Procedures, Pitfalls, and Preservation of Error
Navigating Virginia's New(ish) Court of Appeals
Gentry Locke Appellate CLE

Fairfax Marriott at Fair Oaks
Thursday, September 18, 2025

Monica T. Monday
Michael J. Finney
Scott A. Stephenson
David R. Berry

Gentry Locke's
Appeals & Critical Issues Team

3:00 - 3:05 p.m.	**Welcome and Introductions**
3:05 - 3:15 p.m.	**History and Overview of the New Court of Appeals of Virginia**
3:15 - 4:00 p.m.	**The Mechanics of Handling an Appeal and Avoiding Big Pitfalls**
4:00 - 4:15 p.m.	**Motions Practice in the Court of Appeals**
4:15 - 5:00 p.m.	**Tips on Preserving Error and Avoiding Waiver**
5:00 - 6:00 p.m.	**Reception**

Total CLE Credit Hours: 1 hour and 55 minutes of credit, rounded to 2 hours per MCLE Regulation 102, 0 of which are Ethics.

GENTRY LOCKE
Attorneys

GENTRY LOCKE
Attorneys

Monica Taylor Monday

Chair

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Monica Monday heads the firm's Appeals and Critical Issues practice. Monica represents her clients in Virginia's state and federal appellate courts across a wide variety of cases, including commercial and business disputes, healthcare, property, personal injury, local government matters, domestic relations and more. In 2015, Monica was inducted as a Fellow of the American Academy of Appellate Lawyers — only the fifth Virginia attorney to be so honored. Monica is ranked (Band 1) in *Chambers USA*, Virginia, for Appellate and General Commercial Litigation. She has been described by Chambers USA as having "a commanding reputation as 'one of the go-to practitioners' for appellate work" (2018), as being "held in high esteem as a leading appellate lawyer" (2022), and as being "the dean of Virginia Supreme Court litigation" (2023). She has been recognized among *Virginia's Top 10 Lawyers, Virginia's Top 50 Women Lawyers,* and *Virginia's Top 100 Lawyers* by the Thomson Reuters' *Virginia Super Lawyers*, and on the *Best Lawyers in America* and *Virginia Business* magazine's *Legal Elite* lists. She was a "Leaders in the Law" honoree and named a "Go To Lawyer for Appellate" by *Virginia Lawyers Weekly*.

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

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

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

Education

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

Experience

- Obtained affirmance of defense verdict in tractor-trailer accident case. LeDoux v. Western Express, Inc., 126 F. 4th 978 (4th Cir. 2025)
- In a trade secrets dispute, secured reversal of largest jury verdict in Virginia history. Pegasystems Inc. v. Appian Corporation, 81 Va. App. 433, 904 S.E.2d 247 (2024)
- Obtained reversal of trial court's ruling refusing to enforce a personal guaranty. CSE, Inc. v. Kibby Welding, LLC, 77 Va. App. 795, 887 S.E.2d 789 (2023)
- Court affirmed trial court's interpretation of post-nuptial agreement. Worsham v. Worsham, 74 Va. App. 151, 867 S.E.2d 63 (2022)
- Secured final judgment for bank in equitable subrogation case concerning entitlement to funds in deposit account. Arch Insurance Company v. FVCbank, 301 Va. 503, 881 S.E.2d 785 (2022)
- Court affirmed summary judgment in suit alleging discriminatory taxation. Norfolk Southern Ry. Co. v. City of Roanoke, 916 F.3d 315 (4th Cir. 2019)
- Court affirmed the trial court's decision to set aside a multi-million dollar verdict in a government contracting case. CGI Federal, Inc. v. FCi Federal, Inc., 295 Va. 506, 814 S.E.2d 183 (2018)
- Court held that property owners had a vested right to the use of their property. Board of Supervisors of Richmond County v. Rhoads, 294 Va. 43, 803 S.E.2d 329 (2017)
- In question of first impression involving social host duty to child guest, obtained affirmance of motion to strike. Lasley v. Hylton, 288 Va. 419, 764 S.E.2d 88 (2014)

- Court reversed dismissal of defamation case and clarified the defenses to qualified immunity. Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013)
- Obtained reversal of workers' compensation case where the Full Commission lacked authority to decide the case with a retired Commissioner. Layne v. Crist Electrical Contractor, Inc., 62 Va. App. 632, 751 S.E.2d 679 (2013)
- Obtained reversal of $25 million jury verdict in maritime case relating to asbestos exposure. Exxon Mobil Corp. v. Minton, 285 Va. 115, 737 S.E.2d 16 (2013)
- Obtained reversal of decision striking down water and sewer rates that town charged to out-of-town customers; won final judgment in favor of town. Town of Leesburg v. Giordano, 280 Va. 597, 701 S.E.2d 783 (2010)
- In question of first impression, obtained dismissal of domestic relations appeal based upon terms of property settlement agreement, which waived the right of appeal. Burke v. Burke, 52 Va. App. 183, 662 S.E.2d 622 (2008)
- Obtained reversal of award of writ of mandamus against municipal land development official in subdivision application case. Umstattd v. Centex Homes, G.P., 274 Va. 541, 650 S.E.2d 527 (2007)
- Secured affirmance of compensatory and punitive damages awards for breach of fiduciary duty, tortious interference, and conspiracy. Banks v. Mario Industries of Virginia, Inc., 274 Va. 438, 650 S.E.2d 687 (2007)
- Successfully represented an individual in a premises liability case involving a question of first impression. Taboada v. Daly Seven, Inc., 271 Va. 313, 626 S.E.2d 428 (2006), adhered to on rehearing, 641 S.E.2d 68 (2007)
- Obtained a new trial on damages for injured plaintiff in a medical malpractice case. Monahan v. Obici Medical Management Services, 271 Va. 621, 628 S.E.2d 330 (2006)
- Successfully defended decision of the Virginia Workers' Compensation Commission awarding attendant care benefits for employee who lost both arms in an industrial accident and assessing a large award of attorneys fees against opposing party. Virginia Polytechnic Institute v. Posada, 47 Va. App. 150, 622 S.E.2d 762 (2005)
- Obtained reversal of summary judgment in federal court negligence case. Blair v. Defender Services, 386 F.3d 623 (4th Cir. 2004)
- Successfully defended compensatory and punitive damages jury verdict in malicious prosecution case. Stamathis v. Flying J, Inc., 389 F.3d 429 (4th Cir. 2004)
- Obtained reversal of summary judgment in state malicious prosecution case representing chairman of a school board. Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780 (2003)
- Successful defense of jury verdict in a construction case interpreting statutory warranty for new dwellings. Vaughn, Inc. v. Beck, 262 Va. 673, 554 S.E.2d 88 (2001)
- Successfully defended federal court's dismissal of First Amendment constitutional challenge in voting rights case. Jordahl v. Democratic Party of Virginia, 122 F.3d 192 (4th Cir. 1997), cert. denied, 522 U.S. 1077 (1998)

Administration & Litigation

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

Affiliations

- Boyd-Graves Conference: Chair (2024); Secretary (2022-2024); Steering Committee Member (2016-present); Member (2011-present)
- Member, Advisory Committee on Rules of Court (2024-present)
- Member, Virginia Poverty Law Center Advisory Council (2022-present)
- Member, Virginia Trial Lawyers Foundation Board (2022-present)
- Roanoke Symphony Orchestra Board of Directors (2023-present)
- Member, Judicial Council of Virginia (2013-2023)
- The Virginia Bar Association Appellate Practice Section Council (2009-2023), Chair (2019-2021), Past-Chair (2022-2023)
- Chair, Appellate Committee of the Virginia State Bar Litigation Section (2009-2019)
- Fourth Circuit Rules Advisory Committee; Chair (2017-2018), Virginia Representative (2013-2017)
- Member, Virginia Model Jury Instruction Committee (2012-2020)
- Board of Directors, The Harvest Foundation (2015-2023)
- Member, Special Committee to Study Appellate Mediation in Virginia
- Member, American National Bankshares, Inc., Virginia State Banking Board (2019-2023)
- Board of Trustees, Virginia Museum of Natural History (2009-2019)
- Member, Virginia Workers' Compensation American Inn of Court (2015-2023)
- Member, Virginia State Bar Professionalism Course Faculty (2013-2016)
- Member, Blue Ridge Regional Library Board (2007-2011)
- American Heart Association Roanoke "Go Red for Women" Luncheon; Chair (2017-2018), Co-chair (2016-2017)
- Board of Governors, The Virginia Bar Association (2011-2014)
- Board of Directors, Virginia Law Foundation (2005-2011)
- Member, The Ted Dalton American Inn of Court (2003-2012); Secretary (2007-2012)
- Chair, Committee on Federal Judgeships, Western District, Virginia Bar Association (2004-2008, 2015-present)
- Member, Nominating Committee, The Virginia Bar Association (2004); Membership Committee (2003-2005)

- Board of Directors, Virginia Association of Defense Attorneys (2001-04)
- Co-Chair, Judicial Screening Committee, Virginia Women Attorneys Association (2001-03)
- Member, Board of Trustees, Adult Care Center (1999-04)
- Executive Committee, Young Lawyers Division, Virginia Bar Association (1998-02)
- President, William & Mary Law School Association (2000-01)
- Law Clerk to the Honorable Lawrence L. Koontz, Jr., Chief Judge, Court of Appeals of Virginia (1991-93)

