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8:30 a.m.	**The Augmented Attorney: Using AI to Practice Law Smarter [ETHICS]** John Danyluk, Paul Hawkins, and Callie Loveland
9:30 a.m.	**Your Appeal Starts at Trial: Overturning the Largest Verdict in Virginia History** Michael Finney and Noah Sullivan
10:00 a.m.	**Legislative Update: Money, Guns, Power, and Drugs** Greg Habeeb, Patrice Lewis, Zach LeMaster, and Abigail Thompson
10:30 a.m.	**Break**
10:45 a.m.	**Your Exit Playbook: The Smart Way to Sell Your Business** Bill Gust, Mike Moro, and Joshua Justus
11:15 a.m.	**Transactional Hot Topics** Clark Worthy and Ben Law
11:45 a.m.	**Where Is That Lawyer From, Anyway?** Trey Smith and Charlie Morrison
12:15 p.m.	**Lunch**
1:00 p.m.	**Dealing with Difficult Lawyers Without Becoming One [ETHICS]** Brett Marston and Alicha Grubb
1:30 p.m.	**Hard Knocks: When the Feds Come Calling** Mike Gulland and Jessiah Hulle
2:00 p.m.	**Nice Clause You've Got There… Shame If It Were Unenforceable: What You Should Know About Construction Indemnification** Andrew Gay, Teddy Paisley, and Carter Leverette
2:30 p.m.	**The Lay of the Land: Effective Communication in Land Use and Real Estate Matters** Karen Cohen and Connor O'Donnell
3:00 p.m.	**Break**
3:15 p.m.	**Freedom or Frustration? Navigating the Freedom of Information Act When Bureaucracy Strikes** Ryan Starks, Jared Tuck, and Kiara Anguiano
3:45 p.m.	**Working With In-House Counsel: Same Law Degree, Different Planet** Carlos Hopkins and Tammy Finley
4:15 p.m.	**Using Actual Intelligence to Solve Ethics Issues [ETHICS]** Travis Graham
4:45 p.m.	**Reception**



The Augmented Attorney: Using AI to Practice Law Smarter [ETHICS]

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The Augmented Attorney: Using AI to Practice Law Smarter.

John Danyluk
Paul Hawkins
Callie Loveland
Gentry Locke Seminar 2026

I. Program Overview, Learning Objectives, and Agenda

a. **Program overview.** This program addresses how lawyers can use artificial-intelligence tools responsibly while satisfying professional duties of competence, confidentiality, communication, supervision, candor to courts, and reasonable billing. The materials focus on practical risk management for Virginia lawyers, including court-filing obligations, client communications, contract drafting, law firm governance, and emerging Virginia-specific authority.

b. **Learning objectives.** By the end of this program, participants should be able to:

   i. Identify common legal-practice uses of AI and distinguish lower-risk administrative uses from higher-risk legal, litigation, and client-data uses.

   ii. Apply the Virginia Rules of Professional Conduct to AI-assisted work, including duties of competence, confidentiality, communication, supervision, candor, and reasonable fees.

   iii. Recognize when AI use may require client disclosure, client consent, court disclosure, certification, or additional verification.

   iv. Develop practical safeguards for AI-assisted drafting, legal research, contract review, litigation filings, and law firm governance.

c. **Introduction and AI terminology.**

   i. Core ethics duties: competence, confidentiality, communication, supervision, and professional judgment.

   ii. Litigation risks, court disclosure requirements, hallucinated authorities, and verification protocols.

   iii. Transactional uses, client-generated AI documents, billing, and value-based fees.

   iv. Law firm governance, hypotheticals, and practical takeaways.

II. Substantive Outline: Why AI Ethics Matters Now

a. **Generative artificial intelligence is no longer a theoretical issue for lawyers.** Lawyers and legal staff are already using AI-enabled tools to summarize documents, draft correspondence, generate first drafts of agreements, compare contract versions, prepare chronologies, analyze discovery, create deposition outlines, improve grammar, develop research plans, and manage administrative tasks.

i. Those uses can improve efficiency and quality when they are supervised and verified.

ii. They can also create serious professional risks when a lawyer treats AI output as self-validating.

b. **The central ethical principle is that AI may assist the lawyer, but it cannot be the lawyer.** The lawyer who signs, sends, files, bills for, or relies upon AI-assisted work remains responsible for the work under the Virginia Rules of Professional Conduct, court rules, contracts with clients, protective orders, and ordinary standards of professional judgment.

c. **Key Themes**

i. Artificial intelligence can assist legal work, but it does not replace the lawyer's professional judgment, responsibility, or duty to verify work product.

ii. The lawyer remains responsible for confidentiality, competence, diligence, communication, supervision, candor, and reasonable billing when using AI-assisted tools.

iii. AI creates especially important issues in contract drafting, contract revision, negotiations, and client-generated AI documents because transactional work often contains confidential facts, business terms, and jurisdiction-specific legal assumptions.

iv. For court filings, the practical rule is simple: check local rules, judge-specific procedures, scheduling orders, and case-specific directives before filing, and independently verify every legal citation, quotation, factual assertion, and record reference.

v. For law firms, responsible AI use requires governance: approved tools, data safeguards, employee training, attorney supervision, citation-checking procedures, and billing guidance.

III. What Lawyers Mean by Artificial Intelligence

a. **"Artificial intelligence" is a broad term.**

i. Traditional legal technology has long included machine-learning or AI-like features, including e-discovery technology-assisted review, legal research ranking, contract analytics, litigation analytics, document classification, optical character recognition, and automated workflows.

ii. Generative AI is different because it produces new content in response to prompts, including text, summaries, emails, clauses, outlines, memoranda, code, and arguments.

b. **Because the phrase "AI" can describe many different tools, a lawyer should avoid treating all AI uses as equivalent.**

i. A closed, enterprise-controlled document-summarization tool used on firm-approved systems presents a different risk profile than a public consumer chatbot.

ii. A legal-specific research product that links output to primary authority presents a different verification problem than a general-purpose model that generates fluent text but cannot reliably identify source material.

c. **From a practical and legal ethics standpoint, the most useful distinction is not "AI versus no AI."** It is whether the proposed use is low risk, moderate risk, or high risk.

i. Low-risk uses typically involve public information or stylistic drafting.

ii. Moderate-risk uses may involve client documents but can be managed with approved tools and attorney review.

iii. High-risk uses involve legal research, litigation filings, confidential data, regulated information, or advice that materially affects a client's legal position.

IV. Competence and Technological Literacy

a. **Rule 1.1 and Functional Understanding of AI Tools**

i. **Virginia Rule of Professional Conduct 1.1 requires competent representation** (VA. RULES OF PRO. CONDUCT r. 1.1 (2026) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")).

a. In the AI context, competence *does not* require lawyers to become software engineers.

b. It *does* require lawyers to understand enough about the tools they use to assess whether:

i. The tool is appropriate for the task,

ii. The input creates confidentiality concerns,

iii. The output can be relied on, and

iv. What verification is necessary before use.

ii. **The practical competence standard.** Before using AI for legal work, the lawyer should be able to explain:

a. What the tool is being used for,

b. What information is being provided to it,

c. What the tool can and cannot reliably do,

d. What safeguards apply, and

e. How the lawyer will verify the output.

b. **Questions a Competent Lawyer Should Ask**

i. Is this a public consumer tool, a firm-approved enterprise tool, or a legal-specific research or drafting platform?

ii. Will the information entered into the tool be retained, reviewed by vendor personnel, used to train a model, or shared outside the firm environment?

iii. Does the tool provide source citations, document links, or other material that allows verification?

iv. Does the tool have access to current law, or is it limited to a trained dataset or user-provided documents?

v. Is the task administrative, editorial, substantive, strategic, or legal-research oriented?

vi. Can the lawyer independently verify the output before relying on it?

c. **Competence requires knowing AI's limitations.** AI tools can produce material that is fluent, confident, and wrong.

i. The familiar problem is the hallucinated case citation, but that is not the only risk.

a. AI may misquote a case or statutory/regulatory provision, omit a material exception, misstate the procedural posture, flatten fact-specific legal standards, confuse jurisdictions, summarize a document inaccurately, or assume business terms that the client never accepted.

b. Competence therefore requires active skepticism and independent review.

V. Confidentiality and Data Protection

a. **Why confidentiality is often the most important AI issue.** Lawyers often focus on hallucinated citations because those mistakes are public and embarrassing.

i. In everyday practice, confidentiality may present the more common risk. AI tools may involve cloud processing, vendor access, retention of prompts, training on user inputs, or unclear contractual obligations.

ii. Before entering matter information into any AI system, a lawyer should consider whether the use is consistent with **Virginia Rule of Professional Conduct 1.6** (VA. RULES OF PRO. CONDUCT r. 1.6(a) (2026) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation.")), the engagement letter, outside counsel guidelines, protective orders, privacy law, and the firm's technology policies.

b. **Recent court guidance illustrates why confidentiality should be assessed before AI is used.** In June 2026, the United States District Court for the Northern District of West Virginia issued a standing order limiting the use of artificial intelligence tools in criminal cases involving sensitive discovery materials.

i. The order reflects concern that consumer-facing or data-retentive AI systems may compromise litigation materials if submitted information is retained, used for model training, or exposed to unauthorized third parties.

ii. It prohibits defense teams from uploading designated sensitive discovery materials into AI systems without prior government consent and requires assurances that any approved tool will maintain confidentiality, avoid model-training use, and permit deletion of the information at the end of the case.

iii. Although the order arose in the criminal-discovery context, its broader lesson applies across practice areas: lawyers must understand how an AI tool stores, processes, retains, and discloses information before entering confidential client or litigation materials.

c. **High-Risk Inputs**

i. Medical records and protected health information.

ii. Personnel files and employment investigations.

iii. Client financial records and trade secrets.

iv. Litigation strategy, settlement ranges, and witness assessments.

v. Attorney-client communications and attorney work product.

vi. Discovery materials subject to protective orders.

vii. Personally identifiable information and nonpublic corporate information.

d. **Safer Practices**

i. Use only approved tools for client work and confirm if AI tools within your firm's information technology (IT) suite can be utilized in such a way where client and other sensitive information will not be shared outside of the system.

ii. Minimize the amount of client information entered into the tool.

iii. Redact or anonymize inputs when workable.

iv. Avoid entering privileged or protected information unless the platform and matter-specific circumstances justify the use.

v. Keep a record when confidential information is entered into an AI platform if firm policy requires documentation.

vi. Confirm whether client outside counsel guidelines restrict AI use.

VI. Communication with Clients

a. **There is no single universal rule that every use of AI must be disclosed to every client in every matter.**

b. **The need for disclosure or consent depends on:**

i. The nature of the use,

ii. The sensitivity of the information,

iii. The client's instructions,

iv. The platform used,

v. Whether AI use affects the means by which the representation is carried out,

vi. Whether expenses will be charged to the client, and

vii. Whether applicable court or agency rules require disclosure.

c. **Situations Where Disclosure or Consent Should Be Considered:**

i. Confidential client information will be entered into a third-party or public AI tool.

ii. The client has outside counsel guidelines addressing AI.

iii. AI will materially assist legal research, drafting, document review, transactional analysis, or strategy.

iv. AI will process sensitive employment, medical, financial, or regulated data.

v. The client asks whether AI will be used.

vi. The lawyer intends to pass through an AI-related expense.

vii. The tool is novel, experimental, or not designed for legal use.

d. **Sample Engagement-Letter Concept.** The following language is provided as a drafting concept only and should be tailored to the firm, client, platform, and matter:

The firm may use approved technology tools, including artificial-intelligence-enabled tools, to assist with legal research, document review, drafting, summarization, administrative tasks, and other work on the matter. The firm remains responsible for its legal work and will use those tools consistent with its professional obligations, including duties of confidentiality, competence, supervision, and independent professional judgment. The firm will not use AI tools in a manner inconsistent with client instructions, applicable court orders, or confidentiality obligations.

VII. Supervision and Law Firm Governance

a. **AI use is rarely an individual-lawyer issue.**

i. Associates, summer associates, paralegals, legal assistants, marketing staff, accounting personnel, contract lawyers, vendors, and outside service providers may all use AI-enabled tools.

ii. **Virginia Rules of Professional Conduct 5.1 and 5.3** make governance essential because a firm must have reasonable measures in place to assure that lawyers and nonlawyers conform to professional obligations (VA. RULES OF PRO. CONDUCT r. 5.1(a) (2026) ("A partner in a law firm . . . shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."); VA. RULES OF PRO. CONDUCT r. 5.3(a) (2026) ("With respect to a nonlawyer employed or retained by or associated with a lawyer: a partner . . . in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.")).

b. **Components of a Responsible Law Firm AI Policy**

Policy Component	Practical Content
Scope	Define AI, generative AI, approved tools, prohibited tools, confidential information, client information, and matter-related use.
Approved Tools	Maintain a list of tools approved for client work and identify uses requiring attorney approval.

Confidentiality	Require minimization, redaction, anonymization, vendor review, and compliance with client instructions.
Verification	Require verification of citations, quotations, factual statements, summaries, contract provisions, and legal conclusions.
Supervision	Address use by attorneys, staff, vendors, outsourced providers, and local counsel.
Billing	Address hourly billing, flat fees, value billing, pass-through expenses, and explanation to clients.
Training	Provide periodic training and examples of approved and prohibited uses.
Enforcement	State consequences for bypassing firm policy or using unapproved tools for client work.

VIII. Candor to Courts, Meritorious Claims, and AI Hallucinations

a. **The lawyer who signs or files a document remains responsible for its contents.**

   i. AI-generated legal arguments, citations, quotations, factual assertions, and record references must be checked against reliable sources before they are filed or sent externally.

   ii. Courts generally have not treated the mere use of AI as the problem; they have treated failure to verify AI-assisted work as the problem.

b. ***Mata v. Avianca, Inc.*** (*Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023)) remains the leading early sanctions example. It is useful for teaching because the court did not hold that AI use is inherently improper. The central failure was that counsel submitted nonexistent judicial opinions with fake quotes and citations, then continued to rely on them after the court questioned the authorities.

   i. The lawyer used AI for legal research without understanding its limitations.

   ii. The lawyer failed to verify cases before filing.

   iii. Another lawyer signed/filed the work without reviewing the cited authorities.

   iv. Counsel continued to rely on fabricated authorities after opposing counsel and the court raised concerns.

   v. The court emphasized harm to the opposing party, the court, the client, the reputation of judges, and public confidence in the legal system.

c. ***Park v. Kim*** **and** ***Wadsworth v. Walmart Inc.*** (*Park v. Kim*, 91 F.4th 610 (2d Cir. 2024); *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489 (D. Wyo. 2025)) provide additional examples of federal courts treating AI-generated citation problems as professional responsibility and verification failures. These cases are helpful because they show that sanctions and disciplinary consequences can arise even when the lawyer did not intend to mislead the court.

   i. In *Park v. Kim*, the Second Circuit addressed a lawyer's citation to a nonexistent case generated using ChatGPT.

1. The court stated that counsel admitted using ChatGPT to identify precedent and did not read or otherwise confirm the validity of the nonexistent decision cited.

2. This case is useful because it shows that appellate courts view AI hallucinations as a professional responsibility issue, not merely a technical research mistake.

3. It also underscores that client notification may become part of the remedy when a lawyer's AI-related conduct affects the representation.

ii. In *Wadsworth v. Walmart Inc.*, the District of Wyoming entered an order on sanctions after attorneys submitted filings containing AI-related hallucinated authority.

1. The court explained that AI can be beneficial when used properly, but emphasized that current AI tools have shortcomings, including hallucinations, where AI generates fake sources of information.

2. The court's discussion is helpful for CLE purposes because it does not reject AI categorically. Instead, it frames the problem as one of verification and lawyer responsibility.

3. The case is a useful teaching example because courts may permit AI-assisted practice while still sanctioning lawyers who fail to check output before filing.

d. **Fourth Circuit: *In re Eric Chibueze Nwaubani*.** The Fourth Circuit's 2026 unpublished disciplinary decision in *In re Eric Chibueze Nwaubani* (*In re Nwaubani*, No. 25-9517, 2026 LX 135104 (4th Cir. Mar. 11, 2026) (per curiam) (unpublished)) is especially important for lawyers practicing in Virginia federal courts. The court imposed a public admonishment after briefing contained citations to nonexistent judicial opinions potentially derived from generative AI. The court stated that it did not need to decide whether generative AI was actually used because submitting a brief with nonexistent cases can violate professional obligations regardless of how the false citations were produced. Submitting briefs with nonexistent cases is sanctionable "no matter how it is done."

i. The Fourth Circuit's lesson is broader than "do not use AI badly."

ii. It is: a lawyer's signature and filing obligations require verification of authorities regardless of the tool, source, or delegation path that produced the citation.

iii. Virginia Lawyers Weekly reported that the Fourth Circuit admonished Eric Nwaubani and quoted the court's warning: "Whether done in modern, innovative ways or old-fashioned ways, citing nonexistent decisions is not permitted."

e. **Virginia transcript and evidence issue: *Fairfax v. Fairfax*.** A useful Virginia-specific example is *Fairfax v. Fairfax* (*Fairfax v. Fairfax*, No. CL-2025-10602, slip op. (Va. Cir. Ct. Fairfax Cnty. May 22, 2026)), a Fairfax County Circuit Court order addressing a request for an uncertified, AI-generated transcript from a child custody and visitation trial. The order explained that the transcript was machine-generated by natural-language-processing software, had not been checked, proofread, or corrected, was not an official court record, and could not be relied upon without agreement of all parties and further court order.

i. The court reviewed the transcript and found it was "replete with errors, omissions, and other inaccuracies," so it did not accurately reflect the testimony, argument, or rulings from trial. The court therefore denied release of the uncertified transcript.

ii. The practical point is that AI-generated transcripts, summaries, and demonstrative materials should be treated as unverified unless they have been reviewed through an approved process and accepted by the court or agreed to by the parties.

f. **The teaching point for Virginia lawyers is technology-neutral:** whether an error originates from AI, poor delegation, careless research, or inadequate supervision, the lawyer remains responsible for the filing. A reasonable attorney should discover nonexistent authorities before filing.

IX. AI use in Contract Drafting, Revision, and Negotiation

a. **Transactional work deserves more attention in AI ethics discussions.**

i. AI tools are already being used to create first drafts, generate clauses, compare redlines, summarize deal terms, identify missing provisions, suggest negotiation points, and prepare client-facing summaries.

ii. These tasks can be useful, but they also involve confidential facts, business judgment, enforceability issues, and jurisdiction-specific law.

b. **Contract Drafting:** AI can be useful for generating a first draft of routine or lower-risk documents when the lawyer supplies the business terms, selects the governing law, and reviews the output.

i. It may help create structure, flag missing provisions, or produce alternative formulations of standard clauses.

ii. But AI-drafted contract language should not be treated as form language unless the lawyer has reviewed it for the client's objectives, governing law, industry context, defined terms, internal consistency, and enforceability.

c. **Contract Revision and Redlines:** AI tools can assist with redline review by identifying changed provisions, summarizing business terms, flagging missing definitions, comparing versions, and highlighting inconsistent obligations.

i. Those uses can improve diligence, especially when multiple drafts circulate quickly.

ii. The lawyer must still verify that the tool accurately identified changes and that the revised language matches the negotiated business deal.

d. **Negotiation Preparation:** AI can help prepare negotiation strategies by generating issue lists, identifying fallback positions, summarizing opposing edits, incorporating data to advise on what terms are "market" or "typical" in a given transaction, and comparing proposed language against a preferred form.

i. But negotiation advice requires legal judgment and client counseling.

ii. AI may help the lawyer prepare; it should not decide which risk the client should accept.

e. **Common Contract-Specific AI Risks:**

i. Use of law from the wrong jurisdiction or outdated law.

ii. Inconsistent defined terms or cross-references.

iii. Generic clauses that do not reflect the client's business objectives.

iv. Conflicting indemnity, limitation-of-liability, insurance, and termination provisions.

v. Arbitration, venue, governing-law, and confidentiality clauses that do not match client expectations.

vi. Overconfident explanations of enforceability without jurisdiction-specific support.

vii. Loss of privilege or confidentiality if drafts are uploaded to unapproved tools.

f. **Practical Contract Review Checklist**

i. Confirm the governing law and venue provisions.

ii. Check all defined terms and cross-references.

iii. Compare AI-generated clauses against the client's preferred forms.

iv. Verify statutory or regulatory requirements independently.

v. Review for business consistency, not just grammar.

vi. Confirm that negotiation recommendations are lawyer-approved before being sent to the client.

vii. Document what sources were used and what verification was performed for higher-risk matters.

X. Clients Who Bring AI-Generated Documents or Advice to Counsel

a. **Lawyers will increasingly encounter clients who have already used AI before consulting counsel.**

i. A client may arrive with an AI-drafted contract, a handbook, demand letter, severance agreement, employment policy, lease, settlement proposal, or business advice.

ii. The ethical issue is not that the client used AI.

iii. The issue is how the lawyer responds.

b. **Lawyer's Role When Reviewing Client-Generated AI Materials.** The lawyer should treat AI-generated client materials as unverified drafts.

i. The document may be useful as a starting point for understanding the client's goals, but it should not substitute for legal analysis.

ii. Counsel should identify the client's objective, determine whether the document reflects the actual business arrangement, verify governing law, review enforceability, assess missing provisions, and explain the risks of relying on generalized AI output.

c. **Managing Client Expectations:** Clients may believe AI has already answered the legal question.

   i. The lawyer's counselor role is to explain why legal advice depends on jurisdiction, procedural posture, facts, risk tolerance, business context, and legal authority.

   ii. A helpful framing is: "This is a useful starting point for discussion, but I need to verify the legal assumptions and revise it for your specific situation."

d. **Client-Facing Talking Points**

   i. AI-generated documents may omit mandatory state-specific requirements.

   ii. AI may use outdated or inapplicable law.

   iii. AI may produce language that is internally inconsistent or commercially unreasonable.

   iv. AI may not understand the client's factual context, risk tolerance, or strategic preferences.

   v. AI output should be reviewed by counsel before signature, filing, or external use.

   vi. Clients should not upload privileged, confidential, or sensitive information into public AI tools without legal guidance.

XI. Court AI Rules, Disclosure Requirements, and Emerging Guidance

a. **Court AI requirements remain uneven.**

   i. Some courts require disclosure of AI use.

   ii. Some require certifications that citations were verified.

   iii. Some address AI in judge-specific standing orders or scheduling orders.

   iv. Other courts have no AI-specific rule but still enforce Rule 11, state-law certification requirements, professional conduct rules, and ordinary duties of candor.

b. **Virginia Federal Courts:** Current public summaries report that the Eastern District of Virginia has not adopted a district-wide AI standing order.

   i. Instead, EDVA judges have addressed AI through case-specific directives emphasizing accuracy and independent verification of citations.

   ii. The Western District of Virginia likewise has not adopted a district-wide AI standing order or local rule on generative AI, but recent scheduling orders show that AI requirements may now appear at the judge-specific level.

   iii. Counsel should therefore check district-wide materials, assigned judge procedures, and the actual scheduling order before filing.

c. **Western District of Virginia scheduling orders:** At least Judges Norman Moon and Thomas Cullen have recently included AI disclosure language in scheduling orders.

i. Judge Moon appears to have first used the requirement after a pro se party filed a generative-AI-drafted complaint. He later repeated it in a July 1, 2026, scheduling order involving represented parties.

ii. Judge Cullen entered a scheduling order with the same requirement on July 2, 2026, also in a case involving represented parties.

1. The requirement is limited: a party that uses a generative AI tool to prepare any document filed with the court must disclose the use, certify that the filer independently reviewed and verified the accuracy of any AI-drafted portion, and certify compliance with Rule 11.

2. The requirement excludes information gathered through AI embedded in legal research platforms such as Westlaw or LexisNexis and warns that noncompliance may result in sanctions, striking of the filing, or other remedies.

iii. Recent June and July scheduling orders reviewed for Judges Urbanski, Jones, Dillon, Ballou, and Yoon reportedly did not include similar language. The practical point is that WDVA obligations may depend on the assigned judge and the scheduling order.

d. **Recent federal district cases:**

i. ***Iovino v. Michael Stapleton Associates, Ltd.*** (*Iovino v. Michael Stapleton Assocs., Ltd.*, No. 5:21-cv-00064, 2024 LX 204304 (W.D. Va. July 24, 2024)): The plaintiff's attorneys filed objections containing citations and quotations that the court and opposing counsel could not verify.

1. The court identified multiple cases that appeared not to exist and quotations attributed to existing cases that did not actually appear in those opinions.

2. Judge Cullen stressed that attorneys remain responsible for everything filed with the court, regardless of whether AI was used in drafting.

3. The court ordered counsel to show cause why they should not be sanctioned under Rule 11 and referred the issue for possible professional misconduct review.

ii. ***Powhatan County School Board v. Skinger*** (*Powhatan Cnty. Sch. Bd. v. Skinger*, No. 3:24-cv-00874, 2025 LX 374420 (E.D. Va. July 31, 2025)) demonstrates that Virginia federal courts treat AI-generated hallucinated citations as Rule 11 problems attributable to the filing party. The court held that litigants remain responsible for verifying cited authorities, recognized AI hallucinations as a growing litigation problem, and struck multiple pleadings containing fabricated authorities.

iii. **The practice lesson from *Iovino* and *Powhatan County School Board*.** AI may be used as a drafting tool, but lawyers have a **nondelegable** duty to verify that:

1. Cases exist;

2. Citations are accurate;

3. Quotations are accurate; and

4. Legal propositions are supported by authority.

e. **Virginia state trial courts:** Local Virginia trial-court guidance is developing.

i. **Richmond and Amherst Circuit Courts**

1. Public commentary reports that the Circuit Court of the City of Richmond entered a local AI rule on January 13, 2026, requiring disclosure of AI use and certification of compliance with **Virginia Code § 8.01-271.1(B)** (Va. Code Ann. § 8.01-271.1(B) (2026) ("The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.")).

2. The Circuit Court for the County of Amherst reportedly entered a similar local rule on March 3, 2026. These rules should be verified directly before any filing.

ii. **Additional Virginia circuit-court rules**

1. Local AI-disclosure rules have also been identified in Nelson, King William, Staunton, James City County/Williamsburg, and Waynesboro Circuit Courts.

2. The reported rules generally require written disclosure or certification when generative AI is used to draft, create, enhance, or modify filings, pleadings, motions, briefs, memoranda, orders, letters, exhibits, attachments, or similar materials submitted to the court.

iii. **Trial and evidentiary-hearing materials**

1. Some reported local rules require a separate certification before trial or an evidentiary hearing when generative AI was used in proposed exhibits, including demonstrative exhibits.

2. Counsel should check the applicable court's local rules, any judge-specific directives, and the case's scheduling order before relying on AI-assisted materials.

f. **Practical filing protocol:**

i. At case intake, check district-wide local rules and standing orders.

ii. Before filing, check judge-specific procedures, scheduling orders, and case-specific directives, especially in WDVA where AI disclosure language may appear in individual scheduling orders.

iii. Determine whether disclosure, certification, or no-AI certification is required.

iv. Verify every citation in Westlaw, Lexis, Fastcase, Bloomberg Law, official reporters, or other reliable sources.

v. Verify quotations, record citations, factual assertions, and procedural history.

vi. Keep a matter-level verification record for high-risk filings.

vii. If an AI-related error is discovered after filing, escalate immediately to the responsible attorney to evaluate correction, withdrawal, notice, or other remedial action.

g. **Sample Court Certification Concept**

i. Counsel should use the language required by the applicable court or judge. Where a court permits or requests a general certification, the following may work:

Counsel certifies that any artificial-intelligence-assisted content used in preparing this filing has been reviewed by counsel, and that all legal citations, quotations, record references, factual assertions, and legal propositions have been independently verified for accuracy.

XII. Fees, Billing, and Value-Based Pricing

a. **AI raises an important billing question: if AI makes a task faster, what may the lawyer charge?**

i. **Virginia has taken a relatively lawyer-value-focused approach to AI billing:** hourly lawyers cannot bill phantom time, but value-based fees may account for skill, judgment, verification, and the value of the final work product.

1. Virginia Legal Ethics Opinion 1901 states that time-based billing, such as hourly fees, can only be based on actual time spent (*Va. Legal Ethics Op. 1901, Reasonable Fees and the Use of Generative Artificial Intelligence* (2025)).

2. It also explains that non-hourly or value-based fees may reflect efficiency gains, specialized skill in using technology, and the value of the lawyer's services and output, so long as the fee remains reasonable under **Virginia Rule of Professional Conduct 1.5** and is adequately explained to the client (VA. RULES OF PRO. CONDUCT r. 1.5(a) (2026) ("A lawyer's fee shall be reasonable."); VA. RULES OF PRO. CONDUCT r. 1.5(b) (2026) ("The lawyer's fee shall be adequately explained to the client.")).

ii. **Hourly Billing**

1. For hourly matters, the lawyer may bill for actual time spent using, reviewing, revising, verifying, and integrating AI-assisted work.

2. The lawyer should not bill for time not actually spent.

3. The lawyer also should be careful about billing for time spent learning how to use a tool unless the learning is properly chargeable under the engagement and billing rules.

iii. **Flat Fees and Value Billing**

1. For flat-fee or value-based work, the analysis is different.
2. LEO 1901 recognizes that the time saved by AI does not automatically require a proportional fee reduction.
3. The lawyer's skill in framing the problem, prompting the tool, identifying errors, integrating the output, counseling the client, and accepting professional responsibility can constitute real value.
4. But the fee must still be reasonable and sufficiently explained.

b. **Billing Best Practices**

i. Clarify the fee basis in the engagement letter.

ii. For hourly work, bill only actual time spent.

iii. For flat fees, confirm reasonableness under Rule 1.5 factors.

iv. Disclose any AI-related expense if it will be passed through to the client.

v. Distinguish firm overhead from client-chargeable expenses.

vi. Be prepared to explain the value of technology-assisted work product if challenged.

XIII. Law Firm Administrative Uses of AI

a. **Not all AI use involves substantive legal advice.**

i. Administrative uses may include scheduling, document formatting, proofreading, drafting internal announcements, summarizing non-confidential meetings, creating training hypotheticals, organizing knowledge-management materials, and preparing marketing drafts.

ii. These uses are often lower risk, but they still require supervision, confidentiality screening, and attention to accuracy.

b. **Lower-Risk Administrative Uses**

i. Formatting and proofreading non-confidential materials.

ii. Drafting agendas and internal meeting summaries.

iii. Creating training hypotheticals from public or fictional facts.

iv. Improving readability of public-facing biographies or announcements.

v. Generating first drafts of internal checklists for attorney review.

c. **Administrative Uses Requiring Caution**

i. Timekeeping narratives that reveal confidential strategy.

ii. Marketing materials that imply expertise or results without review.

iii. Human resources materials involving employee privacy or legal rights.

iv. Knowledge-management summaries of privileged work product.

v. Client alerts or public legal updates that require current-law verification.

XIV. Practical AI Governance Checklist for Virginia Lawyers

Issue	Question to Ask
Purpose	What exactly am I asking AI to do?
Tool Approval	Is the tool approved for this type of work?
Confidentiality	Am I entering confidential, privileged, sensitive, or protected information?
Client Instructions	Has the client restricted or conditioned AI use?
Court Requirements	Does any local rule, standing order, scheduling order, or case-specific directive require disclosure or certification?
Verification	How will I verify the output before relying on it?
Supervision	Who used the tool, and who is responsible for attorney review?
Contract Accuracy	If drafting/revising a contract, have I checked governing law, definitions, cross-references, and business terms?
Billing	Am I billing only actual time or charging a reasonable and explained non-hourly fee?
Documentation	Should I document AI use, verification steps, client consent, or court compliance?

XV. Hypotheticals for Discussion

a. **Hypothetical 1: The Hallucinated Brief.** A lawyer asks a public AI tool to draft an opposition brief. The brief includes three cases that appear directly on point. The lawyer files the brief after only a quick skim. Opposing counsel advises that the cases do not exist.

   i. **Issues for discussion:** Competence under Virginia Rule 1.1, diligence under Virginia Rule 1.3 (VA. RULES OF PRO. CONDUCT r. 1.3(a) (2026) ("A lawyer shall act with reasonable diligence and promptness in representing a client.")), candor under Virginia Rule 3.3 (VA. RULES OF PRO. CONDUCT r. 3.3(a)(1) (2026) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal.")), Rule 11 or state-law certification, remedial duties, sanctions, and professional discipline.

   ii. **Teaching point:** The misconduct is not simply using AI; the misconduct is filing unverified legal authority.

b. **Hypothetical 2: Uploading Client Medical Records.** A lawyer uploads medical records, billing data, and patient information into a public AI platform to generate a chronology.

   i. **Issues for discussion:** Rule 1.6 confidentiality, privacy obligations, vendor retention, training use, client consent, anonymization, and approved tools.

   ii. **Teaching point:** Confidentiality analysis must occur before data is entered.

c. **Hypothetical 3: AI Drafts a Settlement Evaluation.** A lawyer asks AI to estimate settlement value from short summaries of liability and damages and sends the recommendation to the client with minimal review.

i. **Issues for discussion:** Competence, independent professional judgment, communication under Virginia Rule 1.4 (VA. RULES OF PRO. CONDUCT r. 1.4(a) (2026) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.")), hidden assumptions, bias, and improper delegation.

ii. **Teaching point:** AI may assist analysis, but the lawyer must own the advice.

d. **Hypothetical 4: The Ten-Minute Contract.** A lawyer charges a flat fee to draft a contract. AI creates a first draft in minutes, followed by one hour of lawyer review. The client later objects that the fee was unreasonable because AI did most of the drafting.

i. **Issues for discussion:** Virginia Rule 1.5, LEO 1901, fee explanation, distinction between hourly and value billing, and value of lawyer judgment.

ii. **Teaching point:** AI efficiency does not automatically make a flat or value fee improper, but the fee must be reasonable and explained.

e. **Hypothetical 5: Client Brings an AI-Drafted Employment Agreement.** A business client brings an AI-generated employment agreement and asks counsel to "just look it over quickly." The document includes noncompete language, arbitration language, confidentiality provisions, and a generic governing-law clause.

i. **Issues for discussion:** Client counseling, contract review, state-specific enforceability, confidentiality, business terms, and scope of representation.

ii. **Teaching point:** Client-generated AI documents should be treated as unverified drafts, not legal advice.

XVI. Key Takeaways

a. AI may be permissible, but it is not self-validating.

b. Competence includes functional AI literacy.

c. Confidentiality analysis is essential before entering client information into AI tools.

d. Verification is non-negotiable for legal citations, quotations, factual assertions, summaries, and contract provisions.

e. Court AI requirements are often judge- and case-specific; check the applicable rules, orders, and scheduling order before filing.

f. Virginia LEO 1901 provides important guidance on reasonable fees and generative AI.

g. Law firm governance should address approved tools, supervision, confidentiality, verification, training, and billing.

h. Clients will increasingly bring AI-generated documents to counsel; lawyers should use those materials as starting points, not as reliable legal advice.

XVII. Key Authorities Cited

Cases and judicial decisions.

a. *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).
b. *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024).
c. *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489 (D. Wyo. 2025).
d. *In re Nwaubani*, No. 25-9517, 2026 LX 135104 (4th Cir. Mar. 11, 2026) (per curiam) (unpublished).
e. *Iovino v. Michael Stapleton Assocs., Ltd.*, No. 5:21-cv-00064, 2024 LX 204304 (W.D. Va. July 24, 2024).
f. *Powhatan Cnty. Sch. Bd. v. Skinger*, No. 3:24-cv-00874, 2025 LX 374420 (E.D. Va. July 31, 2025).
g. *Fairfax v. Fairfax*, No. CL-2025-10602, slip op. (Va. Cir. Ct. Fairfax Cnty. May 22, 2026) (denying release of uncertified AI-generated transcript after finding it was "replete with errors, omissions, and other inaccuracies").

Virginia ethics opinions, rules, and statutes.

a. Va. Legal Ethics Op. 1901, Reasonable Fees and the Use of Generative Artificial Intelligence (2025).
b. VA. RULES OF PRO. CONDUCT rr. 1.1, 1.3, 1.4, 1.5, 1.6, 3.3, 5.1, 5.3 (2026).
c. VA. CODE ANN. § 8.01-271.1(B) (2026).



Your Appeal Starts at Trial: Overturning the Largest Verdict in Virginia History

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Your Appeal Starts at Trial:
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Gentry Locke Seminar

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1. Case Overview

Appian Corporation v. Pegasystems Inc. is a trade secret case filed in the Fairfax County Circuit Court in 2020. Appian Corporation ("Appian") and Pegasystems Inc. ("Pega") are competitors in the business process management software industry. Both are publicly-traded companies; Appian is based in Virginia while Pega is a Massachusetts company.

Appian sued Pega and Youyong Zou, a consultant who had worked with Pega from 2010-2012. Appian claimed that Pega and Zou stole its trade secrets and Pega then incorporated those secrets into its software or used those secrets to compete with Appian. The suit sought damages under the Virginia Uniform Trade Secrets Act ("VUTSA")[1] and the Virginia Computer Crimes Act ("VCCA"), as well as for other torts that were later dismissed or nonsuited. A few months before trial, Appian increased its initial ad damnum of $90 million to $3 billion in compensatory damages; Appian also sought punitive damages, attorneys fees, and costs.

In 2022, there was a week-long jury trial on Pega's plea of the statute of limitations. After the close of the evidence, the trial court held that there were no questions of fact for the jury to decide and that Appian's claims were timely.

On the heels of this ruling, a seven-week jury trial ensued on Appian's claims. In what is the largest jury verdict in Virginia history, the jury found for Appian on both claims and returned a verdict of $2.03 billion on the VUTSA claim and $1 on the VCCA claim. As to Zou, the jury awarded Appian $5000 on the VUTSA claim.

Pega appealed the VUTSA judgment and a three-judge panel of the Court of Appeals of Virginia reversed.[2] In a landmark ruling defining the contours of the

[1] The VUTSA is **Attachment A** to this outline.

[2] The Court of Appeals opinion ("CAV Op.") is **Attachment B**.

VUTSA, the Court held that a "series of errors" required reversal. CAV Op. at 2. The unanimous decision issued on July 30, 2024, and awarded a new trial on all VUTSA issues—both liability and damages. *Id.* at 60-61.

The Court of Appeals held that the trial court improperly instructed the jury that Appian's only causation burden was to show Pega's total sales over an eight-year period. *Id.* at 29-40. That flawed instruction, according to the Court, "relieved Appian of its proper burden to prove causation between the alleged misappropriation and any damages." *Id.* at 60. And that error was compounded when the trial court prevented Pega from presenting evidence that many of its total sales were in areas in which the parties did not compete. *Id.* at 41-45.

In addition to these prejudicial errors concerning causation and damages, the Court also found that Pega should have been permitted to demonstrate its software to the jury and to introduce the number of people with access to Appian's platform. *Id.* at 45-60. These were critical facts to liability issues—namely Pega's defenses that it did not copy Appian's software and that Appian did not take reasonable measures to protect its alleged trade secrets. Although the Court ruled against Pega on its contention that there was insufficient evidence of trade secret misappropriation, the Court ultimately held that there were multiple evidentiary and substantive errors that deprived Pega of a fair trial.

Both Appian and Pega appealed to the Supreme Court of Virginia.[3] The Court granted review of all issues – including the sufficiency issues Pega lost at the Court of Appeals. In a January 8, 2026 opinion, the Supreme Court affirmed the Court of Appeals on all issues and remanded the case for a new trial. *See generally*, SC Op.

Monica Monday and Mike Finney led the appellate team from Gentry Locke that assisted in securing this result for Pega. Monday and Finney served as embedded appellate counsel for Pega at trial, assisting the trial team from Choate Hall and Offit Kurman with evidentiary issues, preservation-of-error, jury instructions, critical legal issues, and post-trial motions. In both appeals, Gentry Locke's appellate team – including Monday, Finney, Dave Berry, and Noah Sullivan – worked alongside an outstanding appellate team from Orrick.

2. The Keys to Success

A. Preservation of Error: As embedded appellate counsel during the trial, Gentry Locke worked with the trial team to preserve error for appellate review. This included ensuring that there were timely, fulsome, and specific

[3] The Supreme Court of Virginia opinion ("SC Op.") is **Attachment C**.

objections made on the record and that we secured ruling on those objections. Further, when Pega's evidence was excluded, the appellate team assisted the trial team in making timely and complete proffers of what the excluded evidence would have been. The appellate team also handled post-trial motions and a jury misconduct issue that surfaced after the verdict.

Comprehensive written materials regarding the preservation of error in Virginia are provided as **Attachment D**.

B. Issue Identification: During the trial, Gentry Locke's appellate team began compiling a list of potential errors (even those that had occurred pre-trial before Gentry Locke's involvement) that could be appealed in the event of an adverse judgment. The team refined and updated the list throughout and after the trial. Some of these key issues on the list were included, briefed, and argued in a motion to set aside the verdict. Ultimately, the list of potential issues was long and set the stage for the process of selecting those issues that would be included in the appeal.

Practice pointers:

- Cataloging potential appellate issues should start pre-trial, based on the court's rulings during the pendency of the case. For example, key motions in limine that are denied.
- Although the trial focus must be on the trial itself, this appellate effort should continue during the trial to the extent practicable.
- Having an appellate lawyer—who does not have the same trial responsibilities—attend trial helps focus on these and other appellate issues, and can be well worth it in the appropriate case.

C. Issue Selection: After the motion to set aside the verdict was unsuccessful, the appellate team undertook an evaluation of the list of potential appellate issues to determine which ones were strong issues for an appeal. As to each issue, this evaluation considered the standard of review, how well the issue was preserved for appeal, the merits of the issue, whether the error was harmful, the available remedy (i.e., a new trial), and thematic value. The final selection of issues for the appeal boiled down to a holistic consideration of a variety of factors, and several viable issues were left on the cutting room floor.

Practice pointers:

- Cast a wide net when evaluating potential appellate issues. Some issues look better—individually or as a compliment to other issues—upon closer inspection. Similarly, top candidates can lose their initial luster.

- How many issues should be raised? "It depends" is not a satisfying answer, but any rules of thumb (*e.g.*, 3-5 issues) must be balanced against the particular appeal's circumstances—including harmony with other issues, space required to develop the issue, and the strength of the issue.

- While evidentiary issues have a more challenging standard of review (abuse of discretion) than legal issues (de novo), they can lead to more complete relief. For example, despite the issues with the causation/damages jury instruction (*see* below), it is unclear whether Pega would have received a new trial on liability if it had not also prevailed on at least one evidentiary issue (*e.g.*, the software issue below).

3. Specific Discussion Points from the Opinions

A. The Jury Instruction: The jury instruction on causation and damages became a key issue at trial and later on appeal. Appian sought an instruction that shifted the burden of proving unjust enrichment damages caused by misappropriation to Pega after Appian simply proved Pega's total sales. For its part, Pega tendered a jury instruction based on traditional principles of Virginia law and assigned the burden of proving causation and damages to Appian as the plaintiff.

The Court of Appeals found the plain meaning of VUTSA § 59.1-338(a)'s language put the burden of providing unjust enrichment damages caused by the misappropriation on the complainant, here Appian. CAV Op. at 32-33. The Court's interpretation was buttressed by the fact that the relevant VUTSA language departed from that of the Uniform Trade Secret Act ("UTSA"). *Id*. at 33. In addition, the Court found that (i) Virginia common law generally places the burden to prove causation and damage on the plaintiff, (ii) even if burden-shifting was appropriate under VUTSA, the trial court had misapplied this framework, and (iii) "from a policy perspective, chaos would ensue in commercial litigation settings if we adopted the premise that the burden for a plaintiff seeking unjust enrichment for any misappropriation of a trade secret in Virginia is simply showing all sales made by the defendant." *See id*. at 34-40 & n.20.

The Supreme Court affirmed the Court of Appeals' jury instruction ruling, and focused on the top-line holdings that Pega bore no burden on causation and damages. Key to the Supreme Court's decision were: (1) the "fundamental precept of Virginia law that a plaintiff bears the burden of proving both that he has been harmed by the defendant's wrongful act and that the defendant's wrongful act proximately caused the damages the plaintiff seeks to recover;" (2) the plain meaning of VUTSA § 59.1-338(a); and (3) VUTSA's key departures from the UTSA's language. *See* SC Opp. at 25-34.

B. Exclusion of Pega's Software: One of Pega's liability defenses was that it did not incorporate Appian's purported trade secrets into its software. However, the trial court excluded Pega from introducing or demonstrating its software at trial. This evidentiary issue turned on questions of authentication, the scope of expert testimony, and the nature of the software as evidence.

The Court of Appeals held that the trial court had abused its discretion, by not allowing Pega to authenticate its software through its chief designer, on a different laptop than used to transmit a copy of the software to Appian in discovery. The Court rejected Appian's argument that Pega had identified the discovery laptop on its exhibit list, and found that "the court conflated the evidence at issue—software—with the method by which the evidence was to be transmitted in discovery (*i.e.*, an electronic transfer link, an external hard drive, or a different laptop). *See* CAV Op. at 45-53.

While acknowledging that trial courts "must be given wide latitude in dealing with such issues," the Supreme Court nevertheless affirmed the Court of Appeals' software decision and associated reasoning. SC Op. at 37-41.

Code of Virginia

Uniform Trade Secrets Act

§ 59.1-336. Short title and definitions

As used in this chapter, which may be cited as the Uniform Trade Secrets Act, unless the context requires otherwise:

"Improper means" includes theft, bribery, misrepresentation, use of a computer or computer network without authority, breach of a duty or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

"Misappropriation" means:

1. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

2. Disclosure or use of a trade secret of another without express or implied consent by a person who

a. Used improper means to acquire knowledge of the trade secret; or

b. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(1) Derived from or through a person who had utilized improper means to acquire it;

(2) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;

(3) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(4) Acquired by accident or mistake.

"Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

"Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

1986, c. 210; 2009, cc. 321, 376.

§ 59.1-337. Injunctive relief

A. Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial

advantage that otherwise would be derived from the misappropriation.

B. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

C. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

1986, c. 210.

§ 59.1-338. Damages

A. Except where the user of a misappropriated trade secret has made a material and prejudicial change in his position prior to having either knowledge or reason to know of the misappropriation and the court determines that a monetary recovery would be inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. If a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

B. If willful and malicious misappropriation exists, the court may award punitive damages in an amount not exceeding twice any award made under subsection A of this section, or $350,000 whichever amount is less.

1986, c. 210; 1990, c. 344.

§ 59.1-338.1. Attorneys' fees

If the court determines that (i) a claim of misappropriation is made in bad faith, or (ii) willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party.

1990, c. 344.

§ 59.1-339. Preservation of secrecy

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include:

1. Granting protective orders in connection with discovery proceedings;

2. Holding in-camera hearings;

3. Sealing the records of the action; and

4. Ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

1986, c. 210.

§ 59.1-340. Statute of limitations

An action for misappropriation shall be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

1986, c. 210.

§ 59.1-341. Effect on other law

A. Except as provided in subsection B of this section, this chapter displaces conflicting tort, restitutionary, and other law of this Commonwealth providing civil remedies for misappropriation of a trade secret.

B. This chapter does not affect:

1. Contractual remedies whether or not based upon misappropriation of a trade secret; or

2. Other civil remedies that are not based upon misappropriation of a trade secret; or

3. Criminal remedies, whether or not based upon misappropriation of a trade secret.

1986, c. 210.

§ 59.1-342. Repealed

Repealed by Acts 2015, c. 709, cl. 2.

§ 59.1-343. Time of taking effect

This chapter shall become effective on July 1, 1986, and shall not apply to misappropriation occurring prior to the effective date. With respect to a continuing misappropriation that began prior to the effective date, the chapter also shall not apply to misappropriation that occurs after the effective date.

1986, c. 210.

COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Judges Beales, Friedman and Callins
Argued at Leesburg, Virginia

PEGASYSTEMS INC.

v. Record No. 1399-22-4

APPIAN CORPORATION

OPINION BY
JUDGE FRANK K. FRIEDMAN
JULY 30, 2024

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Richard E. Gardiner, Judge

E. Joshua Rosenkranz (Christopher J. Cariello; Eric A. Shumsky; Jeremy Peterman; James A. Flynn; Jonas Wang; Monica T. Monday; Michael J. Finney; Orrick, Herrington & Sutcliffe LLP; Gentry Locke, on briefs), for appellant.

Adeel A. Mangi (Jeffrey S. Ginsberg; Muhammad U. Faridi; Clinton W. Morrison; Robert W. Loftin; Jonathan Y. Ellis; Ellen D. Marcus; Sheila M. Costin; Patterson Belknap Webb & Tyler LLP; McGuireWoods LLP; Holmes Costin & Marcus PLLC, on brief), for appellee.

Amicus Curiae: Northern Virginia Chamber of Commerce (Vernon E. Inge, Jr.; Michael H. Brady; Whiteford, Taylor & Preston L.L.P., on brief), for appellee.

Amicus Curiae: Professor Harvey S. Perlman (Juli M. Porto; Blankingship & Keith, P.C., on brief), for appellee.

Amicus Curiae: The American Intellectual Property Law Association (Richard T. Matthews; Williams Mullen, P.C., on brief), for neither party.

Amici Curiae: Professors Mark Gergen and Pamela Samuelson (William M. Jay; Rohiniyurie Tashima; Goodwin Procter LLP, on brief), for neither party.

This case raises questions about trade secrets, corporate espionage, and the proper measure of unjust enrichment damages for such offenses under the Virginia Uniform Trade

Secrets Act (VUTSA). The trial below resulted in the largest damages verdict in the history of the Commonwealth of Virginia—an award of over two billion dollars. A jury found Pegasystems, Inc. (Pega) used improper means to misappropriate trade secrets from Appian Corporation (Appian). On appeal, Pega asks this Court to reverse the jury verdict and enter judgment for Pega because it contends, as a matter of law, there was insufficient evidence that Pega misappropriated any trade secrets. In the alternative, Pega seeks a new trial, arguing the trial court erred in excluding certain evidence and in granting flawed jury instructions (particularly with respect to proximate cause). We reject Pega's claim that it is entitled to judgment as a matter of law; however, we find that the trial court committed a series of errors that require us to reverse the judgment as to Appian's trade secret claims.

BACKGROUND[1]

I. The Business Process Management Industry

This controversy involves companies engaged in the business process management (BPM) industry. Appian and Pega are competitors and "industry leaders" in the BPM field. Both companies offer platforms that enable third party business customers to build complex software applications using "low-code application development platforms." These customers purchase the BPM platform to generate programs or applications (apps) that automate processes, such as fulfilling orders or opening new customer accounts. A BPM customer might use its own employees to design a project or it might hire outside "developers" to do so.

At trial, Pega portrayed itself as having expertise in platforms catering to big, complex, and sophisticated problems with many permutations for "very large . . . companies." Pega's

[1] On appeal from a judgment of a jury verdict, "[w]e consider the evidence and all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party below." *MCR Fed., LLC v. JB&A, Inc.*, 294 Va. 446, 457 (2017) (quoting *Government Emps. Ins. Co. v. United Servs. Auto. Ass'n*, 281 Va. 647, 655 (2011)).

platform put a premium on "scalability"—the ability to quickly and reliably create, customize, and modify apps used by large numbers of users. Thus, Pega suggested its BPM product was particularly useful for complex undertakings. Appian painted Pega's product as overly complex, difficult to grasp, hyper-technical, and clunky. By contrast, Appian's BPM product focused on ease-of-use, speed, and simplicity.

The gist of this dispute is that Appian contends that Pega misappropriated its trade secrets to copy and steal Appian's user-friendly features to enhance Pega's appeal with a broader base of potential customers. Appian further asserts that in the course of stealing its secrets, Pega illicitly obtained trade secrets regarding weaknesses in Appian's BPM platform and Pega used this ill-gotten knowledge for its own advantage.

II. Pega Studies Appian's Product

Pega acknowledges that "[l]ike most companies in a competitive market, . . . Pega stays abreast of its competitors." Appellant's Br. at 8. The trade secret claims in this case primarily arose from activities that Pega's then-head of competitive intelligence, John Petronio, managed from 2012 to 2014. Pega's goal was to examine how Appian's BPM platform performed from the perspective of a developer creating apps. In so doing, Pega hoped to improve its own platform and to learn of Appian's weaknesses to better market its own platform. Pega did not have access to Appian's platform because, as Appian witnesses confirmed, Appian "never made [its] software publicly available without license terms." Appian's software, including its "internal workings," remained a mystery to Pega. Internally, Pega acknowledged that Appian was "guarded" with respect to its "technology."

A. Pega Hires a Consultant, Zou, to Gain Access to Appian's Platform

Through a staffing agency, Petronio sought a source to demonstrate how developers used Appian's platform. In seeking out a consultant, Petronio informed the recruitment company that, "[a]cess to the Appian BPM tool is a must" and "make sure they aren't 'loyal' to Appian because [Pega] doesn't want it getting back to Appian that Pega is doing this work." This search culminated in Pega hiring Youyong Zou to provide consulting services for Pega about Appian's BPM platform. Zou's consulting work for Pega was a side-job; he worked for Serco, a company that implemented government contracts. Zou had access to Appian's platform through his employment with Serco, which licensed Appian's platform.

As part of his consulting services, Zou provided presentations to Pega in which he demonstrated Appian's platform, illustrating strengths and weaknesses. Petronio described Zou as Pega's "spy." Appian characterized Zou as Pega's "Trojan horse." Pega took measures to hide Zou's identity by giving him an alias and blurring his username on screenshots. Over a two-and-a-half-year period, Zou spent approximately 200 hours consulting for Pega and received $23,608 in compensation.

Pega's executives observed some of Zou's demonstrations, which were recorded for training purposes. Pega recorded nearly 100 videos of Zou using Appian's platform, in which Zou would explain strengths and weaknesses of various features on Appian's BPM system. *See, e.g.*, Pl. Ex. 853-910 (training videos). Zou also demonstrated building apps with Appian's software. At trial, Appian established Pega's widespread use of Zou's tutorials. Several of the videos "cascaded" through Pega's product management team. Zou even came to Pega's Massachusetts headquarters for an all-day meeting with Pega's senior leadership. Pega's engineers participated in meetings with Zou, including Kerim Akgonul, Pega's Head of Product Management—the group responsible for making improvements to Pega's platform. Petronio

encouraged Akgonul to meet with Zou to "see something in [t]here that [Akgonul] might like for our product." Pl. Ex. 853 at 01:00-01:15. Appian's expert opined that following Zou's demonstrations, Pega made changes to its platform that had "striking similarities" to Appian's product. Moreover, Pega used the information gathered by Zou to improve its own platform and also to identify and attack Appian's weaknesses.

B. Pega Employees Access Appian's Platform Independent of Zou's Efforts

After Zou stopped consulting for Pega, Pega continued its attempts to access Appian's trade secrets via improper means. For example, in 2017, three years after Zou stopped consulting for Pega, Pega employees accessed Appian's platform using aliases to discreetly view Appian's free trials.

III. Appian Learns of Pega's "Research" and Files this Action

In 2015, Petronio and Pega parted ways. Appian hired Petronio the following year as a consultant. He later became Appian's Senior Director of Market Intelligence and Strategy. Eventually, in 2020, Petronio informed Appian about Zou and his consulting work on behalf of Pega. Appian responded by suing Pega and Zou.

Appian brought claims against Pega under the Virginia Uniform Trade Secrets Act, Code § 59.1-336 et seq., based on Pega's alleged misappropriation of trade secrets through its dealings with Zou, and under the Virginia Computer Crimes Act, Code § 18.2-152.1, et seq., relating to Pega's efforts to obtain improper access to Appian materials.

IV. What Secrets Did Pega Allegedly Receive?

The trade secrets that Appian contends were misappropriated by Pega basically fell into three categories: (1) functions of Appian's platform that Appian accused Pega of copying; (2) knowledge relating to weaknesses of Appian's platform which Pega used to its own advantage;

and (3) access to Appian's confidential documentation such as its user manual which assisted Pega in copying Appian's strengths and exploiting its weaknesses.

A. The Copied Functions that Improved Pega's Platform

Appian identified five functions related to "the architecture and design underlying specific features of Appian's platform" that Pega copied to improve its platform based on Zou's demonstrations. Appellee's Br. at 8. Dr. Marshall, Appian's expert witness, provided extensive testimony over the course of multiple days. He testified that it appeared Pega made improvements to its platform based on trade secrets it obtained from Appian. Marshall testified that Pega misappropriated the following features of Appian's platform, which constituted trade secrets: (1) Smart Services, (2) Custom Data Types, (3) Ease-of-Editing Functionality, (4) Out-of-the-Box Ability to Deploy Applications to Mobile, and (5) Out-of-the-Box Integrated Social View of Worklist and Tasks. These features can be briefly summarized as follows:

1. smart services: this tool enables a developer to implement a function by dragging and dropping an icon into an app;
2. custom data types: these features allow a developer to group related pieces of data together;
3. an edit button: this tool lets a developer toggle between testing an application and editing it;
4. out-of-the-box mobile: this feature permits apps to run on both a desktop and mobile device without additional configuration;
5. out-of-the box social: this provides a pre-programmed user interface that displays work lists and tasks in a social feed permitting easy communication among teams.

Pega countered that none of these features were unique to Appian, that it was commonplace for businesses to study competitors' products, and that its own software did not utilize any of Appian's innovations.

B. Pega Gains Access to Appian Documentation and Insights into Weaknesses in Appian's Platform

Zou's presentations suggested that Appian struggled with "scalability"—the ability to handle large, complex projects. Pega's head of sales concluded that Appian's "weaknesses are glaring and big." Pega's product manager for social features was "not impressed" with Appian's social features, while noting its marketing was "impress[ive]." Pega also identified significant weaknesses in Appian's mobile capabilities. Upon learning about the "internal workings" of Appian's platform from Zou, Petronio announced, "we should never lose to Appian." Prior to Zou's work for Pega, Pega's marketing materials had addressed various Appian weaknesses. However, Pega updated and bolstered these materials to reflect its competitor's shortcomings based on information Zou provided.

Appian asserted Pega's knowledge of these platform foibles constituted additional trade secrets related to the "sensitive structural limitations of Appian's platform previously unknown to Pega[.]" Appellee's Br. at 14. Most of the purported secrets were Appian product deficiencies that Appian did not want potential customers to consider when making purchasing decisions.[2] Appian ultimately categorized these "weakness" trade secrets as problems involving:

1. Concurrent Development and Locking of Process Model
2. Specific Reporting Tools and Chart Types Available
3. Web Services Returned Only the Process ID
4. Specifics on Unified Management Tools Available
5. Star Schema/Reporting on External Data
6. Configuration and Customization of Checkpointing

[2] At the same time, similar information was available through reviews, internet videos, and basic customer observation and comparison. Relatedly, when asked whether Appian's business partner, Serco, was required to have prospective customers sign non-disclosure agreements after receiving demonstrations, Appian's witness Dr. Cole stated, "I don't believe they do, but they do have restrictions," including "careful[] supervis[ion]."

7. Topology Specifics, Including Information from Experimentation

This is *verbatim* how Appian described the weaknesses to the jury in closing argument.

Finally, Appian asserted that, through Zou, Pega obtained Appian's documentation which included private information that enabled Pega to further exploit its knowledge of Appian's platform. For example, Zou gave Pega confidential portions of Appian materials, including a document entitled "High Availability and Disaster Recovery Configurations." This document contained descriptions of Appian's software. Zou also provided Pega documentation related to Appian's mobile and social capabilities. Zou further accessed Appian's user manual through Appian Forum and provided this information to Pega. With respect to Appian's "weaknesses," Pega used the information it gained from Appian's documents to create marketing materials that attacked Appian.

V. How Secret was the Information Pega Obtained?

Appian contended that the information Pega received was "confidential" and closely guarded. Appian's evidence demonstrated that many features of its BPM platform were protected from widespread public consumption. For example, Appian stored its software and related documentation on Appian Forum, a password protected website accessible by authorized users including Appian employees and business partners. To access Appian Forum, a prospective user had to comply with Appian's terms of use, which incorporated individual license agreements that contained some confidentiality provisions. As one witness explained, Appian "never made [its] software publicly available without license terms."

Appian asserted that any third-party companies or partners accessing its software and documentation "had licensing agreements in place" and "any individuals that were

accessing . . . Appian Forum" had to agree to the "terms of use." Appian's "terms of use" on its Forum stated, in part, as follows:

> **Use of Software**
> You may access and download certain software . . . . Any Software You download or access through the Site is the copyrighted work of Appian . . . . Use of the Software is subject to the terms of the . . . software license agreement between You and Appian which governs Your use of the Software and which triggered Your receipt of a username and password to access the Site. To the extent you do not have a . . . license agreement with Appian for the Software, you are prohibited from downloading, accessing or using the Software without Appian's express prior written consent.

At the same time, Appian was involved in sales—and it encouraged its sales representatives to share information about its platform. It urged these representatives or "resellers"—who worked on commission—to demonstrate the platform to potential buyers without significant restrictions.[3] Appian did not limit "the number of people who could be shown the documentation" or view demonstrations provided by its resellers.

Appian also granted latitude in its agreements with its business partners, authorizing them to "market, promote and demonstrate the Appian software to prospective customers." Business Partner Agreement at §§ 1.1, 2.2.1; *see also* Value-Added Service Provider Agreement. Serco was just one of many of Appian's business partners. The Business Partner Agreement provides the business partner "with a nonexclusive, nontransferable license to use, copy and display Appian's published marketing materials associated with the Appian Software, and to incorporate

[3] Appian delegated discretion to these resellers to demonstrate features of its platform and to display documentation to prospective customers. It permitted resellers to decide what was reasonable to disclose, while actively encouraging resellers to promote the benefits of the product. Appian diminishes the breadth of this discretion by retaining the right to enforce disclosure restrictions. Appian confirmed it had no way of tracking usage of its software by its business partners: "We had no automated mechanism for introspecting and auditing installations . . . by companies like Serco." Appian further acknowledged it gave discretion to its partners to decide who could have access to Appian's software.

the Marketing Materials into Business Partner's promotional and marketing literature . . . ." In addition to granting business partners the ability to demonstrate Appian's software for prospective customers, with certain limitations, the agreement provides that a business partner can "[e]nhance, modify and/or combine the Appian software with other software or code to develop prototypes to be demonstrated to prospective customers." The business partner agreement contained a confidentiality provision, but it did not mention any trade secrets. *See* Business Partner Agreement at § 6.1 (listing software as confidential).

Potential customers, who received demos from Appian partners like Serco, could share descriptions, screenshots, and videos of the demos. Further, potential customers, who received demos from Appian's business partners, were not required to sign non-disclosure agreements. Similarly, Appian offered free trials to prospective buyers. These prospective buyers were not required to sign restrictive non-disclosure agreements either (but were subject to "click-through" terms of service). Nonetheless, Appian asserted that it could impose careful supervision over prospective customers and business partners.

VI. Serco's Restrictions on Zou

Notably, Zou was not an Appian employee; he was employed by Serco, a government contractor. Zou had access to Appian's platform and user manuals through his work at Serco, which was a business partner of Appian's. Zou did not have access to Appian's source code. In 2012, Zou, as a condition of employment with Serco, signed an "Employee Proprietary and Confidential Information Agreement." As part of his contract with Serco, Zou was precluded

from sharing confidential information that he learned through his work. Appian claimed "all [its] developers" were governed by "[s]imilar agreements" as Zou's.[4] Appellee's Br. at 6.

VII. Disputed Rulings at Trial

A. The Trial Court Grants Appian's Motion *in Limine* Excluding Evidence of the Number of People with Access to its Software as "Irrelevant"

Appian filed a motion *in limine* to exclude evidence of the number of people with access to its software. Appian argued, and the trial court ruled, that the number of people with access to Appian's trade secrets was "not relevant at all" to the question of whether the software was sufficiently protected to be a trade secret. The court gave the jury a specific instruction that provided, "[t]he numbers of users of the Appian Platform and Appian Forum licenses are not relevant to any issue in this case, and any evidence as to those numbers should be disregarded." In explaining its decision, the trial court stated, "Pegasystems cannot offer mere numbers as a way of showing that the trade secret—that these are not Appian's trade secrets . . . . Pegasystems can certainly put on evidence concerning the security that Appian attached to its licensees and

[4] The question of whether Zou's agreement to protect Serco's confidential information extends to Appian is a point debated by the parties. Zou's confidentiality agreement with Serco included the following provisions related to confidentiality:

- "'Confidential Information' means any and all information disclosed or made available to the Employee or known by the Employee as a direct or indirect consequence of or through his or her employment by Serco and not generally known in the industry in which Serco is or may become engaged during the course of Employee's employment, and which is non-public information of commercial value to Serco, and/or any information related to Serco's business, employees, customers, products, processes . . . and trade secrets."
- "Employee agrees not to use or disclose to anyone or any entity, other than as necessary and appropriate in further of Serco's business activities, any Confidential Information, either during or after employment by Serco."
- "Employee agrees that all Confidential Information used or generated by him or her in connection with employment for Serco is the sole property of Serco."

require of its licensees . . . but it cannot just offer sheer numbers as a way to show that Appian was not maintaining the secrecy of its alleged trade secrets."

After the trial court granted Appian's motion *in limine* prohibiting evidence of the number of people with access to its platform, Pega proffered the following evidence, which it argued was relevant to whether Appian took reasonable measures to protect its trade secrets and whether the trade secrets were generally known:

- From 2012 through 2016, over 12,500 individuals were granted access to Appian Forum.
- Appian did not track the number of "value added service providers" it had.[5]
- Over 44,000 people had access to Appian Forum between 2012 and 2021.
- Appian entertained 12,000 free-trial recipients between 2017 and 2021.

B. The Trial Court Prevented Pega From Demonstrating its Software to the Jury to Show that it Had Not Stolen Disputed Features of Appian's Platform

Before trial, Pega timely disclosed, in an exhibit list, that it intended to introduce versions of its software as evidence, including versions 6.3 and 7.1. Per the exhibit list, Pega stated that it would present its software evidence on a "Pega Laptop" that it described as a "physical object." During discovery, Pega provided Appian with a laptop containing its software for Appian to review. Notably, despite numerous objections to the exhibit list generally, Appian did not object to Pega's exhibit list entries providing that it intended to present its software evidence to the jury.

[5] The Value Added Service Provider Agreement enabled companies (or service providers) to "provide value-added intellectual property on top of the Appian platform." The agreement allowed service providers to "market, promote and demonstrate" Appian's software to "prospective End Users[.]" *See* Value Added Service Agreement at § 2.2.1. The agreement also allowed service providers to "enhance, modify and/or combine the Appian software with other software . . . to develop prototypes to be demonstrated to prospective End Users . . . ." Service providers "retain[ed] exclusive ownership and control of the resulting enhancement . . . ."

In fact, during the trial, Appian itself presented evidence of Pega's BPM platform software on a different computer than that used in discovery.

At trial, Pega sought to present its software to illustrate that many of the features Appian claimed Pega had "stolen" pre-existed Pega's contact with Zou or were developed wholly independently of his demonstrations. However, when Pega sought to introduce this software evidence at trial, on a computer that was not the same laptop on which it had transmitted a copy of the software during discovery, Appian objected because the evidence was on a different computer than used in discovery. Pega explained that the original laptop, which transported the software for discovery purposes, was simply a medium for transferring its evidence to Appian. The original, transport laptop was now inoperable and could not run the software at trial; thus, Pega argued it should be allowed to present its software evidence via another medium such as a different laptop so long as it could authenticate the software. Appian had already introduced the software on a different laptop during its case in chief. Yet Appian argued that Pega's evidence was inadmissible unless Pega used the exact same laptop on which it transmitted a copy of the software to Appian during discovery. The trial court agreed.

The trial court suggested that using a different computer might raise doubts about the software's authenticity, calling for "a trial within a trial to authenticate." Pega was prepared to authenticate the software through Stephen Bixby—the person who led development of the software at Pega. Bixby would have testified that the software introduced at trial was "the exact same thing" Pega produced to Appian during discovery. The trial court, however, refused to permit Pega to attempt to authenticate the software:

> The fact that this upcoming witness may be able to authenticate what's on there, we're not doing that. We're not having a trial within a trial to authenticate that. That's something that should have been dealt with pre-trial during discovery.

> I'm not going to—this is essentially what you're asking me to do is to conduct a discovery proceeding here to determine whether the information on the software is the same as other software, and I'm simply not going to do that. That should have been done during discovery pre-trial.

The court permitted Pega witnesses to testify that various features were not copied from Appian. However, the jury was not allowed to view Pega's software evidence.

C. The Damages Instruction Relating to Proximate Cause

One of the central disputes at the instructions phase of the trial concerned the appropriate proximate cause instruction in the unjust enrichment context under VUTSA. Over Pega's objection, the trial court granted Instruction 14:

> If you find that plaintiff Appian has proved by greater weight of the evidence its claim for misappropriation of trade secrets against defendant Pegasystems, you must find your verdict for Appian and decide the issue of damages as to Pegasystems. You may award the amount of unjust enrichment caused by misappropriation.
>
> For unjust enrichment, Appian is entitled to recover Pegasystems' net profits. Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales; Pegasystems has the burden of establishing by greater weight of the evidence any portion of the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits.

Thus, the court instructed the jury that Appian could prove its damages simply by establishing "Pegasystems' sales" during the relevant time frame. Upon Appian proving Pega's total sales, the burden would shift to Pega to prove damages (sales) were unrelated to its wrongdoing. Accordingly, Appian produced evidence that Pega's sales for the relevant time period were in the billions of dollars. Consistent with Instruction 14, Appian stated in closing argument that "the burden is on [Pega]. If they want to show you some of those sales were innocent, right, because it's about some other feature than ours, they have to show that[,]" and

further, "remember the shifting burdens, it's their burden to show you any sales they made were innocent."

D. The Trial Court Excluded Critical Damages Evidence Based on an Interrogatory Answer

Instruction 14 allowed Appian to rely on Pega's total sales to establish its damages and shifted the burden to Pega to prove which sales were not tainted. Pega was then prohibited from introducing significant evidence regarding its "total sales" based on a discovery response. Appian propounded the following interrogatory to Pega in discovery seeking information relating to revenues tied to *versions* of Pega's BPM *software*:

> Interrogatory No. 18: Identify all *revenues* received by Pegasystems for each fiscal year from 2012 through 2021 relating to *Pega 6.3*, *Pega 7.0* and any subsequent *version* broken out by year and *version* of the software; and identify the costs and expenses Pegasystems incurred in order to realize those revenues.

Pega responded:

> Answer: Pegasystems does not record or report revenue, or any associated costs and expenses incurred by Pegasystems, *based on the "version" of the product sold* (e.g., Pega 6.3, Pega 7.0). There is no mechanism or process by which Pegasystems is able to determine these revenue, cost and expense amounts. As a result, Pegasystems' financial results (including total revenue and all associated costs and expenses) for each applicable fiscal year as reported to the SEC in Pegasystems' annual Form 10-K filings and quarterly Form 10-Q filings are attached as Schedule 3.

(Objections omitted; emphases added). The trial court viewed this response as a declaration that Pega "can't breakdown [its] revenue based on lines of business." Thus, it ruled that Pega could not present evidence that much of its revenue came from products with which Appian did not even compete.

Pega asserted that the fact that it did not track revenue by *version* of its BPM software did not mean that Pega did not track revenue by other products or lines of business. In fact, Pega

submitted an expert report in discovery breaking down its revenues from other business sources. However, the trial court ruled that Pega had "essentially given up" any such defense to damages with its response to Interrogatory 18.

