that a court may decrease a defendant's probation period if warranted by the defendant's conduct and in the interests of justice and may do so without a hearing, unless the defendant poses an imminent threat to the health and safety of himself or others. The bill requires the Department of Corrections to meet with all relevant stakeholders and report to the General Assembly on (i) current practices for community supervision as it relates to monitoring engagement and attainment in education, employment, treatment, and other programs and making recommendations to the court for modification of time served on probation; (ii) how such practices compare to the processes and practices that would be established pursuant to the bill; and (iii) a plan for such implementation by November 1, 2025. Except for this provision requiring the Department of Corrections to meet with all relevant stakeholders and report to the General Assembly, the provisions of the bill do not become effective unless reenacted by the 2026 Session of the General Assembly.

HB 2657/SB 746 Involuntary manslaughter; certain drug offenses.

Provides that any person who knowingly, intentionally, and feloniously manufactures, sells, or distributes a controlled substance knowing that such controlled substance contains a detectable amount of fentanyl, including its derivatives, isomers, esters, ethers, salts, and salts of isomers, and unintentionally causes the death of another person is guilty of involuntary manslaughter if (i) such death results from the use of the controlled substance and (ii) such controlled substance is the proximate cause of the death. The bill provides that venue for a prosecution of this crime shall lie in the locality where the manufacturing, sale, or distribution of such controlled substance occurred, where the use of the controlled substance occurred, or where death occurred. The bill also provides that if a person gave or distributed such controlled substance only as an accommodation to another individual who is not an inmate in a community correctional facility, local correctional facility, or state correctional facility, or in the custody of an employee thereof, and not with intent to profit thereby from any consideration received or expected nor to induce the recipient of the controlled substance to use or become addicted to or dependent upon such

controlled substance, he is not guilty of involuntary manslaughter but is guilty of a Class 6 felony.

Failed

HB 1714 Assault and battery; serious bodily injury; penalty.

Creates a Class 6 felony for any person who commits an assault and battery that results in serious bodily injury, as defined in relevant law, and adds such new offense to the list of violent felony offenses for the purposes of the discretionary sentencing guidelines. The bill contains technical amendments.

SB 918 Driving under the influence.

Provides that the provisions regarding driving or operating a motor vehicle, engine, or train while intoxicated and the provisions regarding operating a motor vehicle by a person under the age of 21 after illegally consuming alcohol shall not apply to any person driving or operating a motor vehicle on his residential property or his adjoining property.

SB 1268 Department of Juvenile Justice; inquiry and report of immigration status; juvenile or adult adjudicated delinquent or convicted of violent juvenile felony.

Requires the Director of the Department of Juvenile Justice or other person in charge of a secure facility where a juvenile or adult has been committed upon an adjudication of delinquency or a finding of guilt for a violent juvenile felony to ascertain whether such juvenile or adult is in the United States illegally and, if such juvenile or adult is found to be in the United States illegally, to communicate such information to U.S. Immigration and Customs Enforcement. Under current law, such immigration inquiries are required of jail officers or correctional officers in charge of state, local, or regional correctional facilities.

VI. Education

Passed

HB 1626/SB 822 Public elementary and secondary school teachers; certain training activities; requirements and limitations.

Prohibits any public elementary or secondary school teacher from being required to participate in any non-academic training activity, as that term is defined in the bill, more frequently than once within six months of employment with the applicable school board and once every five years thereafter, except in the case of certain training relating to secure mandatory test violations upon determination by the school board or division superintendent that additional training is necessary. The bill also provides that the total frequency and duration of non-academic training activities in which each such teacher is required to participate pursuant to state law or regulation or policy or regulation of the applicable school board shall not exceed 25 hours every five years.

HB 1961/SB 738 Public elementary and secondary schools; student discipline; student cell phone possession and use policies; development and implementation.

Directs each school board to develop and each public elementary and secondary school to implement ageappropriate and developmentally appropriate policies relating to the possession and use of cell phones by students on school property during regular school hours. The bill requires such policies to (i) restrict, to the fullest extent possible, student cell phone possession and use in the classroom during regular school hours; (ii) aim to reduce or prevent any distraction in or disruption to the learning environment, including bullying or harassment, that could be caused or facilitated by student cell phone possession and use on school property during regular school hours; (iii) ensure that implementation and enforcement of the policy is the responsibility of the administration, minimizes, to the extent possible, any conflict with the instructional responsibilities of teachers or any disruption to instructional time, and does not involve any school resource officer; (iv) include exceptions to such policies permitting any student, pursuant to an Individualized Education Plan or Section 504 Plan or if otherwise deemed appropriate by the school board, to possess and use a cell phone on school property, including in the classroom, during regular school hours to monitor or address a health concern; and (v) expressly prohibit any student from being suspended, expelled, or removed from class as a consequence of any violation of such policies. Finally, the bill clarifies that (a) no violation of any such student cell phone possession and use policy shall alone constitute sufficient cause for a student's suspension or expulsion from attendance at school and (b) any such violation that involves, coincides with, or results in an instance of disruptive behavior, as that term is defined in applicable law, shall be addressed in accordance with the regulations on codes of student conduct adopted by each school board pursuant to applicable law.

HB 2774/SB 1240 School-connected student overdoses; policies relating to parental notification.

Requires public school principals and heads of private schools in the Commonwealth to report certain information to the parents of enrolled students within 24 hours of a confirmed or suspected school-connected student overdose, as defined in the bill.

HB 2777/SB 955 Public schools; textbooks and other high-quality instructional materials.

Makes several changes relating to the textbooks and other high-quality instructional materials that are utilized as the curriculum basis for public elementary and secondary school student instruction, including (i) requiring each local school board to adopt and implement textbooks and other high-quality instructional materials in English language arts for grades six through 12 and mathematics, science, and history and social studies for grades kindergarten through 12 and requiring the Department of Education to support such local adoption and implementation in several ways and (ii) requiring each education preparation program offered by a public institution of higher education or private institution of higher education or alternative certification program that provides training for any student seeking initial licensure by the Board of Education with certain endorsements to include a program of coursework and clinical experience and require all such students to demonstrate mastery in identifying and implementing textbooks and other high-quality instructional materials. The provisions of the bill, with the

exception of a provision that requires a study of and report on the textbook review and approval process by November 1, 2025, have a delayed effective date of July 1, 2026.

Failed

SB 1031 Public elementary and secondary schools; compulsory attendance requirements; religious exemption; requirements.

Amends the provisions permitting any child and his parents to receive an exemption from school attendance by reason of bona fide religious training or belief, as defined in relevant law, to require the parent of any such child, in order to receive such exemption, to provide (i) evidence of the parent's ability to provide an adequate education for his child; (ii) notice to the division superintendent by August 15 of each year, or as soon as practicable in the event that such child and his parents move into the school division or seek to receive an exemption after the start of the school year, of such child and his parents' intention to receive such an exemption and certification that the child will receive an alternative form of instruction, including a description of the curriculum to be studied in the coming year; and (iii) evidence of the child's progress in accordance with the provisions of the bill.

SB 1346 Public schools; Virginia Opportunity Scholarship Grant Program established.

Establishes the Virginia Opportunity Scholarship Grant Program, to be administered and managed by the Department of the Treasury pursuant to guidelines developed by the Board of Education in collaboration with the Department of the Treasury, for the purpose of ensuring that all children in the Commonwealth have access to quality educational opportunities by annually awarding a grant in the amount of $5,000 per eligible student, as that term is outlined in the bill, for up to 10,000 eligible students each year. The bill requires the grant funds awarded pursuant to the Program to be used to support qualified educational expenses of attending an accredited private school in the Commonwealth, as enumerated by the bill. The bill also (i) directs the Board of Education, in collaboration with the Department of the Treasury, to develop guidelines for the implementation and administration of the Program; (ii) requires the Board of Education to develop and make available to each school board and each school board to make available to parents at the start of each school year informational materials relating to the Program; and (iii) requires the Department of Education to annually collect data on and include as a part of the Board of Education's Annual Report on the Condition and Needs of Public Schools in Virginia the total student participation in the Program

VII. Elections

Passed

HB 1794/SB 1119 Elections; primary dates; presidential year primaries.

Provides that all primaries for offices to be filled at the November election in presidential election years shall be held on the date of the presidential primary. With respect to candidates for election in November of a presidential election year, the bill also lifts the requirement that

petition signatures must be collected after January 1 of the presidential election year. The bill adjusts campaign finance filing deadlines for candidates in presidential year elections to account for the March primary date.

HB 2165/SB 1002 Campaign finance; prohibited personal use of campaign funds; complaints, hearings, civil penalty, and advisory opinions.

Prohibits any person from converting contributions to a candidate or his campaign committee for personal use. Current law only prohibits such conversion of contributions with regard to disbursement of surplus funds at the dissolution of a campaign or political committee. The bill provides that a contribution is considered to have been converted to personal use if the contribution, in whole or in part, is used to fulfill any commitment, obligation, or expense that would exist irrespective of the person's seeking, holding, or maintaining public office but allows a contribution to be used for the ordinary and accepted expenses related to campaigning for or holding elective office, including the use of campaign funds to pay for the candidate's dependent care expenses that are incurred as a direct result of campaign activity. The bill provides that any person subject to the personal use ban may request an advisory opinion from the State Board of Elections on such matters. The foregoing provisions of the bill have a delayed effective date of July 1, 2026. The bill directs the State Board of Elections to adopt emergency regulations similar to those promulgated by the Federal Election Commission to implement the provisions of the bill and to publish an updated summary of Virginia campaign finance law that reflects the State Board of Elections' and Attorney General's guidance on the provisions of such law that prohibit the personal use of campaign funds and any new regulations promulgated by the State Board of Elections.

HJ 443/SJ 253 Study; joint subcommittee to study the consolidation and scheduling of general elections in Virginia; report.

Creates a two-year legislative study on the consolidation and scheduling of general elections in Virginia. A 13-member joint subcommittee is established, consisting of eight members of the General Assembly, four nonlegislative citizen members, and one ex officio member, and is tasked with weighing the potential and probable effects of moving some or all of Virginia's state or local elections to even-numbered years in order to coincide with the federal election schedule. Any recommendations by the joint subcommittee to consolidate or reschedule Virginia's general elections must include recommendations for any amendments to the Constitution of Virginia and the Code of Virginia needed to effectuate the shift. The joint subcommittee is given two years to complete its study, with its final report due no later than the first day of the 2027 Regular Session of the General Assembly.

VIII. Freedom of Information Act

Failed

SB 876 Virginia Freedom of Information Act; notice of public meetings; proposed agenda required.