Awards

- Recipient of the inaugural Circle of Excellence Award by Virginia Lawyers Weekly (2024)
- Recipient of the William & Mary Law School Edmund Randolph Award for Excellence in Oral Advocacy (2023)
- "Leading Individual" by Chambers and Partners USA (2021-2025), Band 1, Litigation: Appellate (Virginia)
- "Leading Individual" by Chambers and Partners USA (2017-2025), Band 1, Litigation: Commercial (Virginia)
- Named a "Go To Lawyer for Appellate" by Virginia Lawyers Weekly (2023)
- "Roanoke Lawyer of the Year for Appellate Law" (2020 & 2025) by Best Lawyers in America
- Recipient of the Gentry Locke J. Rudy Austin Pro Bono Service Award (2023)
- "Virginia Business Power 500" (2020, 2021, 2022, 2023, 2024)
- "Virginia Business Women of Leadership" (2021)
- "Circle of Excellence" Honoree by Virginia Lawyers Weekly (2024)
- Peer rated "AV/Preeminent" by Martindale-Hubbell
- Fellow, American Academy of Appellate Lawyers (AAAL, inducted 2015)
- Fellow, American Bar Association (inducted 2013)
- Fellow, Roanoke Law Foundation (inducted 2013)
- Fellow, Virginia Law Foundation (inducted 2011)
- Benchmark Appellate Local Litigation Star (2013)
- 2013 Class of "Influential Women of Virginia" by Virginia Lawyers Media
- Named one of The Best Lawyers in America in the field of Appellate Law (2009-2026)
- Named to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2025), listed in Virginia Super Lawyers *Top 100* in Virginia (2013-2025), listed in Virginia Super Lawyers Top 50 Women in Virginia (2015-2025), listed in Virginia Super Lawyers Top 10 in Virginia (2019-2025), named to Super Lawyers Business Edition US in the area of Appellate Law (2012-2014), and previously was a Virginia Super Lawyers Rising Star (2007)
- Designated one of the "Legal Elite" by Virginia Business magazine for Appellate Law (2011-2024)
- Named a "Legal Eagle" for Appellate Practice by Virginia Living magazine (2012, 2015)
- Named a "Leaders in the Law" honoree by Virginia Lawyers Weekly (2006)
- Sandra P. Thompson Award (formerly the Fellows Award), Young Lawyers Division, Virginia Bar Association (2003)
- Best Appellate Advocate, First Place Team, and Best Brief, 1991 National Moot Court Competition

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Michael J. Finney

Partner

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

Education

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

Experience

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

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

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

Affiliations

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

Awards

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

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Scott A. Stephenson

Partner

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- Fax: 540.983.9400
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Scott Stephenson is a partner in the firm's Commercial Litigation and Appeals and Critical Issues Groups. A native of nearby Salem, Virginia, Scott graduated from the Georgetown University Law Center in 2014 and joined Gentry Locke shortly afterward. Scott practices complex business litigation in both state and federal courts, including disputes over ownership and management rights within businesses, corporate derivative litigation, property disputes, energy litigation, mineral rights litigation, municipal government litigation, and appellate matters.

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

Education

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

Experience

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

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

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

Affiliations

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

Admissions

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

Awards

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

GENTRY LOCKE
Attorneys

David R. Berry

Partner

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

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

Education

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

Experience

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

Awards

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

Case Studies

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

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

History and Overview: the New Court of Appeals of Virginia

Gentry Locke

I. Appeals of Right Come to Virginia (Senate Bill 1261)

A. *Where do I find the legislation?*

1. S.B. 1261, Va. Gen. Assem. (1st Spec. Sess. 2021).

2. The final version of the bill can be found here: ***Bill Tracking - 2021 session > Legislation (state.va.us)***.

B. ***Patrons:*** Senators John S. Edwards (Chief Patron), Joseph D. Morrissey, and Scott A. Surovell.

C. ***Passage Date:*** Governor Northam signed S.B. 1261 into law on March 31, 2021.

D. *Effective Date of SB 1261:*

1. All but one part of the legislation became effective on January 1, 2022. *See* 2021 Va. Acts ch. 489(6).

2. Code § 17.1-400 became effective on July 1, 2021, *see* 2021 Va. Acts ch. 489(6), and provides for the election of six new judges to the Court of Appeals.

II. Jurisdiction of the (Old) Court of Appeals through December 31, 2021

A. ***Generally:*** The Court of Appeals is a court of limited jurisdiction. *Reaves v. Tucker*, 67 Va. App. 719, 727 (2017).

B. *Appeals of Right (See* Code § 17.1-405 (2021); 17.1-406(B) (2021)):

1. Workers' compensation

2. Juvenile and domestic relations

3. Administrative agency appeals

C. ***Appeals by Petition*** **(*See* Code § 17.1-406(A) (2021)):**

1. Defendant criminal and traffic convictions

2. Commonwealth criminal appeals

D. ***Original Jurisdiction:***

1. Writs of mandamus, prohibition, and habeas corpus in any case over which the Court of Appeals would have appellate jurisdiction. *See* Code § 17.1-404.

2. Writs of actual innocence based on non-biological evidence. *See* Code § 19.2-327.10.

III. Jurisdiction of the New Court of Appeals (January 1, 2022 – present)

A. ***Appellate Jurisdiction:***

1. *Appeals of Right* (Code § 17.1-405)):

   a. A final decision of a circuit court in a civil matter. *See* Code § 17.1-405.

   b. A final decision of a circuit court on appeal from a decision of an administrative agency. *Id.*

   c. A final decision of a circuit court on appeal from a grievance hearing decision issued pursuant to Code § 2.2-3005. *Id.*

   d. A final decision of the Workers' Compensation Commission. *Id.*

   e. A final judgment, order or decree of a circuit court involving:

      i. An application for a concealed weapons permit pursuant to Article 6.1 of Chapter 7 of Title 18.2.

ii. Involuntary treatment of prisoners pursuant to Code §§ 53.1-40.1 or 53.1-133.04.

iii. Declaratory or injunctive relief under Code § 57-2.02. *Id.*

f. A final conviction in a circuit court of a traffic infraction or a crime. *See* Code § 17.1-406(A).

g. An appeal of a Partial Final Judgment in the circuit court. Rule 1:2 (2022).

2. *Interlocutory Appeals*

a. An interlocutory decree or order pursuant to Code §§ 8.01-267.8, 8.01-626, or 8.01-675.5. *See* Code § 17.1-405(A)(4).

b. An interlocutory decree or order involving an equitable claim in which the decree or order (i) requires money to be paid or the possession or title of property to be changed or (ii) adjudicates the principles of a cause. *See* Code § 17.1-405(A)(5).

c. *Note:* Except as provided in Code § 8.01-675.5, no interlocutory decree or order shall be appealed if such decree or order involves: affirmance or annulment of a marriage, divorce, custody of a minor child, spousal or child support, control or disposition of a minor child, any other domestic relations matter arising under Title 16.1 or 20, or any protective order other than a final protective order issued by a circuit court. *See* Code § 17.1-405(B).

3. *Appeals by Petition* (Code § 17.1-406(A)):

a. Commonwealth (and county, city or town) criminal appeals that were previously brought by writ of error under Code § 19.2-317.

b. Commonwealth appeals in criminal cases pursuant to Code § 19.2-398.

B. *Original Jurisdiction:*

1. Writs of mandamus, prohibition, and habeas corpus in any case over which the Court of Appeals would have appellate jurisdiction. *See* Code § 17.1-404.

2. Writs of actual innocence based on non-biological evidence. *See* Code § 19.2-327.10.

IV. Practice in the New Court of Appeals

A. *Judges*

1. The Court of Appeals previously operated with 11 judges. *See* Code § 17.1-400 (2021).

2. The Court has added six new judges, for a total of 17 judges. *See* Code § 17.1-400 (eff. 7/1/2021).

3. "The General Assembly shall consider regional diversity in making its elections." *Id.* Additionally, the Chairs of the Senate Judiciary Committee and House Courts Committee announced that the new Court of Appeals judges also will be selected based on racial and practice area diversity. *See* Virginia State Bar - News - VSB to Evaluate Candidates for Virginia Court of Appeals Vacancies.

B. *Oral Argument*

1. *Panels:* The Court will continue to sit in panels of at least three judges to hear oral argument. Code § 17.1-402(A).

   a. As before, "[e]ach panel shall hear and determine, independently of the others" the appeals. Code § 17.1-402(C).

   b. As before, the chief judge will schedule the argument sessions and assign the judges to the panels, rotating membership on the panels. Code § 17.1-402(B).

2. *Location:* The Court will continue to "sit at such locations within the Commonwealth as the chief judge, upon consultation with the other judges of the court, shall designate so as to

provide, insofar as feasible, convenient access to the various geographic areas of the Commonwealth." Code § 17.1-402(A).

3. *When do you get oral argument?* The Court of Appeals may dispense with oral argument only when: (i) the parties agree that oral argument is not necessary; (ii) the appeal is wholly without merit; (iii) when "the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed"; or (iv) when the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Code § 17.1-403; Rule 5A:27.

    a. Previously, the Court of Appeals could dispense with oral argument in appeals of right through a procedure called "summary disposition" when an appeal lacks merit. Rule 5A:27 (2021).

    b. Under the new standards, the Court is now hearing argument in more cases. However, in 2025, the General Assembly added an additional ground for dispensing with oral argument only for a two-year period unless it is reenacted. *See Supra* IV(B)(3)(iv).

4. *Sitting en banc*.

    a. The Court of Appeals sits en banc in the following situations:

        i. "[W]hen there is a dissent in the panel to which the case was originally assigned and the aggrieved party requests an en banc hearing and at least six judges of the court vote in favor of such a hearing." Code § 17.1-402(D)(i).

        ii. "[W]hen any judge of any panel shall certify that in his opinion a decision of such panel of the court is in conflict with a prior decision of the court or of any panel thereof and five other judges of the court concur in that view." Code § 17.1-402(D)(ii).

iii. When "upon its own motion at any time or upon the petition of any party, in any case in which a majority of the court determines it appropriate to do so." Code § 17.1-402(D).

b. The Court may sit en banc "with no fewer than 13 judges," and "a majority of the judges sitting shall be required to reverse a judgment in whole or in part." Code § 17.1-402(E).

The Mechanics of Handling an Appeal and Avoiding the Big Pitfalls

Gentry Locke

V. Noting an Appeal of Right in the New Court of Appeals

A. *Notice of Appeal* (Code § 17.1-407(A) and 5A:6):

1. The notice of appeal is filed within 30 days after entry of the final judgment or appealable order.

2. The notice of appeal is filed in the Clerk's office of trial court, tribunal or commission from which the appeal is taken.

3. A copy of the notice of appeal is sent to all opposing counsel, parties not represented by counsel, the Clerk of the Court of Appeals, and (in criminal cases) to the Attorney General.

4. The contents of the notice of appeal is governed by Rule 5A:6(b).

5. A notice of appeal is not required in **most** interlocutory appeals. Rule 5A:6(a2). Carefully check the rules for current requirements.

B. *Filing Fee* (Rule 5A:6(c)):

1. The notice of appeal must be accompanied by a $50 filing fee.

C. *Special rules in criminal appeals:*

1. The Attorney General's Office is involved in criminal appeals.

2. Therefore, in criminal cases, a copy of the notice of appeal must be served on the Office of Attorney General and on the attorney for the Commonwealth who prosecuted the case. Rule 5A:6(d)(3).

3. Within 10 days of the filing of the notice of appeal, the Attorney General or the attorney for the Commonwealth who prosecuted the case will file a notice of appearance and serve

the notice of appearance on counsel for the appellant. Rule 5A:6(g).