As a result, the trial court excluded this "other lines of business" damages evidence and Pega made a proffer of what its evidence would have been. According to the proffer, Pega's Chief Executive Officer Allen Trefler would have testified that Pega sold products that did not compete with Appian; specifically "more than 50 percent of Pega's revenue is derived from customers for these other products" that do not compete with Appian. Trefler also would have testified that Pega offers features unrelated to Appian's trade secrets. Pega's Chief Technology Officer Don Schuerman would have testified that Pega had customers who "bought things that Appian didn't sell." Schuerman was barred from testifying about 25 products unique to Pega that increased its sales and that were distinct from its BPM platform. Further, Simon Platt, who created an expert damages report for Pega, would have testified that Appian's damages should be significantly reduced to account for sales driven by Pega's unique products that "were not available from Appian." Platt would have provided that the associated revenue from these sales was attributable to Pega's own innovation rather than as a result of misappropriating Appian's trade secrets. Finally, in challenging the testimony of Appian's damages expert, James Malackowski, Pega was prevented from demonstrating that the expert's damages figure included Pega sales unrelated to Pega's BPM platform.

VIII. The Verdict

The jury returned a verdict in Appian's favor, finding that Pega and Zou misappropriated Appian's trade secrets, in violation of VUTSA, and awarding damages against Pega in the amount of $2,036,860,045. The jury also rendered judgment against Zou in the amount of

$5,000.[6] The trial court entered a written order of judgment in Appian's favor against Pega, awarding the damages verdict, plus attorney fees, costs, and interest. The trial court denied Pega's motions to strike the evidence and to set aside the verdict. The court also denied Pega's request for a new trial or remittitur. This appeal followed.

ANALYSIS

I. The Trial Court Did Not Err in Denying Pega's Motions to Strike and to Set Aside the Verdict

A. Standard of Review

"When ruling on a motion to strike a plaintiff's evidence, a trial court 'is required to accept as true all evidence favorable to a plaintiff and any reasonable inferences that may be drawn from such evidence.'" *TB Venture, LLC v. Arlington Cnty.*, 280 Va. 558, 562 (2010) (quoting *James v. City of Falls Church*, 280 Va. 31, 38 (2010)). "The trial court is not to judge the weight and credibility of the evidence, and may not reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense." *Id.* at 562-63 (quoting *Austin v. Shoney's, Inc.*, 254 Va. 134, 138 (1997)). "That same standard is applicable to [appellate] review of the decision of the trial court granting the motion to strike." *Baysden v. Roche*, 264 Va. 23, 26 (2002).

Pega asks this Court to enter judgment on its behalf as a matter of law on the ground that Appian failed to prove the existence of its trade secrets. Specifically, Pega argues (1) "[n]one of Appian's purported secrets were trade secrets as a matter of law because Appian exposed them

[6] The jury also found in Appian's favor on its computer fraud claim, in violation of the VCCA, and awarded damages in the amount of $1. Pega has not appealed the VCCA verdict. The court entered a suspension of judgment pending the appeal. Similarly, Zou has not appealed the judgment against him and is not a party to this appeal.

without requiring confidentiality," Appellant's Br. at 19, and (2) "Appian did not identify key trade secrets with the requisite particularity." *Id.* at 26.

The purpose of VUTSA is "to protect the owner of a trade secret from another's misuse of that secret." *Collelo v. Geographic Servs.*, 283 Va. 56, 68 (2012) (quoting *MicroStrategy Inc. v. Li*, 268 Va. 249, 263 (2004)). "To state a trade secret claim, a plaintiff must allege sufficient facts to establish (1) the existence of a trade secret, and (2) its misappropriation by the defendant." *Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 284 Va. 382, 405 (2012). Our Supreme Court has stated that "whether a trade secret exists," and "whether a trade secret has been misappropriated" are generally fact questions for the factfinder. *See MicroStrategy Inc.*, 268 Va. at 264-65; *see also Decision Insights, Inc. v. Sentia Grp., Inc.*, 311 F. App'x 586, 592 (4th Cir. 2009) ("Whether or not a trade secret exists is a 'fact-intensive question to be resolved at trial.'" (quoting *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 419 (4th Cir. 1999))).

B. Identifying Trade Secrets and Misappropriation

Under Virginia law, a "trade secret" is "information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process," that "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Code § 59.1-336; *see also Dionne v. Southeast Foam Converting & Packaging, Inc.*, 240 Va. 297, 302 (1990).

Under VUTSA, "[m]isappropriation" requires:

1. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

2. Disclosure or use of a trade secret of another without express or implied consent by a person who
    a. Used improper means to acquire knowledge of the trade secret; or
    b. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was
        (1) Derived from or through a person who had utilized improper means to acquire it;
        (2) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;
        (3) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
        (4) Acquired by accident or mistake.

Code § 59.1-336. "Improper means" includes theft, bribery, misrepresentation, use of a computer network without authority, breach of a duty or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. *Id.*; *see* Kent Sinclair, 1 Virginia Remedies § 29-1 (2023) (noting "the Act's definition of improper means is broad to the point of being sweeping").

"The crucial characteristic of a trade secret is secrecy rather than novelty." *Dionne*, 240 Va. at 302. For example, a list of contacts may have little novelty but still may be a trade secret. *See, e.g., MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 416 (E.D. Va. 2004) (finding "under the right set of [factual] circumstances" customer lists, pricing information, marketing and sales techniques, and information about products can be considered trade secrets), *aff'd*, 429 F.3d 1344 (Fed Cir. 2005). Further, secrecy need not be absolute: "the owner of a trade secret may, without losing protection, disclose it to a licensee, an employee, or a stranger, if the disclosure is made in confidence, express or implied." *Dionne*, 240 Va. at 302; *see also Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 664 (4th Cir. 1993) ("Absolute secrecy is not essential. It is enough that [plaintiff] made it difficult for others to acquire copies of the . . . software through proper means" (internal citations and quotations omitted))).

"Depending on the facts of a particular case, software components, as parts of a computer 'program,' may be trade secrets covered by the Act." *MicroStrategy Inc.*, 268 Va. at 263.

Pega asserts the jury verdict should be reversed because, as a matter of law, there was insufficient evidence to find that Pega misappropriated information that qualified as trade secrets. It claims that the information Zou accessed was not secret, but generic knowledge that was unprotected as it floated amidst thousands of users and various internet discussions and displays.[7] Pega argues that Appian's alleged trade secrets lost legal protection because they were "generally known," "readily ascertainable," and no reasonable efforts were taken to maintain their secrecy. As a result, Pega asks this Court to enter judgment on its behalf. Similarly, Pega claims the trial court erred in denying Pega's motion to strike and motion to set aside the verdict on the grounds that Appian failed to "identif[y] its alleged trade secrets with sufficient particularity." We address each argument in turn.

C. Appian did not Fail, as a Matter of Law, to Show the Misappropriated Information Qualified as Trade Secrets

Not every piece of information a business might wish to keep from its competitors is a trade secret. If a party seeks to avail itself of trade secret protections, it must make reasonable efforts under the circumstances to keep its information secret. Code § 59.1-336. If a company chooses to release or publicize the information, it cannot later wield a trade secret club against competitors who gain access to the information. *See MicroStrategy Inc.*, 268 Va. at 262 ("[T]he owner of a trade secret is not entitled to prevent others from using public information to replicate his product, nor may the owner prevent others from making similar products which are not

[7] A trade secret can exist initially, but lose its status when the process or design becomes generally known or independently derived by others over time. *See Synopsys, Inc. v. Risk Based Sec., Inc.*, 70 F.4th 759, 772 (4th Cir. 2023) ("The trade secret's economic value depreciates or is eliminated altogether upon its loss of secrecy[.]" (quoting *Oakwood Labs. LLC v. Thanoo*, 999 F.3d 892, 913 (3d Cir. 2021))).

derived from the trade secret." (quoting *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 329 (7th Cir. 1984))).

There is an inherent tension between a company's goal of keeping its product's secret features hidden, while also promoting the product's innovative attributes to boost sales. To help businesses navigate this uncertain landscape, the law imposes certain requirements of proof on a party asserting a trade secret claim: (1) each trade secret must derive independent economic value from not being "generally known" nor "readily ascertainable by proper means"; and (2) the plaintiff must make reasonable efforts to maintain the secrecy of the information at issue. Code § 59.1-336. Thus, generally "[i]f an individual discloses his trade secret to others who are under no obligations to protect the confidentiality of the information . . . his property right is extinguished." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984).

1. Pega's Claims that the Trade Secrets were "Generally Known" or Left Unprotected

Pega asserts that Appian lost trade secret protection because it "exposed" its secrets "without requiring confidentiality." Appellant's Br. at 19. For example, Pega claims that Appian delegated to independent resellers complete discretion to disclose its software. Pega also points to Appian's agreements with its resellers as proof that strict confidentiality measures were not in place and that trade secret protection, accordingly, was not preserved. *See* Business Partner Agreement; Value-Added Service Provider Agreement.

Relatedly, Pega argues that Appian shared its secrets with countless independent developers and end users without taking reasonable measures to guard its secrets. Pega claims that "[j]udgment is required for the separate reason that Appian exposed its alleged secrets to thousands of independent app developers . . . without imposing the required confidentiality obligation." Appellant's Br. at 23. For example, Pega asserts: "[t]here were over 6000 people

with access to the alleged trade secrets through Appian Forum alone when Zou provided his demonstrations . . . ."[8]

The problem with Pega's analysis is that, as our Supreme Court stated in *MicroStrategy Inc.*, "whether a trade secret exists" and "whether certain information constitutes a trade secret" are generally questions of fact. 268 Va. at 264-65. Under VUTSA, a trade secret is information that: (1) derives economic value from being neither generally known nor readily ascertainable, and (2) is the subject of reasonable efforts to maintain its secrecy. Code § 59.1-336. And secrecy need not be absolute. *See Dionne*, 240 Va. at 302. Certainly, here, a jury question was presented where the reasonableness of Appian's efforts was hotly contested—and Appian provided considerable evidence that it took careful steps to safeguard its secrets and that the information was neither "generally known" nor readily ascertainable.

2. The Record Contains Ample Evidence that the Contested Information was not Generally Known nor Readily Ascertainable—and that Appian Took Reasonable Steps to Protect its Trade Secrets

Appian's evidence included extensive expert testimony regarding Appian's measures to protect its trade secrets, including through employing "terms of use and license agreements," restricting "access to documentation," and using "firewalls." Appian's expert, Dr. Cole, also described Appian's use of "multifactor authentication," "encryption . . . [,] user authentication, [and] password change requirements." Ultimately, Dr. Cole opined that the steps Appian took to protect its trade secrets were reasonable under the circumstances and entirely consistent with industry standards. Courts consistently have recognized such measures as reasonable under

[8] Pega acknowledges that Appian used "terms of use," which were imposed on developers. Pega argues that Appian's "terms of use" are insufficient to protect its trade secrets because many of the "terms of use" provisions contained no confidentiality restrictions. Pega acknowledges that the agreement between Zou and his employer, Serco, did in fact contain "some confidentiality provisions." Appellant's Br. at 25. But it also points out that the language does not mention Appian, nor identify what information constitutes Appian's trade secrets.

comparable circumstances. *See* Sinclair, 1 Virginia Remedies, *supra*, § 29-1 (listing reasonable efforts to protect trade secrets).

Moreover, while Pega suggested that resellers could freely disclose the targeted information to prospective buyers, the lengthy record is devoid of any evidence of such wholesale disclosures taking place. As Appian observes, evidence from Pega's own witnesses spoke volumes as to the difficulty Pega had getting its hands on Appian's product. One Pega executive, Ben Baril, told a colleague: "Appian is very guarded about their technology so some of this information is impossible to come by without access to a system." Given Pega's access problem, when Petronio utilized a search firm to identify a developer to share the desired information, he advised the recruiter that "access to the Appian BPM tool is a must" and "make sure they aren't loyal to Appian . . . ." Ultimately, the evidence, when viewed in best light to Appian, reveals that Pega used a "spy" to obtain access to Appian's software and confidential "documentation."

The trial court here correctly determined that Appian provided sufficient evidence to survive Pega's motions to strike and to set aside the verdict. Whether Appian established that its information constituted a trade secret was a question of fact for the jury. The voluminous record here demonstrates numerous, earnest ways in which Appian sought to protect its information; similarly, when viewed in best light to Appian, the record shows that the trade secrets were not generally known nor readily ascertainable. Accordingly, we cannot say, as a matter of law, that Appian failed to prove the existence of any trade secrets.

D. Pega's "Particularity" Argument

Pega next asserts that Appian failed to identify its secrets with sufficient particularity "to allow the finder of fact to distinguish that which is legitimately a trade secret from other

information that is simply confidential but not a trade secret, or is publicly available information." *MicroStrategy Inc.*, 331 F. Supp. 2d at 418.

Pega suggests that a heightened "particularity" requirement should be read into Code § 59.1-336. But, as the Utah Supreme Court has opined: "[I]f a 'particularity' requirement beyond what is present in the statute is to be required in trade secret cases, it is for the legislature to implement." *USA Power, LLC v. PacifiCorp*, 372 P.3d 629, 649 n.44 (Utah 2016). Otherwise, a plaintiff need only "defin[e] its purported trade secret in a manner that would allow the factfinder to determine if it met the statutory requirements." *Id.* at 649-50. Virginia's General Assembly has implemented no "particularity" requirement here.

Nonetheless, this debate is somewhat semantic—because Appian is still required to plead and present its case under Virginia law with enough clarity that Pega is adequately informed of what it is defending. *See Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141 (1981). In *Dionne*, our Supreme Court noted that "the proponent must bear the burden of proving a trade-secret claim." 240 Va. at 303 n.2; *see also Preferred Sys. Sols.*, 284 Va. at 407 (stating plaintiff's trade secret claim must provide sufficient facts informing defendant of the nature and character of the claim asserted); Restatement (Third) of Unfair Competition § 39 cmt. d (explaining "[a] person claiming rights in a trade secret bears the burden of defining the information for which protection is sought with sufficient definiteness to permit a court to apply the criteria for protection . . . and to determine the fact of an appropriation").

The need for such clarity is paramount in the trade secret arena because the scope of a trade secret may be quite broad, while at the same time there is no requirement that the holder must file with an administrative body either a written description or an example of the material to be protected, in contrast to patent and copyright law, respectively. *See* 35 U.S.C. §§ 111-112; 17 U.S.C. § 411. Only the plaintiff knows what it considers to be secret—and the defendant cannot

harness a defense without gaining a meaningful description of the violation. *See Inteliclear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 658 (9th Cir. 2020) (to "prove ownership of a trade secret, plaintiffs 'must identify the trade secrets and carry the burden of showing they exist'" (quoting *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F2d 511, 522 (9th Cir. 1993))). Similarly, the factfinder needs to know the alleged secrets' precise contours so it can determine whether the information was generally known and reasonably protected, as well as to assess its worth. *See Trandes Corp.*, 996 F.2d at 661 (a plaintiff must "describe the subject matter of its alleged trade secrets in sufficient detail to establish each element of a trade secret").

While we decline to impose any "heightened" particularity standard that is not found in VUTSA, we do adhere to the admonition that Appian was required to identify its claims in a manner that informed the defendant of the character of the claims asserted. *See Preferred Sys. Sols.*, 284 Va. at 407; *MicroStrategy, Inc.*, 331 F. Supp. 2d at 418. We believe, on this record, Appian's evidence sufficiently identified its secrets to survive Pega's motions to strike and to set aside the verdict.

1. The "Architecture and Design" Trade Secrets Were Sufficiently Delineated to Survive a Motion to Strike and to Set Aside the Verdict on this Record

Appian alleged that Pega misappropriated five "architecture and design" trade secrets: i.e., information Pega lifted from Appian's platform to bolster its own product. These design secrets were Appian innovations dealing with Smart Services, Custom Data Types, Ease-of-Editing Functionality, Out-of-the-Box Ability to Deploy Applications to Mobile, and Out-of-the-Box Integrated Social View of Worklist and Tasks. We will address each feature in turn—and in each case Appian's expert, Dr. Marshall, provided testimony establishing the contours of the secret.

(a) Smart Services

Appian's Smart Services feature enabled software developers to build applications more easily by making available a pre-coded tool "shape" to perform a given task. Dr. Marshall testified that Pega "did not have Smart Services" in Versions 6.2 and 6.3 of its software. He further testified that although "[t]here was information that these services existed," information about "how they worked, how [they] were used was not publicly available. That was privileged information." According to Dr. Marshall, Pega focused on this feature in its sessions with Zou, "asking a number of questions about how Smart Services work in the context of building an application[.]"

Ultimately, according to Dr. Marshall, Pega added a Smart Services feature similar to Appian's to its own platform. Dr. Marshall testified that Pega's improvement related to Smart Services was "released in September 2013" and "there [was] a new category that ha[d] been added to the flow editor, which is the Pega equivalent of what we've just seen called smart shapes. These smart shapes are a subset of the Smart Services offered by Appian." This improvement, according to Dr. Marshall, "greatly enhance[d] [Pega's] ease of use," "greatly reduce[d] the need for training," "reduced the number of errors that developers ma[de]," "increase[d] the number of people who can use the [Pega] platform," and "increase[ed] the productivity of those people." In Pega's marketing publication, "Pega 7: Why Upgrade?" Pega touted this new feature as a reason for customers to purchase the latest version of its software.

(b) Custom Data Types and Ease-of-Editing

Appian's Custom Data Types (CDTs) were a means of improving "human understanding of data" in a project. According to Marshall, Pega had a "different mechanism" called "data classes" which was "difficult for developers to understand." Dr. Marshall testified that Pega made improvements to its platform by adding custom data types that mimicked Appian's CDTs.

He further testified that "[t]hese changes significantly simplify and accelerate the data modeling process in the Pega platform." In its marketing materials, including its "Why Upgrade?" publication, Pega highlighted its new CDT-like feature that would "make[] it easier and faster for developers to know how to use the data and modify the application."

Appian's Ease-of-Editing Functionality feature allowed developers to transition from a simulated end-user environment to an editing environment without having to go through a complex series of navigations. Zou also disclosed this feature to Pega. According to Marshall, Pega's "editing process" did not have an equivalent feature, and Appian alleged that Pega copied this feature to improve its own platform. Dr. Marshall opined that Pega's changes to its editing features were the result of Zou's demonstrations of the platform for Pega's product management team. He further testified these changes were significant because they enabled Pega's platform to be used by "a much broader constituency of users," and allowed "business analysts, less technical people to be able to accomplish far more."

(c) Out-of-the-Box Features

According to Appian's evidence, Pega also co-opted Appian's "out-of-the-box" mobile capabilities. Appian's model did not require any coding to deliver applications to mobile devices, while "Pega had a very basic capability that was not out of the box" and "[d]idn't do very much." Marshall suggested that Pega was floundering in this arena while Appian's mobile capability "was already delivering the ability to take your applications . . . and deliver them to mobile devices as well as the desktop . . . ." Ultimately, Pega added out-of-the-box ability to deploy applications to mobile devices in Version 7.1. Per Dr. Marshall: "this improvement increased developer efficiency and eliminated the need to create separate versions of an application for a phone, tablet, or desktop."

Appian's final "architecture and design" trade secret related to its "Out-of-the-Box Integrated Social View of Worklist and Tasks." This feature allowed for better social interaction among users working on a project. Again, according to Marshall, prior to meeting with Zou, Pega did not have a comparable feature, as its social capability was "extremely basic." After Zou conducted training videos on social interactions among users, Pega subsequently made an improvement to this feature. In its "Why Upgrade?" publication, Pega listed its new social capabilities as a "new and improved feature[]" that "enhance[d] the value of . . . Pega applications," and "gives users the tools to chat easily with colleagues[,] . . . advance a process or resolve a case directly from their conversation feeds, and even incorporate conversations from external social media networks."

Appian's expert identified contours of each of these "Design and Architecture" trade secrets. Marshall's testimony spanned nearly three days and over 800 transcript pages. Appian sufficiently laid out these trade secrets, letting the jury know what Pega was accused of misappropriating.

2. Identifying "Documentation" Secrets and Weaknesses in Appian's Product

In addition to identifying its "Architecture and Design" trade secrets, Appian asserted additional trade secrets were misappropriated based on "sensitive structural limitations of Appian's platform previously unknown to Pega[.]" These secrets essentially boiled down to serious weaknesses in Appian's BPM platform that competitors could exploit. Again, VUTSA's definition of a trade secret encompasses information that derives independent economic value from not being known or readily ascertainable by competitors who "can obtain economic value for its disclosure or use." Code § 59.1-336. Appian's asserted trade secrets in this regard relate to Pega obtaining Appian's "written documentation" that included private information as well as

Pega's ability to identify and exploit weaknesses in Appian's software once armed with Zou's demonstrations and Appian's documentation.[9]

Indeed, Pega initiated a program dubbed "Project Crush" where it analyzed Appian's strengths and weaknesses, and determined that Pega's software had many significant advantages over Appian's. Buttressed by this knowledge, Pega created or updated marketing materials attacking Appian based on these vulnerabilities. Each of the so-called "weakness" trade secrets identified by Appian was the subject of a Pega marketing foray. *Supra* at 7-8. Pega marketing materials addressing these weaknesses were presented to the jury as exhibits.

On this record, the trial court did not err in denying Pega's motions to strike and to set aside the verdict as a matter of law. Having rejected Pega's position that it is entitled to judgment as a matter of law, we next turn to Pega's claims that a series of evidentiary errors and instruction missteps below necessitate a retrial. Here, we agree with Pega.

II. The Trial Court Erred by Giving Instruction 14 Which Failed to Place the Burden of Proving Proximate Causation on Appian

A. Standard of Review

The sole purpose of appellate review of jury instructions is "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Dorman v. State Indus., Inc.*, 292 Va. 111, 125 (2016) (quoting *Cain v. Lee*, 290 Va. 129, 134 (2015)). "We review a trial court's decisions in giving and denying requested jury instructions for abuse of discretion." *Conley v. Commonwealth*, 74 Va. App. 658, 675 (2022). "Whether a proffered

[9] For example, Zou gave Pega confidential portions of certain Appian documents including one entitled "High Availability and Disaster Recovery Configurations," which contained descriptions of Appian's software. Zou also gave Pega a portion of Appian's "Tempo documentation," and additional documentation relating to its mobile and social capabilities. Zou further accessed Appian's user manual through Appian Forum and provided this information to Pega.

jury instruction accurately states the law, however, is reviewed de novo." *Holmes v. Commonwealth*, 76 Va. App. 34, 53 (2022). "Questions relating to burden of proof, including the standard of proof and which party bears the burden to meet it, are questions of law reviewed de novo." *La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC*, 294 Va. 243, 257 (2017) (quoting *Ballagh v. Fauber Enters.*, 290 Va. 120, 124 (2015)).

B. VUTSA and Virginia Precedent Require Plaintiffs to Prove Proximate Cause

Remedies based on unjust enrichment require a defendant to disgorge its gain resulting from a wrong. *Schmidt v. Household Fin. Corp.*, 276 Va. 108, 116 (2008).[10] The damages Appian sought against Pega were grounded in unjust enrichment. VUTSA requires the complainant to prove that "unjust enrichment" damages were "caused by misappropriation." Code § 59.1-338(A). Yet, the trial court's instructions, here, relieved Appian of its burden of proving that the alleged misappropriation *caused* Pega to win any sale. The trial court rejected Pega's requests for instructions requiring Appian to prove that "Pega's wrongful conduct was the proximate cause of Appian's damages." Instead, the court instructed the jury to apply a burden-shifting approach under which, upon proving a misappropriation of a trade secret, Appian's only further burden was to "establish[] by . . . greater weight of the evidence Pegasystems' *sales*." (Emphasis added).

The result was a presumption that Appian's trade secrets were the but-for cause of all of Pega's sales—including product lines that did not use any information associated with Appian's claimed trade secrets. Under this hotly contested framework, once Appian proved Pega's total sales revenue (which was billions during the relevant time frame), the burden shifted to Pega to

[10] VUTSA expressly states that it "displaces conflicting tort, restitutionary, and other law of this Commonwealth providing civil remedies for misappropriation of a trade secret." *See Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 205 n.51 (2016) (quoting Code § 59.1-341(A)).

prove what portion of these sales were not attributable to the trade secrets. Pega contended that this damages rubric was impermissible on multiple levels: (1) it failed to place the burden of proving proximate cause on Appian, (2) it utilized burden shifting concepts that the Supreme Court of Virginia has rejected, and (3) even if burden shifting were appropriate in the unjust enrichment arena, the instruction utilized here, which was modeled after principles enunciated by the Restatement of Unfair Competition, improperly applied the Restatement framework. We agree with Pega on all fronts.

1. Instruction 14

Appian argued to the trial court that burden shifting was appropriate under the Restatement (Third) of Unfair Competition in the situation where a victim of misappropriation has relied upon unjust enrichment damages under VUTSA because the wrongdoer has more knowledge of its own sales than the victim. Based on this logic, Appian championed a burden-shifting framework which placed the onus on Pega, after Appian demonstrated misappropriation, to prove *all* of its sales were not tainted. This instruction followed:

> If you find that plaintiff Appian has proved by greater weight of the evidence its claim for misappropriation of trade secrets against defendant Pegasystems, you must find your verdict for Appian and decide the issue of damages as to Pegasystems. You may award the amount of unjust enrichment caused by misappropriation.
>
> For unjust enrichment, Appian is entitled to recover Pegasystems' net profits. Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales; Pegasystems has the burden of establishing by greater weight of the evidence any portion of the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits.

Instruction 14.

Per the instruction, the court advised the jury that Appian could prove its damages simply by establishing "Pegasystems' sales." This framework impermissibly "shifted the burden" to

Pega to prove sales were not related to the wrongdoing and relieved Appian of its burden to prove proximate cause for the misappropriation. Put another way, for damages purposes, Appian only had to establish Pega's enrichment—it did not have to prove "unjust" enrichment. Moreover, by permitting Appian to use *all* of Pega's sales as damages, the instruction removed any causation nexus between the sales and the misappropriation.

2. VUTSA's Express Language Forecloses Appian's Theory

"Statutory interpretation is a question of law which we review de novo, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." *Wright v. Commonwealth*, 278 Va. 754, 759 (2009). When a statute "is plain and unambiguous, [courts] are bound by th[at] plain meaning." *Jones v. Commonwealth*, 296 Va. 412, 415 (2018) (quoting *Alston v. Commonwealth*, 274 Va. 759, 769 (2007)). A court "must presume that the General Assembly chose, with care, the words that appear in a statute, and must apply the statute in a manner faithful to that choice." *Id.* (quoting *Johnson v. Commonwealth*, 292 Va. 738, 742 (2016)). "Once the legislature has acted, the role of the judiciary 'is the narrow one of determining what [the legislature] meant by the words it used in the statute.'" *Dionne*, 240 Va. at 304 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980)).

VUTSA's plain language places the burden of proving unjust enrichment damages caused by misappropriation on the complainant:

> Damages can include both the actual loss *caused by misappropriation* and the unjust enrichment *caused by misappropriation* that is not taken into account in computing actual loss. *If a complainant is unable to prove* a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Code § 59.1-338(A) (emphases added). First, under the statute's plain language, only damages "caused by misappropriation" are recoverable.

Moreover, the second sentence of the provision makes clear that it is the *complainant*—Appian—that has the burden to "prove" unjust enrichment damages.[11] It is also notable that the key statutory language "[i]f a complainant is unable to prove" is unique to VUTSA. While forty-eight other states have enacted the Uniform Trade Secrets Act (UTSA), the model uniform act does not speak in terms of the complainant "proving" damages.[12] Virginia expressly codified this language clarifying that the burden to "prove" damages is on the complainant. Where a legislative body deviates from a model, uniform act to add language, we effectuate this "deliberate and intentional" choice. *Commonwealth, Dep't of Taxation v. Champion Int'l Corp.*, 220 Va. 981, 992 (1980); *see Cornell v. Benedict*, 301 Va. 342, 350 (2022) ("Our canons of statutory construction presume that the General Assembly's decision" not to adopt some of the statute's definitions, while accepting others, "represents a conscious decision with deliberate implications."). Thus, VUTSA's express language militates against relieving Appian of its burden of proving proximate cause.

[11] Construing the burden is straightforward. The first sentence authorizes damages in the form of actual loss and/or unjust enrichment caused by misappropriation. The second sentence sets forth when a plaintiff may pursue a reasonable royalty. In doing so, the second sentence refers to "other methods of measurement"—which includes the methods mentioned in the first sentence: actual loss and unjust enrichment. Code § 59.1-338(A). Thus, a reasonable royalty is available only if *a complainant is unable to prove* a greater amount of actual loss, unjust enrichment or other damages caused by misappropriation. Notably, the availability of the royalty recovery hinges on the *complainant's* inability to *prove* higher unjust enrichment damages; this framework confirms the complainant has the burden to prove unjust enrichment caused by misappropriation in the first instance.

[12] In discussing when a royalty remedy is available, the corresponding sentence in section 3(a) of the UTSA begins in relevant part: "In lieu of damages measured by any other methods . . . ." Virginia replaced this wording with: "If a complainant is unable to prove a greater amount of damages by other methods of measurement . . . ." *Supra* at 32.

3. Virginia Precedent Requires that Appian Bear the Burden of Proving Proximate Cause

Even if VUTSA did not contain this clarifying language, Virginia law generally places the burden on plaintiffs "in any case" to "prove with reasonable certainty the amount of [their] damages and the cause from which they resulted." *Hale v. Fawcett*, 214 Va. 583, 585-86 (1974). Establishing proximate cause requires a plaintiff to prove that defendant's unlawful conduct produced the damages in a "natural and continuous sequence" and that it was a but-for cause "without which that event would not have occurred." *Ford Motor Co. v. Boomer*, 285 Va. 141, 150 (2013); *see also Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 189 (2006) (plaintiff bears burden of proving its damages were proximately caused by defendant's wrongful conduct). This requirement also applies in the trade secret arena.

Our Supreme Court has stated that to establish lost profits a plaintiff has "the burden of proving with reasonable certainty the amount of damages and the cause from which they resulted; speculation and conjecture cannot form the basis of the recovery." *Banks v. Mario Indus.*, 274 Va. 438, 455 (2007) (quoting S*aks Fifth Ave., Inc.*, 272 Va. at 188). A plaintiff must establish both a causal connection between defendant's wrongful conduct and the damages claimed—and prove the amount of damages with reasonable certainty using a proper method and factual foundation for calculating such damages. *See Saks Fifth Ave., Inc.*, 272 Va. at 188-89. Professor Sinclair's treatise on remedies also notes that this causation requirement should be applied to trade secret claims, including claims for unjust enrichment damages. *See* Sinclair, 1 Virginia Remedies, *supra*, § 29-3[A]; *see also Saks Fifth Ave., Inc.*, 272 Va. at 190 (Plaintiffs must "show the necessary factor of proximate causation.").

Given the plain language of the Act and the foregoing case law on causation and damages principles, Instruction 14 was erroneous in requiring Appian to prove only misappropriation plus

Pega's total sales to meet its burden in proving damages. Appian should have been required to carry the burden of proving that the misappropriation *caused* the damages—and to prove its damages and their cause with reasonable certainty.[13] *Banks*, 274 Va. at 455.

C. Virginia has Rejected the Burden-Shifting Framework Adopted by the Trial Court—and even if it had not, the Instruction Granted by the Trial Court Misconstrues the Restatement Approach

In addition to relieving Appian of its obligation of proving proximate cause, the trial court's Instruction 14 openly applies a burden-shifting framework. Our Supreme Court has explicitly addressed the issue of burden-shifting under VUTSA: "The plain language of the Act does not provide any burden-shifting requirement. As we observed in *Dionne*, 'the proponent must bear the burden of proving a trade-secret claim.' This burden does not shift, even when a plaintiff has presented a prima facie case." *MicroStrategy Inc.*, 268 Va. at 265 (quoting *Dionne*, 240 Va. at 303 n.2).

Appian argues that *MicroStrategy* is not controlling here because it was discussing burden-shifting in the context of the misappropriation element. However, the Court in

[13] Appian observes that the instructions permit the jury to find "the amount of unjust enrichment caused by misappropriation." However, we agree with Pega that saying a jury may "find something is not the same as saying Appian has the burden of proving it. Only one sentence in the instructions addresses Appian's burden: . . . 'Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales.'" Reply Br. at 13. Even if we did not hold that this instruction is erroneous, under Virginia law, the uncertainty spawned by this framework would warrant reversal based on confusion. *See Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 536 (2006) ("[W]here an erroneous instruction conflicts with an instruction that correctly states the law, the verdict must be set aside because it is impossible to determine which instruction was the basis for the jury's decision."); *Gabbard v. Knight*, 202 Va. 40, 47 (1960) (finding that giving conflicting and inconsistent instructions is error, unless it plainly appears from the record that the jury could not have been misled by them); *see also ADA Motors, Inc. v. Butler*, 432 P.3d 445, 451 (Wash. Ct. App. 2018) (finding trial court erred by granting instruction that only required plaintiff to establish defendant's sales because such instruction contained potential for confusion or uncertainty). "No instruction should be given that incorrectly states the applicable law or which would be confusing or misleading to the jury." *Kennemore v. Commonwealth*, 50 Va. App. 703, 712 (2007) (quoting *Mouberry v. Commonwealth*, 39 Va. App. 576, 581-82 (2003)).

MicroStrategy did not qualify or limit its finding that VUTSA does not permit any burden-shifting. While the Court made this ruling in the context of the misappropriation element, VUTSA contains no burden-shifting requirement as to damages either; indeed, as discussed above, the statutory language in Code § 59.1-338(A) places the burden of proof for damages squarely on the complainant.

1. A Proper Reading of the Restatement Reveals that the Complainant Bears the Burden of Proving Proximate Cause

Even if it were appropriate under Virginia law to employ burden-shifting and to invoke the approach adopted by the Restatement (Third) of Unfair Competition, the instruction advanced by Appian wholly misconstrued the Restatement framework. Jurisdictions that allow burden-shifting require plaintiffs to prove more than misappropriation plus total sales. These jurisdictions still require the *plaintiff* to prove "whether or not the sales are attributable to the trade secret[s]"—what some commentators call "sales causation." *See, e.g., ADA Motors, Inc. v. Butler*, 432 P.3d 445, 449-51 (Wash. Ct. App. 2018); *Syntel Sterlin Best Shores Mauritius Ltd. v. Trizetto Grp., Inc.*, 68 F.4th 792, 810 (2d Cir. 2023) (finding Restatement requires plaintiff to establish "defendant's profits on sales attributable to the use of the trade secret").

Under the Restatement formula, *after* the plaintiff has established sales causation, the burden shifts to defendants for analysis of subsequent considerations including: (1) deducting expenses from revenue to yield profits; and (2) what is often called "apportionment" which is the exercise of segregating the portion of revenue from any particular sale that is attributable to the misappropriated information from the portion that is "not attributable to the trade secret[s]."[14] *ADA Motors, Inc.*, 432 P.3d at 450-51.

[14] Apportionment attempts to identify the value of the copied feature from the value attributable to the defendants' own contributions. *ADA Motors*, 432 P.3d at 450-51; *accord* William O. Kerr & Richard B. Troxel, *Calculating Intellectual Property Damages* §§ 7:2, 7:4

These steps—apportionment and profit calculation—help isolate the defendant's unjust gains from its just ones. *See* William O. Kerr & Richard B. Troxel, *Calculating Intellectual Property Damages* § 7:4 (2018 ed.); *Collelo,* 283 Va. at 84 (McClanahan, J., concurring and dissenting in part) (explaining that plaintiffs must "provid[e] a factual basis upon which a jury could discern between [defendants'] just and unjust enrichment"). And, again, the Restatement shifts the burden to defendant to prove these adjustments to the damage calculation—deducting expenses, apportionment, and isolating "just" profits—only after plaintiffs prove the first step: the share of sales that were *caused by the misappropriation*. In short, nothing in the Restatement methodology relieved Appian of its obligation to prove causation in the first instance. This approach is consistent with the Restatement comments and uniform practice of the states that have adopted the Restatement framework. *See ADA Motors, Inc.*, 432 P.3d at 451 ("The plaintiff has the initial burden of proving sales attributable to the trade secret."); *Iconics, Inc. v. Massaro,* 266 F. Supp. 3d 461, 467 (D. Mass. 2017) ("[i]n order to establish defendants' unjust profits, plaintiffs must 'do more initially than toss up an undifferentiated gross revenue number; the revenue stream must bear a legally significant relationship to the infringement" (citations

(2018 ed.). For example, if a defendant made a wonderful, groundbreaking innovation, but then misappropriated one minor editing function from a competitor to enhance the creation, the competitor would not usually recover all profits from the innovation. *See* Restatement § 45, cmt. f: "[I]f the trade secret accounts for only a portion of the profits earned on the defendant's sales, such as when the trade secret relates to a single component of a product marketable without the secret, an award to the plaintiff of a defendant's entire profit may be unjust."

omitted)).[15] The Restatement certainly does not authorize a plaintiff to sidestep its burden of proof as to proximate cause between sales and the misappropriation.[16]

2. The Trial Court Misplaced Reliance on Comment f in the Restatement of Unfair Competition § 45 and on *Petters v. Williamson & Assocs., Inc*., 210 P.3d 1048 (Wash. Ct. App. 2009), to Justify Instruction 14; Neither the Restatement nor the Washington Case Law Support Instruction 14

The trial court granted Instruction 14 based on a misreading of comment f of the Restatement of Unfair Competition § 45 and a case from Washington state that utilized the instruction at issue in another context. Ultimately, Instruction 14 was inconsistent with the very authorities Appian invoked—the Restatement and Washington law.

Comment f, set out below, actually confirms that plaintiffs bear the burden to show proximate cause (or sales causation).[17] The comment first defines the outer limits of recoverable

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[15] *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) ("[I]f General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits."); *Inteum Co. v. Nat'l Univ. of Sing.*, 371 F. Supp. 3d 864, 884-85 (W.D. Wash. 2019) (providing the plaintiff bears the initial burden of establishing the defendant's profits, and then the defendant subsequently bears the burden of establishing which portion of those profits is not attributable to the trade secret and any expenses that should be deducted).

[16] The Restatement makes clear that unjust enrichment is not simply a deep pocket mechanism for collecting sales profits unconnected to wrongdoing. "Allegations that the defendant is a wrongdoer, and that the defendant's business is profitable, do not state a claim in unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment § 51, cmt. I (2011); accord Restatement (First) of Torts § 747, cmt. c (1934) ("[T]he defendant is liable not for the entire profits of his business but only for the profits earned by means of his tortious conduct.").

[17] In pertinent part, comment f states:

> Relief measured by defendant's gain. The traditional form of restitutionary relief in an action for the appropriation of a trade secret is an accounting of the defendant's profits on sales *attributable to the use of the trade secret*. The general rules governing accountings of profits are applicable in trade secret actions. The plaintiff is entitled to recover the defendant's net profits. *The plaintiff has the burden of establishing the defendant's sales*; the defendant has the burden of establishing any portion of

unjust enrichment damages: plaintiffs can recover a defendant's "*profits on sales attributable to the use of the trade secret*." Restatement (Third) of Unfair Competition § 45, cmt. f (1995) (emphasis added). The comment then uses the language Appian emphasized in Instruction 14—identifying a plaintiff's burden as "establishing the defendant's sales." *Id.* This mid-paragraph proposition, however, assumes what has been previously stated in the comment—that plaintiff must *first* identify sales attributable to the improper use of the trade secret. Thus, when this sentence speaks of identifying defendants' "sales," it takes for granted that this figure will be a subset of relevant damages—i.e., sales attributable to the use of the trade secret.[18]

The trial court, however, applied the term "sales" to all Pega's sales—not just sales attributable to the misappropriation of the trade secret. To support its reading of comment f, the trial court adopted a novel interpretation of the law of Washington state and purported to follow *Petters*, 210 P.3d at 1054. *Petters* involved the misappropriation of the design of an undersea drill. Notably, *Petters* did *not* absolve plaintiffs of the initial burden of proving sales causation; it addressed the defendant's *apportionment* burden following the Restatement's burden-shifting template. *Id.* Critically, several years later, in *ADA Motors*, the Washington Court of Appeals clarified and emphasized that *Petters* should *not* be read to relieve a plaintiff of its burden of proving proximate cause. The *ADA Motors* court flatly rejected an instruction nearly identical to the one issued here: "Plaintiff has the initial burden of proving defendants' sales." S*ee* 432 P.3d at 451 (emphasis omitted). The *ADA Motors* court held the instruction to be error—even under

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> the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.

Restatement (Third) of Unfair Competition § 45, cmt. f (1995) (emphases added).

[18] Comment f then shifts the burden to defendants to winnow damages via other factors such as profit calculation and apportionment; for example, showing the value of features that the defendant contributed to the disputed sale.

Petters—because it could "be read to allow the plaintiff to satisfy its burden with gross sales data, *whether or not the sales are attributable to the trade secret*." *Id.* (emphasis added). That is exactly what happened here.

The *ADA Motors* court explained that a proper instruction must impose on plaintiffs the burden of proving not just any sales, but sales "attributable to the trade secret."[19] *Id.*; *accord Inteum Co.*, 371 F. Supp. 3d at 884-85.[20]

Thus, Instruction 14 contravenes Virginia case law, VUTSA's express language, and the Restatement's own burden-shifting framework. We hold that the granting of Instruction 14 was reversible error. Accordingly, we remand for a new trial in which the jury is instructed that the complainant bears the burden of proving proximate cause between the misappropriation and any unjust enrichment damages. *See Saks Fifth Ave., Inc.*, 272 Va. at 190.[21]

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[19] Here, the trial court acknowledged that Instruction 14 was inconsistent with Washington law under *ADA Motors*: "I see that and I disagree with [*ADA Motors'*] conclusion . . . I think this is the wrong standard" under Virginia law. In doing so, it adopted *Petters* while rejecting a subsequent—and controlling—holding of the same court.

[20] Finally, from a policy perspective, chaos would ensue in commercial litigation settings if we adopted the premise that the burden for a plaintiff seeking unjust enrichment for any misappropriation of a trade secret in Virginia is simply showing all sales made by the defendant. Here, Instruction 14 bluntly informed the jury that Appian could establish damages merely by showing that Pega earned $6 billion in sales revenue during the relevant time frame. That is certainly what Appian argued to the jury, noting that "the burdens of proof . . . are critical" and repeatedly focusing on Instruction 14: "We just got to show all the money that flowed in, the 6 billion plus from their customers, right? That's what we have to show." If this instruction were correct, billions of dollars in "total sales" commonly would be in play in corporate trade secret cases involving unjust enrichment—regardless of whether a single, minor misappropriation were asserted or a hundred serious ones. Trade secret litigation routinely would devolve into a "bet the company" gamble unfettered by proximate cause burdens.

[21] We recognize that this error is central to damage issues; however, errors addressing liability follow which require a new trial on VUTSA liability issues as well.

III. The Trial Court Erroneously Excluded Evidence Relevant to Damages and Causation Based on a Skewed Reading of an Interrogatory Response

After Instruction 14 improperly shifted the burden to Pega to disprove damages, the trial court then hampered Pega from meeting that burden by precluding Pega from presenting evidence, or conducting cross-examination, to demonstrate that much of Pega's total sales revenue was attributable to products with which Appian did not compete and that had "nothing to do with" the misappropriation. This evidence, highlighted in detail earlier, *supra* at 16, included testimony that "more than 50 percent of Pega's revenue is derived from customers" buying products not in competition with Appian and that Pega had many customers who "bought things that Appian didn't sell."

Pega's efforts to *disprove* such total sales, under the flawed instruction, were short-circuited based upon a dispute involving an interrogatory. The interrogatory sought information about Pega *revenues* derived from different *versions* of its *software*:

> Interrogatory No. 18: Identify all revenues received by Pegasystems for each fiscal year from 2012 through 2021 relating to Pega 6.3, Pega 7.0 and any subsequent version broken out by year and version of the software; and identify the costs and expenses Pegasystems incurred in order to realize those revenues.
>
> Answer: Pegasystems does not record or report revenue, or any associated costs and expenses incurred by Pegasystems, based on the "version" of the product sold (e.g., Pega 6.3, Pega 7.0). There is no mechanism or process by which Pegasystems is able to determine these revenue, cost and expense amounts. As a result, Pegasystems' financial results (including total revenue and all associated costs and expenses) for each applicable fiscal year as reported to the SEC in Pegasystems' annual Form 10-K filings and quarterly Form 10-Q filings are attached as Schedule 3.

R. 47525-26 (objections omitted). While Pega disclaimed revenue records for *versions* of its software in this answer—the trial court interpreted the response to disclaim records for all of its *products* or other *lines of business*: "[Y]ou've essentially given up by answering an

interrogatory that you can't breakdown the damages, you can't breakdown your revenue based on lines of business."

The trial court's reading of the response misses the distinction between different *products* and different "*versions*" of the same product. The interrogatory asked about "*versions*" of a specific product: Pega's software. Reporting that Pega does not track revenue by software versions is not tantamount to asserting that Pega sells no other products or that Pega does not track revenue by product or by lines of business. This is particularly true where long before trial Pega's damages expert, Platt, submitted a report breaking out revenue attributable to various products.

A trial court has the authority to exclude evidence when, for example, a party makes a blunt disavowal of "overcharge damages" and then shows up at trial seeking to prove such damages. *See Little v. Cooke*, 274 Va. 697, 717-18 (2007). Similarly, if a party asserts in discovery it has no witnesses on whether the traffic light was green or red—and that it conducted no tests on its car's brakes—the trial court can limit the litigant from providing witnesses at trial who claim the light was green, *Martin & Martin v. Bradley Enters.*, 256 Va. 288, 292 (1998); it can also bar undisclosed test reports that reveal the brakes were working perfectly. *See John Crane, Inc. v. Jones*, 271 Va. 581, 593 (2007) (in an expert report context). The logic behind this authority is (1) to aid in disclosure of "all relevant and material evidence before trial in order that the trial may be an effective method for arriving at the truth" and (2) to prevent ambush at trial. *Cooke*, 274 Va. at 717-18.

The above examples of clear discovery misstatements are straightforward and stark. And litigants who provide misleading or false answers in discovery run the risk of harsh consequences at trial. But, here, Pega's discovery response was appropriate, under the circumstances, and the proponent did not object or seek clarification of the response prior to trial.

Appian framed its interrogatory to ask about "versions" of software rather than product lines. Pega answered the interrogatory as it was posed. The interrogatory sought revenues "relating to *Pega 6.3, Pega 7.0* and any subsequent version broken out by year and version of the *software*." R. 47525 (emphases added). The interrogatory request by its express language did not ask Pega to break down revenue based on other product or business lines—rather it focused on "versions" of software. There was no ambush by Pega—or even surprise—as Appian received breakdowns of other product lines in discovery.

If Appian felt the interrogatory answer was unclear or incomplete, it was permitted to seek clarification through a pre-trial motion to compel and, further, a motion seeking sanctions for any failure to comply. Rule 4:12.[22] These options, too, are consistent with the objectives stated in *Cooke* of employing methods designed to arrive "at the truth" and to prevent trial by ambush. *Id.* What happened at trial with respect to Interrogatory 18 defeated both of these goals.

While a trial court wields considerable discretion in deciding evidentiary matters, discretion does "not mean that the [trial] court may do whatever pleases it. The phrase [abuse of discretion] means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Landrum v. Chippenham Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)).

[22] If Appian saw a possible inconsistency between Pega's interrogatory answer and its evidence at trial, then its options for relief included objecting or seeking clarification pre-trial, or introducing the response as evidence at trial and asking the jury to reject Pega's "new position" as untrue. *See TransiLift Equip., Ltd. v. Cunningham*, 234 Va. 84, 93 (1987) ("Resolution of any inconsistencies and discrepancies is peculiarly within the province of the jury."); *see also Gentry v. Toyota Motor Corp.*, 252 Va. 30, 34 n.2 (1996) ("Discovery depositions and answers to interrogatories generally are not conclusively binding upon a party.").

> An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

Id. (quoting *Kern*, 738 F.2d at 970).

We do not see any justifiable basis for the trial court's decision to bar admission of evidence of Pega's massive revenue from products which had nothing to do with any alleged misappropriation based on the interrogatory response. *See Lawlor v. Commonwealth*, 285 Va. 187, 213-14 (2013); *Landrum*, 282 Va. at 352. Here, the trial court demonstrated an error in judgment in concluding that Pega's response to this interrogatory somehow foreclosed the availability of evidence of sales of other product lines.

Appian now posits two cases in an attempt to justify the exclusion of this evidence as a recourse for "discovery abuses." But both cases involve exclusion of evidence as a sanction for violation of a court order. *See Spaid v. Spaid*, No. 0021-22-4, slip op. at 10-11 (Va. Ct. App. Oct. 25, 2022) (affirming discovery sanction "after the circuit court ordered" compliance); *Moore v. Moore*, No. 0314-20-4, slip op. at 22 (Va. Ct. App. Oct. 27, 2020) ("[W]ife violated the scheduling order."). Appian did not seek sanctions or assert noncompliance with a court order regarding the interrogatory below. The trial court did not exclude Pega's damages evidence as a sanction pursuant to Rule 4:12; thus, Appian's reliance on the two, unpublished cases is unpersuasive.[23]

[23] Notably, even if a sanction had been imposed—and it was not—sanction analysis must encompass some notion of proportionality. *See Emerald Point, LLC v. Hawkins*, 294 Va. 544, 558-59 (2017) (in a spoliation context, "[t]o allow such a severe sanction as a matter of course when a party has only negligently destroyed evidence is neither just nor proportionate" (quoting *Brookshire Bros., Ltd v. Aldridge*, 438 S.W.3d 9, 24 (Tex. 2014))); *see also United States v. Rhynes*, 218 F.3d 310, 321 (4th Cir. 2000) (en banc) ("[S]anction analysis must encompass proportionality, and sanctions as extreme as witness exclusion must be proportional to the

The trial court's ruling to exclude Pega's damages evidence was particularly consequential given the burden-shifting instruction on damages; we cannot say the wrongful exclusion of this evidence based on the interrogatory response constitutes harmless error, given the type of evidence excluded and the ultimate award in excess of two billion dollars. *See Egan v. Butler*, 290 Va. 62, 69 (2015) ("In a civil case, the erroneous exclusion of evidence is reversible error when the record fails to show plainly that the excluded evidence could not have affected the verdict." (quoting *Barkley v. Wallace*, 267 Va. 369, 374 (2004)). Indeed, the exclusion of this damages evidence—in tandem with Instruction 14's emphasis on Pega's total sales—exponentially increased the likelihood of a runaway damages verdict that had no correlation to proximate cause.

IV. The Trial Court Erred in Excluding Pega's Software Evidence on the Ground It Was Not on the Original Laptop Used in Discovery and in Denying Pega the Opportunity to Authenticate It Under Rule of Evidence 2:901

"Generally, we review a trial court's decision to admit or exclude evidence using an abuse of discretion standard and, on appeal, will not disturb a trial court's decision to admit evidence absent a finding of abuse of that discretion." *Warren v. Commonwealth*, 76 Va. App. 788, 802 (2023) (quoting *Avent*, 279 Va. at 197). "The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Id.* (quoting *Coffman v. Commonwealth*, 67 Va. App. 163, 166-67 (2017)).

"The proponent of the evidence bears the burden of establishing by a preponderance of the evidence, the facts necessary to support its admissibility." *Bell v. Commonwealth*, 49 Va. App. 570, 576 (2007). "The requirement of authentication or identification as a condition

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offense."). Here, the exclusion of evidence of hundreds of millions of dollars in damages based on a strained reading of a discovery response would lie beyond the pale of proportionality.

precedent to admissibility is satisfied by evidence sufficient to support a finding that the thing in question is what its proponent claims." Va. R. Evid. 2:901.

"In general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues. If a computer processes data rather than merely storing it, authentication issues may arise." *Midkiff v. Commonwealth*, 54 Va. App. 323, 337 (2009) (citations omitted), *aff'd*, 280 Va. 216 (2010). "When a computer is used to create a data compilation, how much information will be required about data input and processing to authenticate the output will depend on the nature and completeness of the data, the complexity of the manipulation, and the routineness of the operation." *Id.* (quoting *McCormick on Evidence* § 227 (Kenneth S. Broun et al. eds., 6th ed. 2006)); *see generally* Charles E. Friend & Kent Sinclair, *The Law of Evidence in Virginia* § 17-1 (8th ed.).[24]

A. The Discovery and Trial History of the Excluded Software Evidence

Appian served a discovery request asking Pega to produce relevant "versions" of its platform so Appian could analyze it and determine whether Pega made improvements based on Appian's trade secrets. Pega complied with the discovery request and provided its software to Appian via a laptop computer. Prior to trial, Pega twice timely disclosed that it intended to introduce "versions" of its software that both pre-dated and post-dated Zou's tutorials. The exhibit list had entries entitled, "Pega Laptop Containing Version 6.3 and subversion (Physical Object)" and "Pega Laptop Containing Version 7.1 and subversions (Physical Object)." Appian

[24] A "computer decodes electronic records, converts them into a format understood by users and either prints them or displays them on a terminal. A person who can verify that the business records are authentic can present the evidence by testifying about what he saw displayed or by presenting a printed copy of the display." *Lee v. Commonwealth*, 28 Va. App. 571, 577 (1998); *see also United States v. Ahlstrom*, 530 F. App'x 232, 239 (4th Cir. 2013) (noting that any concerns about the reliability of machine-generated information are addressed through the process of authentication, which is generally satisfied by evidence describing the process or system used to produce the result and showing it produces an accurate result).

did not object either time. Indeed, Appian conceded when arguing this issue that its discovery request sought Pega's BPM platform—not an old laptop.

The original laptop was, in Pega's words, "a mechanism of getting the software" to Appian. Moreover, Appian was fully aware of the laptop's transmission function; upon receiving Pega's software, Appian moved the software onto another medium to view it and concluded the laptop was "unusable" for other purposes. Again, Appian raised no objection. And during its case in chief, Appian showed the jury Pega's software using a different laptop than the one it received during discovery. However, when Pega sought to do the same thing, Appian balked.

Specifically, Appian objected that, based on Pega's discovery response, Pega could only present its software evidence if it used the original laptop from discovery. Pega argued the laptop was simply a means to produce its evidence, and the evidence at issue was its software. The trial court agreed with Appian and sustained the objection, excluding Pega from introducing its software evidence and any demonstrative images taken from it, stating "[y]our objection to the use of their—this new laptop is sustained." The trial court observed that Pega was free to use the original, non-functional laptop used in discovery to show the software—but the discovery laptop was not able to show it.[25]

After initially being rebuffed, Pega moved again to admit its software evidence when presenting its case. Pega restated that Appian never objected to the exhibit list entries in question. Pega proffered that its witness, Bixby, who worked for Pega for nearly 20 years as a

[25] The issue arose initially when Pega was cross-examining Appian's expert and moved to admit the software evidence. Pega wanted to introduce its software to counter Appian's expert, who alleged that Pega used Appian's trade secrets to improve its platform. The trial court refused, finding "Pega produced the computer the way it is. If they're not ready to go with it now, that's on them . . . if we can't start the computer up, then you're going to have to do your cross without it."

chief designer of software, "can testify about how that software is kept in the course of time and whether or not this [is] the same thing that was given to Dr. Marshall." Pega argued that its software is a fungible product, and the software it would produce is the *exact same thing* as the software Pega gave to Appian during discovery. Pega asked the trial court to allow Bixby to attempt to authenticate the software evidence specifically as it related to his testimony "about his product that he developed, what it can do, what features it had." Pega further explained that "it's difficult for a witness to explain what that software looks like without showing something to the jury to help them understand it."

Ultimately, the trial court ruled against Pega, stating "[t]hat computer is not coming into evidence one way or another. It is not the same computer that was provided." The trial court found that Pega's ability to authenticate the demonstratives via Bixby did not change anything: "The fact that this upcoming witness may be able to authenticate what's on there, we're not doing that. We're not having a trial within a trial to authenticate that."

In this case, we must determine whether the trial court abused its discretion when it ruled Pega could not introduce its software evidence at trial because the software was on a different laptop than the one used in discovery. Further, we must determine whether the trial court abused its discretion in refusing to give Pega an *opportunity* to authenticate its software on a different laptop pursuant to Rule 2:901.

B. The Court Improperly Prevented Pega from Authenticating Its Software

In a technical case where a multi-billion-dollar claim turned on whether and how Pega copied Appian's functions, the trial court prevented Pega from displaying its software and any demonstrative images taken from it. This deprived Pega of evidence that could show that functions it was accused of stealing actually pre-dated Zou or differed from Appian's. Pega told the court the software was "probably the most important exhibit in the case."

The trial court's basis for excluding Pega's software was that the software was inadmissible unless it was contained on the same physical object on which it was produced to the opposing party in discovery. In so ruling, the court conflated the evidence at issue—software—with the method by which the evidence was to be transmitted in discovery (i.e., an electronic transfer link, an external hard drive, or a different laptop). Appian acknowledged its discovery request sought software—and Appian never lodged any pre-trial objection to what it received.

This Court has held, "electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues." *Midkiff*, 54 Va. App. at 337 (quotation marks omitted).[26] Thus, Pega was entitled to introduce a copy of its software as long as it was relevant, under Rule of Evidence 2:401, and authenticated, under Rule 2:901.[27] *See* Va. R. Evid. 2:402.

[26] In support of its position that the software evidence was properly excluded, Appian cites two cases that acknowledge electronic evidence may be manipulated, and thus, Appian argues a higher standard should apply to authenticating electronic evidence. But neither case stands for the proposition that Appian suggests. *See United States v. Browne*, 834 F.3d 403, 412 (3d Cir. 2016) (while recognizing the unique nature of electronic evidence, the court nonetheless found that traditional authentication principles apply). Relatedly, in *Knowles v. Commonwealth*, No. 1814-97-3, slip op. at 9 (Va. Ct. App. Oct. 27, 1998), an unpublished opinion, we stated that "[a] computer record is peculiarly susceptible to tampering and to unidentifiable alterations by any person who has access to the computer." In *Knowles*, however, the trial court excluded electronic evidence on the ground that "the computer professional" who was to offer authenticating testimony was not present to testify. By contrast, in this case, Pega's witness was both qualified and present to authenticate the evidence. *See id.* at 8-9. Neither case Appian invokes stands for the proposition that a higher standard applies when authenticating electronic evidence in Virginia, nor does either case suggest that a refusal to permit Pega to authenticate its software evidence was appropriate here. Instead, both cases, while noting that electronic evidence may be susceptible to tampering in certain circumstances, suggest that traditional authentication principles apply even to electronic evidence.

[27] The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the thing in question is what its proponent claims. Va. R. Evid. 2:901.

For purposes of authentication, under Virginia's "very modest" standard, Friend & Sinclair, *The Law of Evidence in Virginia*, *supra*, § 16-1, the question was whether Pega had evidence "*sufficient for the trier of fact*" to conclude Pega's software was actually Pega's software. *Walters v. Littleton*, 223 Va. 446, 451 (1982) (emphasis added). Pega was prepared to authenticate the software through the person, Stephen Bixby, who led development of the software that Pega sought to introduce and who also would have testified that it was "the exact same thing" Pega produced to Appian in discovery.

The trial court observed that allowing Pega to use a different computer to display the evidence might raise doubts about the software's authenticity. However, the court then expressly prohibited Pega from authenticating it ("we're not doing that")—even though the court recognized that Pega's witness, Bixby, "may be able to authenticate what's on there." And it prohibited Pega from using a different laptop to demonstrate the software after having already allowed Appian to show the software on a different laptop.[28]

A court abuses its discretion when it makes a mistake of law. *See Lawlor*, 285 Va. at 214 n.5. It abuses its discretion when it fails to consider a relevant factor that should have been given significant weight—or gives substantial weight to an immaterial factor. *Landrum*, 282 Va. at 352. A court also abuses its discretion "when it believes that the law requires something that it does not . . . ." *Lawlor*, 285 Va. at 213.

[28] As this Court observed over 35 years ago, "the potentially limitless application of computer technology to evidentiary questions will continually require legal adaptation." *Penny v. Commonwealth*, 6 Va. App. 494, 499 (1988). As artificial intelligence progresses, battles over the accuracy of computer images and manipulation of "deepfakes" can be expected to intensify. *See generally* Paul W. Grimm et al., Artificial Intelligence as Evidence, 19 Nw. J. Tech. & Intell. Prop. 9 (2021). No such issues were raised here. Basic authentication efforts were simply prohibited.

Here, the law did not require that Pega must play the software to the jury on the same laptop it provided in discovery. *Id.* If the exhibit were a voicemail or an officer's body camera footage, would only the exact thumb drive submitted in discovery be admissible?[29] Moreover, the court did not mention any basis under either Rule 2:901 or 2:403 for refusing to allow authentication and excluding the evidence. It did state that the matter should have been resolved pre-trial—but, again, Appian never filed any objection to the list during discovery. Appian authored the timing of its objection. Here, there simply was no indication that basic authentication would have caused any unreasonable delay or hardship. Again, (1) Bixby was present and prepared to say the software was the same as tendered in discovery, (2) there was no specific claim of tampering or corruption, (3) Appian had already introduced the software to the jury *on its own laptop*, (4) authentication would not prevent Appian from challenging the software if it had a plausible basis for doing so, and (5) no objection had been lodged by Appian pre-trial in response to the discovery designation.

Appian cites no case prohibiting a party from introducing—let alone even attempting to authenticate—software evidence on the ground that the software resides on a medium different from the one used to transmit it in discovery. Nor does Appian explain why it was appropriate for the court to prohibit Pega from using the software on that basis when Appian's expert displayed the software on a different medium earlier at trial. Ultimately, under these

[29] Notably, introducing the authenticated evidence would not have deprived Appian of the opportunity to challenge it, if it had a basis for doing so. Appian would still be free to argue to the jury that the software was corrupted. *See Church v. Commonwealth*, 71 Va. App. 107, 122-23 (2019) (finding when threshold for proving admissibility has been met, any gaps in the evidence are relevant to the jury's assessment of its weight rather than its admissibility).

circumstances, the trial court abused its discretion in denying Pega the opportunity to authenticate its software. *See Landrum*, 282 Va. at 352. [30]

C. Appian's Attempt to Defend the Trial Court's Exclusion of Pega's Software Fails

On appeal, Appian seeks to circumvent the trial court's actual rationale for exclusion, which was that the computer Pega brought to trial "was not 'the laptop [Pega] gave [Appian].'" Lacking support for the trial court's ruling, Appian attempts to recast the trial court's decision in various ways. First, Appian seeks to portray the trial court's order as a sanction based on a purported "finding" of "gamesmanship" in discovery. However, there is no such finding in the record. In fact, Appian sought no such sanction during discovery, and the trial court imposed none. Nor could it have: Appian never objected to, or tried to flesh out, Pega's discovery response.

Appian then recasts the ruling by suggesting that the "court merely applied Rule 2:901's authentication requirement." Appellee's Br. at 42. Again, the record offers Appian no solace. Prohibiting a party from even attempting to authenticate evidence is not tantamount to applying the authentication rule. Moreover, Appian does not contest Pega's proffer that Bixby had first-hand knowledge that the software was what Pega represented it to be and "the exact same thing" Pega produced in discovery. Mere speculation about tampering generally goes to the weight of the evidence, not its admissibility. *See McDaniel*, 73 Va. App. at 316; *Reedy v. Commonwealth*, 9 Va. App. 386, 391-92 (1990).

[30] We do not suggest that concern regarding a drawn-out and unnecessary "trial within a trial" cannot be a proper basis for exclusion of evidence. At the same time, a trial within a trial is sometimes *mandated* by our precedent. *See Campbell v. Bettius*, 244 Va. 347, 352 (1992) (legal malpractice damages issues). On this record, however, there was no logical basis for prohibiting Pega to authenticate its software evidence.

Appian finally tries to minimize the impact of the ruling by suggesting that Pega witnesses were permitted to argue they did not copy Appian's software. Appian argues this was enough—and that any error in excluding the software was de minimis or harmless. We reject this analysis. Pega explained to the trial court that where software was concerned, demonstrative aids were vital. With the software, Pega claims it could have shown the jury that "the features in question in this case . . . either existed in Version 6.3, which predated Mr. Zou, or were developed entirely independently within Pega without any input from Appian." Further, Appian's expert was given broad discretion to opine—and he opined liberally—that many things Pega saw on Appian's system were copied by Pega on a grand scale. The best way to disprove this testimony was by showing the jury that each function either predated Zou or worked differently from Appian's, or both.

The trial record further confirms the importance of this evidence. Virginia courts have noted on multiple occasions that a litigant's emphasis on certain evidence in closing argument provides insight into whether an error in admitting or excluding evidence is harmless. *See Keesee v. Donigan*, 259 Va. 157, 162 (2000) (identifying prejudice from "emphasi[s] . . . in [a] closing argument"); *see also Hodges v. Commonwealth*, 272 Va. 418, 437 (2006) (noting frequent emphasis on erroneous evidence in closing argument); *Durant v. Commonwealth*, 7 Va. App. 454, 461 (1988) (prosecution emphasis on issue in closing argument weakens harmless error claim). Here, Appian repeatedly attacked Pega for its lack of *software* evidence in arguing to the jury. For example, Appian urged the jury in closing argument to reject the testimony of Pega's witnesses who denied that Pega copied Appian's trade secrets; Appian argued that Pega asked the jury simply to "take [its] word for it," with no corroborating evidence. It further exploited Pega's lack of software evidence, telling the jury: "Show me, where it is? They

haven't *shown you* a thing . . . . *That's how you tell, you look at the platform*." (Emphasis added).

Prohibiting Pega from introducing its software was not harmless error. *See Food Lion v. Melton*, 250 Va. 144, 153 (1995) (exclusion of evidence not harmless). The error significantly hampered Pega's liability defense, and we cannot say it did not affect the verdict. *Barkley*, 267 Va. at 374. Thus, the error necessitates reversal of the judgment.[31]

V. The Trial Court Erred in Instructing the Jury that the Number of People with Access to Appian's Secrets was "Not Relevant" and Abused Its Discretion in Excluding Relevant Evidence on the Ground It Was "Irrelevant"

Because this case will be remanded for a new trial, we must consider an additional issue that is likely to arise on retrial. *Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 203 (2003); *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 555 (2017). The question is whether it is appropriate for the trial court to instruct the jury—as it did in Instruction 13-1—that the number of users of Appian's platform is "not relevant to any issue in this case" and to exclude related evidence.

A. Standard of Review

Evidentiary rulings are reviewed for an abuse of discretion. *Galloway v. Northampton Cnty.*, 299 Va. 558, 563 (2021). In evaluating whether a trial court abused its discretion, we do not substitute our judgment for that of the trial court. Instead, we consider whether the record fairly supports the trial court's action. *See Carter v. Commonwealth*, 293 Va. 537, 543 (2017). "A [circuit] court by definition abuses its discretion when it makes an error of law . . . . The abuse-of-discretion standard includes review to determine that the discretion was not guided by

[31] While a retrial is required on liability and damages under VUTSA, Pega has not appealed the judgment on the VCCA claim and it stands.

erroneous legal conclusions." *Porter v. Commonwealth*, 276 Va. 203, 260 (2008) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

In Virginia, "[a]ll relevant evidence is admissible, except as otherwise provided by . . . statute, Rules of the Supreme Court of Virginia, or other evidentiary principles." Va. R. Evid. 2:402(a). "'Relevant evidence' means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401. Evidence is relevant if it has any logical tendency to prove an issue in a case, and relevant evidence may be excluded only if the prejudicial effect of the evidence outweighs its probative value. S*ee John Crane, Inc.*, 274 Va. at 590; *Jones v. Commonwealth*, 50 Va. App. 437, 446 (2007). Here, the trial court did not apply balancing considerations; it held that the "numbers" evidence was irrelevant, excluded it, and instructed the jury accordingly. Whether an instruction accurately states the law is reviewed de novo. *Holmes*, 76 Va. App. at 53.[32]

B. Evidence of the Number of People with Access to the Secrets is Not Irrelevant

The trial court granted Appian's motion *in limine* to exclude evidence of the number of people with access to Appian's platform. The trial court ruled that the number of people with access to Appian's platform was "not relevant at all." The court gave the jury an instruction that

[32] Instruction 13-1 stated:

> The numbers of users of the Appian platform and Appian Forum licensees are not relevant to any issue in this case, and any evidence as to those numbers should be disregarded.

provided, "[t]he numbers of users of the Appian platform . . . are not relevant to any issue in this case."[33]

Pega then proffered a swath of evidence that demonstrated that thousands of people had access to the alleged trade secrets, *supra* at 12, with varying degrees of restrictions. For example, various users were under different agreements, including licensing agreements, terms of use for Appian Forum, additional terms of use, the Value-Added Service Provider Agreement, the Business Partner Agreement, and the Cloud Trial and Evaluation Clickwrap Agreement, all of which required shifting amounts of protection. These agreements, moreover, did not identify—or put users on notice of—the trade secrets at issue in this case.

Appian's own expert lent some support to Pega's theory. At trial, Dr. Cole testified that prospective customers that received free demos were not required to sign non-disclosure agreements. He also confirmed that prospective customers, who received free demos, could share descriptions, screenshots, and videos. Dr. Cole suggested that free trial users had access to Appian's trade secrets but were bound by terms of service, despite not having to sign non-disclosure agreements. Appian put faith in the proposition that free users and others carefully reviewed the legal restrictions buried behind the click screen. Pega had less faith in this mechanism.

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[33] In explaining its decision, the trial court stated,

> Pegasystems cannot offer mere numbers as a way of showing that the trade secret – that these are not Appian's trade secrets . . . . Pegasystems can certainly put on evidence concerning the security that Appian attached to its licensees and require of its licensees . . . but it cannot just offer sheer numbers as a way to show that Appian was not maintaining the secrecy of its alleged trade secrets.

The suggestion that mere numbers *alone* cannot defeat a trade secret claim, however, does not mean that evidence that thousands of users had access to Appian's trade secrets is irrelevant.

We do not disagree with the trial court's basic premise that the number of people who can see the secret is not *dispositive* of whether the information is protected or generally known. This is especially true where the information is zealously shielded. *See Bd. of Trade of Chi. v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-51 (1905) (finding holder of trade secret does not lose rights by communicating secrets to others if done confidentially pursuant to a contract); *see also MicroStrategy Inc.*, 268 Va. at 262 (a trade secret owner does not lose protection "by disclosing the secret to a licensee, an employee, or others" so long as the disclosure is made in "confidence"). For example, *millions* of people can enjoy a restaurant chain's fried chicken, but the recipe, if closely guarded, can still be a trade secret.[34]

Pega's argument is that, while not dispositive, the number of people with access to Appian's trade secrets is relevant because it goes to multiple issues in the case—specifically, whether Appian took reasonable efforts in protecting its secrets and whether such secrets were generally known and readily ascertainable. *See* Code § 59.1-336. Indeed, courts have consistently held that "the extent to which the information is known outside of [one's] business" is a "factor[] to be considered in determining whether given information is one's trade secret." S*I Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1256 (3d Cir. 1985) (quoting Restatement

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[34] The fact that some or all of the components of the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements. Hence, even if all of the information is publicly available, a unique combination of that information, which adds value to the information, also may qualify as a trade secret.

Penalty Kick Mgmt. v. Coca Cola Co., 318 F.3d 1284, 1291 (11th Cir. 2003) (internal citations omitted); *see also Decision Insights, Inc. v. Sentia Grp., Inc.*, 416 F. App'x 324, 329 (4th Cir. 2011) (recognizing "a trade secret may be composed of publicly-available information if the method by which that information is compiled is not generally known").

(First) of Torts § 757, cmt. b (1939)). The Restatement of Torts lists the following factors as instructive:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

See Restatement of Torts, § 757, cmt. b; *Pauwels v. Deloitte LLP*, 83 F.4th 171, 181 n.2 (2d Cir. 2023) (applying Restatement factors); *Allstate Ins. Co. v. Fougere*, 79 F.4th 172, 188 (1st Cir. 2023) (same).