Requires public bodies subject to the Virginia Freedom of Information Act to include a proposed agenda and any subsequent revisions to be posted on the public body's official public government website, if any, and made available to the public prior to the meeting. The bill provides that any items added to the agenda after the meeting commences may be considered and discussed at the meeting, but final action shall not be taken on such an item unless the matter is time-sensitive.

SB 1029 Virginia Freedom of Information Act; procedure for responding to requests; charges; posting of notice of rights and responsibilities.

Limits the fees charged for producing public records to the median hourly rate of pay of employees of the public body or the actual hourly rate of pay of the person performing the work, whichever is less, and provides that a public body may petition a court for relief from this fee limit if there is no one who can process the request at the median hourly rate of pay or less. The bill makes corresponding amendments to the required statement on charges in the notice of rights and responsibilities that must be posted on a public body's website. The bill also amends existing law providing that a public body may petition a court for additional time to respond to a request for public records to allow such petitions to be heard in either general district or circuit court, to give such petitions priority on the court's docket, and to toll the response time while such a petition is pending before a court. The bill makes technical amendments, including moving provisions regarding charges for the production of public records into a separate section of the Virginia Freedom of Information Act.

IX. General Laws

Passed

HB 1973 Preservation of affordable housing; definitions; civil penalty.

Creates a framework for localities to preserve affordable housing by exercising a right of first refusal on publicly supported housing, defined in the bill. The bill authorizes localities to implement an ordinance that requires an owner to accept a right of first refusal offer by the locality or qualified designee, defined in the bill, in order to preserve affordable housing for at least 15 years. The bill requires that any locality adopting such an ordinance to preserve affordable housing submit an annual report to the Department of Housing and Community Development pursuant to existing law.

HB 2515/SB 1212 Virginia Consumer Protection Act; prohibited practices; mandatory fees or surcharges disclosure.

Prohibits a supplier, in connection with a consumer transaction, from advertising or displaying a price for goods or services without clearly and conspicuously displaying the total price, which shall include all mandatory fees or surcharges, as defined in the bill. The bill specifies the requirements for compliance with its provisions for certain suppliers and excludes from its provisions (i) certain fees charged by motor vehicle dealers, as defined in relevant law; (ii) fees charged by electric utilities, natural gas utilities, and telecommunications service providers, as

those terms are defined in relevant law; and (iii) certain costs associated with real estate settlement services. The bill requires a food delivery platform to (a) at the point when a consumer views and selects a vendor or items for purchase, include a clear and conspicuous disclosure of any additional fee or percentage charged, as defined in the bill, and (b) after a consumer selects items for purchase, but prior to checkout, display a subtotal page that itemizes the price of such selected items and any additional fee or percentage included in the total cost.

SB 1219 General Assembly; Legislator Compensation Commission established.

Establishes the Legislator Compensation Commission, to be formed every four years for the purpose of reviewing the salaries, expense allowances, retirement benefits, and other emoluments received by members of the General Assembly and determining whether any adjustments to salaries or allowances are needed. The 11-member Commission shall be appointed as follows: two former members of the Senate of Virginia and four former members of the House of Delegates, to be appointed by the Joint Rules Committee, and five nonlegislative citizen members, with the Governor, the Speaker of the House of Delegates, the House Minority Leader, and the Senate Majority and Minority Leaders each appointing one such member. Any adjustments made to salaries, expense allowances, or other emoluments or benefits enacted in a budget bill based upon the recommendation of the Commission shall not be effective until January 1 of the year immediately following the general election for all members of the General Assembly.

Failed

HB 2498/SB 1287 Virginia Gaming Commission; established.

Establishes the Virginia Gaming Commission as an independent agency of the Commonwealth, exclusive of the legislative, executive, or judicial branches of government, to oversee and regulate all forms of legal gambling in the Commonwealth except for the state lottery. The bill sets eligibility requirements for the appointment of a Commissioner and Virginia Gaming Commission Board members, provides powers and duties of such Commissioner and Board members, and provides for the transfer of current employees of relevant state agencies to the Commission. The bill contains numerous technical amendments.

SB 982 Casino gaming; eligible host localities.

Adds Fairfax County to the list of localities eligible to host a casino in the Commonwealth and provides that any proposed site for a casino gaming establishment considered by Fairfax County shall be (i) located within one-quarter of a mile of an existing station on the Metro Silver Line, (ii) part of a coordinated mixed-use project development consisting of no less than 1.5 million square feet, (iii) within two miles of a regional enclosed mall containing not less than 1.5 million square feet of gross building area, and (iv) outside of the Interstate 495 Beltway.

SB 1136 Local anti-rent gouging authority; civil penalty.

Provides that any locality may by ordinance adopt anti-rent gouging provisions. The bill provides for notice and a public hearing prior to the adoption of such ordinance and specifies that all landlords who are under the ordinance may be required to give at least two months' written notice of a rent increase and cannot increase the rent by more than the locality's calculated allowance, not to exceed three percent, and states that such allowance is effective for a 12-month period beginning July 1 each year. The bill requires the locality to publish such allowance on its website by June 1 of each year. Certain facilities, as outlined in the bill, are exempt from such ordinance. The bill also requires a locality to establish an anti-rent gouging board to establish rules and procedures by which landlords may apply for and be granted exemptions from the rent increase limits set by the ordinance or delegate such duties and functions to an existing local board, department, or agency. Finally, the bill provides that a locality shall establish a civil penalty for failure to comply with the requirements set out in its ordinance.

X. Health

Passed

HB 1649/SB 740 Board of Medicine; continuing education; unconscious bias and cultural competency.

Directs the Board of Medicine to require unconscious bias and cultural competency training as part of the continuing education requirements for renewal of licensure. The bill specifies requirements for the training and requires the Board of Medicine to report the number of licensees who have successfully completed such training to the Department of Health and the Virginia Neonatal Perinatal Collaborative.

HB 1716/SB 1105 Contraception; right to contraception; applicability; enforcement.

Establishes a right to obtain contraceptives and engage in contraception, as such terms are defined in the bill. The bill clarifies that none of its provisions shall be construed to permit or sanction the performance of any sterilization procedure without a patient's voluntary and informed consent. The bill creates a cause of action that may be instituted against anyone who infringes on such right.

HB 2610/SB 875 Department of Medical Assistance Services; state pharmacy benefits manager; independent evaluation.

Requires the Department of Medical Assistance Services by July 1, 2026, to select and contract with a thirdparty administrator to serve as the state pharmacy benefits manager to administer all pharmacy benefits for Medicaid recipients, including recipients enrolled in a managed care organization. The bill enumerates requirements for the Department's contract with the state pharmacy benefits manager. In addition, the bill directs the Department to engage an independent consultant to evaluate the implementation of a contract with a third-party pharmacy benefits manager pursuant to the bill.

HB 2617/SB 1120 Commission on Women's Health established; report.

Establishes the Commission on Women's Health as a permanent commission in the legislative branch of state government for the purpose of studying and making recommendations on issues related to women's and maternal health. The Commission consists of 15 members, 10 of whom are legislative members and five of whom are nonlegislative citizen members with significant experience or expertise in women's or maternal health policy.

Failed

HB 2394 Department of Medical Assistance Services; Medicaid; long-term services and supports; presumptive eligibility; sunset.

Directs the Department of Medical Assistance Services to provide presumptive eligibility for Medicaid, including long-term services and supports where appropriate, to individuals who meet certain criteria. The provision of presumptive eligibility is conditional on the Department obtaining all necessary approvals and federal financial participation. The bill sunsets on July 1, 2026, if such approval and federal financial participation is not obtained.

XI. Labor and Commerce

Passed

HB 1766/SB 1056 Unemployment compensation; increase weekly benefit amounts; report.

For unemployment compensation claims effective on or after January 1, 2026, an eligible individual's weekly benefit amount shall be $100 higher than the current weekly benefit amount, as denoted in the table in the printed bill. The bill directs the Commission on Unemployment Compensation, in consultation with the Virginia Employment Commission, to convene a work group to study making annual adjustments to individual weekly benefit amounts based on the average weekly wage. The bill also provides that, beginning July 1, 2025, for claims effective on or after July 1, 2025, an eligible individual's weekly unemployment compensation benefit amount shall be paid for a maximum duration of 26 weeks. As introduced, this bill was a recommendation of the Commission on Unemployment Compensation.

HB 1921 Employment; paid sick leave; civil penalties.

Expands provisions of the Code that currently require one hour of paid sick leave for every 30 hours worked for home health workers to cover all employees of private employers and state and local governments. The bill requires that employees who are employed and compensated on a fee for-service basis accrue paid sick leave in accordance with regulations adopted by the Commissioner of Labor and Industry. The bill provides that employees transferred to a separate division or location remain entitled to previously accrued paid sick leave and that employees retain their accrued sick leave under any successor employer. The bill allows employers to provide a more generous paid sick leave policy than prescribed by its provisions. Employees, in addition to using paid sick leave for their physical or mental illness or to care for a family member, may use paid sick leave for their need for services or relocation due to domestic abuse,

sexual assault, or stalking. The bill provides that certain health care workers who work no more than 30 hours per month may waive the right to accrue and use paid sick leave. The bill also provides that employers are not required to provide paid sick leave to certain health care workers who are employed on a pro re nata, or as-needed, basis, regardless of the number of hours worked. The bill requires the Commissioner to promulgate regulations regarding employee notification and employer recordkeeping requirements. The bill authorizes the Commissioner, in the case of a knowing violation, to subject an employer to a civil penalty not to exceed $150 for the first violation, $300 for the second violation, and $500 for each successive violation. The Commissioner may institute proceedings on behalf of an employee to enforce compliance with the provisions of this bill. Additionally, an aggrieved employee is authorized to bring a civil action against the employer in which he may recover double the amount of any unpaid sick leave and the amount of any actual damages suffered as the result of the employer's violation. The bill has a delayed effective date of July 1, 2026.

HB 1928 Minimum wage.

Increases the minimum wage incrementally to $15.00 per hour by January 1, 2027. The bill codifies the adjusted state hourly minimum wage of $12.41 per hour that is effective January 1, 2025, and increases the minimum wage to $13.50 per hour effective January 1, 2026, and to $15.00 per hour effective January 1, 2027. The bill requires the Commissioner of Labor and Industry to establish an adjusted state hourly minimum wage by October 1, 2027.

HB 2531 Paid family and medical leave insurance program; notice requirements; civil action.