VI. Appeal Bonds (Code § 8.01-676.1)

A. ***The Same Governing Statute:*** Appeal bonds continue to be governed by Code § 8.01-676.1.

B. ***Filing the Appeal Costs Bond:*** A party filing a notice of appeal must simultaneously file in the trial court, lower tribunal or commission an appeal bond if required by Code § 8.01-676.1. Rules 5A:6(a); 5A:16(a).

1. Appeal costs bonds are no longer required in criminal appeals. *See* Code § 8.01-676.1(A).

2. A $500 appeal costs bond or irrevocable letter of credit is required in civil appeals, Code § 8.01-676.1(A), except where the appeal "is necessary to protect the estate of a decedent or a person under a disability, or to protect the interests of the Commonwealth or any county, city, or town of this Commonwealth." Code § 8.01-676.1(M).

3. The appellant may pay a cash bond. Code § 8.01-676.1(S).

4. A party filing an appeal bond must give notice in writing to counsel for the appellee. Rule 5A:17(b).

C. ***Suspending Bonds and Letters of Credit:*** "An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall file a suspending bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and except as provided below, execution shall be suspended upon the filing of such security and the timely prosecution of such appeal." Code § 8.01-676.1(C).

1. The total amount of the suspending bond or letter of credit "shall include an amount equivalent to one years interest

calculated from the date of the notice of appeal" at 6% interest. Code § 8.01-676.1(J).

2. There is a $25 million cap on the amount of a suspending bond or letter of credit, Code § 8.01-676.1(J), but a party may lose that protection by "purposefully dissipating its assets or diverting assets outside of the jurisdiction of the United States for the purpose of evading the judgment." Code § 8.01-676.1(K).

3. The trial court may refuse to suspend the execution of decrees for support and custody, and may also refuse suspension when a judgment refuses, grants, modifies, or dissolves an injunction. Code § 8.01-676.1(D).

4. The appellant may pay a cash bond. Code § 8.01-676.1(S).

VII. The Record: Transcript or Written Statement of Fact (Rule 5A:8)

A. ***Not Much Change:*** The procedures for filing transcripts or written statements of fact are largely unchanged. But in 2025, the Supreme Court clarified the procedure for handling disputes concerning written statements of facts.

B. ***Transcripts:***

1. As under the old rules, transcripts that are germane to any assignment of error must be filed with the trial court within 60 days of the entry of the final or appealable order. Rule 5A:8(a).

2. A notice of filing transcripts must be filed within 10 days after the notice of appeal is filed. Rule 5A:8(b).

C. ***New Rule for Written Statements:*** Written statements of fact are now due 60 days (not 55 days) after the entry of the final or appealable order. Rule 5A:8(c) sets forth the procedure for filing written statements of fact, and Rule 5A:8(d) sets forth the procedure for objecting to written statements of fact. Please note the 2025

amendments which clarify the procedure for the trial court to follow in handling written statements of fact.

VIII. Preliminary Statement of Assignments of Error (Rule 5A:25)

A. ***Appellant's Duty:*** The appellant must file a non-binding preliminary statement of the assignments of error within 15 days after the filing of the record with the Court. Rule 5A:25(d).

B. ***Appellee's Duty:*** If the appellee intends to raise assignments of cross-error, it must file a non-binding preliminary statement of additional assignments of error within 10 days after the appellant files a preliminary statement of assignments of error. *Id.*

C. ***File with the Designation of the Appendix:*** When an appendix is required, the preliminary statement of assignments of error may be combined in one pleading with the designation (or cross-designation) of the contents of the joint appendix. *See id.*

D. ***Assignments of Error are Required in All Appeals:*** The preliminary statement of assignments of error must be filed even when an appendix is not required. Rule 5A:25(a)(1).

IX. Briefing Rules in the New Court of Appeals (Rule 5A:19)

A. ***Time*:**

1. *The opening brief* – Unless otherwise provided by statute or order of the Court, the opening brief must be filed 40 days after the date of the filing of the record in the Court. Rule 5A:19(b)(1).

2. *The appellee brief* – Unless otherwise provided by statute or order of the Court, the appellee brief must be filed within 30 days after filing of the opening brief. Rule 5A:19(b)(2).

3. *The reply brief* - Unless otherwise provided by statute or order of the Court, the reply brief must be filed within 14 days after the date of the filing of the brief of appellee. Rule 5A:19(b)(3).

4. *The reply brief in support of cross-error* - If the reply brief of the appellant addresses cross-error, the appellee may file a reply brief in support of cross-error within 14 days after the filing of the reply brief of appellant. Rule 5A:19(b)(5).

5. *The amicus brief* –An amicus brief is timely filed if filed no later than 7 days after the principal brief or filing of the party supported. A brief amicus curiae filed in support of neither party is timely if filed no later than 7 days after the opening brief or petition. Rule 5A:23(b).

B. ***Length:***

1. Parties may use word or page limits. The addition of page limits is new. Rule 5A:1(c)(4); Rule 5A:19(a), (b).

    i. Headings, footnotes, and quotations are included in the page and word limit. *See* Rule 5A:1(c)(4). The inclusion of headings to this list is new.

    ii. The cover page, table of contents, table of authorities, signature block, and certificate are not included in the page or word limit. *See* Rule 5A:1(c)(4). The addition of the signature block to this list is new.

2. *The opening brief and the appellee brief*: the longer of 50 pages or 12,300 words. Rule 5A:19(a).

3. *The reply brief of appellant and the reply brief in support of cross-error:* the longer of 20 pages or 3,500 words. *Id.*

4. *The amicus brief:* must comply with the word limits that apply to briefs of the party being supported. *Id.*; Rule 5A:23(c). If a person or entity is filing an amicus brief in support of neither

party, the brief amicus curiae must comply with the rules applicable to the appellant or petitioner. Rule 5A:23(c).

X. The Appendix (Rule 5A:25)

A. ***New rule Where There is An Electronic Record:*** "No appendix is required in cases where the clerk of the trial court or other tribunal has filed the record electronically." Rule 5A:25(a)(1).

1. This new rule is an outgrowth of the recommendation by the Working Group that studied the issue. Working Grp. to Study Jurisdiction of the Court of Appeals of Va., Rep. to the Judicial Council of Va.: Court of Appeals Jurisdiction Study – SJ 47, at 10 (Sept. 24, 2020).

2. Almost all of Virginia's circuit court clerk's offices send an electronic record of the proceedings to the appellate courts.

B. ***Paper Records:*** Where there is a paper record, an appendix must be filed unless otherwise ordered by the Court. Rule 5A:25(a)(2).

C. ***Not Much Else Has Changed:*** The rules governing the designation of the contents of the appendix are largely unchanged. Rule 5A:25(d).

1. Exception: the time period for filing an agreed designation of the appendix is now 15 (not 10) days after the filing of the record in the Court. Rule 5A:25(d).

XI. Extensions of Time

A. ***Mandatory Deadlines:*** The times for filing a notice of appeal, petition for appeal, petition for review, petition for rehearing, and request for rehearing en banc are mandatory. Rule 5A:3(a).

B. ***Extensions for <u>Some</u> Deadlines:*** The court may grant an extension of time to file a notice of appeal, petition for rehearing, and petition for rehearing en banc in the discretion of the Court "on motion for good cause shown." *Id.* The Court has no authority to grant an extension of time for a petition for appeal of a certified interlocutory appeal. See

Virginia Code § 8.01-675.3 for extensions of time of the notice of appeal.

C. ***Extension of the Briefing Schedule:*** Motions for an extension of the briefing deadlines must be filed no later than 10 days after the expiration of the deadline. Rule 5A:19(c)(4).

D. ***Extensions generally:*** Under Rule 5A:3(c), a motion for extension of time is governed under the "good cause" standard and is timely if filed:

1. within any specific deadline governing motions to extend under Rules 5A:8(a), 5A:13(a), 5A:19(b), and 5A:19(c), or

2. if a rule does not provide a specific deadline, within 30 days after the filing deadline from which an extension is sought.

XII. Attorney Fees (Rules 1:1A, 5A:30)

A. ***General Rule:*** "In any case in which a party has a statutory, contractual or other basis to request attorney fees, the party may request an award of attorney fees incurred in the appeal of the case by making the request in an appellant's, petitioner's, appellee's, or respondent's brief." Rule 5A:30(b)(2)(A).

B. ***Note:*** "Under Rule 1:1A, "in any civil action appealed to an appellate court that results in a final appellate judgment favorable to an appellee, a prevailing appellee who has recovered attorney fees, costs or both in the circuit court pursuant to contract, statute or other applicable law may make application in the circuit court in which judgment was entered for attorney fees, costs or both incurred on appeal." *See also* Rule 5A:30(b)(1).

1. The application must be filed within 30 days after the entry of the "final appellate judgment." Rule 1:1A(a).

2. The phrase "final appellate judgment" means "the issuance of the mandate by the appellate court or, in cases in which no mandate issues, the final judgment or order of the appellate court disposing of the matter." *Id.*

3. The application may be made in the same case from which the appeal was taken, which case will be reinstated on the circuit court docket upon the filing of the application. *Id.*

XIII. Taxable Costs (Rule 5A:30)

A. ***General Rule:*** Certain costs may be taxed in the Court of Appeals. Unless ordered by the Court: (1) if an appeal is dismissed, costs will be taxed against the appellant; and (2) if a judgment is reversed, costs will be taxed against the appellee. If a judgment is affirmed in part or reversed in part, or is vacated, costs will be allowed as ordered by the Court. Rule 5A:30(a); see also Code § 17.1-604 ("costs shall be recovered . . . by the party substantially prevailing.").

B. ***What costs are taxable***

1. Costs incurred in the printing or producing of necessary copies of briefs, appendices, and petitions for rehearing are taxable. Rule 5A:30(c). *Note:* there is a $500 limit on the recovery of printing for briefs and appendices. Code § 17.1-605.

2. The filing fee is a taxable cost. Rule 5A:30(c).

3. Costs incurred in the preparation of transcripts may be taxable. Rule 5A:30(c); Code § 17.1-128.

C. ***Timing:*** A notarized bill of costs must be filed within 14 days of the decision in the case. Objections to a bill of costs must be filed within 10 days after the filing of the bill of costs. Rule 5A:30(d).

XIV. Rehearing After Final Disposition of the Appeal (Rules 5A:33-35)

A. ***Governing Rules:*** Petitions for rehearing and petitions for rehearing en banc after final disposition of a case are governed by Rules 5A:33 – Rule 5A:35.