Thus, while the number of people with access to information is not, in isolation, determinative of the information's trade secret status—such evidence is hardly irrelevant. To the contrary, who is given access to such information, and in what numbers, are among the most important factors in assessing both whether the information was generally available and the reasonableness of efforts to maintain its secrecy. *Turret Labs USA, Inc. v. CargoSprint, LLC*, No. 21-952, 2022 U.S. App. LEXIS 6070, at *5 (2d Cir. Mar. 9, 2022) (listing cases); *see MicroStrategy Inc.*, 268 Va. at 264 (inquiries "require[] an ad hoc evaluation of all the surrounding circumstances").[35]

The bar for establishing that evidence is relevant is not high. S*ee McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 629 (1953) ("The criterion of relevancy is whether or not the evidence tends to cast any light upon the subject of the inquiry."). Appian has not provided a single case where an instruction was given informing a jury that such "numbers" evidence is

[35] Similarly, courts have observed that "the chance of a leak increases as the number of people having access to information increases." *United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 743 (3d Cir. 1985).

irrelevant. Instead, it has framed a different question: is it permissible for a factfinder to determine that confidentiality provisions are so clear as to preserve trade secrecy despite disclosure to numerous trusted people?[36] But that is a distinct inquiry, going to the merits of the claim, from the question we are reviewing: is the excluded evidence about thousands of people having access to Appian's trade secrets irrelevant as a matter of law in the context of a trade secret claim?

Appian does not argue it was entitled to judgment below as a matter of law—it argues the factfinder's verdict should be upheld. But, none of the cases cited by Appian *prohibit* a factfinder from making the trade secret determination based on many factors, including the number of people with access to the alleged secret. This is particularly true where, as here, the adequacy of confidentiality measures was hotly disputed. Pega proffered, for example, that thousands of free trial users and prospective customers of Appian had access to review the secrets and that Appian did not even keep track of how many "Value Added Service Provider Agreements" it had issued.

As noted above, Appian took many legitimate steps to protect its secrets—and a reasonable jury certainly could find its actions sufficient to afford its information trade secret

[36] To be sure, there are cases that answer this question in the affirmative. *See SyncSort v. Innovative Routines, Int'l*, No. 04-3623, 2011 U.S. Dist. LEXIS 92321, at *40 (D.N.J. Aug. 18, 2011) ("distribution . . . to many users" does "not *necessarily* negate trade secrecy," as a matter of law, if the owner also took correspondingly reasonable measures to protect secrecy); *see Dionne*, 240 Va. at 297 ("The secrecy need not be absolute; the owner of a trade secret may, without losing protection, disclose it to a licensee, an employee, or a stranger, if the disclosure is made in confidence, express or implied."). Similarly, courts have rejected trade secret claims based on the *limited* "number of people who had access"—however, even this confirms that the "numbers" evidence was considered. *See Oberfoell v. Kyte*, No. A17-0575, 2018 Minn. App. Unpub. LEXIS 74, at *10 (Jan. 22, 2018). Ultimately, trade secret "number" issues come in varying shapes and sizes. For example, in *Dionne*, a family owned business was at issue and the actions of one actor with a confidentiality agreement were under review—by contrast, in a software case thousands of users may have access, with varying levels of restrictions, and the measures for controlling such restrictions may be hotly contested.

status. But, ultimately, in this case, that is a factual question; and here the trial court improperly removed a relevant factor from the jury's consideration. *MicroStrategy Inc.*, 268 Va. at 264-65 (whether a trade secret exists is generally a question of fact). This error denied Pega the opportunity to effectively argue that Appian forfeited its trade secret protection by broadly sharing the information with thousands.[37] On remand, an instruction telling jurors that such evidence is not relevant should not be granted.

CONCLUSION

This complex trial ventured into uncharted legal waters and culminated in a multi-billion dollar damages award which we now reverse. We reject Pega's claim that Appian failed to establish misappropriation of any trade secret as a matter of law. However, we agree with Pega that the trial court erred in granting Instruction 14, which relieved Appian of its proper burden to prove causation between the alleged misappropriation and any damages. Moreover, while Jury Instruction 14 erroneously permitted Appian to rely on Pega's total "sales" to prove unjust enrichment damages, the trial court then improperly foreclosed Pega, based on Interrogatory 18, from showing that many of Pega's total sales were in areas in which Appian did not even compete with Pega.

[37] Appian posits that the trial court actually excluded the numbers evidence based on other grounds: "confusion" concerns, application of Rule of Evidence 2:403(a)(i), or as a trial sanction. While Appian made these arguments to the trial court, ultimately the trial court excluded the evidence on relevancy grounds; the record does not support Appian's suggestion that the trial court's exclusion was on any ground other than relevancy. The trial court, upon considering case law from both sides, found the evidence that related to the number of people with access to Appian's trade secrets was simply irrelevant. "My view is that the numbers are not relevant at all, as I read the cases." In granting jury Instruction 13-1, the trial court stated, "I've re-reviewed the case law, and it's my view that the numbers are not, not relevant. The reason is pretty simple. The case law indicates what that would mean is that you got more successful selling your secret, you lose the secret. Certainly the law can't allow that."

Under the circumstances of this case, the trial court also abused its discretion by refusing to permit Pega to attempt to authenticate its software evidence and, as a consequence, by excluding Pega's software—a principal means of demonstrating it did not steal secrets through Zou—on the basis that it was on a different laptop than provided in discovery. Finally, on remand, the trial court should refrain from instructing the jury that the number of people with access to Appian's platform is "not relevant"—and, accordingly, should not exclude all related evidence of these numbers on that basis. We reverse the judgment as to the VUTSA claims and remand for a new trial consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

PRESENT: Powell, Kelsey, McCullough, Chafin, and Russell, JJ., and Millette and Mims, S.JJ.

APPIAN CORPORATION

v. Record No. 240736

PEGASYSTEMS, INC.

OPINION BY
JUSTICE WESLEY G. RUSSELL, JR.
JANUARY 8, 2026

FROM THE COURT OF APPEALS OF VIRGINIA

Appian Corporation ("Appian") appeals from a judgment of the Court of Appeals reversing a jury verdict in its favor against Pegasystems Inc. ("Pega"). Specifically, Appian asserts that the Court of Appeals erred in reversing the circuit court's decisions regarding two jury instructions and several discovery/evidentiary issues. In addition to defending the Court of Appeals' judgment on the errors alleged by Appian, Pega asserts cross-error, arguing that the Court of Appeals erred in affirming the denial of its motions to strike and set aside the verdict. For the reasons that follow, we affirm the judgment of the Court of Appeals.

I. BACKGROUND[1]

Appian and Pega are software companies that create and sell business process management ("BPM") platforms, "low-code" software that automates complex multi-step processes for businesses. Appian and Pega are "aggressively direct competitors[,]" often finding themselves competing for the same customers.

Although Pega had entered the BPM marketplace nearly two decades before Appian, by 2012, Appian had achieved higher rankings in certain industry ratings. Alan Trefler, Pega's

[1] Portions of the record below were sealed by the circuit court. "To the extent that we mention facts found only in the sealed record, we unseal only those specific facts, finding them relevant to our decision in this case. The remainder of the previously sealed record remains sealed." *Minh Duy Du v. Commonwealth*, 292 Va. 555, 560 n.3 (2016).

CEO, conceded that Appian's ascent in the ratings was upsetting, with other Pega employees contemporaneously describing the news as "catastrophic and unexpected."

A. Pega engages in corporate espionage

In February 2012, Pega's then-head of competitive intelligence, John Petronio, sought to improve Pega's industry standing vis-a-vis Appian. Petronio hired the professional staffing and solutions firm KForce to find and hire an "Appian Developer who has extensive experience with BPM Tools" to aid in a "competitive analysis project[.]" The prospective developer needed "access to [Appian's] systems" but "should not have worked directly for Appian." KForce's notes also included instructions from Petronio that KForce was to "make sure" that the developer was not "loyal" to Appian "because [Petronio] doesn't want it getting back to Appian that Pega is doing this work."

These recruitment efforts led Pega to Youyong Zou, a software developer employed at the time by Serco, a government contractor. Critically, Zou's role within Serco gave him access to Appian's BPM platform, which Serco licensed from Appian. As an employee of an Appian business partner, Zou also had access to Appian Forum, a password-protected website where Appian employees, customers, and business partners could access Appian product documentation, download Appian software, and participate in discussion threads regarding Appian products.

Zou started moonlighting as a consultant for Pega in early 2012. The purpose of his work for Pega was to get access to Appian's "software [and] documentation" and then pressure-test and conduct experiments within the platform in order to identify its strengths and weaknesses. Zou's status as an expert in Appian software, and more importantly his status as someone with access to Appian's documentation and software, made him valuable to Pega.

Zou's role as an outside contractor was key: Appian had no interest in sharing information regarding its platform with a direct competitor. Pega employees repeatedly acknowledged in depositions and at trial that Appian's "internal workings" were a "black box," Appian was "very guarded about their technology," and the company "would not have sold [Pega] a license" to use its software. As a result, in its internal communications, Pega characterized Zou as its Appian "spy."

Zou provided intelligence to Pega in three primary ways: (1) preparing video tutorials of himself building applications in Appian to assist Pega in "find[ing] weaknesses [Pega] can exploit" and strengths to incorporate in its products; (2) participating in live presentations with Pega employees to the same effect; and (3) downloading and sharing confidential Appian documentation saved in Appian Forum with Pega.

Appian identified numerous tutorial videos created by Zou to assist Pega. Zou's video presentations to Pega employees were geared toward demonstrating user experience and answering Pega employee questions, including by describing the architecture of Appian's social interface. Zou's presentations also involved visiting Pega's headquarters in Massachusetts twice to meet with senior leadership and other employees.

Pega went to great lengths to conceal Zou's identity during his presentations to Pega employees. Pega leadership "spent hours and hours removing (blurring) [Zou's] name from the videos" he had prepared and requested that he "change his name on the screen and the ownership of the assets (within Appian)" ahead of a presentation to keep himself anonymous. In fact, Pega employees often referred to Zou as "Matt" or "the other 'Matt'" internally—a tongue-in-cheek reference to Matt Calkins, Appian's CEO—to keep him from being "outed" as Pega's "spy."

The documentation Zou shared with Pega included Appian's "High Availability and Disaster Recovery Configurations," architecture diagrams that "reveal[ed] how Appian handle[d] high performance[,]" as well as key documentation relating to Appian's mobile and social features. Petronio testified that "the information from Mr. Zou was folded into documents for sales, including internal strategy documents and external documents that they could . . . use with a customer or give to the customer." Zou's tutorials and Appian's documents were "used to educate [Pega's] sales teams and help them form competitive strategies[,]" and multiple Pega employees testified to the way Zou's insights were parlayed into briefs deployed by Pega when competing against Appian.

Between 2013 and 2021, Pega was in direct competition with Appian over 200 times. A member of Pega's sales team told others in 2013 that, "[i]f your team is competing against Appian anywhere, please get in touch with . . . John Petronio ASAP to get a briefing on where you should attack Appian[.]" Evidence at trial also established that Pega incorporated Appian's internal information and processes into its own platform in order to improve it. As a result, Appian's product change expert, Dr. Richard Marshall, identified "striking similarities" between the two companies' products.

Zou continued his work for Pega until he lost access to Appian's server in 2014. Despite the loss of its "spy," Pega continued to attempt to access Appian's systems surreptitiously. Specifically, Pega employees used aliases and non-Pega credentials to try to access Appian's free trials. Pega's own Chief Technology Officer conceded that such efforts were not appropriate and regretted his failure to take steps that would have prevented the activities.

Appian learned of Pega's attempts at corporate espionage in 2020 from an ironic source. Petronio, who had been laid off by Pega in 2015, was hired by Appian, eventually becoming its

Senior Director of Market Intelligence and Strategy. In 2020, Petronio disclosed the work he had done at Pega with Zou to Appian's counsel. Appian subsequently filed several claims against Pega and Zou, including claims for misappropriation of trade secrets under the Virginia Uniform Trade Secrets Act ("VUTSA"), Code § 59.1-336 *et seq*.[2]

B. The fruits of Pega's corporate espionage

Dr. Marshall, Appian's product change expert, identified "five illustrative improvements" in Pega's platform that he traced back to information supplied to the company by Zou:

> (1) "smart services" – an invention that allows ordinary users to automatically carry out "complex, dynamic actions" without needing to know how to code;
>
> (2) "ease of editing" – a feature that allows programmers who make a mistake to "go straight back into the editing environment without having to go back through complex series of navigations";
>
> (3) "custom data types" – a feature allowing developers to group related pieces of data together;
>
> (4) "out-of-the-box" social – an "innovative single interface" that brings "collaboration into the work context" and gives centralized access to work lists and tasks all in the same place; and
>
> (5) "out-of-the-box" mobile – a feature allowing applications to run on both desktop and mobile devices without additional coding or effort.

Although Pega might have known "what" these Appian features were, Zou provided the "how"—the "architecture and design behind that 'what.'" At trial, Dr. Marshall walked the jury through each of these features, explaining what they were and how they had been implemented into Pega's platform, tracking the changes between Pega software versions 6.3 and 7.1. From his

[2] Appian's complaint also alleged violations of the Virginia Computer Crimes Act ("VCCA") and included counts for tortious interference with Appian's business expectancies, statutory business conspiracy, and common law conspiracy. All but the VUTSA and VCCA claims were resolved prior to the jury's verdict.

review of Zou's videos, the documentation Zou provided Pega, and Pega's internal communications, Dr. Marshall concluded that Pega looked at the architecture of these Appian features to create Pega analogues that were then implemented into its own software, beginning with version 7.1.

Appian also argued that Zou's information revealed product weaknesses that Appian did not want to be revealed to customers and that Pega incorporated into its marketing efforts when competing against Appian. Specifically, Dr. Eric Cole, one of Appian's other experts, identified seven "weaknesses" as trade secrets: (1) concurrent development and locking of process model; (2) weak reporting tools and chart types available; (3) web services returning only a Process ID; (4) specifics on unified management tools available; (5) star schema/reporting on external data; (6) configuration and customization of checkpointing; and (7) topology specifics, including information from experimentation. As existing strategy documents were supplemented with the intelligence gathered by the spying efforts, a Pega employee exclaimed: "We should never lose against Appian!"

As noted above, Zou was able to download and share Appian documentation, such as the user manual, because of his access to Appian Forum. Appian Forum's terms, however, did not allow those with access to share Appian's proprietary information with competitors. In pertinent part, authorized users were informed:

> **Use of Documents**
> . . . You may download, view, copy, and print the Documents subject to the following: (a) the Documents may be used only for personal, informational, and non-commercial purposes, and (b) the Documents may not be modified or altered in any way. Except as set forth above, you may not use, download, upload, copy, print, display, perform, reproduce, publish, license, post, transmit, or distribute any Documents, in whole or in part, without Our express, prior written consent.

and

> **Use of Software**
> . . . Any Software You download or access through the Site is the copyrighted work of Appian or its licensors. Use of the Software is subject to the terms of the separate software license agreement between You and Appian which governs Your use of the Software ("Software License Agreement") and which triggered Your receipt of a username and password to access the Site. To the extent you do not have a separate license agreement with Appian for the Software, you are prohibited from downloading, accessing or using the Software without Appian's express prior written consent.

Dr. Cole testified that many of the documents on the Appian Forum were labeled "confidential"—as was the server *all* of the documents were housed in—and marked and controlled in a way indicating that they were trade secrets. Zou also was a signatory of Serco's "Employee Proprietary and Confidential Information Agreement," which included several provisions against sharing confidential information learned by Zou during his employment at Serco.[3]

C. Discovery and other disputes and their effect at trial

The hypercompetitive relationship between Appian and Pega was not limited to business dealings; it was evident in how the parties approached discovery and other pretrial obligations.

[3] At trial, Pega offered evidence that Appian's licensees were allowed to install Appian software in order to "[m]arket, promote and demonstrate the Appian Software to prospective customers." These licensees—often playing the role of "resellers"—were not required to secure confidentiality agreements from prospective customers who received demonstrations, and these customers could take pictures and videos of the demonstrations provided by the licensees. The demonstrations, however, required supervision by the Appian business partner, who was "prohibited from offering potential customers unsupervised access to the Appian Software over the internet[.]" Customers could also apply for free trials from Appian, but were subject to "clickwrap" terms and conditions when registering for the trials. *See, e.g.*, *Valiente v. Nexgen Global, LLC*, 2025 U.S. App. LEXIS 29465, at *18 (11th Cir. Nov. 10, 2025) (explaining that "[a] clickwrap agreement is created when users assent to terms by clicking a button near a disclosure referencing those terms" and that "a clickwrap agreement may be formed when . . . users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use" of a website or software) (citing *Lamonaco v. Experian Info. Sols., Inc.*, 141 F.4th 1343, 1347 (11th Cir. 2025) and *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014)).

A review of the record reveals that the parties took aggressive positions in discovery, which led to multiple pretrial disputes resulting in several pretrial and trial rulings that are issues in this appeal.

1. The number of people with access to Appian's trade secrets

Rather than simply identifying the number of authorized users of its platform, Appian filed a motion *in limine* to exclude any evidence and argument regarding the distribution of licenses to the platform, arguing that "[t]he number of licenses that Appian distributed or the amount, if any, that Appian charged for licenses is irrelevant to any claims or defenses in this case." Pega argued that the number of people who had access to Appian's platform through free trials was relevant to a trade secrets defense because it showed that Appian did not take reasonable measures to protect its so-called "secrets." It proffered that, if allowed to explore this issue at trial, witnesses "would have testified that Appian's records reflect close to 45,000 registrations between 2012 and 2021 for Appian Forum; over 1,800 free trial registrations [between] 2012 and 2017; and over 12,000 [free trial] registrations between 2017 and 2020."

The circuit court granted Appian's motion, ruling that "Pegasystems cannot offer mere numbers as a way of showing that . . . these are not Appian's trade secrets." Pega was free to put into evidence testimony "concerning the security that Appian attached to its licensees[,]" but it could not "just offer sheer numbers as a way to show that Appian was not maintaining the secrecy of its alleged trade secrets."

Throughout the trial, Appian and Pega repeatedly clashed over this ruling, with Appian objecting that Pega was eliciting testimony or presenting evidence that improperly went to the number of free licenses Appian offered. At an April 20, 2022 hearing on jury instructions, Appian offered a curative instruction, Jury Instruction 13-1: "The numbers of users of the

Appian platform and Appian Forum licensees are not relevant to any issue in this case, and any evidence as to those numbers should be disregarded."

Appian argued that the instruction was necessary, despite the successful motion *in limine*, because "the jury still heard evidence of the number of licensees, the number of users of the Appian platform." Pega disagreed, arguing that it was "unnecessary" and "not a neutral instruction." Moreover, Pega "couldn't find any support for an extraneous instruction like this one that talks about the number of users or the number of people who had access, instructing the jury not to consider that fact." The circuit court gave the instruction.

2. Pega's production of its software in discovery

The parties also clashed over the manner in which Pega produced its software pretrial, how Pega identified the software as an exhibit as required by the pretrial order, and whether the software could be shown to the jury. Central to Appian's case was its claim that Pega had incorporated Appian's trade secrets into software beginning with version 7.1, improving the software when compared to version 6.3, which predated Zou's activities.

During discovery, Pega produced an 8-gigabyte laptop with the relevant software versions on it. In turn, Appian provided it to its expert, Dr. Marshall. When Dr. Marshall reviewed the various software versions (and subversions), he identified some "vagaries," "limited corruption," and "leftovers" in version 7.1.8 of Pega's platform. Nonetheless, he was able to test "all of the key points" of the various versions, including the corrupted one. Dr. Marshall noted that the software Pega provided during discovery was "server software" not designed to run on an 8-gigabyte laptop; admitted that he had taken the software off of the production laptop and moved it to an external drive in order to conduct his analysis; and testified using demonstratives derived from material he reviewed from that external drive.

Consistent with its obligations under the pretrial order to identify exhibits prior to trial, Pega identified as an exhibit the software it had produced on the laptop in discovery. Specifically, Pega listed exhibits DX-1575 and DX-1576, "Pega Laptop Containing Version 6.3 and subversion (Physical Object)" and "Pega Laptop Containing Version 7.1 and subversions (Physical Object)[.]"

At trial, Pega sought to introduce copies of Pega software versions 6.3 and 7.1 during its cross-examination of Appian's witness, Dr. Marshall. In doing so, Pega did not seek to use the laptop that it had produced in discovery, but rather, sought to use a different laptop. Appian objected on the grounds that the laptop Pega sought to use was not the same "[p]hysical [o]bject" as the laptop it had provided to Appian during discovery and there was no guarantee that it contained the same exact software that had been produced in discovery.

Appian argued that because Dr. Marshall had not examined Pega's new laptop, he could not confirm that the software on it was the same as the software he had reviewed. If Pega had wanted to introduce a new laptop, it "had every opportunity to provide timely notice to set that up to take a notice of inspection, but given where we are now" in trial, Appian insisted that Pega should have to use the laptop it had produced in discovery. The circuit court agreed, sustaining Appian's objection and requiring that Pega use the laptop it produced in discovery when cross-examining Dr. Marshall. Ultimately, that laptop, whether due to age, unsuitability for the function, or some other reason, proved inoperable. When Pega requested the option of substituting the software "for a more legible copy" the circuit court declined, saying: "No. We are done with this issue. We are going to bring the jury in and we're going to get this case moving."

This would not be the last time this issue arose, and Pega clashed both with Appian's counsel and the circuit court on this topic several times before the trial was done. Pega offered to have one of its witnesses, Stephen Bixby, authenticate the software versions on the newer laptop on the stand. It proffered that Bixby—the development lead at Pega—would "testify about how that software is kept in the course of time and whether or not this is the same thing that was given to Dr. Marshall." Moreover, Pega also proffered that Bixby would testify that he was responsible for the team that built the software and "would have shown the jury how the software existed in Version 6.3 versus 7.1, and explained why, in his percipient knowledge, the changes to the software had nothing at all to do with Mr. Zou's input[.]"

The circuit court refused to allow Bixby to authenticate the software on the new laptop and again sustained Appian's objection to Pega introducing the software, stating:

> Let me make my position very, very clear because apparently Pega is not grasping it. That computer is not coming into evidence one way or another. It is not the same computer that was provided. If Pega wanted to use a computer in evidence, they should have provided one that worked a little bit better than apparently the one that was provided . . . that computer is not coming in to evidence. *The fact that this upcoming witness may be able to authenticate what's on there, we're not doing that. We're not having a trial within a trial to authenticate that.* That's something that should have been dealt with pre-trial during discovery.

(Emphasis added.)

The circuit court further noted that counsel was revisiting arguments that had been made before, and "[t]his case is dragging, and it's dragging much more than it should." When Bixby did take the stand, he was allowed to *testify* to aspects of Pega 6.3 and 7.1, but not to *demonstrate* those aspects to the jury using Pega's software evidence.

3. Pega's discovery responses relating to damages

The parties also engaged in contentious discovery regarding any damage that Appian claimed to have suffered as a result of Pega's alleged theft of its trade secrets. Appian served Interrogatory #17, which sought information detailing the revenue Pega had received from identified customers over a specified time period, and Interrogatory #18, which reads:

> Interrogatory No. 18: Identify all revenues received by Pegasystems for each fiscal year from 2012 through 2021 relating to Pega 6.3, Pega 7.0 and any subsequent version broken out by year and version of the software; and identify the costs and expenses Pegasystems incurred in order to realize those revenues.

In response, Pega filed an October 29, 2021 motion for a protective order, arguing that the interrogatories were part of an "improper effort to obtain in this case discovery unrelated to the claims pled in Appian's long-pending Complaint[,]" and instead related to a then-unapproved Amended Complaint. Appian filed a motion to compel Pega to answer Interrogatory #17, but did not move to compel a response to Interrogatory #18, noting instead in a footnote that Interrogatory #18 "is already before the Court on Pegasystems' motion for a protective order[,]" and it "expects a prompt response as to that interrogatory upon denial of Pegasystems' motion." At a November 4, 2021 hearing, Pega withdrew its motion for a protective order but not its objections to Interrogatory #17. After further back-and-forth, the circuit court entered a "CONSENT ORDER" on November 8, 2021, resolving Appian's motion to compel an answer to Interrogatory #17. The consent order provided "that Pegasystems' objections to Interrogatory are overruled. Pegasystems will fully answer Appian's Interrogatory 17 no later than November 15, 2021." The consent order made no mention of Interrogatory #18.

On November 15, 2021, Pega provided both objections and answers to Interrogatory #17 and Interrogatory #18. In its response, Pega continued to object to Interrogatory #18 as

"overbroad, unduly burdensome, and seeking irrelevant information"—claiming it "seeks information about 'all revenues' relating to certain products, not limited to those opportunities (if any) where Pegasystems allegedly used information obtained improperly to convince a particular customer to buy or license that Pegasystems product or service in preference to an Appian product." The objection continues by noting that "Pegasystems derived revenue from the above products that was wholly unrelated to any competitive situation with Appian, and such revenue is not relevant to Appian's claims." Pega went on to respond to the Interrogatory with the following:

> Notwithstanding the foregoing objections, Pegasystems will provide revenue information by producing data obtained from business records maintained in the ordinary course of its business pursuant to Va. Sup. Ct. R. 4:8(f).[4] Pegasystems does not record or report revenue, or any associated costs and expenses incurred by Pegasystems, based on the "version" of the product sold (e.g., Pega 6.3, Pega 7.0). There is no mechanism or process by which Pegasystems is able to determine these revenue, cost and expense amounts. As a result, Pegasystems' financial results (including

[4] Rule 4:8(f) provides that

> [w]here the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification must be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained. A specification of electronically stored information may be made under this Rule if the information will be made available in a reasonably usable form or forms.

> total revenue and all associated costs and expenses) for each applicable fiscal year as reported to the SEC in Pegasystems' annual Form 10-K filings and quarterly Form 10-Q filings are attached as Schedule 3.

During trial, Pega attempted to adduce evidence that some of its revenue was earned from the sale of non-BPM platform products that had no connection to the alleged corporate espionage. Appian consistently objected to these attempts, arguing that, because Pega had provided its total corporate financial statements without any attempts at differentiation between products in its response to Interrogatory #18, Pega was precluded from offering such differentiation at trial. Appian buttressed its interpretation of the response to Interrogatory #18 with deposition testimony from Pega's CFO that the "Pega Platform" accounts for "90 percent or above" of Pega's revenue, and software applications and programs that are not tied to the Pega Platform are only a "small part" of Pega's business. Pega countered, arguing that Interrogatory #18 did not seek a revenue breakdown with respect to the different "end products" Pega produced, but rather, only asked for revenues related to two "versions" of Pega's BPM platform. The fact that Pega did not track revenue by version of a single product—its BPM platform—did not mean that it did not track revenue by product line.

The circuit court held that Pega's answer to Interrogatory #18, "strongly suggests . . . that the revenue related to these platforms is *the* revenue" at issue, and Pega could not "breakdown [its] revenue based on lines of business." (Emphasis added.) As a result, it had "essentially given up" any defense that it had earned significant revenue from non-BPM platform products. Pega proffered that if Appian's objection had been overruled, Pega CEO Alan Trefler would have testified that there were multiple non-BPM platform product categories at Pega; "more than 50 percent of Pega's revenue [was] derived from customers for these other products" during the relevant period; and Appian and Pega did not compete regarding these other products.

Additional testimony from Pega's CTO would have established that a portion of Pega customers "bought things that Appian didn't sell." Similarly, Simon Platt, Pega's damages expert, was prevented from testifying that Appian did not compete with Pega regarding certain Pega products and lines of business, and Pega was kept from pressing James Malackowski, Appian's damages expert, on whether his damages calculations included non-BPM platform products sold by Pega for which there was no connection to the alleged espionage.

4. Who bears what burden on damages

A final area of contention between the parties that is pertinent to this appeal revolved around the allocation of the burden of proof on damages. Drawing from the Restatement (Third) of Unfair Competition, § 45 cmt. f, Appian argued that while the burden of production initially lay with Appian to establish Pega's sales of products tainted by Pega's alleged misappropriation of trade secrets, the burden on damages should shift once that threshold showing had been made. Specifically, Appian contended that if the jury determined that Pega had sold tainted products, it became Pega's obligation to demonstrate that any portion of those sales should not be attributed to the misappropriation of trade secrets. Pega objected, arguing that Appian's position was essentially "proximate cause isn't required" and that Virginia law did not provide for burden-shifting in this scenario. The circuit court ultimately agreed with Appian and gave the jury Instruction #14, which, in pertinent part, reads:

> If you find that plaintiff Appian has proved by greater weight of the evidence its claim for misappropriation of trade secrets against defendant Pegasystems, you must find your verdict for Appian and decide the issue of damages as to Pegasystems. You may award the amount of unjust enrichment caused by misappropriation.
>
> For unjust enrichment, Appian is entitled to recover Pegasystems' net profits. Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales; *Pegasystems has the burden of establishing by greater weight of the evidence any*

> *portion of the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits*.

(Emphasis added.)

At the close of trial—which ran for seven weeks—the jury found for Appian. It awarded Appian damages in the amount of $2,036,860,045 from Pega and $5,000 from Zou for the VUTSA violation. Pega moved to set aside the verdict, but the circuit court denied the motion.

Pega appealed to the Court of Appeals, first arguing that the circuit court erred in entering judgment on the jury's verdict because the evidence was insufficient to establish that Pega had misappropriated the trade secrets of Appian. *Pegasystems Inc. v. Appian Corp.*, 81 Va. App. 433, 448-49 (2024). Alternatively, Pega contended that it was entitled to a new trial based on the circuit court erroneously granting Instruction #14 regarding burden-shifting, *id.* at 476, erroneously limiting the damages evidence Pega could offer based on the circuit court's reading of Pega's response to Interrogatory #18, *id*. at 488, erroneously prohibiting Pega from authenticating and introducing copies of its software at trial, *id*. at 492, and erroneously concluding that the total number of people who had access to the allegedly misappropriated trade secrets was "not relevant" to any issue in the case. *Id*. at 501.

In a detailed and thorough opinion, the Court of Appeals "reject[ed] Pega's claim that Appian failed to establish misappropriation of any trade secret as a matter of law." *Id*. at 507. However, the Court of Appeals ultimately reversed the judgment of the circuit court, concluding that the circuit court "erred in granting Instruction 14," erred in limiting the damages evidence Pega could adduce based on Pega's response to Interrogatory #18, erred in "refusing to permit Pega to attempt to authenticate its software evidence and, as a consequence, by excluding Pega's software . . . on the basis that it was on a different laptop than provided in discovery[,]" and erred in instructing the jury that the number of people with access to Appian's platform is "not

relevant" to the issues before the jury. *Id.* at 507-08. Accordingly, the Court of Appeals reversed the judgment of the circuit court and remanded the matter for a new trial on Appian's VUTSA claims. *Id.* at 508.

Appian filed a petition for appeal in this Court. Appian asserts that the Court of Appeals erred in concluding that the circuit court erred in: (1) giving Instruction #14; (2) excluding certain evidence as a result of Pega's response to Interrogatory #18; (3) precluding Pega from authenticating versions of its software by means other than the laptop it had produced in discovery thereby preventing the software's admission at trial; and (4) giving Instruction #13-1 informing the jury that the number of people with access to Appian's alleged trade secrets was irrelevant to any issue before the jury. Pega advanced assignments of cross-error, effectively asserting that Appian had failed to establish that any trade secrets had been misappropriated, and therefore, both the circuit court and the Court of Appeals had erred in their conclusions regarding Pega's motions to strike and to set aside the verdict. Having granted review on both parties' assignments of error, we now address their respective arguments.

II. ANALYSIS

A. Standard of review

"Armed with a jury verdict approved by the circuit court," Appian "occupies the 'most favored position known to the law.'" *RGR, LLC v. Settle*, 288 Va. 260, 283 (2014) (quoting *Bennett v. Sage Payment Solutions, Inc.*, 282 Va. 49, 54 (2011)). Accordingly, Appian "is entitled to have the evidence, and all the inferences that may reasonably be drawn from it, viewed in the light most favorable to" it. *Norfolk Southern Ry. Co. v. Sumner*, 297 Va. 35, 47 (2019). Therefore, as to factual questions, we presume the judgment below to be correct and are

bound by it "unless it is plainly wrong or without evidence to support it." *Dixon v. Sublett*, 295 Va. 60, 66 (2018) (internal quotation marks and citation omitted).

We also owe deference to the circuit court regarding its decisions about the admission or rejection of evidence and regarding any limitations it imposed upon a party as a result of how that party met (or failed to meet) its discovery obligations, including compliance with the pretrial scheduling order. We may only disturb such rulings if they constitute an abuse of discretion. *See, e.g.*, *Palmyra Assocs., LLC v. Commissioner of Hwys.*, 299 Va. 377, 384 (2020) (applying abuse of discretion standard to a circuit court's decision to admit or exclude evidence); *Galloway v. City of Northampton*, 299 Va. 558, 563 (2021) (applying abuse of discretion standard to issues related to discovery/pretrial order compliance). The abuse of discretion standard recognizes that a decisionmaker has been granted "a range of choice," and we will not set aside that choice "unless the court's discretionary decision exceeded the outermost limits of the range of choice available." *Palmyra Assocs.*, 299 Va. at 384 (internal quotation marks and citations omitted). In general, a circuit court abuses its discretion by failing to consider "a relevant factor that should have been given significant weight"; by considering "an irrelevant or improper factor" and giving that factor "significant weight"; or "when all proper factors, and no improper ones are considered" but the circuit court's weighing of those factors constitutes "a clear error of judgment." *AV Auto., LLC v. Gebreyessus*, 301 Va. 321, 329 (2022) (quoting *Galiotos v. Galiotos*, 300 Va. 1, 11 (2021)).

We owe no deference, however, to a circuit court's resolution of questions of law. *See Commonwealth v. Holman*, 303 Va. 62, 70 (2024) (citing *Amin v. County of Henrico*, 286 Va. 231, 235 (2013)). "[W]hether a jury instruction accurately states the relevant law is a question of law[.]" *Hawthorne v. VanMarter*, 279 Va. 566, 586 (2010). Accordingly, we review *de novo*

whether the challenged jury instructions given by the circuit court were accurate statements of Virginia law. *Id*.

B. The evidence was sufficient to support Appian's claim that Pega misappropriated Appian's trade secrets

In its assignments of cross-error, Pega asserts that its motions to strike and set aside the verdict should have been granted because the evidence failed to establish that Appian's trade secrets were misappropriated. Specifically, Pega argues that Appian failed to identify with sufficient specificity its alleged trade secrets, failed to establish that the "alleged trade secrets qualified as trade secrets" under VUTSA, and failed to establish that it "took reasonable efforts to maintain the secrecy of its alleged trade secrets[.]" Both the circuit court and the Court of Appeals rejected these arguments. For the reasons that follow, we agree with the lower courts and affirm the judgment of the Court of Appeals regarding Pega's assignments of cross-error.

1. Trade secrets under VUTSA

For the purpose of VUTSA, a "trade secret" is any

> information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> 1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> 2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Code § 59.1-336.

The statutory definition of "trade secret" that the General Assembly adopted in VUTSA is a broad one extending "far beyond the layperson's conception of secret formulas." 1 Kent Sinclair, *Virginia Remedies* § 29-1[A] (5th ed. 2024). By the unambiguous terms of Code

§ 59.1-336, a "trade secret" includes *any* information that provides actual or potential economic value to those who rightfully possess it and that is not "readily ascertainable" through legitimate means by others "who can obtain economic value from . . . disclosure or use" of the information, so long as the rightful possessor of the information has taken "reasonable" steps under the circumstances to maintain the secrecy of the information.

Reasonable minds may differ as to whether a particular piece of information provides actual or potential economic value to its owners, whether such information is publicly available, or whether those seeking the information for their own benefit are required to use improper means to obtain it. Code § 59.1-336.

Similarly, reasonable minds may differ as to whether a piece of information is "secret" for the purposes of VUTSA. Although we have recognized that "[t]he crucial characteristic of a trade secret is secrecy," we also have recognized that such "secrecy need not be absolute; the owner of a trade secret may, without losing protection, disclose it to a licensee, an employee, or a stranger, if the disclosure is made in confidence, express or implied." *Dionne v. Southeast Foam Converting & Packaging, Inc.*, 240 Va. 297, 302 (1990) (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974)). Determining whether the owner of information has engaged in "efforts that are reasonable under the circumstances to maintain its secrecy[,]" Code § 59.1-336, will depend on the specific facts.

As a result, whether a piece of information constitutes a trade secret under VUTSA "often is not obvious and" will "require[] an ad hoc evaluation of all the surrounding circumstances. For this reason, the question of whether certain information constitutes a trade secret ordinarily is best resolved by a fact finder after full presentation of evidence from each side." *MicroStrategy Inc. v. Li*, 268 Va. 249, 264 (2004) (internal quotation marks and citations

omitted). Accordingly, "the determination whether a trade secret exists ordinarily presents a question of fact to be determined by the fact finder from the greater weight of the evidence." *Id*.

2. Rational jurors could conclude that Pega misappropriated trade secrets

Pega contends that Appian failed to identify sufficiently the trade secrets allegedly stolen and that the information it learned from its efforts was not, in fact, a trade secret. Given the deference we owe the jury's verdict, *Settle*, 288 Va. at 283, Pega has a heavy burden on appeal. Pega can prevail on its motion to strike/motion to set aside the verdict arguments only if, after we view "the evidence . . . and all the inferences that may reasonably be drawn from it . . . in the light most favorable to" Appian, *Sumner*, 297 Va. at 47, no rational jury could have concluded as this jury did.

At the outset, it is important to recognize that, even though the two companies here are software companies, the trade secrets at issue did not have to be a specific line or lines of computer code. VUTSA applies to *any* information that meets the statutory definition, whether that be computer code, a marketing plan, or even undisclosed and not publicly ascertainable strengths and weaknesses of a product.

Here, the evidence at trial was sufficient to identify the information that Appian claimed Pega misappropriated. Both Dr. Marshall and Dr. Cole testified to specific information about how Appian's platform worked and its weaknesses that was obtained by Zou and then disclosed to Pega. As the Court of Appeals correctly summarized, this testimony and other evidence specifically identified "(1) functions of Appian's platform that Appian accused Pega of copying; (2) knowledge relating to weaknesses of Appian's platform which Pega used to its own advantage; and (3) access to Appian's confidential documentation such as its user manual which assisted Pega in copying Appian's strengths and exploiting its weaknesses." *Pegasystems*, 81

Va. App. at 452. Although not as specific as a particular line of computer code, Appian's allegations and the evidence at trial were sufficient to identify the pieces of its valuable information that it contended constituted trade secrets and that were misappropriated by Pega.

Turning to Pega's contention that the information identified by Appian did not constitute trade secrets, the question is whether a rational factfinder could have concluded from the evidence that the information was a trade secret under VUTSA. The first part of that inquiry required the jury to determine whether Appian "[d]erive[d] independent economic value, actual or potential, from" the information "not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use[.]" Code § 59.1-336.

Although other evidence also supports the jury's determination that the information at issue fell within this statutory definition, the actions and statements of Pega itself provided a sufficient basis for concluding that the information did so. It is undisputed that Pega hired what it described as a "spy" in Zou, went to great lengths to conceal his identity, utilized the information he provided for its own financial benefit, and, when he lost access, engaged in efforts to trick Appian into granting it access to the information through its employees' use of aliases and non-Pega credentials. It is not much of an inference to conclude that Pega would not have engaged in such activities if the information did not have economic value to both Appian and Pega.[5] Similarly, it is not an impermissible logical leap for a factfinder to conclude that

[5] Standing alone, a Pega employee stating that, once Pega possessed Zou's information, it "should never lose against Appian" for a contract again provides a sufficient basis for a rational jury to conclude that the information provided actual or potential economic value to both companies.

Pega would not have engaged in the undisputed acts of corporate espionage for information that was "readily ascertainable" by it without the need to employ improper means.[6]

Pega next contends that the information could not constitute a trade secret under VUTSA because Appian did not take sufficient steps to protect the information. Specifically, Pega argues that the information ceased to be a potential trade secret because "Appian broadly exposed its BPM platform—and thus every capability it now claims is secret—to thousands of developers and countless prospective customers" without obtaining express contractual assurances that those with access would not share the information. According to Pega, by sharing the information and not requiring such express contractual assurances, "Appian extinguished any trade-secret protection it may have had as a matter of law." We disagree.

Although VUTSA does require the entity claiming trade secret protection to have taken steps to maintain the secrecy of the information, the language of the statute and our prior cases make clear that such secrecy need not be absolute. As we previously have explained, the holder of a trade secret "may, without losing protection, disclose it to a licensee, an employee, or a stranger, if the disclosure is made in confidence, *express or implied*." *Dionne*, 240 Va. at 302 (emphasis added). Thus, merely sharing information with others does not preclude it from being a trade secret. Similarly, the failure to obtain express assurances from those with whom the

[6] VUTSA defines "improper means" as including "theft, bribery, misrepresentation, use of a computer or computer network without authority, breach of a duty or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." Code § 59.1-336. On appeal, Pega does not expressly challenge that it used improper means to obtain Appian's information, so we need not explore the outer limits of the statutory definition. Suffice it to say that a reasonable jury could conclude that Pega hiring someone it characterized as its corporate "spy" and engaging in other efforts that its own CTO conceded were inappropriate falls well within the definition.

information is shared is unnecessary to maintain trade secret protection so long as the facts and circumstances imply that the information is to be held in confidence.

The statute only requires that the holder of the trade secret engage in "efforts that are *reasonable* under the circumstances to maintain its secrecy." Code § 59.1-336 (emphasis added). As a leading commentator has observed, by adopting the reasonableness standard, the General Assembly made clear that VUTSA requires neither "bank vault" nor "'armed guard' style protection" to maintain trade secret protection. 1 Kent Sinclair, *Virginia Remedies* § 29-1[A] (5th ed. 2024). The efforts to maintain secrecy need only be reasonable. Whether efforts are reasonable in a given set of circumstances generally is a jury question. *Cf. Johnson v. Wilmoth*, 209 Va. 82, 85 (1968); *Merchants & Miners Transp. Co. v. L. J. Upton & Co.*, 127 Va. 406, 412 (1920).

Here, the evidence demonstrated that Appian took at least some efforts to maintain the secrecy of its information. For example, the terms of use for people given access to the Appian Forum limited what users could do with the information obtained, and a reasonable juror reviewing those terms of use could conclude the terms prohibited Zou's disclosures here. Furthermore, as Dr. Cole testified, many of the documents on the Appian Forum were labeled "confidential"—as was the server all of the documents were housed in—and marked and controlled in a way indicating that they were trade secrets. Jurors also learned that Appian relied on confidentiality agreements, such as the one between Serco and Zou, that its customers had with their employees who had access to Appian's information. Furthermore, those who accessed Appian's software through free trials were subject to "clickwrap" terms and conditions that limited their use or misuse of the information obtained.

The jury concluded from this and other evidence that Appian had taken reasonable steps to keep its information secret within the meaning of VUTSA. As the Court of Appeals noted, this conclusion finds support in the efforts engaged in and the difficulties encountered by Pega in attempting to access the information. *Pegasystems*, 81 Va. App. at 470. The jury reasonably could conclude that Appian had engaged in "efforts that are reasonable under the circumstances to maintain [the] secrecy" of the information at issue, Code § 59.1-336, from the fact that Pega needed to engage in elaborate and improper methods to access the information. Accordingly, the evidence was sufficient to support the jury's conclusion that Pega misappropriated Appian's trade secrets, and therefore, we affirm the Court of Appeals' conclusion that the circuit court correctly denied Pega's motions to strike and set aside the verdict.[7]

C. The circuit court erred by instructing the jury that Pega bore any burden of proof regarding Appian's damages claim

At Appian's request, the circuit court granted Instruction #14 to guide the jury in making its damages determination. The instruction directed the jury that, in determining any damages as a result of Pega's misappropriation of Appian's trade secrets, "Appian ha[d] the burden of establishing by greater weight of the evidence Pegasystems' sales[,]" but that Pega bore the "burden of establishing by greater weight of the evidence any portion of the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits."

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[7] In doing so, we reiterate that the existence of a trade secret under VUTSA and whether a trade secret has been misappropriated represent questions of fact that, in general, are to be resolved by the factfinder. *MicroStrategy*, 268 Va. at 264. Our conclusion that the evidence adduced at trial was sufficient to support the jury's verdict does not suggest that the evidence compelled that result or that another jury faced with the same evidence necessarily would have reached the same verdict. Rather, we only conclude that, viewing the evidence in the light most favorable to Appian and granting Appian all reasonable inferences that flow from such a view of the evidence, *Sumner*, 297 Va. at 47, the jury's determination was neither "plainly wrong [n]or without evidence to support it." *Dixon*, 295 Va. at 66.

The instruction entitled Appian, once it had established that Pega had misappropriated trade secrets and had sales, to all of Pega's sales revenue as damages unless Pega could convince the jury that the sales were unrelated to the misappropriation or were otherwise offset by expenses related to running the company. In effect, Pega was given the burden of proving that portions of its raw sales figures did not represent profits tied to the misappropriation, and thus, did not represent unjust enrichment as a result of Pega's misdeeds.

The Court of Appeals concluded that Instruction #14 was not an accurate statement of Virginia law. For the following reasons, we agree with the Court of Appeals that Instruction #14 was not an accurate statement of Virginia law and that the circuit court erred in giving it.

1. The common law burden of proof on damages and its significance[8]

It long has been a fundamental precept of Virginia law that a plaintiff bears the burden of proving both that he has been harmed by the defendant's wrongful act and that the defendant's wrongful act proximately caused the damages the plaintiff seeks to recover. *See, e.g.*, *Banks v. Mario Indus.*, 274 Va. 438, 455 (2007); *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 190 (2006); *Shepherd v. Davis*, 265 Va. 108, 125 (2003); *Hale v. Fawcett*, 214 Va. 583, 585 (1974). This concept in Virginia dates to English common law, which required a plaintiff to prove the amount of his damages if he sought anything more than nominal damages. As the Supreme Court of Georgia, with citations to English cases, recently summarized:

> a plaintiff at common law had to prove to a sufficient certainty the amount of money that would satisfy that harm. See *Kendrick v. Bartland*, 86 Eng. Rep. 1056, 1056 (2 Mod. 253) (Com. Pl. 1660) ("[The plaintiff] shall have damages for what he can prove[.]"); *Gardiner v. Croasdale*, 97 Eng. Rep. 625, 627 (2 Burr. 904) (KB

[8] Remedies tied to unjust enrichment damages were well known when the English common law was received in Virginia. *See generally The Intellectual History of Unjust Enrichment*, 133 Harv. L. Rev. 2077 (2020) (tracing the remedy from the Roman civil law through the English courts of law and chancery and, ultimately, to American law).

> 1760) ("[I]n an action for damages, the plaintiff is to recover his damages, according to his proof[.]"); *Robey v. Howard*, 171 Eng. Rep. 734, 734 (2 Stark. 555) (KB 1819) ("[I]t was incumbent on the plaintiff to prove his damages.").

Walmart Stores East, LP v. Leverette, 917 S.E.2d 702, 708 (Ga. 2025).

That this long-standing Virginia principle originates in the common law is significant to our resolution of this appeal. Code § 1-200 provides that "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." Accordingly, Virginia courts are not at "liberty to simply disagree with English common law." *White v. United States*, 300 Va. 269, 278 (2021). If the common law is to be changed, the task belongs to the legislature.[9] *See Robinson v. Matt Mary Moran, Inc.*, 259 Va. 412, 417-18 (2000).

Because the power to alter common law precepts belongs to the legislature, we may not infer such changes absent the General Assembly adopting language demonstrating that it intended to depart from the common law. "Abrogation of the common law requires that the General Assembly plainly manifest an intent to do so." *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 276 n.4 (2016) (quoting *Linhart v. Lawson*, 261 Va. 30, 35 (2001)). When the General Assembly enacts a statute, the enforcement of which implicates common law processes and concepts, such as the burden of proof in a suit for damages, the statutory language

[9] Because of Virginia's steadfast and explicit commitment to the concept of the separation of powers, *see* Va. Const. Art. I, § 5 and Art. III, § 1, our deference to the General Assembly's prerogative in this realm long has been understood to contain a constitutional dimension as well. *See* 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, Editor's App. Note E, at 405 (1803) ("In Virginia, it would be a violation of the constitution for the *courts* to undertake to supply all defects of the common law not already supplied by statute. That is the exclusive province of the *legislature*.").

"must . . . be read along with the provisions of the common law, and the latter will be read into the statute unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law." *Wicks v. City of Charlottesville*, 215 Va. 274, 276 (1974). Thus, absent a clear manifestation of the General Assembly's intent to alter a plaintiff's burden of proof in a suit brought under VUTSA, the burden of proof on damages remains with the plaintiff and the circuit court erred in instructing the jury otherwise.[10]

2. VUTSA's damages provision

Damages under VUTSA are governed by Code § 59.1-338. In pertinent part, that section provides that:

> a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. If a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Code § 59.1-338(A). By its express terms, the statute allows a successful VUTSA plaintiff, identified in the statute as "a complainant," to recover "the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into

[10] In reaching our conclusion, we acknowledge that the General Assembly did intend to alter the common law in some respects when it adopted VUTSA. Code § 59.1-341 provides that, subject to certain exceptions, VUTSA "displaces conflicting tort, restitutionary, and other law of this Commonwealth providing civil remedies for misappropriation of a trade secret." Thus, VUTSA generally preempts common law causes of action that are based on the misappropriation of a trade secret. This preemption, however, is of the causes of action themselves, not the manner in which any particular cause of action is proved. Because nothing in VUTSA suggests that the General Assembly intended VUTSA to alter the burden of proof for one seeking damages, the common law rule regarding the burden of proof on damages remains in effect. *Wicks*, 215 Va. at 276.

account in computing actual loss" or "a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." No language in Code § 59.1-338 suggests that the General Assembly intended to displace the default, common law rule that a plaintiff bears the burden of proof on damages.

To the contrary, as the Court of Appeals observed, the words of the statute strongly suggest that, as at common law, a VUTSA plaintiff bears the burden of proof on damages without any burdens being shifted to the defendant. *Pegasystems*, 81 Va. App. at 479-80. The language providing for an alternative measure of damages if "a complainant," i.e., the plaintiff, "is *unable to prove* a greater amount of damages by other methods of measurement," Code § 59.1-338 (emphasis added), leaves little doubt that the plaintiff has the burden to prove damages. Otherwise, his inability to do so would not require an alternative measure of damages. By providing royalties as an alternative measure of damages when a plaintiff is unable to prove the true amount of his actual loss or unjust enrichment damages, the General Assembly did not shift the burden of proof regarding any aspect of a VUTSA damages claim; rather, it left it where it lay—with the plaintiff.

3. UTSA and the Restatement (Third) of Unfair Competition do not alter our conclusion

Given the lack of language in VUTSA supporting its burden-shifting argument, Appian must convince us that such burden-shifting is necessarily implied by VUTSA. *Wicks*, 215 Va. at 276. Its attempts to do so focus on VUTSA being based on the model Uniform Trade Secrets Act ("UTSA"), which Appian contends incorporates a comment to the Restatement (Third) of Unfair Competition.

a. UTSA

There is no dispute that, when the General Assembly enacted the statute in 1986, VUTSA was based on the 1985 model UTSA statute promulgated by the Uniform Law Commission. Section 3 of the 1985 version of UTSA addresses damages and provides that

> [e]xcept to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Unif. Trade Secrets Act. § 3(a) (Unif. L. Comm'n 1985).

Even accepting Appian's premise that, despite the absence of any express burden-shifting language, the 1985 version of UTSA implicitly shifts a portion of the burden of proof on damages to a defendant, it does not follow that VUTSA also contains such an implicit reordering of the burden of proof.

First, UTSA, unlike VUTSA, was not adopted against the backdrop of Virginia's express adoption of the common law. Code § 1-200. Therefore, UTSA does not carry the same presumption that common law principles and precepts "will be read into the statute unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law." *Wicks*, 215 Va. at 276.

Second, and perhaps more importantly, in adopting VUTSA the General Assembly made the conscious choice *not* to adopt the damages provision contained in the 1985 version of UTSA verbatim. Although both acts contain provisions providing for the payment of a royalty for a

misappropriated trade secret, the language implementing those provisions is markedly different. UTSA, without reference to the complainant or his inability to prove damages by other methods, provides that "[i]n lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." Unif. Trade Secrets Act § 3(a) (Unif. L. Comm'n 1985). In stark contrast, the language of VUTSA ties the availability of royalty damages to a plaintiff's inability to prove the true amount of his damages by other measures, providing: "*If a complainant is unable to prove a greater amount of damages by other methods of measurement*, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." Code § 59.1-338 (emphasis added).

As the Court of Appeals correctly observed, the General Assembly's deviation from the language of the model act is significant. *Pegasystems*, 81 Va. App. at 480. When the General Assembly "deviates from a model, uniform act to add language, we effectuate this 'deliberate and intentional' choice." *Id*. (quoting *Commonwealth, Dep't of Taxation v. Champion Int'l Corp.*, 220 Va. 981, 992 (1980)). Thus, even assuming that the model act implicitly shifts a portion of the burden of proof when certain prerequisites are met, the different language the General Assembly adopted precludes such an interpretation of VUTSA.

b. Restatement (Third) of Unfair Competition

In its attempt to convince us that Code § 59.1-338 implicitly shifts a portion of the burden of proof on damages to a defendant, Appian also relies upon the Restatement (Third) of Unfair Competition. To determine unjust enrichment damages in trade secret cases, a comment to the Restatement opines that a "plaintiff has the burden of establishing the defendant's sales; the

defendant has the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits." Restatement (Third) of Unfair Competition § 45 cmt. f (Am. L. Inst. 1995). Appian argues that, electing to embrace the view of the Restatement, "[t]he overwhelming majority of other States, many interpreting similar statutes also modeled off the model Uniform Trade Secrets Act, have adopted the burden-shifting framework" embodied in Instruction #14. Appian also relies upon the amicus brief filed by Professor Harvey Perlman, who, in 1989, was appointed by the American Law Institute as one of two Co-Reporters for the Restatement (Third) of Unfair Competition. Although we respect our sister states and the work of both the American Law Institute and Professor Perlman, the views each expresses in and about the Restatement (Third) of Unfair Competition alters neither the text of VUTSA nor the presumption we must follow regarding the common law.

In his amicus brief, Professor Perlman makes a cogent, policy-based argument explaining why the Restatement comment champions adopting a burden-shifting framework. He notes that it often will be difficult, if not impossible, for a plaintiff to learn enough about a defendant's internal financial workings to prove the exact amount of unjust enrichment. He concludes that a burden-shifting framework, such as was adopted by the circuit court here, is appropriate because it "accords with the general principle that a burden is imposed on the party best able to present the evidence."

Given our task, the argument misses the mark. To the extent that policy considerations augur in favor of a burden-shifting framework, that is a choice to be made by the General Assembly, not this Court. *See, e.g.*, *Riner v. Commonwealth*, 268 Va. 296, 321 (2004) (recognizing that changes to common law principles based upon public policy arguments are the province of the General Assembly).

As noted above, the text adopted by the General Assembly is inconsistent with the Restatement position advanced by Appian and Professor Perlman.[11] The statutory language, providing that a royalty remedy may be utilized "[i]f a complainant is unable to prove a greater amount of damages by other methods of measurement," Code § 59.1-338, recognizes that the plaintiff bears the burden of proof. It does so while simultaneously recognizing the issue identified by Professor Perlman, that it may be difficult, if not impossible, for a plaintiff to prove unjust enrichment damages. Aware of the potential problem, the General Assembly elected to provide the alternative remedy of a royalty rather than adopt the burden-shifting method preferred by the Restatement, Professor Perlman, and Appian.

For the foregoing reasons, we conclude that the General Assembly did not, explicitly or implicitly, adopt a burden-shifting framework regarding proof of damages when it adopted VUTSA. As a result, Instruction #14 is not an accurate statement of law on the burden of proof

[11] Given that our task is to interpret Code § 59.1-338, we find it significant that Professor Perlman does not quote the actual text of Code § 59.1-338 in his amicus brief. We note that a focus on the actual statutory text led a leading academic commentator on Virginia remedies to conclude that the plaintiff bears the burden of proof on damages. *See* 1 Kent Sinclair, *Virginia Remedies* § 29-3[A] (5th ed. 2024). Focused on the text of the Virginia statute and without a mention of burden-shifting, Professor Sinclair concludes that under VUTSA,

> [a] plaintiff has the burden to show with reasonable certainty the amount of [its] damages and the cause from which they resulted, [i.e., misappropriation of its trade secret]; speculation and conjecture cannot form the basis of the recovery. In order to make that showing, the plaintiff is thus required to demonstrate a causal connection between the defendant[s'] wrongful conduct and the damages asserted. Furthermore, *the plaintiff must establish the amount of those [alleged] damages by using a proper method and factual foundation for calculating damages.*

Id. (internal quotation marks, footnotes, and citations omitted) (emphasis added).

on damages, and the circuit court erred in giving that instruction to the jury. Accordingly, we affirm the judgment of the Court of Appeals regarding Instruction #14.

D. The circuit court erred in limiting Pega's damages evidence based on the response to Interrogatory #18

Appian argues that the Court of Appeals erred in reversing the circuit court's ruling preventing Pega from arguing that any portion of its gross revenue was not tied to the sales of BPM platform products. Appian contends that the circuit court acted within its considerable discretion when it ruled that Pega's response to Interrogatory #18 meant that it had "essentially given up" any defense that it earned significant revenue from non-BPM platform products. Although we agree with Appian that a circuit court has considerable discretion in making determinations regarding compliance with discovery and the admissibility of evidence, we agree with the Court of Appeals that the circuit court abused its discretion in ruling as it did here.

If the evidence Pega sought to introduce directly contradicted a discovery response, both Appian and the circuit court would stand on much firmer ground. As the Court of Appeals noted, however, the evidence that Pega sought to introduce did not contradict Pega's response to Interrogatory #18.

By the express language of Interrogatory #18, Appian sought an annualized revenue and cost breakdown "from 2012 through 2021 relating to Pega 6.3, Pega 7.0 and any subsequent version broken out by year and version of the software[.]" Interrogatory #18 does not request information regarding revenues Pega may have realized from other product lines or products that did not involve the specific versions of the software mentioned. This is not a distinction without a difference. As the Court of Appeals observed, Interrogatory #18 requested information "about '*versions*' of a specific product: Pega's software. Reporting that Pega does not track revenue by software versions is not tantamount to asserting that Pega sells no other products or that Pega

does not track revenue by product or by lines of business." *Pegasystems*, 81 Va. App. at 489. Because the question was limited to revenue from specific software versions, the circuit court abused its discretion in concluding that the interrogatory response precluded Pega from offering relevant revenue information about the sale of other products and product lines that—although potentially relevant on the question of damages—was not responsive to Interrogatory #18.

Appian challenges the distinction drawn by the Court of Appeals, noting that Pega elected to produce its "financial results (including total revenue and all associated costs and expenses) for each applicable fiscal year as reported to the SEC in Pegasystems' annual Form 10-K filings and quarterly Form 10-Q filings" in response to Interrogatory #18. Appian argues that this represented a warranty that all of Pega's revenues were related to the software mentioned and that it learned that Pega claims to derive revenue from other products "for the first time at trial[.]" We find neither argument persuasive.

The argument that Pega's response to Interrogatory #18 effectively warranted that all its corporate revenue came from the sale of the mentioned software might have more purchase if Pega had simply produced its 10-K and 10-Q filings without saying anything more. The response, however, was not simply a production of those documents. Rather, Pega objected to Interrogatory #18. In its lengthy objection, which referenced the sale of items containing the software as distinct "products," Pega also asserted that the interrogatory was "overbroad, unduly burdensome, and seeking irrelevant information." As noted by the Court of Appeals, Appian did not challenge the objection or move to compel a response. *Pegasystems*, 81 Va. App. at 490.

Furthermore, Appian's contention that it learned that Pega claimed to have revenue from products unrelated to the mentioned software "for the first time at trial" is belied by the record. As the Court of Appeals noted, "long before trial Pega's damages expert . . . submitted a report

[to Appian] breaking out revenue attributable to various products[,]" 81 Va. App. at 489, leaving no doubt that Pega claimed to sell products that did not involve the software mentioned in Interrogatory #18. Although a party may not use an expert report to effectively amend prior discovery responses and introduce new theories into a case that are contradicted by the party's prior discovery responses, the information here did not contradict the interrogatory response. To the extent that Appian actually believed that Pega was changing theories midstream and had abandoned what Appian understood the response to Interrogatory #18 to mean, it should have taken action. It did not do so.[12]

In concluding that the circuit court abused its discretion in how it enforced its interpretation of Pega's response to Interrogatory #18, we do not, in any way, depart from our long-held view that circuit courts enjoy considerable discretion in making determinations regarding compliance with discovery and the admissibility of evidence tied to that compliance (or lack thereof). *See, e.g.*, *Martin & Martin v. Bradley Enters.*, 256 Va. 288, 292-93 (1998). Rather, given these specific circumstances and the fact that Pega's response to Interrogatory #18 is not contradicted by the information Pega sought to introduce, we only conclude that the decision of the circuit court, which effectively denied Pega the ability to put on its damages defense, "exceeded the outermost limits of the range of choice available." *Palmyra Assocs.*, 299

[12] Given the facts and circumstances here, it is ultimately immaterial whether Appian did not challenge the objection/response because it was fooled by the answer or because it wholly understood the response and hoped to use it to preclude Pega from placing any revenue figure in front of the jury other than its total revenue. Our conclusion that the circuit court abused its discretion here does not turn on whether Appian, Pega, or both were playing "gotcha" with this particular discovery response.

Va. at 384 (internal quotation marks and citation omitted). Accordingly, we affirm the judgment of the Court of Appeals regarding Interrogatory #18.[13]

E. The circuit court erred in precluding Pega from attempting to authenticate and possibly introduce as evidence the relevant versions of its software

Appian next contends that the Court of Appeals erred in concluding that the circuit court erroneously prevented Pega from authenticating the versions of the software at issue and possibly introducing that software as evidence. Specifically, Appian notes that the circuit court's decision was tied to its determinations regarding Pega's compliance with the pretrial order, and thus, represents a "core case-management decision[] that must be left to trial judges." Although we agree with Appian that trial judges must be given wide latitude in dealing with such issues, *see, e.g.*, *Galloway*, 299 Va. at 563, we agree with the Court of Appeals that, in this case dealing with this issue, the circuit court's chosen course constituted an abuse of discretion.

Appian's argument, and the circuit court's subsequent ruling that precluded Pega from using or introducing the versions of its software at issue, requires a laser focus on only a portion of Pega's pertinent pretrial identification of exhibits.[14] Appian argues the ruling was reasonable because Pega's response specifically identified the exhibits by referencing a "laptop" as a

[13] In concluding that the circuit court abused its discretion by effectively adopting a "nuclear" sanction here, we do not endorse the manner in which Pega approached its discovery obligations. The record can be read as revealing a party that sought to obfuscate rather than disclose, and even a slight change in the facts of this case might have led us to conclude that the sanction adopted by the circuit court fell within its discretion. The discovery process is designed to end the proverbial "trial by ambush"; a party who seeks to evade its discovery obligations in a manner that allows it to do just that does so at its potential peril.

[14] Appian asserts that the circuit court did not expressly preclude Pega from utilizing or introducing the relevant versions of its software at trial. Rather, the circuit court simply required Pega to use the laptop produced in discovery to utilize or introduce the software at trial. Of course, when the laptop would not function, the ruling effectively precluded Pega from utilizing or introducing the software at trial.

"physical object." From this, Appian argued, and the circuit court agreed, that the laptop itself was the identified exhibit, and therefore, Pega was limited to the laptop.

Such a ruling may have been a reasonable one if all Pega had done to identify an exhibit was to say the "Pega Laptop" was the exhibit; however, its identifications were not limited in this way. The full identifications were "Pega Laptop *Containing Version 6.3 and subversion* (Physical Object)" and "Pega Laptop *Containing Version 7.1 and subversions* (Physical Object)." (Emphases added.) Thus, the language Pega used specifically identified the referenced software versions the laptop contained and not other items on the laptop, such as a file containing Minesweeper or solitaire games, as the exhibits. Given the express language Pega used to identify the software in its disclosure of exhibits and the centrality of the identified software versions to the case,[15] the only fair reading of the identification is that the laptop was the medium on which the software was stored and had been produced in discovery, not that the laptop—as opposed to the software it contained—was the sole exhibit.

To hold otherwise in an era where disputes turn on electronically stored information that must be produced in discovery could lead to disastrous results. It is not hard to imagine electronic data being produced on a thumb drive that, when a lawyer goes to place the thumb drive into a projection device at trial, is dropped and stepped on, rendering it inoperable. Such an occurrence should not end the trial but simply cause the parties to come up with another

[15] This is not to say that a party may evade disclosure or identification requirements by claiming that the item or information that was not disclosed is key to proving a claim or defense. The importance of the information is a factor among many, including potential prejudice to the opponent, that should inform a circuit court's determination of compliance with a pretrial order and possible sanctions. A complete failure to even suggest that a particular item, such as the software in this case, will be used as an exhibit may, in circumstances not present here, lead to its exclusion no matter how critical it is to a claim or defense.

medium by which the relevant, electronically stored/produced information may be shown to the jury.

The circuit court was, of course, allowed to limit Pega to using only those versions of the software that had been produced in discovery and identified on the exhibit list. When the laptop would not work, Pega sought to establish this by having a witness authenticate the software by testifying that what it sought to use at trial was exactly the same software that had been loaded onto the laptop and produced in discovery. Pega proffered that Bixby was competent to testify that the versions of the software it sought to use and introduce at trial were the exact same versions that Pega had produced on the laptop provided to Appian. Rather than allow Bixby to attempt to authenticate the software in this fashion, the circuit court unreasonably rejected such an attempt altogether. It did so despite expressly recognizing that Bixby very well may have sufficient knowledge to confirm that the software versions Pega sought to use at trial were identical to what was on the laptop that had been produced in discovery.

In arguing that the circuit court's decision to prevent Pega from even attempting to authenticate the software was within the bell-curve of reasonableness that would insulate the circuit court's decision from potential reversal, Appian essentially argues that the problems were caused by how Pega produced the software and that it would have been unfair to force Appian to accept Bixby's testimony that the exact same software versions were being used. Although the manner in which Pega produced the software in discovery was wholly within Pega's control, the remainder of Appian's premise is faulty.

Neither Appian nor the circuit court would have been required to accept Bixby's testimony at face value. Appian would have been free to challenge Bixby's testimony through cross-examination, with the evidence being admitted only if, after hearing the testimony and

Appian's challenge to it, the circuit court concluded that Pega had established that the software it sought to use at trial was identical to what had been produced.[16] The circuit court retained the discretion to refuse to admit the evidence if it found the authentication testimony unconvincing; what it could not do was deny Pega any opportunity to establish that the software versions were identical.

As noted above, we owe deference to a circuit court's management of a trial, including its conclusions regarding a party's compliance with the requirements imposed by a pretrial scheduling order. *Galloway*, 299 Va. at 563. As such, a circuit court confronted with such questions has available to it "a range of choice," and we will not set aside its choices "unless the court's discretionary decision exceeded the outermost limits of the range of choice available." *Palmyra Assocs.*, 299 Va. at 384 (internal quotation marks and citations omitted). Under the facts and circumstances here, the circuit court's decision to deny Pega the ability to introduce the software at trial—without allowing Pega any chance to demonstrate that it was the exact software that had been produced in discovery—"exceeded the outermost limits of the range of choices available[,]" *id.*, and thus constituted an abuse of the circuit court's discretion. Accordingly, the circuit court erred in precluding Pega from attempting to authenticate and

[16] Appian claims that the only way to confirm definitively that the software was identical was to subject it to a full forensic review that could take days. Accepting this as true, the circuit court still had numerous options at its disposal short of the drastic option it chose. For example, the circuit court could have allowed the parties to conduct such a review prior to allowing the software to be used. Alternatively, the circuit court, if it had concluded Bixby's testimony was credible, could have conditionally allowed Pega to utilize the software with a strong admonition that if it proved to be different after Appian's forensic review, a curative instruction would issue and a significant sanction would be imposed. By employing the ultimate sanction without conducting any review to determine if the software was different than what had been produced, the circuit court abused its discretion.

possibly introduce as evidence the relevant versions of its software, and we affirm the Court of Appeals' judgment to that effect.

F. The circuit court erred in instructing the jury that the number of people with access to Appian's claimed trade secrets was "not relevant"

In granting Appian's motion *in limine* precluding Pega from introducing evidence of the absolute number of people Appian had allowed to access the claimed trade secrets, the circuit court largely adopted Appian's position that "[t]he number of licenses that Appian distributed . . . is irrelevant to any claims or defenses in this case." The circuit court doubled down on its relevancy determination when it instructed the jury that "[t]he numbers of users of the Appian platform and Appian Forum licensees are not relevant to any issue in this case, and any evidence as to those numbers should be disregarded." Although we review a circuit court's evidentiary determinations under the deferential abuse of discretion standard, *Palmyra Assocs.*, 299 Va. at 384, a circuit court abuses its discretion when it erroneously concludes that admissible, relevant evidence is irrelevant. *Commonwealth v. Proffitt*, 292 Va. 626, 636 (2016). For the reasons that follow, the circuit court erred in concluding that the number of people with access to the claimed trade secrets was irrelevant.

The bar for establishing that a piece of evidence is relevant "is exceedingly low[.]" 1 Kent Sinclair, *The Law of Evidence in Virginia* § 6-1 (8th ed. 2025). Evidence is relevant if it has "any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence."[17] Va. R. Evid. 2:401. As a result, "[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant." *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 260 (1999). Relevant pieces of

[17] Subject to certain exceptions, relevant evidence is admissible; irrelevant evidence is inadmissible. Va. R. Evid. 2:402(a).

evidence need not establish the fact in issue conclusively; rather, they are "relevant if [they] 'tend[] to cast any light upon the subject of the inquiry.'" *Townes v. Virginia State Bd. of Elections*, 299 Va. 34, 53 (2020) (quoting *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 629 (1953)). Accordingly, the question before the circuit court was whether the "numbers of users of the Appian Platform and Appian Forum licensees" had any tendency, however slight, to shed light on the question of whether Appian's claimed trade secrets were, in fact, trade secrets.

Although we have made clear that sharing information with others does not necessarily remove any trade secret protections that might otherwise apply, *Dionne*, 240 Va. at 302, it does not logically follow that the total number of people with whom the information is shared is irrelevant to the question of whether sufficient secrecy has been maintained. On a commonsense level, the more people who learn of a secret, the less likely it is that it will remain a secret. Therefore, the total number of people with the information may shed light on whether the information can be learned from publicly available sources. More importantly, to maintain trade secret protection for a piece of information, the holder of that information must engage in "efforts that are reasonable under the circumstances to maintain its secrecy." Code § 59.1-336. A rational factfinder could conclude that certain efforts are reasonable if only five people know the information but are inadequate if 30,000 people know the information. Thus, the total number of people who have been given the information can "cast . . . light upon the subject of the inquiry[,]" *Townes*, 299 Va. at 53, and therefore, the circuit court erred in deeming that number irrelevant and inadmissible. Accordingly, we affirm the judgment of the Court of Appeals on this issue.[18]

[18] In concluding that the total number of people who knew of Appian's purported trade secrets was relevant, we agree wholeheartedly with the Court of Appeals' observation that "the number of people who can see the secret is not *dispositive* of whether the information" is a trade

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Court of Appeals. Accordingly, we remand the matter to the Court of Appeals with instructions to remand the matter to the circuit court for further proceedings consistent with this opinion.

Affirmed.[19]

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secret under VUTSA. *Pegasystems*, 81 Va. App. at 504. Purported trade secrets can be disclosed to a million people and remain protected under VUTSA so long as "the disclosure[s were] made in confidence, express or implied." *Dionne*, 240 Va. at 302. Conversely, disclosure of the information to less than a handful of people can remove trade secret protections under VUTSA if the disclosures were not "made in confidence, express or implied[,]" *id*., causing a factfinder to conclude that the holder of the information did not engage in "efforts that are reasonable under the circumstances to maintain" the secrecy of the information. Code § 59.1-336.

[19] Given that our affirmance of the judgment of the Court of Appeals results in the verdict in the circuit court being set aside, we acknowledge that Code § 8.01-678 requires we engage in harmless error review. *See Commonwealth v. White*, 293 Va. 411, 419-420 (2017). Because of the combination of the errors discussed above and their potential effect on the proceedings in the circuit court, we cannot say that it "plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached[.]" Code § 8.01-678. Accordingly, we cannot say that the errors committed by the circuit court were harmless.