Requires the Virginia Employment Commission to establish and administer a paid family and medical leave insurance program with benefits beginning January 1, 2028. Under the program, benefits are paid to covered individuals, as defined in the bill, for family and medical leave. Funding for the program is provided through premiums assessed to employers and employees beginning January 1, 2027. The bill provides that the amount of a benefit is 80 percent of the employee's average weekly wage, not to exceed 120 percent of the state weekly wage, which amount is required to be adjusted annually to reflect changes in the statewide average weekly wage. The bill caps the duration of paid leave at 12 weeks in any application year and provides self-employed individuals the option of participating in the program.

HB 2764/SB 917 Collective bargaining by public employees; exclusive bargaining representatives.

Repeals the existing prohibition on collective bargaining by public employees. The bill creates the Public Employee Relations Board, which shall determine appropriate bargaining units and provide for certification and decertification elections for exclusive bargaining representatives of state employees and local government employees. The bill requires public employers and employee organizations that are exclusive bargaining representatives to meet at reasonable times to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment. The bill repeals a provision that declares that, in any procedure providing for the designation, selection, or authorization of a labor organization to represent employees, the right

of an individual employee to vote by secret ballot is a fundamental right that shall be guaranteed from infringement. The bill has a delayed effective date of July 1, 2026.

Failed

HB 2126/SB 1190 Virginia Energy Facility Review Board established; localities; comprehensive plan and local ordinances related to siting of critical interconnection projects; planning district commissions; regional energy plans; Virginia Clean Energy Technical Assistance Center established.

Establishes the Virginia Energy Facility Review Board as a political subdivision of the Commonwealth for the purposes of conducting critical interconnection reviews; conducting analysis and study policy options; reviewing regional energy plans, local comprehensive plans, and local solar and storage ordinances; and facilitating the responsible siting of critical interconnection projects in the Commonwealth. The bill also establishes the Virginia Clean Energy Technical Assistance Center, consisting of public institutions of higher education, to serve as an interdisciplinary study, research, and information resource and to provide technical assistance to state agencies, planning district commissions, localities, the Review Board, other public bodies, and private entities in matters related to critical interconnection projects. The bill requires the Center to collaborate with the Review Board to issue the regional energy report and to establish the model local ordinance. The bill requires the Review Board to issue a regional energy report that models each planning district's meaningful annual contribution to clean energy generation, energy efficiency measures, and energy storage. Each planning district commission is required to adopt a regional energy plan to address energy generation, storage, and use that demonstrates a meaningful contribution to the Commonwealth's energy goals as determined by the regional energy report issued by the Review Board and to submit the plan to the Review Board. The Review Board is required to determine if a regional energy plan is in compliance with certain provisions within 60 days of receipt of such plan. If the Review Board determines that the regional energy plan is not in compliance, the relevant planning district commission has 60 days to adopt a compliant regional energy plan. If the relevant planning district commission fails to adopt a compliant energy plan within the 60 days, the Review Board, within 90 days of such failure, is required to issue an alternative regional energy plan that is in effect for such region. The bill requires the Review Board to establish a model local ordinance for siting, permitting, and zoning of critical interconnection projects and all other ground-mounted front of-meter solar energy and energy storage projects. The bill requires each locality to adopt an ordinance for the permitting of solar energy facilities and energy storage facilities, that is consistent with the Commonwealth Clean Energy Policy and the model ordinance and submit it to the Review Board. Under the bill, the Review Board is required to determine if the local ordinance is compliant with certain requirements. If the Review Board determines that the local ordinance is not in compliance, the locality has 60 days to adopt a compliant local ordinance. If the locality fails to adopt a compliant local ordinance within the 60 days, the bill provides that the model local ordinance established is in effect for such locality. The bill provides a procedure for a planning district commission or a locality to appeal a Review Board determination regarding a regional energy plan or a local ordinance. Under the bill, any developer planning to construct a critical interconnection project is required to submit an application to the Review Board. The Review Board is required to determine if the critical interconnection project (i)

qualifies as a project of statewide significance, as defined in the bill, and (ii) complies with the ordinance in each locality in which the proposed critical interconnection project would be located. In making its determination, the Review Board is required to consider the Commonwealth Clean Energy Policy, certain regulations adopted by the State Air Pollution Control Board, certain renewable portfolio requirements, and any other information it deems relevant. The bill provides that the Review Board has the discretion to disregard any unreasonable restriction, as defined in the bill, in the local ordinance on the installation of the critical interconnection projects or the building of structures that facilitate the installation of critical interconnection projects. In addition, the Review Board may consider any regional energy plan developed by the relevant planning district commission. The Review Board is required to issue its opinion on the critical interconnection project within 90 days of receiving an application. The bill requires a locality to issue its final decision regarding any zoning change, variance, or the issuance of a special exemption, special use permit, or conditional use permit related to a critical interconnection project no later than 180 days after receiving a critical interconnection opinion issued by the Review Board. If the locality's final decision diverges from the Review Board's opinion, the locality is required to include a written determination setting forth all facts and conclusions reached by the locality that support its final decision. Under the bill, a locality's failure to make a final decision within the 180-day period constitutes a granting of the zoning change, variance, special exemption, special use permit, or conditional use permit related to a critical interconnection project. The bill requires that any appeal of a locality's decision related to a critical interconnection project will be filed in the circuit court of such locality. The bill provides that such appeal can be brought only by the aggrieved applicant or the owner of the property subject to a special exception and no other person has standing to file such appeal or seek judicial review. Under the bill, in any such appeal, there is a rebuttable presumption that the opinion of the Review Board is correct as it relates to certain factors. Such presumption may be overcome by a preponderance of the evidence that the locality's decision to grant or deny a project or to include the challenged conditions was consistent with provisions in the locality's ordinance that are not unreasonable restrictions. This bill is a recommendation of the Commission on Electric Utility Regulation.

XII. Local Government

Passed

HB 1601/SB 1449 Siting of data centers; site assessment; high energy use facility.

Provides that prior to any approval of a rezoning application, special exception application, or special use permit for the siting of a new high energy use facility (HEUF), as defined in the bill, a locality shall require that an applicant perform and submit a site assessment to examine the sound profile of the HEUF on residential units and schools located within 500 feet of the HEUF property boundary. The bill also allows a locality to require that a site assessment examine the effect of the proposed facility on (i) ground and surface water resources, (ii) agricultural resources, (iii) parks, (iv) registered historic sites, and (v) forestland on the HEUF site or immediately contiguous land. The provisions of the bill shall not apply to a site with an existing legislative or administrative approval where an applicant is seeking an expansion or modification of an already existing or approved facility and such expansion does not exceed an additional 100

megawatts or more of electrical power. Finally, the bill provides that its provisions shall not be construed to prohibit, limit, or otherwise supersede existing local zoning authority.

HB 2037 Land development; solar canopies in parking areas.

Provides that any locality may include in its land development ordinances a provision that requires that an applicant must install a solar canopy over designated surface parking areas. Such provisions shall apply only to nonresidential parking areas with 100 parking spaces or more and may require coverage of up to 50 percent of the surface parking area. The bill provides that localities shall allow for deviations, in whole or in part, from the requirements of the ordinance when its strict application would prevent the development of uses and densities otherwise allowed by the locality's zoning or development ordinance. The bill has a delayed effective date of July 1, 2026.

HB 2559/SB 1489 Authority of local governments; service employees.

Permits any county, city, or town in the Commonwealth to provide for certain requirements concerning incumbent and successor service employers, defined in the bill, by local ordinance or resolution. For example, such local ordinance or resolution may require that successor service employers retain incumbent service employees during a transition period of 90 days. Under the bill, service employees are those who perform work in connection with the care or maintenance of property, services at an airport, or food preparation services at schools. The provisions of the bill do not include any building owned by the Commonwealth or any institution of higher education. The bill provides that an employer that violates the provisions of a local ordinance or resolution enacted pursuant to the bill may be subject to a civil action and monetary damages.

XIII. Social Services

Passed

HB 1617 Homeless youth; fees; certain government documents.

Provides that when a homeless youth seeks to receive a certified copy of a vital record, including his birth record, or his DMV-issued learner's permit, driver's license, special identification card, or identification privilege card or permit, no fee shall be assessed.

HB 1897 Board of Social Work; Board of Counseling; master's social worker; scope of practice; regulations.

Expands the scope of practice of master's social workers to allow the provision of clinical services under the supervision of a licensed clinical social worker. The bill also directs the Board of Social Work to promulgate regulations to allow master's social workers to engage in clinical services under the supervision of a licensed clinical social worker and directs the Board of Counseling to amend its regulations to state that a licensed baccalaureate social worker shall not be required to (i) register with the Board of Counseling or (ii) fulfill any additional training or education requirements in order to serve as a qualified mental health professionaltrainee. The bill

directs the Department of Medical Assistance Services and the Department of Behavioral Health and Developmental Services to amend their regulations to deem the services provided by a licensed baccalaureate social worker to be equivalent to the services provided by a qualified mental health professional-trainee and reimbursed at a comparable rate, and directs the Department of Medical Assistance Services to seek all necessary federal authority to enact such changes.

HB 2742 Malcolm's Law; hospitals; urine drug screening; fentanyl.

Requires hospitals with an emergency department, when conducting a urine drug screening, as defined in the bill, to assist in diagnosing a patient's condition, to include testing for fentanyl in such urine drug screening. The bill has a delayed effective date of January 1, 2026.

Failed

HB 1555 Health Care Regulatory Sandbox Program established.

Requires the Department of Health to establish the Health Care Regulatory Sandbox Program to enable a person to obtain limited access to the market in the Commonwealth to temporarily test an innovative health care product or service on a limited basis without otherwise being licensed or authorized to act under the laws of the Commonwealth. Under the Program, an applicant requests the waiver of certain laws, regulations, or other requirements for a 24-month testing period, with an option to request an additional six-month testing period. The bill provides application requirements, consumer protections, procedures for exiting the Program or requesting an extension, and recordkeeping and reporting requirements. The bill requires the Department of Health to provide an annual report to the Chairs of the House Committee on Health and Human Services and the Senate Committee on Education and Health that provides information regarding each Program participant and recommendations regarding the effectiveness of the Program. The bill directs the Board of Health to adopt emergency regulations to implement the provisions of the bill and has an expiration date of July 1, 2030.

XIV. Taxation

Passed

HB 1699 Tax exemptions; Confederacy organizations.

Eliminates the exemption from state recordation taxes for the Virginia Division of the United Daughters of the Confederacy and eliminates the tax-exempt designation for real and personal property owned by the Virginia Division of the United Daughters of the Confederacy, the General Organization of the United Daughters of the Confederacy, the Confederate Memorial Literary Society, the Stonewall Jackson Memorial, Incorporated, the Virginia Division, Sons of Confederate Veterans, and the J.E.B. Stuart Birthplace Preservation Trust, Inc.