B. ***Length:*** The longer of 25 pages or 5,300 words. Rule 5A:33(a); Rule 5A:34(a).

C. ***Time:*** 14 days following the decision or order. *Id.*

D. ***Procedure When Rehearing Granted:*** Rule 5A:35 governs the procedures in the Court when a rehearing is granted.

XV. Electronic Filing: Pursuant to amendments of the Rules for the Court of Appeals and Supreme Court, electronic filing is required for all filings beginning June 1, 2021, except where the party is a pro se prisoner or a litigant who has been granted permission by the court to file documents in paper form. *See* **Amendments to Rules of the Supreme Court of Virginia (state.va.us).**

XVI. Interlocutory Appeals in the New Court of Appeals

A. ***General Rule*:** The Court of Appeals will hear interlocutory appeals certified by the circuit court under Code § 8.01-675.5, interlocutory appeals under the Multiple Claimant Litigation Act (Code § 8.01-267.8), and interlocutory appeals under Code § 17.1-405. Interlocutory appeals of injunctions and certain immunity rulings will be heard by the Supreme Court of Virginia. Code § 8.01-626; Code § 8.01-670.2.

B. ***Discretionary Interlocutory Appeals***

1. Multiple Claimant Litigation under Code § 8.01-267.1 *et seq.*

   a. "The Court of Appeals, in its discretion, may permit an appeal to be taken from an order of a circuit court although the order is not a final order where the circuit court has ordered a consolidated trial of claims joined or consolidated pursuant to this chapter." Code § 8.01-267.8(A).

   b. "The Court of appeals, in its discretion, may permit an appeal to be taken from any other order of a circuit court

in an action combined pursuant to this chapter although the order is not a final order provided the written order of the circuit court states that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Code § 8.01-267.8(B).

c. Procedure for Seeking Discretionary Review:

i. A petition for appeal must be filed with the clerk of the Court of Appeals not more than 10 days after entry of the trial court's order. Rule 5A:12(a)(1). A petition may not exceed the longer of 35 pages or 7,500 words. Rule 5A:12(d). The petition must be accompanied by a $50 filing fee. Rule 5A:12(e).

ii. A brief in opposition to a petition for appeal may be filed with the clerk of the Court of Appeals within 7 days after the petition is served on counsel for respondent. Rule 5A:13(a)(1). The brief in opposition must not exceed the longer of 35 pages or 7,500 words. Rule 5A:13(b)(1).

2. Certified Interlocutory Appeals under Code § 8.01-675.5.

a. *Generally:* When, before trial, a circuit court issues a non-final order or decree, a party may file in the circuit court a motion asking the circuit court to certify such order or decree for interlocutory appeal. Code § 8.01-675.5(A).

b. The motion shall include a concise analysis of the statutes, rules, or cases believed to be determinative of the issues and request that the court certify in writing that the order or decree involves a question of law as to which (i) there is substantial ground for difference of opinion; (ii) there is no clear, controlling precedent or point in the decisions of the Supreme Court or Court of Appeals;

(iii) determination of the issues will be dispositive of a material aspect of the proceeding pending before the court; and (iv) it is in the parties' best interest to seek an interlocutory appeal. *Id.*

c. *Petition for appeal:*

   i. Within 15 days of the entry of an order by the circuit court granting such certification, a petition for appeal may be filed with the Court of Appeals. *Id.*; Rule 5A:12(a)(2).

   ii. The petition may not exceed the longer of 35 pages or 7,500 words. Rule 5A:12(d).

   iii. The petition must be accompanied by a $50 filing fee. Rule 5A:12(e).

d. *Brief in opposition:*

   i. A brief in opposition to a petition for appeal may be filed with the clerk of the Court of Appeals within 7 days after the petition is served on counsel for respondent. Rule 5A:13(a)(2).

   ii. The brief in opposition must not exceed the longer of 35 pages or 7,500 words. Rule 5A:13(b)(1).

e. If the Court of Appeals determines that the certification has sufficient merit, it may, in its discretion, permit an appeal to be taken from the interlocutory order or decree. Code § 8.01-675.5(A).

f. Consideration of such an appeal will proceed in accordance with the applicable procedures. *Id.*

g. *Stay:* No petition or appeal under Code § 8.01-675.5 will stay proceedings in the circuit court unless the circuit court or appellate court so orders upon a finding that (i) the petition or appeal could be dispositive of the entire civil action or (ii) there exists good cause, other than the

pending petition or appeal, to stay the proceedings. Code § 8.01-675.5(B).

h. "The failure of a party to seek interlocutory review under this section shall not preclude review of the issue on appeal from a final order." Code § 8.01-675.5(C).

i. "An order by the Court of Appeals denying interlocutory review under this section shall not preclude review of the issue on appeal from a final order, unless the order denying such interlocutory review provides for such preclusion." *Id.*

MOTIONS PRACTICE IN THE COURT OF APPEALS

Gentry Locke

1. General requirements for motions.

a. *In writing:* Motions shall be in writing and filed with the clerk of the Court. Rule 5A:2(a)(1).

b. *Certification:* All motions shall contain a statement by the movant that the other parties to the appeal have been informed of the intended filing of the motion. Rule 5A:2(a)(1).

   i. For motions where all parties are represented by counsel, the statement by the movant shall also indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition. Rule 5A:2(a)(1).

   ii. This rule does not apply to motions to dismiss petitions in original jurisdiction proceedings. Rule 5A:2(a)(1).

c. *Filing*: All motions must be filed electronically, although *pro se* parties may file by non-electronic means or others with leave of the Court. Rule 5A:1(c)(1).

d. *Format*: For rules on paper size, font and other requirements, see Rule 5A:4(a).

e. *Certificate*: If a motion is subject to a word count, the motion must include a certificate that the document complies with the applicable word limit and state the number of words in the motion. Rule 5A:4(d).

2. General requirements for responses to motions.

a. *Filing deadline:* Responses to motions may be filed within 10 days after the filing of the motion. However, the Court may act on the motion before the 10 days expire, if necessary. Rule 5A:2(a)(2).

b. *Filing:* All responses must be filed electronically (except for *pro se* parties or by leave of the Court). Rule 5A:1(c)(1).

c. *Format*: For rules on paper size, font and other requirements, see Rule 5A:4(a).

3. **Replies:** The Rules do not expressly mention or permit replies in support of a motion.

4. **Oral argument:** No oral argument on motions is permitted except by leave of the Court. Rule 5A:2(a)(3).

5. **Orders:** Promptly after the Court has entered an order, the clerk will send a copy of the order to all counsel. Rule 5A:2(d).

6. **Motions to Dismiss. Rule 1:1B(b).**

   At any time after a notice of appeal has been filed and after the expiration of the 21-day period under Rule 1:1, any party to the appeal may file a motion in the appellate court to dismiss the appeal.

   a. The motion may assert that the appeal is "moot or cannot proceed for some other sufficient reason."

   b. The failure to file a motion to dismiss does not preclude a party from making such arguments in the appellate briefs.

   c. The appellate court may decide the motion based on the existing record or, in its discretion, issue a temporary remand to the circuit court for the purpose of making findings of facts regarding factual issues relevant to the motion.

7. **Motions for Extension of Time.**

   a. *Extensions Generally:* Except as provided below in sections *b* and *c*, the times prescribed in the Rules for filing papers may be extended by a judge of the court in which the papers are to be filed upon a showing of good cause shown. Filing a motion for an extension does not toll the applicable deadline. Rule 5A:3(b).

   b. *Mandatory filing deadlines:*

      i. The times for filing the notice of appeal, petition for appeal, petition for rehearing, and request for rehearing en banc are mandatory. Rule 5A:3(a).

      ii. Except for the petition for appeal, an extension may be granted in the discretion of the Court on motion for good cause shown. Rule 5A:3(a).

c. *Transcripts:* The deadline for filing transcripts may be extended by a Judge of the Court of Appeals only upon a written motion filed within 90 days after the entry of final judgment. Timely motions will be granted only upon a showing of good cause to excuse the delay. Rule 5A:8(a).

d. *Briefs:* A motion for extension of the briefing deadlines shall be filed no later than 10 days after the expiration of the deadline. Rule 5A:19(b)(4) and (c)(4).

e. *When motion for extension is timely.* Rule 5A:3(c).

i. A motion for extension of time is timely if filed either:

1. Within any specific deadline governing motions to extend under Rule 5A:8(a) (transcript), Rule 5A:13(a) (brief in opposition to petition), Rule 5A:19(b)(4) (brief in appeals as a matter of right), and Rule 5A:19(c)(4) (brief in discretionary appeals). Rule 5A:3(c)(1).

2. If a Rule does not provide a specific deadline governing motions to extend, within 30 days after the filing deadline from which the extension is sought. Rule 5A:3(c)(2).

8. Motions to Extend Page/Word Limits. Rule 5A:19(a).

The word/page limits for the opening brief, brief of appellee, and reply brief will not be extended except by permission of the Court on motion for an extension of the limits.

9. Motions for Appointment of Counsel. Rule 1:1B(c).

a. At any time after a notice of appeal has been filed and after the expiration of the 21-day period under Rule 1:1, a party legally entitled to appointed counsel may file a motion for the appointment of appellate counsel.

b. The appellate court may decide the motion or may, in its discretion, refer the motion to the circuit court for appointment.

10. Motions to Associate Out-of-State Lawyers as Counsel *Pro Hac Vice*. Rule 1A:4.

a. If the lower court has already entered an order granting a *pro hac vice* motion, that order is valid in all Virginia courts (including the Court of

Appeals) until the case is concluded or a court revokes the *pro hac vice* admission. Rule 1A:4(3)(c); Rule 1A:4(6).

b. A *pro hac vice* motion may also be filed for the first time where the case is currently pending, including the Court of Appeals. Rule 1A:4(1); Rule 1A:4(3).

c. The procedures of Rule 1A:4 must be followed for local counsel to associate an out-of-state lawyer *pro hac vice*, including: (1) a notarized application; (2) a motion; (3) a proposed order; and (4) the required application fee. See Rule 1A:4(3)(a)-(b).