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

Gentry Locke Seminar

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I. ERROR MUST BE PRESENTED TO THE TRIAL COURT FIRST

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

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

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

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

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

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

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

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

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

B. <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).



Legislative Update: Money, Guns, Power, and Drugs

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Gentry Locke Consulting's Legislative Update: Money, Guns, Power, and Drugs

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Gentry Locke Seminar
October 2026

*The written materials for this CLE presentation include the enclosed summaries of numerous bills introduced and passed by the 2026 Regular Session of the General Assembly, as prepared by the Virginia Division of Legislative Services, and entitled *In Due Course: 2026 Changes to Virginia's Laws*. We will be discussing select bills during our presentation.



"All laws enacted at a regular session, . . .
excluding a general appropriation law,
shall take effect on the first day of July
following the adjournment of the session of the
General Assembly at which it has been enacted."
Constitution of Virginia, Article IV, Section 13

In Due Course:

2026 Changes to Virginia's Laws

In Due Course is a selection of legislation passed by the 2026 Regular Session of the General Assembly that is likely to affect the daily lives of the citizens of Virginia. The following legislation has been signed by the Governor and for the most part will go into effect on July 1, 2026.

The summaries were prepared by the staff of the Division of Legislative Services. Complete information on actions of the 2026 Regular Session is available on the Legislative Information System website.

Topics

Agriculture
Alcoholic Beverage Control
Cannabis Control
Civil Procedure
Commerce
Consumer Protections
Corrections
Criminal Offenses
Criminal Procedure
Domestic Relations
Freedom of Information
Gaming
General Government
Health & Health Professions
Higher Education
Housing
Insurance
Juveniles
Labor & Employment
Landlord & Tenant Act
Local Government
Motor Vehicles
Public Education
Public Safety
Public Utilities
Social Services
Special License Plates
Speed Cameras
Taxation
Technology
Traffic Infractions
Voting

Agriculture

HB 109. Board of Agriculture and Consumer Services; noxious weeds; commercial viability; report. The law amends the definition of noxious weed to remove the exclusion for living plants or parts thereof that are commercially viable or commercially propagated in Virginia and removes the requirement that the Noxious Weeds Advisory Committee include in its recommendations to the Board of Agriculture and Consumer Services an analysis of the current and potential in-state commercial viability of a plant species. The law requires a plant that is designated by the Board as a noxious weed and commercially propagated in Virginia to be subject to a phase-out period of two years for grasses, forbs, and vines; four years for shrubs; and seven years for trees. The law directs the Commissioner of Agriculture and Consumer Services

to conduct a review of the legislative and regulatory authority of the Board pertaining to the control of noxious weeds and report his findings and recommendations to the Chairs of the House Committee on Agriculture, Chesapeake and Natural Resources and the Senate Committee on Agriculture, Conservation and Natural Resources by November 1, 2026.

HB 402. Cottage food laws; sale of certain food over phone and internet; work group; report. The law expands the exemption from state inspection requirements for private homes where the resident processes and prepares certain food products, including pickles and other acidified vegetables, to allow for such person to sell such products at any location, through the internet, or by telephone to an individual in the Commonwealth for his own consumption and deliver such products in person, by mail, or by delivery service subject to certain restrictions. Current law only allows for the sale to take place in person at the private home, a temporary event, or a farmer's market. The law also directs the Department of Agriculture and Consumer Services to convene a work group to examine the structural, equipment, and facility standards for private homes in the Commonwealth producing products that do not meet the cottage food law exemptions. The law requires the work group to complete its meetings by November 1, 2026, and report its findings and recommendations to the Chairs of the Senate Committee on Agriculture, Conservation and Natural Resources and the House Committee on Agriculture, Chesapeake and Natural Resources by the first day of the 2027 Session of the General Assembly.

HB 1443/SB 386. Owners of sewage treatment works; land application, marketing, or distribution of sewage sludge; perfluoroalkyl and polyfluoroalkyl substances; testing requirements; work group; report. The law directs any owner of a sewage treatment works land applying, marketing, or distributing sewage sludge in the Commonwealth, beginning January 1, 2027, to collect representative samples of the sewage sludge intended to be land applied, marketed, or distributed and have such samples analyzed by an accredited laboratory for perfluoroalkyl and polyfluoroalkyl substances (PFAS). The law mandates certain outcomes for the land application of such sewage sludge depending on the concentration of PFAS in such sewage sludge. The law directs the Department of Environmental Quality to modify all Virginia Pollution Abatement permits for the land application of sewage sludge and Virginia Pollutant Discharge Elimination System permits for sewage treatment works that include sewage sludge prepared for land application, marketing, or distribution as soon as practicable. The law requires the Department to utilize the PFAS Expert Advisory Committee (PEAC) or convene a work group to study and recommend approaches to reduce the occurrence of PFAS in sewage sludge intended for land application within the Commonwealth. The Department is required to report the recommendations of the PEAC or work group to the Governor and the Chairs of the Senate Committee on Agriculture, Conservation and Natural Resources and the House Committee on Agriculture, Chesapeake and Natural Resources by November 1, 2027.

Alcoholic Beverage Control

HB 308/SB 620. Virginia Alcoholic Beverage Control Authority; permitting of retail tobacco product retailers; purchase, possession, and sale of retail tobacco products; penalties; report. The law transitions and provides a more comprehensive structure for the current licensing and enforcement responsibilities related to liquid nicotine and retail tobacco products from the Department of Taxation to a permitting system administered by the Virginia Alcoholic Beverage Control Authority. The law requires the Board of Directors of the Virginia Alcoholic Beverage Control Authority to conduct an unannounced buyer operation at least once every 24 months to verify that a permittee, defined in the law, is not selling retail tobacco

products to persons under 21 years of age. Portions of the law have a delayed effective date of October 1, 2026.

HB 975. Alcoholic beverage control; food-to-beverage ratio; report. The law reduces the current 45 percent food-to-beverage ratio for certain mixed beverage licensees and requires that a mixed beverage restaurant, caterer's, or limited caterer's licensee meet or exceed the following: (i) for such licensees with monthly food sales averaging at least $48,000, the food-to-beverage ratio shall not apply; (ii) for such licensees with monthly food sales averaging at least $25,000 but less than $48,000, the food-to-beverage ratio shall meet or exceed 30 percent; and (iii) for such licensees with monthly food sales averaging at least $4,000, but less than $25,000, the food-to-beverage ratio shall meet or exceed 45 percent, except that for any licensee with monthly food sales averaging less than $25,000 with a seating capacity of less than 30 seats and an occupancy permit for less than 60 people total, the food-to-beverage ratio shall meet or exceed 30 percent. The law also requires that restaurants have at least as many seats at tables as at counters.

The law requires the Virginia Alcoholic Beverage Control Authority to collect data regarding the compliance of mixed beverage licensees with the provisions of the law and the impact of the change to the food-to-beverage ratio on the gross amount of food consumed on a licensee's premises. The law requires the Authority to report such data to the Chairs of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services by November 1, 2027.

SB 424. Alcoholic beverage control; government stores; distiller's licensees as agents of the Board; sale of alcoholic beverages. The law allows certain holders of a distiller's license appointed as agents of the Board of Directors of the Virginia Alcoholic Beverage Control Authority to sell spirits, beer, wine, or cider for on-premises or off-premises consumption, provided that the spirits, beer, wine, or cider is manufactured within the same licensed premises or on contiguous premises of such agent licensed as a distillery, brewery, or winery. Under current law, such agents of the Board are permitted to give samples of such alcoholic beverages.

The law also increases the amount of spirits such distiller's licensees may give or sell to any person per day from three ounces to six ounces and requires such distiller's licensees to have food reasonably available at all times when spirits are served. The law provides that such food may be provided by food trucks, patrons providing their own food, or the agent of the Board and specifies that failure of such distiller's licensees to have food reasonably available may result in the Board's reconsideration of the agency agreement appointing such holder of a distiller's license or its officers and employees as agents of the Board.

The law requires the Authority to collect data regarding the compliance of distiller's licensees with the provisions of this law and report such data to the Chairs of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services by November 1, 2026, and again by November 1, 2027. The law also requires the Authority to convene a stakeholders group to review the manufacturer event licenses and off-site sales privileges granted to manufacturing licensees and report its findings and any recommendations for statutory or regulatory changes to the Chairs of the House Committee on General Laws and the Senate

Committee on Rehabilitation and Social Services no later than December 1, 2026. The law sunsets on July 1, 2028.

Cannabis Control

SB 543. Marijuana and hemp products; enforcement; civil penalties; work group; report. The law amends various provisions of law to increase enforcement and penalties related to the illegal sale of marijuana or marijuana products by persons licensed or permitted by the Virginia Department of Agriculture and Consumer Services, the Virginia Alcoholic Beverage Control Authority, and the Virginia Cannabis Control Authority (CCA). The law requires the Board of Directors of the CCA (the Board) to create and require a decal for retail marijuana stores, microbusinesses, pharmaceutical processors, and cannabis dispensing facilities to prominently display on the premises of such establishments where marijuana, marijuana products, marijuana paraphernalia, immature marijuana plants, or marijuana seeds are sold to consumers that allows consumers to electronically verify the validity of such establishment's license or permit from the Board. The law requires such decal to be displayed with a civil penalty of $10,000 for each day that such decal is not displayed in the establishment. The law also creates a $10,000 civil penalty for creating or falsifying such decal.

The law allows the Board to issue a notice of violation and order to cease unlicensed activity to any person who is engaged in the cultivation, processing, distribution, or selling of marijuana or marijuana products in violation of current law, and if the Board issues such notice and order, it may also order the seizure of such marijuana or marijuana products. Any person who intentionally removes such notice and order or sticker without authorization of the Board is subject to a civil penalty prescribed by the Board, not to exceed $5,000. The law specifies that the Chief Executive Officer of the Board or investigators appointed by him shall be sworn to enforce the provisions of the Cannabis Control Act and Board regulations and have the authority to investigate violations of the statutes and regulations the CCA is required to enforce. The law also requires the Board to establish, advertise, and administer a tip line, which may be accessed by phone and by internet, for members of the public to anonymously report concerns about, or suspected instances of, illicit retail marijuana practices.

The law revises certain provisions related to the assessment of civil penalties against manufacturers and sellers of certain industrial hemp extracts and foods containing industrial hemp extracts. Effective November 1, 2026, the law also creates a civil action pursuant to the Virginia Fraud Against Taxpayers Act and makes it a prohibited practice under the Virginia Consumer Protection Act to sell or offer for sale a substance intended for human consumption, orally or by inhalation, that (i) contains more than 0.3 percent total tetrahydrocannabinol or (ii) contains more than two milligrams of total tetrahydrocannabinol per package.

The law requires the Department of Criminal Justice Services to establish compulsory minimum and in-service training standards for law-enforcement officers on the enforcement of the Cannabis Control Act and certain provisions of law related to hemp by January 1, 2027.

Additionally, the law requires the Secretary of Public Safety and Homeland Security and the Secretary of Health and Human Resources to convene a work group to analyze the current efforts in the Commonwealth to combat the sale of illicit cannabis products and submit a report of its

findings and recommendations to the Chairs of the House Committees on Appropriations, on General Laws, and for Courts of Justice and the Senate Committees on Finance and Appropriations, on General Laws and Technology, on Rehabilitation and Social Services, and for Courts of Justice by October 1, 2026.

Civil Procedure

HB 671. Jurors; exemptions from jury service upon request; competency to perform jury duty. The law provides that no person shall be deemed incompetent to serve on any jury on the basis of disability if the person would otherwise be competent to serve if provided with reasonable accommodation. The law also provides that any person under a disability that substantially impairs the person's ability to perform jury duty shall be exempt from jury duty upon such person's request.

HB 1426. Limitations on enforcement of judgments; docketing of general district court judgments in the circuit court. The law provides that, for judgments entered in a general district court on or after July 1, 2026, where enforcement of such judgments is sought by a debt buyer, the docketing of an abstract of such judgment in the circuit court shall not affect the 10-year limitation period to enforce such judgment. Under current law, such docketing allows a general district court judgment to be treated as a judgment entered by the circuit court and may be extended in the same manner as a judgment entered by the circuit court.

Commerce

HB 69/SB 240. Retail franchise agreements; governing law; competition restrictions. The law provides that retail franchise agreements shall be governed by the laws of the Commonwealth and prohibits any person from offering or entering into a franchise agreement that includes competition restrictions that extend beyond termination or expiration of the franchise agreement, except as a term of sale in the event that a franchisee sells a franchise to a third party or back to the franchisor.

HB 665/SB 489. Financial institutions and services; virtual currency kiosk operators; license required; civil penalties. The law establishes requirements effective July 1, 2027, for the operation of virtual currency kiosks, as defined in the law, including a requirement that a virtual currency kiosk operator obtain licensure with the State Corporation Commission. The law requires operators to file annual and quarterly reports, provide certain disclosures, and take reasonable steps to detect and prevent fraud and money laundering. The law prohibits operators from accepting transactions above specified daily and monthly limits and establishes a maximum transaction charge of 18 percent of the value of such transaction. A person who violates the law's provisions is subject to a fine of up to $1,000 per violation as well as the existing enforcement provisions of the Virginia Consumer Protection Act. The law directs the State Corporation Commission to begin accepting applications for virtual currency kiosk operators on or before March 1, 2027, for licenses that will be effective beginning July 1, 2027.

Consumer Protections

HB 122. Manufacturing or sale of cosmetic products with certain ingredients prohibited; civil penalties. The law prohibits any person from manufacturing, selling, delivering, offering for sale, or using in connection with a consumer transaction any cosmetic product that contains certain ingredients that are listed in the law. The law exempts retailers that do not (i)

manufacture cosmetics containing prohibited ingredients or (ii) knowingly sell or offer for sale cosmetics containing prohibited ingredients. The law provides that a violation of its provisions constitutes a prohibited practice under the Virginia Consumer Protection Act and specifies that its provisions do not apply to or restrict the continued sale by a retailer of cosmetics in existing inventory before July 1, 2026.

HB 322/SB 186. Misbranded food; manufactured-protein food products; civil penalty. The law provides that a food is misbranded if it purports to be or is represented as a meat food product or poultry product and such food product (i) bears or contains a manufactured-protein food product, as defined in the law; (ii) is offered for sale; and (iii) has a label that is part of or placed on the food product package or other container storing such product that identifies the food as a meat food product or poultry product, unless such label bears a conspicuous and prominent qualifying term and is in close proximity to an identifying meat term, as such terms are defined in the law. The law exempts a meat food product that the Department of Agriculture and Consumer Services determines contains a trace amount of a manufactured-protein food product, prohibits the sale or offering for sale of a food product that is misbranded pursuant to the provisions of the law, and makes doing so a violation of the Virginia Consumer Protection Act. The law provides that a person who violates the provisions of the law is subject to a civil penalty not to exceed $500 and allows the Board of Agriculture and Consumer Services to adopt increased civil penalties not to exceed $500 for first, second, and subsequent violations of the law.

HB 360. Virginia Consumer Protection Act; prohibited practices; kratom products; civil penalties. The law prohibits selling or offering for sale (i) any kratom product to a person younger than 21 years of age; (ii) any kratom product that does not include a label listing all ingredients and the required disclosure as amended by the law; (iii) any kratom product not stored in an area that is not directly accessible to consumers, including behind a retail counter or in a locked display case, except for kratom products required to be refrigerated which may be stored, in accordance with relevant Virginia Alcoholic Beverage Control Authority regulations, in the same beverage cooler or refrigerator as wine and beer; (iv) any kratom product containing any synthesized material, semi-synthetic alkaloid, or synthetic kratom-like compound; (v) any kratom product containing 7-hydroxymitragynine in an alkaloid fraction exceeding one percent of total alkaloids in the container or providing more than one milligram of 7-hydroxymitragynine per serving; (vi) any kratom product adulterated with any dangerous, poisonous, or otherwise deleterious non-kratom ingredient, including any substance listed as a controlled substance under state or federal law; (vii) any kratom product that is combustible or intended for vaporization or injection; (viii) any kratom product that is manufactured, packaged, or marketed in a manner attractive to children; or (ix) any kratom extract product containing residual solvent levels exceeding applicable statutory or pharmacopeial limits.

HB 398/SB 315. Safeguarding American Veteran Empowerment Act; prohibited practices; civil penalties. The law creates the Safeguarding American Veteran Empowerment Act to regulate the practices of persons seeking to receive compensation for preparing, presenting, prosecuting, advising, consulting, or assisting any individual regarding any veterans' benefits matter, as defined in the law. The law provides that a violation of its provisions constitutes a prohibited practice under the Virginia Consumer Protection Act.

HB 1022/SB 493. Consumer protection; automatic renewal or continuous service offers; disclosure and cancellation. The law amends certain definitions related to automatic renewal or

continuous service offers, including the definition of "clear and conspicuous" as it relates to seller disclosures and requirements to provide a simple cancellation mechanism. The law replaces the term "supplier" in current provisions with "seller" and provides a definition for such term. The law requires sellers to provide a cancellation mechanism that is at least as easy to use as the mechanism used to initiate the automatic renewal or continuous service offer, and includes additional requirements for providing such cancellation mechanism. Under the law, certain businesses are no longer exempt from disclosure and cancellation requirements for automatic renewal or continuous service offers, and a violation of the provision constitutes a prohibited practice under the Virginia Consumer Protection Act.

Corrections

HB 173/SB 276. State correctional facilities; visitation policies; work group; report. The law sets additional visitation standards for visitors to state correctional facilities. The law requires the Department of Corrections (the Department) to provide extended or additional visitation access for long-distance visitors. The law provides that each in-person visit shall last a minimum of two hours unless shortened at the request of either the visitor or the incarcerated individual, or in response to an active security event. The law also provides that visitation privileges may be suspended only for conduct occurring during visitation that presents a direct and substantial threat to the physical safety of participants or the security of the correctional facility. The law provides a timeline and process for appealing any suspension of visitation rights. Finally, the law directs the Department to convene a work group to consider and develop practical policy and legislative recommendations regarding visitation. The work group is required to report its findings and specific legislative and policy recommendations to the General Assembly by October 1, 2026.

HB 296. State correctional facilities; visitation policies; work group; report. The law requires the Department of Corrections to establish and publicly post on its website and in the lobby of each state correctional facility an objective dress code for individuals visiting a state correctional facility and specifies certain requirements for and limitations on what such dress code may include. The law prohibits any state correctional facility from enforcing a dress code that is more restrictive than the dress code posted by the Department.

The law also prohibits any individual from being denied in-person visitation unless such individual is in clear violation of visitation rules or policies. Prior to denying entry to a visitor, the law requires the reasoning to be (i) reviewed in person by the facility administrative duty officer and (ii) approved by a regional administrator or superior. The law requires the Department to submit a report annually on or before November 1 to the General Assembly and the Governor with information on visitors denied entry to state correctional facilities, including the following information disaggregated by facility and by month: (a) the number of visitors denied entry and (b) the reasoning for such denials, including the specific rules or policies such visitors were alleged to have violated.

The law requires the Department to convene a work group consisting of relevant stakeholders to consider goals and develop practical policy and legislative recommendations related to facilitating visitation within state correctional facilities and report its findings and recommendations to the Governor and the General Assembly no later than November 1, 2026.

HB 361. Earned sentence credits; incarceration while awaiting trial or pending an appeal. Effective July 1, 2028, the law provides that a person's eligibility for earned sentence credits includes any period of time actually spent in any state or local correctional facility, state hospital, or juvenile detention facility awaiting trial or pending an appeal that was deducted from such person's term of incarceration or detention. The law provides that the provisions apply retroactively to any person who is confined in any state or local correctional facility on July 1, 2028.

Criminal Offenses

HB 250. Sex offenses prohibiting proximity to children; Park Authorities Act; penalty. The law provides that every adult who is convicted of an offense prohibiting proximity to children, when the offense occurred on or after July 1, 2026, shall as part of his sentence be forever prohibited from going, for the purpose of having any contact whatsoever with children who are not in his custody, within 100 feet of the premises of any place owned or operated by an authority created pursuant to the Park Authorities Act that he knows or should know is a playground, athletic field or facility, or gymnasium.

The law also provides that any person convicted of an offense under the laws of any foreign country or any political subdivision thereof, or the United States or any political subdivision thereof, similar to any offense set forth in current law shall be forever prohibited from going, for the purpose of having any contact whatsoever with children who are not in his custody, within 100 feet of the premises of any place owned or operated by an authority created pursuant to the Park Authorities Act that he knows or has reason to know is a playground, athletic field or facility, or gymnasium.

A violation of the law's provisions is punishable as a Class 6 felony.

HB 317/SB 743. Damage or trespass to public services or utilities or critical infrastructure; penalties. The law adds the intentional destruction of or damage to any fixture, equipment, or information technology system that is used to provide, process, transmit, or maintain public services, public utilities, cable television, broadband, or other critical infrastructure, as defined in relevant law, to the existing offense of damage or trespass to public services or utilities.

HB 629. Certain sex offenses; sexual extortion; unlawful creation of image of another; penalties. The law provides that any person who, with the intent to cause the complaining witness to engage in certain sexual acts, maliciously (i) threatens in writing, including electronically, (a) to disseminate, sell, or publish a videographic or still image, created by any means whatsoever, or (b) to not delete, remove, or take back a previously disseminated, sold, or published videographic or still image, created by any means whatsoever, that depicts the complaining witness or such complaining witness's family or household member, as defined in relevant law, as totally nude or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast or (ii) threatens eviction, loss of housing, property damage, or any financial loss, but such complaining witness does not thereby engage in such sexual acts is guilty of attempted sexual extortion and shall be punished as prescribed by relevant law.

The law also adds to the existing offense of unlawfully creating an image of another a prohibition on any person knowingly and intentionally creating any videographic or still image

by any means whatsoever of any nonconsenting person if that person is not exposed to show the genitals, pubic area, buttocks, or female breast but such videographic or still image is obscene, as defined in relevant law, when such nonconsenting person is in a restroom, dressing room, locker room, hotel room, motel room, tanning bed, tanning booth, bedroom, or other location. A violation of such prohibition is a Class 1 misdemeanor unless such nonconsenting person is younger than 18 years of age, in which case it is elevated to a Class 6 felony.

HB 662/SB 444. Offenses relating to gift cards; penalties. The law adds the offenses of gift card theft, gift card forgery, gift card fraud, and criminally receiving goods and services fraudulently obtained to the existing provisions of law related to credit cards.

HB 933/SB 283. Penalties for failure to appear; contempt. The law provides that a court shall consider certain mitigating factors to determine whether the failure of any person to appear before any court or judicial officer as required was willful. Under current law, no mitigating factors are specified for a court or judicial officer to consider in determining whether a person willfully failed to appear.

SB 55. Sex offenses prohibiting proximity to children; state parks; penalty. The law provides that every adult who is convicted of an offense prohibiting proximity to children, when the offense occurred on or after July 1, 2026, shall as a part of his sentence be forever prohibited from going, for the purpose of having any contact whatsoever with children who are not in his custody, within 100 feet of a playground, athletic field or facility, or gymnasium he knows or has reason to know is located on the premises of a state park. A violation is a Class 6 felony.

SB 137. Obstructing reproductive health care facility; penalties. The law creates a Class 1 misdemeanor for any person who (i) by force or threat of force, or by physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, another person because such other person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services, defined in the law, or (ii) intentionally damages or destroys, or attempts to damage or destroy, a reproductive health care facility, defined in the law, because such facility provides reproductive health services. The law also provides that the provisions of the law shall not be construed to place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside a reproductive health care facility.

Criminal Procedure

HB 26/SB 62. Modification of sentence for marijuana-related offenses. The law creates a process by which a person adjudicated delinquent or convicted of certain felony offenses involving, or violations of probation or community supervision related to, the possession, manufacture, selling, giving, distribution, transportation, or delivery of marijuana committed prior to July 1, 2021, who remains incarcerated or on probation or community supervision on July 1, 2026, may receive an automatic hearing to consider modification of such person's sentence. The law sunsets on July 1, 2029.

HB 149/SB 136. Decreasing probation period. The law establishes criteria for which a defendant's supervised probation period shall be reduced, including completing educational activities, maintaining employment, completing treatment, or obtaining housing. The law provides that a court may decrease a defendant's probation period if warranted by the defendant's conduct upon receipt of a request from the Department of Corrections and requires the

Department of Corrections to request termination of a defendant's supervised probation period after 12 months in certain situations.

HB 247/SB 416. Deferred disposition in a criminal case; persons with autism, intellectual disabilities, or developmental disabilities; expungement. The law adds developmental disabilities to the autism and intellectual disability deferred disposition statute. The law also provides that when a court defers and dismisses a charge pursuant to the autism, intellectual disability, or developmental disability deferred disposition statute, such charge may be considered as otherwise dismissed for purposes of expungement of police and court records. The law also (i) clarifies that the defendant may request a hearing to determine the appropriateness of a deferred disposition at any time before or after any plea and (ii) provides that no statement made by the defendant at such a hearing is admissible in any criminal proceeding, except that any such statement made under oath may be admissible in a criminal proceeding for perjury or for purposes of impeachment in a criminal matter.

HB 1298/SB 748. Issuance of vacatur for victims of human trafficking. The law expands the current process for the issuance of writs of vacatur for victims of human trafficking to include ancillary matters, defined in the law, and any charge or arrest related to a qualifying offense as defined in current law. The law also expands the list of qualifying offenses eligible for such writ.

SB 230. Expungement of police and court records. Effective December 1, 2026, the law permits the expungement of police and court records relating to an initial charge when a person is arrested, charged, summonsed, or indicted for the commission of an infraction, a crime, or a civil offense and such person is not ultimately convicted, provided that no stipulation of facts sufficient to find guilt was entered or the court did not determine the facts sufficient to find guilt but deferred adjudication or disposition to a later date. The law also permits that a petition may request expungement of the police and court records for multiple charges arising out of separate transactions or occurrences. The law also provides that if a person was the subject of a delinquency or traffic proceeding and was not ultimately adjudicated delinquent or convicted, provided that no stipulation of facts sufficient to find guilt was entered or the court did not determine facts sufficient to find guilt but deferred adjudication or disposition to a later date, such matter is eligible for expungement. Lastly, the law (i) allows certain deferred dispositions to be eligible for expungement; (ii) requires the attorney for the Commonwealth, if he files an objection to the petition for expungement, to include the basis for such objection; (iii) provides that the unavailability of certain information shall not be a basis for refusing expungement; (iv) requires the court, if it finds potential manifest injustice to the petitioner, to order expungement; (v) provides that the existence of a prior conviction alone shall not be a sufficient basis to deny an expungement; (vi) allows any person whose petition for relief is the subject of an appeal to proceed under a pseudonym pursuant to relevant law; and (vii) allows specifically identified emergency or preliminary protective orders to be expunged.

Domestic Relations

HB 303. Divorce; adultery; filing; parties living separate and apart; work group; report. The law specifies that a divorce may be decreed on the grounds of adultery, provided that such adultery occurred prior to the final separation of the parties. The law further allows for a divorce from bed and board to be decreed on the application of either party upon the parties living separate and apart; under current law, a divorce from bed and board may only be decreed for cruelty, reasonable apprehension of bodily hurt, willful desertion, or abandonment. The law

specifies that no waiting period is required for the filing for such a divorce, but the decree of such a divorce may only be decreed pursuant to certain requirements otherwise specified in the law. The law further directs the Virginia Family Law Coalition, in conjunction with the Virginia State Bar Family Law Section, to convene a work group to consider whether to eliminate fault-based grounds for divorce in the Commonwealth and to submit a report of its findings and recommendations to the Governor and to the Chairs of the House and Senate Committees for Courts of Justice no later than December 1, 2026.

HB 905. Persons other than ministers who may perform rites of marriage; clerk; issuance of order; bond requirement. The law provides that a clerk of a circuit court may issue an order authorizing one or more persons to celebrate the rites of marriage in the Commonwealth. Under current law, only a circuit court judge may issue such an order. The law further makes discretionary the entrance into a bond in the penalty of $500 prior to performing the rites of marriage for a person authorized to celebrate the rites of marriage; under current law, such entry is mandatory. Finally, the law civilly immunizes the clerk of any circuit court from a cause of action arising from the issuance or rescinding of such order, absent gross negligence or willful misconduct.

Freedom of Information

SB 699. Virginia Freedom of Information Act; public bodies to post meeting agendas. The law requires public bodies subject to the Virginia Freedom of Information Act (FOIA) to post the proposed agenda on the public body's official government website, if any, prior to the meeting. The law provides that no final action may be taken on any items added to an agenda after a meeting commences unless the matter is time-sensitive or is the subject of a closed meeting properly identified in a motion in accordance with FOIA requirements and defines "final action." This law is a recommendation of the Virginia Freedom of Information Advisory Council.

SB 701. Virginia Lottery; disclosure of identity of winners. The law prohibits the Virginia Lottery (the Department) from disclosing information about any individual winner and exempts such information from disclosure under the Virginia Freedom of Information Act unless the winner consents to such disclosure. Under current law, the Department is prohibited from disclosing information about any individual winner whose prize exceeds $1 million unless the winner consents to such disclosure.

Gaming

HB 145/SB 129. Fantasy contests; regulation and taxation. The law imposes (i) a 10 percent tax on a fantasy contest operator's fantasy contest revenue, with 2.5 percent of the tax revenue being allocated to the Problem Gambling Treatment and Support Fund and the remaining 97.5 percent being allocated to the general fund, and (ii) a 2.6 percent fee on a fantasy contests operator's fantasy contest revenue to be utilized by the Virginia Lottery to cover the costs of administration and regulation of fantasy contests in the Commonwealth. The law also limits the definition of "fantasy contest" and requires fantasy contest operators to apply to the Virginia Lottery for a permit before offering any fantasy contest in the Commonwealth.

HB 396. Charitable gaming; Texas Hold'em poker tournaments. The law increases from 18 years of age to 21 years of age the minimum age an individual must be to participate in Texas Hold'em poker tournaments. The law provides that no qualified organization may conduct Texas Hold'em poker tournaments (i) at a location outside of the county, city, or town in which its

principal office, as registered with the State Corporation Commission, is located or in an adjoining county, city, or town or (ii) at an establishment that has been granted a retail alcoholic beverage control license unless such license is held by the qualified organization. The law also allows unlimited rebuys during the first two hours of tournament play or until the first break, whichever occurs first, and permits one add-on at the end of the rebuy period before play resumes at the end of the first break.

HB 515. Sports betting; prohibition on use of credit cards. The law prohibits the Director of the Virginia Lottery from approving the use of credit cards as a method for sports bettors to fund sports betting accounts. The law also requires a permit holder to take reasonable measures to prohibit the acceptance of credit cards to fund sports betting accounts on its sports betting platform.

General Government

SB 637. Virginia Human Rights Act; procedures for a charge of unlawful discrimination. The law provides that, for the purposes of nondiscrimination in places of public accommodation, "place of public accommodation" includes educational institutions. The law reduces from 15 to five the number of employees in the definition of "employer" for purposes of nondiscrimination in employment. The law also amends from 300 days to two years the timeframe for filing a complaint alleging unlawful discrimination with the Office of the Attorney General.

Health & Health Professions

HB 6/SB 596. Contraception; right to contraception; applicability; enforcement. The law establishes a right to obtain contraceptives and engage in contraception, as such terms are defined in the law. The law clarifies that none of its provisions shall be construed to permit or sanction the performance of any sterilization procedure without a patient's voluntary and informed consent. The law creates a cause of action that may be instituted against anyone who infringes on such right.

HB 656/SB 524. Mental health and substance abuse disorders; network adequacy standards; comparative analyses; report; emergency regulations. The law directs the Department of Health to issue regulations that include quantitative network adequacy standards for timely access to care, travel time, and geographical distance that are at least as stringent as those imposed for qualified health plans and qualified dental plans. The law amends the definitions of "mental health services" and "substance abuse services" for the purposes of health insurance coverage.

The law requires health carriers to submit all comparative analyses prepared pursuant to federal law to the Bureau of Insurance on the date and frequency as specified by the Bureau and includes additional information to include in such submission. Under the law, the Bureau may impose a penalty not to exceed $100,000 for a noncompliant or insufficient comparative analysis or require a carrier to remove, revise, or remedy noncompliant treatment limitations. The law also amends the contents of the annual report submitted by the Bureau to the General Assembly to cover enforcement efforts with respect to the federal Mental Health Parity and Addiction Equity Act of 2008.

The law authorizes the Bureau to promulgate regulations as necessary to implement the provisions of the law and directs the Department of Health to adopt emergency regulations to implement the provisions of the law. The law directs the Department of Human Resource

Management to evaluate the impact of the proposed changes to the provisions of the law related to health insurance. The provisions of the law related to health insurance have a delayed effective date of July 1, 2027.

HB 1391/SB 813. Sickle Cell Coordinated Access Network established. Effective July 1, 2027, the law directs the State Health Commissioner, in coordination with the Virginia Commonwealth University Health Systems Authority, to establish and maintain the Sickle Cell Coordinated Access Network to provide health care providers in the Commonwealth with real-time consultation and support from sickle cell specialists.

SB 418. Therapeutic interchange and adaptation. The law authorizes pharmacists to perform therapeutic interchanges by substituting a drug with another drug in the same therapeutic class when such substitution lowers the cost or is cost-neutral to the patient or the prescribed drug is in a drug shortage and the substitution conforms to Board of Pharmacy regulations. The law directs the Board of Pharmacy to determine which therapeutic classes of drugs shall be eligible for therapeutic interchange and which classes shall be prohibited. The law also authorizes pharmacists to adapt prescriptions by changing the dosage form or quantity of a medication or by completing missing information on a prescription when there is evidence to support such change.

SB 429. Department of Health; State Health Commissioner; nursing homes; periodic medical visits and resident assessments; oversight and accountability. The law requires all nursing homes to notify the resident of a nursing home, the resident's family, and the Department of Health if a federally required physician visit does not take place. The law also requires each nursing home to conduct a comprehensive assessment on an annual basis to determine each resident's needs and describe each resident's capability to perform daily life functions. Such assessments must be reviewed at least once every 92 days, and more frequently in the event of a significant change in the resident's physical or mental condition.

The law directs the Department of Health and State Health Commissioner to take steps to improve care quality, protect residents, and strengthen oversight and accountability of nursing homes in the Commonwealth. The law directs the Department to enhance recruitment efforts and expand workforce capacity in the Office of Licensure and Certification, accelerate training and onboarding initiatives, and explore measures to reduce administrative burdens. The law requires the Commissioner to submit an annual report with recommendations for continuing improvement of nursing home quality and oversight.

Higher Education

HB 131. Public institutions of higher education; reasonable accommodations for the religious beliefs and practices of individual students. The law requires each public institution of higher education to provide reasonable accommodations, as defined in the law, for the religious beliefs and practices of individual students with regard to admissions, class attendance, and the scheduling of examinations and work assignments and to provide and describe in the institution's student handbook or an equivalent document and in the institution's faculty handbook or an equivalent document a grievance procedure for any student to seek redress when the student believes that he has been unreasonably denied such reasonable accommodations for his religious beliefs and practices.

HB 971. College student-athletes; biometric data; protections and limitations. The law prohibits any private institution of higher education, associate-degree-granting public institution

of higher education, or baccalaureate public institution of higher education in the Commonwealth from disclosing to any individual or entity outside of the institution any enrolled student-athlete's biometric data, as defined in the law, without the prior written consent of the student-athlete. The law also prohibits any individual or entity from making the possession, use, or ownership of or the rights to any student-athlete's biometric data a condition of any contract with the student-athlete for the use of the student-athlete's name, image, or likeness without the prior written consent of the student-athlete in a writing that is separate and apart from such contract.

HB 1040/SB 431. Virginia Commonwealth University Health System Authority; board of directors; chief executive officer. The law makes several changes relating to the board of directors and the chief executive officer of the Virginia Commonwealth University Health System Authority (the Authority), including (i) reducing from 19 to 13 the number of appointed members on the boards of directors and adding the chief executive officer of the Authority as an ex officio member with voting privileges, thereby reducing from 21 to 16 the total number of board members; (ii) changing from voting to nonvoting the nature of the membership of the President of Virginia Commonwealth University (the University) on the board of directors and prohibiting rather than requiring, as under current law, the President of the University from serving as chairman of the board of directors; (iii) lengthening the terms of all members of the board of directors from three years to four years; (iv) requiring the biennial election of a chairman and vice-chairman of the board of directors, requiring such chairman and vice-chairman to have served for at least two years on the board of directors, and prohibiting any employee of the University, employee of the Authority, member of the board of visitors of the University, or legislative member from serving as chairman; (v) providing that no further action shall be taken if a majority of each of the three-member committees appointed by the board of directors of the Authority and the board of visitors of the University do not agree on the removal of the chief executive officer of the Authority within 30 days of the appointment of the committees by each board; and (vi) providing that in the event that a majority of the members of each committee do not agree on the selection or conditions of appointment of the chief executive officer within 30 days of the appointment of the committees by each board, then the process set forth in statute shall be repeated until such selection has been made or such conditions of appointment have been determined. Current law requires the President of the University to make a binding decision in the event of any such disagreement.

Housing

HB 164/SB 328. Housing for local employees; grants for homeownership and workforce housing alternatives. The law eliminates the maximum amount a locality may provide (i) to employees of the locality, employees of the school board, and employees of constitutional officers for homeownership grants to purchase primary residences in the locality and (ii) to school division personnel for residential housing assistance grants to provide affordable workforce housing alternatives. The law also eliminates the requirement that such grants adhere to the Virginia Housing and Development Authority regional sales price and household income limitation guidelines. Current law imposes a maximum grant amount of $25,000 for individual grants per employee, as well as a maximum lifetime cumulative amount of $25,000 per employee.

HB 1279/SB 388. Affordable housing; religious organizations and other nonprofit tax-exempt properties. Effective January 1, 2027, the law allows for the administrative approval of

development and construction of housing on land owned by property tax-exempt religious organizations or certain property tax-exempt nonprofit organizations and provides that zoning ordinances shall allow the by-right development and construction of housing on real property owned by such organizations, subject to various conditions and limitations. The law provides that the review of such developments be completed pursuant to general law and states that localities shall not require a special exception, special use permit, conditional use permit, rezoning, or any discretionary review or approval process. The law requires that at least 60 percent of the housing development's total units be for affordable housing and that the housing development remain affordable for at least 30 years. The law also provides that all such housing is subject to local real property taxation following completion, unless explicitly exempted by the locality. The law expires on January 1, 2031.

Insurance

HB 220/SB 630. Health insurance; tobacco surcharge. The law eliminates the authority of a health carrier to vary its premium rates based on tobacco use. Under current law, a health carrier may charge premium rates up to 1.5 times higher for a tobacco user than for a nonuser. The provisions of the law apply to health benefit plans providing individual or small group health insurance coverage entered into, amended, extended, or renewed on or after January 1, 2027.

HB 328. Health insurance; essential health benefits benchmark plan. The law requires the Bureau of Insurance to select a new essential health benefits benchmark plan for the 2028 plan year, or the soonest plan year thereafter as permitted by the Centers for Medicare and Medicaid Services, that includes, in addition to the essential health benefits package included in the existing benchmark plan, coverage for (i) doula care services; (ii) the treatment of iatrogenic infertility; (iii) fertility treatment and diagnosis, including a maximum of three cycles per lifetime of assisted reproductive technology; (iv) hearing aids for individuals of all ages; (v) pasteurized donor human breast milk; (vi) the prophylaxis, diagnosis, and treatment of pediatric autoimmune neuropsychiatric disorders associated with streptococcal infections and pediatric acute-onset neuropsychiatric syndrome; and (vii) the treatment of polycystic ovary syndrome. Such mandate for coverage does not apply to the individual or small group markets. Certain provisions of the law have a delayed effective date pursuant to approval by the Centers for Medicare and Medicaid Services of certain coverage as outlined in the law, and the law contains an emergency clause applicable to certain other provisions. As introduced, this law was a recommendation of the Health Insurance Reform Commission.

HB 1182/SB 361. Health insurance; coverage for contraceptive drugs and devices. The law requires health insurance carriers to provide coverage, under any health insurance contract, policy, or plan that includes coverage for prescription drugs on an outpatient basis, for contraceptive drugs and contraceptive devices approved by the U.S. Food and Drug Administration, including those available over-the-counter. The law prohibits a health insurance carrier from imposing upon any person receiving prescription contraceptive benefits pursuant to the provisions of the law any copayment, coinsurance payment, or fee, except in certain circumstances. Additionally, the law requires any health benefit plan that provides coverage for hormonal contraceptives to provide point-of-sale coverage without cost-sharing at in-network pharmacies for hormonal contraceptives available over-the-counter. The law also requires each insurer to provide information about contraceptive coverage on its website and by mail upon request.

HB 1214. Health insurance; cost-sharing payments for insulin and diabetes equipment and supplies; limit. The law decreases the cap on the cost-sharing payment that a covered person is required to pay for a covered prescription insulin drug from $50 to $35 for a 30-day supply of the prescription insulin drug and provides such cap is an aggregate cap that applies in situations where the covered person is prescribed more than one insulin drug. The law also establishes such an aggregate cap of $35 for a 30-day supply of diabetes equipment and supplies.

Juveniles

HB 123/SB 146. Delinquent children; loss of driving privileges for alcohol, firearm, and drug offenses; truancy. The law allows the court discretion in ordering the denial of a child's driving privileges in instances when the child has failed to comply with school attendance and meeting requirements as provided in relevant law. Under current law, the court is required to order the denial of such child's driving privileges. The law also provides that if the court has ordered the denial of a child's driving privileges, the court shall order such child to surrender his driver's license, which shall be held in the physical custody of the court during any period of license denial. This law is a recommendation of the Committee on District Courts.

HB 438/SB 70. Delinquency petition; referral to court service unit. The law provides that at any point prior to the commencement of an adjudication hearing on a petition alleging that a child is delinquent, the court, upon request of the child with consent of the attorney for the Commonwealth, if a party to the case, may refer the delinquency charge back to the court service unit in writing and the intake officer shall proceed informally pursuant to relevant law. Additionally, the law provides that upon such referral, the court shall dismiss the petition and order that the court records pertaining to the petition be expunged pursuant to relevant law. Lastly, the law allows an intake officer to proceed informally on a complaint alleging a child is in need of services, in need of supervision, or delinquent if the juvenile has previously been proceeded against informally.

Current law does not permit proceeding informally when a juvenile (i) commits a violent juvenile felony or (ii) is alleged delinquent for an offense that would be a felony if committed by an adult if such juvenile had previously been (a) proceeded against informally by intake or (b) adjudicated delinquent for a prior offense that would be a felony if committed by an adult.

SB 18. Children; adjudication of delinquency. The law specifies that "delinquent child" means a child 11 years of age or older who has committed a delinquent act. Currently, there is no minimum age for a child to be adjudicated delinquent. The law provides that if a child younger than 11 years of age is found to have committed an act that would be delinquent if committed by a child 11 years of age or older, the child shall not be proceeded upon as delinquent and the court shall (i) dismiss any petition alleging such child has committed an act that would be delinquent if committed by a child 11 years of age or older and (ii) order that the court records pertaining to such petition be expunged pursuant to relevant law. The law allows the attorney for the Commonwealth to file a petition alleging that such child is in need of services and if such child is found to be in need of services, the court may make any orders of disposition authorized under relevant law. The law also provides that any funding that is available to provide services to a child 11 years of age or older who is proceeded upon as delinquent shall also be made available to a child younger than 11 years of age who is found to have committed an act that would be delinquent if committed by a child 11 years of age or older in order to provide such child with the same services. The law includes in the definition of "child in need of services" a child

younger than 11 years of age who has committed an act that would be delinquent if committed by a child 11 years of age or older.

The law adds that a child may be taken into immediate custody when such child is alleged to be in need of services or supervision and there is a clear and substantial danger to the safety of the child's family or the safety of the public. Currently, a child may be taken into immediate custody when such child is alleged to be in need of services or supervision and there is a clear and substantial danger to the child's life or health. Finally, the law includes in the offense of causing or encouraging acts rendering children delinquent, abused, etc., any person 18 years of age or older, including the parent of any child, who willfully contributes to, encourages, or causes any act, omission, or condition that (a) causes a child younger than 11 years of age to commit an act that would be delinquent if committed by a child 11 years of age or older or (b) causes any child to participate in or become a member of a criminal street gang in violation of existing law. Under the law, any person who commits such offense is guilty of a Class 1 misdemeanor.

Labor & Employment

HB 1/SB 1. Minimum wage. The law increases the minimum wage incrementally to $15.00 per hour by January 1, 2028. The law codifies the adjusted state hourly minimum wage of $12.77 per hour that is effective January 1, 2026, and increases the minimum wage to $13.75 per hour effective January 1, 2027, and to $15.00 per hour effective January 1, 2028. Effective January 1, 2029, and annually thereafter, the law requires the minimum wage to be adjusted to reflect increases in the consumer price index.

HB 5/SB 199. Employment; paid sick leave; civil penalties; civil actions. The law requires one hour of paid sick leave for every 30 hours worked for all employees of private employers and state and local governments, with certain exceptions. The law requires that employees who are employed and compensated on a fee-for-service basis accrue paid sick leave in accordance with regulations adopted by the Commissioner of Labor and Industry. The law provides that employees transferred to a separate division or location remain entitled to previously accrued paid sick leave and that employees retain their accrued paid sick leave under any successor employer. The law allows employers to provide a more generous paid sick leave policy than prescribed by its provisions and specifies that employees, in addition to using paid sick leave for their physical or mental illness or to care for a family member, may use paid sick leave to seek or obtain certain services or to relocate or secure an existing home due to domestic abuse, sexual assault, or stalking. The law requires the Commissioner to promulgate regulations for the implementation and enforcement of the law's provisions by July 1, 2027.

The law authorizes the Commissioner, in the case of a knowing violation, to subject an employer to a civil penalty not to exceed $150 for the first violation, $300 for the second violation, and $500 for each successive violation. The Commissioner or Attorney General may commence administrative proceedings or bring a civil action to enforce the law's provisions. Additionally, the law authorizes an aggrieved employee to bring a civil action against the employer in which he may recover double the amount of any unpaid sick leave and the amount of any actual damages suffered as the result of the employer's violation. Certain provisions of the law have a delayed effective date of July 1, 2027.

HB 636/SB 215. Prohibiting employer seeking wage or salary history of prospective employees; wage or salary range transparency; cause of action. The law prohibits a prospective employer from (i) seeking the wage or salary history of a prospective employee; (ii)

relying on the wage or salary history of a prospective employee in considering the prospective employee for employment; (iii) relying on the wage or salary history of a prospective employee in determining the wages or salary the prospective employee is to be paid upon hire; (iv) refusing to interview, hire, employ, or promote or otherwise retaliating against a prospective or current employee for not providing wage or salary history or requesting a wage or salary range; (v) failing or refusing to disclose in each public and internal posting for each job, promotion, transfer, or other employment opportunity the wage, salary, or wage or salary range; and (vi) failing to set a wage or salary range in good faith. The law authorizes the Attorney General to bring a cause of action to enforce its provisions and provides that an employer that violates such provisions is subject to a civil penalty of up to $1,000 for the first violation and up to $5,000 for any subsequent violation. The law permits an aggrieved prospective employee or employee to bring an action to recover actual damages and any other legal and equitable relief as may be appropriate within one year of when his rights were violated.

HB 1207/SB 2. Paid family and medical leave insurance program; notice requirements; civil action. The law requires the Virginia Employment Commission to establish and administer a paid family and medical leave insurance program with benefits beginning April 1, 2028. Under the program, benefits are paid to covered individuals, as defined in the law, for family and medical leave. Funding for the program is provided through premiums assessed to employers and employees beginning April 1, 2028. The law provides that the amount of a benefit is 80 percent of the employee's average weekly net earnings, not to exceed 100 percent of the statewide average weekly net earnings, which amount is required to be adjusted annually to reflect changes in the statewide average weekly wage. The law caps the duration of paid leave at 12 weeks in any application year, or four weeks in the case of paid leave for safety services, and provides self-employed individuals the option of participating in the program.

Landlord & Tenant Act

HB 15/SB 48. Virginia Residential Landlord and Tenant Act; landlord remedies; noncompliance with rental agreement; mandatory waiting period. The law increases the mandatory waiting period for a landlord to pursue remedies for termination of the rental agreement from five days to 14 days. The waiting period begins after a landlord serves written notice on a tenant notifying the tenant of his nonpayment of rent and of the landlord's intention to terminate the rental agreement if rent is not paid.

HB 95. Virginia Residential Landlord and Tenant Act; landlord remedies; noncompliance with rental agreement; payment plan. Effective July 1, 2027, the law requires a landlord who owns more than four rental dwelling units or more than a 10 percent interest in more than four rental dwelling units, before terminating a rental agreement due to nonpayment of rent if the exact amount of rent owed is less than or equal to one month's rent plus any late charges contracted for in the rental agreement and as provided by law, to serve upon such tenant a written notice informing the tenant of the exact amount due and owed and offer the tenant a payment plan under which the tenant must pay the exact amount due and owed in equal monthly installments over a period of the lesser of six months or the time remaining under the rental agreement. The law prohibits the landlord from charging any additional late fees during the payment plan period in connection with the unpaid rental amount for which the tenant entered into the payment plan so long as the tenant makes timely payments in accordance with the terms of the payment plan. The law also outlines the remedies a landlord has if a tenant fails to pay the exact amount due and owed or enter into a payment plan within five days of receiving notice or

if a tenant enters into a payment plan and after such plan becomes effective fails to pay rent when due or fails to make a payment under the terms of the agreed-upon payment plan. The law directs the Department of Housing and Community Development to develop a sample payment plan for use by landlords and maintain such sample payment plan on the Department's website.

HB 616. Department of Housing and Community Development; Virginia Residential Landlord and Tenant Act; tenant records. Effective July 1, 2027, the law requires a landlord, upon written request by a tenant, to within 10 business days provide such tenant a statement containing all charges and payments incurred by the tenant over the duration of the tenancy or the past 12 months, whichever is shorter. The law specifies that such statement shall itemize separately rent and the cost of each utility and that the landlord is not obligated to provide such written statement if the landlord owns fewer than four rental dwelling units or less than a 10 percent interest in more than four rental dwelling units, whether individually or through a business entity, in the Commonwealth unless the landlord receives any state or local rental or utility assistance funds on behalf of the tenant. The law additionally directs the Department of Housing and Community Development to, based on input from relevant stakeholders, develop a standardized printable template for the landlord to use to provide the tenant such written statement.

HB 1005/SB 313. Virginia Residential Landlord and Tenant Act; rental payment methods; prohibited fees. The law requires a landlord subject to the Virginia Residential Landlord and Tenant Act to accept payment of periodic rent and any security deposit by check and money order. The law additionally prohibits such a landlord from requiring a tenant to pay any fee to submit periodic rent payments or other amounts due in excess of the actual out-of-pocket expenses charged to the landlord by a third party to process a payment. Finally, the law prohibits a landlord from requiring a tenant to pay any fee for the maintenance or repair of any dwelling unit unless the repair is necessitated by the tenant's violation of the Virginia Residential Landlord and Tenant Act.

Local Government

HB 153/SB 94. Siting of data centers; site assessment; high energy use facility. The law provides that, prior to any approval of a rezoning application, special exception application, or special use permit for the siting of a new high energy use facility (HEUF), as defined in the law, a locality shall require that an applicant perform and submit a site assessment to examine the sound profile of the HEUF on residential units and schools located within 500 feet of the HEUF property boundary. The law also allows a locality to require that a site assessment examine the effect of the proposed facility on (i) ground and surface water resources, (ii) agricultural resources, (iii) parks, (iv) registered historic sites, and (v) forestland on the HEUF site or immediately contiguous land. The provisions of the law shall not apply to a site with an existing legislative or administrative approval where an applicant is seeking an expansion or modification of an already existing or approved facility and such expansion does not exceed an additional 100 megawatts or more of electrical power. Finally, the law provides that its provisions shall not be construed to prohibit, limit, or otherwise supersede existing local zoning authority.

HB 256/SB 425. Comprehensive plan; environmental justice strategy. The law requires cities with populations greater than 20,000 and counties with populations greater than 100,000 to consider, beginning July 1, 2026, at the next and all subsequent reviews of the comprehensive plan, adopting an environmental justice strategy. The law provides that the locality's strategy

shall be to identify environmental justice and fenceline communities within the jurisdiction of the local planning commission and identify objectives and policies to reduce health risks, to promote civic engagement, to prioritize improvements and programs that address the needs of environmental justice and fenceline communities, as those terms are defined in the law, and to establish baseline environmental and health conditions to characterize any disproportionate public health conditions in the identified fenceline communities.

SB 530. State and Local Government Conflict of Interests Act; electronic disclosure by local government officers and employees. The law requires local government officers and employees to file their annual disclosure statements electronically with the Virginia Conflict of Interest and Ethics Advisory Council, using the Council's online filing system. Such officers and employees shall be able to file the annual disclosure statement electronically beginning January 1, 2027, but such electronic filing shall be required (i) for localities with populations in excess of 250,000, beginning January 1, 2028; (ii) for localities with populations in excess of 100,000 but not more than 250,000, beginning January 1, 2029; and (iii) for localities with populations not exceeding 100,000, beginning January 1, 2030. The law provides that the Department of Elections shall be responsible for coordinating the electronic filing by candidates for Governor, Lieutenant Governor, Attorney General, the Senate, or the House of Delegates, and the general registrars shall be responsible for coordinating the electronic filing by candidates for constitutional offices, local governing bodies, and elected school boards.

Motor Vehicles

HB 646. Green warning lights; certain farm vehicles. The law authorizes the use of green warning lights on vehicles displaying a permanent farm use placard, farm vehicles, farm tractors, and farm utility vehicles while operating on or along a highway.

HB 911/SB 446. Limited-duration licenses, driver privilege cards and permits, and identification privilege cards; expiration. The law extends the validity of limited-duration licenses, driver privilege cards and permits, and identification privilege cards, other than REAL ID credentials and commercial driver's licenses and permits, to a period of time consistent with the validity of driver's licenses, which, under current law, is a period not to exceed eight years or, for a person age 75 or older, a period not to exceed five years, and permits and special identification cards. The law aligns requirements for eligibility for limited-duration commercial driver's licenses and permits and REAL ID-compliant limited-duration commercial driver's licenses with federal requirements and clarifies the validity periods for such documents. The law directs the Department of Motor Vehicles to implement the extended validity periods for limited-duration licenses, driver privilege cards, or permits upon renewal or reissuance.

HB 1224/SB 396. Driver's licenses; requirements for initial licensure; persons age 18 to 21. Effective January 1, 2027, the law expands from 60 days to 90 days the length of time an applicant for a first-time noncommercial driver's license who is at least 18 years old and not more than 21 years old is required to hold a learner's permit and requires such an applicant to complete a course of driver instruction prior to being issued a driver's license. The law provides that learner's permits other than motorcycle learner's permits, accompanied by other documentation verifying that the driver is at least 18 years old and less than 21 years old and has successfully completed an approved driver's education course, constitute a temporary driver's license for the purpose of driving unaccompanied by a licensed driver 18 years old or older, provided that certain other requirements are met.

Public Education

HB 299/SB 200. Board of Education; Standards of Learning assessments and related assessment methods; development, administration, scoring, and release. The law makes several clarifying revisions to applicable law relating to the development, administration, and scoring of Standards of Learning assessments and related assessment methods for determining the level of achievement of Standards of Learning objectives by all students, including (i) clarifying that students who are children with disabilities, as that term is defined by applicable law, who participate in alternative methods of Standards of Learning assessment administration or in alternate assessments through the Virginia Alternate Assessment Program are exempt from several requirements set forth in applicable law relating to the administration and grading of Standards of Learning assessments and related assessments and (ii) repealing the provisions requiring the Board of Education to establish a through-year growth assessment system in lieu of a one-time end-of-year assessment. The provisions of the law limiting the number of end-of-course assessments that may be administered to students in grades seven through 12 and requiring the score received by each student in grades seven through 12 on an end-of-course assessment to account for at least 10 percent of the student's final grade in such course are subject to a contingent and delayed effective date.

HB 836/SB 491. Public schools; right to free public elementary and secondary education; discrimination based on immigration status prohibited; civil cause of action. The law prohibits any child in the Commonwealth from being denied a free public education through secondary school on the basis of the actual or perceived immigration or citizenship status of the child or the child's parents, in accordance with the Constitution of Virginia and consistent with the requirements of the Fourteenth Amendment to the United States Constitution. The law also, among other things, prohibits any school board, public elementary or secondary school, school resource officer employed by a local law-enforcement agency in any public elementary or secondary school, or any individual who is an employee, contractor, or agent of a school board from engaging in certain enumerated actions and practices that involve or result in the denial of a free public education, or denial of the benefits or exclusion from participation in any program or activity thereof, of a child on the basis of the actual or perceived immigration or citizenship status of the child or the child's parents. The law establishes a civil cause of action for violations of the foregoing prohibitions. The law requires the Department of Education, in collaboration with the Office of the Attorney General, to develop and make available to each school board by August 1, 2026, guidance and resources on developing policies and procedures to implement the requirements set forth in the law and requires each school board to develop and implement by December 31, 2026, such policies and procedures and to require each public elementary and secondary school principal and administrator in the school division to complete training on compliance with the provisions of the law as soon as is practicable but not later than the beginning of the 2027–2028 school year, consistent with the guidance and resources developed and made available by the Department of Education.

HB 1283/SB 724. High school graduation requirements; application. The law provides that, in the event that the Board of Education establishes or modifies any graduation requirements or diploma pathways, the Board shall only apply such new or modified graduation requirements or diploma pathways to students who enter ninth grade at the beginning of or after the first school year of implementation of such new or modified graduation requirements or diploma pathways.

The law is applicable beginning with students who enter the ninth grade on or after the beginning of the 2027–2028 school year.

HB 1455/SB 815. School boards; opening of the school year; certain alternative schedules and schedule flexibility permitted. The law extends from no earlier than 14 days before Labor Day to no earlier than 14 days before September 1 of each year the requirement relating to the earliest date that each school board is permitted to schedule as the first day on which students are required to attend school each year.

Public Safety

HB 21/SB 27. Firearm industry members; standards of responsible conduct; civil liability. The law creates standards of responsible conduct for firearm industry members and requires such members to establish and implement reasonable controls regarding the manufacture, sale, distribution, use, and marketing of the firearm industry member's firearm-related products, as those terms are defined in the law. Such reasonable controls include reasonable procedures, safeguards, and business practices that are designed to (i) prevent the sale or distribution of a firearm-related product to a straw purchaser, a firearm trafficker, a person prohibited from possessing a firearm under state or federal law, or a person who the firearm industry member has reasonable cause to believe is at substantial risk of using a firearm-related product to harm themselves or unlawfully harm another or of unlawfully possessing or using a firearm-related product; (ii) prevent the loss of a firearm-related product or theft of a firearm-related product from a firearm industry member; (iii) ensure that the firearm industry member complies with all provisions of state and federal law and does not otherwise promote the unlawful manufacture, sale, possession, marketing, or use of a firearm-related product; (iv) prevent the installation and use of an auto sear on firearm-related products; and (v) ensure that the firearm industry member does not engage in an act or practice in violation of the Virginia Consumer Protection Act. The law also provides that a firearm industry member may not knowingly create, maintain, or contribute to a public nuisance, as defined in the law, through the sale, manufacturing, importing, or marketing of a firearm-related product. The law creates a civil cause of action for the Attorney General or a local county, city, or town attorney to enforce the provisions of the law or for any person who has been injured as a result of a firearm industry member's violation to seek an injunction and to recover costs and damages. The law also allows the Attorney General to issue a civil investigative demand if he has reasonable cause to believe that any person has engaged in, is engaging in, or is about to engage in any violation of such standards of responsible conduct.

HB 217/SB 749. Purchase, sale, transfer, etc., of assault firearms and certain ammunition feeding devices prohibited; penalties. The law creates a Class 1 misdemeanor for any person who imports, sells, manufactures, purchases, or transfers an assault firearm, as that term is defined in the law with some exceptions, and prohibits a person who has been convicted of such violation from purchasing, possessing, or transporting a firearm for a period of three years from the date of conviction. The law provides that an assault firearm does not include any firearm that is an antique firearm, has been rendered permanently inoperable, or is manually operated by bolt, pump, lever, or slide action. The law also prohibits the sale of a large capacity ammunition feeding device, as that term is defined in the law. The law provides that any person who willfully and intentionally (i) sells an assault firearm to another person or (ii) purchases an assault firearm from another person is guilty of a Class 1 misdemeanor and that any person who imports, sells, barters, transfers, or purchases a large capacity ammunition feeding device is guilty of a Class 1 misdemeanor.

HB 901/SB 495. Substantial risk orders; eligible petitioners; substantial risk factors and considerations; court jurisdiction; constructive possession of firearms; penalty. The law expands the list of persons eligible to file a petition for an emergency substantial risk order. The law provides various factors that a judge or magistrate shall consider for the purpose of determining whether to issue an emergency substantial risk order or a substantial risk order. The law expands court jurisdiction over substantial risk orders from circuit courts to juvenile and domestic relations district courts and general district courts and requires petitions against minors to be filed in juvenile and domestic relations district courts. The law requires a copy of the order to be served on the parent or guardian of the minor at any address where the minor resides or the local board of social services in the case where the minor is the subject of a dependency or court-approved out-of-home placement. The law also provides the process for which firearms not owned by the subject of a petition are returned to the lawful owner of such firearms. The law provides that any emergency substantial risk order or substantial risk order issued remains in full force and effect pending any appeal. Lastly, the law provides that any person who makes a materially false statement or representation to a court during the petitioning process is guilty of a Class 1 misdemeanor.

HB 1482/SB 352. Law-enforcement officers; restrictions on wearing of facial coverings; exceptions; penalty. The law prohibits any law-enforcement officer, defined in the law, from wearing a facial covering, defined in the law, while engaged in the performance of his official duties. The law sets out several exceptions to such prohibition, including protective facial coverings to protect against disease, infection, and exposure to toxic substances and facial coverings worn by any law-enforcement officer assigned to a special weapons and tactics team while engaged in the performance of his official duties with such team. The law subjects the law-enforcement officer to disciplinary action, including dismissal, demotion, suspension, transfer, or decertification, and creates a Class 1 misdemeanor for any law-enforcement officer who wears a facial covering in violation of the provisions of the law unless the law-enforcement agency that employs such law-enforcement officer has adopted and established a written policy for and restrictions on the use of facial coverings. The law also directs the Department of Criminal Justice Services to develop a model policy for and restrictions on the use of facial coverings by law-enforcement officers.

HB 1525. Possession, transportation, or purchase of certain firearms by certain persons; penalty; emergency. The law, which became effective on April 22, 2026, provides additional exceptions, outlined in the law, for persons younger than 18 years of age to possess or transport handguns or assault firearms anywhere in the Commonwealth. The law also makes it a Class 1 misdemeanor for persons younger than 21 years of age to purchase a handgun or assault firearm anywhere in the Commonwealth. The law directs the Department of State Police to administer, enforce, and otherwise implement existing law related to required criminal history record information checks to sell firearms.

Public Utilities

HB 2/SB 72. Phase I and Phase II Utilities; energy efficiency upgrades; low-income residents; report. The law states that it is the policy of the Commonwealth to reduce, wherever feasible and cost-effective, heating-related costs of living for low-income residents. The law requires Dominion Energy Virginia and Appalachian Power to make best, reasonable efforts to provide by December 31, 2031, prescriptive efficiency measures, as defined in the law, and related efficiency improvements to at least 30 percent of the qualifying households, as defined in

the law, identified by such utilities, provided that the State Corporation Commission determines that such measures and improvements are in the public interest. The law requires such utilities to report to the Commission its activities, plans, and filings regarding the law's provisions no later than January 1, 2028, annually thereafter, and in any recurring filing that the Commission deems appropriate. The law also requires that Dominion Energy and Appalachian Power make reasonable efforts to incorporate recommendations or feedback provided by the task force that evaluates barriers to access and enrollment in programs for income-qualified energy customers.

HB 429/SB 249. Electric utilities; integrated resource plans. The law makes various changes related to the content and process for an integrated resource plan (IRP) developed by an electric utility that provides a forecast of its load obligations and a plan to meet those obligations. The law (i) extends the planning timeframe from 15 to 20 years; (ii) requires Appalachian Power to file an IRP by removing an exception from the definition of "electric utility"; (iii) changes the frequency with which a utility is required to file an IRP from biennially to triennially; (iv) requires utilities to consider the use of grid-enhancing technologies as alternatives to new transmission infrastructure, and when new transmission lines are envisioned, to provide the reasons grid-enhancing technologies are not sufficient to defer or eliminate the need for new transmission infrastructure; and (v) requires utilities to consider the use of surplus interconnection service, as defined in the law, to add new electric generation projects and energy storage resources to the grid. The law requires that the current stakeholder review process for integrated resource plans be facilitated by a third-party facilitator selected by the State Corporation Commission and compensated by the utility. The law requires, as part of the stakeholder review process, the utility to provide stakeholders with reasonable access to the same modeling software, modeling assumptions, modeling inputs, and data used by the utility to evaluate supply and demand resources in its integrated resource plan to enable stakeholders to create modeling scenarios for the utility's consideration during the development of its integrated resource plan. The law requires the State Corporation Commission to (a) establish guidelines that ensure that utilities develop comprehensive integrated resource plans and provide meaningful public engagement and maximum transparency during the planning process; (b) conduct a proceeding by July 1, 2027, and at least once every five years thereafter, to identify and review each of its existing orders relevant to integrated resource plans to determine if such orders remain necessary and effective and are not overly burdensome; and (c) convene a work group to make recommendations on the required guidelines. As introduced, this law was a recommendation of the Commission on Electric Utility Regulation.

HB 770/SB 650. Public utilities; water and sewerage companies; discounted rates for low-income customers. Effective January 1, 2027, the law provides that a public utility engaged in the business of furnishing water or sewerage facilities may propose and the State Corporation Commission may approve rates and tariff provisions that provide discounted service to customers with an annual household income equal to or less than 200 percent of the federal poverty level. The law permits the utility to recover the costs of providing such discounted service through its rates for commercial and industrial customers.

HB 1151/SB 423. Electric utilities; delay in provision of service permitted. Effective July 1, 2027, the law provides that a distributor of electric energy may delay the provision of service if such delay is necessary to maintain electric grid reliability, to avoid exceeding available generation or transmission capacity constraints, or to ensure compliance with load

interconnection policies or rules issued by the State Corporation Commission or the Federal Energy Regulatory Commission.

Social Services

HB 301. Adult adoptees; access to vital records. The law requires the State Registrar to provide adult adoptees access to their birth certificate upon request, provided that the requester submits an application, proof of identification, and payment and that the original birth certificate is not the certificate of birth in use, subject to amendment, or used by an individual for legal purposes. The law directs the State Registrar to make a contact preference form available to birth parents that allows them to indicate their preference for contact by the adopted person, to be stored with the adopted person's birth certificate and provided upon the adopted person's request for the birth certificate.

HB 931/SB 270. Recovery residences; regulations. The law establishes certain requirements for recovery residences and directs the State Board of Behavioral Health and Developmental Services (the Board) to promulgate regulations to establish minimum certification standards for recovery residences. The law also requires that the regulations promulgated by the Department of Behavioral Health and Developmental Services (the Department) related to the certification of recovery residences include provisions that no recovery residence, or operator, employee, or agent of a recovery residence, may require a resident to participate in medical or psychological services, including clinical substance use treatment, that such recovery residence receives financial benefit from, either directly or indirectly, as a condition of entering or continuing residence at such recovery residence. The law requires the Department to monitor credentialing agencies providing credentials to recovery residences to ensure criteria related to certification comply with regulations and specifies that no such credentialing agency shall provide credentials to a recovery residence that is owned or operated by an individual who is employed by or in a position of authority at such credentialing agency, or an immediate family member of any such individual. The law also requires that referrals to recovery residences made by the Department, any agency of the Commonwealth, or a court may only be made to recovery residences that are certified.

HB 1366. Department of Social Services; corrective action plans and assumption of temporary control of local boards and local departments. The law grants the Commissioner of Social Services the authority to create and enforce a corrective action plan for any local board of social services or local department of social services that (i) fails to administer public assistance and social services programs in accordance with applicable laws and regulations or (ii) takes any action or fails to act in a manner that poses a substantial risk to the health, safety, or well-being of a child or adult. The law permits similar authority for any local board of social services that (a) fails to provide child welfare services in accordance with applicable law or regulations or (b) takes any action or fails to act in a manner that poses a substantial risk to the health, safety, or well-being of a child. Under the law, if a local board or department fails to comply with a corrective action plan, the Commissioner has the authority to temporarily assume control of all or part of the local board's operations. The law also provides that, when a local board of social services or local department of social services requests assistance, the Commissioner has the authority to utilize staff of the Department of Social Services or contract with private entities to provide public assistance and social services programs in the locality served by the local board or department. The law also adds adult services to the definition of "social services" for purposes of Title 63.2 (Welfare (Social Services)).

HB 1490. Department of Social Services; centralized intake system for reports or complaints of child abuse or neglect; response to complaints within 24 hours for children under three years of age. Effective July 1, 2027, the law establishes a centralized hotline for reports and complaints of child abuse or neglect. The law requires the Department of Social Services to establish and maintain a hotline for reports and complaints of child abuse or neglect and specifies that the Department shall determine the validity of such reports and complaints. The law eliminates the requirement that local departments must be capable of receiving and responding to reports and complaints of abuse or neglect and instead requires that any complaint of child abuse or neglect received by a local department shall be immediately forwarded to the Department's child abuse and neglect hotline.

Effective in due course, the law directs the Department of Social Services to (i) promulgate regulations necessary to implement the provisions of the law by July 1, 2027, and (ii) contract with a third party by August 1, 2026, to conduct a comprehensive study and review of the screening process used for child protective services complaints across Virginia.

SB 640. Department of Social Services; corrective action plans; centralized hotline for reports or complaints of child abuse or neglect. The law establishes a centralized hotline for reports and complaints of child abuse or neglect and grants the Commissioner of Social Services the authority to create and enforce a corrective action plan for any local board of social services or local department of social services that (i) fails to administer public assistance and social services programs in accordance with applicable laws and regulations or (ii) takes any action or fails to act in a manner that poses a substantial risk to the health, safety, or well-being of a child or adult. The law permits similar authority for any local board of social services that (a) fails to provide child welfare services in accordance with applicable law or regulations or (b) takes any action or fails to act in a manner that poses a substantial risk to the health, safety, or well-being of a child. Under the law, if a local board or department fails to comply with a corrective action plan, the Commissioner has the authority to temporarily assume control of all or part of the local board's operations. The law also provides that, when a local board of social services or local department of social services requests assistance, the Commissioner has the authority to utilize staff of the Department of Social Services or contract with private entities to provide public assistance and social services programs in the locality served by the local board or department.

The law requires the Department of Social Services to establish and maintain a hotline for reports and complaints of child abuse or neglect and specifies that the Department shall determine the validity of such reports and complaints. The law eliminates the requirement that local departments must be capable of receiving and responding to reports and complaints of abuse or neglect and instead requires that any complaint of child abuse or neglect received by a local department shall be immediately forwarded to the Department's child abuse and neglect hotline. The law also adds adult services to the definition of "social services" for purposes of Title 63.2 (Welfare (Social Services)).

The law directs the Department of Social Services to (1) promulgate regulations necessary to implement the provisions of the law and (2) contract with a third party by August 1, 2026, to conduct a comprehensive study and review of the screening process used for child protective services complaints across Virginia. The law also directs the Secretary of Health and Human Resources to convene a Social Services Task Force to develop a comprehensive improvement plan to address changes needed within the State Department of Social Services and the local departments of social services.

The provisions of the law related to centralized intake have a delayed effective date of July 1, 2027.