HB 2264/SB 1306 Department of Taxation; free tax filing program.

Directs the Tax Commissioner to terminate the Virginia Free File program and the related agreement with the Consortium for Virginia. The bill also requires the Tax Commissioner to develop and offer a free individual state income tax filing program, effective beginning in taxable year 2028, that is similar to and compatible with the federal Internal Revenue Service (IRS) Direct File program. To implement the new program, the bill requires the Tax Commissioner to enter into a memorandum of understanding with the IRS and coordinate with the IRS in program development. The bill contains technical amendments that remove obsolete language regarding fillable forms.

HB 2663/SB 1336 Electricity consumption tax; rate adjustments.

Increases the electric utility consumption tax's special utility tax rates for commercial and industrial consumer electricity consumed per month (i) in excess of 2,500 kWh but not in excess of 50,000 kWh and (ii) in excess of 50,000 kWh.

Failed

HB 1598 First-time Homebuyer Grant Program.

Establishes a First-time Homebuyer Grant Program for the purpose of assisting first-time homebuyers with first-time homebuyer expenses, as those terms are defined in the bill. The bill provides that the Department of Housing and Community Development shall award eligible first-time homebuyers a grant in an amount equal to five percent of such expenses incurred during a calendar year, not to exceed $10,000. Any grant awarded pursuant to the Program shall be repaid to the Commonwealth if the property for which expenses were incurred is sold within three years from the purchase date, unless the sale is made following a natural disaster or other act of God.
HB 1969 Taxation; extension of expiring sunsets. Extends to taxable year 2026:

1. The exemption for discharged loans for eligible veterans currently set to expire January 1, 2026; 2
2. The credit for amounts paid to another state for income taxes of a pass-through entity currently set to expire January 1, 2026;
3. The standard deduction in an amount equal to $8,500 for single individuals and $17,000 for married persons currently set to revert to $3,000 for single individuals and $6,000 for married persons as of January 1, 2026;
4. The deduction for eligible educator expenses currently set to expire January 1, 2025;
5. The tax credit for low-income taxpayers currently set to expire January 1, 2026;
6. The tax credit for reforestation and afforestation currently set to expire January 1, 2025;
7. The election for eligible owners of pass-through entities to be taxed at the entity level currently set to expire January 1, 2026;
8. The subtractions from the numerators of the property and payroll apportionment factors for eligible companies for (i) property acquired in any qualified locality before January 1, 2025, and (ii) payroll attributable to jobs created within such locality before January 1, 2025;
9. The major business facility job tax credit currently set to expire July 1, 2025;

10. The worker training tax credit for (i) expenses incurred by a business for eligible worker training currently set to expire July 1, 2025, and (ii) direct costs incurred by a business engaged primarily in manufacturing in conducting orientation, instruction, and training in the Commonwealth, relating to the manufacturing activities undertaken by the business currently set to expire January 1, 2025;
11. The tax credit for purchase of machinery and equipment used for advanced recycling and processing recyclable materials currently set to expire January 1, 2025;
12. The tax credit for participating landlords renting qualified housing units (i) in eligible census tracts currently set to expire January 1, 2026, and (ii) in eligible non-metropolitan census tracts currently set to expire January 1, 2026;
13. The tax credit for green and alternative energy job creation currently set to expire January 1, 2025;
14. The tax credit for qualified research and development expenses currently set to expire January 1, 2025;
15. The tax credit for Virginia qualified major research and development expenses currently set to expire January 1, 2025;
16. The exemption from sales and use taxation for gold, silver, or platinum bullion or legal tender coins currently set to expire June 30, 2025;
17. The exemption from sales and use taxation for certain printed materials purchased from an advertising business from a printer within the Commonwealth and distributed outside the Commonwealth before July 1, 2025; and
18. The exemptions from sales and use taxation for (i) parts, engines, and supplies for aviation component parts currently set to expire July 1, 2025, and (ii) prescription medicines and drugs purchased by veterinarians currently set to expire July 1, 2025

XV. Technology

Passed

HB 2094 High-risk artificial intelligence; development, deployment, and use; civil penalties.

Creates requirements for the development, deployment, and use of high-risk artificial intelligence systems, defined in the bill, and civil penalties for noncompliance, to be enforced by the Attorney General. The bill has a delayed effective date of July 1, 2026.

SB 854 Consumer Data Protection Act; social media platforms; responsibilities and prohibitions related to minors.

Requires that any controller or processor that operates a social media platform shall (i) use commercially reasonable methods, such as a neutral age screen mechanism, to determine whether a user is a minor younger than 16 years of age and (ii) limit any such minor's use of such social media platform to one hour per day, per service or application, and allow a parent to give verifiable parental consent to increase or decrease the daily time limit. The bill has a delayed effective date of January 1, 2026.

Failed

HB 2046/SB 1214 High-risk artificial intelligence; development, deployment, and use by public bodies; work group; report.

Creates requirements for the development, deployment, and use of high-risk artificial intelligence systems, as defined in the bill, by public bodies. The bill also directs the Chief Information Officer of the Commonwealth (CIO) to develop, publish, and maintain policies and procedures concerning the development, procurement, implementation, utilization, and ongoing assessment of systems that employ high-risk artificial intelligence systems that are consistent with the requirements created by the bill. The bill directs the CIO to convene a work group to examine the impact on and the ability of local governments to comply with the requirements of the bill. The substantive requirements of the bill have a delayed effective date of July 1, 2027.

HB 2462 Unauthorized use of name, portrait, voice, likeness, or picture of any person; digital replica; civil liability; statute of limitations.

Expands the existing ability for any person to maintain a suit in equity, including the accompanying remedies available, for the unauthorized use of his name, portrait, or picture for advertising purposes or for the purposes of trade to include the unauthorized use of his voice or likeness. The bill also creates civil liability for a person who produces, distributes, or makes available the digital replica, defined in the bill, of a person's voice or likeness in an expressive audiovisual work or sound recording without prior written consent, with exceptions enumerated in the bill. The bill also extends the current statute of limitations for such civil suits from 20 years to 100 years after the death of such person.

XVI. Transportation/Motor Vehicles

Passed

HB 2096 Intelligent Speed Assistance Program established; penalty.

Establishes the Intelligent Speed Assistance Program to be administered by the Commission on the Virginia Alcohol Safety Action Program. The bill authorizes enrollment in such Program as an alternative to suspending a person's driver's license upon such person's conviction of certain speed-related offenses. The bill requires a court to order enrollment in such Program for a person convicted of reckless driving and who was found to have been driving in excess of 100 miles per hour. The bill requires the Commissioner of the Department of Motor Vehicles to provide the option, in a written notice, for enrollment in such Program instead of license suspension for a person who has accumulated certain amounts of demerit points, and if such person does not respond to such written notice within 30 days, the bill requires such suspension of his license. The bill requires any person enrolled in the Program to enter into and successfully complete the Program and install an intelligent speed assistance system, defined in the bill, in any motor vehicle owned by or registered to the participant and prohibits such person from driving any motor vehicle that does not have such a system installed. The bill creates a Class 1 misdemeanor for tampering with or attempting to bypass or circumvent such a system. The bill provides that any person who enters into the Program prior to trial may pre-qualify with the Program to have

an intelligent speed assistance system installed on any motor vehicle owned or operated by him and that the court may consider such pre-qualification and installation. The bill has a delayed effective date of July 1, 2026.

HB 2475 Use of safety belt systems.

Requires all adult passengers in a motor vehicle equipped with a safety belt system to wear such safety belt system when the motor vehicle is in motion on a public highway. Current law requires adult passengers to wear such safety belts when occupying the front seat.

SB 1233 Pedestrian crossing violation monitoring systems and stop sign violation monitoring systems; speed safety cameras; violation enforcement; civil penalty.

Authorizes state and local law-enforcement agencies to place and operate pedestrian crossing violation and stop sign violation monitoring systems in school crossing zones, highway work zones, and high-risk speed corridors for purposes of recording pedestrian crossing and stop sign violations, as those terms are defined in the bill. The bill changes the terms "photo speed monitoring device" to "speed safety camera" and "high-risk intersection segment" to "high-risk speed corridor" in provisions related to vehicle speed violations. The bill makes various changes to the requirements for the use of speed safety cameras and extends most of those requirements to the use of pedestrian crossing and stop sign violation monitoring systems. The bill requires local law-enforcement agencies implementing or expanding the use of pedestrian crossing violation and stop sign violation monitoring systems, prior to the implementation or expansion of such systems, to conduct a public awareness program for such implementation or expansion.

SB 1332 Charges for towing and storage of certain vehicles.

Increases the maximum hookup and initial towing fee of a passenger car from $150 to $210 and repeals the July 1, 2025, sunset of provisions that authorize a towing and recovery operator to charge a fuel surcharge fee of $20 for the removal of certain vehicles. The bill prohibits a towing and recovery operator from charging such a fuel surcharge fee in any locality the governing body of which (i) has adopted an ordinance setting reasonable limits on fees charged for the towing or removal of vehicles on private property in accordance with existing law and (ii) has conducted a review considering an adjustment of such limitations by December 31, 2025.

Failed

HB 2080 Registration decals; discontinued.

Discontinues the requirement for and issuance of decals displaying the expiration month and year of motor vehicle registration to be displayed on license plates. The bill also removes the requirement for the Department of Motor Vehicles to issue appropriately designated license plates for motor vehicles held for rental. The bill does not eliminate existing requirements that vehicles are to be registered. The bill has a delayed effective date of July 1, 2026

GENTRY LOCKE
Attorneys

Only Clients Die. Lawyers Live Forever.
Succession Planning for Lawyers

Matthew W. O'Toole
804.956.2064
motoole@gentrylocke.com

Only Clients Die. Lawyers Live Forever!
Planning for the Unexpected as a Solo Practitioner or Small Firm Partner

Matthew W. O'Toole
Gentry Locke Seminar
2025

I. Build an ethics-compliant contingency plan for your law practice. Protect your clients and yourself! While this is not an ethics-specific presentation, there is no escaping the ethical duty we owe to our clients in the event of an unexpected event and we are no longer able to practice.

a. As a solo practitioner or partner in a small law firm, you have significant ethical responsibilities to your clients in the event you are no longer able practice, no matter the reason.

i. Expect the unexpected! Develop a complete contingency plan and put procedures in place to protect your practice, your clients and your family. A well-developed, comprehensive plan can safeguard against unintended consequences when the unanticipated happens.

ii. Never say never! No one ever plans to be involved in an accident or receive a life-altering diagnosis. Unexpected death, disability, diagnosis/illness, injury – despite the reason, you are obligated to protect client interests if you can no longer practice.

iii. Don't wait! Take steps now to put a plan in place while you still have control over your practice.

b. Key Themes

i. It is common sense to establish a contingency plan and lawyers have an ethical duty to make arrangements in the event of an unexpected transition or emergency.

ii. If something happens to a lawyer, what will happen to his or her clients and current matters?