11. Motions for Leave to file Brief *Amicus Curiae*. Rule 5A:23.

a. May be filed during the petition, appeal, and rehearing stages, and in proceedings invoking the Court of Appeals' original jurisdiction. Rule 5A:23(a).

b. With the exception of the United States and the Commonwealth of Virginia, all other persons or entities must obtain leave of court by motion, in order to file a brief *amicus curiae*. Rule 5A:23(b)-(c).

c. The motion for leave must:

i. state whether the brief would be in support of a party (and if so, which party or parties) or in support of none of the parties;

ii. certify that the applicant has sought to obtain consent of all parties;

iii. state which, if any, of the parties has consented to the motion and whether a party that has not consented has stated an intention to file an opposition to the motion; and

iv. attach the proposed brief. Rule 5A:23(c).

d. *Timeliness*: The Rules provide that a brief *amicus curiae* is timely if filed no later than 7 days after the principal brief or filing of the party supported, or, if supporting neither party, no later than 7 days after the opening brief or petition. Rule 5A:23(d). We believe that this effectively means that the motion for leave must be filed within these 7-day periods (particularly since a motion may be opposed), but the Rules themselves are unclear on this point.

e. No reply briefs are permitted by *amicus curiae* without the Court's permission. Rule 5A:23(d).

12. Tips on Motions Practice in the Court of Appeals.

a. Be succinct and clear. We find that the use of numbered paragraphs—for both the motion and a response—is helpful in that regard.

b. With the exception of a motion to dismiss, motions are not a vehicle to advance your substantive appellate positions. While some reference to the underlying issues may be necessary for context, try to avoid substantive arguments.

c. We have found that the Court of Appeals is more generous on time extensions than page/word extensions. For example, in a recent very complicated appeal, the Court granted only a five-page or 1,230 word extension for the opening and appellee briefs. For time, 14- or 21-day extensions are common—particularly by consent—but "good cause" must always be shown.

d. Do not oppose reasonable time/length extensions. That's just not good practice—and you may unexpectedly need an extension yourself in the appeal.

e. For non-consent motions, be mindful of the 10-day time period for a response. The Court of Appeals will rarely rule on such a motion until (i) the opposing party responds, or (ii) the 10-day period expires. That means, for example, if you are seeking an time extension, but file the motion 8 days before your current deadline, the Court may not rule on the motion until after your current deadline has passed. That is an uncomfortable position to find yourself in, even if the Court is likely to grant you some relief.

f. Similarly, be mindful of the timeliness "grace periods." See above, #7(e). For example, if your opponent failed to file his opening brief by the deadline, and you intend to file a motion to dismiss, you should wait until the 10-day grace period for an extension motion has expired. See Rule 5A:3(c)(2); Rule 5A:19(b)(4); Rule 5A:19(c)(4).

Trial and Error – Avoiding Waiver in Virginia's Appellate Courts

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I. ERROR MUST BE PRESENTED TO THE TRIAL COURT FIRST

A. The Contemporaneous Objection Rule: "No ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review." Rule 5:25; *see also* Rule 5A:18; Code § 8.01-384(A).

1. "The contemporaneous objection rule, embodied in Rule 5A:18 in the Court of Appeals and Rule 5:25 in this Court, is based on the principle that a litigant has the responsibility to afford a court the opportunity to consider and correct a perceived error before such error is brought to the appellate court for review." *Williams v. Gloucester Sheriff's Dep't*, 266 Va. 409, 411 (2003).

2. "Specificity and timeliness undergird the contemporaneous-objection rule." *Flowers v. Commonwealth*, 84 Va. App. 143, 158 (2025) (quoting *Bethea v. Commonwealth*, 297 Va. 730, 743 (2019)).

3. The purpose of the rule is to give the trial court an opportunity to rule intelligently on an issue. *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010).

4. A contemporaneous objection informs the trial judge of the action complained of in order to give the judge the opportunity to consider the issue and to take timely corrective action, if warranted, in order to avoid unnecessary appeals, reversals and mistrials. *Nusbaum v. Berlin*, 273 Va. 385, 402-403 (2007); *Robinson v. Commonwealth*, 13 Va. App. 574, 576 (1992).

5. Additionally, "a specific, contemporaneous objection gives the opposing party the opportunity to meet the objection at that stage of the proceeding." *Weidman v. Babcock*, 241 Va. 40, 44 (1991); *Flowers*, 84 Va. App. at 158.

6. The rule was adopted for the purpose of protecting the trial court from appeals based upon undisclosed grounds and to prevent the setting of traps on appeal. *Fisher v. Commonwealth*, 236 Va. 403, 414 (1988), *cert. denied*, 490 U.S. 1028 (1989); *Norfolk Southern R. Co. v. Lewis*, 149 Va. 318, 323 (1928).

7. "The rule is not intended, however, 'to obstruct petitioners in their efforts to secure writs of error, or appeals, but . . . to put the record in such shape that the case may be heard in th[e] [appellate court] upon the same record upon which it was heard in the trial court." *Scialdone*, 279 Va. at 437 (quoting *Kercher v. Richmond, Fredericksburg & Potomac R.R. Co.*, 150 Va. 108, 115 (1928)).

8. Unless the contemporaneous objection rule has been satisfied or an exception applies, appellate courts will not consider objections raised for the first time on appeal. *Wackwitz v. Roy*, 244 Va. 60, 63 (1992); *Hogle v. Commonwealth*, 75 Va. App. 743, 755 (2022) ("If a party fails to timely and specifically object, he waives his argument on appeal.").

B. <u>The Scope of the Contemporaneous Objection Rule</u>

1. The contemporaneous objection rule is not limited to evidentiary rulings or other rulings relating to incidents of the trial. *Lee v. Lee*, 12 Va. App. 512, 515 (1991). It also applies to issues, arguments, theories of recovery, legal findings, and legal conclusions, which must be raised in the trial court. *Id.*; *Riner v. Commonwealth*, 268 Va. 296, 325 (2005); *Berner v. Mills*, 38 Va. App. 11, 18 (2002), *aff'd*, 265 Va. 408 (2003); *Green v. Warwick Plumbing & Heating Corp.*, 5 Va. App. 409, 413 (1988); *Kendrick v. Nationwide Homes, Inc.*, 4 Va. App. 189, 192 (1987).

2. The contemporaneous objection rule applies in workers' compensation cases. Rule 5A:18; *see, e.g., Williams*, 266 Va. at 410 (affirming the Court of Appeals' refusal to consider an argument that was "neither raised nor previously addressed in the proceedings" before the commission).

3. The contemporaneous objection rule applies to administrative proceedings before the Virginia Department of Health Professions. *See, e.g., Doe v. Va. Bd. of Dentistry*, 50 Va. App. 626, 636-37 (2007).

4. The contemporaneous objection rule applies to arguments raising constitutional errors. *See, e.g., Riner*, 268 Va. at 325, n. 11 (refusing to consider on appeal an argument that the admission of hearsay violated the Confrontation Clause of the United States Constitution because only state law hearsay objections were made at trial); *Clark v. Commonwealth*, 78 Va.

App. 726, 767 (2023) ("Rule 5A:18 applies to bar even constitutional claims.") (quotation omitted).

5. But the rule does not apply to arguments or objections to a court's subject matter jurisdiction, which cannot be waived and may be challenged at any time – even for the first time on appeal. *Po River Water & Sewer Co. v. Indian Acres Club*, 255 Va. 108, 112 (1998); *Wackwitz*, 244 Va. at 63. Note, however, that other jurisdictional challenges – those that do not affect the trial court's subject matter jurisdiction – must be timely raised in the trial court. *See, e.g., Porter v. Commonwealth*, 276 Va. 203, 228-229 (2008) ("Jurisdiction is a term which can engender much confusion because it encompasses a variety of separate and distinct legal concepts.").

6. The rule also does not preclude subsequent reliance on new case law where the law has changed between trial and appeal, provided the objection was stated at trial. *Compare Darnell v. Commonwealth*, 12 Va. App. 948, 952 (1991) (where defendant objected at trial on double jeopardy grounds, the appellate court would consider a double jeopardy argument based upon a new United States Supreme Court case that was issued after the trial because case law has retroactive effect), *with Gheorghiu v. Commonwealth*, 280 Va. 678, 688-89 (2010) (where defendant failed to challenge venue in the trial court, the Court would not consider defendant's venue challenge on appeal, even though a new venue case was decided after his trial).

7. Moreover, when a party has timely objected, exceptions are not required after a trial court rules. Code § 8.01-384.

8. Finally, "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him . . . on appeal." Code § 8.01-384(A); *Jacks v. Commonwealth*, 74 Va. App. 783, 792-93 (2022) (addressing the merits of an appeal because the appellant "had no opportunity to object" when the circuit court acted "*sua sponte*, without a hearing, and outside the presence of . . . counsel").

C. The Ends of Justice Exception

1. The contemporaneous objection rule has a very narrow exception that permits appellate courts to review error raised for the first time on appeal "for good cause shown or to enable this Court to attain the ends of justice." Rule 5:25; Rule 5A:18.

2. "Application of the ends of justice exception is appropriate when the judgment of the trial court was error and application of the exception is necessary to avoid a grave injustice or the denial of essential rights." *Charles v. Commonwealth*, 270 Va. 14, 17 (2005) (applying the "ends of justice" exception because the trial court's error resulted in an excessive and void sentence that would deprive the defendant of his liberty).

3. The Court of Appeals applies the "grave injustice" standard articulated by the Supreme Court of Virginia. *See Lacey v. Commonwealth*, 54 Va. App. 32, 46 (2009) (recognizing the "grave injustice" standard for considering requests to apply the "ends of justice" exception). It has also stated the circumstances under which it will apply the exception: "The ends of justice exception allows this Court to avoid upholding a 'miscarriage of justice.' Yet the defendant must affirmatively demonstrate the existence of such a miscarriage, 'not that a miscarriage *might* have occurred.' A trial court's error standing alone, even when of constitutional significance, does not suffice." *Compare id.* (finding no miscarriage of justice with a jury verdict form which correctly recited the offense for which defendant was charged, there was no harm to defendant, and evidence of guilt was overwhelming) (internal and external citations omitted), *with Bell v. Commonwealth*, 81 Va. App. 616, 627-31 (2024) (applying the ends of justice on appeal from a summary contempt proceeding, which, itself, constituted "a miscarriage of justice").

4. Where evidence of guilt is overwhelming, the appellate court may decline to invoke the "ends of justice" exception. *See, e.g., Lacey*, 54 Va. App. at 46-47 (citing *Bazemore v. Commonwealth*, 42 Va. App. 203, 222 (2004)).

5. In practice, this exception is applied only in "rare instances." *See e.g., Ali v. Commonwealth*, 280 Va. 665, 671 (2010) (applying the "ends of justice" exception when an element of the crime of which the defendant was convicted did not occur); *Campbell v. Commonwealth*, 14 Va. App. 988, 994 (1992) (applying the "ends of justice" exception where an instruction allowed a jury to convict a defendant without proof of an essential and necessary element of the charged offense); *Jimenez v. Commonwealth*, 241 Va. 244, 250 (1991) (applying the "ends of justice" exception because the jury was not instructed as to a material element of the offense charged); *Ball v. Commonwealth*, 221 Va. 754, 758-759 (1981) (applying the "ends of justice" exception when the defendant had been "convicted of a crime of which under the evidence he could not properly be found guilty").