Special License Plates

The issuance of revenue-sharing special license plates for supporters of the Richmond Society for the Prevention of Cruelty to Animals (SPCA) bearing the legend SAVING LIVES TOGETHER is authorized. (HB 811)

The existing non-revenue sharing special license plate for members of the Virginia Realtors is converted to a revenue-sharing special license plate with the revenue benefiting the Virginia REALTORS Disaster Relief Fund. (HB 1339/SB 204)

The issuance of Sons of Confederate Veterans and Robert E. Lee special license plates is repealed. Such special license plates already in circulation will remain valid until their expiration and will not be renewed. (HB 1344)

Information on creating or obtaining special license plates is available at any DMV office or online at www.dmv.virginia.gov.

Speed Cameras

HB 994. Photo speed monitoring devices; placement and operation. The law authorizes the governing body of any locality to provide by ordinance for the placement and operation of a photo speed monitoring device by a law-enforcement agency in a safety red zone, defined in the law, for the purpose of recording vehicle speed violations in such safety red zone. The law directs the Supreme Court of Virginia to develop a summons for vehicle speed violations captured by photo speed monitoring devices and requires summonses issued for such vehicle speed violations to be such summons. The law makes various changes to the requirements for the use of photo speed monitoring devices, including the use of funds from collected civil penalties, signage, data retention and storage, photo speed monitoring device calibration, making certain information available to the public, requirements for private vendors, and reporting. The law establishes civil penalties for violations of requirements and provides that for any summons issued, failure to comply with the requirements for the operation of photo speed monitoring devices renders such summons invalid.

The law also limits the use of photo speed monitoring devices in highway work zones to when workers are present, as defined in the law, and provides that a certificate sworn to or affirmed by a law-enforcement officer or a retired sworn law-enforcement officer is not prima facie evidence of the facts contained therein for a photo speed monitoring device placed in a highway work zone unless the operator of the photo speed monitoring device provides a sworn certification verifying that workers were present at the time of the vehicle speed violation.

The law directs the Commissioner of Highways to develop criteria for designating a highway segment as a high-risk pedestrian corridor for purposes of identifying safety red zones.

The law contains delayed effective dates for certain provisions.

HB 1220. Photo speed monitoring devices; placement and operation. The law directs the Supreme Court of Virginia to develop a summons for vehicle speed violations captured by photo speed monitoring devices and requires summonses issued for such vehicle speed violations to be such summons. The law makes various changes to the requirements for the use of photo speed

monitoring devices, including the use of funds from collected civil penalties, signage, data retention and storage, photo speed monitoring device calibration, making certain information available to the public, requirements for private vendors, and reporting. The law establishes civil penalties for violations of requirements and provides that for any summons issued, failure to comply with the requirements for the operation of photo speed monitoring devices renders such summons invalid.

The law also limits the use of photo speed monitoring devices in highway work zones to when workers are present, as defined in the law, and provides that a certificate sworn to or affirmed by a law-enforcement officer or a retired sworn law-enforcement officer is not prima facie evidence of the facts contained therein for a photo speed monitoring device placed in a highway work zone unless the operator of the photo speed monitoring device provides a sworn certification verifying that workers were present at the time of the vehicle speed violation.

The law contains delayed effective dates for certain provisions.

SB 84. Photo speed monitoring devices, pedestrian crossing violation monitoring systems, and stop sign violation monitoring systems; placement and operation; violation enforcement; civil penalties. The law authorizes state and local law-enforcement agencies to place and operate pedestrian crossing violation and stop sign violation monitoring systems in school crossing zones, highway work zones, and high-risk speed corridors for purposes of recording pedestrian crossing and stop sign violations, as those terms are defined in the law. The law requires local law-enforcement agencies implementing or expanding the use of pedestrian crossing violation and stop sign violation monitoring systems, prior to the implementation or expansion of such systems, to conduct a public awareness program for such implementation or expansion.

The law directs the Supreme Court of Virginia to develop a summons for vehicle speed violations captured by photo speed monitoring devices and violations captured by the other devices authorized by this law and requires summonses issued for such violations captured by such devices to be such summons. The law makes various changes to the requirements for the use of these devices, including the use of funds from collected civil penalties, signage, data retention and storage, photo speed monitoring device calibration, making certain information available to the public, requirements for private vendors, and reporting. The law establishes civil penalties for violations of requirements and provides that, for any summons issued, failure to comply with the requirements for the operation of such devices renders such summons invalid and requires courts to dismiss such summons.

The law also limits the use of such devices in highway work zones to when workers are present, as defined in the law, and provides that a certificate sworn to or affirmed by a law-enforcement officer or a retired sworn law-enforcement officer is not prima facie evidence of the facts contained therein for a device placed in a highway work zone unless the operator of the photo speed monitoring device, pedestrian crossing violation monitoring system, or stop sign violation monitoring system, respectively, provides a sworn certification verifying that workers were present at the time of the violation.

SB 219. Photo speed monitoring devices; placement and operation; summons. The law requires a second summons for a vehicle speed violation captured by a photo speed monitoring device to be mailed if a summoned person fails to appear on the date of return set out in the first summons mailed. If the summoned person fails to appear after the second summons, the law

requires the Commissioner of the Department of Motor Vehicles to refuse to issue or renew the vehicle registration certificate or the license plate issued for such vehicle until the required civil penalties and any administrative fees have been paid and any applicable reinstatement processes required by the Department of Motor Vehicles have been completed.

The law directs the Supreme Court of Virginia to develop a summons for vehicle speed violations captured by photo speed monitoring devices and requires summonses issued for such vehicle speed violations to be such summons. The law makes various changes to the requirements for the use of photo speed monitoring devices, including the use of funds from collected civil penalties, signage, data retention and storage, photo speed monitoring device calibration, making certain information available to the public, requirements for private vendors, and reporting. The law establishes civil penalties for violations of requirements and provides that, for any summons issued, failure to comply with the requirements for the operation of photo speed monitoring devices renders such summons invalid and requires courts to dismiss such summons.

The law provides that any person against whom an enforcement action is carried out by a locality or law-enforcement agency, pursuant to the authority granted for the use of photo speed monitoring devices, where the enforcement action was based upon a willful disregard for applicable law, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to carry out any further enforcement in a manner consistent with the law and may be entitled to reasonable attorney fees and court costs. The law also provides that if a locality fails to comply with such an order, the court may order that the locality shall be ineligible to receive any funds collected from enforcement using photo speed monitoring devices, in excess of those used for its photo speed monitoring device program, and that the court shall order that any such excess funds be deposited in the Virginia Highway Safety Improvement Program until the locality comes into compliance with such order.

The law also limits the use of photo speed monitoring devices in highway work zones to when workers are present, as defined in the law, and provides that a certificate sworn to or affirmed by a law-enforcement officer or a retired sworn law-enforcement officer is not prima facie evidence of the facts contained therein for a photo speed monitoring device placed in a highway work zone unless the operator of the photo speed monitoring device provides a sworn certification verifying that workers were present at the time of the vehicle speed violation.

The law contains delayed effective dates for certain provisions.

Taxation

HB 488. Wage garnishment; state tax debt. Effective July 1, 2027, the law provides that the maximum part of the aggregate disposable earnings of an individual for any workweek that is subject to garnishment to collect delinquent taxes and charges owed to the state government shall not exceed the lesser of (i) 25 percent of such individual's disposable earnings for that week or (ii) the amount by which such individual's disposable earnings exceed 40 times the federal or Virginia minimum wage, whichever is greater. The law also directs the Department of Taxation to recognize Currently Not Collectible status granted by the Internal Revenue Service and to offer taxpayers with such status a similar Virginia status with comparable protections from collection activities.

HB 716. Income tax; innocent spouse tax relief. The law authorizes the Department of Taxation to grant relief to a taxpayer liable for payment of all or part of any unpaid tax, assessment, or other deficiency that is owed due to a mistake made by such taxpayer's spouse on a joint tax return, regardless of whether the taxpayer claimed such relief from the federal government.

HB 915. Local taxation; extension for federal government shutdown. The law allows a local governing body to provide an extension on personal property taxes owed by federal employees who are furloughed due to a federal government shutdown and essential federal employees who continue to work during such shutdown but do not receive immediate payment for such work as a result of such shutdown. The law states that any such extension granted shall end and the taxes shall be due no later than 90 days following the reopening of the federal government.

HB 954. Rounding procedures. The law provides for rounding procedures in certain cash transactions and authorizes the governing body of a locality to by ordinance set temporary procedures for the adjustment of bills and account balances for taxes and other charges due to the locality to account for the cessation of production of the penny coin by the United States Mint until July 1, 2027. The law also directs the Department of Taxation to evaluate options and recommend a uniform procedure for such adjustments and balances for all localities of the Commonwealth and report its findings and recommendations no later than November 1, 2026.

Technology

HB 518. Streaming advertisement volume control; civil penalty. Effective July 1, 2027, the law requires a video streaming service, social media video service, or third-party advertising manager, as defined in the law, that serves consumers residing in the Commonwealth to exercise reasonable care to engage in normalization of the audio of short-form content, as defined in the law, so that such audio is not transmitted at a louder volume than the long-form content, also defined in the law, it accompanies, consistent with the regulations adopted by the Federal Communications Commission pursuant to the federal Commercial Advertisement Loudness Mitigation (CALM) Act for television broadcast stations, cable operators, and other multichannel video programming distributors. The law provides that the Office of the Attorney General shall enforce the provisions of the law.

HB 1161. Government Data Collection and Dissemination Practices Act; dissemination of personal information to federal government; civil penalties. The law provides that any agency or political subdivision of the Commonwealth shall only disseminate personal information (i) to the extent necessary to comply with state or federal law, including the federal Health Insurance Portability and Accountability Act; (ii) to the extent necessary to carry out the administration of a state or federal program pursuant to state or federal law; (iii) to comply with a subpoena, court order, or administrative proceeding; (iv) to the extent necessary to ensure fulfillment of the obligations of a purchase or contract made in accordance with the Virginia Public Procurement Act or a memorandum of understanding or management agreement made in accordance with the Restructured Higher Education Financial and Administrative Operations Act; (v) when the data subject has given consent; or (vi) to the extent necessary to accomplish a proper purpose of the agency. The law also prohibits an agency or political subdivision from selling personal information. The law authorizes a court, in the case of a willful and knowing violation, to subject a specific public officer, appointee, or employee of any agency to civil penalties.

HB 1186/SB 394. Department of Education; artificial intelligence system use in instructional settings; development of AIS safety guidance required; AIS Innovation in Education Pilot Program established; report. The law requires the Department of Education, in consultation with school divisions and other relevant stakeholders, to compile information on current uses of artificial intelligence systems (AIS) for student instruction in public schools in the Commonwealth and to establish and post in a publicly accessible location on its website guidance for the safe, ethical, and equitable use of AIS in instructional settings in public elementary and secondary schools. The law requires each school board to establish, implement, and enforce policies consistent with the guidance developed by the Department in accordance with the provisions of the law. The law also directs the Department to establish and oversee the AIS Innovation in Education Pilot Program for the purpose of funding, evaluating, and scaling innovative uses of AIS in public elementary and secondary schools by providing support to school divisions in piloting AIS applications for instruction, tutoring, student engagement, operational efficiency, and teacher support and to submit an annual report to the Chairs of the House Committee on Education and the Senate Committee on Education and Health by December 1. The Pilot Program has an expiration date of July 1, 2030.

SB 338. Consumer Data Protection Act; data controller responsibilities; precise geolocation data. The law provides that, for purposes of the Consumer Data Protection Act, a controller of personal data shall not sell or offer for sale precise geolocation data concerning a consumer.

Traffic Infractions

HB 55. Noise abatement monitoring systems; local authority; civil penalties. The law authorizes counties and cities in Planning Districts 8, 9, and 15 (Northern Virginia, Rappahannock-Rapidan, and Richmond) to place and operate noise abatement monitoring systems, defined in the law, on any highway located in the locality for the purpose of recording and enforcing exhaust system violations, also defined in the law. The law provides that the operator of a vehicle is liable for a civil penalty not to exceed $100, but the violation shall not be reported on the driver's operating record or to the driver's insurance agency. The law provides that a locality may exempt from enforcement by noise abatement monitoring systems vehicles used for agricultural, horticultural, or forestry purposes as demonstrated by vehicle license plates. Under the law, the civil penalty will be paid to the locality in which the violation occurred to be used for the cost of administering the noise abatement monitoring system program and for transportation safety initiatives. The law contains the same data privacy and storage requirements as are in current law for photo speed monitoring devices. The law requires any locality that places and operates such a noise abatement monitoring system to report on its public website by January 15 of each year on the number of traffic violations prosecuted, the number of successful prosecutions, and the total amount of monetary civil penalties collected. The law has an expiration date of July 1, 2028.

HB 320. Live streaming while driving; prohibited; penalty. The law prohibits any person, while driving a moving motor vehicle on the highways in the Commonwealth, from (i) initiating, participating in, or manipulating an electronic device in order to interact with any live stream, as that term is defined in the law, and (ii) manipulating any electronic device to enable or maintain the functions of a live stream on or with such electronic device. The law establishes penalties for violations, in addition to any other penalties available under current law, including periods of license suspension and a fine of not more than $500 if a person who commits such a violation is involved in an accident at the time of such violation.

HB 564/SB 583. Parking, stopping, and standing enforcement; bus obstruction monitoring systems. The law allows localities to authorize the use of bus obstruction monitoring systems by a public transit agency operating within the locality for the purpose of enforcing local ordinances related to parking, stopping, or standing in bus stop zones or in lanes reserved for transit buses during posted times.

HB 812. Regulation of traffic; bicycles and certain other devices; bicycle signals. The law requires a person operating a bicycle or other device lawfully permitted in a bicycle lane or on a shared-use path in or approaching an intersection with a bicycle signal to obey such bicycle signal. The law also sets requirements for signals that are displayed by bicycle signals and requirements for situations in which traffic lights, including bicycle signals, are out of service. The law provides that a violation constitutes a traffic infraction punishable by a fine of no more than $350.

SB 221. School crossing zones; active times. The law authorizes a local governing body, by ordinance, to increase from 30 minutes to up to 60 minutes the period of time before and after regular school hours during which school crossing zones are active if it determines that children will be going to or from school during that period of time.

Voting

HB 82/SB 58. Elections; deadline for receipt of absentee ballots and certain other information, etc. Effective January 1, 2027, the law moves the time of the deadline for receipt of an absentee ballot, information required to cure an absentee ballot, or proof of identification to accompany a provisional ballot provided for lack of identification from noon to 5:00 p.m. on the day of the deadline.

HB 612/SB 311. Constitutional amendment (voter referendum); marriage between two adult persons; repeal of same-sex marriage prohibition. The law provides for a referendum at the November 3, 2026, general election to approve or reject an amendment that requires the equal treatment under the law of a lawful marriage between two adult persons regardless of the sex, gender, or race of such persons. The amendment also repeals the current provision that defines marriage as only a union between one man and one woman.

HB 773. Elections; absentee voting; cure process. Effective January 1, 2027, the law removes the requirement that absentee ballots be received by the Friday immediately preceding the day of the election for the general registrar to implement the process of curing errors or failures in such absentee ballots. The law also moves the deadline for curing errors or omissions in absentee ballot applications from noon on the third day after the election to noon on the Monday after the election.

HB 774. Elections; absentee and provisional ballots; cure process. Effective January 1, 2027, the law requires that, if the electoral board determines that any person having submitted a provisional vote was not entitled to vote as a result of a material error or omission on the provisional ballot form, the registrar is required to promptly notify the voter by telephone or email of the error or omission and to provide information to the voter on how to correct the issue so his ballot may be counted. The voter is entitled to make such necessary corrections before noon on the Monday after the election. The law moves the deadline for curing errors or omissions in absentee ballot applications from noon on the third day after the election to noon on the Monday after the election. The law also requires the Department of Elections to issue

guidance to local election officials on the uniform processing and counting of provisional ballots, including any provisional ballot cast by a person submitting a registration application on the same day as the election.

HB 781/SB 449. Constitutional amendment (voter referendum); fundamental right to reproductive freedom. The law provides for a referendum at the November 3, 2026, election to approve or reject an amendment to the Constitution of Virginia relating to the right to make one's own decisions related to reproductive health care, including access to abortion. The amendment protects patients and their doctors and nurses from being punished for making such decisions. The amendment allows the state to place restrictions on access to abortion during the third trimester of pregnancy except when the patient's life or physical or mental health is at risk or the pregnancy cannot survive.

HB 963/SB 6. Constitutional amendment (voter referendum); qualifications of voters, right to vote, persons not entitled to vote. The law provides for a referendum at the November 3, 2026, general election to approve or reject an amendment that would provide for the fundamental right to vote in the Commonwealth, revise the qualifications of voters so that a person convicted of a felony is not entitled to vote during his period of incarceration but is automatically invested with the right to vote upon release from incarceration, and update the existing prohibition on voting by persons found to be mentally incompetent to instead apply to persons who have been found to lack the capacity to understand the act of voting.

SB 582. Elections; absentee and provisional ballots; process and timing for rejected absentee ballot applications, returned absentee ballots, and rejected provisional ballots. Effective January 1, 2027, the law requires the general registrar to promptly notify a voter by telephone or email of an error or omission on the provisional ballot form and to provide information to the voter on how to correct the issue so his ballot may be counted if, prior to the determination of the validity of provisional ballots by the electoral board, the general registrar determines that such voter's provisional ballot form contains a material error or omission. The voter is entitled to make such necessary corrections before noon on the Monday after the election. The law also requires the list of absentee ballot applicants to be updated daily and to include whether each application has been accepted or rejected and, if it has been rejected, the reason for rejection or, if it has been accepted, the status of the absentee ballot. Registrars are also required to enter such information into the voter registration system, and such information is required to be made available to voters via a free-access system made available by the Department of Elections. The law removes the requirement that absentee ballots be received by the Friday immediately preceding the day of the election for the general registrar to implement the process of curing errors or failures in such absentee ballots. The law also moves the deadline for curing errors or omissions in absentee ballot applications from noon on the third day after the election to noon on the Monday after the election. Finally, the law requires the Department to promulgate regulations and issue guidance to local election officials on the uniform processing and counting of provisional ballots and requires the Secretary of Administration to convene a work group for the purpose of studying potential changes to the same day registration provisional voter process.

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Published in Richmond, Virginia, by the Division of Legislative Services, an agency of the General Assembly of Virginia. Contact the Division at 201 North 9th Street, 4th Floor, Richmond, VA 23219, online at http://dls.virginia.gov, or by phone at 804-698-1810.



Your Exit Playbook: The Smart Way to Sell Your Business

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2026 Gentry Locke Seminar
Mike Moro, Bill Gust, and Joshua Justus

I. Introduction

For most business owners approaching a transition, the sale of their company is the largest financial transaction of their lives—and the outcome depends far less on finding a willing buyer than on understanding what is actually being negotiated. These materials address many of the legal, tax, and structural issues that seller-side counsel must address before a company goes to market: the choice between an asset and stock purchase, merger mechanics, reorganizations under Section 368(a)(1)(F) of the Internal Revenue Code (the "Code"), installment sale treatment, and the deal terms that most commonly erode seller value, including working capital adjustments, indemnification exposure, earn-outs, and rollover equity. The central lesson is straightforward: headline purchase price and take-home value are rarely the same number, and the difference is almost always determined by decisions made before the documents are drafted.

II. Why This Topic Matters Now: The Baby Boomer Exit Wave

A. The "Silver Tsunami" Defined

The term "Silver Tsunami" refers to the demographic wave of baby boomer business owners—those born roughly between 1946 and 1964—reaching retirement age and bringing their businesses to market simultaneously. An estimated 2–3 million U.S. small and mid-sized businesses are expected to change hands over the next decade as baby boomer owners retire, and baby boomers still own an estimated 40–50%+ of U.S. private businesses, creating substantial supply-side pressure on the M&A market. *See* Alison Coleman, The 'Silver Tsunami' Is Reshaping Small Business: Why Exit Planning Can't Wait, Forbes (Jan. 14, 2026), https://www.forbes.com/sites/alisoncoleman/2026/01/14/the-silver-tsunami-is-reshaping-small-business-why-exit-planning-cant-wait/.

This supply surge is increasing buyer selectivity, particularly for businesses that are owner-dependent, operationally disorganized, or difficult to diligence.

B. Market and Demographic Context

KPMG's *2025 M&A Deal Market Study* identified valuation disagreement (44%), diligence completion (41%), and regulatory hurdles (41%) as the top barriers to deal closure. 2025 M&A Deal Market Study, KPMG (2025), https://kpmg.com/us/en/articles/2025/2025-ma-deal-market-study.html.

ABA deal point research confirms that indemnification caps, escrow periods, and representation and warranty insurance adoption continue to shift in buyer-friendly directions in competitive processes. ABA Bus. Law Section, *Private Target*

Mergers & Acquisitions Deal Points Study (2025) [hereinafter *ABA Deal Points Study*].

C. Why Seller-Side Counsel Has an Outsized Role

For most founders, the sale of their business is their largest lifetime liquidity event—often exceeding the value of their home, retirement accounts, and other savings combined. Lawyers who engage before the LOI can materially improve outcomes; those engaged later in the process typically cannot unwind unfavorable economics already agreed in principle.

A recurring theme for counsel is that sellers think they are selling a company for a price. In reality, they are negotiating a package of price, tax treatment, risk allocation, timing, and legacy considerations. Headline value is not the same as take-home value.

III. Understanding Seller Priorities: Baby Boomer Owner Psychology

A. Typical Seller Priorities

- Liquidity and retirement security—certainty of cash at closing
- Preserving legacy: employees, customers, community relationships
- Limiting post-closing entanglement (no long consulting arrangements, no open-ended liability)
- Minimizing unpleasant surprises in tax, indemnity, or working capital true-up mechanics

B. The Counseling Challenge

Many founder-owners overestimate value by pricing the business on personal sacrifice, tenure, and identity, while buyers price on transferable cash flow, risk, and future growth. *See* Crossroads Advisers, *Are Baby Boomers Finally Ready to Sell?* (July 10, 2025), https://crossroadsadvisers.com/2025/07/10/are-baby-boomers-finally-ready-to-sell/. Advisors involved in business-owner planning should be alert to this disconnect: the business owner's sense of value is emotional and relational, while the buyer's model is financial and risk-adjusted.

C. Ask Early

"Are you optimizing for maximum price, certainty of closing, or continuity/legacy?" In many processes, sellers can optimize all three only imperfectly. Client goals drive structure; a seller prioritizing a clean exit prefers an all-cash transaction; a seller seeking maximum price may tolerate more structured consideration (e.g., seller note, earnout, rollover equity).

IV. Pre-Sale Planning: Where Seller Value Is Created

A. Start Early—12 to 24 Month Runway

Value is created before the business goes to market, not during document negotiation. A 12–24 month preparation runway is the standard recommendation. Buyers expect disciplined preparation; businesses with strong records and lower owner dependence command premium multiples and shorter diligence cycles.

B. Entity Structure and Tax Planning—Choose the Right Vehicle

1. Asset Sale vs. Stock/Equity Sale

Buyers prefer asset transactions: they obtain a stepped-up tax basis in acquired assets under I.R.C. § 1012 and can ring-fence pre-closing liabilities. Sellers prefer equity sales (stock or membership interest) as they are generally cleaner, avoid double taxation for C-corp sellers, and better support a "walk-away" outcome.

The gap is partially bridged by I.R.C. § 338(h)(10) elections (S-corp and certain subsidiary stock sales treated as asset sales for tax purposes) and § 336(e) elections (available to S-corps and certain subsidiaries not eligible for § 338(h)(10)). I.R.C. §§ 338(h)(10), 336(e).

2. Merger Structures

Forward triangular mergers and reverse triangular mergers are common in strategic deals and can achieve asset-purchase economics in an equity form. *See* Del. Gen. Corp. Law §§ 251, 259 (2024); Va. Code Ann. §§ 13.1-716, 13.1-721 (2024). Counsel should confirm state merger statute requirements—board approval, shareholder vote thresholds, dissenters' rights—early in the process.

3. S-Corp to Partnership Reorganization (the "F Reorg")

Private equity (PE) buyers typically make acquisitions through entities taxed as partnerships, not S-corps. An S-corp seller targeting PE buyers may need to convert to a single-member LLC before closing via an "F reorganization" under I.R.C. § 368(a)(1)(F). I.R.C. § 368(a)(1)(F); Rev. Rul. 2008-18, 2008-1 C.B. 674.

The F reorganization allows an S-corp to convert to a single-member LLC (disregarded entity), enabling a deemed asset sale for tax purposes while maintaining legal continuity. The acquiring entity then purchases the LLC interests, which are treated as a purchase of assets for income tax purposes. Timing matters: the reorganization must be completed before signing, and counsel must coordinate with the Seller's CPA to preserve S-corp status through conversion.

In current middle-market and PE-driven deals, the F reorganization has largely supplanted § 338(h)(10) and § 336(e) elections as the go-to bridge between buyer and seller tax objectives.

4. Qualified Small Business Stock (QSBS)

If the company is a C-corp and stock qualifies under I.R.C. § 1202, the seller may exclude up to $10 million (or 10x adjusted basis) of gain from federal income tax. I.R.C. § 1202(b). This is one of the most significant tax benefits available to small business sellers. Eligibility requirements are strict (active domestic C-corp, original issuance of stock, a five-year holding period, § 1202(e) active business test); counsel should confirm eligibility early.

C. Taxation of Deals—Model Before LOI

Allocation of purchase price in an asset sale is governed by I.R.C. § 1060 and Treas. Reg. § 1.1060-1. Both buyer and seller must file Form 8594 (Asset Acquisition Statement) with consistent allocations. I.R.C. § 1060; Treas. Reg. § 1.1060-1. Asset classes carry different tax rates: ordinary income for inventory, receivables, and depreciation recapture; capital gain for § 197 intangibles and goodwill. I.R.C. §§ 1221, 1245, 197.

The installment sale method (I.R.C. § 453) allows sellers receiving payments over time (seller notes, earnouts structured as contingent payments) to defer gain recognition proportionally. Note: the installment method is not available for sales of inventory or marketable securities. I.R.C. § 453(b), (i), (k). State income tax on sale proceeds varies; Virginia taxes gain from the sale of a Virginia business, and nonresident sellers may have Virginia-source income for Virginia-located assets. Va. Code Ann. §§ 58.1-302, 58.1-322 (2024).

D. Financial Readiness

- Financial statements must be consistent and defensible (at least three years of clean P&Ls and balance sheets).
- Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA) or Seller's Discretionary Earnings (SDE) add-backs must be supportable and documented. Unsupported add-backs are the first target in quality-of-earnings (QofE) review.
- QofE report is expected in most sponsor-driven or competitive auction processes. A seller-commissioned QofE prepared before marketing reduces post-LOI surprises.

E. Legal Housekeeping Checklist

- Clean cap table: stock ledger, membership interests, option plans, warrants all current
- Governing documents and board/member minutes current and accurate
- UCC and lien search; identify and plan for payoff of debt instruments

- Anti-assignment and change-of-control provisions in material contracts (leases, customer agreements, supplier agreements, licenses)—these can block or delay closing
- Employment agreements, non-competes, confidentiality/NDA agreements, and IP assignment agreements with key employees in place
- Data privacy compliance (if applicable): applicable state law equivalents and any FTC guidance

F. Assemble the Right Advisory Team

- Investment banker or business broker to manage the process and buyer pool
- M&A counsel (structure, documents, negotiation)
- CPA/tax advisor (model after-tax proceeds under multiple structures before LOI)
- Estate or wealth planning advisor—business sale proceeds must flow into a broader estate plan
- Employment or other regulatory specialists as needed

V. Today's Buyers And What They Expect

A. Private Equity Buyers

PE remains the dominant buyer class in the middle market. Financial buyers captured 44.9% of M&A activity in 2025, up from 43.4% in 2024. Add-on acquisitions accounted for roughly 59.8% of total PE buyouts in 2025, as many PE buyers seek companies to integrate into existing portfolio companies. Capstone Partners, *Middle Market Private Equity Index* (May 2026), https://www.capstonepartners.com/insights/report-middle-market-private-equity-index/.

PE buyers are structured as partnerships (LLCs/LPs), which drives the F reorganization discussion above. They expect strong or replaceable management, defensible EBITDA margins, recurring revenue, clean diligence, and a credible growth thesis.

B. Strategic / Corporate Buyers

Strategic buyers can pay the highest nominal value where synergies are real. Bain reported strategic deal value rose 42% year-over-year in 2025. Bain & Company, *Looking Back at M&A in 2025: Behind the Great Rebound* (2026), https://www.bain.com/insights/looking-back-m-and-a-report-2026/. Strategic buyers run rigorous diligence and integration planning. As a result, representations and indemnities in strategic deals can be more demanding than in PE deals.

C. Search Funds / ETA Buyers

Entrepreneurship-through-acquisition (ETA) buyers are now a meaningful feature of the small and lower-middle market. Stanford-tracked search fund formation

reached 94 new search funds in 2023—a record. Stanford Graduate School of Business, *2023 Search Fund Study* (2024). Over 56% of current business buyers have never owned a business before, and approximately 42% are "corporate refugees" leaving corporate employment for ownership. Small Bus. & Entrepreneurship Council, Businesses for Sale: Will 2025 Be a Buyer's Market? (Feb. 20, 2025), https://sbecouncil.org/2025/02/20/businesses-for-sale-will-2025-be-a-buyers-market/.

ETA buyers often care most about transition support and cultural continuity. ETA buyers often rely on SBA 7(a) loans. The approval process for these loans can be unpredictable so counsel should scrutinize financing certainty.

D. Family Offices / Independent Sponsors

Family offices and independent sponsors can be attractive for sellers seeking flexibility, longer-term orientation, or legacy preservation. These buyers are often less process-rigid than large PE funds but they still expect clean diligence and credible financials. Additionally, they may accommodate seller-friendly governance arrangements post-close.

E. What All Buyers Expect Today

Buyers increasingly focus on risk allocation and cash-flow certainty in competitive processes, as reflected in deal terms. *See* SRS Acquiom, M&A Deal Terms Study (2025), https://www.srsacquiom.com/our-insights/deal-terms-study-2025/ (analyzing more than 2,200 private-target acquisitions valued at approximately $505 billion).

VI. Deal Structure And Economics

A. Transaction Form—Statutory Framework

1. Stock Purchase

Seller transfers shares of stock; buyer steps into seller's shoes. Governed by state corporation law. *See* Va. Code Ann. § 13.1-605 (2024) (Virginia stock transfers). No third-party consent is typically required for contracts unless a change-of-control provision is triggered. This structure also applies *mutatis mutandis* for the acquisition of other types of equity such as limited liability membership interests or partnership interests.

2. Asset Purchase

Buyer acquires specified assets and assumes specified liabilities; seller retains excluded liabilities. Governed by state commercial law. *See* Va. Code Ann. §§ 8.2-101 *et seq.* (2024) (UCC Article 2); Va. Code Ann. §§ 8.6A-101 *et seq.* (2024) (UCC Article 6, bulk transfers).

3. Merger

Forward or reverse triangular merger achieves similar economic result in a single statutory step. *See* Va. Code Ann. §§ 13.1-716 to 13.1-721 (2024) (Virginia corporations); Va. Code Ann. § 13.1-1071 *et seq.* (2024) (Virginia LLCs). Requires board/manager approval and often member/shareholder vote; dissenters' rights may attach under Va. Code Ann. § 13.1-730.

B. Purchase Price Contains Multiple Components

Modern M&A transactions rarely involve a simple lump-sum payment. Sellers should expect and plan for the following components:

- Cash at closing (the "headline" number)
- Working capital adjustment: post-closing true-up based on normalized working capital at closing
- Escrow / holdback: portion of price held back pending indemnification claims, typically 10%–15% of purchase price, released 12–18 months post-close
- Seller note: promissory note payable over time; may qualify for installment sale deferral under I.R.C. § 453; subordinated to senior debt in PE deals
- Rollover equity: seller reinvests a portion of proceeds in the acquiring entity—common in PE deals, typically 10%–20% of deal value
- Earnout: contingent consideration tied to post-closing financial performance; addressed in Section VII

C. Working Capital Adjustments—The Most Common Surprise

The working capital adjustment is the most common source of post-closing seller frustration and disputes. Sellers who do not understand working capital mechanics before signing the LOI are frequently caught off-guard. Key negotiation points include:

- Target peg (the normalized working capital amount): negotiate based on trailing 12-month average, not a single point in time
- Calculation Methodology: which GAAP principles govern; how are deferred revenue, accrued liabilities, and customer deposits treated?
- Debt and Debt-like items: what is included in "closing indebtedness" (e.g., deferred revenue, seller transaction costs)?
- Post-closing adjustment procedure, dispute resolution (neutral accountant), and timing of true-up payment

D. Rollover Equity—Not Cash at Close

Rollover equity is often marketed as the "second bite of the apple," but sellers must understand: rollover value is not equivalent to cash at close. Key issues include: minority governance protections, tag-along rights, information rights, drag-along exposure, preferred return on PE sponsor's equity, and illiquidity until

the next exit. Rollover equity has its own tax consequences. *See* I.R.C. §§ 721, 722, 723 (partnership contribution rules); Rev. Rul. 2000-5, 2000-1 C.B. 436.

E. Earn-outs

Earnouts are commonly used to bridge valuation gaps, but they shift economic risk back to the seller and create post-closing management tension. ABA Deal Points Study data indicates earnouts appear in approximately 20–30% of private M&A transactions, with greater frequency where target performance is uncertain or seller/buyer valuations diverge significantly. *ABA Deal Points Study,* supra. Counsel should model an earnout as a loan to the buyer with uncertain repayment, not as deferred price.

VII. Key Legal Terms Where Sellers Most Commonly Lose Value

A. Representations and Warranties

Seller's counsel should focus on: compliance representations, tax and employee benefit representations (ERISA; I.R.C. §§ 401–409A), intellectual property (IP) and data/privacy representations, and the interplay of knowledge qualifiers and materiality qualifiers.

The *materiality scrape* is a significant economic issue: buyers often insist that materiality qualifiers in representations are disregarded for indemnification purposes, effectively expanding seller exposure. See *ABA Deal Points Study*, supra (tracking prevalence of materiality scrape provisions across deal cohorts). Recent ABA data shows that approximately 79% of private-target deals include some form of materiality scrape, a dramatic increase from just 14% in 2004, confirming that scrape provisions are now market standard. *Id*. Disclosure schedule quality is as important as the agreement itself. Overbroad or imprecise disclosures can waive protections or inadvertently create claims.

B. Indemnification Mechanics

Core negotiation points include:

- Survival period: typically 12–24 months for general reps; longer for fundamental and tax-related representations
- Cap: often 10%–20% of purchase price for general representations, 100% for fundamental reps
- Basket/deductible: tipping basket vs. true deductible—an important distinction that can dramatically affect exposure
- Fraud carve-out: always present; counsel should ensure definition of "fraud" is narrowly tailored

See ABA Deal Points Study, supra (tracking cap, basket, and survival period trends across middle-market deals). The exclusive remedy clause is critical: if representations and warranty insurance (RWI) is the exclusive remedy (except for fraud), seller's post-closing exposure is limited—but only if the policy is properly structured and the purchase agreement and RWI policy are aligned.

C. Rep and Warranty Insurance (RWI)

RWI has become increasingly common in middle-market M&A. *See* Brendan Gallagher & Maria Kordunsky, *The Continued Rise of Representations and Warranties Insurance*, ABA Bus. Law Today (Mar. 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-march/the-continued-rise-of-representations-and-warranties-insurance/.

Typical coverage is 10%–20% of enterprise value or purchase price. Premiums have declined; recent pricing in many cases is below 3% of policy limits, with retentions as low as 0.5% of enterprise value. The Horton Group, *Reps & Warranties Insurance: Key Trends and Opportunities in Q2 2025* (2025), https://www.thehortongroup.com/resources/reps-warranties-insurance-key-trends-and-opportunities-in-q2-2025/. Seller's counsel must confirm that the RWI policy, escrow agreement, and purchase agreement align on procedures, retention, and exclusions before signing.

D. Earnout Provisions—Where Seller Optimism Becomes Litigation Risk

If an earnout is unavoidable, seller's counsel must negotiate the following points expressly:

- Precise metric definition (EBITDA vs. revenue; GAAP vs. cash basis)
- Accounting consistency covenant binding on buyer post-closing
- Buyer's operational conduct restrictions post-closing
- Dispute resolution mechanism (neutral accountant or arbitration)
- Information and inspection rights for seller

E. Non-Compete and Restrictive Covenant Provisions

Sellers should expect non-compete, non-solicit, and confidentiality obligations. In Virginia, covenants must be reasonable in scope, geography, and duration to be enforceable. Va. Code Ann. § 40.1-28.7:8 (2024) restricts non-competes for "low-wage employees" but does not restrict owner-level non-competes in M&A transactions. Counsel should tailor scope to what is actually necessary to protect the goodwill being sold—overbroad restrictions may be unenforceable.

VIII. Closing And Post-Closing Obligations

A. Transition Services and Consulting Arrangements

Many sellers expect a gradual handoff, but vague transition obligations create long-tail frustration. Key terms to negotiate and spell out include: hours/availability per week, compensation (if any), scope of duties, term, and early termination triggers. If the seller is a "key man" for contracts, licenses, or relationships, the transition period may be non-negotiable for the buyer so it is important to plan for this at the LOI stage.

B. Escrow Release and Claims Process

The escrow agreement and purchase agreement must align on: timing (release date), notice procedures for claims, dispute resolution mechanics, and release of unclaimed amounts. Counsel should avoid structures that allow buyers to hold proceeds hostage without a disciplined, time-limited claims process. General indemnification claims should have a procedural cutoff.

C. Post-Closing Tax Compliance

Final short-year tax returns, S-corp elections, and stub-period allocations require coordination with the CPA. For an S-corp sale, I.R.C. § 1377 elections (closing the books at the sale date) may be needed to properly allocate income between pre- and post-closing periods. I.R.C. § 1377(a)(2). Form 8594 (Asset Acquisition Statement) must be filed consistently by both buyer and seller. I.R.C. § 1060; Treas. Reg. § 1.1060-1.

IX. Seller Pitfalls & Practical Seller-Side Takeaways

The most common seller mistakes that counsel should work to prevent include:

- Waiting too long to prepare the business for sale—starting only after the LOI is received
- Ignoring tax planning until after the LOI is signed: deal structure is difficult to unwind once agreed in principle
- Assuming valuation is driven by effort or history rather than transferable earnings and future cash flow
- Accepting an LOI with a long exclusivity period and weak process protections, giving buyer leverage to renegotiate
- Underestimating post-closing exposure: working capital true-ups, indemnification claims, and earnout disputes are more common than sellers expect
- Taking the "best headline price" from the weakest or least-certain buyer—certainty of close matters. *KPMG's 2025 M&A Deal Market Study* underscores the risk: financing challenges (53%), preferences for lower-risk deals (52%), and term renegotiation pressure (49%) remain significant barriers to completion. *2025 M&A Deal Market Study*, KPMG, supra. Sellers who give leverage away early suffer most when these dynamics materialize.
- Failing to model after-tax proceeds under multiple structures: the highest gross price may not be the highest net-to-seller
- Not briefing the estate planning attorney early: sale proceeds flowing into an estate plan require pre-close coordination, not post-close

A. Key Messages

- Start early. Exit planning is part legal, part operational, and part emotional. The best outcomes come from prepared businesses, not just good businesses.
- Headline value ≠ take-home value. Model after-tax, risk-adjusted, actually-collectible proceeds before any deal is signed.

- Structure before LOI. Asset vs. stock, merger form, S-corp reorganization, QSBS eligibility, and installment sale elections all need to be modeled before the letter of intent locks in a structure.
- Buyers are available, but selective. Well-prepared, transferable businesses command better multiples and better terms. Unprepared businesses are discounted or passed over.
- The non-price terms matter. Working capital, indemnity, earnout, and rollover mechanics can erode 10–25% of nominally agreed price. Seller's best protection is careful, early negotiation of these terms.
- Coordinate across disciplines. M&A counsel, tax advisor, and estate planner must work together. Be sure to bring your business-owning clients to M&A counsel early—before the deal is on the table.



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Transactional Hot Topics

Gentry Locke Seminar 2026

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I. Force Majeure: Drafting for Today's World

A. Why Force Majeure Became a Front-Burner Issue

(i) COVID-19 exposed weaknesses in boilerplate force majeure provisions, and these provisions are being further tested by today's world.

(ii) Subsequent disruptions:

(a) Supply chain failures

(1) "Supply Chain or Distribution Failure: Navigating the New Normal," October 1, 2025, https://www.aon.com/en/insights/reports/global-risk-management-survey/supply-chain-or-distribution-failure-navigating-the-new-normal. This notice discusses the following factors as contributing to supply chain disruptions or failures:

- Extreme weather and natural catastrophes;
- Collapse of key infrastructure, such as the loss of key ports and shipping channels, including as a result of ongoing conflicts in the Middle East;
- Shortages and strikes, including commodity shortages across various industries, cyber attacks, and labor strikes worldwide;
- Emerging risks, including trade/tariff wars, an increase in insolvency cases (particularly in the transportation and logistics sectors), and the use of forced labor within the global supply chain; and.
- Overreliance on a single supplier (particularly small suppliers that provide components to larger suppliers).

(b) Inflation

(1) Inflation has risen again in 2026, up to 3.4% in July 2026 after periods of slower inflation during 2024 and 2025. "Current U.S. Inflation Rates (2000-2026)", accessed August 13, 2026, https://www.usinflationcalculator.com/inflation/current-inflation-rates/.

(2) Inflation is a mismatch between overall supply and demand, and is being impacted by supply disruptions caused by the pandemic, global conflicts, labor shortages, monetary and fiscal stimuli, and increased consumer

demand. “Inflation in the U.S. Economy: Causes and Policy Options,” October 6, 2023, https://www.congress.gov/crs-product/R47273.

(c) Tariffs and trade restrictions

(1) Tariffs are a tax imposed on imported goods paid by the business or individual receiving those goods at the port of entry. “Tarriffs,” accessed on August 13, 2026, https://www.uschamber.com/tariffs?tab=0.

B. Virginia Law: Start with the Contract

(i) There is no common-law "force majeure doctrine" that saves a poorly drafted agreement.

(a) “Tarrifs As Force Majeure Events: Can Trump’s Trade Policies Excuse Contractual Performance Under Virginia Law, April 30, 2025, https://greenehurlocker.com/tariffs-as-force-majeure-events-can-trumps-trade-policies-excuse-contractual-performance-under-virginia-law/

(ii) Virginia courts generally enforce contracts as written.

(a) “The contract must be construed as written, without adding terms that were not included by the parties, and when the terms in a contract are clear and unambiguous, the contract must be construed according to its plain meaning.” *Parikh v. Family Care Ctr., Inc.*, 273 Va. 284, 288 (2007) (citing *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 271 Va. 574, 578 (2006)).

(b) “It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.” *Wilson v. Holyfield*, 227 Va. 184, 187 (1984) (citing *Meade v. Wallen*, 226 Va. 465, 467, (1984); *Magann Corp. v. Electrical Works*, 203 Va. 259, 264, (1962)).

(iii) Parties seeking relief must show that the triggering event falls within the specific contractual language.

(a) *Drummond Coal Sales, Inc. v. Norfolk Southern Ry. Co.*, 2018 U.S. Dist. LEXIS 143047 (W.D. Va. 2018)

(1) Drummond sought relief from a contractual obligation to meet minimum volume requirements by contending that subsequently-enacted environmental regulations eliminated the demand for coal that would support such obligation. *Drummond Coal Sales*, 2018 U.S. Dist. LEXIS 143047, at *1-2. Amongst its claims, Drummond made a claim for declaratory relief pursuant to a force majeure provision included in the underlying contract. *Id.* at *9. In response, Norfolk Southern argued that the environmental regulations did not fall within the language of the force majeure clause, and asked the court to apply certain cannons of statutory construction (e.g., *ejusdem generis* and *noscitur a sociis*).

- "*Ejusdem generis*" meaning, "where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at *29 (quoting *Yates v. United States*, 135 S. Ct. 1074, 1086, 191 L. Ed. 2d 64 (2015)); and
- "*Noscitur a sociis*" meaning "a word is known by the company it keeps" *Id.* at *30 (citing *Yates*, 135 S. Ct. at 1085).
- The force majeure definition in the underlying contract included: "any act of God or of a public enemy or terrorist act, wars, rebellions, labor troubles, strikes, lockouts, riots, embargoes, blockades or interventions or expropriations by government or governmental authorities, interference by civil, military or governmental authorities, other civil unrest, failure or delay of manufacturers, suppliers or other third parties to deliver machinery or equipment or otherwise to perform, or any Force Majeure Event with respect to Kinder Morgan or a Consignee." *Id.* at *6-7.

(2) Applying *noscitur a sociis*, the court found that none of the events described in the force majeure provision could be read to encompass the alleged cause of nonperformance—market conditions resulting from government regulation. *Id.* at 30-31.

C. Questions to Ask

(i) Does the cited event actually qualify under the clause?

(ii) Is performance impossible, impracticable, or merely more expensive?

(iii) Was notice timely given?

(iv) Was mitigation required?

(v) Does the clause excuse performance entirely or only delay it?

(vi) Does a qualifying force majeure event give either party the right to terminate a contract?

D. Drafting Lessons

(i) Specifically address:

(a) Pandemics and public health emergencies

(b) Government shutdown orders

(c) Supply chain disruptions

(d) Labor shortages

(e) Cybersecurity incidents

(ii) Define remedies:

(a) Suspension of obligations

(b) Extension of deadlines

(c) Termination rights after a specified period

(iii) Sample provisions:

(a) No party shall be liable or responsible to the other party, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement (except for any obligations to make payments to the other party hereunder), when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's ("*Impacted Party*") reasonable control, including, without limitation, the following force majeure events ("*Force Majeure Event(s)*"): (a) acts of God; (b) flood, fire, earthquake, pandemic, epidemic, national or regional health emergency [OTHER POTENTIAL DISASTER(S) OR CATASTROPHE(S),] or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order, law, or actions; (e) embargoes or blockades in effect on or after the date of this Agreement; (f) national or regional emergency; (g) strikes, labor stoppages or slowdowns, or other industrial disturbances; (h) telecommunication breakdowns, power outages or shortages, lack of warehouse or storage space, inadequate transportation services, or inability or delay in obtaining supplies of adequate or suitable materials; and (i) other [similar] events beyond the [reasonable] control of the Impacted Party.

(b) The Impacted Party shall give notice within five (5) days of the Force Majeure Event to the other party, stating the period of time the occurrence is expected to continue. The Impacted Party shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized. The Impacted Party shall resume the performance of its obligations as soon as reasonably practicable after the removal of the cause. In the event that the Impacted Party's failure or delay remains uncured for a period of sixty (60) consecutive days following written notice given by it under this Section [NUMBER], either party other party may thereafter terminate this Agreement upon thirty (30) days' written notice.

II. Buy-Sell Agreements and Deadlock in Virginia Closely Held Businesses

A. What really governs disputes between owners?

(i) Requirements for Governing Documents

(a) Shareholder agreements, operating agreements, and partnerships agreements are <u>not</u> required under Virginia law.

(1) Corporations

- Formation of a Virginia corporation requires the filing of articles of incorporation, which generally must set forth the corporation's name, the number of authorized shares (including the number of shares authorized in each class of share, if there is more than one class authorized), and the address of the corporation's initial registered office, the name of its initial registered agent, and the

registered agent's qualification for serving such role. Va. Code. Ann. § 13.1-619(A). The articles may also set forth additional information (to the extent not otherwise inconsistent with the law), such as the purpose of the corporation, the management and affairs of the corporation's business, provisions defining, limiting, and regulating the powers of the corporation, its board of directors, and its shareholders, a par value for authorized shares, any provision required or permitted to be included in the bylaws, and certain provisions relating to the duty of directors or other persons to offer certain business opportunities to the corporation before pursuing on his or her own. Va. Code. Ann. § 13.1-619(B). Certain businesses may be required to include additional provisions in their articles (e.g., banks, trust companies, insurance companies, savings and loan associations and savings banks, railroads, and public service companies, including companies providing telephone, heat, light, power, water, or sewerage facilities to the public). Va. Code. Ann. § 13.1-620.

- Corporations are also required to adopt bylaws, which shall be initially adopted by either the incorporator or the board of directors. Va. Code. Ann. § 13.1-624(A). The bylaws may contain any provision that is not inconsistent with law or the articles of incorporation. Va. Code. Ann. § 13.1-624(B).
- The Virginia Stock Corporation Act permits shareholders to enter into shareholder agreements, voting agreements, and/or voting trusts, but none are required. *See* Va. Code Ann. §§ 13.1-670-671.1.

(2) Limited liability companies

- Limited liability companies are required to file articles of organization setting forth the name of the company, the name and address of the company's initial registered agent, and its qualifications, and the address of the company's principal office. Va. Code Ann. § 13.1-1011(A). The articles may set forth any other matter permitted under the Virginia Limited Liability Company Act to be included in an operating agreement. Va. Code Ann. § 13.1-1011(B).
- The members of a limited liability company may enter into an operating agreement to regulate or establish the affairs of the company, but they are not required to do so. Va. Code Ann. § 13.1-1023(A)(1).
- An operating agreement may contain provisions regarding the affairs of the company and the conduct of its business to the extent such provisions are not inconsistent with Virginia law or the company's articles of incorporation, and must initially be agreed to by all members of the company. Va. Code Ann. § 13.1-1011(A)-(B).

(3) Partnerships

- Generally, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership (excluding associations formed under other statutes – such as those forming a corporation or limited liability company). *See* Va. Code Ann. § 50-73.88(A)-(B). In other words, a formal partnership agreement is not required to form a partnership.
- Otherwise, the relationship of the partners is governed by the partnership agreement, except to the extent provided under Va. Code Ann. § 50-73.81(B). To the extent a partnership agreement does not otherwise provide, the Virginia Uniform Partnership Act will govern the relations between the partners and between the partners and the partnership. Va. Code Ann. § 50-73.81(A).

(4) Buy-Sell Agreement

- A "buy-sell agreement" is a type of shareholder, operating, or partnership agreement, but in practice is typically limited to matters involving the transfer of ownership interests in the entity.

(ii) Most closely held business disputes arise from deadlock.

(a) Common areas of disagreement:

(1) Compensation

(2) Capital calls

(3) Strategic direction

(4) Employment and termination issues

(5) Distributions

(6) Alleged breach of fiduciary duties

(7) Access to books and records

(8) Personal issues between owners. In other words, the owners just can't get along!

(b) Other Triggering Events

(1) Death

(2) Disability

(3) Bankruptcy

(4) Divorce

(5) Loss of professional license

(6) Termination of employment

(c) Certain events may be governed by statute.

(1) Dissociation of a member from an LLC

- Unless otherwise provided in the articles or operating agreement, a member will be dissociated from a limited liability company upon the occurrence of any of the following events: (1) a member's resignation, to the extent resignation is provided for in writing in the articles or an operating agreement; (2) an event agreed to in the articles or an operating agreement; (3) expulsion pursuant to the articles or operating agreement; (4) the expulsion by unanimous vote of the other members if (a) it is unlawful to carry on the business of the company with that member, or (b) there has been an assignment or transfer of all that member's membership interest in the company, other than a transfer for security purposes or a court order charging the member's interest; (5) by judicial determination because the member engaged in wrongful conduct that adversely and materially affected the business of the company; the member willfully or persistently committed a material breach of the articles or operating agreement, or the member engaged in conduct relating to the business of the company which makes it no reasonably practicable to carry on the business with the member; (6) the member's (a) bankruptcy, (b) assignment for the benefit of creditors, (c) seeking or consenting to the appointment of a trustee, receiver, or liquidator of all or substantially all of the member's property; or (d) failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the member's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated; (7) the member's death or appointment of a guardian or conservator, or a judicial determination that the member is incapable of performing its duties under the articles or operating agreement; (8) in the case of a trust, upon the distribution of the trust's entire transferable interest in the company; (9) in the case of a member that is an estate, upon the distribution of the trust's entire transferable interest in the company; (10) termination of a member who is not an individual, partnership, corporation, limited liability company, trust, or estate; (11) expiration of ninety days after the limited liability company notifies a corporate member that it will be expelled because it has filed articles of dissolution or the equivalent, its existence has been terminated or its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, if there is no revocation of the certificate of dissolution or no reinstatement of its existence, its charter or its right to conduct business; or (12) a partnership or limited liability company that is a member has been dissolved and its business is being wound up. Va. Code Ann. § 13.1-1040.1.

(2) A partner in a partnership may be dissociated for similar reasons, regardless of the partnership agreement. *See* Va. Code Ann. § 50-73.109-10. However, the partner's dissociation could be "wrongful" if it is in breach of the partnership agreement, or certain situations when the partnership is created for a definite term or particular undertaking and the dissociation occurs prior to the expiration of such term or completion of such purpose. Va. Code Ann. § 50-73.110(B).

(iii) Use of A.I. tools to create operating, partnership, or shareholder agreements

(a) Individuals may use an A.I. tool to prepare their governing documents without ever consulting an attorney. These agreements may not comply with applicable law, apply to the type of entity or equity that is involved, and may be deficient in a number of areas that an experienced attorney would recommend. Furthermore, the agreement may have internal inconsistencies or inadequate dispute resolution provisions that make it very difficult when disputes arise.

(b) "AI Can Draft Contracts—But Can You Trust Them", November 17, 2025, https://www.sidley.com/en/insights/publications/2025/11/ai-can-draft-contracts-but-can-you-trust-them.

B. Dissolution

(i) Dissolution could be an option when owners are at a deadlock.

(ii) Dissolution requires winding up the business of the company (e.g., paying and discharging all debts, liabilities, and obligations; distributing remaining assets). *See, e.g.*, Va. Code Ann. § 13.1-1048 (regarding dissolution of limited liability companies).

(iii) Virginia courts have statutory authority to order judicial dissolution in certain circumstances.

(a) Corporations

(1) In a proceeding of a shareholder of a privately-held corporation, a circuit court may dissolve the company if it's established that: (a) the directors are deadlocked in the management of corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the company is threatened or suffered; or the business of the company can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; (b) the directors or those in control have/are acting in a manner that is illegal, oppressive, or fraudulent; (c) the shareholders are deadlocked in voting power and have failed for at least two consecutive annual meeting dates to elect successor directors to those whose terms have expired; or (d) the corporate assets are being misapplied or wasted. Va. Code Ann. § 13.1-747(A)(1). See other events that could provide for a judicial dissolution at Va. Code Ann. § 13.1-747(A)(2)-(6).

(b) Limited Liability Companies.

(1) The circuit court may decree dissolution if it is not reasonably practicable to carry on the business in conformity with the articles or any operating agreement. Va. Code Ann. § 13.1-1047.

(2) Virginia courts apply an "exacting standard" to the statutory language, but does not require a finding that it is impossible for the company to conduct business. *Ticonderoga Farms, LLC v. Knop*, 304 Va. 486, 507 (2025). However, this is a strict standard, and "if the company's core business can be conducted without undue interference or distraction—with the statutory or other rights of both the minority and majority members being observed and protected—the standard will not be met"; in other words, it is not merely met by showing disagreements amongst the members over particular decisions or how to run the company, even if there is litigation between the members (so long as the company can still operate). *Id.* at 507-8.

(c) Partnerships

(1) On application of a partner, a judicial determination that: (a) the economic purpose of the partnership is likely to be unreasonably frustrated; (b) another partner has engaged in conducted relating to the partnership's business that makes it not reasonably practicable to carry on the business of the partnership with that partner; or (c) it is not reasonably practicable to carry on the partnership business in conformity with the partnership agreement. Va. Code Ann. § 50-73.117(A)(5).

(iv) Litigation over deadlock can be expensive and disruptive. Whether litigation is over a provision of the articles or the operating agreement, or the action of an owner to seek judicial dissolution, litigation can be very lengthy and expensive, and may not provide the result that the owner(s) or the company want.

C. Deadlock Resolution

(i) To the extent the owners are willing to agree, it is helpful if the shareholder agreement, operating agreement, or partnership agreement has provisions regarding dispute resolution. These provisions could provide for the following:

(a) Mediation/arbitration

(b) Independent manager or tie-breaker

(c) Advisory board mechanism

(d) Buy/Sell or Put/Call Rights

(e) Mandatory buyout upon specified events

D. Drafting Buy-Sell Provisions

(i) Options for Buy-Sell Provisions:

(a) Put/Call Rights

(1) A put right allows an owner to force the purchase of his/her/its equity.

(2) A call right allows the company or other owners to force the sale of an owner's equity

(3) Example provision:

- (a) Triggering Event. Upon the occurrence of any Triggering Event, the affected Owner (the "Selling Owner") shall have the right (the "Put Right"), and the Company shall have the right (the "Call Right"), to require the purchase and sale of all, but not less than all, of the Selling Owner's Equity Interests in accordance with this Section. For purposes of this Agreement, the term "Triggering Event" shall mean the occurrence of any of the following events with respect to the Selling Owner: (i) death of the Owner; (ii) the Owner's permanent disability; (iii) the Owner's retirement from active participation in the business of the Company; (iv) the termination of the Owner's employment or service relationship with the Company, whether voluntarily or involuntarily; (v) the filing by or against the Owner of a petition in bankruptcy or insolvency, the appointment of a receiver, trustee, or custodian for the Owner or any substantial portion of the Owner's assets, the making of an assignment for the benefit of creditors, or the commencement of any other proceeding for relief under any bankruptcy or insolvency law that is not dismissed within ninety (90) days; (vi) the entry of a final judgment, decree, or order that would result in the transfer of all or any portion of the Owner's Equity Interests to a spouse, former spouse, creditor, trustee, receiver, or other third party; (vii) the Owner's attempted Transfer of any Equity Interest in violation of this Agreement; provided, that, the Selling Owner shall not be entitled to exercise the Put Right with respect to such event; (viii) the dissolution, liquidation, merger, conversion, termination, or cessation of existence of an Owner that is not a natural person; or (ix) the judicial determination that the Owner is legally incompetent or incapable of managing the Owner's affairs.
- (b) Exercise of Put Right. The Selling Owner may exercise the Put Right by delivering written notice to the Company within one hundred eighty (180) days following the occurrence of the applicable Triggering Event. The notice shall state that the Selling Owner elects to sell all of the Selling Owner's Equity Interests pursuant to this Section.
- (c) Exercise of Call Right. The Company may exercise the Call Right by delivering written notice to the Selling Owner within one hundred eighty (180) days following the occurrence of the applicable Triggering Event. The notice shall state that the Company elects to purchase all of the Selling Owner's Equity Interests pursuant to this Section.
- (d) Purchase Price. The purchase price for the Equity Interests shall be the Fair Market Value thereof as of the date of the Triggering Event. For purposes of this Agreement, "Fair Market Value" means the value of the Equity Interests determined as of the applicable valuation date based upon the value of the Company as a going

concern and without regard to the occurrence of the event giving rise to the valuation. Fair Market Value shall be determined by an independent appraiser in accordance with generally accepted valuation principles and shall be based upon the amount that a willing buyer would pay and a willing seller would accept in an arm's-length transaction, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. In determining Fair Market Value, a reasonable discount may be applied by the independent appraiser for lack of marketability, minority ownership, lack of control, or similar factors, unless otherwise expressly provided in this Agreement.

- (f) Closing. The closing of the purchase and sale shall occur within ninety (90) days after the final determination of the purchase price, unless otherwise agreed by the parties.
- (g) Payment Terms. Unless otherwise agreed, the purchase price shall be paid as follows: (i) twenty percent (20%) in cash at closing; and (ii) the balance pursuant to a promissory note payable over five (5) years in equal quarterly installments of principal and interest, bearing interest at the Prime Rate published in The Wall Street Journal on the closing date plus one percent (1%).

(b) Right of First Refusal

(1) An owner receives an offer to sell his/her/its equity, or wants to offer his/her/its equity for sale, but is required to first offer it to the company and/or the remaining owners. Typically, if there is an offer in hand, the selling owner will have to offer the equity to the company/owners on no less favorable terms than those offered to/by the third party offeror. If there is no offer, the agreement may provide a formula that determines a price at which the selling owner would be obligated to sell the equity to the company/the other owners before offering the equity to a third party.

(2) Example provision:

- (a) Transfers Subject to this Section. Except for Permitted Transfers expressly authorized by this Agreement, no Owner may Transfer all or any portion of such Owner's Equity Interests unless such Transfer first complies with the provisions of this Section.
- (b) Transfer Notice. If an Owner (the "Transferring Owner") receives a bona fide written offer from an independent third party to purchase any of the Transferring Owner's Equity Interests and desires to accept such offer, the Transferring Owner shall deliver written notice (the "Transfer Notice") to the Company and the other Owners. The Transfer Notice shall include: (1) the name and address of the proposed transferee; (2) the number or percentage of Equity Interests proposed to be transferred; (3) the purchase price being offered for such Equity Interests; (4) all material terms and

conditions of the proposed transfer; and (5) a copy of the third-party offer or purchase agreement.

- (c) Company's Right of First Refusal. For a period of thirty (30) days following receipt of the Transfer Notice, the Company shall have the right, but not the obligation, to purchase all, but not less than all, of the offered Equity Interests on the same terms and conditions set forth in the Transfer Notice. The Company may exercise its right by delivering written notice to the Transferring Owner within such thirty (30)-day period.
- (d) Owners' Secondary Right of First Refusal. If the Company does not elect to purchase all of the offered Equity Interests, the remaining Owners shall have the right, but not the obligation, for a period of thirty (30) days thereafter, to purchase all or any portion of the offered Equity Interests on the same terms and conditions set forth in the Transfer Notice. Unless otherwise agreed among the remaining Owners, each Owner shall have the right to purchase a portion of the offered Equity Interests equal to such Owner's pro rata ownership percentage (excluding the Equity Interests being offered for sale). Any Equity Interests not elected to be purchased by an Owner may be purchased by the other participating Owners in such proportions as they may agree.
- (e) Closing. The closing of any purchase pursuant to this Section shall occur within sixty (60) days after the exercise of the applicable purchase right, unless otherwise agreed by the parties.
- (f) Sale to Third Party. If neither the Company nor the remaining Owners elect to purchase all of the offered Equity Interests, the Transferring Owner may Transfer the offered Equity Interests to the proposed transferee on terms no more favorable to the transferee than those contained in the Transfer Notice, provided that: (1) the Transfer is completed within ninety (90) days after expiration of the rights granted herein; and (2) the transferee agrees in writing to be bound by this Agreement. If the Transfer is not completed within such ninety (90)-day period, the proposed Transfer shall again become subject to the provisions of this Section.
- (g) Transfers in Violation of this Section. Any purported Transfer made in violation of this Section shall be void and of no force or effect, and the Company shall not recognize any such purported transferee as an Owner.
- (h) Prohibited Transfers. Notwithstanding anything contained in this Agreement to the contrary, no Transfer of any Equity Interests shall be permitted, and the Company shall not be required to recognize or register any purported Transfer, if such Transfer: (1) would violate any applicable federal, state, or local law, rule, regulation, order, judgment, or governmental approval requirement; (2) would result

in the Company becoming subject to registration or reporting requirements under applicable securities laws; (3) would cause the Company to cease to qualify for, or would adversely affect, any tax classification, tax election, or tax treatment then applicable to the Company; (4) would cause the Company or any Owner to incur material adverse tax consequences not otherwise contemplated by this Agreement; (5) would require the consent of any governmental authority, lender, contractual counterparty, or other third party that has not been obtained; or (6) would otherwise materially and adversely affect the business, operations, legal status, or tax status of the Company.

- NOTE: depending on the type of entity and its tax classifications, particular care should be taken to ensure that a transfer of equity will not have an adverse impact on the company or its other owners, including transfers that could cause the company to lose its tax classification status.

(c) Shotgun Provision

(1) One owner offers to either (a) buy the other owner's equity at a specified price; or (b) sell his/her/its equity to the other owner at the same price. The offeree is then required to choose one of the two options and consummate the transaction.

(2) Example Provision:

- (a) Initiation. If at any time an Owner (the "Initiating Owner") desires to purchase all of the Equity Interests owned by another Owner (the "Offeree") or to sell all of the Initiating Owner's Equity Interests to the Offeree, the Initiating Owner may deliver written notice (the "Shotgun Notice") to the Offeree specifying: (1) the cash purchase price per Equity Interest (the "Shotgun Price"); and (2) the aggregate purchase price for all of the Offeree's Equity Interests. The Initiating Owner shall be deemed to have offered either to (i) purchase all of the Offeree's Equity Interests at the Shotgun Price or (ii) sell all of the Initiating Owner's Equity Interests at the Shotgun Price.
- (b) Election by Offeree. Within sixty (60) days after receipt of the Shotgun Notice, the Offeree shall deliver written notice to the Initiating Owner electing either to: (1) sell all of the Offeree's Equity Interests to the Initiating Owner at the Shotgun Price; or (2) purchase all of the Initiating Owner's Equity Interests at the Shotgun Price. Failure to timely deliver an election notice shall be deemed an election to sell all of the Offeree's Equity Interests to the Initiating Owner.
- (c) Closing. The closing of the transaction shall occur within ninety (90) days following the Offeree's election. At closing: (1) the selling

Owner shall transfer good and marketable title to its Equity Interests free and clear of all liens and encumbrances; and (2) the purchasing Owner shall pay the purchase price in immediately available funds.

- (d) Financing. The purchasing Owner may obtain third-party financing in connection with the purchase, provided that such financing does not delay the closing.
- (e) Mandatory Purchase and Sale. Upon the Offeree's election (or deemed election), the selling Owner shall be obligated to sell, and the purchasing Owner shall be obligated to purchase, all of the Equity Interests subject to the Shotgun Notice.
- Optional:
    - The Shotgun Procedure may be initiated only following (i) a defined "deadlock event," (ii) the Owners' failure to resolve such deadlock event within thirty (30) days after written notice thereof, and (iii) completion of any mediation procedures required under the agreement.

(d) Drag-Along/Tag-Along Rights

(1) Drag-along rights allow majority owners to compel the participation of the minority owners' equity.

(2) Tag-along rights allow minority owners to participate in a sale of the majority owners' interests.

(3) Example Provision (drag along):

- (a) If at any time a Shareholder who, together with its Permitted Transferees, holds no less than 50% of the outstanding Common Stock (a "Dragging Shareholder"), receives a bona fide offer from a Third Party Purchaser to consummate, in one transaction, or a series of related transactions, a Change of Control (a "Drag-along Sale"), the Dragging Shareholder shall have the right to require that each other Shareholder (each, a "Drag-along Shareholder ") participate in such Transfer in the manner set forth in this Section, provided, however, that no Drag-along Shareholder shall be required to participate in the Drag-along Sale if the consideration for the Drag-along Sale is other than cash. Notwithstanding anything to the contrary in this Agreement, if the Drag-along Sale is structured as a merger, consolidation, business combination, sale of assets, or other transaction requiring the approval or consent of the Shareholders, each Drag-along Shareholder shall (i) vote in favor of the Drag-along Sale (and any related actions that may be necessary to consummate such sale) and otherwise consent to and raise no objection to such Drag-along Sale and such related actions and (ii) refrain from taking any actions to exercise, and take all actions to waive, any dissenters' appraisal, or other similar rights that it may have in connection with such transaction.

- (b) The Dragging Shareholder shall exercise its rights pursuant to this Section by delivering a written notice (the "Drag-along Notice") to the Company and each Drag-along Shareholder no later than twenty (20) days prior to the closing date of such Drag-along Sale. The Drag-along Notice shall make reference to the Dragging Shareholder's rights and obligations hereunder and shall describe in reasonable detail: (1) the number of shares of Common Stock to be sold by the Dragging Shareholder, if the Drag-along Sale is structured as a Transfer of Common Stock; (2) the identity of the Third Party Purchaser; (3) the proposed date, time, and location of the closing of the Drag-along Sale; (4) the per share purchase price and the other material terms and conditions of the Transfer; and (5) a copy of any form of agreement proposed to be executed in connection therewith.
- (c) If the Drag-along Sale is structured as a Transfer of Common Stock, then, subject to Section xx, the Dragging Shareholder and each Drag-along Shareholder shall Transfer the number of shares equal to the product of (i) the aggregate number of shares of Common Stock the Third Party Purchaser proposes to buy as stated in the Drag-along Notice and (ii) a fraction (A) the numerator of which is equal to the number of shares of Common Stock then held by such Dragging Shareholder or Drag-along Shareholder, as the case may be, and (B) the denominator of which is equal to the number of shares then held by all of the Shareholders (including, for the avoidance of doubt, the Dragging Shareholder).
- (d) The consideration to be received by a Drag-along Shareholder shall be the same form and amount of consideration per share of Common Stock as is to be received by the Dragging Shareholder (or, if the Dragging Shareholder is given an option as to the form and amount of consideration to be received, the same option shall be given) and the terms and conditions of such Transfer shall, except as otherwise provided in the immediately succeeding sentence, be the same as those upon which the Dragging Shareholder Transfers its Common Stock. Each Drag-along Shareholder shall make or provide the same representations, warranties, covenants, indemnities, and agreements as the Dragging Shareholder makes or provides in connection with the Drag-along Sale (except that in the case of representations, warranties, covenants, indemnities, and agreements pertaining specifically to the Dragging Shareholder, the Drag-along Shareholder shall make the comparable representations, warranties, covenants, indemnities, and agreements pertaining specifically to itself); provided, that all representations, warranties, covenants, and indemnities shall be made by the Dragging Shareholder and each Drag-along Shareholder severally and not jointly and any indemnification obligation shall be pro rata based on the consideration received by the Dragging Shareholder and each

Drag-along Shareholder, in each case in an amount not to exceed the aggregate proceeds received by the Dragging Shareholder and each such Drag-along Shareholder in connection with the Drag-along Sale; and provided, further, that a Drag-along Shareholder shall not be required to agree to a non-competition or other restrictive covenant.

- (e) The reasonable and documented fees and expenses of the Dragging Shareholder incurred in connection with a Drag-along Sale and for the benefit of all Shareholders (it being understood that costs incurred by or on behalf of a Dragging Shareholder for its sole benefit will not be considered to be for the benefit of all Shareholders), to the extent not paid or reimbursed by the Company or the Third Party Purchaser, shall be shared by all the Shareholders on a pro rata basis, based on the aggregate consideration received by each Shareholder; provided, that no Shareholder shall be obligated to make or reimburse any out-of-pocket expenditure prior to the consummation of the Drag-along Sale.
- (f) Each Shareholder shall take all actions as may be reasonably necessary to consummate the Drag-along Sale, including entering into agreements and delivering certificates and instruments, in each case consistent with the agreements being entered into and the certificates being delivered by the Dragging Shareholder.
- (g) The Dragging Shareholder shall have ninety (90) days following the date of the Drag-along Notice in which to consummate the Drag-along Sale, on the terms set forth in the Drag-along Notice (which such ninety (90) day period may be extended for a reasonable time not to exceed an additional thirty (30) days to the extent reasonably necessary to obtain any Government Approvals). If at the end of such period, the Dragging Shareholder has not completed the Drag-along Sale, the Dragging Shareholder may not then effect a transaction subject to this Section without again fully complying with the provisions of this Section.

(e) Others

(1) There are other approaches, but the provisions listed above are some of the most common.

III. Updates to the Virginia Residential Landlord and Tenant Act—Va. Code § 55.1-1200 *et seq*. that took effect either on July 1, 2026 or will take effect on July 1, 2027:

A. Changes Effective July 1, 2026:

(i) ARTICLE 1 – GENERAL PROVISIONS

(a) § 55.1-2000: Definitions.

(1) Redefined "essential service" to include central air conditioning when supplied by the landlord and operating or represented as operating as of the effective date of the rental agreement.

(2) ***Practice Note:*** *The provision of air conditioning was previously not an "essential service." This addition brings the provision of central air under the control of Section 55.1-1239 – Wrongful failure to supply an essential service and provides tenants with a remedy if a central air system fails.*

(b) § 55.1-1208: Prohibited Provisions in Rental Agreements.