1. You still have a duty to meet litigation and transactional deadlines in the event of unexpected death, injury or illness.

2. Missed deadlines and open matters left unattended can subject you to malpractice claims.

3. Keep your family in mind as you plan and make intentional, well-thought out decisions of how your practice will continue or wind-down in the event of unexpected death or illness and include the plan in your personal estate planning.

iii. Important steps to consider doing now:

1. Establish a secure plan for your files. *See Section II below.*

2. Establish a plan to assure sufficient cash to continue your office operations for a reasonable time, with an authorized signatory to access such funds. *See Section III below.*

3. Consider entering into a Contingency/Practice Succession Agreement with other attorneys or law firms for coverage. *See Section IV below.*

4. Make sure your estate planning documents have specific directions and authorizations for the personal representative to deal with the logistics of transitioning your practice. *See Section V below.*

5. Obtain appropriate insurance. Consider professional liability tail insurance. *See Section VI below.*

iv. How this works in real life:

1. A lawyer either has his/her own solo practice or a lawyer in a two-person law firm has a partner who practices in a different field of law. The lawyer enters into a Practice Succession Agreement with another firm that specializes in his/her area of practice to assume responsibility for his/her clients in the event of his/her death, disability, illness, or retirement.

c. Ethics Rules – Contingency Plans

i. **ABA Formal Op. 92-369** provides that a lawyer's duty of competent representation includes arranging to safeguard clients' interests in the event of the lawyer's death, disability, impairment, or incapacity.

1. To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's disability or death. Such a plan should, at a

minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death. A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the disabled or deceased lawyer to notify them of the disability or death and to request instructions in accordance with Rule 1.15.

ii. **Comment [5] to Rule 1.3 Diligence** of the Virginia Rules of Professional Conduct ("VRPC") provides that "a lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity."

iii. **Rule 1.6(b)(4) Confidentiality of Information** of the VRPC provides that "to the extent a lawyer reasonably believes necessary, the lawyer may reveal… such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity, or incompetence"

II. File Management.

a. Establish a written file retention and destruction policy. Having a strong file management policy in place for your practice will make an emergent transition easier.

i. The policy should address different forms of file retention (e.g. paper and electronic) and comply with ethics rules (further discussed below).

ii. Communicate the policy to your clients in your engagement letter and closing letter.

iii. Upon termination of representation, review a client's file to determine the retention period that applies based on the written policy, and ensure that all original documents and any copies of documents requested by the client are returned to the client within a reasonable time.

iv. Make sure to address the file retention policy in the Contingency/Practice Succession Agreement.

b. Ethics Rules to consider when drafting a your file retention policy:

i. **Rule 1.15(c)(4) Safekeeping Property** requires that client trust account records be "preserved at least five calendar years after termination of the representation or fiduciary responsibility."

ii. **Rule 1.16(e)** provides that upon termination of representation, all original, client-furnished documents and any originals of legal instruments or official documents in the lawyer's possession (e.g. wills, corporate minutes) should be returned within a reasonable time to the client or the client's new counsel upon request.

iii. **LEO 1305:** A lawyer does not have a general duty to preserve indefinitely all closed or retired files. A lawyer should screen all closed files in order to ascertain whether they contain original documents or other property of the client, in which case the client should be notified of the existence of those materials and given the opportunity to claim them. A lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the statute of limitations period has not expired or which may not be readily available to the client through another source. Similarly, a lawyer should be cognizant of the need to preserve materials which relate to the nature and value of his or her legal services in the event of any action taken by the client against the lawyer. The lawyer may at the appropriate time dispose of the remaining files in such a manner as to best protect the confidentiality of the contents.

iv. **ABA Informal Opinion 1384:** In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based on their obvious relevance and materiality to matters that can be expected to arise. A lawyer should preserve for an extended time an index or identification of the files that the lawyer has destroyed or disposed of.

III. Office Operations

a. Establish a plan to assure sufficient cash to continue or wind-up office operations of the practice in the event of an unexpected emergency or transition.

    i. Consider retaining funds in your law practice bank account to cover costs in the event of a transition. Life insurance and disability insurance can also help to provide financial stability and flexibility. Insurance options are further discussed in Section VI below.

    ii. Designate an authorized signatory to access your law practice bank account in the event of your death, disability, impairment or incapacity. Ensure that the authorized signatory is informed of your office operations, applicable ethics rules, and contingency plan.

b. Office Procedures

    i. Consider developing a manual that outlines basic office procedures (i.e. file retention and destruction, fees and billing, marketing). Make sure other lawyers/support staff in your practice know where this can be accessed. Consider updating this manual no less than annually.

    ii. Make sure someone else is able to access your emails, case schedules, documents, social media, accounting platforms, client contact information and vendor contact list. (*See* Uniform Fiduciary Access to Digital Assets Act, Virginia Code § 64.2-116, et seq.)

IV. Written Agreement with a Responsible Attorney to Protect Client Interests

a. Pursuant to Comment [5] of Rule 1.3 Diligence, a lawyer has an ethical responsibility to plan for client protection in the event of his or her death, disability, impairment, or incapacity. If the lawyer is a solo practitioner, he or she should consider entering into a written agreement with an attorney (the "Responsible Attorney") who can assume responsibility for closing his or her law practice and arranging for the protection of client files. These agreements are commonly referred to as Contingency Agreements or Practice Succession Agreements. [*Sample agreement attached*.]

b. Although a lawyer generally has a duty to maintain confidentiality of client information, Rule 1.6(b)(4) Confidentiality of Information permits the lawyer to disclose such information to the Responsible Attorney as is reasonably necessary to protect client interests in the event of his or her death, illness, disability, impairment, or incapacity.

c. The written agreement should authorize the Responsible Attorney to:

    i. Contact clients for instructions on transferring files

ii. Disposition of closed files
iii. Obtain extensions of time in litigation (if needed)
iv. Collect accounts receivable/bill for and collect fees on open files
v. Payment of outstanding liabilities of the office
vi. Take appropriate actions to close/transition/sell your law practice in accordance with ethics rules.

d. It is important to note when considering who you name as the Responsible Attorney, if the Responsible Attorney also represents you in an attorney capacity, the Responsible Attorney may be prohibited from representing your clients, as he or she would have fiduciary obligations to you.

e. Consider whether you would like for an authorized signatory to access your client trust account in the event of your incapacity, extended absence due to illness, disability or death. If you do not designate an authorized signatory, client money will remain in the trust account until a court order is granted. You may want to consider someone other than the Responsible Attorney, as this provides for checks and balances. Make sure the person is a trusted individual, as you remain responsible for any misappropriated funds.

f. Regularly review and update the written agreement with the Responsible Attorney (and/or agreement with your authorized signatory), as circumstances change.

g. Consider putting a Durable Special Power of Attorney in place. [*Sample Special Power of Attorney attached*.]

i. This allows you to name a lawyer attorney-in-fact to act on your behalf regarding matters related to your clients and your law practice in the event you are incapacitated or otherwise unable to do so.
ii. Lawyer attorney-in-fact is limited to the scope of powers you choose to put in the document, including but not limited to the power to notify clients, deal with financial institutions, examine files and records, sell the law practice, etc.

V. Estate Planning Considerations

a. Do your clients, colleagues and family a favor and have a well-organized, comprehensive estate plan in place that, in addition to family and financial matters, also addresses protection of clients, files, and the future of your law practice. The most flexible and comprehensive estate plan involves using a revocable trust structure accompanied by other important ancillary documents.

i. Revocable Trust

1. A Revocable Trust offers privacy and significant flexibility.

2. You can designate a lawyer or special trustee (i.e. your law firm or a colleague) to specifically address the closure or transition of your law practice. If you have already entered into a separate agreement with a Responsible Attorney to close your practice (as mentioned above in Section IV), note this in your Trust document and authorize your personal representative to carry out the terms of the agreement.

3. If you own an interest in a law firm, make sure provisions in the Operating Agreement or Partnership Agreement coordinate with your estate plan. Best case: assign your interest to your Revocable Trust to avoid a public record generally required as a part of the probate process.

4. Other practical considerations:

    a. Avoids the probate process otherwise applicable to tangible and intangible property passing under a Last Will and Testament.

    b. Allows seamless transition of your practice with specific instructions, rather than folks wondering what to do, how to do it and who can do it.

    c. Assures that your assets go where you want them to go and how you want them to go.

    d. Children can direct the funds into lower level trusts for their children.

    e. Can protect against beneficiaries' domestic situations (divorce).

    f. Can protect against remarriage of surviving spouse. If premature death, surviving spouse usually remarries.

    g. It is best way to provide direction/instruction to your beneficiaries from the grave!

ii. Last Will and Testament

1. If you have a Revocable Trust in place, the Will would provide that the balance of your estate pour over into the Revocable

Trust. Although the Will is public record and property passing pursuant to its terms subject to the probate process, the balance of the estate would be distributed pursuant to the terms of the Revocable Trust, which is not public record.

2. Identify an Executor to carry out administrative details of probate (if any assets in your estate are subject to probate), such as payment of creditors, filing federal and state tax returns, martialing assets into the trust if you have one in place and making a disposition of property.

3. Best case scenario is all of your assets are titled in the name of your Revocable Trust so there will be no need to use the Will, it is only there in the event you inadvertently missed transferring an asset to your Trust.

iii. Durable Power of Attorney

1. This document specifically authorizes a named individual to carry out your legal affairs in the event that you should become mentally or physically incapable of handling your own affairs. A "durable" Power of Attorney survives your incapacity.

2. Although cumbersome, a Power of Attorney is great to have in place if the need arises.

3. Consider an escrow arrangement:

a. Usually an attorney-in-fact immediately possesses the authority set forth in the Power of Attorney document.

b. In order to assure that the attorney-in-fact does not act before needed, you can request that a trusted individual (i.e. your attorney or a law firm) hold the Power of Attorney, and once certain circumstances are met, deliver the original document to the attorney-in-fact.

iv. Durable Medical Power of Attorney

1. This document specifically authorizes a named individual(s) to interact with your medical providers in the event that you are unable to communicate with such medical providers. Avoids the issues that can occur under Virginia's Health Care Decisions Act. Simply say what you want and who you want to implement it.