6. In short: "The ends of justice exception is narrow and is to be used sparingly, and it applies only in the extraordinary situation where a miscarriage of justice has occurred." *Pulley v. Commonwealth*, 74 Va. App. 104, 126 (2021) (cleaned up; quotations omitted).

7. Practice Tip: If an issue has not been timely raised in the trial court, argue to the appellate court why the "ends of justice" exception applies – and raise those arguments in the opening brief. *See, e.g., Foster v. Commonwealth*, 2023 Va. App. LEXIS 706, at *4 (2023) (explaining appellants must raise "ends of justice" exception in an opening brief, and collecting cases). The Court of Appeals does not invoke the "ends of justice" exception *sua sponte*, and it will not consider an "ends of justice" argument raised for the first time in a reply brief. *Id.*; *see also Davis v. Goforth*, 82 Va. App. 720, 736 n.6 (2024); *Dominion Coal Corp. v. Bowman*, 53 Va. App. 367, 372, n.6

(2009) (declining to consider *sua sponte* the "good cause" or "ends of justice" exceptions to Rule 5A:18). That said, in limited instances, the Supreme Court may consider the "good cause" and "ends of justice" exceptions *sua sponte*. *See, e.g., Toghill v. Commonwealth*, 289 Va. 220, 226 (2015) (where, after defendant's conviction, Fourth Circuit issued opinion holding statute in question unconstitutional, good cause exception applicable even though defendant did not raise the constitutionality issue at trial). *But see Jones v. Commonwealth*, 239 Va. 29, 39 n.5 (2017) (explaining the appellant did not "assert any grounds for invoking the 'good cause' or 'ends of justice' exceptions under Rule 5:25, and we will not sua sponte raise them on his behalf").

D. The Good Cause Exception

1. The contemporaneous objection rule also has a "good cause" exception. Rule 5:25; Rule 5A:18.

2. The good cause exception may apply when the litigant did not have an opportunity to object to the assigned error. *See, e.g., Commonwealth v. Amos*, 287 Va. 301, 307 (2014); *Flanagan v. Commonwealth*, 58 Va. App. 681, 694 (2011); *cf. Jacks*, 74 Va. App. at 792-93 (reaching same conclusion based on Code § 8.01-384, without discussing "good cause" exception).

3. Like the "ends of justice" exception, the good cause exception is rarely applied. *See e.g., Gheorghiu*, 280 Va. at 689 (where defendant delayed in bringing a new case to the attention of the court, there is no good cause to excuse the failure to object).

4. And like the "ends of justice" exception, the "good cause" exception must be raised by an appellant in the opening brief. *See Foster*, 2023 Va. App. LEXIS 706, at *4 (2023) (collecting cases).

E. How to Satisfy the Contemporaneous Objection Rule

1. **Make a timely objection or motion on the record.**

   a. Generally, to satisfy the requirements of the contemporaneous objection rule, an objection must be made contemporaneously with the introduction of the objectionable evidence or at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the asserted error. *Johnson v. Raviotta*, 264 Va. 27, 33 (2002); *Reid v. Baumgardner*, 217 Va. 769, 773-74 (1977).

   b. *Make sure the trial court actually rules on motions you file:* It is not enough to simply file a motion. *See Brandon v. Cox*, 284 Va. 251, 256 (2012) (holding that "merely filing a motion in the clerk's office of a circuit court" is insufficient under Code § 8.01-384(A) and Rule

5:25); *Lee v. Commonwealth*, 2015 Va. App. LEXIS 249, at *12-13 (2015) (same, under Rule 5A:18).

c. *Make the objection on the record:*

i. It is the appellant's duty to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error. When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues related to the assignments of error, any assignment of error affected by the omission will not be considered. *Galumbeck v. Lopez*, 283 Va. 500, 507 (2012) (citing Rule 5:11(a)(1)); *see also Commonwealth Transp. Comm'r v. Target Corp.*, 274 Va. 341, 348 (2007) (a circuit court's judgment is presumptively correct, and the appellant has the burden of presenting a sufficient record to permit a determination whether the court committed an alleged error); *Dixon v. Dixon*, 71 Va. App. 709, 716 (2020) ("The burden is upon the appellant to provide the appellate court with a record which substantiates the claim of error. In the absence of a sufficient record, we will not consider the point.") (cleaned up).

ii. "Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." Code § 8.01-384(A).

iii. The appellate court will not consider objections or excluded evidence without a proper showing of what the objection or evidence was. *Galumbeck*, 283 Va. at 500 (objections made at a sidebar conference that was not part of the record would not be considered on appeal, even though a written proffer was later filed).

d. *Continuing Objections:* In the appropriate circumstances, the trial court can note a party's continued objection with respect to the admission of evidence or other matter. Ask the trial court to note your continuing objection to the specific evidence. But if something happens during the trial that changes the context of the trial court's earlier ruling, you may have to renew your objection to preserve the issue. *See Riverside Hosp. v. Johnson*, 272 Va. 518, 526-527 (2006); *Fisher*, 236 Va. at 413-414 (affirming a capital murder conviction and death sentence, the Court holds that defendant's earlier objection related to the jury having a copy of the transcripts while listening to the tapes, and a continuing objection on that ground did not indicate to the trial court that an objection was also being made to the introduction of the transcripts as evidence), *cert. denied*, 490

U.S. 1028 (1989). Continuing objections require extraordinary vigilance to ensure that no new or different basis for the objection has arisen.

e. *Motions for a Mistrial:* As a general rule, a motion for a mistrial must be made "at the time an objectionable element is injected into the trial of the case." *Hall v. Commonwealth*, 213 Va. 736, 737 (1973) (the motion for mistrial came "too late" because it was not made until after the prosecution had rested, the trial court had overruled the defendant's motion to strike, and the defense had rested); *Porter*, 276 Va. at 256 (motion for a mistrial, on the basis of comments made by the trial court during defendant's closing argument, was not timely when it was raised at the conclusion of the defendant's closing argument); *Lacey*, 54 Va. App. at 44-45 (holding the defendant's motion for a mistrial due to erroneous jury verdict form, which was made after the jury's verdict, was not timely, and refusing to apply the "ends of justice" exception).

f. *Objections to Improper Argument:* Objections to improper argument in opening or closing statements must be made at the time the objectionable statement is made. Counsel should not only object to improper argument at the time, but also give the reasons for the objection and move for a mistrial or a cautionary instruction that the jury to disregard the improper remarks. *Reid*, 217 Va. at 773. The objection comes too late if it is made after the argument is concluded or after the case is submitted to the jury. *Id.* (citing *Russo v. Commonwealth*, 207 Va. 251, 256-257 (1966)); *Pullen v. Nickens*, 226 Va. 342, 346-347 (1983) ("If counsel believes that an argument requires or justifies a mistrial, he has the duty to move promptly before conclusion of the argument so that the trial court may determine what corrective action, if any, should be taken."); *Beavers v. Commonwealth*, 245 Va. 268, 279 (request for a mistrial after the conclusion of the entire opening statement constitutes a waiver), *cert. denied*, 510 U.S. 859 (1993).

g. *Objections to Jury Instructions:*

   a. An instruction given without objection will not be disturbed on appeal, and becomes the law of the case and is binding in future proceedings, whether or not the instruction correctly states the law. *Kondaurov v. Kerdasha*, 271 Va. 646, 658 (2006). An objection to a jury instruction must be made when the instruction is tendered. Bringing the issue to the trial court's attention after the trial is too late.

h. *Objections to Jury Verdict Forms:* An objection to a defective jury verdict form must be made before the jury retires to deliberate. *Banks v. Mario Indus.*, 274 Va. 438, 455 (2006).

i. *Objections to Venue:* An objection to venue based upon pre-trial publicity must be made before the jury is empaneled and sworn. *Riner*, 268 Va. at 310 (where the defendant did not object when the trial court took under advisement his pre-trial motion to change venue because of adverse media coverage, the issue was waived because defendant did not renew the motion prior to the seating of the jury). When a defendant does not object to the trial court's decision to take the change of venue motion under advisement, it is incumbent upon him to renew that motion or remind the court that it was still pending at some point before the jurors selected to hear the case were sworn. *Id.*; *Green v. Commonwealth*, 266 Va. 81, 94 (2003).

j. *Objections to the Seating of a Juror:* An objection to the seating of a juror must be made before the jury is empaneled and sworn. *Green*, 266 Va. at 100-101; *Breard v. Commonwealth*, 248 Va. 68, 80 (1994) (trial court reasonably could have assumed defendant acquiesced in seating a juror when defendant failed to renew motion to strike the juror after the court said it would rehear the motion upon completion of voir dire).

k. *Objections to the Admissibility of Evidence:* "'An objection to the admissibility of evidence must be made when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing party has rested.'" *Banks*, 274 Va. at 455 (quoting *Bitar v. Rahman*, 272 Va. 130, 139 (2006)). Because a motion to strike tests the sufficiency of the evidence, not its admissibility, it should not be used to challenge the admissibility of evidence that has already come into evidence. *Id.*

l. *Motions to Exclude the Evidence:* "There may be circumstances where evidence is admitted conditioned upon further foundational support and the satisfaction of that condition may not be known until the conclusion of the case-in-chief or at the end of presentation of all of the evidence. The proper motion at that time is a motion to exclude the evidence. Assuming that exclusion of the evidence creates deficiencies in the quantum of proof, a motion to strike may then test the sufficiency of the evidence." *Banks*, 274 Va. at 456 n.2. Further, where a defect in an expert witness' testimony may not be apparent until the testimony of that witness is completed, an objection to the admissibility of the evidence should be raised "at that first opportunity" to be timely. *Id.* at 456.

m. *Motions to Strike:* To preserve challenges to the sufficiency of the evidence, the defendant should move to strike the plaintiff's case at

the close of the plaintiff's evidence, and renew the motion at the close of all of the evidence or move to set aside the verdict. *United Leasing Corp. v. The Lehner Family Business Trust*, 279 Va. 510, 517-18 (2010). A defendant cannot rely on a prior made motion to strike because any challenge to the sufficiency of the evidence, which includes evidence presented by the defense, will necessarily raise a new and distinct issue from the issue presented by the denied motion to strike. Further, by introducing evidence in his defense, the defendant demonstrates by his conduct his intent to abandon the argument that the plaintiff failed to meet its burden through the evidence presented in its case-in-chief. *Id.* (an appellate court will not review a challenge to the sufficiency of the evidence when a defendant who has chosen to introduce evidence in his defense, after the trial court has overruled his motion to strike made at the conclusion of the plaintiff's case, does not make either a motion to strike at the close of all the evidence or a motion to set aside the verdict); *see also Rompalo v. Commonwealth*, 72 Va. App. 147, 155-56 (2020) ("Because [the defendant] did not renew her motion to strike after she presented evidence on her own behalf, and she did not file a motion to set aside the verdict, she has not preserved her sufficiency argument for appeal, and we do not consider it.").