(1) **All landlords, as opposed to only public housing authorities**, are prohibited from requiring a tenant to pay for the maintenance or repair of any unit, unless necessitated by a violation of the Act.

(ii) ARTICLE 3 – TENANT REMEDIES

(a) § 55.1-1235: Early Termination of Rental Agreement by Military Personnel.

(1) Qualifying military personnel may now terminate rental agreements at any time prior to their date of departure.

(2) ***Practice Note:*** *Prior to the change the termination date was not more than 60 days prior to the date of departure necessary to comply with official orders or any supplemental instructions for interim training or duty prior to the transfer.*

(b) § 55.1-1241: Landlord's Noncompliance as Defense to Action for Possession for Nonpayment of Rent.

(1) Tenants are no longer required to pay disputed rent into court escrow as a prerequisite to raising a defense of landlord noncompliance in an eviction action. Remedies for a landlord's noncompliance have also been limited to a reduction in rent, termination of the lease upon the tenant's request, and ordering the landlord to remedy the condition that resulted from material noncompliance.

(2) **Practice Note**: This change removed significant monetary threshold requirement on the tenant that provided *protection to the landlord from a tenant's assertion of a frivolous defense against an action for possession.*

(iii) ARTICLE 5 – LANDLORD REMEDIES

(a) § 55.1-1245: Noncompliance with Rental Agreement; Monetary Penalty.

(1) The pay-or-quit notice period for nonpayment of rent is extended from five days to fourteen days. Tenants now have fourteen days rather than five days to cure a rent default before the landlord may terminate the rental agreement.

(2) ***Practice Note:*** *Be sure to update any Pay-or-quit notices*

(iv) ARTICLE 6 – RETALIATORY ACTION

(a) § 55.1-1259: Actions to Enforce.

(1) Localities may seek injunctive relief and damages on a tenant's behalf for a landlord's material non-compliance with the terms of a lease agreement, fire hazards, and serious threats to life, health, or safety including infestation of rodents or a lack of heat, hot or cold running water, electricity, or adequate sewage disposal facilities.

(2) ***Practice Note:*** *This is a completely new subparagraph of Section 55.1-1259. The locality is required to provided prior notice of the nature of the violation and the landlord has failed to remedy the situation to the satisfaction of the locality within a reasonable time frame.*

(v) ARTICLE 7 -EVICTION DIVERSION PROGRAM

(a) § 55.1-1262: Eviction Diversion Program; Process; Court-Ordered Payment Plan.

(1) Beginning July 1, 2026, eligibility for the Eviction Diversion Program will be significantly broadened. The initial payment required to enter the program has been lowered from 25% to 10% of the amount owed. Additionally, tenants no longer need to be employed to qualify for the program—they must simply have income. Prior late-payment and redemption restrictions have been replaced with a requirement that the tenant not owe outstanding rent under, or have defaulted on, a payment plan within the previous 12 months.

(2) Participating courts now must attach information about the Eviction Diversion Program to unlawful detainer summonses. Further, the payment plan schedule has been modified so that the remaining balance after the initial payment is made in three installments of 30% each.

(3) ***Practice Note:*** *This program was established in 2019 with pilot programs in Danville, Hampton, Petersburg and Richmond. A practitioner will need to check whether the general district court of the locality of the rental unit has also implemented this program.*

B. CHANGES EFFECTIVE JULY 1, 2027:

(i) ARTICLE 1 – GENERAL PROVISIONS

(a) § 55.1-1202: Notice.

(1) There will be new requirements for notices of termination based on nonpayment of rent. Such notices must now include an itemized statement of charges and payments covering the lease or previous 12 months, whichever is shorter, along with any late charges, attorneys' fees, costs, damages, and other amounts claimed to be due. If the lease provides for submetering or energy allocation, the notice must include utility-related debits and credits incurred by the tenant.

(2) ***Practice Note:*** *This is a completely new subparagraph of Section 55.1-1202. Failure to comply with the provisions of this subparagraph will render any notice of termination ineffective.*

(b) § 55.1-1203: Application; Notice, Deposit, Fee, and Additional Information.

(1) **Before collecting an application or collecting any payment of information from a prospective tenant**, landlords must disclose their fees, screening standards, disqualifying factors, any use of consumer-reporting practices and the applicant's right to obtain a free copy of any consumer report used or other adverse action and right to dispute the accuracy of information *appearing* in the consumer report.

(2) ***Practice Note:*** *This requirement has been added as Subparagraph A. and this information must be provide to a prospective applicant in writing or by posting in a manner that is accessible to such prospective applicant prior to a landlord collecting an application or any payment.*

(c) § 55.1-1204: Terms and Conditions of Rental Agreement; Payment of Rent; Copy of Rental Agreement for Tenant.

(1) Landlords must accept checks and money orders as payment for rent and any security deposit. Further, landlords will be required to provide a written receipt when a tenant pays rent by cash or money order. Finally, landlords may charge a fee for processing payments but may not require a tenant to pay more than the landlord's actual out-of-pocket cost charged by a third-party payment processor for payments made by credit card, debit card, or other electronic methods.

(2) ***Practice Note:*** *These changes are set forth in Subparagraph J. 1. Of Section 55.1-1204.*

(d) § 55.1-1209: Confidentiality of Tenant Records.

(1) Landlords must provide, upon a tenant's written request and within ten business days, an accounting of the tenant's charges and payments. This accounting must include utility billing details if the rental agreement provides for the use of submetering or energy allocation. However, this Section does not apply to landlords that own fewer than four rental units, unless they receive state or local rental or utility assistance funds on behalf of the tenant.

(2) ***Practice Note:*** *The Department of Housing and Community Development is required under Section 36-139(33) of the Code of Virginia to develop a standardized printable template that a landlord may use to satisfy this additional requirement under Section 55.1-1209.*

(e) § 55.1-1212: Energy Submetering, Energy Allocation Equipment, Sewer and Water Submetering Equipment, and Ratio Utility Billing Systems; Local Government Fees.

(1) Landlords may no longer charge copying fees when a tenant requests records regarding energy submetering equipment, energy allocation equipment, water and submetering equipment, or ratio utility billing systems. Further, landlords must include a description of how energy and utility billing fees are calculated and a history of payments for each tenant

within these records over the duration of the lease or the past 12 months, whichever is shorter.

(2) ***Practice Note***: These changes are set forth in subparagraph F of Section 55.1-1212.

(f) § 55.1-1212.1: Installation of Small Portable Solar Generation Devices.

(1) Landlords that own more than four rental units or more than a ten (10) percent interest in more than four rental dwelling units, whether individually or through a business entity, generally cannot prohibit tenants from installing qualifying small portable solar devices on the exterior of their rental unit, although reasonable restrictions on placement and size are permitted. Tenants must provide at least seven days' notice before installation, are responsible for any resulting damage, and landlords are not liable for conditions caused solely by the device. Tenants in properties using ratio utility billing systems, or where installation would require alterations to the building's electrical systems, cannot install such devices without the landlord's approval.

(2) ***Practice Note:*** *This is a completely new section. For purposes of this new section a "small portable solar generation device" means a movable photovoltaic generation that (i) has a maximum power output of not more than 1,200 watts per dwelling unit; (ii) is designed to be connected to the electrical system of a building through and electrical outlet; (iii) is located on the customer's side of the electric meter and intended primarily to offset part of the customer's electricity consumption; (iv) meets the standards of the most recent National Electric Code; (v) is certified by a nationally recognized testing laboratory, as described in 29 C.F.R. § 1910.7, or an equivalent nationally recognized testing laboratory; and (vi) includes a device of feature that prevents the device from affecting or exporting power to the electrical system of the building during a power outage. A small portable solar generation device that has a maximum power output to the receptacle outlet of not more than 391 watts is exempt from product listing provisions that would require alterations to building's premises, wiring, or electrical panels.*

(ii) ARTICLE 4 – TENANT REMEDIES

(a) § 55.1-1240: Fire or Casualty Damage

(1) The notice period for both tenants and landlords when terminating a lease due to fire or casualty damage has been extended from fourteen days to twenty-one days. Within seven days of receiving such notice, a tenant may request that the landlord reevaluate the habitability of the unit. Landlords will also be required to make reasonable efforts to meet with the tenant, discuss the damage and alternatives to lease termination, and determine whether a comparable unit in the same complex is available and can be offered to the tenant on the same lease terms. However, the landlord need not comply with these requirements if it is determined that the fire or

casualty damage was caused by the tenant's violation of their duties under § 55.1-1227.

(2) ***Practice Note:*** *Prior to the effective date of this amendment, in the case of fire or casualty damage the landlord could determine that the damage to the unit required the removal of the tenant and the use of the premises was substantially impaired, in which case the landlord could terminate the lease effective as of the end of the notice period.*

(b) § 55.1-1244: Tenant's Assertion; Rent Escrow.

(1) Tenants are no longer required to pay into court escrow the amount of rent called for under the lease agreement to bring an action asserting that the landlord is in material noncompliance with the lease agreement. However, the tenant must pay rental amounts that come due during the pendency of the action, although failure to do so is not grounds for dismissal of the action but may be considered by the court in rendering its decision.

(2) ***Practice Note:*** *Notwithstanding that the tenant is not required to make rent payments into escrow, if the tenant fails to make such payments then the landlord can proceed to file a separate court action to obtain possession of the premises or to obtain a money judgment against the tenant for amounts due under the lease*

(iii) ARTICLE 6 – RETALIATORY CONDUCT

(a) § 55.1-1258: Retaliatory Conduct Prohibited.

(1) Prohibitions on landlord retaliation will be significantly broadened. Protected activities now include complaints to media outlets, fair housing complaints, and participation in tenant organizations. Prohibited retaliatory conduct now includes things such as rent or fee increases, selective rule enforcement, harassment, coercion, threats of legal action, threats of lease termination, and refusal to renew certain subsidized leases. At the same time, the changes add several express exceptions allowing landlords to act for legitimate, nonretaliatory reasons, such as default, previously issued termination notices, lease-based rent increases, or good-cause nonrenewal of subsidized leases.

(2) ***Practice Note:*** *Significantly, the tenant's burden of proving the retaliatory conduct of the landlord has been removed from this section.*

(iv) 2026 Updates to the Manufactured Home Lot Rental Act—Va. Code § 55.1-1300 et seq.

(a) § 55.1-1301: Written Rental Agreement Required.

(1) Manufactured home lot rental agreements must now include specific language indicating that lot rent does not include homeowner's insurance or flood insurance.

(2) ***Practice Note:*** *New subparagraph B of Section 55.1-1301 states that the landlord shall provide the following statement, in bold typeface, in the rental agreement: "Lot rent does not include homeowner's insurance.*

Homeowner's insurance for manufactured homes does not necessarily include flood insurance. If a tenant wishes to protect his home and personal property from potential flood damage, he should obtain a separate flood insurance policy. Flood insurance may be required for land and property located in a special flood hazard area. Tenants can contact the Federal Emergency Management Agency (FEMA) or visit the websites for FEMA's National Flood Risk Information System or for the Virginia Department of Conservation and Recreation's Flood Risk Information System to obtain information regarding whether the property is located in a special flood hazard area."

(3) *Additionally, new subparagraph B provides: "Any failure of the landlord to provide such notice shall not affect the validity of the rental agreement. If the tenant requests translation of the notice from English to another language, the landlord may assist the tenant in obtaining a translator or refer the tenant to an electronic translation service. In doing so, the landlord shall not be deemed to have breached any of his obligations under this chapter or otherwise become liable for any inaccuracies in the translation. The landlord shall not charge a fee for such assistance or referral."*

(b) § 55.1-1302: Term of Rental Agreement; Fee Disclosure Statement; Renewal; Security Deposits.

(1) Now requires manufactured home park owners to provide an itemized disclosure of all charges, including the security deposit, rent, and any upfront charges, that begins on the first page of the rental agreement. Tenants also now have a remedy allowing them to recover actual damages or $500 per statutory violation and attorneys' fees if the park owner attempts to collect charges that were not set forth in the itemized disclosure.

(2) ***Practice Note:*** *These changes are set forth in new subparagraph B of Section 55.1-1302 and align the Manufactured Home Lot Rental Act with Section 55.1-1204.1 of the VRLTA that was enacted in 2024 and amended in 2025.*

(3) In addition, the renewal process has been revised by requiring tenants, rather than either party, to give notice of nonrenewal. Furthermore, the landlord is required to allow rental agreements to be automatically renewed except for reasons that would justify termination or eviction. For rental agreements not renewed for reasons that would justify termination, the park owner must provide at least 90 days' written notice stating the reason for nonrenewal.

(4) ***Practice Note****: Although the landlord's right to unilaterally prohibit a rental agreement from not renewing was removed, the provision remains that a rental agreement will not automatically renew if the landlord provides the tenant with at least 60 days written notice prior to the expiration of the current lease term of any change to the terms of the lease. In such case, the rental agreement will renew with the changed terms unless the tenant notifies the landlord within 30 days that the tenant does not accept the changed terms. If the tenant does not accept the changes then the tenant*

can decide to not let the rental agreement renew, unless the landlord agrees to not change the terms.

(c) § 55.1-1303: Landlord's Obligations.

(1) Park owners must provide a copy of the written rental agreement and the statement of tenant rights and responsibilities to the tenant within ten business days of the effective date of the rental agreement.

- ***Practice Note:*** *The requirement to provide this information is not new but the time has been reduced from one month to 10 days. The provision remains that (i) the failure of the landlord to timely provide this information does not affect the validity of the rental agreement and (ii) the landlord cannot maintain any action against the tenant until the landlord can prove the this information has been provided to the tenant*

(d) § 55.1-1308.3: Right of First Refusal for Resident Entities and Localities.

(1) This new section grants resident entities a right of first refusal, and localities a secondary right of first refusal, when a manufactured home park is offered for sale. Park owners must provide notice of a proposed sale to tenants, the locality, and the Department of Housing and Community Development, and a resident entity or locality may purchase the park by matching the price and substantially equivalent terms of the third-party offer. To exercise this right, the purchaser must commit to preserving the property as a manufactured home park for at least fifteen years, subject to limited exceptions. Park owners must notify tenants of their rights under this section by both mail and personal delivery on an annual basis and by posting written notices in prominent places throughout the park.

(2) Practice Note: *Section 55.1-1300 was amended to include a definition of "Resident entity." It means a formal or informal entity that provides documentation that it represents more than 50 percent of the tenant households with a valid lot rental agreement in the manufactured home park at the time an offer to purchase the manufactured home park is made. This is a very high threshold and doubles the prior 25 percent requirement under Section 55.1-1308.2.*

The initial time lines on both the Seller (5 days from contract) and the resident entity and/or locality (15 days from receipt of the notice of sale) are tight, so whether a resident entity or locality will exercise its right of first refusal should be quickly known. However, it is critical that the Seller fully comply with the requirements of this section to ensure that any challenge by a resident entity, locality or person with a valid rental agreement can be quickly addressed.

(2) *Additionally, this new section specifically states that if a Seller owns multiple Parks and enters into a Purchase Agreement to sell all of the Parks together, the Seller must split out each Park from the Purchase Agreement when it provides the required notice. In situations where a Purchaser wants*

to buy all of the Parks, the possibility that a resident entity or locality may purchase one of the Parks could adversely affect the entire transaction and must be carefully negotiated upfront with any potential Purchaser. .

(3) ***Additional requirements placed on Sellers of Manufactured Home Parks:***

Practice Note: *The repeal of Section 55.1-1308.2 and the enactment of new Sections 55.1-1308.3 through 1308.5 completely change the obligations of the Sellers of Manufactured Home Parks to provide prior notice of the pending sale of a Park and also materially changes the contractual requirements on the Seller with regard to the sale of a Park.*

(e) § 55.1-1308.4: Opportunity to purchase for resident entities.

(1) This new section adds negotiation requirements for the seller of a manufactured home park when a resident entity submits an offer. A failure to comply with this section gives tenants an opportunity to recover actual damages and statutory damages equal to twelve times the amount of monthly lot rent and attorneys' fees.

(f) § 55.1-1308.5: Affidavit of compliance with notice requirements.

(1) This new section requires the seller of a manufactured home park to record an affidavit confirming compliance with these new requirements.

(g) § 55.1-1320: Lot Rent Increase Prohibition Based on Notice of Violation from Locality.

(1) This new section prohibits park owners from increasing lot rent while unresolved zoning, building, fire code, or habitability violations remain outstanding. A violation is not considered resolved until the locality confirms it has been cured or adequate progress has been made. Tenants who pay an improper rent increase under this section may recover the overpaid amount and attorneys' fees.

IV. Digital Assets Under the Uniform Commercial Code

A. The 2022 UCC Amendments and Article 12

(i) The Uniform Commercial Code recently underwent its most significant modernization in decades with the adoption of the 2022 UCC Amendments (the "Amendments") and Article 12 which specifically address "Controllable Electronic Records" including:

(a) Digital assets

(b) Electronic money

(c) Cryptocurrency

(d) Tokenized assets

(e) Electronic records

(f) Emerging fintech transactions

(ii) Virginia codified the 2022 UCC Amendments in Sections 8.13-01 through 8.401 of the Code of Virginia (1950), as amended (the "Code") and codified Article 12 in Sections 8.12-101 through 8.1-101 through 8.1-107 (cited as the "Uniform Commercial Code – Controllable Electronic Records).

(iii) Prior to the enactment of the Amendments digital assets were treated as "general intangibles" under Article 9 of the UCC and thus were considered in the same categories as traditional bank deposits and conventional securities. This treatment created uncertainty for transfer, perfection, priority, and good-faith purchaser analysis of digital assets.

(iv) B. Controllable Electronic Record (CER)

(a) A controllable electronic record, or CER, is generally a record stored in an electronic medium that can be subjected to "control." Article 12 focuses on whether a person has the power to obtain substantially all of the benefit from the CER, prevent others from doing so, and transfer that control to another person.

B. Secured Transactions Implications

(i) Traditional Methods of securing "Perfection" in Secured Transactions:

(a) Filing financing statements identifying the collateral

(b) Taking possession of the collateral

(c) Obtaining control of deposit accounts through a Deposit Account Control Agreement

(ii) The Amendments create a new method of securing "Perfection" for CERs:

(a) Perfection by Control

(1) Control generally exists when a secured party can:

1. Enjoy substantially all benefits of the asset;
2. Prevent others from obtaining those benefits; and
3. Transfer the asset to another person.

(2) Control can be achieved for CERs through filing a UCC-1 with an adequate collateral description that should include references to:

1. Controllable electronic records;
2. Controllable accounts;
3. Controllable payment intangibles;
4. Wallets, private keys, accounts, custody arrangements, proceeds, and related rights; and
5. having a "Controllable Electronic Records Control Agreement" prepared and executed.

C. Lessons for Virginia Practitioners

(i) For Transactional Lawyers

(a) Review:

(1) Existing collateral descriptions;

(2) Security agreements; and

(3) Perfection strategies.

(b) Consider whether:

(1) Current documents adequately capture digital assets; and

(2) Additional control agreements are needed.

(c) For Commercial Litigators

(1) Prepare for:

- Expert testimony on blockchain technology;
- Tracing analyses;
- Control disputes; and
- Novel UCC priority battles.

(ii) For Bankruptcy Practitioners

(a) Expect increased disputes concerning:

(1) Asset characterization;

(2) Perfection status;

(3) Custody arrangements; and

(4) Priority determination.

(iii) Brief Summary:

Asset Type	Method of Perfection	Best Practice
Equipment	Filing	UCC-1
Deposit Account	Control	Control Agreement
Investment Property	Control	Securities Control Agreement
Cryptocurrency/CER	Control	Wallet-Based Control Structure
Tokenized Payment Rights	Control	CER Documentation

V. Recent Changes to ALTA/NSPS Land Title Survey Table A Requirements

A. Purpose of Table A

(i) Table A contains the optional survey responsibilities and specifications that can be added to an ALTA/NSPS Land Title Survey.

(ii) The selected items define the scope of the survey and often determine whether the survey satisfies lender, title insurer, purchaser, or development requirements.

B. Practice Point for Virginia Attorneys

(i) Real estate attorneys should review Table A selections early in the transaction because survey scope directly affects closing timelines, costs, and title underwriting.

(ii) Key Changes in the 2021 ALTA/NSPS Standards

(a) Expansion and Reorganization of Zoning Information (Table A Item 6):

(1) Prior Standard

- Zoning information was more limited and less detailed.

(2) Current Standard

- Item 6(a) now permits inclusion of:
  - zoning classification;
  - setbacks,
  - height restrictions,
  - floor area restrictions, and
  - parking requirements, when supplied through a zoning report or letter.

(b) Enhanced Building Information (Table A Item 7):

(1) Item 7 now separately addresses:

- building dimensions,
- building footprint square footage,
- other requested area calculations, and
- building height measurements.

(c) Increased Flexibility Through Custom Table A Item 20:

(1) The standards expressly encourage parties to negotiate additional survey requirements under Item 20;

(2) Engineering-design-related requests that exceed traditional ALTA survey functions should generally be addressed through Item 20 rather than modifying existing Table A items; and

(3) Any customized Table A provisions or changes to standard wording must be identified and explained.



Where Is That Lawyer From, Anyway?

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"Where's that Lawyer From Anyway…?"

Gentry Locke Seminar
October 2, 2026

Trey Smith
Charlie Morrison
Frank Clay

I. Introduction

After a recent trial, we spoke with jurors about our case. One of them wanted to talk about opposing counsel. After making several statements suggesting that counsel didn't know much about the local area and had not connected with the jury, he asked, "where is that lawyer from anyway?"

Most trial lawyers eventually try a case somewhere they are not from. Virginia is a geographically diverse state that stretches across a wide range of areas and cultures. Trials in a typical Southwest Virginia courthouse would be tried very differently than one in Northern Virginia or Hampton Roads. The distance is more than geographic. Every venue has its own economy, its own vocabulary, and its own assumptions. Jurors bring all of that information into the box with them.

These materials are to assist a Virginia practitioner in becoming familiar with an otherwise unknown venue. They are organized chronologically: before trial, at trial, and after the verdict.

II. Before Trial

A. Know the Court

Virginia circuit courts have only narrow local rulemaking authority. Under Virginia Code § 8.01-4, a circuit court's rules "shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices," and any

local rule inconsistent with statute, the Rules of the Supreme Court of Virginia, decided cases, or that abridges substantive rights, is invalid. For the most part then, the written "law" for trial procedure is consistent across venues.

For jury selection, find out what the particular circuit actually provides beyond Code § 8.01-353(A). Some circuits use supplemental juror questionnaires. Some judges will permit a case-specific questionnaire on request or motion, particularly where pretrial publicity or community entanglement is likely. Ask the court or clerk's office what the local practice is, and ask early.

What differs, and what you must learn, is everything left to the judge (or local court's) discretion: scheduling practices, motions practice, how the judge runs voir dire, and the unwritten customs of the local bar. Check the circuit's page on the Virginia Judicial System website and the court's own website for standing orders, suggested practices, and courtroom procedures, and then call the judge's chambers and the clerk's office to fill the gaps. Study any scheduling or trial management order entered by your judge. Learn the courtroom and the judge's preferences on motions in limine, exhibits, and technology.

As for voir dire practice, find out how much attorney-conducted examination the judge allows, whether questions must be submitted in advance, and how strikes are exercised. Visit the courthouse. Know the layout, the sight lines from the jury box, where the screens are, where counsel may stand. Call the clerk's office and introduce yourself weeks ahead. Clerks in smaller jurisdictions are often generous with practical information.

No source beats the lawyers who try cases in the venue. Call them. Ask how the judge runs voir dire and rules on objections, what juries there have done in similar cases, and which arguments have worn out their welcome. Bar contacts and listservs will surface names. Consider

associating local counsel for trial. A respected local name at your table vouches for you with the court, the clerk, and the panel.

Finally, treat focus groups as venue research, not just case research. A focus group drawn from the trial venue, or a comparable community, tests more than your themes and your numbers. It teaches you how people there talk about work, injury, doctors, and lawsuits.

B. Using Private Investigators

A local investigator can be the fastest way for an out-of-town trial team to acquire venue knowledge. Legitimate uses include verifying the jury panel list, which Code § 8.01-353(A) makes the parties responsible for verifying; public-records and background research on panel members; research on the community, its employers, and its institutions; and locating and interviewing fact witnesses. But an investigator is not a way around the rules that bind the lawyer. Virginia draws the lines in three places: licensing, ethics, and criminal law.

Private investigators are regulated by the Department of Criminal Justice Services under Virginia Code § 9.1-138 *et seq*. For example, § 9.1-139(C) requires individual registration and business licensure. Confirm the registration before the engagement.

The rules of professional conduct prohibits a lawyer, before or during trial, from communicating with a juror or anyone the lawyer knows to be a member of the venire. Va. R. Prof'l Conduct 3.5(a)(3) (a lawyer shall not "conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire."). The restrictions extend to jurors' immediate family and household. Va. R. Prof'l Conduct 3.5(b).

Two general rules close any gap: a lawyer may not violate the Rules "through the acts of another," Va. R. Prof'l Conduct 8.4(a), and a lawyer must make reasonable efforts to ensure a

supervised nonlawyer's conduct is compatible with the lawyer's obligations, Va. R. Prof'l Conduct 5.3. The same principle governs social media: the ban on access requests to jurors applies whether the request comes from the lawyer or an agent. ABA Formal Op. 466 (2014). Since 2024, a defendant who knowingly contacts a juror after trial with intent to harass, intimidate, or threaten commits a Class 1 misdemeanor. Va. Code § 18.2-465.2.

Practice pointer: put the instructions to the investigator in writing. The investigator does not contact, approach, follow, photograph, or surveil any venire member, juror, or member of their families or households, for any reason. Online research into panel members is passive review of public content only: no access requests, no pretext accounts, no messages. Investigation of the community, its economy, and its institutions is fair game; investigation of particular panel members is limited to public records and public postings, documented by source and date. No pretexting—a lawyer cannot use an agent to do what he could not do him- or herself. Va. R. Prof'l Conduct 8.4(a), (c).

C. Learn the Local Economy

Every venue has an economic engine, and the jury pool comes from the people who run it. In our recent case's venue, coal mining is the economy. A randomly drawn panel will include miners, retired miners, disabled miners, and their spouses, children, and neighbors. The lesson applies to any venue with a dominant industry—whether coal, agriculture, a single plant, a military installation, or a university.

D. Keep Track of your Client's Social Media and Reputation

The biggest risk is the client who will not stay off social media. In a small area, assume that members of the panel know your client. Give the client written social-media instructions at the outset of the representation and revisit them before trial. Then build a voir dire question around

community familiarity with the client rather than hoping the subject never comes up. Ask the panel directly whether anyone knows the plaintiff, follows her online, or has heard about the case. This turns a hidden risk into information you can act on, through follow-up questions, motions to strike for cause under Code § 8.01-358, or peremptory strikes.

E. Know the Venire

Under Code § 8.01-353(A), upon request, the clerk, sheriff, or other officer responsible for notifying jurors "shall make available to all counsel of record in that case, a copy of the jury panel to be used for the trial of the case at least five full business days before the trial," showing "the name, age, address, occupation, and employer of each person on the panel." The list comes only on request, so make the request early, in writing, and calendar the deadline. And do not take the list at face value. As indicated above, errors in it are not grounds for a mistrial or assignable as error on appeal; by statute "the parties in the case shall be responsible for verifying the accuracy of such information." Code § 8.01-353(A).

Just like investigators, counsel's own research into the panel is governed by ethics guidance. A lawyer may passively review a juror's or prospective juror's public internet presence, but may not send an access request (a "friend" or connection request) to a juror or have anyone else do so; an access request is a prohibited *ex parte* communication with a juror. ABA Formal Op. 466 (2014). Passive review of public postings is legitimate and, in a small venue, close to indispensable if you want to exercise strikes intelligently.

III. At Trial

A. Voir Dire

Virginia gives counsel a direct statutory right to conduct voir dire. Under Code § 8.01-358, the court and counsel for either party "shall have the right to examine under oath any person

who is called as a juror" and to "ask such person or juror directly any relevant question" to ascertain relationship to a party, interest in the cause, opinions formed or expressed, or "any bias or prejudice" in the case. Code § 8.01-358. If it appears the juror "does not stand indifferent in the cause," another must be seated. The statute also puts a duty on the panel itself: "A juror, knowing anything relative to a fact in issue, shall disclose the same in open court." *Id*. In a small venue, where panel members may know the parties, the witnesses, the treating physicians, and one another, that disclosure duty should be mentioned during voir dire. If community saturation is bad enough, the Code contemplates the extreme remedy of a jury from elsewhere when an impartial one cannot be obtained locally. Code § 8.01-363.

The circuit court mechanics are set by Code § 8.01-359. In most civil cases of consequence, seven persons from a panel of not less than thirteen constitute the jury. Code § 8.01-359(A). After strikes for cause, the parties or their counsel, beginning with the plaintiff, alternately strike names from the panel until seven remain; where there are more than two parties, all plaintiffs share three strikes and all defendants and third-party defendants share three. Code § 8.01-359(B).

B. The Limits: What You Can and Cannot Do in Voir Dire

The statutory right to ask questions is not unlimited, and the trial judge holds the reins. Most of the reported Virginia decisions construing Code § 8.01-358 are criminal appeals, but they interpret the same statutory language that governs civil voir dire, and circuit judges apply them in civil cases.

A party has "no absolute right to have the court ask every question he propounded." *Thomas v. Commonwealth*, 279 Va. 131, 162 (2010) (quoting *Bassett v. Commonwealth*, 222 Va. 844, 853 (1981)). What the trial court must provide is a "full and fair" opportunity to ascertain whether prospective jurors "stand indifferent in the cause," and it is within the court's sound

discretion to decide when a party has had that opportunity. *LeVasseur v. Commonwealth*, 225 Va. 564, 581 (1983); *Buchanan v. Commonwealth*, 238 Va. 389, 401 (1989). Appellate review of a decision to exclude voir dire questions is for abuse of discretion. *Thomas*, 279 Va. at 162.

Relevance is the touchstone. "To be permissible, counsel's questions must be relevant in that they are such as would necessarily disclose or clearly lead to the disclosure of relationship, interest, opinion, or prejudice." *Buchanan*, 238 Va. at 401. Courts are not required to allow questions so ambiguous as to render the answers meaningless. *Id.* In plain terms: questions tied to the statutory categories of § 8.01-358, relationship, interest, opinion, bias, will generally be permitted; questions that read as argument, as pre-instruction on the law, or as an attempt to commit jurors to a result in advance will not.

Within those limits, the judge should not cut off legitimate bias questioning. Asking prospective jurors about their "preconceived notions, opinions, or misconceptions" is entirely appropriate, because a juror must be able to lay those aside and decide the case "based solely on the law and evidence presented at trial." *Lovos-Rivas v. Commonwealth*, 58 Va. App. 55, 61 (2011). In a malpractice case in a small venue, that principle supports questions about attitudes toward lawsuits against doctors, about relationships with the defendant providers and their practices, and about what panel members have heard in the community about the case.

If the court does limit you, protect the record. In *LeVasseur*, the Supreme Court could not review the exclusion of further voir dire questions because counsel made no proffer of the questions he would have asked, leaving the Court "unable to determine from the record whether they would have been relevant." *LeVasseur*, 225 Va. at 582. When a judge sustains an objection to a line of voir dire, proffer the specific questions on the record, outside the panel's presence if necessary. Without the proffer, the issue is gone on appeal.

Know the law on rehabilitation. When a panel member discloses a relationship or an opinion that warrants exclusion, expect opposing counsel or the court to ask the familiar rehabilitating question: can you set that aside and be fair? The Supreme Court has held that once voir dire discloses a juror's state of mind warranting exclusion for cause, further questions put to him for the purpose of rehabilitating him "can have little effect" unless they serve to dispel a clear misunderstanding. *LeVasseur*, 225 Va. at 585–86 (citing *Justus v. Commonwealth*, 220 Va. 971, 977 (1980); *Breeden v. Commonwealth*, 217 Va. 297, 300 (1976)). At the same time, a trial court's refusal to strike a juror for cause will not be disturbed on appeal absent manifest error amounting to an abuse of discretion. *Townsend v. Commonwealth*, 270 Va. 325, 329–30 (2005).

Two subjects deserve their own warnings. The first is insurance. Under Rule 2:411 of the Virginia Rules of Evidence, evidence that a person was or was not insured is not admissible on the question whether the person acted negligently or otherwise wrongfully, and injecting the existence of liability insurance into the trial through voir dire can draw a mistrial motion just as surely as doing it through a witness. Va. R. Evid. 2:411. The rule has exceptions; evidence of insurance may come in when offered for another purpose, such as proof of a witness's bias, which is how the Supreme Court permitted evidence of an expert's financial relationship with the defendant's liability insurer in *Graves v. Shoemaker*, 299 Va. 357 (2020). But voir dire is the wrong place to ad-lib on the subject. If you believe there is a good-faith basis to ask panel members about employment by or a financial interest in an insurer involved in the case, raise it with the court before voir dire begins, ideally in writing, and get a ruling on the permissible form of the question. Do not improvise it in front of the panel.

The second is peremptory strikes. The Equal Protection Clause forbids the exercise of peremptory challenges on the basis of race, and that prohibition applies in civil cases; a private

civil litigant exercising strikes is engaged in state action. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson v. Kentucky*, 476 U.S. 79 (1986), to civil litigation). Gender-based strikes are equally forbidden. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Be prepared for the possibility that the demographics of the panel make any pattern in your strikes conspicuous, keep contemporaneous notes of the race-neutral and gender-neutral reasons for each strike, and be ready to state them if a challenge comes.

C. In Front of the Jury: What You Can and Cannot Say and Do

Juror contact rules do not relax once the jury is sworn. Va. R. Prof'l Conduct 3.5(a)(1) bars communication with jurors, direct or indirect, and the duty covers the whole trial team. In a small venue the panel shares your elevator, hallway, and diner, and the courthouse itself can create the problem: in older buildings the jury room may abut the attorney conference room or share a thin wall with the hallway where counsel may converse. Learn the layout before trial, treat every conversation in the building as one the jury can hear, and hold anything sensitive for outside.

Certain arguments that lawyers use to better connect with a jury can also cause trouble. Regarding damages, Virginia is particular about the math. Any party may tell the jury the amount sought in opening or closing statements, or both. Code § 8.01-379.1. Counsel may not, however, suggest a formula for deriving pain and suffering (the classic per diem argument of so many dollars a day, for instance). *Certified T.V. & Appliance Co. v. Harrington*, 201 Va. 109, 114–15 (1959). But counsel may walk the jury through the verdict form, assigning a fixed sum to each category of damages and adding them to the total requested. *Wakole v. Barber*, 283 Va. 488, 494 (2012).

As for liability, expect a defense motion in limine aimed at the "reptile" strategy, which some courts treat as golden rule argument in new clothing: casting jurors as guardians of community safety. *See Brooks v. Caterpillar Glob. Mining Am.*, No. 4:14CV-00022-JHM, 2017

U.S. Dist. LEXIS 125095, at *24–25 (W.D. Ky. Aug. 8, 2017). These motions are often overbroad, and courts refuse them when they target a strategy instead of specific evidence or argument. The Western District of Virginia, in part, declined a preemptive discovery-stage order for that reason. *Beach v. Costco Wholesale Corp.*, Civil Action No. 5:18-cv-00092, 2019 U.S. Dist. LEXIS 57862, at *10–13 (W.D. Va. Apr. 4, 2019). The line between the reptile and golden rule arguments is slim. But counsel is clearly prohibited from asking jurors to protect themselves or their community from the defendant.

IV. After Trial

Talk to your jurors. Post-trial juror conversations are the only reliable way to learn what actually mattered and can serve as venue research for the next case in that jurisdiction. Ours confirmed which witnesses landed, which themes carried, and, just as useful, which of our worries never mattered to the jury at all.

Post-verdict juror contact is permitted in Virginia, within limits counsel should know before making the first call. Rule 3.5 of the Virginia Rules of Professional Conduct addresses communications with jurors before, during, and after trial. Before and during trial, a lawyer connected with the case may not communicate with members of the venire or the jury outside official proceedings. After the trial, communication with jurors is permitted so long as the lawyer refrains from questions or comments that tend to harass or embarrass the juror or to influence the juror's actions in future jury service. Va. R. Prof'l Conduct 3.5 & cmt 2. Comment 2 explains why the door stays open: if lawyers could never speak with jurors after trial, counsel could not learn whether a verdict might be subject to certain legal challenges. Three further points deserve emphasis:

- The Rule's restrictions on communications with and investigations of jurors extend to members of a juror's immediate family or household. Va. R. Prof'l Conduct 3.5(b).
- Permitted post-trial communications should be made considerately and with deference to the juror's personal feelings. A juror's expressed desire not to talk ends the conversation. Va. R. Prof'l Conduct 3.5(a)(2)(iii).
- Confirm whether the presiding judge has entered any order restricting juror contact, and follow any circuit-specific practice on notice to the court or opposing counsel before initiating contact. Here, it never hurts to get the court's explicit permission before speaking with jurors.

Approached correctly, these conversations are welcomed by many jurors who gave a week of their lives to the case and are often glad someone asked what they thought.

V. Conclusion

Research the community, the economy, the venire, and the courtroom before you arrive. Request the panel list under Virginia Code § 8.01-353 and verify it. Learn the local rules and the judge. Mine your client's knowledge of the community, and manage your client's social media. Speak to local attorneys. At trial, use the full scope of examination that Virginia Code § 8.01-358 provides when conducting your voir dire. After trial, contact jurors within the bounds of the professional rules to learn your strengths and weaknesses.



Dealing with Difficult Lawyers Without Becoming One [ETHICS]

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DEALING WITH DIFFICULT LAWYERS WITHOUT BECOMING ONE

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Gentry Locke Seminar
October 2026

Overview

For most Virginia lawyers, the greatest test of professionalism is not how we behave when everyone is cooperative, reasonable, and courteous. The real test comes when opposing counsel is combative, disrespectful, obstructive, or simply difficult. In those moments, lawyers face a choice: respond in kind, or remain firm, effective, and civil while advancing the client's interests. The challenge—and the purpose of this outline—is captured in its title: **dealing with difficult lawyers without becoming one.** Civility is not weakness, passivity, or surrender. It is the discipline to advocate zealously, maintain credibility, and uphold the dignity of the legal system even when others choose a different path. As Virginia lawyers, we inherit a profession built on the belief that courtesy and professionalism are not obstacles to success; they are among the most effective tools for achieving it.

Virginia lawyers have an ethical responsibility to practice civility because professionalism, courtesy, and respect are foundational to the administration of justice and the proper functioning of a self-governing profession. The Supreme Court of Virginia has endorsed the *Principles of Professionalism for Virginia Lawyers*, which recognize that, in taking the attorney's oath, Virginia lawyers pledge to conduct themselves "professionally and courteously" and to treat all persons—including clients, opposing counsel, judges, court personnel, and witnesses—with respect and dignity. These *Principles* emphasize that civility is not inconsistent with zealous advocacy; rather, courteous and professional conduct often advances a client's interests more effectively than hostility or gamesmanship.

Virginia lawyers are officers of the legal system and bear a special responsibility for maintaining public confidence in the courts and the rule of law. Accordingly, attorneys should strive to resolve disputes with professionalism, communicate respectfully, honor their commitments, and avoid conduct that undermines the dignity of the judicial process. The duty of civility reflects not only aspirational standards of professionalism but also the broader ethical obligation of lawyers to promote the fair, efficient, and honorable administration of justice.

This outline aims to address first, general professionalism and civility obligations and then second, how to address behavior that crosses the line into sanctionable or reportable conduct.

[1] With special thanks to John Camacho, Sam McGuinn and Carly Carpenter.

Part I – Civility in the Practice of Law

I. Professional Civility – the Virgina Lawyer's Agreement

A. VSB Oath: "I do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the Commonwealth of Virginia, and that I will faithfully, honestly, professionally, and courteously demean myself in the practice of law and execute my office of attorney at law to the best of my ability, so help me God."

B. VBA's *Principles of Professionalism for Virginia Lawyers* outlines how Virginia lawyers should conduct themselves when performing their duties as lawyers. It has been endorsed by the Supreme Court of Virginia and all of Virginia's statewide bar associations. Relevant excerpts are below:

i. Preamble: "*In their very first professional act, all Virginia lawyers pledge to demean themselves "professionally and courteously." Lawyers help their clients, the institutions with which they deal and themselves when they treat everyone with respect and courtesy. These Principles of Professionalism serve as a reminder of how Virginia lawyers have acted in the past and should act in the future.*"

ii. In my conduct toward everyone with whom I deal, I should:
   1. Act at all times with professional integrity, so that others will know that my word is my bond
   2. Treat everyone as I want to be treated – with respect and courtesy

iii. In my conduct toward my clients, I should:
   1. Act with respect and courtesy
   2. Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests

iv. In my conduct toward courts and other institutions with which I deal, I should:
   1. Treat all judges and court personnel with respect and courtesy
   2. Be punctual in attending all court appearances and other scheduled events
   3. Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants
   4. Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions

v. In my conduct toward opposing counsel, I should:
    1. Treat both opposing counsel and their staff with respect and courtesy
    2. Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients
    3. Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements
    4. Agree whenever possible to opposing counsel's reasonable requests for extensions of time that are consistent with my primary duties to advance my clients' interests
    5. Return telephone calls, emails, and other communications promptly
    6. Be punctual in attending all scheduled events

II. Ethical Rules & Requirements – the Virginia Lawyer's Obligations

Civility is not just aspirational – in many ways, it is required. The Rules of Professional Conduct do not require lawyers to be passive or agreeable, but they do create boundaries around dishonest, obstructive, abusive, or prejudicial behavior that can harm clients and the administration of justice more broadly.

A. Rule 1.1 Competence - When a lawyer is not properly prepared, they may be tempted to resort to incivility.

B. Rule 3.1 Meritorious Claims & Contentions - Lawyers may advocate creatively and press good-faith arguments, even if those arguments are unlikely to succeed. However, civility concerns arise when lawyers knowingly assert meritless positions or file papers primarily to harass, delay, or increase costs for the other side.

C. Rule 3.4 Fairness to Opposing Party and Counsel - A lawyer shall not obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

D. Rule 3.5 Impartiality and Decorum of the Tribunal - "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics." (Comment 4 to Rule 3.5).

E. Rule 4.4 Respect for Rights of Third Persons - "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

    i. Examples of uncivil behavior under 4.4

1. Needlessly humiliating deposition questions
2. Harassing third parties with subpoenas
3. Aggressive conduct towards witnesses
4. Sending correspondence designed to embarrass/intimidate

F. Rule 8.2 Judicial Officials - "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer." Impugning the integrity of the judge is a surefire way to hurt your clients case.

G. Rule 8.4 Misconduct
   i. It is professional misconduct for a lawyer to:
      1. "[E]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." Rule 8.4(c)

III. Examples of Unprofessional/Uncivil Behavior

A. Personal attacks and insults
   i. Name calling
   ii. *Ad hominem* attacks on opposing counsel/client
      1. Civil: "That argument is not supported by the facts or law."
      2. Uncivil: "Counsel knows this argument is frivolous."
      3. Very Uncivil: "Counsel is lying! He's trying to trick you, your honor!"

B. Profanity, Yelling, Harassment
   i. Abusive or "obstreperous" conduct. "Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." Comment 4 to Rule 3.5
   ii. Yelling, interrupting, talking over others, etc.

C. Disrespectful courtroom conduct and theatrics
   i. Belligerence or theatrics. "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics." Comment 4 to Rule 3.5. Patient firmness should always prevail over belligerence or theatrics.
   ii. Visible displays of disrespect. Eye rolling, facial expressions, exaggerated reactions, sighing, etc.

D. Strategic incivility
   i. Withholding procedural information
      1. Refusing to provide basic scheduling information.
      2. Declining to clarify positions.
      3. Forcing motion practice over easily resolvable issues.

ii. Excessive unnecessary objections or those only for the purpose of being obstructionist.
iii. Unwillingness to assent to reasonable requests.
iv. Discovery obstruction.

E. Incivility towards non-lawyers – e.g. being rude to clerks, bailiffs, deputies, paralegals, secretaries, experts, etc. (See item I.b.v.1, above).

IV. Incivility's Effect on Opposing Counsel

Civility can be a strategic advantage. Cooperative, professional, accommodating, behavior can disarm opposing counsel to a degree and in many cases will lead to a better result for the client. Aggressive, combative, obstructive behavior will often times agitate opposing counsel and cause them to become more aggressive. Incivility can reduce cooperation on procedural and logistical issues. Incivility can also harden settlement negotiations.

V. Incivility's Effect on the Fact Finder

Fact finders evaluate more than the facts and evidence. They also observe demeanor, tone, professionalism, trustworthiness. A lawyer who appears reasonable and controlled will be more persuasive to the fact finder. Incivility can be distracting. At trial, the focus should be on the evidence, not the lawyers. Incivility can also affect how the client is perceived. Evasive, hostile, unfair behavior on the part of the lawyer can give the impression that the client's position is weak.

VI. A Civil Response to Incivility

A. When they go low, we go high. Respond calmly and with dignity.
i. Wait to fire back an email.
ii. Speak firmly and slowly.
iii. Document your communications.
iv. Do not be a tattle tale.
v. Keep a tight leash on the case.

Part II – Sanctionable and Reportable Behavior

I. When can Sanctions be requested against an Attorney?

Sanctions are "penalt[ies] or coercive measure[s] that result[] from failure to comply with a law, rule, or order." FRIEND'S VA. PLEADING & PRAC. § 15.01 (2025) (citing BLACK'S L. DICTIONARY 1368 (8th ed. 2004)).

Sanctions serve many important purposes. For instance, sanctions benefit litigants by protecting against "the mental anguish and expense of frivolous assertions of unfounded factual and legal claims and against the assertions of valid claims for improper purposes." *Oxenham v. Johnson*, 241 Va. 281, 286 (1991). Furthermore, sanctions protect the courts from abuse. *Id.* As discussed below, however, not all bad behavior is sanctionable. Sanctionable behavior falls into

three distinct categories: bad faith and/or frivolous claims, discovery abuse, and miscellaneous conduct addressed by the courts' inherent authority to discipline attorneys. Sanctions are designed to deter abusive litigation conduct—not to punish losing arguments.

A. Sanctions for Frivolous Claims.

Whether in state or federal court, sanctions cannot be brought as an independent claim. The following are procedural rules, not substantive rights, and must be brought "by motion in a pending action." *See Covington v. Haboush*, 28 Va. Cir. 360, 363 (1992).

i. Virginia State Courts - Va. Code Ann. § 8.01-271.1

In Virginia state courts, a claim is sanctionable if it lacks factual support, lacks legal support, or is filed for an improper purpose—judged under an objective reasonableness standard. Virginia Code § 8.01-271.1(B) provides that, "[b]y ***signing*** a motion or pleading, an attorney certifies that

> (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after **reasonable inquiry**, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is **not interposed for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

(emphasis added).

Virginia Code § 8.01-271.1(C) provides that, "[b]y making an ***oral motion*** to the court, an attorney certifies that

> (i) to the best of his knowledge, information, and belief formed after **reasonable inquiry** it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(emphasis added).

Note that, just because a claim advocates a novel position does not mean that the claim is frivolous. *See* FRIEND'S VIRGINIA PLEADING & PRAC. § 15.02 (2026). The Court of Appeals has held:

> Code § 8.01-271.1 expressly protects "good faith" arguments seeking "the extension, modification, or reversal of existing law." What it does not protect, however, are insupportable claims about the present scope of existing law. It is one thing to acknowledge the existing state of the law and argue for what some might

> think would be an improvement. It is quite another to claim erroneously that existing law does not exist.

Carrithers v. Harrah, 63 Va. App. 641, 654 (2014); *see also Oxenham*, 241 Va. at 286 ("Yet the threat of a sanction should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case.").

If an attorney certifies a pleading without first verifying the validity of its claims or makes claims for an improper purpose (harassment), the court "**shall**" impose "an appropriate sanction." VA. CODE ANN. § 8.01-271.1(D) (emphasis added). An appropriate sanction may include an order to pay the other party the reasonable expenses incurred by filing the pleading or motion, including reasonable attorney fees. In determining whether to impose sanctions, courts use an objective reasonableness standard. *See Cornerstone Custom Homes, L.L.C. v. Blackstock, Inc.*, 61 Va. Cir. 658, 659 (2002).

Courts may award sanctions *sua sponte* or in response to a motion. *See Gallahan v. Flood*, 2000 Va. App. LEXIS 586 (Va. Ct. App. Aug. 8, 2000).

Exemplary case:

***Muhammad v. Fatehi*, 80 Va. App. 157 (2024) - Court awarded sanctions where claims were both legally unsupported and tied to non-litigation objectives like publicity.**

In this case, Muhammad's attorney appealed the lower court's imposition of sanctions pursuant to Va. Code 8.01-271.1 for filing a complaint that was "not warranted by existing law or a good faith argument for the extension of law and…filed for the improper purpose of 'political publicity.'" *See Muhammad*, 80 Va. App. at 163. The attorney had filed a complaint against her opponent for the 2021 Norfolk Commonwealth's Attorney primary election, Ramin Fatehi. *Id.* at 161-62. The complaint alleged that Fatehi was failing in his prosecutorial duties, and that this failure constituted a public nuisance. *Id*. at 162. The attorney had previously advertised the action on Facebook in an attempt to solicit plaintiffs. *Id.*

At the time the attorney filed the complaint, no case existed in American jurisprudence that alleged that poor performance by a public officer constituted a public nuisance. *Id.* at 163. The attorney failed to include any analogous cases to justify the extension of existing jurisprudence. *Id.* at 167 ("Even when resolving doubts in favor of the plaintiffs, the lack of any factually analogous precedent suggests [the attorney's] argument for the extension of existing public nuisance law to the maladministration claim is unreasonable."). The court thus held that the claim was sanctionable under VA. CODE ANN. § 8.01-271.1(B)(ii) because it was unreasonable and did not present a good-faith argument for the extension of existing law. *Id.*

Furthermore, the court also found the claim sanctionable under Va. Code Ann. § 8.01-271.1(B)(iii) because it was made for the improper purpose of political publicity. *Id.* at 167-68. The court acknowledged that "[w]hen determining whether a complaint was filed for improper purposes, courts 'are guided by the purpose of Code § 8.01-271.1 as well as various policy considerations.'" *See id.* at 168 (quoting *Kambis v. Considine*, 290 Va. 460, 467 (2015)). The court

recognized that the list of improper purposes included in § 8.01-271.1 is not exhaustive. *Id.* ("Other recognized purposes include 'protect[ing] litigants from the mental anguish and expense of frivolous assertions of unfounded factual and legal claims' as well as 'protect[ing] courts against those who would abuse the judicial process.'" (alterations in original)).

In this case, the attorney admitted that she had political motivations for filing the suit against her opponent. The court subsequently held this to be an improper purpose, and therefore sanctionable under § 8.01-271.1(B)(iii). *Id.* ("The court system exists to hear legitimate legal disputes, not to air political disputes and grievances. It is not acceptable for [the attorney]—or any other litigant—to use the judiciary to promote political agendas and file frivolous pleadings—especially in connection with criminal indictments."). Thus, because the attorney's claims were unsupported by law and were made for improper purposes, the court held that sanctions were proper under § 8.01-271.1. *Id.* at 169.

ii. Federal Courts - Rule 11 and 28 U.S.C. § 1927

Rule 11 states:

> By presenting the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information

FED. R. CIV. P. R. 11.

Unlike § 8.01-271.1, Rule 11 includes a safe harbor provision. Before filing for sanctions, the moving party must first serve its Rule 11 motion on the opposing party. FED. R. CIV. P. R. 11(C)(2). The opposing party must be given twenty-one (21) days to correct the offending behavior before counsel can file their motion for sanctions. *Id.*

In assessing whether a filing was made for an improper purpose, courts use an objective reasonableness standard instead of assessing subjective intent. When deciding whether sanctions are appropriate, courts look to the motivations of the signer rather than the consequences on the opponent. More specifically:

> [I]t is not enough that the injured party subjectively believes that a lawsuit was brough to harass, or to focus negative publicity on the injured party; instead, such improper purposes must be derived from the motive of the signer in pursuing the suit. An opponent in a lawsuit, particularly a defendant, will nearly always subjectively feel that the lawsuit was brought for less than proper purposes; plaintiffs and defendants are not often on congenial terms at the time a suit is brought. However, a court must ignore evidence of the injured party's subjective beliefs and look for more objective evidence of the signer's purpose.

In re Kunstler, 914 F.2d 505, 518-19 (4th Cir. 1990).

28 U.S.C. § 1927 Sanctions

28 U.S.C. § 1927 provides for a broader issuance of sanctions for improper conduct, stating in full:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C.S. § 1927.

Section 1927 offers an additional avenue for sanctions, applying only when counsel unreasonably and vexatiously multiplies proceedings in bad faith. *See Six v. Generations Fed. Credit Union*, 891 F.3d 508, 520 (4th Cir. 2018). Sanctions awarded under this statute are compensatory in nature. *Id.* In other words, a court must find a "causal link between wrongful conduct and an unreasonable and vexatious multiplication of proceedings" before sanctions can be awarded under § 1927. *Id.* at 520-21. For instance, in *Six*, the court held that § 1927 sanctions were appropriate when counsel repeatedly failed to authenticate a document they had a copy of before the complaint was filed. *Id.* at 521. The court emphasized that counsel was not being sanctioned because they failed to disclose their copy of the document. *Id.* Rather, the court clarified that counsel's sanctions were based on bad-faith objections to the authenticity of the documents when they knew the documents to be authentic. *Id.* Therefore, because counsel had needlessly generated additional costs for appeal, the court held that § 1927 sanctions were appropriate. *Id.* at 520.

B. Sanctions for Discovery Abuse

What happens when opposing counsel won't respond to discovery? In both state and federal courts, movants must first attempt to confer with opposing counsel to resolve the issue before filing for sanctions, and they must certify to the court that such attempt was made when they file for sanctions.

i. Virginia State Courts – Va. Sup. Ct. R. 4:12

In Virginia courts, a party may apply for an order compelling discovery when:

(i) a deponent fails to answer a written question;
(ii) a corporation fails to designate an individual to testify on its behalf;
(iii) a party fails to respond to an interrogatory; or
(iv) a party fails to permit an inspection

VA. SUP. CT. R. 4:12.

An evasive or incomplete answer is a failure to answer. If the court grants a motion to compel, a moving party is entitled to the reasonable expenses in obtaining the order. If the court denies a motion to compel defending party is entitled to reasonable expenses for opposing the order.

Generally, trial courts have broad discretion to impose discovery-related sanctions. *See Walsh v. Bennett*, 260 Va. 171, 175 (2000). Even if parties respond to discovery requests, courts may still be willing to impose sanctions if the responses are incomplete or evasive. *See* VA. SUP. CT. R. 4:12. For instance, in *Galloway v. County of Northampton*, the Court held that 4:12 sanctions were appropriate when counsel had identified an expert they intended to call, but nevertheless failed to disclose his expert report prior to trial. 299 Va. 558, 564-65 (2021). The Court therefore concluded that said expert was excluded from testifying at trial. *Id.* at 566.

ii. Federal Courts - Rule 37

Virginia's Rule 4:12 mirrors Rule 37 in the federal court system. Rule 37 provides that sanctions may be imposed when

(i) a party fails to comply with a court order requiring discovery;
(ii) a party fails to disclose, to supplement, or admit;
(iii) a party fails to attend its own deposition;
(iv) a party fails to answer interrogatories;
(v) a party fails to respond to a request for admission;
(vi) a party fails to preserve electronically stored information;
(vii) a party fails to participate in framing a discovery plan.

FED. R. CIV. P. R. 37.

Under Rule 37(c)(1), if opposing counsel fails to disclose or supplement, they are precluded from presenting that evidence on a motion, at a hearing, or at trial, unless they show that the failure

to disclose or supplement was harmless or "substantially justified." FED. R. CIV. P. R. 37(C)(1). The party proffering the evidence bears the burden of showing their failure to disclose was justified or harmless. *Deque Sys. v. Browserstack, Inc.*, 177 F.4th 585, 595 (4th Cir. 2026).

Courts look to several factors in determining whether noncompliance with discovery was justified or substantially harmless. Relevant factors include: (1) the surprise to the opposing party; (2) the ability to cure that surprise; (3) the disruption to the trial; (4) the importance of the evidence; and (5) the explanation for nondisclosure. *Id.*

Courts generally exercise broad discretion to impose sanctions under Rule 37. *Id.* at *16-17 ("Because the failure to provide initial disclosures 'unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case[,] …we give particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1).'" (quoting *Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 278-79 (4th Cir. 2005))). If the court determines that the failure was not harmless or substantially justified, an order compelling discovery is appropriate. FED. R. CIV. P. R. 37(C)(1). As a consequence of an order compelling discovery, the court shall require the opposing party to pay "the reasonable expenses incurred in making the motion, including attorney's fees." FED. R. CIV. P. R. 37(a)(5)(A). If, however, the court determines that the failure was harmless or substantially justified, the moving party shall be required to pay opposing counsel the costs of opposing the motion to compel. FED. R. CIV. P. R. 37.

C. Inherent Authority to Impose Sanctions

In addition to their statutory authority to impose sanctions, both state and federal courts may impose sanctions based on their "inherent authority." As explained below, however, the extent of this inherent authority varies depending on the court. **Key distinction:** Virginia courts cannot impose monetary sanctions under inherent authority; federal courts can (in limited situations).

i. Virginia State Courts

The Virginia Supreme Court has recognized the inherent authority of state courts "to supervise the conduct of attorneys practicing before them and to discipline any attorney who engages in misconduct." *See Nusbaum v. Berlin*, 273 Va. 385, 399 (2007). Virginia courts have the inherent authority to remove attorneys from cases and, in severe cases, to "suspend or annul" attorney licenses. *See id.* However state courts' inherent authority is not boundless. Absent an explicit contractual or statutory provision, courts do not have the authority to impose monetary sanctions for attorney misconduct. *Id.* at 400. Notably, the Virginia Supreme Court has emphasized that a court's inherent authority to discipline an attorney is not for punishment purposes. *Id.* Rather, a state court may only use its inherent authority to discipline attorneys when it seeks to "safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession." *Id.* (quoting *Statewide Grievance Comm. v. Fountain*, 56 Conn. App. 375, 378 (2000)).

Therefore, if an attorney's misconduct falls outside the above-referenced rules, monetary sanctions may not be pursued. However, the affected party may still petition for alternative intervention, such as removal or license suspension, though these should only be utilized in

extreme circumstances. *See Env't Specialist, Inc. v. Wells Fargo Bank Northwest, N.A.*, 291 Va. 111, 121 (2016) ("[T]here is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of aspirational standards, and behavior that is subject to discipline and/or sanctions.").

ii. Federal Courts

Federal courts possess greater discretion in imposing sanctions for attorney misconduct. The Supreme Court has held that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 19 U.S. 204, 227 (1821). Unlike Virginia state courts, federal courts have recognized an inherent power to impose monetary sanctions. *See Chambers v. NASCO, Inc*., 501 U.S. 32, 50 (1991). As the Supreme Court noted in *Chambers*:

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules.

Id. The Court qualified its inherent authority, holding further that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." *Id.* In cases where the statute or Rules don't provide an adequate pathway for addressing the bad-faith conduct, however, the Court may rely on its inherent authority. *Id.*

D. Threatening/Filing for Sanctions

i. Sanctions should not be a threat. Either conduct is or isn't sanctionable. If you believe an attorney has committed a sanctionable event, file your motion (meet and confer if required in federal court), or don't.

ii. Be prepared to deal with the consequences of your motion – whether granted or not.

II. Bar Complaints

A. Mandatory Reporting

Rule 8.3(a): A lawyer shall inform the appropriate authority when (1) the lawyer has *reliable information*; and (2) the information concerns a violation that raises a *substantial question* as to another lawyer's honesty, trustworthiness, or fitness to practice law.

Virginia uses "reliable information" as its standard, not "knowledge." The VSB Committee Commentary to Rule 8.3 states that the phrase "reliable information" was chosen because it indicated more clearly than the ABA Model Rule's "knowledge" the sort of information that should support a complaint of attorney misconduct. As interpreted by LEOs, the standard requires a substantial degree of certainty; and does not arise where the information is based only on suspicion of wrongdoing. *See* LEO 1528; LEO 1566.

With regard to the substantial question threshold, "Substantial" refers to the seriousness of the offense, and not the amount of evidence. Rule 8.3 cmt. [3]. The reporting duty is limited to offenses that a self-regulating profession must vigorously endeavor to prevent. Rule 8.3 cmt. [3]. A measure of judgment is required in applying the Rule. Rule 8.3 cmt. [3].

i. Types of Conduct That Typically Satisfy the Threshold (derived from Rule 8.4 and the LEOs) are:

1. Dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c); LEO 1840.
2. Criminal acts reflecting on fitness. Rule 8.4(b).
3. Conversion or misuse of client funds. Rule 8.4(b), (c); LEO 1886.
4. Fraud on a tribunal. Rule 8.4(c); Rule 3.3.

ii. Self-Reporting Obligations (Rule 8.3(e))

A lawyer must report to the Virginia State Bar if: (1) the lawyer has been disciplined by a disciplinary authority in another jurisdiction; (2) the lawyer has been convicted of a felony; or (3) the lawyer has been convicted of a crime involving theft, fraud, extortion, bribery, or perjury (or an attempt, solicitation, or conspiracy to commit any of these). The report must be made in writing to the Clerk of the Disciplinary System within 60 days of the final order or judgment. Rule 8.3(e). The duty is triggered only after the conviction or decision becomes final. Rule 8.3 cmt. [6].

iii. Reporting Judges (Rule 8.3(b))

Reporting a judge is mandatory if a lawyer has reliable information that a judge committed a violation of the applicable judicial-conduct rules raising a substantial question as to the judge's fitness for office. The report goes to the Judicial Inquiry and Review Commission. Rule 8.3(b).

B. Limits on Mandatory Reporting: Confidentiality (Rule 1.6 and Rule 8.3(d))

Rule 8.3 imposes no no duty to disclose information protected by Rule 1.6, and disclosure of Rule 1.6 information may itself be prohibited. Rule 8.3(d); Rule 1.6. If reporting under Rule 8.3 would require disclosure of client-protected information, the lawyer must consult the client; and the lawyer must obtain client consent before disclosure. Rule 1.6(c)(2) and cmt [13]Consultation must include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure. Rule 1.6(c)(2) and cmt. [13] As a practical matter, client confidentiality generally takes precedence over the reporting duty.

i. Lawyers Assistance Program Exception

Information obtained through an approved lawyers assistance program (for help with mental health and substance abuse concerns) is protected. Rule 8.3(d). The exception does not apply where a lawyer indicates an intent to engage in illegal activity, such as conversion of client funds. Rule 8.3 cmt. [5]; LEO 1886 (supervisory lawyers must report past dishonest conduct such as embezzlement notwithstanding the lawyer's participation in an assistance program).

ii. Timing Considerations

Reporting should occur without unnecessary delay once the duty is triggered. A narrow exception is that a lawyer may postpone reporting for the minimum period necessary to protect a client's interests, for example until the end of litigation where immediate reporting would materially disadvantage, harm, or prejudice the client. Rule 1.6 cmt. [14].

B. Permitted but Discretionary Bar Complaints.

A good-faith report may be ethically permissible, even if Rule 8.3 does not make it mandatory, but any report or threat to report remains constrained by Rule 1.6, Rule 3.4(i), Rule 3.4(j), Rule 8.4, and Va. Code § 54.1-3908. *See* ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 04-433 (2004) (persuasive only). Conduct that is below the mandatory threshold includes (1) isolated mistakes, (2) ordinary negligence, (3) discovery disputes, and (4) incivility or aggressive advocacy.

Conduct that merits a discretionary report can be: (1) conduct that does not raise a substantial question of fitness; (2) situations involving unclear facts, competing interpretations, and limited evidence; (3) suspected impairment without present misconduct and (4) isolated competence issues. Discipline for incompetence under Rule 1.1 requires performance that extends significantly beyond mere attorney error, and incorrect legal research alone is not clear and convincing evidence of incompetence. *Barrett v. Va. State Bar*, 272 Va. 260, 271-72, 634 S.E.2d 341,347-48 (2006) (*Barrett II*). There is no duty to report based on suspicion or incomplete information. Rule 8.3; LEO 1566.

Remember, not all complaints proceed. Bar Counsel screens whether the alleged facts, if true, would state a Rule violation, and a lawyer is asked to respond only if they would. Complaints are broadly defined and carefully reviewed before any response is required. Rules of the Supreme Court of Virginia, Part 6, § IV, ¶ 13.

D. Consideration Before Filing a Bar Complaint.

The threshold analytical questions should be whether the reporting lawyer (1) has reliable information (LEO 1528; LEO 1566), (2) can identify a Rule violation (Rule 8.4), and (3) can establish a substantial question of fitness. Rule 8.3(a) and cmt. [3]. A reporting lawyer should also

consider if the information is protected by Rule 1.6 (Rule 8.3(d)), and if client consent is required before reporting. Rule 1.6(c)(2).

A reporting lawyer should also examine her motive and purpose for the report. (Rule 3.4(i)) A lawyer shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter. Rule 3.4(i). The governing test can be found in LEO 1755 and is (1) is the communication a threat, and (2) if so, was it made solely to obtain an advantage in a civil matter?

In *Barrett I*, 269 Va. 583, 611 S.E.2d 375 (2005), a Virginia Beach solo practitioner (Barrett), acting *pro se* in his own divorce, threatened opposing counsel four times with a bar complaint or sanctions, including a threat to report her for a Rule 1.1 competence violation based on typographical errors in her pleadings. The opposing lawyer field a bar complaint, and Barrett was found to have violated Rule 3.4. The Court affirmed the Rule 3.4(i) violation because the succession of threats lacked a good-faith basis, and Barrett's admitted motivation was to force opposing counsel to withdraw. 269 Va. at 594-96, 611 S.E.2d at 381-82.

The prohibition reaches the threat itself, not just a filed complaint. Barrett never filed the bar complaint; the leverage motive plus the absence of a good-faith basis was enough. The "good faith basis" line is the divider: a report grounded in a genuine, substantial violation is defensible; a threat deployed to gain civil advantage is sanctionable.

i. Immunity and Liability Considerations

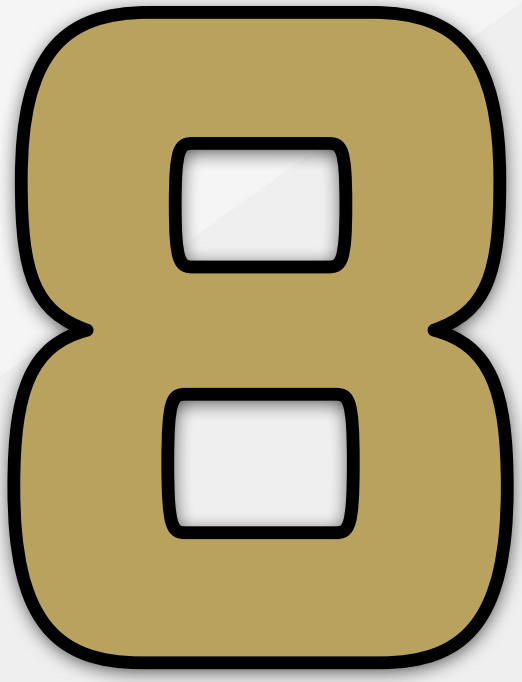
Virginia law provides qualified immunity for bar complaints. Va. Code § 54.1-3908. A reporting attorney cannot face civil liability unless the statements were false and were made willfully and maliciously. Va. Code § 54.1-3908. This is qualified, rather than absolute, immunity, and the confidentiality of the disciplinary process does not bar a potential retaliatory suit by an accused lawyer.

Keep in mind Rule 8.3's use of "shall report" creates a binding mandate. However, the VSB's own comment on the same rule expressly observes that blanket reporting regimes, where attorneys must report all perceived rule violations, have "proved to be unenforceable" in other jurisdictions. In practice, sanctions for failure to report are generally confined to situations involving clear and actual knowledge of egregious misconduct, such as serious financial impropriety, undisclosed conflicts, or dishonesty to the court. In most cases, the rule as interpreted and enforced affords attorneys meaningful discretion in deciding whether a report is required.

Closing Thoughts

Ultimately, most difficult lawyers are temporary adversaries, but your professional reputation is permanent. Judges, clients, opposing counsel, and colleagues may forget the details of a particular motion, deposition, or dispute, but they will remember whether your word was trustworthy, your conduct professional, and your advocacy effective. The profession does not expect lawyers to tolerate misconduct, nor does it require silence in the face of sanctionable or reportable behavior. It does, however, require judgment, restraint, and integrity. The goal is not

merely to identify difficult lawyers or respond to them appropriately; it is to ensure that, after every contentious case and every challenging interaction, we can honestly say that we fulfilled our oath to conduct ourselves professionally and courteously. In the end, the most successful lawyers are not those who win by being the loudest, most aggressive, or most difficult—they are those who can navigate difficult lawyers without ever becoming one themselves.



Hard Knocks: When the Feds Come Calling

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Hard Knocks:
When the Feds Come Calling

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Gentry Locke Seminar
October 2026

PROGRAM OVERVIEW

This Continuing Legal Education program provides a general overview of the early stages of federal government investigations and provides practical "to-do" items when advising your client on responding to such investigations.

WHY, WHEN, AND HOW THE FEDERAL GOVERNMENT WILL MAKE INITIAL CONTACT WITH YOUR CLIENT

- **Warning signs**. Rarely do federal government investigations appear out of the blue. Usually, your client has some warning signs of possible misconduct or government inquiry.
    - **Internal reporting**. Internal reporting, such as a controller's financial review or a compliance team's regulatory alert, may flag legal issues for your client's business.
    - **Audit results**. Negative audit results, especially involving a federal interest like Medicare, may trigger scrutiny of your client's business.
    - **Whistleblower complaints**. Formal and informal complaints by purported whistleblowers against your client may detail activity that the whistleblower—and possibly by extension, the federal government—may perceive as illegal.
    - **Business competitors**. A federal investigation or indictment of your client's business competitor for similar conduct may raise concern that your client is also being investigated.
- **Initial government contact**. There are numerous ways that the federal government may inform your client about a criminal investigation, including:
    - **Target letter**. A letter from the US Attorney informing your client of an ongoing criminal investigation, and typically requesting to discuss the investigation with your client's defense counsel.
    - **Search warrant**. A court-approved warrant to search your client's house, business, and/or affects for evidence as part of a criminal investigation. Your client will almost certainly not know about the search warrant until the raid occurs.[1]

[1] Fed. R. Crim. P. 41.

- **"Knock and talk."** An informal procedure where federal agents approach your client and seek to engage in a voluntary interview relating to a criminal investigation.

- **Grand jury subpoena**. An investigative demand for your client to produce testimony or materials. Issued by the US Attorney on behalf of a federal grand jury conducting a criminal investigation,[2] there are two types:

    - **Subpoena duces tecum**. Demands materials, like documents, to be produced to the grand jury at a specific time and place by your client's records custodian.

    - **Subpoena ad testificandum**. Requires live testimony of your client, or one of your client's employees or agents, before the grand jury.

- **HIPAA subpoena**. An investigative demand for your healthcare client to produce materials. Issued by the US Attorney as part of an investigation of federal healthcare offenses.[3]

- **Indictment/Information**. Formal criminal charges against your client, filed in federal court.[4] These often remain under seal until executed, and your client may learn about the charges when an arrest warrant is executed.

- **Civil investigations/actions**. A civil investigation or action against your client may suggest that a parallel criminal investigation exists or will exist in the future. There are numerous ways that the federal government may inform your client about a civil investigation, including:

    - **Civil Investigative Demand (CID)**. An investigative demand from the US Attorney for your client to produce testimony or materials relating to a civil False Claims Act (FCA) investigation.[5]

    - **Complaint**. Formal civil claims against your client, filed in federal court and served on your client.