2. Establish a clear cascade of authorized agents so that the healthcare providers do not have to make a determination under the statutory default provisions.

v. Advance Medical Directive

1. The Health Care Decisions Act of Virginia authorizes you to formally state your desires regarding the providing, withholding, or withdrawal of life-prolonging procedures in the event of a terminal medical condition.

2. You may also appoint an agent to make health care decisions for you under specified circumstances if you are determined to be incapable of making an informed decision. You can direct your agent to follow your desires and preferences as stated in the Advance Medical Directive or as otherwise known to your agent.

3. You make the decisions and your agent simply implements them.

vi. A Note About Digital Assets

1. With the rise of social media, online advertising, and electronic data storage it is important to consider digital assets in the transition of your practice.

2. Consider including provisions in your estate documents that enables your personal representative or trustee to access and control digital assets, obtain passwords and other electronic credentials, and have rights and authority granted under the Virginia Uniform Fiduciary Access to Digital Assets Act (Va. Code § 64.2-116 et seq.).

3. You can also enable your Responsible Attorney or an attorney-in-fact under your Power of Attorney to access, use and control digital devices and digital assets related to your law practice.

VI. Insurance Considerations. Insurance is not only a helpful tool in times in of uncertainty to give your family and legal practice financial flexibility, it is the responsible thing to do as a solo practitioner or partner of a small firm. Below are some insurance options to ensure your practice and your loved ones have added financial protection.

a. Professional Insurance:
   i. Legal Malpractice Insurance.

1. Ensure your legal malpractice is up to date and sufficient for the types of matters you take.

ii. Professional Liability Insurance

1. Consider adding professional liability tail coverage. This is an add-on option that protects your business after the policy expires or is canceled.

b. Disability and Life Insurance

i. These products can add flexibility, financial stability and continuity for the practice.

ii. Both serve a different purpose, consider obtaining both if practical. Life insurance only helps if you are dead! Disability insurance can provide a financial safety net if you survive an accident but are severely injured, leaving you unable to work.

c. Liability Umbrella Policy – Why the heck not?

i. An umbrella policy provides an added layer of liability insurance that extends beyond the limits on a home or automobile policy. It provides additional protection in situations involving personal injury, bodily injury, or property damage.

d. Under-insured/Uninsured Motorist Coverage – Absolutely a must as part of your umbrella liability policy.

i. This form of coverage helps to pay for damage caused by an uninsured or under-insured driver.

ii. Obtain as much as possible. For example, some companies will provide $1 million liability limits on personal auto policies, which will automatically provide $1 million limits on the uninsured and underinsured coverage as well.

iii. Look for umbrella policies that allow you to match uninsured liability coverage with the liability coverage (i.e., $5mil liability coverage/$5 mil uninsured and underinsured coverage).

VII. Final Arrangements - If you do everything else, you may as well do this too!

ATTACHMENTS

1. Sample Durable Special Power of Attorney for Attorney at Law regarding Law Practice
2. Sample Contingency/Practice Succession Agreement

SAMPLE FORM

DURABLE SPECIAL POWER OF ATTORNEY
FOR ATTORNEY AT LAW REGARDING LAW PRACTICE

KNOW ALL MEN BY THESE PRESENTS: That I, [NAME], a licensed attorney-at-law and member of the _____ State Bar, whose _____ State Bar Number is _____, whose date of birth is _____, of _____ County, [STATE], presently residing at _____, and whose law practice office address is _____ (and who, for purposes of recordation is the "Grantor"), has made, constituted and appointed and by these presents, do make, constitute and appoint _____, a [STATE] licensed attorney-at-law and member of the _____ State Bar, whose _____ State Bar Number is _____, as my true and lawful attorney-in-fact, referred to herein as "my lawyer attorney-in-fact," for the following limited purposes. I intend by this instrument to create a Durable Special Power of Attorney, to be used by my lawyer attorney-in-fact for purposes of dealing with my law practice, in the event of my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf (for purposes of this instrument, my "law practice" is defined as [TITLE OF LAW OFFICE], with my office in _____, [STATE] as [TITLE OF LAW OFFICE], or any other successor in interest, may operate an office for the practice of law.

The affidavit of my lawyer attorney-in-fact that I have disappeared, am disabled, incapacitated or incompetent, shall be conclusive proof of the facts stated in such affidavit. In determining whether I have disappeared, am disabled, incapacitated, incompetent, or unable to act on my own behalf, my lawyer attorney-in-fact may act upon such evidence as my lawyer attorney-in-fact shall deem reasonably reliable, including, without limitation, communications with members of my family or other reliable sources, or written opinions of one or more medical doctors duly licensed to practice medicine.

I hereby relieve my lawyer attorney-in-fact from any liability for actions taken in good faith under this instrument. All actions taken pursuant to this Durable Special Power of Attorney by my lawyer attorney-in-fact shall be taken in compliance with all applicable [STATE] laws governing attorneys-at-law and all rules and regulations of the [STATE] Supreme Court and the [STATE] State Bar, including, without limitation. Rules of Professional Conduct adopted by the [STATE] Supreme Court and Legal Ethics Opinions; to the extent that any provision of this Durable Special Power of Attorney should be in conflict with any such laws, rules, regulations, or legal ethics opinions, such laws, rules, regulations, or legal ethics opinions shall govern.

This power of attorney and the authority of my said lawyer attorney-in-fact hereunder shall not terminate in the event of my disappearance, disability, incapacity, or incompetence, or because of lapse of time and shall be deemed a "durable" power of attorney under the laws of the [STATE].

My true and lawful lawyer attorney-in-fact is appointed to manage all property associated with my law practice, real and personal (when the term "property" is hereinafter used, it shall include, whenever applicable, both real and personal property, tangible, intangible and mixed, and any interest or right therein) and to act in and conduct all matters related to my law practice, and for

that purpose and in my name, place and stead, and for my use and benefit, and as my act and deed, to do and execute, or to concur with persons jointly interested with myself therein in the doing or executing of, all or any acts, deeds and things, that is to say:

1. **Power To Inventory And To Conduct His/Her Own Conflict Of Interest Check**. To inventory all client case files and client property under my control, and to conduct his/her own conflict of interest check before delving into client files; in the event that my lawyer attorney-in-fact identifies such a conflict of interest, my lawyer attorney-in-fact shall appoint a Successor or Substitute lawyer attorney-in-fact as provided in paragraph 14 below, to deal with that file.

2. **Power To Notify Clients.** To notify all of my clients of my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf, and to take whatever action my lawyer attorney-in-fact deems advisable to protect the interests of my law practice and the interests of my clients, until such time as my clients have obtained substitute counselor have engaged my lawyer attorney-in-fact as substitute counsel.

3. **Power To Safeguard Clients Files and Property.** To safeguard client's files and property, and to deliver client's files and property as directed in writing by the clients, obtaining proper receipts therefor.

4. **Power To Deal With Financial Institutions.** To open accounts for my law practice with, to add to, withdraw from, or close accounts for my law practice (including operating or general accounts, and attorney escrow or trust accounts) in financial institutions, including, without limitation, banks, trust companies, brokerage firms, mutual fund companies, or other institutions, or to draw upon any such financial institution, corporation, firm, association, or individual for any sum or sums of money or other property to which I may be entitled as I might or could do; to execute and deliver any instruments, checks, or other negotiable instruments with respect to the accounts with such financial institutions; to contract for any services rendered by such financial institutions; upon receipt of any checks, drafts, dividends, interest, income, or moneys, to deposit the same in the appropriate account in my name in any financial institution;

5. **Power To Enter My Law Office**. To enter my law office and to use the office equipment and supplies as necessary;

6. **Power Regarding Mail And Courier Deliveries**. To receive, to sign for, and to open my law practice mail (including electronic mail (email)) and courier deliveries and to process and respond to them, as necessary; To deal with the United Postal Service;

7. **Power To Examine Files And Records.** To examine files and records of my law practice and to obtain information as to any pending matters requiring attention;

8. **Power To Obtain Client Consent To Obtain Extensions Of Time**. To obtain client consent to obtain extensions of time and to contact opposing counsel and courts/agencies to obtain extensions of time;

9. **Power To Apply For Extensions Of Time**. To apply for extensions of time regarding any pending matters;

10. **Power To Prepare And File Accountings and Bills**. To prepare and file or submit accountings and bills to my clients and others;

11. **Power To Preserve Client Confidences And Secrets**. To preserve confidences and secrets of my clients and to protect the attorney-client privilege;

12. **Power To Screen Files For Conflicts Of Interest**. To screen my client files for conflicts of interest on the part of my lawyer attorney-in-fact or any other attorney to whom a client is referred;

13. **Power To Mediate And Arbitrate**. To submit to mediation and/or arbitration on my behalf;

14. **Power To Appoint Successor Or Substitute Lawyer Attorney-in-Fact**. If my lawyer attorney-in-fact is unable or unwilling to act on my behalf under this instrument, either as to a specific matter, or overall, then my lawyer attorney-in-fact is empowered to appoint in writing another discreet and competent attorney-at-law licensed in the [STATE] as a Successor or Substitute lawyer attorney-in-fact to act on my behalf, with full powers to act under the terms of this instrument;

15. **Power To Collect Accounts Receivable**. To collect accounts receivable belonging to my law practice.

16. **Power To Deal With Creditors.** To determine the nature and amounts of all claims of creditors, including clients, of my law practice and to deal appropriately with said creditors.

17. **Power To Sell My Law Practice**. To sell my law practice, partially or in its entirety, including good will, in accordance with Rule 1.17 of the [STATE] Rules of Professional Conduct, or any successor or replacement Rule. My lawyer attorney-in-fact is empowered to purchase my law practice, partially or in its entirety, but only if such purchase is pursuant to a written agreement entered into between my lawyer attorney-in-fact and me prior to my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf.

18. **Power To Request Appointment Of Receiver**. If deemed necessary and appropriate in my lawyer attorney-in-fact's discretion, to seek the appointment of my lawyer attorney-in-fact or other discreet and competent attorney-at-law as receiver, in accordance with the provisions of [STATE] Code Section 54.1-

3900.01, or any successor replacement statue.