2. **State all grounds with reasonable certainty.**

a. The contemporaneous objection rule not only requires an objection to be timely raised, but also requires the objection to be stated with "reasonable certainty." *Oden v. Salch*, 237 Va. 525, 533 (1989) (when the basis of an objection is that an instruction "did not correctly state the law as applicable to the facts of the case," the objection is too general to be of any assistance to the trial court and is a plain violation of the letter and spirit of Rule 5:25).

b. "Specificity and timeliness undergird the contemporaneous-objection rule, animate its highly practical purpose, and allow the rule to resonate with simplicity: Not just any objection will do. It must be both *specific* and *timely* – so that the trial judge would know the particular point being made in time to do something about it." *Bethea*, 297 Va. at 743-44 (cleaned up; quotations omitted).

b. "'It is the duty of a party, as a rule, when he objects to evidence, to state the grounds of his objection, so that the trial judge may understand the precise question or questions he is called upon to decide. The judge is not required to search for objections which counsel have not discovered, or which they are not willing to disclose.'" *Darnell*, 12 Va. App. at 952 (quoting *Jackson v. Chesapeake & Ohio Ry. Co.*, 179 Va. 642, 651 (1942)).

c. "Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." *Edwards v. Commonwealth*, 41 Va. App. 752, 760 (2003) (defendant argued in the trial court about a specific, shared requirement of two different offenses but, in the appellate court, defendant attempted to argue a distinction between the two offenses on a different basis). Appellate courts will not consider an argument that differs from the specific argument presented to the trial court, even if it relates to the same general issue. *See, e.g., Commonwealth Transp. Comm'r*, 274 Va. at 351-352 (refusing to consider a new argument in support of a jury instruction); *Clark v. Commonwealth*, 30 Va. App. 406, 411-412 (1999) (preserving one argument on sufficiency of the evidence does not allow argument on appeal regarding other sufficiency questions); *West Alexandria Prop., Inc. v. First Va. Mort. and Real Estate Inv. Trust*, 221 Va. 134, 138 (1980) (An appellant may not advance new reasons for an argument raised below: "though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court.")

d. "A general argument or an abstract reference to the law is not sufficient to preserve an issue." *Edwards*, 41 Va. App. at 760; *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 526 (2006) (a general objection that fails to put the trial court on fair notice of the complaint does not satisfy Rule 5:25).

e. *Jury Instructions*: A proponent of a jury instruction is not required to argue the specific grounds and relevant facts for the instruction at the time it is proffered in order to preserve the challenge for appeal. Having heard the evidence, the trial court already knows the evidentiary basis for the instruction. When a trial court refuses to give an instruction proffered by a party that is a correct statement of law and which is supported by adequate evidence in the record, this action, *without more*, is sufficient to preserve for appeal the issue of whether the trial court erred in refusing the instruction. *Emergency Physicians of Tidewater, PLC v. Hanger*, 303 Va. 77, 86-88 (2024).

3. Get a ruling on all objections.

a. Simply making the objection may not be enough. *See, e.g., Riner*, 268 Va. at 325; *but see* Code § 8.01-384(A) ("No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court."). To make the issue reviewable on appeal, the trial court must also rule on the objection. *Riner*, 268 Va. at 325.

b. Failure to request a ruling on a pretrial motion waives that error on appeal. *Riner*, 268 Va. at 325 (where the trial court took defendant's pre-trial motion challenging venue under advisement pending the outcome of *voir dire*, and defendant did not object to this ruling until the jury was empaneled, the issue was waived; defendant should have objected to the decision to take the motion under advisement, reminded the trial court of the pending motion, or renewed the motion before the jury was empaneled and sworn); *Lenz v. Commonwealth*, 261 Va. 451, 463 (failure to request a ruling on pretrial motion waived issue on appeal), *cert. denied*, 534 U.S. 1003 (2001).

c. Thus, when a motion or objection is taken under advisement, counsel must bring the issue to the attention of the trial court again and ask for a ruling. *See, e.g., Green*, 266 Va. at 93-95 (where trial court took pre-trial change in venue motion under advisement, issue waived because defendant failed to renew the objection or remind the trial court about the objection before the jury was empaneled and sworn), *cert. denied*, 540 U.S. 1194 (2004).

d. However, when a party makes his objection known to the court prior to or at the time of entry of the final order, the entry of the final order constitutes a rejection of those objections, and satisfies the contemporaneous objection rule. Scialdone, 279 Va. at 440.

II. OTHER WAYS TO PRESERVE ERROR IN THE RECORD

A. Proffer of Excluded Evidence: When the trial court excludes evidence or testimony, it is necessary to make a proffer of the evidence excluded in order to give the appellate court a proper record upon which to consider whether the trial court made the correct evidentiary ruling.

1. A proponent must make known to the court the substance of the excluded evidence, and this is done by way of a proffer. Rule 2:103(a)(2).

2. A proffer has two main purposes: (1) it allows the trial court a fair opportunity to resolve the issue at trial, and (2) it provides a sufficient record for appeal. *See, e.g., Whittaker v. Commonwealth*, 217 Va. 966, 968 (1977); *Creamer v. Commonwealth*, 64 Va. App. 185, 195 (2015).

3. A good proffer places into the record the "specifics" of the excluded evidence so the appellate court may determine what the excluded evidence was and what it would have established. *Smith v. Hylton*, 14 Va. App. 354, 358 (1992). Thus, a good proffer must contain all of the information necessary to allow the trial court to resolve the issue and to permit appellate review. *Creamer*, 64 Va. App. at 195. At a minimum, a proffer must contain a summary of the witness' expected testimony that is sufficient to establish its relevance. *Id.*

4. The proponent of the evidence also bears the burden of meeting other foundational requirements to the satisfaction of the trial judge, and of opposing any objections raised regarding the admissibility of the evidence. *Creamer*, 64 Va. App. at 195.

5. When a trial court refuses to admit evidence, the party must proffer or avouch the evidence for the record. If he fails to do so, the appellate court has no basis to decide whether the party was prejudiced by the error. *Daniel Constr. Co. v. Tolley*, 24 Va. App. 70, 79 (1997).

6. Where a trial court refuses to allow a proffer, it prevents a determination of the propriety of the trial court's ruling by the reviewing court and is prejudicial to the party making the proffer and generally is reversible error. *Smith*, 14 Va. App. at 358.

7. A good proffer can be made several ways, including:

    a. an unchallenged unilateral avowal of counsel (or a mutual stipulation) that gives a complete summary of the evidence on the record, *see Galumbeck*, 283 Va. at 508; *Wright v. Commonwealth*, 52 Va. App. 690, 697 (2008);

    b. questioning the witness on the stand outside the presence of the jury, *Galumbeck*, 283 Va. at 500 (absent an unchallenged avowal of counsel or stipulation, the court will not consider an error assigned to the rejection of testimony unless such testimony has been given in the absence of the jury and made a part of the record as the rules prescribe); or

    c. asking the trial court to mark "refused" or "denied" an exhibit, document or jury instruction you have unsuccessfully offered, *see* Rule 5:10(a) and Rule 5A:7(a).

8. Timing of the proffer

    a. The time for making a proffer and the range of content required depend, in part, on the proffer's purpose. *Creamer*, 64 Va. App. at 195.

    b. As a general rule, the proffer must be made before the trial court rules on the issue. *Commonwealth v. Shifflett*, 257 Va. 34, 44 (1999); *Creamer*, 64 Va. App. at 195.

    c. Thus, where a defendant, post-trial, proffers a different, more detailed, or additional basis for concluding that evidence offered during trial was relevant and should have been admitted and the trial court rejects that proffer, the appellate court may not consider the contents of the untimely proffer in reviewing the correctness of the trial court's ruling excluding evidence. *Shifflett*, 257 Va. at 44 (post-trial proffers on admissibility that

differed from the contemporaneous proffers during trial were untimely); *Creamer*, 64 Va. App. at 195 (appellate court may consider only the representations about the evidence that the trial court considered, *i.e.*, those made contemporaneously with the admissibility issue).

d. A proffer may be made for the sole purpose of providing a complete record for appeal (and not to assist the trial judge in ruling on the admissibility of evidence), even after the verdict. *Creamer*, 64 Va. App. at 195.

9. Refusal of a proffer: If you have a trial judge who refuses to hear your proffer, put it on the record anyway – state it to the court reporter while opposing counsel is present, even if the trial judge has left the room.

B. Motions

1. *Motions in Limine:* Anticipate the important evidentiary issues early, and bring them on for a hearing in advance of trial. Remember to have a court reporter present for the hearing, and memorialize the trial court's ruling in an order (or, at a minimum, make sure the ruling is on the record). Also, if a motion *in limine* is taken under advisement, renew the motion at the appropriate time at trial. *Galumbeck*, 283 Va. at 500 (where party failed to request a ruling from the trial court on a motion in limine, the issue has been waived). Further, effective July 1, 2024, litigants are now protected from waiver where the trial court makes a pre-trial ruling that the court states is without prejudice to moving for reconsideration based on developments at trial; under Code § 8.01-384, the failure to move for reconsideration will not be deemed a waiver.

2. *Motions to Strike*

a. "[An] objection to the sufficiency of the evidence is properly made by a motion to strike, rather than when the evidence is first offered. Obviously, the objecting party cannot be sure, nor can the court decide, until the offering party has rested, whether the various fragments of evidence have added up to a justiciable whole." *Kondaurov*, 271 Va. at 655.

b. To preserve challenges to the sufficiency of the evidence, the defendant should move to strike the plaintiff's case at the close of the plaintiff's evidence, and renew the motion at the close of all of the evidence or move to set aside the verdict. *United Leasing Corp.*, 279 Va. at 510.

c. A plaintiff may move to strike a defense or the defendant's evidence.

d. State all grounds for the motion to strike with specificity because general statements will not be considered. *United Leasing Corp.*, 279 Va. at 517-19 (where a specific argument was stated in a motion to

strike after the close of the plaintiff's evidence, but was not raised when the motion to strike was renewed at the close of all the evidence, that specific argument was waived); *Floyd v. Commonwealth*, 219 Va. 575, 584 (1978) ("A general objection to the sufficiency of the evidence should state with some specificity the grounds of the objection.")