    - **Third-party notice of legal process**. If the federal government requests your client's information from a third party, such as an ISP or Google, that

[2] Fed. R. Crim. P. 17.
[3] 18 U.S.C. § 3486(a)(1)(A)(i)(I).
[4] https://www.justice.gov/archives/jm/criminal-resource-manual-201-indictment-and-informations
[5] 31 U.S.C. § 3733.

third party may notify your client—unless the government legally prohibits disclosure (e.g., "gag order").[6]

- *Note: The federal government's initial contact is neither the beginning nor the end of the investigation. You will not know how long the investigation has been ongoing, or where it is headed.*

HOW YOUR CLIENT SHOULD (AND SHOULD NOT) RESPOND

- **Collect contact information**. Your client should ask the federal agents for their names, agencies, and contact information, and a copy of any legal process that has been executed.

- **Stay silent for now**. Your client should not answer questions and instead refer the federal agents to you, as counsel.

- **Retain counsel**. If you are not experienced with criminal defense or investigations, you should consider advising your client to retain counsel with expertise in that area. Regardless, your client should involve you or other defense counsel in all planning and communications regarding the pending investigation. This preserves privileges and improves the chances of opening a dialogue with the federal government agency conducting the investigation.

    - **Do-not-contact letters**. Defense counsel may send the federal agency a letter requesting no contact with your client or its employees unless counsel is present. Federal government lawyers have ethical responsibilities limiting contact with represented parties,[7] and those responsibilities extend to the lawyers' agents as well.[8]

    - **Opening dialogue**. Defense counsel should open a dialogue with the federal agency, especially if it is a prosecutor. A key question is whether your client or one of its employees is a target, subject, or witness vis-à-vis the investigation.

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[6] *E.g.*, https://policies.google.com/terms/information-requests?hl=en-US ("When we receive a request from a government agency, we send an email to the user account before disclosing information. If the account is managed by an organization, we'll give notice to the account administrator. We won't give notice when legally prohibited under the terms of the request. We'll provide notice after a legal prohibition is lifted, such as when a statutory or court-ordered gag period has expired.").

[7] *E.g.*, Va. R. Prof. Cond. 4:2 ("[A] lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."); *United States v. Koerber*, 966 F. Supp. 2d 1207, 1228, 1332 (D. Utah 2013) (finding that non-covert ex-parte communications with a represented company's "constituents" violates Utah Rule of Professional Conduct 4:2).

[8] Va. R. Prof. Cond. 5:3 (extending a lawyer's ethical responsibilities to "a nonlawyer employed or retained by or associated with a lawyer").

        - Target. A person accused of criminal activity.
        - Subject. A person suspected of or potentially implicated in criminal activity.
        - Witness. A person who likely observed the activity subject to the investigation.

    - **Pool counsel**. Defense counsel may determine that there is a conflict-of-interest with representing both a company and its employees, if the company or employees are subjects or targets of the federal investigation. In that event, your client should consider retaining pool counsel to represent the employees separate from the company's counsel. The same is true for individual employees who are subjects or targets; they may need to retain their own counsel.

- **Maintain documents and other information**. Your client should not destroy any evidence and should consider whether it is necessary to put a stop/hold on automatic document destruction (such as automatic email deletion).

    - **"The cover-up may be worse than the crime."**[9] Destroying evidence after receiving notice of an investigation, or lying to federal agents, can lead to independent charges like obstruction,[10] misprision of a felony,[11] or false statements.[12]

- **Identify a control group**. Although a company's attorney-client privilege is not limited to a "control group," your client should still identify a core individual or group of individuals with defined duties who will direct the client's response to the investigation. This helps cabin communications with defense counsel, prevent rumors, and streamline efficiency.

WHAT HAPPENS WHEN YOUR CLIENT IS CONTACTED BY A FEDERAL AGENT

- **Federal agency investigations**. Many criminal (and even civil) investigations begin with federal agencies that probe your client's activity and then bring promising investigations to the US Attorney for further investigation and/or prosecution.

    - *Note: Early-stage investigations by federal agents may appear informal and carry less protections for your client than, say, formal grand jury proceedings.*

- **"Knock and talk."** A typical first contact between your client and a federal agent will be an introduction and then questions relating to the federal government agency's investigation. Often called a "knock and talk" because the agents may visit your client's house. How your client should respond:

[9] https://www.jdsupra.com/legalnews/obstruction-of-justice-it-s-not-the-34658/ (examples)
[10] *See generally* 18 U.S.C. Ch. 73 Part I ("Obstruction of Justice")
[11] 18 U.S.C. § 4
[12] 18 U.S.C. § 1001

- Your client should not answer any questions or volunteer any information.

- Your client should assert that it will retain counsel and refer the federal agent to defense counsel.

- Your client should be pleasant but firm, rather than argumentative, threatening, violent, or shifty.

- Your client should collect the federal agent's contact information and gather any information that the agent is willing to provide.

- **Interview request**. The federal agent may request that your client or one or more of your client's employees consent to an interview with the federal agent or a government lawyer. How your client should respond:

    - Your client should respond in the same way as to a knock-and-talk, asserting that the client will not answer any questions and will obtain counsel.

    - Your client should have defense counsel explain the interview process to the employee so he/she can make an informed decision about whether to agree. Whether or not consenting to an interview is appropriate and/or sensible is highly fact specific.

THE ROLE OF A FEDERAL GRAND JURY

- **Grand jury**.[13] A federal grand jury is an ex parte investigative body empaneled by a US District Court to investigate whether there is "probable cause" that criminal activity occurred, and to return an indictment for such activity.[14] The prosecutor from the US Attorney's Office is responsible for presenting evidence, including witness testimony and materials like documents, to the grand jury to support probable cause.

    - **History**. The institution of the grand jury is well-established, being recognized in Magna Carta of 1215, developed in English common law, and enshrined in the US's Bill of Rights.[15]

    - **Court's role**. The role of the US District Court is to empanel the grand jury, enforce the jury's subpoenas through contempt proceedings, and resolve disputes over privilege and motions to quash the jury's subpoenas.

    - **Ex parte**. Because grand jury proceedings are ex parte, only the federal government offers evidence, with no opportunity for the accused to rebut, impeach, or otherwise defend against the evidence. This has led to a perception that obtaining an indictment is easy—and coined the popular adage that a grand jury could "indict a

[13] *See generally* Fed. R. Crim. P. 6
[14] https://www.uscourts.gov/court-programs/jury-service/types-juries
[15] https://www.uscourts.gov/sites/default/files/grand-handbook.pdf

ham sandwich"[16]—although that perception has been somewhat challenged in recent years.[17]

- **Structure**. A grand jury consists of 16-23 grand jurors, who are selected from the federal district and division where the US District Court sits. Grand jurors serve for up to 18 months.

- **Secrecy**. The grand jury process is secret.[18] The only persons allowed in grand jury proceedings are the grand jurors, the prosecutor, any agents of the prosecutor, a court reporter, any interpreters, and any testifying witness. Defense counsel is not allowed to observe or participate.

- **Broad power**. A grand jury has ***expansive*** power to investigate suspected criminal activity. As the US Supreme Court has described it:

  - "[T]he grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed."[19]

  - **Grand jury subpoenas**. The grand jury exercises its investigative power through subpoenas, which are either for testimony (ad testificandum) or for materials like documents (duces tecum).[20]

  - **Limits on power**. There are few limits on the grand jury's investigative power. They include:

    - **"Fishing expeditions."** Courts should quash grand jury subpoenas that are unreasonable in scope and therefore "arbitrary" fishing expeditions. The US Supreme Court has explained that this limit requires an accused to show that "there is no reasonable possibility that the category of materials the Government seeks will produce

[16] https://history.nycourts.gov/biography/sol-wachtler/ (attributing this quote to former New York Court of Appeals Associate Judge Sol Wachtler)
[17] https://news.bloomberglaw.com/us-law-week/courts-track-failed-indictments-as-doj-falls-under-scrutiny
[18] Fed. R. Crim. P. 6(e)(2)
[19] *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) (citations omitted)
[20] Fed. R. Crim. P. 17

information relevant to the general subject matter of the grand jury's investigation."[21]

- **Improper purpose**. Courts should quash subpoenas that are issued out of malice or an intent to harass an accused, rather than with an intent to investigate.[22] Courts should also quash subpoenas with the purpose of compiling criminal discovery against an already-indicted defendant.[23]

- **Oppressive**. Courts may quash subpoenas that are an undue and oppressive burden on the accused.[24]

- **Responding to a grand jury subpoena**.

  - **Challenging a grand jury subpoena**. History shows that a direct attempt to quash a subpoena for being overbroad or oppressive is unlikely succeed. That is because the bar for showing that a subpoena is too broad in scope or an unreasonable burden is very, very high.

    - **Overbreadth**. The standard for showing that a subpoena is a fishing expedition seeking irrelevant information is that "there is ***no reasonable possibility*** that the ***category*** of materials the Government seeks will produce information relevant to the ***general subject matter*** of the grand jury's investigation."[25]

      - All of this language favors the grand jury's ability to gather evidence. Indeed, the accused must show that the "particular category of documents" sought "can have no conceivable relevance to any legitimate object of investigation by the federal grand jury."[26]

    - **Oppression**. All grand jury subpoenas, by their nature, are a burden on the recipient.[27] So the recipient must show that it is such a burden as to be unreasonably "oppressive" compared to the investigative value of the subpoena. Only "in the ***most extreme*** cases of a ***clear showing*** of unreasonableness" will a court grant a motion to quash."[28]

      - *In re Grand Jury Subpoena etc*., 405 F. Supp. 1192, 1198 (N.D. Ga. 1975). Denying a motion to quash a grand jury subpoena that would

[21] *Id*. at 301
[22] *Id*.
[23] *Under Seal v. United States (In re Grand Jury Subpoena)*, 175 F.3d 332, 340 (4th Cir. 1999)
[24] *Id*. at 299
[25] *Id*. at 301
[26] *In re Horowitz*, 482 F.2d 72, 80 (2d Cir. 1973)
[27] *In re Grand Jury Subpoena etc*., 405 F. Supp. 1192, 1198 (N.D. Ga. 1975)
[28] *In re Grand Jury Subpoena etc*., 405 F. Supp. 1192, 1198 (N.D. Ga. 1975)

cost a small nonprofit over 125,000 to 250,000 man-hours and $1-2 million to comply with, but ordering the federal government to front some of the labor and costs to review.

- *Fulton Cty. Bd. of Registration & Elections v. United States*, No. 1:26-cv-02777-WMR, 2026 U.S. Dist. LEXIS 150853, at *28 (N.D. Ga. July 7, 2026). Granting a motion to quash a grand jury subpoena seeking "personal identifying information of thousands of [election] employees and volunteers" because the court found the request served little investigative purpose and threatened a "chilling effect" on election participation.

- **Negotiating limits**. Almost always, a better approach than moving to quash a grand jury subpoena is negotiating limits to the subpoena with the US Attorney. Your client should discuss with defense counsel what reasonable limitations on the subpoena's request would be.

  - *Note: A subpoena can be limited in scope by time period, search terms, or custodians, or defense counsel can negotiate a rolling production for subpoenaed materials. In rare cases, defense counsel may negotiate for the federal government to front some of the costs of compliance with the subpoena, such as reviewing and producing paper materials.*

  - **Motion to quash**. If negotiating limits to the subpoena fails, then as a last resort, your client should move to quash the subpoena and argue to the US District Court why reasonable limits should be put on the subpoena to make it reasonable in scope.

- **Preserving privilege**. When responding to a grand jury subpoena, your client should take necessary measures to preserve all privileges, including the attorney-client privilege and any Fifth Amendment privilege.

  - **Attorney-client privilege**. Protects confidential communications between your client and its counsel involving legal services or advice.[29]

    - **"Need to know" test**. Although the US Supreme Court has rejected the "control test" for privilege in companies, federal courts have recognized that communications lose "confidential" status if they are shared outside a group of employees in a company who "need to know" about it.[30] Therefore, your client should limit attorney-client communications to a core group of employees involved in responding to the federal government investigation.

[29] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)
[30] *E.g.*, *McAirlaids, Inc. v. Kimberly-Clark Corp.*, No. 7:13-CV-193, 2014 U.S. Dist. LEXIS 201138, at *13 (W.D. Va. Sep. 26, 2014)

- **Who owns the privilege?** In evaluating the attorney-client privilege, your client should question who owns the privilege. If the client is an individual, he/she owns it. If the client is a company, then the company owns it, and the client should take steps to prevent employees from disclosing privileged communications.

- **Fifth Amendment privilege**. Unlike the attorney-client privilege, this privilege can only be invoked by individuals, not companies. Your client should consult with defense counsel about whether to invoke it and, if so, how to do it effectively.

  - **"Testimonial."** The Fifth Amendment only protects your client from "testifying" against him/herself. So your client can plead the Fifth in response to a grand jury subpoena ad testificandum but has more limited options when responding to a subpoena duces tecum. In general, the act of producing subpoenaed materials is not testimonial unless, for example, it constitutes an admission that the materials exist.[31]

  - **Immunity**. The US Attorney may agree to immunity for your client in exchange for certain testimony or production of materials.

- **Preserving confidentiality**. When producing materials in response to a federal grand jury subpoena duces tecum, your client should request confidential and FOIA-exempt treatment of proprietary, trade secret, and other confidential business information in a cover letter accompanying the production.[32]

- **Prepping for grand jury testimony**. Your client and/or its employees should not go in blind to grand jury testimony, if possible. Counsel should prepare the client for testimony by conducting an internal investigation into issues that the grand jury may be investigating, and in turn, questioning the client about those issues.

  - *Note: The purpose of testimony preparation is not to influence the grand jury witness, but rather to contextualize the grand jury's investigation, which benefits both the grand jury (because the witness is prepared for the prosecutor's line of questioning) and the client (because it provides the client with more details on what occurred and what the grand jury may hear from the witness).*

- **Attending grand jury proceedings**. Although defense counsel will not be allowed to observe or participate in grand jury proceedings, counsel should be present nearby outside the proceedings (such as in a waiting room), so the witness (whether your client or an employee) can request to pause the proceedings and consult with

[31] *United States v. Doe*, 465 U.S. 605, 613 (1984)
[32] *E.g.*, FOIA, 5 U.S.C. § 552 et seq.; 18 U.S.C. § 1905, 28 C.F.R. § 16.7, 5 U.S.C. § 552a

counsel if the need arises. Also, defense counsel can debrief with the witness after the testimony.

OTHER WAYS YOUR CLIENT MIGHT BE CONTACTED

- **CIDs, complaints, agency subpoenas (e.g., SEC, IRS)**. Besides federal agent contacts and grand jury subpoenas, the federal government may initiate an investigation against your client using other methods like CIDs, civil complaints, SEC subpoenas, or specialized criminal subpoenas like HIPAA subpoenas. Although the full range of these devices are outside the scope of this CLE, you should be aware of them, because many are indicators or precursors of a criminal investigation.

HOW IS A CRIMINAL INVESTIGATION RESOLVED?

- **What's the end goal?** Your client may ask: "what's the endgame to responding to a criminal investigation?" Or, "is this just an attempt to prolong an inevitable criminal charge?" The answer is "no, not necessarily." The federal government has numerous tools in its arsenal for wrapping up investigations, even ones with serious merit.

    - **Declination**. The best scenario for your client—this is a complete walkaway from the investigation, with the federal government declining to bring criminal charges or even civil claims against your client. Often, declination is not formal. Instead, your client must accept cold comfort until the statute of limitations runs out.

    - **Non-Prosecution Agreement (NPA)**. A good result for many cases, where the federal government (usually the US Attorney) enters a contractual agreement with your client to not bring charges so long as the client complies with certain contractual commitments, like monitoring regulatory compliance, paying fines, and disclosing financial information to the government over a multiyear period. The government may or may not require admission of wrongdoing to enter an NPA.[33]

    - **Deferred Prosecution Agreement (DPA)**. Similar to an NPA, except the government actually files criminal charges against your client and holds them in abeyance pending the client's compliance with certain contractual commitments. Also, unlike an NPA, the government will require admission of wrongdoing.[34]

    - **Plea agreement**. Requires your client to plead guilty to a crime, the terms of which can be negotiated with the prosecutor. For example, if your client has exposure to being convicted of numerous crimes, defense counsel should negotiate pleading guilty to one of them—ideally one with more favorable potential sentencing

[33] https://www.nacdl.org/Content/DPAsNPAs; https://www.law.cornell.edu/wex/non_prosecution_agreement_NPA
[34] https://www.nacdl.org/Content/DPAsNPAs; https://www.law.cornell.edu/wex/deferred_prosecution_agreement_DPA

outcomes. Defense counsel should also negotiate terms like a sentencing range,[35] or specific factual admission of wrongdoing that mitigate collateral consequences.

- **Civil resolution**. In some cases, your counsel should explore the possibility of resolving a criminal investigation with a civil resolution, such as settling False Claims Act allegations with a monetary settlement structure.

- **Indictment/trial**. In some cases, your client's best option may be to simply sit back and wait to see if the federal government seeks indictment, and then challenge the criminal charges at trial.

- **Considerations**. Other considerations when evaluating possible outcomes include:

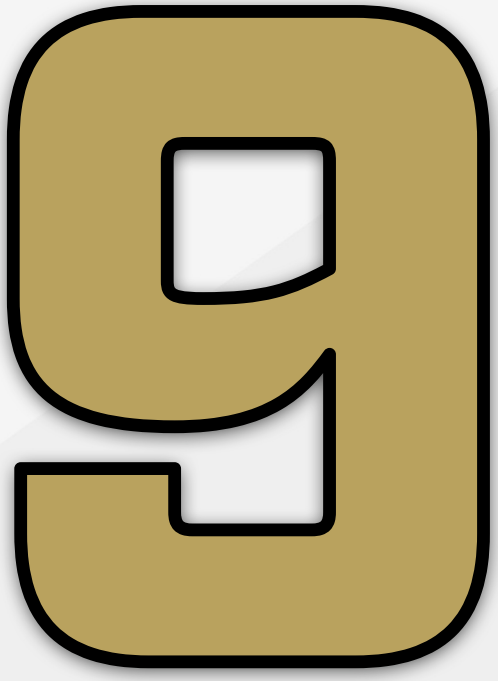
  - **Collateral consequences**. Especially for companies in highly regulated industries.

  - **Statute of limitations**.

  - **The scope of an outcome**. For instance, will resolution in one federal district deter a further investigation and prosecution in another district, or at the state level?

    - *Note: Virginia has enacted a statute that prohibits prosecution of a crime if the same underlying act has already been prosecuted federally.*[36]

[35] *E.g.*, Fed. R. Crim. P. 11(c)(1)(C).
[36] Va. Code § 19.2-294.



Nice Clause You've Got There... Shame If It Were Unenforceable: What You Should Know About Construction Indemnification

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Nice Clause You've Got There… Shame If It Were Unenforceable: What You Should Know About Construction Indemnification.

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Gentry Locke Seminar

I. Introduction

For the construction lawyer, indemnification is not something that you should gloss over.[2] Parties frequently attempt to allocate risk through contractual indemnity clauses, and Virginia's anti-indemnification statute—Va. Code § 11-4.1—significantly limits the extent to which one party may transfer liability for its own negligence. Consequently, the practitioner must have a certain level of mastery over such terms to preserve their enforceability.

Sixteen years have passed since the Supreme Court of Virginia's landmark decision in *Uniwest Construction, Inc. v. Amtech Elevator Services, Inc.* took center stage regarding contractual indemnification and the art of crafting an enforceable indemnification clause in a contract.[3] Understanding the developments that have taken place since *Uniwest* is essential to define the boundaries of permissible indemnification clauses in construction contracts. With this background in mind, let us begin with the statute itself.

II. Virginia's Anti-Indemnification Statute—Va. Code § 11-4.1

A. Virginia's anti-indemnification statute provides that any provision in a construction contract requiring a contractor to indemnify another party against liability for bodily injury or property damage "caused by or resulting solely from" the negligence of that party is void and unenforceable.[4]

a. *Two Kinds of Anti-Indemnification Statutes*. Most jurisdictions have similar statutes. These statutes usually fall into one of two categories.

Some jurisdictions allow indemnification of a party for its own negligence unless the indemnitee was *solely* negligent.[5]

Others prohibit any indemnification of a party for its own negligence, even if the indemnitee was not solely at fault.[6]

i. At first glance, one may assume that § 11-4.1 falls into the first category of indemnification statutes. However, in *Uniwest*, the Virginia Supreme Court

[1] Special thanks to Randall W. Shirey for his contributions to this outline.
[2] The authors recently published an article on this topic, which is attached to this outline and originally appeared in Virginia Lawyer, Vol. 74, No. 5 published by the Virginia State Bar.
[3] 699 S.E.2d 233, 280 Va. 428 (2010).
[4] Va. Code § 11-4.1.
[5] *See* Construction Anti-Indemnity Statutes, SAXE, DOERNBERGER & VITA, P.C. (Sep. 19, 2024), https://www.sdvlaw.com/surveys/construction-anti-indemnity-statutes/.
[6] *Id*.

held that § 11-4.1 falls into the latter category: prohibiting the indemnification of a party for its own negligence, even if the indemnitee was not solely at fault.[7]

III. The Landmark *Uniwest* Decision

A. *Uniwest Construction, Inc. v. Amtech Elevator Services* marked a sea change in the interpretation and application of § 11-4.1.

a. *Facts*. Uniwest, the prime contractor on a building renovation project, engaged subcontractor Amtech Elevators to perform elevator work for the project.[8] During the project, scaffolding collapsed, injuring one Amtech employee and killing another.[9]

Uniwest sought indemnification from Amtech pursuant to the indemnification clause in their contract, which stated: "If any claims . . . be made or asserted, *whether or not such claim(s) are based upon the negligence of Uniwest* . . . , [Amtech] agrees to indemnify and save harmless Uniwest from any and all such claims."[10]

b. *Analysis*. The Supreme Court of Virginia analyzed this indemnification clause through the lens of § 11-4.1, reasoning that the statute voids any indemnification clause that reaches the negligence of the indemnitee.[11] The Court reached this interpretation of the statute because "[the] phrases 'caused by' and 'resulting solely from' are disjunctive . . . ."[12] As a result of this language, the court explained, an indemnification clause is void if it indemnifies the indemnitee of *any* negligence whatsoever—even if another party's negligence also contributed to the loss.[13] Because the contract's indemnification clause indemnified Uniwest of its own negligence, it was void under § 11-4.1.[14]

IV. Unpacking *Uniwest*—Significant Case Law Developments

In the wake of *Uniwest*, courts and practitioners alike were left with more questions than answers. Thankfully, key decisions in both Virginia and federal courts have fleshed out the permissible scope of indemnification provisions, the effect of other contractual measures like savings clauses, and the types of contracts which are subject to § 11-4.1 to begin with.

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[7] *Uniwest*, 280 Va. at 442.
[8] *Id*. at 435.
[9] *Id*. at 436–37.
[10] *Id*. at 441–42 (emphasis added).
[11] *Id*. at 442.
[12] *Id*.
[13] *Id*.
[14] *Id*.

A. *What is a "Contract Relating to Construction"?* To be subject to § 11-4.1, a contract must be a "contract relating to . . . construction."[15] Three key cases applying *Uniwest* have come to different results while interpreting this requirement.

   a. In *RSC Equipment Rental, Inc. v. Cincinnati Insurance Co.*, the Western District of Virginia focused on the nature of the contract at issue, not its ultimate purpose, to determine that a rental contract for equipment to be used in a construction project was *not* a "contract relating to construction" for purposes of § 11-4.1.[16]

   b. In *Travelers Indemnity Co. v. Lessard Design, Inc.*, the Eastern District of Virginia determined that an architect's design contract *was* a "contract relating to construction" because it directly related to the construction of the building and gave the architect a supervisory role in ensuring that his plans were executed during the construction process.[17]

      i. *Travelers* also provides an especially helpful framework for analyzing the enforceability of indemnification clauses after *Uniwest*. An indemnification clause is void, the court explained, if: (1) the underlying contract is a "contract relating to construction," (2) the indemnifying party is a "contractor," and (3) the provision reaches damage caused by the indemnitee's own negligence.[18]

   c. In March of this year, a New York federal court applying Virginia law in *Norfolk Southern Railway Co. v. Nautilus Insurance Co.* held that a contract for the purchase and removal of salvage materials from a project site was *not* a "contract relating to construction."[19] The court explained that "an agreement to purchase or rent instrumentalities or materials that will be used for a construction project does not, without more," make § 11-4.1 applicable to the contract.[20]

B. *Indemnification Clause Overbreadth*. Several decisions since *Uniwest* have illustrated how the level of specificity in an indemnification clause can determine its enforceability.

   a. In *Supchak v. Fuller Construction Corporation*, the circuit court invalidated indemnification clauses in three separate contracts.[21] The clauses at issue were almost identical to the one deemed invalid in *Uniwest*, being drafted broadly enough to indemnify the indemnitee for its own negligence.[22] Critically, it did not matter that the damage at issue was not actually caused by the indemnitee; the facial breadth of the provision was fatal all the same.[23]

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[15] Va. Code § 11-4.1.
[16] 54 F. Supp. 3d 480, 486–87 (W.D. Va. 2014).
[17] 321 F. Supp. 3d 631, 636–38 (E.D. Va. 2013).
[18] *Id.* at 636–39.
[19] 2026 U.S. Dist. LEXIS 55074, at *17 (S.D.N.Y March 16, 2026).
[20] *Id*.
[21] 86 Va. Cir. 517, 521–23 (Chesapeake Co. 2013).
[22] *Id*. at 522–23.
[23] *Id*.

b. In *Hellas Construction, Inc. v. Bayside Concrete, Inc.*, the indemnification clause itself facially complied with *Uniwest*, but a clarifying subparagraph stated that "provisions of the indemnification provided . . . shall not be construed to indemnify any Indemnitee for its *sole negligence*."[24] Although this clarifying language was meant to respect the limits prescribed by *Uniwest*, it made the clause fatally overbroad by failing to exclude Hellas's contributory negligence.[25]

c. *Sauer Construction, LLC v. QBE Insurance Corporation* demonstrates how a lack of specificity can also invalidate an indemnification clause.[26] There, the provision required indemnification for any damages not arising from the indemnitee's own "misconduct."[27] The court held that the indemnification clause was invalid because the clause did not specifically exclude all the indemnitee's negligence that may fall outside of the narrower definition of "misconduct."[28]

C. *Savings Clauses: Helpful or Worthless?* After *Uniwest*, the question of whether a savings clause can rescue an otherwise invalid indemnification clause under § 11-4.1 remains uncertain.

a. *Snyder v. Waterford Falls Church II LLC*, one of the first decisions applying *Uniwest*, took a permissive approach to a savings clause in an otherwise invalid indemnification clause.[29] It did not treat the indemnification clause as facially invalid because it included savings language limiting indemnification "to the fullest extent permitted by law."[30]

b. In *Fortune-Johnson, Inc. v. QFS, LLC*, the indemnification clause itself violated § 11-4.1 on its face.[31] The Court of Appeals of Virginia, however, rejected the argument that such clause was nonetheless valid because it included savings language—"to the fullest extent permitted by law"—because this would authorize courts to "blue pencil" parties' written agreements.[32] For now, *Fortune-Johnson* remains the controlling authority in Virginia state courts on the effect of savings clauses.

c. However, in *ZP No. 332, LLC v. Huffman Contractors, Inc.*, the federal district court came to the same result as *Snyder*, allowing a savings clause to preserve the otherwise enforceable portions of an unenforceable indemnification clause.[33] Thus,

[24] 2019 U.S. Dist. LEXIS 234348, at *8 (E.D. Va. Mar. 12, 2019).
[25] *Id*. at *9–10.
[26] 2024 U.S. Dist. LEXIS 223199 (W.D. Va. Dec. 10, 2024).
[27] *Id*. at *14.
[28] *Id*. at *15–16.
[29] 2012 Va. Cir. LEXIS 429, at *11 (Fairfax Co. 2012).
[30] *Id*.
[31] 2025 Va. App. LEXIS 105, at *6 (Feb. 25, 2025).
[32] *Id*. at *9.
[33] 2025 U.S. Dist. LEXIS 114614 (E.D. Va. June 16, 2025).

the extent to which a savings clause can rescue an otherwise invalid indemnification provision may depend on whether a litigant chooses to file in state or federal court.

D. *Other Considerations*. As *Uniwest* has now had sixteen years to percolate through the courts, its application has illustrated several other relevant considerations.

a. In *Prum v. Linde Gas North America LLC,* the indemnification clause required the "Vendor" to indemnify Linde Gas for "any occurrence arising in connection with Vendor's or its employees' or representatives' performance or failure to perform under the Contract, breach of the Contract, violation of any Laws in performing under the Contract, or acts, omissions, or commission of any tort in performing under the Contract."[34] This clause was narrow enough to survive *Uniwest*, providing a good example of careful drafting.[35]

b. In *Hensel Phelps Construction Co. v. Thompson Masonry Contractor, Inc.*, the general contractor attempted to use the subcontractor's alleged breach of indemnification clauses to avoid its breach of contract claims being barred by the applicable statute of limitations.[36] Even though the indemnification clauses at issue were drafted before *Uniwest*, the Supreme Court of Virginia was unsympathetic to the argument that finding such provisions void would leave contractors without recourse against subcontractors for persisting liabilities.[37]

c. In *Morris v. DSA Roanoke LLC*, the circuit court held that an indemnitee cannot rely on an indemnification provision to implead a third party when it is being sued solely for its own negligence.[38] Doing so, the court explained, would conflict with the spirit of § 11-4.1.[39]

V. Navigating Current Law—Practical Guidance

The application of § 11-4.1 by courts in the wake of *Uniwest* illustrates the confusion and lurking pitfalls that await even the most seasoned practitioner while drafting construction indemnification clauses. Through this jurisprudential fog, we can distill several practical considerations derived from the cases above.

A. *§ 11-4.1's Limited Scope*. The case law demonstrates that, although § 11-4.1's application reads rather broadly, its practical scope should not be taken for granted. Contracts that the practitioner may well think of as "relating to" construction, such as renting equipment for a construction project or the purchase and removal of salvage equipment from a construction site, do not always fall within the ambit of § 11-4.1.

[34] 2016 Va. Cir. LEXIS 106, at *8 (Hopewell Co. 2016).
[35] *Id*.
[36] 791 S.E.2d 734, 292 Va. 695 (2016).
[37] 292 Va. at 706–07.
[38] 102 Va. Cir. 204, 205 (Roanoke Co. 2019).
[39] *Id*. at 204.

B. *Drafting Concerns*. If the relevant contract falls within § 11-4.1 and reaches an indemnitee's own negligence, *Uniwest* and its progeny are lurking. Drafters who want an indemnification clause to be enforceable must draft with care to avoid the pitfalls encountered by many previous practitioners.

    a. However, a party more concerned with limiting potential exposure has options upon encountering an indemnification clause that reaches too far. The party can point out the clause's invalidity and negotiate more favorable terms; or, more cunningly, it can do nothing, taking comfort in the belief that any attempt to demand indemnity could fail under the prevailing interpretation of § 11-4.1.

C. *Savings Clauses*. One should also consider the effect of a savings clause in its construction contracts. When drafting a construction contract, does savings language provide any extra peace of mind? As the case law illustrates, the answer to this question eludes certainty. If a savings clause provides the practitioner any security blanket, it is a thin one.

VI. Conclusion

Va. Code § 11-4.1, *Uniwest*, and the litany of relevant cases since make indemnification clauses in Virginia construction contracts an unpredictable landscape. It is essential that practitioners keep a critical eye on the language and scope of contractual indemnification clauses. Word choice and sentence structure are critical to the outcome. Choose wisely.

Is that Indemnification Provision Enforceable?
Lessons from Fifteen Years of Case Law Applying Va. Code § 11-4.1

Virginia Lawyer, Vol. 74, No. 5 (February 2026)

By Andrew O. Gay, Teddy B. Paisley III, and Carter B. Leverette

It's Wednesday night, and like most lawyers (perhaps a slight exaggeration), you and your esteemed colleagues are deep in a game of construction law jeopardy. Amid the fervor of the room, and noticing you are only slightly behind the leader, you select your next category—"Contract Terms" for $800. Your friend and moderator, channeling his best Alex Trebek, reads the statement, "a duty to make good any loss, damage, or liability incurred by another."[1] The familiar melancholic tune begins to play, but it doesn't matter. You know the answer, smash that red button with confidence, and state in the required interrogatory form: "What is indemnity?" At last, you take the lead, only to squander it on the next question.

For the construction lawyer, indemnification is not something you should gloss over. Rather, the practitioner must have a certain level of mastery over such terms to preserve their enforceability. Similarly, the litigator must understand the current legal landscape and whether an indemnification provision can be enforced or invalidated. For years, *Uniwest* took center stage in the discussions concerning contractual indemnification and the art of crafting an enforceable indemnification clause in a construction contract. But we now have fifteen years of additional case law to account for, both when negotiating contractual indemnification provisions and when litigating them. So, in the spirit of construction law jeopardy, select "Changes in the Law" for $1000, and let's dig in.

Virginia's Anti-Indemnification Statute—Va. Code § 11-4.1

First, a bit of a refresher. Va. Code § 11-4.1 states:

> **Any provision** contained in **any contract relating to** the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto, including moving, demolition and excavation connected therewith, or **any provision** contained in **any contract relating to** the construction of projects other than buildings **by which the contractor** performing such work **purports to indemnify or hold harmless** another party to the contract **against liability for damage arising out of bodily injury to persons or damage to property** suffered in the course of performance of the contract, **caused by or resulting solely from** the negligence of such other party or his agents or employees, is against public policy and is **void and unenforceable**.[2]

Most jurisdictions have a similar statute prohibiting certain indemnification provisions, and they usually fall into one of two categories.[3] Some allow indemnification of a party for its own negligence unless the indemnified party was *solely* negligent. Others prohibit any indemnification of a party for its own negligence, even if the indemnitee was not solely at fault because another party's negligence contributed to the damage.

One could be forgiven for thinking that Virginia's prohibition falls into the former category—only prohibiting indemnification where the indemnitee was *solely* negligent. But in *Uniwest*, the Supreme Court of Virginia held otherwise.

The Landmark *Uniwest* Decision

Uniwest Construction, Inc. v. Amtech Elevator Services marked a sea change in the interpretation and application of § 11-4.1.[4] The prime contractor, Uniwest, engaged subcontractor Amtech Elevators to perform the elevator work for the project.[5] During Amtech's performance of its work, the scaffolding collapsed, leading to one injury and one fatality, both of whom were Amtech employees.[6] Lawsuits ensued.

Among other claims, Uniwest sought indemnification from Amtech pursuant to paragraph 10 of the subcontract, which stated, in pertinent part, "If any claims . . . be made or asserted, w*hether or not such claim(s) are based upon the negligence of Uniwest* . . . , [Amtech] agrees to indemnify and save harmless Uniwest from any and all such claims."[7] The Supreme Court of Virginia analyzed the indemnification provision through the lens of § 11-4.1 and reasoned that

> [the] phrases 'caused by' and 'resulting solely from' are disjunctive in the statute, [which] voids *any* indemnification provision that reaches damage caused by the negligence of the indemnitee, even if the damage does not result *solely* from the negligence of the indemnitee. Thus, the issue is not whether an indemnification provision is written so broadly that it encompasses the negligence of parties in addition to the indemnitee. Rather, the issue is whether the provision is so broad that it indemnifies the indemnitee from its *own* negligence.[8]

Ultimately, the high Court determined that the indemnification provision obligated Amtech to indemnify Uniwest for Uniwest's own negligence and "irreconcilably conflict[ed] with the public policy expressed in Code § 11-4.1, which voids any contractual provision 'which . . . purports to indemnify or hold harmless [Uniwest] against liability for damage . . . caused by or resulting solely from the negligence of [Uniwest].'"[9]

Unpacking *Uniwest*—Significant Case Law Developments

In the wake of *Uniwest*, Virginia courts and federal courts applying Virginia law continued to develop the limits of indemnification provisions in construction contracts. Key decisions have fleshed out the permissible scope of indemnification provisions, the effect of other contractual measures like savings clauses, and the types of contract that are subject to § 11-4.1 to begin with.

One of the first decisions applying *Uniwest* took a permissive approach to the parties' indemnification provision. In *Snyder v. Waterford Falls Church II LLC*, the circuit court acknowledged that the indemnification provision in question, like the one in *Uniwest*, potentially encompassed the indemnitee's own negligence.[10] However, the court did not treat the provision as facially invalid because it included savings language limiting indemnification "to the fullest

extent permitted by law."[11] But take care—savings clauses like this should be considered unreliable based on more recent case law, as discussed below.

A year later, another circuit court invalidated indemnification provisions in three separate contracts at issue in *Supchak v. Fuller Construction Corporation*.[12] There, the language of the provision was similar to that in *Uniwest* and reached indemnification for the indemnitee's own negligence. The provisions all included the same "fullest extent permitted by law" language that saved the provision in *Snyder*.[13] Even so, the *Supchak* court determined that the provisions were invalid. Critically, it did not matter that the damage at issue was not actually caused by the indemnitee; the facial breadth of the provision was fatal all the same.[14]

While the majority of decisions applying *Uniwest* have come from Virginia courts, the federal district courts sitting in the Commonwealth have also contributed to Virginia's indemnification landscape. In particular, federal decisions have addressed what contracts fall within what contracts fall within § 11-4.1's scope. In *RSC Equipment Rental, Inc. v. Cincinnati Insurance Co.*, the district court held that a rental contract for equipment to be used in a construction project was not a "contract relating to construction" for purposes of § 11-4.1.[15] Applying the rationale of an unpublished opinion from the Fourth Circuit Court of Appeals,[16] the district court focused on the nature of the contract at issue, not its ultimate purpose.[17] The equipment might have been destined for a jobsite, but the contract itself was still essentially a rental agreement—not a construction contract. Section 11-4.1 did not apply.[18]

Prum v. Linde Gas North America LLC, another circuit court decision, provides an example of a carefully drafted indemnification provision that withstood *Uniwest*.[19] The contract required the "Vendor" to indemnify Linde Gas for "any occurrence arising in connection with Vendor's or its employees' or representatives' performance or failure to perform under the Contract, breach of the Contract, violation of any Laws in performing under the Contract, or acts, omissions, or commission of any tort in performing under the Contract."[20] Accordingly, the provision did not reach the indemnitee's own negligence.[21]

Hensel Phelps Construction Co. v. Thompson Masonry Contractor, Inc. dealt with a construction contract for a project at Virginia Tech in the late 1990s.[22] The general contractor attempted to use the subcontractor's alleged breach of indemnification provisions to avoid its breach of contract claims being barred by the applicable statute of limitations.[23] The Supreme Court of Virginia held that the provisions—though drafted before *Uniwest*—were nonetheless void under *Uniwest*.[24] The court was unsympathetic to the argument that its decision left contractors without recourse against subcontractors for persisting liabilities.[25]

The federal district court's decision in *Travelers Indemnity Co. v. Lessard Design, Inc.* provides an especially helpful framework for analyzing indemnification provisions under § 11-4.1 and *Uniwest*.[26] In *Travelers*, an architect's contract required it to indemnify the owner and developer against "any and all losses . . . relating to the services performed by the Architect."[27] Travelers cited *RSC* and *Carpenter* in support of its argument that the design contract was not a

construction contract, but the court determined that § 11-4.1 applied because the contract directly related to the construction of a building and gave the architect a supervisory role in ensuring that his plans were executed during the construction process.[28] The court went on to emphasize that the purpose of § 11-4.1—preventing injuries and keeping contractors from unfairly shifting the cost of the prime's negligence to subcontractors with less bargaining power—favored voiding the indemnification provision.[29] *Travelers* instructs that an indemnification provision is void under § 11-4.1 if: (1) the underlying contract is a "contract relating to construction," (2) the indemnifying party is a "contractor," and (3) the provision reaches damage caused by the indemnitee's own negligence.[30]

Soon after *Travelers*, a circuit court held that an indemnitee cannot rely on an indemnification provision to implead a third party when it is being sued solely for its own negligence. In *Morris v. DSA Roanoke LLC*, a subcontractor, DSA, was sued exclusively for its own negligence and sought to implead its sub-subcontractor, Thomas Builders, based on an indemnification agreement between them.[31] The court held that allowing DSA to do so would conflict with the spirit of § 11-4.1 because "DSA could only recover through the indemnification provision between it and Thomas Builders for damages caused by DSA's own negligence."[32] The issue was not the language of the provision itself, but DSA's attempt to invoke it under circumstances barred by statute. Even if Thomas Builders had contributed to DSA's negligence, *Uniwest*'s broad interpretation of § 11-4.1 prohibits indemnification for an indemnitee's own negligence, in whole or in part.

Two more recent Virginia federal decisions further illustrate how the level of specificity in an indemnification clause can determine its enforceability. In *Hellas Construction, Inc. v. Bayside Concrete, Inc.*, the plaintiff sought attorneys' fees from its subcontractor under an indemnification provision.[33] Although the clause's main text complied with *Uniwest*, a clarifying subparagraph stated that "provisions of the indemnification provided . . . shall not be construed to indemnify any Indemnitee for its *sole negligence*."[34] The district court held that this language did not exclude Hellas's contributory negligence, rendering the provision void.[35] Although the clarifying language was meant to respect the limits prescribed by *Uniwest*, it ultimately made the clause overly broad.

On the other hand, *Sauer Construction, LLC v. QBE Insurance Corporation* demonstrates how a lack of specificity can also invalidate an indemnification clause.[36] There, the provision required indemnification for any damages not arising from the indemnitee's own "misconduct."[37] The indemnitor argued that "misconduct" was narrower than negligence, meaning the provision might encompass the indemnitee's own negligence.[38] The district court agreed, reasoning that there "are at least some types of negligence that would fall outside of 'misconduct.'"[39] Because the clause did not specifically exclude all the indemnitee's negligence, the court found it void under § 11-4.1.

Finally, the two most recent decisions address whether a savings clause can rescue an otherwise invalid indemnification provision under § 11-4.1. In *Fortune-Johnson, Inc. v. QFS, LLC*, the indemnification clause expressly violated § 11-4.1 by including indemnification for "the negligence of any indemnit[ee]."[40] Although the clause included savings language—"to the fullest extent permitted by law"—the Court of Appeals of Virginia rejected the argument that this reflected an intent to comply with § 11-4.1 or authorized reformation.[41] The court "decline[d] to step in and correct the overbreadth" of the contract, emphasizing that "neither Virginia law nor the subcontracts themselves authorize courts to "blue pencil" or otherwise rewrite the parties' written agreements."[42]

Conversely, in *ZP No. 332, LLC v. Huffman Contractors, Inc.*, the federal district court allowed a savings clause to preserve the enforceable portions of the indemnification agreement.[43] The contract provided that the indemnitee would be indemnified "regardless of whether such claim, damage, loss[,] or expense is caused in part by a party indemnified hereunder."[44] Although this blatantly violated § 11-4.1, the court relied on savings language to uphold the rest of the indemnification provision.[45] Specifically, the contract stated that "in a state that prohibits any part of the indemnity coverage contained herein, the Contractor shall provide the maximum indemnity coverage allowed by that state to each of the Indemnified Parties."[46] It also provided that "[t]he invalidity of any part or provision of the Contract Documents shall not impair or affect in any manner the validity, enforceability, or effect of the remaining parts and provisions of the Contract Documents."[47] Based on these clauses, the court held "that the voided sentence of the clause does not affect the rest of that clause's validity, enforceability, and effect."[48]

Navigating Current Law—Practical Guidance

The application of § 11-4.1, as interpreted by the Supreme Court of Virginia in *Uniwest*, illustrates the persisting confusion and lurking pitfalls for anyone involved in construction contracts in the Commonwealth. After 15 years, the state of the law continues to evolve. But several practical considerations emerge as common themes in the cases described above.

First, it's important to recognize that § 11-4.1 only applies to provisions in construction contracts, which includes

> any contract **relating to the construction, alteration, repair or maintenance** of a building, structure or appurtenance thereto, including moving, demolition and excavation connected therewith, or . . . any contract relating to the construction of projects other than buildings.[49]

This part of § 11-4.1 reads rather broadly, but the case law demonstrates that its practical scope should not be taken for granted. As discussed, federal case law suggests that § 11-4.1 and *Uniwest* don't always apply to contracts that might well be thought of as "relating to" construction, such as renting equipment for a construction project. Instead, the nature of the underlying contract and how it interacts with the purpose of § 11-4.1 are key considerations. It

remains to be seen whether Virginia courts will adopt the reasoning of their federal counterparts in similar cases.

Assuming the relevant contract falls within § 11-4.1 and reaches an indemnitee's own negligence, *Uniwest* and its progeny are lurking. Obviously, drafters who want an indemnification provision to be enforceable must draft with care. But a party more concerned with limiting potential exposure has options when faced with a provision that reaches too far. The party can point out the provision's invalidity and negotiate more favorable terms; or, more cunningly, it can do nothing, taking some comfort in the knowledge that any attempt to demand indemnity could fail under the prevailing interpretation of § 11-4.1.

One should also consider the effect of a savings clause. If there's one in the construction contract at issue, could it save an otherwise overbroad indemnification provision? When drafting a construction contract, does savings language provide any extra peace of mind? As the case law illustrates, the answers to such questions elude certainty. It is possible that a savings clause might keep a court from declaring the indemnification provision void, but judges have been more eager to disregard the savings clause and refuse to "blue pencil" the indemnification provision. And, as *Hellas* teaches, even language meant to be helpful might ultimately doom an indemnification provision if not carefully implemented. If a savings clause provides any security blanket, it's a thin one.

* * *

Va. Code § 11-4.1, *Uniwest*, and the litany of relevant cases since make indemnification provisions in Virginia construction contracts an unpredictable landscape. It is essential that practitioners keep a critical eye on the language and scope of contractual indemnification clauses. Word choice and sentence structure are critical to the outcome. Choose wisely.

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[1] *Indemnity*, BLACK'S LAW DICTIONARY (11th ed. 2019)
[2] Va. Code § 11-4.1 (emphasis added).
[3] *See* Construction Anti-Indemnity Statutes, SAXE, DOERNBERGER & VITA, P.C. (Sep. 19, 2024), https://www.sdvlaw.com/surveys/construction-anti-indemnity-statutes/.
[4] 699 S.E.2d 233, 280 Va. 428 (2010).
[5] 280 Va. at 435.
[6] *Id.* at 436–37.
[7] *Id.* at 441–42 (emphasis added).
[8] *Id.* at 442 (emphasis added).
[9] *Id.*
[10] 2012 Va. Cir. LEXIS 429, at *11 (Fairfax Co. 2012).
[11] *Id.*
[12] 86 Va. Cir. 517, 521–23 (Chesapeake Co. 2013).
[13] *Id.* at 521–22.
[14] *Id.* at 522–23.
[15] 321 F. Supp. 3d 631 (W.D. Va. 2014).
[16] Carpenter Insulation & Coatings Co. v. Statewide Sheet Metal & Roofing, Inc., No. 90-2426, 1991 U.S. App. LEXIS 14267 (4th Cir. July 9, 1991) (holding that a sales agreement for roofing materials was not a construction contract within the scope of § 11-4.1).
[17] 321 F. Supp. at 486–87.
[18] *Id.*

[19] 2016 Va. Cir. LEXIS 106 (Hopewell Co. 2016).
[20] *Id.* at *8.
[21] *Id.*
[22] 791 S.E.2d 734, 292 Va. 695 (2016).
[23] 292 Va. at 703.
[24] *Id.* at 704–06. The court also rejected the contractor's attempt to characterize as "indemnification" provisions other provisions that might not have been void under *Uniwest*. *Id.*
[25] *Id.* at 706–07.
[26] 321 F. Supp. 3d 631 (E.D. Va. 2018).
[27] *Id.* at 634.
[28] *Id.* at 636–38.
[29] *Id.* at 637–38.
[30] *Id.* at 636–39.
[31] 102 Va. Cir. 204 (Roanoke Co. 2019).
[32] *Id.* at 205.
[33] 2019 U.S. Dist. LEXIS 234348 (E.D. Va. Mar. 12, 2019).
[34] *Id.* at *8 (emphasis added).
[35] *Id.* at *9–10.
[36] 2024 U.S. Dist. LEXIS 223199 (W.D. Va. Dec. 10, 2024).
[37] *Id.* at *14.
[38] *Id.* at *15.
[39] *Id.* at *15–16.
[40] 2025 Va. App. LEXIS 241093, *6 (Feb. 25, 2025).
[41] *Id.*
[42] *Id.* at *9.
[43] 2025 U.S. Dist. LEXIS 114614 (E.D. Va. June 16, 2025).
[44] *Id.* at *5.
[45] *Id.* at *5–6.
[46] *Id.* at *6.
[47] *Id.*
[48] *Id.*
[49] Va. Code § 11-4.1 (emphasis added).

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The Lay of the Land: Effective Communication in Land Use and Real Estate Matters

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The Lay of the Land:
Effective Visual Communication in Land Use Matters

Gentry Locke Seminar 2026
Karen L. Cohen

I. Introduction

Whether presenting a boundary or easement dispute to a judge or jury, negotiating a real estate transaction, or drafting a license agreement, effective representation depends on a clear understanding of the physical property—the "lay of the land." Ambiguous deed descriptions, missing or outdated surveys, and parties' differing understandings of what rights or property interests were or were not conveyed, all provide fertile ground for disputes about ownership and use of land.

In this outline, we discuss some Virginia cases that involve such disputes, highlighting the importance of effective visual communication when describing land, boundaries, easement rights, and the like. The cases featured in this outline involve issues such as when extrinsic evidence may or may not be used to contradict a plat, when certain legal rules about boundaries might override a plat, when the width of an easement may be other than what is stated on a plat, and when an easement holder may be able to relocate an easement without the servient estate holder's consent. Misunderstandings about boundary lines, compounded by the lack of a survey or an unclear plat, also can lead to adverse possession and prescriptive easement claims, and some of those cases are included in this outline. Finally, these materials cover the Virginia legislature's recent changes to Va. Code § 55.1-304, regarding petitions for relocation or modification of easements when the easement holder and servient estate owner do not agree on a proposed relocation or modification. There are many other examples of real property matters where effective visual communication is essential – partition suits, subdivision creation, leases, licenses, and restrictive covenants, just to name a few – but these are beyond the scope of this presentation.

During the presentation, we will offer some practice pointers on how to enhance visual communication and understanding of land use issues through the use of modern tools such as publicly available mapping (GIS) on local government websites or GoogleEarth® or Googlemaps®, which when used alone or with software tools such as Bluebeam®, can provide useful visual aids. To gain a full understanding of any property issue, it is essential to use both modern mapping tools and traditional sources such as plat books in the land records room of the clerk's office. Of course, there's no substitute for a site visit for truly getting the "lay of the land"; however, that is not always practical. At a minimum, therefore, the practitioner should gain visual familiarity with the property at issue by using maps and plats, rather than just relying on the words of a written instrument, a client's description, or an opposing counsel's representations about the property.

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II. Boundary Line Disputes

When neighbors cannot agree on a boundary line, a property owner can file a lawsuit to establish the boundary line. Under Virginia Code § 8.01-179, a landowner with a right to possession can file an action in circuit court to designate the true boundary line. The judge may appoint an independent licensed surveyor to conduct a survey and submit a report. Va. Code § 8.01-181. The resulting judgment is recorded in the deed book and forever settles, determines, and designates the true boundary line as among the parties, their heirs, devisees, and assigns, and may be enforced as a judgment in ejectment. Va. Code § 8.01-183. A boundary line lawsuit strictly determines *where* the line is located but it does not necessarily resolve claims of title to disputed land by, for example, adverse possession, which requires distinct legal claims.

A. Plat Interpretation in Boundary Disputes

***Cohan v. Thurston*, 223 Va. 523, 292 S.E.2d 45 (1982)**

In *Cohan v. Thurston*, Francis H. and Pearl E. Cohan brought an action in ejectment against E. J. Thurston and others, claiming title to a strip of land in the Lynnhaven Colony subdivision in Virginia Beach. The Cohans alleged the strip of land was part of their lot, known as Lot 1, which they had acquired in 1956 by a deed describing the lot by reference to the recorded plat. The defendants contended the disputed strip of land lay outside Lot 1, and argued that a point on the plat marked with an "o" denoted the actual boundary dividing the strip of land from Lot 1.

The trial court ruled the plat ambiguous and admitted extrinsic evidence of the intention of the subdivision's developer and the surveyor who had prepared the plat, who testified that the "o" on the plat was in fact the division line. Upon such evidence, the court determined Lot 1 did not include the strip of land in controversy and entered judgment for the defendants. The Supreme Court reversed and entered final judgment for the Cohans, holding that the trial court erred in admitting and considering extrinsic evidence regarding the intention of the developer and the surveyor in finding for defendants.

The Court set forth the general rule that "extrinsic evidence is not admissible to vary the terms of a written instrument." *Cohan*, 223 Va. at 525 (citing *Camp v. Camp*, 220 Va. 595, 598, 260 S.E.2d 243, 245 (1979)).

"[W]here the description of premises conveyed in the deed is definite, certain and unambiguous, extrinsic evidence cannot be introduced to show it was the intention of the grantor to convey a different tract." *Id*. (citing *Vanover Hollyfield*, 151 Va. 287, 292, 144 S.E. 450, 451 (1928)). The court explained how the plat's meaning was plain on its face:

> An examination of the plat reveals it to be unambiguous. No line separates the disputed land from the larger portion of Lot 1. This may be compared with the narrow strip of land at the head of the boat basin between Lots 12 and 13, which strip lies between lines clearly marked by the surveyor, indicating it is not included as part

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> of either lot. Similarly, another narrow strip of land lying between Lynnhaven Circle and a boat basin is enclosed by lines at each end.
>
> The only mark separating the western portion of Lot 1 from the contested land is an "o" on the south line of Lynnhaven Drive. Over plaintiff's objection, the surveyor who prepared the plat was permitted to testify that this "o" was in fact the division line. However, the plat itself expressly states that: "All points shown circled, thus: 'o', are marked by 1-inch iron pipe, 5-feet long." A surveyor called by the plaintiffs testified this symbol was commonly used to denote pipes placed in the ground to mark points of curvature, not to denote division lines.

Id. The court further pointed out in a footnote that the "o" symbol was used on the plat in several places where the road curves but where *no* boundary line intersects, supporting the view that the "o" did not denote a division line, notwithstanding (improperly admitted) testimony to the contrary. The court explained that its decision was consistent with its precedent. *See id*. at 525-26 (citing *Robbins Walker*, 119 Va. 222, 226, 89 S.E. 128, 129 (1916) (case decided "[w]ithout considering any oral testimony . . . but looking alone to the plat")); *cf*. *Brainerd Dickinson*, 217 Va. 637, 641, 231 S.E.2d 710, 713 (1977) (in a suit for reformation of a survey, theparties' intent was controlling where plat was "ambiguous on its face" because it "was not properly drawn to scale").

Note on visuals: *Although the appendix to the Cohan case includes a portion of the plat at issue, the poor resolution of the image makes it impossible to see what the court is describing. However, as demonstrated in our presentation, it is possible to gain a better understanding of the case by using the City of Virginia Beach mapping tools to identify the parcels, the disputed land, and the other platted parcels and strips of land not shown on the exhibit but used by the court in its reasoning*.

***Ettinger v. Oyster Bay II Community Property Owners' Association*, 296 Va. 280, 819 S.E.2d 432 (2018)**

In *Ettinger v. Oyster Bay II Community Property Owners' Association*, Phillip P. Ettinger, owner of Parcel E in the Oyster Bay II community in Accomack County, sued the Oyster Bay II Community Property Owners' Association after the Association erected a construction fence and "no trespassing" sign along Hibiscus Drive (the road forming Parcel E's northeast boundary), blocking his access as he prepared to develop the lot. Ettinger sought a declaration that his boundary extended to the center of the road, while the Association claimed it only extended to the intervening strip.

Ettinger claimed that his property line ran to the center of the abutting road under the Virginia rule that a conveyance of land bounded by a way carries title to the center of the way unless a contrary intent is expressly shown.[1] The Association

[1] The word "way" generally refers to any platted route, such as a road, street, highway, drive, or alley.

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contended that Ettinger's property only extended to the edge of the road, relying on the deed and plat. The deed identified the parcel's precise square footage – 196,670 sq. ft. – which was the square footage of Ettinger's property if one *excluded* the roadbed. The deed described Ettinger's property as "bounded on the Northeast, by Hibiscus Drive," and incorporated a recorded subdivision plat which appeared to place the boundary at the road's edge. The Association argued that this manifested the grantor's intent to convey only to the road's edge. The circuit court relied on those details and entered judgment for the Association, *Ettinger*, 296 Va. at 283–85, ruling Ettinger held merely a right of way.

The Supreme Court of Virginia disagreed with the circuit court's ruling and reversed, reasoning that quantity designations such as the square footage number stated in the deed are the least certain mode of describing land and must yield to definite boundaries. The court said the mere reference to the subdivision plat is not an express statement of contrary intent sufficient to negate the rule that title extends to the center of the road unless a contrary intent is expressly shown.

The court began its analysis with Virginia's settled rule that "a conveyance of land bounded by or along a way carries title to the center of the way, unless a contrary intent is shown," and emphasized that any reservation of the strip between the road's edge and centerline must be express because "[n]o such reservation will arise by implication." *Id.* at 284–85 (quoting *Martin v. Garner*, 286 Va. 76, 80–81 (2013); *Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass'n*, 240 Va. 221, 228 (1990)). The stated area did not overcome that rule because quantity designations are "regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances." *Id.* at 286 (quoting *Spainhour v. B. Aubrey Huffman & Assocs., Ltd.*, 237 Va. 340, 347 (1989)). Nor did the plat control: "A mere reference to the plat does not constitute evidence of contrary intent." *Id.* at 287.

Note on visuals: *A visual that initially seems clear (as shown in the presentation) may not mean what it appears at first blush. As this case shows, unless a contrary intent is expressly shown, the rule of law that establishes the legal boundary controls. This is one reason why it is important for attorneys to review subdivision plats prepared by surveyors and engineers. For example, had there been an intention by the subdivider to lay out the community in such a way that the boundary of Parcel E really was supposed to extend only to edge of the road (and not to the centerline), the preparer of the plat could have included notes on the drawing expressly stating that. Without that express statement of contrary intent though, the abutting parcels' ownership extends to the center of the road in accordance with the rule of law.*

B. Necessary Parties in Boundary Disputes

Garner v. Joseph, 300 Va. 344 (2021)

The Supreme Court of Virginia considered whether the holders of an easement were necessary parties to a riparian boundary-adjustment suit between their neighbors.

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Garner v. Joseph, 300 Va. 344, 346 (2021). The Garners and the Edwards owned adjoining lots on Snug Harbor Lane in Newport News. The Edwards' property separates the Garners' property from the shoreline. The Josephs also own property on the shoreline, sharing a common boundary with the Edwards. Under a 1959 deed, the Garners held a perpetual six-foot easement and right of way across the adjoining Edwards parcel running to the low-water mark of Deep Creek, together with the right to construct a private pier within that easement. *Id.* at 346–47. After a 2015 declaratory judgment confirmed the easement, the Garners built a pier. Several years later, in 2018, the Josephs, who also owned property on the shoreline and shared a common boundary with the Edwards, filed suit against Edwards to apportion the riparian boundaries. The resulting consent decree relocated the boundary so that part of the Garners' pier fell within the Josephs' riparian area, yet the Garners were never joined to the boundary apportionment action between the Josephs and the Edwards. *Id.* at 347–48.

The circuit court held the Garners were not necessary parties and lacked standing, reasoning that their easement rights were merely being "ascertained," not "diminished or defeated." *Id.* at 348–49. The Supreme Court reversed. Reviewing the question de novo, it reaffirmed that a person holding a material interest "likely either to be defeated or diminished" is a necessary party, and that the test turns on the materiality of the interest rather than on whether it is inferior to a fee simple. *Id.* at 349–52. Because the apportionment placed part of the Garners' pier on the Josephs' land and exposed them to a trespass action, their interest was likely to be diminished or defeated, distinguishing *Buxton v. Murch*, 249 Va. 502 (1995). *Id.* at 352–53 ("Unlike the non-joined lot owners in *Buxton*, whose interests in the proceedings were 'sufficiently represented' by the named parties, neither the Josephs nor Edwards represented the Garners' interest in the 2018 apportionment proceeding.").

Note on visuals: *The opinion reproduces the apportionment map of the three lots but does not clearly depict which lines are the boundary lines, nor does it clearly indicate how the Garners' pier encroached over the established line. GIS information provides a clearer image of the properties at issue, and with historical aerial imagery, we are able to see the Garner's pier before a significant portion of it was removed*.

C. Ownership Established by Adverse Possession

***Sanders v. Easter, et al.*, No. 0062-25-2, 2026 Va. App. LEXIS 120 (Va. Ct. App. Feb. 24, 2026) (unpublished opinion)**

In a recent case, the Court of Appeals affirmed a circuit court's finding that the plaintiff-appellees (the "Easters") established their claim of title to certain disputed land by adverse possession. The Easters had mistakenly believed the disputed land to be part of their property "based on the description of their property in the deed, an erroneous Amelia County tax map, and an adjoining landowner's survey[.]" The

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court found that the Easters had established adverse possession by clear and convincing evidence:

> To establish title to real property by adverse possession, a claimant must prove actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the statutory period of 15 years." *Helms v. Manspile*, 277 Va. 1, 7 (2009) (quoting *Grappo v. Blanks*, 241 Va. 58, 61 (1991)). The claimant must prove all elements by clear and convincing evidence. *Id*. "A single act or piece of evidence may tend to prove more than one element of adverse possession." *Quatannens v. Tyrrell*, 268 Va. 360, 371 (2004). For example, "occupation, use, and improvement of the property" can prove a claim of right, *Grappo*, 241 Va. at 62; actual possession, *La Due*, 201 Va. at 207; and exclusivity and visibility, *Quatannens*, 268 Va. at 371-72.

Sanders v. Easter provides an excellent overview of the law of adverse possession. Select parts of the opinion that recite black-letter law are reprinted below for reference. Consult the full text opinion for the court's full analysis.

1. Actual Possession

The court explained this element as follows:

> "[A]ctual possession is 'absolute dominion and enjoyment of the property.'" *Quatannens*, 268 Va. at 366 (quoting *Taylor's Devisees v. Burnsides*, 42 Va. (1 Gratt.) 165, 190 (1844)). "Use and occupation of property . . . constitutes proof of actual possession." *Grappo*, 241 Va. at 62. "The usual kind of actual possession relied upon is occupancy, use[,] or residence upon the premises for the statutory period of time, evidenced by cultivation, enclosure, or erection of improvements, or other plainly visible, continuous and notorious manifestation of exclusive possession . . . ." *La Due*, 201 Va. at 207. While "occasional cultivation" is usually insufficient to show actual possession, *see id*., more regular or habitual use and cultivation of land can be sufficient, *see Lennig's Ex'rs v. White*, 20 S.E. 831, 837 (Va. 1894).

The court found that the Easters established actual possession because they regularly farmed the disputed area, cut and maintained roads through it, built

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permanent tree stands for hunting, and had harvested timber from up to 30% of the trees in the disputed land.

2. Hostile Possession and Claim of Right

Hostile possession or possession under a claim of right is established as follows:

> "One is in hostile possession if his possession is under a claim of right and adverse to the right of the true owner." *Grappo*, 241 Va. at 62. "In other words, the possessor must profess, through words or actions, a belief that he is entitled to use the land and prevent others from using it in a manner that precludes the legal owner from exercising his rights over the property." *Quatannens*, 268 Va. at 372. "Claim of right" means
>
> > a possessor's intention to appropriate and use the land as his own to the exclusion of all others. That intention need not be expressed but may be implied by a claimant's conduct. Actual occupation, use, and improvement of the property by the claimant, as if he were in fact the owner, is conduct that can prove a claim of right.
>
> *Id*. at 369 (quoting *Grappo*, 241 Va. at 62); *see also Veldhuis v. Abboushi*, 77 Va. App. 599, 609 (2023) ("[T]he act of granting another permission to use your property is a clear indication that the grantor views himself, and no other, as the rightful owner and possessor of the property.").
>
> Importantly for this case, a possessor's mistaken belief that he or she owns the subject property can—in some cases—defeat hostility. "[O]ne who possesses another's land under a mistake regarding the boundaries of the property and does not intend to claim land beyond the 'true' property line, cannot adversely hold the land in question." *Brown v. Moore*, 255 Va. 523, 532 (1998). However, the practical test is not "whether the possessor would have claimed title . . . had he not been mistaken as to the true boundary line called for in his chain of title," but "[w]hether the positive and definite intention to claim as one's own the land up to a particular and definite line on the ground existed." *Id*. at 533 (alteration in original) (quoting *Hollander v. World Mission Church*, 255 Va. 440, 443 (1998)). Or as the Court put it a few years later:
>
> > when a claimant mistakenly believes that a particular "line on the ground" represents the extent of his or her own land and treats all the land within the line on the ground as his or her own in a manner that satisfies

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> the other requirements of adverse possession—particularly actual, exclusive, and visible possession—then the hostility requirement is generally satisfied.
>
> *Quatannens*, 268 Va. at 372. So, in Brown, the possessors' mistaken belief that they owned the disputed property was not fatal to their adverse possession claim because their excavation and cultivation of the land evinced their intent "to claim the disputed property 'against anybody.'" 255 Va. at 533. That, the Court said, was sufficient to show hostility. *Id*.

The court explained that "[h]ere, the Easters have used and improved the Disputed Land as if they were the owners in several ways since 1998" including regularly bushhogging the field, renting out a portion of it, expelling trespassers and posting "no trespassing" signs. Further, the Easters mistakenly believed the disputed land was theirs "based on the description of their property in the deed, an erroneous Amelia County tax map, and an adjoining landowner's survey," and "treated the land as such—and in a manner that satisfied the other elements of adverse possession—thereby demonstrating that their possession was hostile to Sanders' legal title and under a claim of right." *Id*. (quoting *Quatannens*, 268 Va. at 369, 372; Brown, 255 Va. at 532-33).

3. Exclusive Possession

The court recited the law on the exclusivity element as follows:

> "One's possession is exclusive when it is not in common with others." *Grappo*, 241 Va. at 62. "The occupancy need not be such as physically to bar out trespassers, but only to manifest unequivocally a claim of ownership on the part of the occupant and preclude all others . . . from using it as their own or in common with the claimant." *Leake*, 199 Va. at 984 (Snead, J., dissenting) (quoting *Lyons v. Fairmont Real Est. Co.*, 77 S.E. 525, 532 (W. Va. 1912)).

The court found the Easters met this element, even though a hunting club had used the disputed land for a time, because after that "they took actions sufficient to establish exclusivity" including ejecting trespassers, posting around 20 "no trespassing" signs and updating them every three years, installing cameras to help catch trespassers, and installing a cable gate to keep others (except those with the Easters' permission) from driving on the woods road. The appeals court said that the trial court had:

> correctly focused on one of the most important aspects of exclusive possession: the exclusion of the rightful owner. *See Quatannens*, 268 Va. at 375 ("In order to have exclusive possession, a claimant must 'shut out the rightful owner.'" (quoting *Taylor's Devisees*, 42

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> Va. (1 Gratt.) at 190)); *Taylor's Devisees*, 42 Va. (1 Gratt.) at 191 (explaining that the hallmark of a disseisor's exclusive possession is the "non-existence of an actual possession on the part of the rightful owner").

4. Visible, Open, and Notorious Possession

Explaining the requirement for visible acts of ownership, the court said:

> "Possession is visible when it is so obvious that the true owner may be presumed to know about it." *Grappo*, 241 Va. at 62; *see also Dawson v. Watkins*, 41 Va. 259, 269 (1843) (explaining that a disseisor's possession must "be accompanied with such visible acts of ownership as from their nature indicate a notorious claim of property in the land").

The Court of Appeals held that the circuit court correctly found that the Easters' possession was sufficiently visible, open, and notorious, noting they cultivated openly visible land for decades and bushhogged it regularly, "all . . . observable from the public highway." The appeals court further stated: "Add to that the tree stands in the wooded area, the regular maintenance and construction of the woods roads, the use of recreational vehicles on those roads, the 'no trespassing signs,' and the cable gate—the record amply supports the circuit court's finding that the Easters visibly, openly, and notoriously possessed the Disputed Land after 1998."

5. Continuous Possession

Holding that the circuit court correctly found that the Easters established adverse possession of the disputed land by clear and convincing evidence, the court concluded with the final element, continuous possession:

> "Possession is continuous only if it exists without interruption for the statutory period." *Grappo*, 241 Va. at 62. In Virginia, the statutory period is 15 years. Code § 8.01-236. In the event of a break in possession, "the seizin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseizin." *Armstrong v. Morrill*, 81 U.S. (14 Wall.) 120, 146 (1871).

The court rejected appellant's argument that the circuit court improperly tacked the predecessor owner's period of ownership, upholding the circuit court's determination that the evidence established that the Easters met all the elements of adverse possession without interruption from 1998 to 2017.

Note on the visuals: *I spoke to appellee's counsel, Robert E. Hawthorne, Jr., Hawthorne & Hawthorne, P.C., who along with his partners, Bradley D. Foster and Derrick P. Fellows, successfully represented the Easters in this case. I asked Robert whether visual evidence played an important part in this case. He explained that photographic evidence helped to clearly and convincingly establish the requisite elements of adverse possession.*

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In particular, an aerial photo was used to overlay the disputed area depicted on the survey to show where the portion of the disputed property that had been maintained as a hayfield was situated relative to the remaining contested forested area. The most useful and illustrative photographic evidence came from the ground, showing the wide, cleared trails that ran throughout the wooded area, along with evidence of survey monuments (in particular an old painted pipe marking the corner his clients were trying to establish), posted signs placed by his clients or their agents (both old and new), wire remnants of an old fence line, and evidence of old tree stumps from prior select-cut harvests. Most importantly of all were the photos of the wooded tree canopy (the photos were taken from the ground), which by expert testimony of a consulting forester, showed the marked difference between the Easters' property (which had been selectively cut for a period of more than eighty years) and that of the defendants' property, which had been clear-cut years ago up to the disputed line. As a result, the expert was able to opine that the visible distinction between the two was apparent.

***Abboushi v. Veldhuis,* 108 Va. Cir. 522 (Alexandria 2021), *aff'd Veldhuis v. Abboushi,* 77 Va. App. 599, 603–13 (2023) (only on exclusivity issue)**

This was a dispute between adjoining neighbors, the Abboushis (plaintiffs) and Veldhuis (defendant), where the Abboushis claimed to have adversely possessed a portion of Veldhuis' property. The Abboushis purchased their property in 1996 without obtaining a survey. At the time, their neighbor on the defendant Veldhuis' lot was defendant's father, Joe. The Abboushi's had relied on Joe's verbal description of the boundary between their two properties as "a straight line" running along the edge of Joe's driveway to the side of a large pine tree at the back of the lot. 108 Va. Cir. at 522–23 (described in the opinion as the "west" side, but it appears that the testimony may have reversed north and south, and thus "west" would be "east").

On what the Abboushis believed to be their property based on Joe's description of the line, the Abboushis installed plantings, trellises, ornamental objects, a stone wall, and a fence along the line. At trial, one of the Abboushi plaintiffs marked the line as described to him by Joe, indicating the line's endpoint with a red dot on a photograph. There were photographs that depicted the plantings, trellises, ornamental objects, stone wall, and fence placed along the claimed line. *Id.* at 523–24, 527. These visuals, together with witness testimony established the asserted "line on the ground" as there was no survey establishing the boundary of the Abboushis' property at the time of purchase. *Id.* at 527.

After analyzing the requisite elements—actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the fifteen-year statutory period—the circuit court found that the Abboushis had "proven by clear and convincing evidence that they adversely possessed the disputed area and that the line on the ground to which they lay claim runs on the east (sic) edge of Defendant's driveway in a straight line back to the fence in the rear of [plaintiffs' address], to the red dot marked by [plaintiff] . . . ." *Id*. The court exercised its authority under Code § 8.01-181 to appoint a surveyor to make an official survey of the boundary line. *Id.* at

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528. The final order approved the resulting survey and metes-and-bounds description, translating the visually identified line into a recordable legal boundary encompassing 539 square feet. *Abboushi v. Veldhuis*, 2022 Va. Cir. LEXIS 86, at *2–5 (Alexandria Apr. 26, 2022).