19. **Power To Terminate Attorney-Client Relationship And To Appear Before Court Or Other Tribunal To Request Withdrawal Of Appearance.** To terminate the attorney-client relationship with a client by proper notice to the client, and to appear before court or other tribunal to request withdrawal in a pending matter;

20. **Power To Sell, Encumber And Dispose Of Real and Personal Property.** To sell, pledge or otherwise encumber or dispose of any real or personal property belonging to my law practice;

21. **Power To Purchase Real And Personal Property.** To buy, or otherwise acquire, any property, including stocks, bonds. Treasury- securities, or other investments, all in a prudent manner;

22. **Power To Invest And Manage.** To Invest or reinvest, lease or let, or otherwise manage any of the property of my law practice, real and personal, tangible and intangible; to make investments and re-investments on behalf of my law practice, being bound by the Prudent Investor Rule, including, without limitation, taking the following actions: exercising all rights with respect to investments which my law practice now owns or may hereafter acquire, including, without limitation, the right to buy, sell, grant security interests in, or otherwise deal with such investments; opening, establishing, utilizing, or closing investment and brokerage accounts; to sell, assign, endorse and transfer any stocks, bonds, options or other securities of any nature whatsoever standing in the name of my law practice, and to execute any and all documents necessary to effectuate the foregoing, including, without limitation, stock and/or bond powers and certificates, and affidavits of domicile;

23. **Power To Sue And Defend.** To commence or carry on, or to defend, at law or in equity, all actions, suits or other proceedings touching my law practice, or touching anything in which my law practice may be in any wise concerned;

24. **Power To Demand And Receive.** To demand, settle, collect, sue for, receive, enforce payment of, submit to arbitration or mediation, compromise, receive, give receipts or discharges for, or make such other appropriate disposition regarding such matters related to my law practice as my lawyer attorney-in-fact deems appropriate, of all moneys, rights to payment, property (real and personal, tangible and intangible), securities, debts, chattels, causes of action, or other property whatsoever now belonging or hereafter to belong to my law practice;

25. **Power To Settle, Compromise, Arbitrate Or Mediate.** To settle or compromise, or submit to arbitration or mediation, all debts, taxes, accounts, claims, causes of action or disputes between my law practice and any other person or entity, regardless of the identity of the person or entity involved;

26. **Power To Borrow**. To make or endorse promissory notes, or to renew the same from time to time, without personal liability on the part of my lawyer attorney-in-fact;

27. **Power To Deal With Taxes And Tax Agencies**. To inspect, prepare, execute or file income, information, or other tax returns or forms and to act on behalf of my law practice in dealing with any office of the Internal Revenue Service, any office of the [STATE] Department of Taxation, or any office of any other federal, state or local tax department or agency in connection with any income, withholding, employment or other tax matters (including, without limitation: signing a waiver agreeing to a tax adjustment or an offer of waiver of restriction on assessment or collection of a tax deficiency, or a waiver of notice of disallowance of claim for credit or refund; signing a consent to extend the statutory time period for assessment or collection of a tax; signing a closing agreement under Section 7121 of the Internal Revenue Code; receiving a refund check and negotiating it on behalf of my law practice; representing me at a conference with the tax agency; filing a written response on my behalf with the tax agency; signing employment tax returns; receiving confidential tax information); designating in writing any other person or agent to act on my behalf regarding the foregoing tax matters;

28. **Power To Employ And Dismiss**. To employ or dismiss agents, accountants, attorneys, or others, and to compensate them from assets or income from my law practice;

29. **Power Regarding Insurance.** To apply for, take out, renew, maintain, pay premiums on, modify, make claims against, collect benefits from, surrender, or cancel fire, casualty, professional liability, or other liability insurance policies on me, on my lawyer attorney-in-fact, or any property of my law practice; to apply for, take out, renew, maintain, pay premiums on, modify, make claims against, take loans against, collect benefits from, surrender or cancel policies of disability insurance, long term care insurance, office overhead insurance, life insurance, or other insurance; the foregoing powers apply to private and public insurance plans, including, without limitation Medicare, Medicaid, SSI, and Workers Compensation;

30. **Power To Execute Instruments.** Regarding my law practice, to execute, acknowledge or deliver in my name, or to sign my name to, any deed, contract, instrument, certificate or document, including giving all necessary covenants, warranties and assurances, and to sign, seal, acknowledge and deliver the same; to execute disclosures, disclaimers, affidavits or any other documents on my behalf;

31. **Power Regarding Safe Deposit Boxes**. Regarding my law practice, to rent or surrender safe deposit boxes, and to enter any safe deposit boxes which I may now or hereafter have and to remove any of the contents therefrom or to place items therein;

32. **Power Deal With Any Governmental Agency.** Regarding my law practice, to act on my behalf in dealing with any federal, state or local governmental department or agency;

33. **Power To Resign As Fiduciary And To Appoint Successor Fiduciary.** When authorized by the governing instrument, to resign any position which I may hold as fiduciary, and to appoint a successor fiduciary in my place and stead, including the appointment of my lawyer attorney-in-fact as such successor fiduciary;

34. **Power To Petition Court To Permit My Resignation as Fiduciary And For Appointment Of Substituted Or Successor Fiduciary.** To petition the Court of appropriate venue and jurisdiction on my behalf to permit my resignation as fiduciary and to request the appointment of a substituted or successor fiduciary in my place and stead, including the appointment of my lawyer attorney-in-fact as such successor or substituted fiduciary;

35. **Power To Maintain, Repair, Or Demolish Property.** To contract with and to pay contractors or workmen to maintain, make repairs to, or demolish any real or personal property which I may own in connection with my law practice;

36. **Power To Enforce Acceptance Of This Durable Special Power Of Attorney**. To initiate any litigation that may be necessary in order to require third parties to recognize the validity of this power of attorney and to seek damages, including punitive damages, for injury to me and my law practice because of any nonrecognition;

37. **Power To Coordinate And Cooperate With Any Other Fiduciary Acting On My Behalf.** To coordinate and cooperate with any other attorney-in-fact or other fiduciary acting on my behalf, in order to carry out the powers conferred on my lawyer attorney-in-fact herein;

38. **Power To Notify Professional Liability Insurance Carriers.** To notify any professional liability insurance carriers of my disappearance, disability, incapacity, incompetence, or inability to act on my own behalf, and to cooperate with such insurance carriers regarding matters related to my insurance coverage, including the addition of my lawyer attorney-in-fact as an insured under my policy or policies.

Except as otherwise limited in this instrument, I do give and grant unto my said lawyer attorney-in-fact full power and authority to do and perform all and every lawful act, deed, matter and thing whatsoever in and about my law practice and property associated with my law practice as effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specially enumerated powers being in aid and exemplification of the power herein granted regarding my law practice and not in limitation or definition thereof; and I hereby ratify all that my said lawyer attorney-in-fact shall lawfully do or cause to be done by virtue of these presents.

And I hereby declare that any act or thing lawfully done hereunder by my said lawyer attorney-in-fact shall be binding on me, and on my heirs, legal and personal representatives, and assigns, whether the same shall have been done before or after my death, or other revocation of this instrument, unless and until reliable intelligence or notice thereof shall have been received by any party who, upon the faith of this instrument, accepts my said lawyer attorney-in-fact as authorized to represent me.

I intend that this power of attorney be a substitute for the necessity of any court or agency proceeding to appoint a guardian, conservator, trustee, representative payee, receiver, or other similar fiduciary for my law practice, since I wish to avoid the necessity for such a proceeding; however, should it become necessary for the court or agency to appoint such a guardian, conservator, trustee, representative payee, receiver, or other fiduciary, I nominate my above named attorney-in-fact to be such guardian, conservator, trustee, representative payee, receiver, or other fiduciary. I intend that the agency created by this power of attorney shall not be subsumed, nullified, or in any way impaired by the court or agency appointment of such a guardian, trustee, conservator of my person or estate, representative payee, receiver, or any other similar fiduciary. I intend that any such fiduciary shall not be entitled to revoke, impair, or alter the agency relationship created by this power of attorney. I intend that, in accordance with the law of every state or other jurisdiction, including, in the Commonwealth of Virginia, the statutory provisions of **Title 11 of the Code of [STATE], 1950, as amended**, regarding survival of powers of attorney after appointment of a guardian, this power of attorney shall continue in force after any such appointment, and shall in every respect be superior to and prevail over any such appointment, regardless of the jurisdiction appointing the guardian, conservator, trustee, representative payee, receiver, or other fiduciary for the administration of my affairs regarding my law practice during my lifetime.

Any provision of the law to the contrary, no person or entity (other than a court of competent jurisdiction and the _____ State Bar) shall have the authority to require my said lawyer attorney-in-fact to disclose any information relating to the actions taken or not taken by my said lawyer attorney-in-fact hereunder, and no person or entity (other than a court of competent jurisdiction and the _____ State Bar) shall have the authority to inspect or to permit the inspection of the records maintained by my lawyer attorney-in-fact hereunder. Nonetheless, my lawyer attorney-in-fact may consent to the disclosure of such information and/or the inspection of such records if my lawyer attorney in fact is required to do so by court order or the order of the _____ State Bar.

My lawyer attorney-in-fact shall be entitled to the payment of reasonable compensation from my law practice for any services which my lawyer attorney-in-fact renders under this instrument. Reasonable compensation shall be deemed to be the usual and customary hourly rate in effect at the time services are rendered, and such compensation may vary from time to time based on such rates.

I reserve the right to amend in writing or to revoke this durable special power of attorney. This power of attorney may be revoked only by a document signed by me, expressly revoking this power of attorney, and recorded in the Clerk's Office of the Circuit Court of the City or County in which my law practice is located, or if more than one location, in the City or County where my

primary office is located. The revocation of this power of attorney shall not affect the validity of any action taken by my said lawyer attorney-in-fact prior to the revocation. This power of attorney expressly supersedes and revokes all other durable special powers of attorney heretofore made by me regarding my law practice.

The actions authorized by this power of attorney are intended to create only the authority to act; this power of attorney is not intended to create any obligation to act on the part of my lawyer attorney-in-fact to act. My lawyer attorney-in-fact shall neither be liable for the failure to act nor for the failure to consider taking any of the actions authorized in this power of attorney. My lawyer attorney-in-fact, while acting in good faith, is released from any liability to me or my estate for any acts or failures to act of my lawyer attorney-in-fact, except for willful misconduct or gross negligence. I agree to indemnify and hold my lawyer attorney-in-fact harmless from any liability and expense, including attorney's fees, that my lawyer attorney-in-fact may incur as a result of serving under this power of attorney, except for liability or expense arising from willful misconduct or gross negligence. This indemnification agreement does not extend to any acts, errors, or omissions of my lawyer attorney-in-fact while rendering or failing to render professional services in my lawyer attorney-in-fact's capacity as attorney for my former clients, after such clients have become clients of my lawyer attorney-in- fact.