3. *Post-trial Motions*

   a. A motion to reconsider can preserve issues or objections that arise by virtue of the actual verdict or ruling, or those objections which are raised for the first time. In fact, such a motion may be required to address new concerns about the court or commission's ruling. *See, e.g., Williams*, 266 Va. at 410 (Although the rules of the Workers' Compensation Commission "do not contain specific procedures for a motion for rehearing or motion to reconsider, such motions are not uncommon," and they are the established method to preserve an issue for appeal.)

   b. A party may challenge the sufficiency of the evidence by moving to set aside the verdict. However, a sufficiency motion after the verdict comes too late to resurrect matters that should have been raised at trial.

   c. *Practice Tip:* Remember that the trial court loses jurisdiction of the case, and therefore the ability to rule on your post-trial motion, 21 days after the entry of the final order or decree. Rule 1:1. Therefore, if the final order has been entered when you file your post-trial motion, you must bring it on for a hearing and get a ruling within the 21 day period.

   d. *Caution:* Again, it may not be enough to merely complain to the court. If you present objections for the first time after the trial or ruling, you should get a ruling from the court to preserve the error for appellate review. *See Nusbaum*, 273 Va. at 402-403 (refusing to consider error that the party raised when that party told the trial judge he was not asking the judge to change his mind).

4. *Objections to the Final Order*

   a. An objection to a final order or decree that simply states "seen and objected to" will not preserve error unless it has been timely objected to on the record (with the requisite specificity) and a ruling has been made. *See, e.g., Lee*, 12 Va. App. at 516-17 (objecting generally to an order will not suffice to preserve for review errors not raised in the record).

   b. "No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such

order on appeal except by express written agreement in his endorsement of the order." Code § 8.01-384(A).

c. Once a litigant informs the circuit court of his or her legal argument, there can be no waiver under Code § 8.01-384(A) unless the record "affirmatively show[s] that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection." *Helms v. Manpile*, 277 Va. 1, 6-7 (2009) (where defendants argued in written closing argument that they owned a parcel of land by adverse possession, their endorsement of the final order as "seen" did not waive their closing argument and preserved for appeal the adverse possession claim); *Scialdone*, 279 Va. at 440 ("Where a party makes his objections known to the court prior to or at the time of entry of a final order or decree and does not specifically disclaim the desire to have the court rule on those objections, entry of a final order or decree adverse to those objections constitutes a rejection of them and preserves them [under the contemporaneous objection rule] for appeal.").

d. Where a party makes his objections known to the court prior to or at the time of entry of a final order or decree and does not specifically disclaim the desire to have the court rule on those objections, entry of a final order or decree adverse to those objections constitutes a rejection of them and preserves them under Rule 5:25 for purposes of appeal. *Scialdone*, 279 Va. at 440.

e. But to be safe . . . if you note objections in the final order or attach those objections, ask the trial court to consider them and note in the final order that they have been considered and overruled.

C. Argument

Counsel may make clear the ground for his objection in closing argument. *Lee*, 12 Va. App. at 515.

III. A FEW WAYS TO AVOID THE WAIVER OF ERROR

A. *Do not offer the same objectionable evidence.* In Virginia, if a party objects to the introduction of evidence that is admitted, and afterwards introduces the same evidence himself, it is not a ground for reversing the judgment, although the evidence itself was incompetent. *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 101 (2005) (waiver rule applied to evidence plaintiff introduced in her case-in-chief; the trial court had overruled the plaintiff's pre-trial motion to exclude that evidence). However, this rule does not apply when the objecting party elicits evidence of the same character either during cross-examination of a witness or in rebuttal testimony. *Id.* at 102; *Brooks v. Bankson*, 248 Va. 197, 207 (1994) (sellers did not waive objection to trial court's admission of evidence concerning the buyers' "walk through" inspection of a house prior to closing when, in rebuttal, sellers introduced

similar evidence about the house's condition). Further, this rule is limited by the requirement that the subject matter of the evidence at issue be the same as the subject matter of the evidence to which an objection was made, and does not apply to the consideration of inadmissible evidence on a different subject. *Drinkard-Nuckols*, 269 Va. at 102-10; *Pettus v. Gottfried*, 269 Va. 69, 79 (2005).

B. *Do not approbate and reprobate or take inconsistent positions.*

1. "'No litigant will be permitted to approbate and reprobate – to invite error . . . and then to take advantage of the situation created by his own wrong.'" *Garlock Sealing Techs., LLC v. Little*, 270 Va. 381, 387-388 (2005) ("We will not permit Garlock Sealing to obtain an apportionment of liability among itself and 10 entities that were not parties to this litigation and then complain about the method of apportionment."); *Hansen v. Stanley Martin Cos.*, 266 Va. 345, 358 (2003) ("Having invited the trial court to use a 'discovery rule' for determining the accrual date of the Maryland Consumer Protection Act claim, Stanley Martin cannot now argue for the application of a different rule [the date of injury] on appeal.")

2. Litigants may not take inconsistent positions at different stages of litigation. *Commonwealth Transp. Comm'r*, 274 Va. at 351-352 (In an eminent domain case, "[t]he Transportation Commissioner will not be permitted to argue in this Court that Target may not recover any damages for loss of visibility when, in the circuit court, the Transportation Commissioner asserted that Target is entitled to recover damages if it does not have 'reasonable visibility' of its property.").

3. The approbate-reprobate doctrine is very much alive and well in Virginia. *See generally Commonwealth v. Holman*, 303 Va. 62, 71 (2024). To put it "colloquially," litigants may not "zig" on appeal after they previously "zagged" below. *Amazon Logistics, Inc. v. Va. Emp't Comm'n*, __ Va. __, 912 S.E.2d 290, 292 (2025).

C. *Be very careful with jury instructions.* Object to the submission of a jury instruction addressing any issue which you think is a matter of law for the trial court to decide. The failure to object to such an instruction waives any future assignment of error that the issue was a matter of law for the trial court to decide. *Banks*, 274 Va. at 658. Further, object to jury instructions that address related matters or have the same burden of proof on a related matter. For example, in a defamation case, if you object to the instruction on malice, you should also object to the punitive damages instruction. The Supreme Court has relied on the failure to object to other instructions as a waiver of an objection to a separate instruction. *See, e.g., Raytheon Tech. Servs. Co. v. Hyland*, 273 Va. 292, 300-301 (2007).

D. *Get a ruling on pre-trial motions.* When it comes to filing motions in limine, filing the motion is not sufficient to preserve the argument for appeal. You must also get a ruling on the motion. Therefore, when the trial court takes a motion in limine under advisement, you must renew the objection at trial and get a ruling on the

objection. *See, e.g., Galumbeck*, 283 Va. at 500; *Brandon*, 284 Va. at 256 ("[M]erely filing a motion in the clerk's office of a circuit court" is insufficient under Code § 8.01-384(A) and Rule 5:25); *Lee*, 2015 Va. App. LEXIS 249 at *12-13 (same, under Rule 5A:18).

IV. RELATED TOOLS FOR APPELLEES

A. *Right Result, Wrong Reason:*

1. Appellate courts do not review lower courts' opinions, but their judgments. *Evans v. Commonwealth*, 290 Va. 277, 288 n.12 (2015).

2. Where the lower court's decision is correct, but its reasoning is incorrect, and the record supports the correct reason, the appellate court will uphold the judgment pursuant to the right result for the wrong reason doctrine. *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 542 (2016); *Haynes v. Haggerty*, 291 Va. 301, 305 (2016).

3. An appellate court may uphold a judgment even when the correct reasoning is not mentioned by a party in trial argument or by the trial court in its decision, so long as the record contains sufficient information to support the proper reason. *Miller & Rhoads Bldg.*, 292 Va. at 542.

B. *"Bad Brief" Waiver:*

1. Rule 5:27(d) of the Rules of the Supreme Court of Virginia provides that an appellant's opening brief must contain "[t]he standard of review, the argument, and the authorities relating to each assignment of error." The corresponding Rule in the Court of Appeals is Rule 5A:20(e).

2. If an appellant fails to develop adequate argument in support of an assignment of error, the appellant waives that argument. *Atkins v. Commonwealth,* 272 Va. 144, 149 (2006).

3. Likewise, if a brief assigns error on one ground, but then fails to specifically argue those grounds in the body of the brief, the appellate courts consider the issue waived due to an inadequately developed argument. *Amazon Logistics*, 912 S.E.2d at 294; *AlBritton v. Commonwealth*, 299 Va. 392, 412 (2021).

4. Typically, bad-brief waiver applies to situations in which an appellant makes a cursory argument in support of an assignment of error and fails to provide sufficient legal reasoning, factual analysis, or citations to authority. But, the doctrine may also apply when the argument on brief, even if carefully crafted and legally persuasive, has little, if anything, to do with the assignment of error. *Amazon Logistics*, 912 S.E.2d at 294.

C. *Failure to Include a Necessary Part of the Record:*

1. The appellant bears the burden to provide the appellate court with a record which substantiates the claim of error. *Dixon*, 71 Va. App. at 716.

2. The record must allow the appellate court to "fully review" the grounds for the lower court's decision. *Dixon*, 71 Va. App. at 716.

3. "When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by such omission will not be considered." Rule 5A:8(b)(4)(ii); *see also* Rule 5:11(a)(1).

4. "In the absence of a sufficient record," the appellate court "will not consider the point." *Robinson v. Robinson*, 50 Va. App. 189, 197 (2007).

D. *Failure to Adequately Assign Error:*

1. "An assignment of error is not a mere procedural hurdle an appellant must clear in order to proceed with the merits of an appeal. Assignments of error are the core of the appeal." *Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.*, 293 Va. 113, 122 (2017).

2. Appellate courts are "limited to reviewing the assignments of error presented by the litigant." *Banks v. Commonwealth*, 67 Va. App. 273, 289 (2017). As a result, they will not consider issues touched upon by the appellant's argument but not encompassed by an assignment of error. *Id.* at 290. An issue that is not part of the appellant's assignment of error is considered waived. *See Simmons v. Commonwealth,* 63 Va. App. 69, 75 n.4 (2014); *Winston v. Commonwealth*, 51 Va. App. 74, 82 (2007).