This power of attorney is granted in and shall be governed by the laws of the [STATE]; however, I intend that this power of attorney be universally recognized and that it be universally admissible to recordation.

The captions used in this Durable Special Power of Attorney have been used for ease of reference, and are not to be used for its interpretation.

This Power of Attorney is executed pursuant to the laws and statutes of the [STATE] and shall not be affected or terminated by my subsequent disability, incapacity or mental incompetence, and all acts done or performed by my lawyer attorney-in-fact pursuant to this Power of Attorney during such disability, incapacity or mental incompetence on my part shall bind me as fully as if I were not subject to such disability, incapacity or mental incompetence.

By signing below, I indicate that I am emotionally and mentally competent to make this document, and that I understand the purpose and effect of this instrument. The signature of my lawyer attorney-in-fact is shown below.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ____ day of _____, 20_____.

_____
Lawyer

_____
_____, Lawyer
Attorney-in-Fact

[NAME] signed the foregoing durable special power of attorney in my presence. I am a disinterested witness and I am not the spouse or a blood relative of [NAME].

_____ _____
Witness Witness

[STATE]
CITY/COUNTY OF _____ , to-wit:

I, the undersigned Notary Public in and for the jurisdiction aforesaid, in the [STATE], do hereby certify that [NAME] whose name is signed to the foregoing power of attorney dated _____, 2022, has acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand on _____, 20_____.

_____
Notary Public

My commission expires: _____

PRACTICE SUCCESSION AGREEMENT

THIS AGREEMENT, dated for identification this ____ day of _____ , 20___, by and among _____ ("*Solo Practitioner / Small Firm*") and _____ ("Successor Practitioner / Successor Firm");

WITNESSETH THAT:

RECITALS

A. *Solo Practitioner* currently practices law through *Small Firm*;

B. *Solo Practitioner / Small Firm* desires to provide for successor representation for his or her clients upon his or her death, disability, or retirement;

C. Successor Firm is willing to assume responsibility for *Solo Practitioner / Small Firm*'s clients in the event of *Solo Practitioner*'s death, disability, or retirement on the terms and conditions herein; now, therefore,

IN CONSIDERATION OF the mutual covenants herein, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, it is AGREED as follows:

ARTICLE I
Definitions

For purposes of this Agreement, the following words have the meaning ascribed to them:

"Case" means a _____ case for which *Solo Practitioner / Small Firm* has been retained, whether or not suit has been filed. Litigation and other law files that are not these types of _____ cases are excluded from this Agreement.

"Disabled" means that *Solo Practitioner* is absent from his or her full time duties at *Small Firm* on account of physical, mental, or emotional condition, disease, or injury, for 180 consecutive days or 352 days in any three (3) consecutive years or (ii), *Solo Practitioner*'s attending physician (and, if Successor Practitioner so elects, a second physician acceptable to him or her) determines that, due to physical, mental, or emotional condition, disease, or injury, *Solo Practitioner* more likely than not will be permanently unable to resume his or her customary duties as a lawyer on a full-time basis within one (1) year following such determination. Notwithstanding the foregoing, if *Solo Practitioner* would be considered disabled under the terms of *Small Firm*'s partnership agreement then in effect, he or she shall be "disabled" for purposes of this Agreement.

"Retire" means to voluntary or involuntary withdraw from the full time practice of law, regardless of age, provided *Solo Practitioner* shall not be deemed to be retired for purposes of this Agreement until *Small Firm* has received notice of same.

ARTICLE II
Transfer of Cases

It is the intent of the parties that Successor Firm will assume responsibility for all Cases that do not present disqualifying conflicts, subject to client approval.

2.1 Conflict Check. Upon *Solo Practitioner*'s dying, retiring, or becoming disabled, *Solo Practitioner*, or his or her personal representative or other legal representative, and Successor Practitioner, shall meet with Successor Firm representatives to review the identities of the parties to *Solo Practitioner*'s Cases. Successor Firm shall forthwith perform a conflict check and promptly advise of any Cases that present conflict problems. Conflicted Cases shall not be subject to the remaining terms of this Agreement.

2.2 Notice to Clients. Upon culling conflicted Cases, the parties will prepare a joint notice to *Solo Practitioner*'s clients advising of the client's rights under Virginia law, stating that Successor Practitioner has agreed to take on the client's Case, subject to client and, if necessary, court approval, such notice to comply with all Virginia rules governing attorney conduct.

2.3 Transfer of Files. Upon receipt of approval of a transfer of a client's Case file to Successor Firm, the party receiving approval shall notify the others, whereupon *Solo Practitioner / Small Firm* will make the client's file available for pickup by Successor Practitioner / Successor Firm. *Small Firm* shall render a receipt for each file received. If Successor Practitioner / Successor Firm desires to photocopy a file, it may do so at *Solo Practitioner*'s cost. Successor Practitioner / Successor Firm shall be responsible for all work on the Case from and after the earlier of the date of notice that all approvals have been obtained or the date the file is picked up by or otherwise comes into Successor Practitioner / Successor Firm's possession.

2.4 Unapproved Transfers. *Solo Practitioner*, or Successor Practitioner / Successor Firm if *Solo Practitioner* is deceased or disabled, may take any action he, she, or it chooses to dispose of any Case for which all requisite approvals for transfer to Successor Practitioner / Successor Firm have not been obtained within sixty (60) days of notice to the Case client.

2.5 Excessive Conflicts. *Solo Practitioner*, or his or her personal representative or other legal representative, may terminate this Agreement if the number of Cases which Successor Practitioner / Successor Firm declines to assume exceeds 10% of the total number of Cases.

ARTICLE 111
Allocation of Earned Fees

3.1 Fee Division. The parties intend to comply with all rules of the Supreme Court of Virginia, Virginia State Bar governing the sharing of legal fees. The parties intend that *Solo Practitioner / Small Firm* divide the fees received on a Case in an equitable manner based roughly on the amount of work each party contributes to the Case. Therefore, unless *Solo Practitioner*, or *Solo Practitioner*'s personal representative or other legal representative, and Successor Practitioner / Successor Firm agree otherwise, fees received on Cases assumed by Successor Practitioner / Successor Firm shall be divided as provided in Schedule A attached hereto and incorporated herein.

Should a Case not fall precisely in any one category described in Schedule A, the parties will in good faith endeavor to reach an equitable division.

3.2 Costs Advanced. *Solo Practitioner / Small Firm* and Successor Practitioner / Successor Firm will each be entitled to recoverable costs advanced by each, respectively with respect to each Case.

3.3 Collection: Payment. *Small Firm* will collect and hold in trust for *Solo Practitioner*, his or her estate, Successor Practitioner / Successor Firm, as applicable, all fees due to *Solo Practitioner* or his or her estate hereunder and all recoverable costs advanced by *Solo Practitioner / Small Firm* on the Cases assumed by Successor Practitioner / Successor Firm, and will promptly remit all such sums as and when collected to *Solo Practitioner* or to *Solo Practitioner*'s personal representative or other legal representative, or to Successor Practitioner / Successor Firm, as applicable. If *Solo Practitioner* receives less than the full amount due from the client for any Case, amounts received shall be divided on a *pro rata* basis, such that fee receipts shall be divided in accordance with Schedule A and cost recoveries will be divided based on the relative proportions of costs advanced by each of *Solo Practitioner / Small Firm* and Successor Practitioner / Successor Firm on that client's Case.

ARTICLE IV
Relationship to Other Agreements

Solo Practitioner / Small Firm and Successor Practitioner / Successor Firm agree that payments received by *Solo Practitioner* or his or her estate under this Agreement shall be applied toward amounts that may otherwise be due to *Solo Practitioner* or his or her estate by reason of the liquidation of *Small Firm* upon *Solo Practitioner* 's death, disability or retirement, as provided in Successor Practitioner / Successor Firm's partnership agreement.

Small Firm may be dissolved upon *Solo Practitioner*'s death or retirement, in which event Successor Practitioner, if he or she was a partner in *Small Firm* at the time of such event, shall succeed to all of the rights of Successor Firm herein.

ARTICLE V
Disputes

If any dispute arises under this Agreement, the parties shall utilize the mediation and, if necessary, binding arbitration services of the Virginia State Bar Fee Dispute Resolution Program, whose decision shall be final; but if that Program declines to make its services available for a dispute hereunder, the parties may resort to any available legal and equitable remedies.

ARTICLE VI
Revocation

The parties desire that this Agreement remain in full force and effect through performance; however, recognizing that personal professional services are involved, that rules governing attorneys and their relationships with each other and with clients are subject to change, and that

changes in personnel may occur at *Small Firm* as well as at Successor Firm, this Agreement may be terminated by *Solo Practitioner* or by *Small Firm* upon sixty (60) days' advance written notice to the other, except that *Small Firm* may not terminate if *Solo Practitioner* dies or becomes disabled prior to the end of such sixty (60) days or if *Solo Practitioner* has Retired.

ARTICLE VII
Notices

For purposes of this Agreement, notices shall be effective when delivered in person or one (l) day following delivery to FedEx or other nationally-recognized courier prepaid, addressed as follows:

If to *Solo Practitioner / Small Firm*:

ADDRESS

If to Successor Practitioner / Successor Firm:

ADDRESS

A party may change his, her, or its address for notices by giving notice to the other parties in the manner provided above.

ARTICLE VIII
Miscellaneous

This Agreement comprises the entire understanding of the parties with respect to the subject matter herein. It may be amended only by writing signed by the parties charged with performance under the amended provision. This Agreement shall be governed by and construed in accordance with the laws of Virginia. Should any provision herein be determined by a court of competent jurisdiction to be void or unenforceable, the remaining provisions shall remain in full force and effect and the parties shall endeavor in good faith to effectuate in a valid and enforceable manner the intent of the void or unenforceable provision. Neither party may assign any rights or obligations under this Agreement without the consent of the other, which may be withheld in the other's sole discretion.

_____
Signature *Solo Practitioner*

SMALL FIRM NAME

By: _____
Its authorized partner

SUCCESSOR FIRM NAME

By: _____
Its authorized partner

_____
Signature Successor Practitioner

Schedule A

Fee Division

Stage of Case at *Solo Practitioner*'s death. etc.	***Solo Practitioner*'s % Share**	***Small Firm*'s Share**
Preliminary: Met with client, file opened	15	85
Initial: Medical records obtained. insurer put on notice, experts not retained	25	75
Underway: Suit filed & experts retained	35	65
	50	50
Pretrial: Trial date scheduled. discovery substantially complete	70	30
Tried to Verdict: Case has been tried but appeal is filed and prosecuted or defended by *Small Firm*		

GENTRY LOCKE
Attorneys

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