Veldhuis appealed on a single issue, namely, whether the court erred in finding the Abboushis had satisfied the exclusive possession element of adverse possession, given that Joe allegedly installed a drainage pipe in the disputed area. The circuit court had said that, without a survey, it could not determine the location of this two-inch underground drainage pipe that Veldhuis said Joe had installed within the disputed area. While the circuit court had found the testimony unclear as to exactly where and when the pipe was installed, it found that the drainage pipe had been installed only with the Abboushis' permission, and therefore, did not defeat the exclusivity element of adverse possession. Although the parties had stipulated to a house-location survey, the survey did not note the location of a two-inch underground drainpipe. *Id.* at 527–28 & n.12. The court stated: "No survey or other evidence was presented to establish the precise location of the pipe." *Id.* at 527. Given the contradictory testimony, the court could not determine whether the pipe lay on the defendant's undisputed property or within the disputed area. *Id.*

On appeal, Veldhuis contended that the shared location of the drainage pipe negated the exclusivity required for the Abboushis to establish adverse possession. The Abboushis countered that Joe had sought and obtained their permission before installing the pipe, so his use was permissive and left their exclusive possession intact. The appeals court agreed with the Abboushis that Joe's asking the Abboushis for permission to install the pipe in that area was further indication that the Abboushis owned that area. *See Veldhuis v. Abboushi*, 77 Va. App. 599, 603–13 (2023) ("Here, the fact that the Abboushis granted Joe permission to install the pipe in the disputed area is dispositive. Even assuming that the pipe was actually installed both (1) within the bounds of the disputed area and (2) prior to the Abboushis establishing their claim of right by adverse possession, the Abboushis would still prevail on their claim, as their exclusive possession of the disputed area was unaffected by the installation of the pipe.").

Note on the visuals: *Based on the directional references (e.g., east, west, etc.) in the opinion, which appear to be taken from trial testimony, it seems that the witnesses may have been referring to an exhibit where what was assumed to be the north orientation was in fact the opposite of true north. One tip to avoid confusion is to always use a north arrow on every drawing, even on aerial photographs. At the time of trial, however, there was no survey, and all the directions were based on oral testimony. In this case, it did not affect the outcome of the case because everyone at the trial was operating on the same assumption about which way was "north." However, it is a good reminder about the importance of directional orientation and use of a north arrow on visuals.*

III. Easement Disputes. An easement is a non-possessory right to use another's land for a specific purpose. Restatement (Third) of Property: Servitudes § 1.2 (Am. L. Inst. 2000). The estate

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benefited by the easement is the "dominant estate," and the estate burdened by it is the "servient estate."

A. Easement Width Disputes

***Thibault Enterprises, LLC v. Yost,* 927 S.E.2d 806 (Va. 2026)**

The appellees owned a 1.08-acre parcel in Dinwiddie County accessed via a fifty-foot-wide express ingress-and-egress easement over land owned by the appellant, who used the servient land for agricultural purposes. *Id*. at 807. The appellees traveled on a roughly twelve-foot-wide gravel road within that fifty-foot corridor, while the appellant placed fencing, grapevines, fence poles, and hay bales within the fifty-foot easement area but to the side of the gravel road. *Id*. The appellees sued, characterizing the encroachments as a nuisance and seeking an injunction requiring removal of all objects from the full fifty-foot width; the circuit court granted the injunction, and the Court of Appeals affirmed by unpublished opinion, reasoning that any object within the defined width impermissibly "narrowed" the easement. *Id*. at 807–08.

The Supreme Court reversed and entered final judgment for the appellant, holding that a defined-width easement does not give the dominant estate a per se right to an object-free corridor across its full stated width. *Id*. at 810–11. Instead, courts evaluating an alleged encroachment should (1) examine the deed language to determine the purpose of the easement and the parties' intent, and (2) evaluate whether the servient owner's actions unreasonably interfere with that purpose. *Id*. at 810. Because the evidence showed the appellees' ingress and egress was, by and large, unimpeded by the placement of items off the gravel road, the appellant was not required to remove them. *Id*. at 810–11. The Court grounded its holding in Va. Code § 55.1-305, which prohibits only "unreasonable interference" with the dominant estate's enjoyment, and in a century of Virginia precedent applying a reasonableness standard rather than a bright-line rule.

***Palmer v. R. A. Yancey Lumber Corp.,* 294 Va. 140, 803 S.E.2d 742 (2017)**

The Palmer Property (approximately 44 acres) and the Yancey Property (approximately 317 acres) derived from the common ownership of Richard Richardson, whose estate was subdivided upon his death in 1828, leaving the Yancey Property landlocked; an implied easement by necessity for access then arose by operation of law, burdening the Palmer Property. *Palmer v. R. A. Yancey Lumber Corp.*, 294 Va. 140, 143–44 (2017). A private "Access Road" had long been the sole means of ingress and egress from the Yancey Property to a public road. *Id*. at 144. The disagreement arose when Yancey prepared to harvest timber and sought to haul logs by tractor-trailer instead of ten-wheel logging trucks (which were the kind of trucks that Yancey's neighbor had recently used). Using tractor-trailers would necessitate widening the Access Road in three locations. Yancey

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requested an express easement that would allow the proposed use, but Palmer refused to consent, and Yancey filed a declaratory judgment action. *Id*. at 144–45.

Yancey asked the circuit court to "(i) declare that it possesses such an easement as a permanent easement, wide enough for ingress and egress of all vehicles [used for, among other purposes,] timbering," and (ii) enjoin Palmer from interfering with the right to so use the easement." *Id*. at 145.

Palmer argued that, as a matter of law, an easement by necessity cannot be widened without the servient owner's consent once its location is fixed. She also argued that widening the road for tractor-trailers would unreasonably burden her property. The circuit court rejected Palmer's argument that as a matter of law the easement by necessity could not be widened by order of the court without her consent, concluding that it did have that authority. The court determined that Yancey had an easement by necessity along the Access Road over the Palmer property and the only issue was the "scope of the easement by necessity," *id*. at 147, and that the "factual dispute . . . centers on what is reasonably necessary for Yancey to transport and market its timber from the Yancey Property." *Id*. at 148. The court found that tractor trailers were reasonably necessary for timbering large properties like the Yancey Property, and found the easement should be widened in a few places to accommodate such use. *Id*.

The Supreme Court of Virginia first held that, as a matter of law, a circuit court has authority to grant a dominant landowner the right to widen an established easement by necessity without the servient landowner's consent. *Id*. at 151. Rejecting Palmer's proposed bright-line rule that an easement, once located, can never be widened, the Court explained that the rules governing easements by necessity are the antithesis of any static rule that would freeze an easement to its dimensions at inception. *Id*. at 151–52. The court embraced the majority rule that "a way of necessity is not limited to such use of the land as was actually made and contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time." *Id*. at 154. "In short, the 'scope' of the easement by necessity 'may increase to meet the increased necessities of the property.'" *Id.* at 155 (internal citations omitted). Because such an easement arises by operation of law to serve the reasonable, changing needs of the dominant estate, its scope, including its width, may increase to meet those needs, present and future. *Id*. at 155–57. That authority is cabined by a limiting principle: modifications undertaken for the beneficial enjoyment of the dominant estate must not create unreasonable burdens on the servient estate, and a trial court adjudicating a proposed modification must balance the benefits and burdens to both estates in deciding which changes, if any, to approve. *Id*. at 157.

Whether particular modifications are reasonably necessary is a question of fact reviewed with the highest deference, and the Court affirmed the circuit court's findings, which were supported by expert testimony, that tractor-trailers were reasonably and practicably (not absolutely) necessary for Yancey's timbering operation and that the limited widening would not unreasonably burden the Palmer

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Property, particularly because roughly two-thirds of the roadbed remained unchanged and the same modifications would have been required even for ten-wheel trucks. *Id*. at 158–63. In determining the reasonableness of the proposed modifications, the court considered detailed road measurements and a surveyor's plat keyed to thirteen "station markers" identifying the modifications to be made, and determined that the circuit court's judgment granting Yancey the right to make the modifications to widen the easement by necessity for use by tractor-trailers was "neither plainly wrong nor without evidence to support it," affirming the judgment of the circuit court. *Id*. at 163.

Justice Mims, concurring in part and dissenting in part, would have required clear and convincing proof that tractor-trailers were reasonably necessary, rather than merely more profitable than ten-wheel trucks. *Id*. at 164–67 (Mims, J., concurring in part and dissenting in part).

Notes on the visuals: *The detailed survey showing the proposed modifications seemed to persuade the court that the modifications were relatively limited, affecting only a few areas of the easement and in some cases, improving it*.

B. Prescriptive Easement

Boxley v. Crouse, 79 Va. App. 350 (2023)

The appellees' property had been accessed since 1976 via "Hawk Trail," a road crossing the appellant's adjoining parcel; in 1995, the appellant's predecessor erected an unlocked gate across Hawk Trail and mailed the appellees a key without explanation. *Boxley v. Crouse*, 79 Va. App. 350, 354–55 (2023). After the predecessor's death, the appellant installed a new lock in 2020 and refused to provide a key, prompting suit for a declaratory judgment establishing a prescriptive easement and an injunction requiring removal of the gate. *Id*. at 355.

The Court of Appeals affirmed judgment for the appellees. *Id*. at 360. To establish a prescriptive easement, a claimant must show use that is adverse, under a claim of right, exclusive, continuous, and uninterrupted, with the owner's knowledge and acquiescence, for at least twenty years. *Id*. at 355–56; *see also Hafner v. Hansen*, 279 Va. 558, 562 (2010). "Continuous" use need not be daily or even monthly, just frequent enough to give the landowner reasonable notice that a right is being exercised against him, and the appellees' open and visible use for at least twenty-five years satisfied this standard, creating a presumption of adverse use that the appellant failed to rebut. *Boxley*, 79 Va. App. at 356–58. The Court further rejected the argument that mailing a gate key constituted permission, holding that the unexplained mailing of a gate key (without evidence of an agreement or express permission) was insufficient to rebut the presumption of adverse use, *id*. at 358–59, citing *Horn v. Webb*, 302 Va. 69 (2023) ("*Horn I*"), for the proposition that circumstantial evidence of permission is not sufficient to rebut the presumption that the use arose adversely or under a claim of right. In *Horn I*, the Supreme Court had reversed the circuit court's finding that a servient landowner rebutted the presumption (of adversity), noting the landowner only "offered

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circumstantial evidence of a permission to dock the boat that existed between the [previous servient landowner] and the [dominant landowner]."[2]

On the gate itself, the Court applied Code § 33.2-110(A), which permits a servient landowner to erect a gate across a right-of-way only if the gate connects to fences extending to each side of the right-of-way. Va. Code § 33.2-110(A); *Boxley*, 79 Va. App. at 359–60. Because the appellant's freestanding gate violated the statute, the Court of Appeals affirmed the order requiring its complete removal. *Id*. at 360.

IV. Easement Relocation and Modification: Amended Code § 55.1-304 (2026)

A. Case Law Under Prior Statute

***Smith v. Allen Creek Assocs., LLC*, 85 Va. App. 611 (2025)**

In this case, Allen Creek Associates ("ACA") was the servient landowner developing a residential community, seeking to relocate two rights-of-way crossing its land. The appellants, the Smiths, owned neighboring parcels served by those easements and opposed the move. ACA argued that under Va. Code § 55.1-304, they could be granted an easement relocation when there would be no economic damage, no undue hardship, and the easement was at least 10 years old. Appellants argued that there was no ripe controversy, the relocation was an unconstitutional taking for a private party's benefit, and the court had misapplied the statute.

The Appeals court rejected all three of the Appellants' arguments, reasoning that the controversy was ripe because the dispute rested on present facts, and that this was not an unconstitutional taking. They further reasoned that the statue was not misapplied – there was no undue hardship or economic, damage caused by relocating the easement.

B. The Revised Statute

In the 2026 session, the General Assembly adopted amendments to Virginia's easement relocation statute (H.B. 252) (codified at Va. Code § 55.1-304). The amendments were recommended by the Boyd-Graves Conference after a request from the legislature to consider whether Virginia should adopt the Uniform Easement Relocation Act (UERA). Virginia's existing easement relocation statute already allowed a servient estate owner to petition the circuit court if a dominant estate holder unreasonably refused to cooperate in relocating an *access* easement (*see, e.g., Smith v. Allen Creek Assocs., supra*). Therefore, the Boyd-Graves

[2] In the initial decision in 2023, (*Horn I*), the Supreme Court of Virginia ruled that the Horns established a valid prescriptive easement to dock their pontoon boat alongside the Webbs' dock and use the electrical outlet. However, the court denied their claim to store smaller watercraft (canoes and skiffs) on the land. Following the initial ruling, disputes arose over alleged destruction of the electrical apparatus by the Webbs. In July 2026 (*Horn II*), the Supreme Court of Virginia affirmed the lower court's refusal to reopen the closed case for new unsworn misconduct claims, but explicitly noted that the Webbs could face severe legal consequences in a new, separate proceeding if they did indeed destroy the electrical equipment. *Horn v. Webb*, Record No. 250511 (Va. July 16, 2026) (unpublished order).

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Conference determined that wholesale adoption of the UERA was not necessary, but that petitions for relocation of other types of easements, not just ingress/egress easements, should be expressly recognized by statute, and that elements of the UERA should be incorporated to provide well-articulated standards for when the court should grant such a petition.

Effective July 1, 2026, House Bill 252 amended Code § 55.1-304, governing the relocation or modification of easements by the owner of the servient estate. H.B. 252, 2026 Gen. Assemb., Reg. Sess. (Va. 2026) (Feb. 2, 2026).

Prior law permitted an owner of land subject to an easement for ingress and egress to relocate the easement on the servient estate by recorded consent of the easement holder and other affected parties, or, absent consent, by petition to the circuit court. Va. Code § 55.1-304 (2024) (prior version). Under the prior law, a court could grant relocation only upon finding that (i) the relocation would not result in economic damage to the parties in interest, (ii) no undue hardship would result, and (iii) the easement had existed for at least ten years. *Id.*

As amended, § 55.1-304 introduces defined terms for "dominant estate," "easement holder," "servient estate," and "public entity." H.B. 252, supra, § 55.1-304(A) (as enacted). Subsection B retains the consent-based mechanism, requiring a recorded written agreement evidencing the consent of the easement holder and all other affected persons, including trustees and beneficiaries of deeds of trust encumbering the dominant or servient estates. § 55.1-304(B).

Subsection C replaces the prior three-factor test with a six-factor reasonableness standard. § 55.1-304(C). Absent agreement, a court may order relocation or modification only if it does not materially: (i) lessen the utility of the easement; (ii) increase the burden on the easement holder's reasonable use and enjoyment; (iii) impair an affirmative easement-related purpose; (iv) impair the safety of those entitled to use the easement; (v) disrupt the easement holder's use and enjoyment during the relocation, unless the servient owner substantially mitigates the duration and nature of the disruption; or (vi) impair the value, use, or physical condition of the benefited land. *Id.* The servient owner bears all costs of relocation or modification, except attorney's fees. *Id.*

Subsection D extends this framework to easements created by express grant or reservation (including reciprocal easements), prescription, implication, necessity, or estoppel, but excludes from its scope public service corporation easements and facilities; public utility easements and facilities, whether publicly or privately owned; conservation and open-space easements (and easements appurtenant to them); telecommunications easements; and easements held by a "public entity." *See* § 55.1-304(D).

This change in the law provides clarity on the existing right of a landowner to petition the court to relocate an ingress and egress easement subject to certain standards, and expands the circumstances in which a servient owner potentially

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could modify or relocate other types of easements without the easement holder's consent.

Perhaps it has been done, but it is hard to imagine how one could make a persuasive case for an easement relocation without using clear visual tools such as surveys, maps, plats and photographs.

V. Conclusion

Effective visual communication is critical in real estate and land use matters to prevent disputes from happening and to resolve or successfully litigate disputes if they do arise. When dealing with matters like disputed boundaries, an easement's location or its width, or whether an alleged encroachment really encroaches, words alone may fail to convey the facts on the ground, and it is often helpful to use tools such as GIS or online maps in conjunction with surveys and plats to better understand the lay of the land.

Appendix Materials

Va. Code § 8.01-179-183 Establishing boundaries to land

Va. Code § 55.1-304 Easement relocation or modification

Va. Code § 55.1-305 Enjoyment of easement

Boyd-Graves materials on UERA and amendment to Va. Code § 55.1-304

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§ 55.1-305. Enjoyment of easement

Unless otherwise provided for in the terms of an easement, the owner of a dominant estate shall not use an easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement, and the owner of the servient estate shall not engage in an activity or cause to be present any objects either upon the burdened land or immediately adjacent to such land that unreasonably interferes with the enjoyment of the easement by the owner of the dominant estate. For the purposes of this section, "object" does not include any fence, electric fence, cattle guard, gate, or division fence adjacent to such easement as those terms are defined in §§ 55.1-2800 through 55.1-2826. Any violation of this section may be deemed a private nuisance, provided, however, that the remedy for a violation of this section shall not in any manner impair the right to any other relief that may be applicable at law or in equity.

2003, c. 774, § 55-50.1; 2007, c. 931;2019, c. 712.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 55.1-304. Relocation or modification of easement

A. For the purposes of this section:

"Dominant estate" means an estate or interest in real property benefitted by an appurtenant easement.

"Easement holder" means (i) in the case of an appurtenant easement, the dominant estate owner or (ii) in the case of an easement in gross, the grantee of the easement or a successor.

"Public entity" means (i) the United States; (ii) an agency of the United States; (iii) the Commonwealth; or (iv) an agency, institution, authority, or political subdivision of the Commonwealth.

"Servient estate" means an estate or interest in real property that is burdened by an easement.

B. Any easement may be relocated or modified by consent by recording in the office of the clerk of the circuit court of each county or city in which the easement or any part of the easement is located a written agreement evidencing the easement holder's consent and the consent of all other affected persons as may be required, such as trustees and beneficiaries of deeds of trust encumbering the dominant or servient estates, and setting forth the new location or modification of the easement.

C. In the absence of such written agreement, the servient estate may seek relocation or modification of the easement upon petition to the circuit court and notice to all parties in interest. The petition shall be granted if, after proper notice and a hearing, the court finds that relocation or modification of the easement does not materially (i) lessen the utility of the easement; (ii) after the relocation or modification, increase the burden on the easement holder in its reasonable use and enjoyment of the easement; (iii) impair an affirmative, easement-related purpose for which the easement was established; (iv) during or after the relocation or modification, impair the safety of anyone entitled to use the easement; (v) during the relocation or modification, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the owner of the servient estate substantially mitigates the duration and nature of the disruption; or (vi) impair the value, use, or physical condition of the land benefitted by the easement. The owner of the servient estate shall pay all costs, except attorney fees, to relocate or modify the easement.

D. The provisions of subsection C apply to an easement established by express grant or reservation, including reciprocal easements, or by prescription, implication, necessity, estoppel, or other method, but may not be used to relocate or modify (i) a public service corporation easement or any facility operated by a public service corporation; (ii) a public utility easement or public utility facility, whether publicly or privately owned; (iii) a conservation easement as defined in § 10.1-1009 or open-space easement as defined in § 10.1-1700;(iv) an easement appurtenant to a conservation easement as defined in § 10.1-1009 or open-space easement as

defined in § 10.1-1700;(v) a telecommunications easement; (vi) an easement held by a public entity; or (vii) any easement if the proposed location would interfere with the use or enjoyment of those easements listed in clauses (i) through (vii).

Code 1919, § 5168; Code 1950, § 55-50; 1992, c. 373; 2019, c. 712;2026, c. 916.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Article 16. Establishing Boundaries to Land

§ 8.01-179. Motion for judgment to establish boundary lines

Any person having a subsisting interest in real estate and a right to its possession, or to the possession of some share, interest or portion thereof, may file a motion for judgment to ascertain and designate the true boundary line or lines to such real estate as to one or more of the coterminous landowners. Plaintiff in stating his interest shall conform to the requirements of § 8.01-137, and shall describe with reasonable certainty such real estate and the boundary line or lines thereof which he seeks to establish.

Code 1950, § 8-836; 1954, c. 606; 1977, c. 617.

§ 8.01-180. Parties defendant; pleadings

The plaintiff shall make defendants to such motion for judgment all persons having a present interest in the boundary line or lines sought to be ascertained and designated.

Code 1950, § 8-837; 1954, c. 606; 1977, c. 617.

§ 8.01-181. Surveys

The court may appoint a surveyor and direct such surveys to be made as it deems necessary, and the costs thereof shall be assessed as the court may direct.

Code 1950, § 8-838; 1954, c. 606; 1977, c. 617.

§ 8.01-182. Claims to rents, etc., not considered

In a proceeding under this article, no claim of the plaintiff for rents, profits or damages shall be considered.

Code 1950, § 8-839; 1977, c. 617.

§ 8.01-183. Recordation and effect of judgment

The judgment of the court shall be recorded in the current deed book of the court. The judgment shall forever settle, determine, and designate the true boundary line or lines in question, between the parties, their heirs, devisees, and assigns. The judgment may be enforced in the same manner as a judgment in an action of ejectment.

Code 1950, § 8-840; 1977, c. 617.

Boyd-Graves Conference Report

DATE: September 12, 2025

STUDY TOPIC: Uniform Easement Relocation Act (House Bill 1721)

STUDY GROUP CHAIR: Lucia Anna (Pia) Trigiani

STUDY GROUP MEMBERS: Jeffrey M. Bourne, Karen L. Cohen, Benjamin D. Leigh, James L. Windsor

EXECUTIVE SUMMARY:

The topic of this study comes to the Boyd-Graves Conference ("Conference") at the request of the Virginia General Assembly in the third enactment clause of House Bill 1721 considered during the 2025 Session:

> The Boyd-Graves Conference shall conduct a study on the provisions of Article 1.1. (§ 55.1-315.1 et seq.) of Chapter 3 of Title 55.1 of the Code of Virginia, as created by this act. The Boyd-Graves Conference shall report any findings of such study to the Chairmen of the Senate and House Committees for Courts of Justice by November 1, 2025.

House Bill 1721 proposes changes to Virginia Code Section 55.1-304 concerning relocation of easements. As introduced, House Bill 1721 adopts the Uniform Easement Relocation Act ("UERA") recommended by the National Conference of Commissioners on Uniform State Laws ("Uniform Law Commission"). House Bill 1721 was approved by both the Senate and the House of Delegates *with amendments* (to incorporate reference to public utility easements and local government easements and to incorporate Senate Bill 1435) and forwarded to the Governor for signature.

The Governor recommended amendments to exclude state agencies. The Governor's amendments were accepted by the House but rejected by the Senate. Ultimately, the Governor vetoed the bill offering the following explanation:

> Pursuant to Article V, Section 6, of the Constitution of Virginia, I veto House Bill 1721, which relates to the compensation for conservation or open-space easement.
>
> Unfortunately, the General Assembly failed to accept my amendments which would exempt state agencies from having to pay the Commonwealth for lost revenue, preventing unnecessary and burdensome intrastate transfers of funds and provide legislators more time to address concerns from state agencies about language from Senate Bill 1435, which was inserted into this bill after failing in the General Assembly this session.
>
> More time is necessary to review the potential implications of this legislation.
>
> Accordingly, I veto this bill.

Senate Bill 1435, referenced in the veto explanation, dealt with eminent domain compensation for lands under conservation easements. It appears that the Governor's veto was related to that issue rather than the UERA-related provisions. The Conference Study Group undertook only an analysis of the UERA and the recommendations in this report are limited to that topic.

The Study Group met five times via Zoom.[1] The Study Group reviewed testimony offered in support of the bill, [2] considered information provided by the bill patron, Delegate Vivian E. Watts and background provided by Ellen F. Dyke, one of the Virginia representatives to the Uniform Law Commission, who chaired the Uniform Law Commission Committee that drafted the Uniform Easement Relocation Act, as well as independent research and legislative history available from

[1] The Study Group recognizes the significant contributions of Tucker Blythe, a summer associate at Kaufman & Canoles, P.C., whose research and enthusiasm were invaluable to the assessment of this area of the law and whose research memorandum is the basis of this analysis.

[2] In testimony offered during legislative committee consideration of House Bill 1721, a witness in support of the legislation reported that litigation is pending. Study Group research into the status of that litigation confirmed that the case filed in Patrick County Circuit Court is active and pending. A second suit interpreting Section 55.1-304 was on appeal to the Virginia Court of Appeals when House Bill 1721 was under consideration. The Court of Appeals issued a decision on August 19, 2025. *See Darlene S. Smith, et al. v. Allen Creek Associates, LLC* (Record No. 0xxx-xx-3).

the Legislative Information System.
ANALYSIS:

I. Background

The Uniform Law Commission promulgated the UERA in 2020 "to modernize a common law rule that gives easement holders absolute power to restrict development of land burdened by an easement."[3] The problem UERA is trying to address is the "imbalance of power" that results from harsh application of the rule requiring an easement holder to consent to relocation.[4] As explained by the Uniform Law Commission:

> Under the current law of many states, an easement holder can prevent development of another's land by withholding consent to relocation – even when relocation would not diminish the easement's utility to the easement holder. Some easement holders have abused this power by demanding ransom payments in exchange for consent. The UERA provides a court-supervised alternative for easement relocation that will prevent this type of abuse.[5]

Virginia law already provides a similar "court-supervised alternative" in Virginia Code § 55.1-304; however, the Virginia law is much more limited than the UERA. First, the Virginia relocation statute only applies to "an easement for the purpose of ingress and egress" and requires that the easement have "been in existence for not less than 10 years." The UERA applies more broadly (to other types of easements, not just access easements) and does not impose an "age requirement" on an easement in order for it to be relocated.

The Uniform Law Commission promotes the UERA as a means to standardize the law, promote economic growth, prevent property disputes, and better define property owner rights - all outcomes worth considering.[6] The Study Group determined that these worthy goals could be achieved through relatively minor alterations to Virginia's existing easement relocation statute (Va. Code § 55.1-304), by simply broadening the current statute to include more easement types (not just access easements), subject to certain exclusions as provided in the UERA (*e.g.*, utility easements and conservation easements), adopting the UERA's standards for a petition for relocation or modification of an easement, and eliminating Virginia's requirement that the easement have been in existence for 10 years.

The Uniform Law Commission intended the UERA to be retroactive.[7] The General Assembly, however, removed this provision from the version adopted; in the House Courts of Justice

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[3] *Why Your State Should Adopt The Uniform Easement Relocation Act*, UNIF. L. COMM'N (OCt. 2023), https://www.uniformlaws.org/viewdocument/enactment-kit-70?CommunityKey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=librarydocuments.
[4] *Id.*
[5] *Id*.
[6] *Id.*
[7] *Id.* § 14, cmts. 1-2 ("Retroactive application of the act will not deprive the easement holder or others entitled to use and enjoy the easement of any of the functional benefits of the easement upon relocation and will not cause the easement holder, security-interest holders, or other owners of recorded interests in the servient or dominant estate to suffer material harm, even during the relocation process, regardless of whether the act applies to an easement created before, on, or after the effective date of the act.").

Committee Civil Subcommittee hearing on January 15, 2025, the Subcommittee noted that the General Assembly, as a standard policy, does not usually enact retroactive provisions.[8] Accordingly, the UERA version passed by the General Assembly and vetoed by the Governor contained no retroactivity provision, likely demonstrating the Virginia drafters' proclivity for prospective legislative revisions.[9] The Conference Study Group makes no specific recommendation regarding retroactivity.

II. Statutory History

Although the statutory history of Section 55.1-304 dates back to 1919, the first relocation mechanism did not appear in the Code until 1992.[10] The initial statute addressing easements, Section 5168 of the Virginia Code of 1919, addressed easements and appurtenances generally[11] and did not provide guidance for the relocation of easements nor create a provision for court petitions.[12]

Similarly, the successor section of the Code enacted in 1950, Section 55-50, did not create a procedure, but prohibited the servient estate owner from "engag[ing] in an activity or caus[ing] to be present any objects either upon the burdened land or immediately adjacent thereto which unreasonably interferes with the enjoyment of the easement by the owner of the dominant estate."[13] The common law rule requiring mutual consent dictated relocation prior to 1992, leaving servient estate owners no real avenue to move the easements on their land other than by agreement with the dominant estate. (While servient estate owners could petition a court for equitable relief as some had done since at least the 19th century, obtaining judicial relief from the mutual consent rule was a far from certain outcome.)

The first statutory language *directly* addressing relocation came in the 1992 revision to the Code. That revision, which codified the same language found in the current Section 55.1-304, replaced the language in Section 55-50 outright.[14] Pursuant to that language and since codification, servient estate owners have been entitled to two means of relocating easements on their land: by (1) agreement of the parties (the mutual consent rule), or (2) a petition to the court showing (a) no economic damage to any party, (b) no undue hardship, and (c) the easement had existed for more than ten years.[15] The text of Section 55-50 was simply moved without alteration to Section 55.1-304 in 2019.[16]

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[8] Virginia House of Delegates Civil Subcommittee, *Civil Subcommittee Hearing*, Va. HOUSE OF DELEGATES COMM. STREAMING, at 1:23:58 (January 15, 2025), https://virginiageneralassembly.gov/house/committees/commstream.html.
[9] *See* 2024 Va. HB 1721.
[10] 1992 Va. HB 702 (to be codified as Va. CODE ANN. § 55-50 (1992)).
[11] Va. CODE ANN. § 5168 (1919) ("[N]either the owner of the dominant nor the servient portions of the land have power to adversely interfere with their proper use and enjoyment.").
[12] *See id.*
[13] Va. CODE ANN. § 55-50 (1950).
[14] 1992 Va. HB 702 (to be codified as Va. CODE ANN. § 55-50 (1992)).
[15] Va. CODE ANN. § 55-50 (1992).
[16] 2018 Va. SB 1080 (to be codified as Va. CODE ANN. § 55.1-304 (2019)).

III. Caselaw Interpretation and Application

Until very recently, the courts' scope, interpretation, and application of Section 55.1-304 and its identical predecessor, Section 55-50, have been sparse, and at times, inconsistent. For example, no court has published an opinion directly citing Section 55.1-304 since its ratification in 2019 until the Court of Appeals' opinion issued in August 2025 - just this past month (see note 2, *supra*). From 1992 to 2019 only a handful of published opinions are based on Section 55.1-304 and interpretation is minimal. No case addresses the requirement that an easement must exist for ten years before the servient estate owner can petition the court. In fact, at times courts have cited that portion of the statute and intentionally omitted the ten-year requirement altogether.[17]

Even the scope of applicability of 55.1-304 or 55-50 is not completely clear; the majority of cases relocate *express* easements, though one circuit court applied Section 55-50 to relocate an easement by prescription.[18] Until the very recent *Smith* opinion issued on August 19, 2025, the decisions lacked any comprehensive discussion of either the "undue hardship" or "economic damage" prongs of the statute.[19]

Courts have interpreted other components of the statute, however, including what constitutes "parties in interest,"[20] when acquiescence counts as an agreement,[21] and whether an agreement imparts a duty of good faith.[22] Yet, other key questions remain unanswered, such as which party is responsible for the costs of relocating the easement after the court grants the petition,[23] or why the restriction is set at ten years.

The majority of cases citing Section 55-50 focus on determining whether the parties were in agreement.[24] This trend likely comes from the Supreme Court of Virginia's curious decision to continue applying the mutual consent rule in 1994, 1996, and 2003, notwithstanding the *express* option to file a petition pursuant to Section 55-50 enacted in 1992.[25] As a result, several circuit

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[17] Ransone v. Pittman, 100 Va. Cir. 435, 437 (Lancaster Cnty. Cir. Ct. 2005) ("[A petition] may occur only after a hearing wherein the Court finds '(i) the relocation will not result in economic damage to the parties in interest' and '(ii) there will be no undue hardship created by the relocation . . . .'").

[18] Massie v. Cash, 1998 Va. Cir. LEXIS 604, at *3-4 (Amherst Cnty. Cir. Ct. 1998).

[19] *See, e.g.*, Taylor v. McConchie, 264 Va. 377, 384-85 (2002) (remanding to introduce evidence of a change in a turn that "adversely affected" vehicular and pedestrian access to the road).

[20] *Ransone*, 100 Va. Cir. at 437 ("By the plain meaning of the language in § 55-50 "the parties in interest" would include [servient estate owners and other parties with interest in the easement and estates].").

[21] Heyward v. Blue Ridge Lumber, 1998 Va. Cir. LEXIS 615, at *5-6 (Nelson Cnty. Cir. Ct. 1998) (accepting repayment for timber removed and not contesting further development of a new way).

[22] Starkweather v. Bullock, 32 Va. Cir. 120, 124 (Caroline Cnty. Cir. Ct. 1993) (mandating the servient estate owner act on the express grant to relocate the easement so that it was accessible and done in good faith).

[23] The District Court for the Eastern District of Virginia contemplated the answer to this question in one opinion, citing the Supreme Court of the United States, various federal Circuit Courts of Appeals, federal district courts, and other state authorities in the absence of any Virginia caselaw, concluding the movant would pay all costs; in the end, the claim faltered on other grounds. Columbia Gas Transmission, LLC v. Grove Ave. Developers, Inc., 2018 U.S. Dist. LEXIS 140942, at *7-9 (E.D. Va. 2018).

[24] *See, e.g.*, *Heyward*, 1998 Va. Cir. LEXIS 615 at *5-6.

[25] Shooting Point, LLC. v. Wescoat, 265 Va. 256, 265 (2003) ("We initially observe that, generally, when a fixed location of a granted easement is established, that location may be changed *only* with the express or implied consent of the persons interested.") (emphasis added); Buxton v. Murch, 249 Va. 502, 508 (1995) ("Even where there has been a definite location of an easement, it may be changed with the express or implied consent of the persons interested."); Fairfax Cnty. Park. Auth. v. Atkisson, 248 Va. 142, 148 (1994).

courts have followed this precedent.[26] Although some circuit courts have referenced the petition mechanism since 1992, the Supreme Court of Virginia has not yet issued an opinion recognizing it.[27] In the remaining cases, courts dismissed claims because the parties did not adequately show undue hardship or economic damage,[28] or did not file a petition at all.[29]

Virginia caselaw unevenly applies this Code section, if at all.[30] This inconsistency supports the addition of clear parameters to the statute so that those whose land is burdened by an easement are aware of their rights and legal opportunities to relocate or modify such easements when certain clear parameters are satisfied.

IV. Other Authorities - *Easements and Change*:

A leading law review article summarizing the UERA and the current state of the law across the United States was published in 2022 by the Baylor Law Review, titled *Easements and Change*.[31] The article provides compelling reasons for Virginia to expand its current, relatively limited law. For example, the article addresses one common criticism of the UERA that servient estate owners will seize this change in the law to upend dominant tract easements, which would create short term instability, erode trust between parties, and provoke unnecessary litigation.[32] In response, it points out how this fear has not played out in states with UERA provisions, as in Massachusetts.

Under a utilitarian lens, even if there is short term uncertainty, the long term flexibility will lead to more efficient land allocation over time.[33] This flexibility is most important in cases of changed circumstances; where a restrictive system would fail to account for the changes, but where the flexible UERA system would thrive.[34] Similarly, it notes that the "carefully modulated rules for an easement relocation proceeding" will also mitigate the uncertainty of the number of claims under the UERA by providing predictable outcomes.[35]

Given that Virginia already has a statute that goes at least part of the way to remedy the problem identified by the UERA's drafters, but arguably does not go far enough, the Study Group concluded that, rather than adopt the UERA in full or even to the extent reflected in the bill that passed, the existing statute can be more simply modified to broaden its applicability beyond access

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[26] *Massie*, 1998 Va. Cir. LEXIS 604 at *7-8 (Amherst Cnty. Cir. Ct. 1998) ("Virginia has recently affirmed the long standing rule that a right of way can only be moved by the agreement of both the owners of the dominant property and the owners of the servient property."); *Starkweather*, 32 Va. Cir. at 123.
[27] *Ransone*, 100 Va. Cir. at 437.
[28] *Id.* ("Plaintiffs, who bear the burden of proof, failed to prove to the Court in their case in chief either element (i) or (ii) above which are prerequisites for the court relocating a right of way pursuant to § 55-50.").
[29] Morris v. Whitley, 50 Va. Cir. 320, 325 (Nelson Cnty. Cir. Ct. 1999) ("[N]o no specific request has been made pursuant to this Statute.").
[30] To further illustrate this point, even Michie's Jurisprudence still only lists the change by consent rule without any mention of a petition to a court as an alternative. 6B M.J. Easements § 22.1 ("Even where there has been a definite location of an easement, it may be changed with the express or implied consent of the persons interested.") (citing *Shooting Point, L.L.C.*, 265 Va. at 265).
[31] John A. Lovett, *Easements and Change*, 74 BAYLOR L. REV. 1 (2022).
[32] *Id.* at 77.
[33] *Id.* at 80.
[34] *Id.* at 85-87.
[35] *Id.* at 80.

easements, remove the 10-year requirement, and add the UERA's clear standards for when a court should grant a petition for relocation or modification of an easement.

V. Summary of House of Delegates Civil Subcommittee Hearing:

The General Assembly treated the UERA favorably since the General Assembly's first attempt to pass House Bill 1721 in 2024; the House Courts of Justice Committee Civil Subcommittee hearing on January 15, 2025 confirmed that continued sentiment.[36] For example, Delegate Watts expounded the value of uniformity in certain areas of the law, notwithstanding small variations across jurisdictions. Delegate Marcus B. Simon clarified that one such variation in the revised bill is the list of exclusions for certain easements based on public feedback, namely, railroad, public service corporation, conservation, and telecommunication easements.

After hearing from the Uniform Law Commission drafting representative, Ms. Dyke, Delegate Simon acknowledged the UERA is a "no harm, no foul" law, because servient estate owners can only prevail upon a petition to the court if the change does not materially impact the dominant estate owner's use of the easement; it should not cause any major issues if the General Assembly chose to implement it. John Lovett, the author of the Baylor Law Review article, spoke as a witness and noted that the UERA approach will allow courts to provide fairer determinations than if the Commonwealth retained the statute as written. His perspective highlighted why Virginia, which already allows a petition for relocation in limited circumstances, would benefit from changes.

The only question the Subcommittee deferred to a floor vote was the question of whether the UERA provisions, if enacted, should *retroactively* apply; this question came from Yvonne Rorrer's testimony about pending lawsuits in Patrick County Circuit Court (Case No. CL23000693 and Case No. CL2000799) which have been impaired by various interpretations of the ten-year limitation without caselaw to establish which is correct.[37] Even in tabling the discussion about a retroactivity provision, the Subcommittee fully acknowledged the inequitable result of Ms. Rorrer's situation under the current statute and spoke about how the UERA would prevent similar problems in the future. At the end of the hearing, no one spoke in opposition to the vote; the vote to pass House Bill 1721 as written was unanimous.[38]

VI. Draft Legislation:

Based on the foregoing considerations, the Study Group determined that certain elements of the UERA should be incorporated into Virginia's existing statutory framework and that certain features of the current law should be changed. Specifically, the Study Group recommends that Va. Code § 55.1-304 be expanded to cover more than just access easements; it should cover the same categories of easements as recommended in the UERA, subject to certain exclusions for public utility facilities and conservation easements (as provided in the UERA) and others previously recommended, such as telecommunications easements. Additionally, there appears to

[36] Virginia House of Delegates Civil Subcommittee, *supra* note 7, at 1:02:49.
[37] *Id.* at 1:17:20. In her suit, one side claims the easement was created within the last ten years, but the other side argues it was in existence before that time. This dispute illustrates the need for the Conference to provide a clear scope in its suggested revision.
[38] *Id.* at 1:24:27.

be no rationale for continuing the requirement that the easement must have existed for ten years. The Study Group found the UERA standards for when a court should grant a petition to be clear and fair-minded, so those standards were carried over from the UERA into the Study Group's draft legislation.

Most notably, the suggested revised legislation:

- Contains limited definitions;
- Clarifies that the article applies to all types of easements, including those established by prescription, implication, necessity, estoppel, or other method, in addition to express or reserved easements;
- Maintains the list of excluded groups based on the UERA language as well as additional exclusionary language based on feedback to the General Assembly;
- Uses the UERA relocation standards;
- Removes the ten-year requirement;
- Designates the party filing the petition to be responsible for all relocation expenses;
- Applies language about notice to all parties with an interest in the dominant and servient estates;
- Retains the § 55.1-304 provision that an easement may be relocated by mutual consent by recording a written agreement between the parties.

RECOMMENDATION FOR CHANGE:

The Study Group concluded the current provision of Section 55.1-304 should be amended to add clarity and additional direction to the judiciary in reviewing matters brought forward in litigation to relocate or modify an easement. Because litigation is pending, however, the Study Group recommends holding legislation until litigation concludes.

RECOMMENDATION TO CARRY-OVER FOR FURTHER STUDY:

Introduction of recommended legislation should be delayed pending resolution of litigation. Further study is not recommended unless the outcome of the litigation and any resulting court decisions raise issues that warrant further consideration.

EXHIBITS:

- Exhibit 1 - House Bill 1721
- Exhibit 2 – Senate Bill 1435
- Exhibit 3 - Recommended Legislation & Summary
- Exhibit 4 - Uniform Easement Relocation Act
  a. Uniform Law Commission Summary
  b. Uniform Law Commission Statement of Support
  c. Uniform Easement Relocation Act Draft Legislation
- Exhibit 5 - Relevant Case Law
- Exhibit 6 - Baylor Law Review Article
- Exhibit 7 - Restatement Servitudes - Section 4.8

#4920-3526-7683.3

2025 SESSION

ENROLLED

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend the Code of Virginia by adding in Chapter 1 of Title 25.1 a section numbered 25.1-110 and by adding in Chapter 3 of Title 55.1 an article numbered 1.1, consisting of sections numbered 55.1-315.1 through 55.1-315.12, relating to condemnation of conservation or open-space easement; compensation; Uniform Easement Relocation Act.

[H 1721]

Approved

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 1 of Title 25.1 a section numbered 25.1-110 and by adding in Chapter 3 of Title 55.1 an article numbered 1.1, consisting of sections numbered 55.1-315.1 through 55.1-315.12, as follows:

§ 25.1-110. Condemnation of conservation or open-space easement; compensation.

Notwithstanding any other provision of law, if a person takes by condemnation proceedings any land or right-of-way or similar interest therein that is subject to a conservation easement, as such term is defined in § 10.1-1009, or an open-space easement, as such term is defined in § 10.1-1700, the person, in addition to any compensation determined under the provisions of this title, shall compensate, in amounts proportionate to the land or interest therein being condemned, (i) the Commonwealth for the value of any tax credit received by the landowner under the provisions of the Virginia Land Conservation Incentives Act of 1999 (§ 58.1-510 et seq.) during the pendency of the conservation easement or open-space easement and (ii) the locality in which the land or interest therein is located for any property tax avoided by the landowner during the pendency of the conservation easement or open-space easement.

Compensation required to be paid to the Commonwealth under clause (i) shall be in addition to (1) any compensation required by the provisions of the conservation easement due to the landowner and holder, as such term is defined in § 10.1-1009, or compensation required by the provisions of the open-space easement due to the landowner and the public body, as such term is defined in § 10.1-1700, and (2) fulfillment of the requirements of § 10.1-1704 pertaining to the conversion or diversion of open-space land.

Any compensation paid to the Commonwealth or the locality shall be used in a manner consistent with the conservation purposes of the conservation or open-space easement extinguished or open-space land that is converted or diverted.

The provisions of this section shall not apply to a natural gas utility, as defined by § 56-265.4:6, and a natural-gas company, as defined by 15 U.S.C. § 717a.

Article 1.1.

UNIFORM EASEMENT RELOCATION ACT.

§ 55.1-315.1. Definitions.

As used in this article, unless the context requires a different meaning:

"Appurtenant easement" means an easement tied to or dependent on ownership or occupancy of a unit or a parcel of real property.

"Conservation easement" means a nonpossessory property interest created for one or more of the following conservation purposes:

1. Retaining or protecting the natural, scenic, wildlife, wildlife-habitat, biological, ecological, or open-space values of real property;

2. Ensuring the availability of real property for agricultural, forest, outdoor-recreational, or open-space uses;

3. Protecting natural resources, including wetlands, grasslands, and riparian areas;

4. Maintaining or enhancing air or water quality;

5. Preserving the historical, architectural, archeological, paleontological, or cultural aspects of real property; or

6. Any other purpose under Title 10.1.

"Dominant estate" means an estate or interest in real property benefited by an appurtenant easement.

"Easement" means a nonpossessory property interest that:

1. Provides a right to enter, use, or enjoy real property owned by or in the possession of another; and

2. Imposes on the owner or possessor a duty not to interfere with the entry, use, or enjoyment permitted by the instrument creating the easement or, in the case of an easement not established by express grant or reservation, the entry, use, or enjoyment authorized by law.

"Easement holder" means:

1. In the case of an appurtenant easement, the dominant estate owner; or

2. In the case of an easement in gross, public utility easement, conservation easement, or negative easement, the grantee of the easement or a successor.

"Easement in gross" means an easement not tied to or dependent on ownership or occupancy of a unit or a parcel of real property.

"Lessee of record" means a person holding a lessee's interest under a recorded lease or memorandum of lease.

"Negative easement" means a nonpossessory property interest whose primary purpose is to impose on a servient estate owner a duty not to engage in a specified use of the estate.

"Person" has the same meaning as provided in § 8.01-2.

"Public utility easement" means a nonpossessory property interest in which the easement holder is a public service corporation or a municipal corporation as those terms are defined in § 56-1 or is a publicly regulated or publicly owned utility under federal law or laws of the Commonwealth or is a locality or another political subdivision of the Commonwealth. "Public utility easement" includes an easement, whether recorded, unrecorded, implied, prescriptive, or otherwise, benefitting a public service, including any easement containing facilities owned or operated by a public service corporation.

"Railroad easement" means an easement that provides the easement holder with the right to enter, use, or enjoy real property for the construction, operation, maintenance, or use of rail facilities, including trackwork, train controls, stations, and maintenance facilities. "Railroad easement" includes easements that are associated with and support rail facilities, including granting easements, drainage easements, and access easements.

"Real property" means an estate or interest in, over, or under land, including structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land whether or not described or mentioned in the contract of sale or instrument of conveyance. "Real property" includes the interest of a lessor and lessee and, unless the interest is personal property under law of the Commonwealth other than this article, an interest in a common-interest community.

"Record," used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"Security instrument" means a mortgage, deed of trust, security deed, contract for deed, lease, or other record that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor's interest under a lease, or title to the real property. "Security instrument" includes:

1. A security instrument that also creates or provides for a security interest in personal property;

2. A modification or amendment of a security instrument; and

3. A record creating a lien on real property to secure an obligation under a covenant running with the real property or owed by a unit owner to a common-interest community association.

"Security-interest holder of record" means a person holding an interest in real property created by a recorded security instrument.

"Servient estate" means an estate or interest in real property that is burdened by an easement.

"Telecommunications easement" means a nonpossessory property interest in which the easement holder is a telecommunications, cable, or broadband provider.

"Title evidence" means a title insurance policy, preliminary title report or binder, title insurance commitment, abstract of title, attorney's opinion of title based on examination of public records or an abstract of title, or any other means of reporting the state of title to real property that is customary in the locality.

"Unit" means a physical portion of a common-interest community designated for separate ownership or occupancy with boundaries described in a declaration establishing the common-interest community.

"Utility cooperative" means a nonprofit entity whose purpose is to deliver a utility service, such as electricity, oil, natural gas, water, sanitary sewer, storm water, or telecommunications, to its customers or members and includes an electric cooperative, rural electric cooperative, rural water district, and rural water association.

§ 55.1-315.2. Scope; exclusions.

A. Except as otherwise provided in subsection B, this article applies to an easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method.

B. This article shall not be used to relocate:

1. A railroad easement;

2. A public service corporation easement and any facility operated by a public service corporation;

3. An easement if the proposed location would encroach on an area of an estate burdened by a conservation easement or would interfere with the use or enjoyment of a public utility easement, a railroad easement, or an easement appurtenant to a conservation easement;

4. A telecommunications easement; or

5. Any easement held by the Commonwealth of Virginia or the Virginia Passenger Rail Authority.

C. This article does not apply to relocation of an easement by consent.

§ 55.1-315.3. Right of servient estate owner to relocate.

A servient estate owner may relocate an easement under this article only if the relocation does not materially:

1. Lessen the utility of the easement;

2. After the relocation, increase the burden on the easement holder in its reasonable use and enjoyment of the easement;

3. Impair an affirmative, easement-related purpose for which the easement was created;

4. During or after the relocation, impair the safety of the easement holder or another entitled to use and enjoy the easement;

5. During the relocation, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the servient estate owner substantially mitigates the duration and nature of the disruption;

6. Impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate; or

7. Impair the value of the collateral of a security-interest holder of record in the servient estate or dominant estate, impair a real-property interest of a lessee of record in the dominant estate, or impair a recorded real-property interest of any other person in the servient estate or dominant estate.

§ 55.1-315.4. Commencement of civil action.

A. To obtain an order to relocate an easement under this article, a servient estate owner shall commence a civil action in the circuit court of the city or county in which the easement or any part of the easement is located in accordance with the provisions of § 55.1-304.

B. A servient estate owner that commences a civil action under subsection A:

1. Shall serve a summons and petition on:

a. The easement holder whose easement is the subject of the relocation;

b. A security-interest holder of record of an interest in the servient estate or dominant estate;

c. A lessee of record of an interest in the dominant estate; and

d. Except as otherwise provided in subdivision 2, any other owner of a recorded real-property interest if the relocation would encroach on an area of the servient estate or dominant estate burdened by the interest; and

2. Is not required to serve a summons and petition on the owner of a recorded real-property interest in oil, gas, or minerals unless the interest includes an easement to facilitate oil, gas, or mineral development.

C. A petition under this section shall state:

1. The intent of the servient estate owner to seek the relocation;

2. The nature, extent, and anticipated dates of commencement and completion of the proposed relocation;

3. The current and proposed locations of the easement;

4. The reason the easement is eligible for relocation under § 55.1-315.2;

5. The reason the proposed relocation satisfies the conditions for relocation under § 55.1-315.3;

6. That the servient estate owner has made a reasonable attempt to notify the holders of any public utility easement, conservation easement, or negative easement on the servient estate or dominant estate of the proposed relocation; and

7. For all easements where the dominant estate holder is a local government, that the servient estate owner has made a written request to the governing body or appropriate agency of the locality to relocate the easement and that the request was denied.

D. At any time before the court renders a final order in an action under subsection A, a person served under subdivision B 1 b, c, or d may file a document, in recordable form, that waives its rights to contest or obtain relief in connection with the relocation or subordinates its interests to the relocation. On filing of the document, the court may order that the person is not required to answer or participate further in the action.

§ 55.1-315.5. Required findings; order.

A. The court may not approve relocation of an easement under this article unless the servient estate owner:

1. Establishes that the easement is eligible for relocation under § 55.1-315.2; and

2. Satisfies the conditions for relocation under § 55.1-315.3.

B. An order under this article approving relocation of an easement shall:

1. State that the order is issued in accordance with this article;

2. Recite the recording data of the instrument creating the easement, if any, and any amendments;

3. Identify the immediately preceding location of the easement;

4. Describe in a legally sufficient manner the new location of the easement;

5. Describe mitigation required of the servient estate owner during relocation;

6. Refer in detail to the plans and specifications of improvements necessary for the easement holder to enter, use, and enjoy the easement in the new location;

7. Specify conditions to be satisfied by the servient estate owner to relocate the easement and construct improvements necessary for the easement holder to enter, use, and enjoy the easement in the new location;

8. Include a provision for payment by the servient estate owner of expenses under § 55.1-315.6;

9. Include a provision for compliance by the parties with the obligation of good faith under § 55.1-315.7; and

10. Instruct the servient estate owner to record an affidavit, if required under subsection A of § 55.1-315.8, when the servient estate owner substantially completes relocation.

C. An order under subsection B may include any other provision consistent with this article for the fair and equitable relocation of the easement.

D. Before a servient estate owner proceeds with relocation of an easement under this article, the owner shall record, in the land records of each jurisdiction where the servient estate is located, a certified copy of the order under subsection B.

§ 55.1-315.6. Expenses of relocation.

A servient estate owner is responsible for reasonable expenses of relocation of an easement under this article, including the expense of:

1. Constructing improvements in accordance with an order under § 55.1-315.5;

2. During the relocation, mitigating disruption in the use and enjoyment of the easement by the easement holder or another person entitled to use and enjoy the easement;

3. Obtaining a governmental approval or permit to relocate the easement and construct necessary improvements;

4. Preparing and recording the certified copy required by subsection D of § 55.1-315.5 and any other document required to be recorded;

5. Obtaining any title work required to complete the relocation or required by a party to the civil action as a result of the relocation;

6. Purchasing applicable premiums for title insurance related to the relocation;

7. Engaging the services of any expert necessary to review plans and specifications for an improvement to be constructed in the relocated easement or on the dominant estate and to confirm compliance with the plans and specifications referred to in the order under subdivision B 6 of § 55.1-315.5;

8. Paying any maintenance cost associated with the relocated easement that is greater than the maintenance cost associated with the easement before relocation; and

9. Obtaining any third-party consent required to relocate the easement.

§ 55.1-315.7. Duty to act in good faith.

After the court, pursuant to § 55.1-315.5, approves relocation of an easement and the servient estate owner commences the relocation, the servient estate owner, the easement holder, and other parties in the civil action shall act in good faith to facilitate the relocation in compliance with this article.

§ 55.1-315.8. Relocation affidavit.

A. If an order under § 55.1-315.5 requires the construction of an improvement as a condition for relocation of an easement, relocation is substantially complete, and the easement holder is able to enter, use, and enjoy the easement in the new location, the servient estate owner shall:

1. Record, in the land records of each jurisdiction where the servient estate is located, an affidavit certifying that the easement has been relocated; and

2. Send, by certified mail, a copy of the recorded affidavit to the easement holder and parties to the civil action.

B. Until an affidavit under subsection A is recorded and sent, the easement holder may enter, use, and enjoy the easement in the current location, subject to the court's order under § 55.1-315.5 approving relocation.

C. If an order under § 55.1-315.5 does not require an improvement to be constructed as a condition of the relocation, recording the order under subsection D of § 55.1-315.5 constitutes relocation.

§ 55.1-315.9. Limited effect of relocation.

A. Relocation of an easement under this article:

1. Is not a new transfer or a new grant of an interest in the servient estate or the dominant estate;

2. Is not a breach or default of, and does not trigger, a due-on-sale clause or other transfer-restriction clause under a security instrument, except as otherwise determined by a court under law other than this article;

3. Is not a breach or default of a lease, except as otherwise determined by a court under law other than this article;

4. Is not a breach or default by the servient estate owner of a recorded document affected by the relocation, except as otherwise determined by a court under law other than this article;

5. Does not affect the priority of the easement with respect to other recorded real-property interests burdening the area of the servient estate where the easement was located before the relocation; and

6. Is not a fraudulent conveyance or voidable transaction under law.

B. This article does not affect any other method of relocating an easement permitted under law of the Commonwealth other than this article.

§ 55.1-315.10. Non-waiver.

The right of a servient estate owner to relocate an easement under this article shall not be waived, excluded, or restricted by agreement even if:

1. The instrument creating the easement prohibits relocation or contains a waiver, exclusion, or restriction of this article;

2. The instrument creating the easement requires consent of the easement holder to amend the terms of the easement; or

3. The location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, acquiescence, estoppel, or implication.

§ 55.1-315.11. Uniformity of application and construction.

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

§ 55.1-315.12. Relation to Electronic Signatures in Global and National Commerce Act.

This article modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but does not modify, limit, or supersede § 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in § 103(b) of that act, 15 U.S.C. § 7003(b).

2. That the provisions of Article 1.1 (§ 55.1-315.1 et seq.) of Chapter 3 of Title 55.1 of the Code of Virginia, as created by this act, shall not become effective unless reenacted by the 2026 Session of the General Assembly.

3. That the Boyd-Graves Conference shall conduct a study on the provisions of Article 1.1. (§ 55.1-315.1 et seq.) of Chapter 3 of Title 55.1 of the Code of Virginia, as created by this act. The Boyd-Graves Conference shall report any findings of such study to the Chairmen of the Senate and House Committees for Courts of Justice by November 1, 2025.

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SENATE BILL NO. 1435

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on January 29, 2025)

(Patron Prior to Substitute—Senator Perry)

A BILL to amend the Code of Virginia by adding in Chapter 1 of Title 25.1 a section numbered 25.1-110, relating to eminent domain powers of persons; compensation to the Commonwealth and localities.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 1 of Title 25.1 a section numbered 25.1-110 as follows:

§ 25.1-110. Condemnation of conservation easement; compensation.

Notwithstanding any other provision of law, if a person takes by condemnation proceedings any land or right-of-way or similar interest therein that is subject to a conservation easement, as such term is defined in § 10.1-1009, the person, in addition to any compensation determined under the provisions of this title, shall compensate (i) the Commonwealth in an amount equal to the value of any tax credit received by the landowner under the provisions of the Virginia Land Conservation Incentives Act of 1999 (§ 58.1-510 et seq.) during the pendency of the conservation easement and (ii) the locality in which the land or right-of-way is located (a) in an amount of any property tax avoided by the landowner during the pendency of the conservation easement and (b) if the right-of-way is located on property that is registered with the Virginia Landmarks Register and the National Register of Historic Places, in an amount equal to any additional value conferred upon the property during the period that the property was registered.

SUMMARY

Relocation or modification of easement by owner of servient estate. Establishes that any easement may be relocated or modified either (i) by filing with each clerk of the circuit court of the city or county in which the easement or any part of the easement is located a written agreement evidencing the consent of the easement holder, as defined in the bill, and the consent of any other affected persons or (ii) in the absence of such agreement, upon petition to the circuit court and notice to all interested parties. The bill also provides that certain easements enumerated in the bill shall not be subject to a relocation or modification upon petition to the circuit court. This bill is a recommendation of the Boyd-Graves Conference.

SENATE BILL NO. _____ HOUSE BILL NO. _____

A BILL to amend and reenact § 55.1-304 of the Code of Virginia, relating to relocation or modification of easement by owner of servient estate.

Be it enacted by the General Assembly of Virginia:

1. That § 55.1-304 of the Code of Virginia is amended and reenacted as follows:

§ 55.1-304. Relocation or modification of easement.

~~The owner of land that is subject to an~~ A. For the purposes of this section:

"Dominant estate" means an estate or interest in real property benefitted by an appurtenant easement.

"Easement holder" means (i) in the case of an appurtenant easement, the dominant estate owner or (ii) in the case of an easement in gross, the grantee of the easement or a successor.

"Servient estate" means an estate or interest in real property that is burdened by an easement.

B. Any easement ~~for the purpose of ingress and egress~~ may ~~relocate the easement, on the servient estate,~~ be relocated or modified by consent by recording in the office of the clerk of the circuit court of ~~the~~ each county or city in which the easement or any part of ~~such~~ the easement is located~~,~~ a written agreement evidencing the easement holder's consent and the consent of all other affected persons as may be required, such as trustees and beneficiaries of deeds of trust encumbering the dominant or servient estates, and setting forth the new location or modification of the easement.

C. In the absence of such written agreement, the ~~owner of the land that is subject to such easement~~ servient estate may seek relocation or modification of the easement ~~on the servient estate~~ upon petition to the circuit court and notice to all parties in interest. The petition shall be granted if, after proper notice and a hearing ~~held~~, the court finds that ~~(i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than 10 years~~ relocation or modification of the easement does not materially (i) lessen the utility of the easement; (ii) after the relocation or modification, increase the burden on the easement holder in its reasonable use and enjoyment of the easement; (iii) impair an affirmative, easement-

related purpose for which the easement was established; (iv) during or after the relocation or modification, impair the safety of anyone entitled to use the easement; (v) during the relocation, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the owner of the servient estate substantially mitigates the duration and nature of the disruption; or (vi) impair the value, use, or physical condition of the land benefitted by the easement. The owner of the servient estate shall pay all costs, except attorney fees, to relocate or modify the easement.

D. The provisions of subsection C apply to an easement established by express grant or reservation, including reciprocal easements, or by prescription, implication, necessity, estoppel, or other method, but may not be used to relocate or modify (i) a public service corporation easement or any facility operated by a public service corporation, (ii) a public utility easement or public utility facility whether publicly or privately owned, (iii) a conservation easement, (iv) an easement appurtenant to a conservation easement, (v) a telecommunications easement, or (vi) any easement if the proposed location would interfere with the use or enjoyment of those easements listed in clauses (i) through (v).

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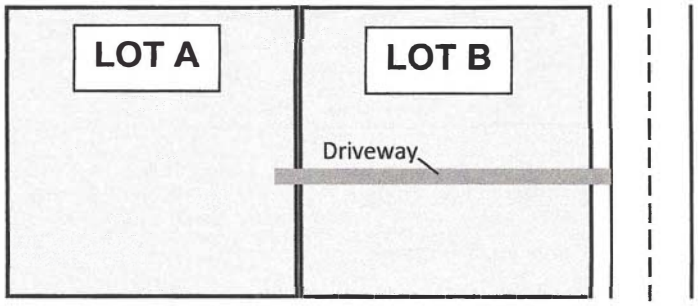
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THE UNIFORM EASEMENT RELOCATION ACT

- A Summary -

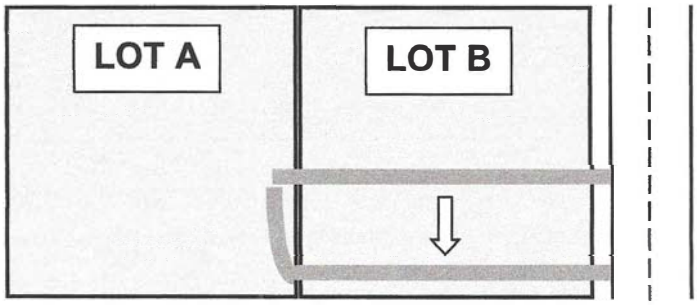
An easement is an interest in real property that gives the easement holder the right to use another person's land. For example, think of two neighboring lots A and B. Lot B is adjacent to a public highway, but Lot A has no access to the road. The owners of the two lots could negotiate an agreement for the owner of Lot A to construct a driveway across Lot B, connecting Lot A to the road. If the agreement is formalized and recorded in public land records, we would say that the owner of Lot A holds an *easement* allowing access to the property via the driveway across Lot B.



An easement like this one is legally tied to the property, not to the current owner. If either lot is transferred to a new owner, Lot A can still be accessed via the easement across Lot B. Thus, easements can endure for many years, even as the character and use of the properties change.

Easement Relocation

Now, consider what could happen if the owner of Lot B wants to develop the property. The easement allowing access to Lot A might restrict the development options. The owner of Lot B might prefer to relocate Lot A's driveway to another part of the property in order to create a larger area for development, as shown here:



In this situation, what rights does the easement holder have?

Under the traditional law of most states, an easement can be relocated only with the consent of both parties – the easement holder and the owner of the property burdened by the easement. But this power can be abused. In our example, the owner of Lot A could prevent the development of Lot B by withholding consent to relocate the driveway, even if the relocation had no major effect

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

on Lot A's access to the public road. In some cases, easement holders have used this power to demand a payment before consenting to a relocation.

Modernizing the Law

The Uniform Easement Relocation Act (UERA) modifies the rule requiring mutual consent for easement relocation. If the parties cannot agree, the UERA allows the owner of the burdened property (Lot B in our example) to get permission from a court to relocate an easement. The burdened property owner must provide advance notice of the relocation plan to parties who own an interest in the property served by the easement (Lot A), and any of them may object to the relocation in court.

Before the court allows easement relocation, the burdened property owner must show that the relocation would not materially:

- reduce the usefulness of the easement,
- impose a burden on the easement holder,
- impair a purpose for which the easement was created,
- impair the safety of anyone using the easement, or
- reduce the value or condition of the easement holder's property.

In addition, the burdened property owner must pay all the expenses of relocation and ensure that the easement holder's access is not disrupted during relocation.

Certain exceptions apply: the UERA does not allow relocation of easements held by public utilities, or easements that restrict development, such as conservation easements and negative easements.

Conclusion

The Uniform Easement Relocation Act corrects an imbalance of power that allows easement holders to unreasonably restrict development of another person's property. The act provides an alternative procedure for court-ordered easement relocation as a safety valve in case the owners of the properties affected by the easement cannot agree to terms. Enacting the UERA will encourage flexibility and cooperation between property owners and protect the property rights of both easement holders and the owners of land subject to an easement.

For more information about the Uniform Easement Relocation Act, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM EASEMENT RELOCATION ACT

An easement is a legal right to use another person's private property for a specific purpose. Easements are often granted to provide a right-of-way to access otherwise inaccessible property.

The Uniform Easement Relocation Act (UERA) was approved by the Uniform Law Commission in 2020 to modernize a common law rule that gives easement holders absolute power to restrict development of land burdened by an easement. The UERA should be enacted by states because:

- ***UERA encourages economic growth.*** States and municipalities benefit from greater tax revenue, new jobs, and new housing when land is developed. An easement can prevent property development, especially if it was granted years before development of the burdened land was economically viable. The UERA will provide a court-supervised safety valve to allow the development of properties subject to an easement.

- ***UERA protects property rights.*** Both the holder of an easement and the owner of property burdened by the easement have important property rights. The UERA ensures that relocation of an easement will not impede the easement holder's right-of-way to access land benefitted by an easement. At the same time, the UERA protects a burdened property's owner interest in achieving the highest and best use of its land without imposing any cost or burden on the easement holder.

- ***UERA helps prevent disputes***. Easements are a common cause of friction between neighboring property owners who may disagree about the existence of an easement or the terms of an easement's use. The UERA provides increased flexibility that can help resolve these disagreements or even prevent them from arising in the first place.

- ***UERA corrects an imbalance of power.*** Under the current law of many states, an easement holder can prevent development of another's land by withholding consent to easement relocation – even when relocation would not diminish the easement's utility to the easement holder. Some easement holders have abused this power by demanding ransom payments in exchange for consent. The UERA provides a court-supervised alternative for easement relocation that will prevent this type of abuse.

- ***UERA follows the modern legal trend***. In addressing easement relocation, at least twenty states have adopted some form of the UERA rule allowing unilateral relocation of an easement. The UERA is consistent with this modern trend and provides detailed procedural rules and safeguards when landowners seek to relocate an easement..

- ***UERA protects the environment.*** The UERA does not apply to conservation easements, meaning undeveloped land protected by a conservation easement will remain off-limits for relocation and development.

For more information about the Uniform Easement Relocation Act, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.

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UNIFORM EASEMENT RELOCATION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-NINTH YEAR
JULY 10–15, 2020

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 30, 2020

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 129th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up-to-date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

UNIFORM EASEMENT RELOCATION ACT

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

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KENNETH D. DEAN	Missouri
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OTHER PARTICIPANTS

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UNIFORM EASEMENT RELOCATION ACT

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UNIFORM EASEMENT RELOCATION ACT

Prefatory Note

I. Background

The Uniform Easement Relocation Act ("UERA" or "the act") is designed to provide a simple and practical solution to a problem that has confronted servient estate owners, easement holders, and courts for many decades in the United States. Before 2000, under the most widely employed common law rule, a servient estate owner whose property was burdened by an easement could not relocate the easement without the consent of the easement holder.[1] This rule, however, was not followed in every state. Some state courts drew on equitable balancing principles and occasionally allowed servient estate owners to relocate an easement without the consent of the easement holder, particularly if the change to the easement was relatively modest, the interests of the servient estate owner were substantial, or there was evidence of easement holder acquiescence.[2] Relying on a statute that permitted special proceedings for easement relocation, Kentucky courts occasionally allowed easements to be relocated.[3] Finally, grounded in its 200-year-old, civil law tradition, Louisiana law has long provided that "[i]f the original location [of a servitude] has become more burdensome for the owner of the servient estate or if it prevents him from making useful improvements on his estate, [the owner of the servient estate] may provide another equally convenient location for the exercise of the servitude which the owner of the dominant estate is bound to accept."[4]

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[1] *See, e.g.*, Stamatis v. Johnson, 224 P.2d 201, 202-03 (Ariz. 1950); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980); R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581, 588 (Wyo. 1999). *See also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7.13 (2020).

[2] *See, e.g.*, Enos v. Casey Mountain, Inc., 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988); Kline v. Bernardsville Ass'n, Inc. 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993); Vossen v. Forrester, 963 P.2d 157, 161-62 (Or. Ct. App. 1998); Southern Star Central Gas Pipeline, Inc. v. Murray, 190 S.W.3d 423, 430-31 (Mo. Ct. App. 2006); Umprhes v. J.R. Mayer Enters., Inc., 889 S.W.2d 86, 90 (Mo. Ct. App. 1994).

[3] Wells v. Sanor, 151 S.W.3d 819, 823 (Ky. Ct. App. 2004) ("Kentucky . . . follows a minority position that in addition to mutual consent also allows the owner of a servient estate to unilaterally modify or alter the location of a roadway easement so long as it does not change the beginning and ending points and does not result in material inconvenience to the rights of the dominant estate."); Stewart v. Compton, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); Terry v. Boston, 54 S.W.2d 909, 909-910 (Ky. 1932). *But see* Adams v. Pergrem, 2007 WL 4277900, at *3 (Ky. Ct. App. Dec. 7, 2007) (citing *Wells* and observing in dicta that "unless a granting instrument provides otherwise, an easement with a fixed location cannot be relocated without the express or implied consent of the owners of both the servient and the dominant estates"). The flexible approach used by Kentucky courts has its origins in a now repealed statute that allowed for a special court proceeding to approve easement relocations. F.M. English, Annotation, *Relocation of Easements*, 80 A.L.R.2d 743, § 9 (1961).

[4] La. Civ. Code Ann. art. 748 (2020). For a detailed discussion of servitude relocation in Louisiana and another mixed jurisdiction with strong civil law roots, see John A. Lovett, *A New Way, Servitude Relocations in Scotland and Louisiana (A Comparative Mixed Jurisdiction Analysis)*, 9 EDIN. L. REV. 352 (2005).

Moreover, Louisiana law has always required the expenses of a unilateral servitude relocation to be "borne by the owner of the servient estate."[5]

In 2000, the American Law Institute altered the landscape of easement and servitude relocation in the U.S. when it promulgated Section 4.8(3) of the Restatement (Third) of Property: Servitudes (the Restatement). The Restatement offered an approach to easement relocation that essentially adopts the civil law approach used in Louisiana and much of the rest of the world and allows a servient estate owner to relocate an easement on the following terms:

> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
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> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.[6]

A number of state courts, including several state supreme courts, have robustly adopted the Restatement approach to easement relocation.[7] Some state courts rejected the Restatement approach.[8] Still other state courts adopted the Restatement approach but

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[5] *Id*. Similarly, the Louisiana Civil Code has always allowed the owner of a servient estate burdened by a legal servitude of passage benefitting an enclosed estate (the civil law analogue of an easement by necessity) to relocate the servitude "to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate." La. Civ. Code art. 695.

[6] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3) (2000).

[7] *See, e.g.*, Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1237-39 (Colo. 2001) (adopting Section 4.8(3) to govern applications for relocation of irrigation ditch easements); Clinger v. Hartshorn, 89 P.3d 462, 469 (Colo. Ct. App. 2003) (affirming *Roaring Fork* and holding that trial court did not abuse its discretion in concluding that relocation of prescriptive access easement used for guiding and outfitting purposes was improper due to increased burden it imposed on dominant tenement); M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057-59 (Mass. 2004) (adopting section 4.8(3)); Carlin v. Cohen, 895 N.E.2d 793, 796-799 (Mass. App. Ct. 2008) (applying *MPM Builders* to hold that servient owner was entitled to relocate specifically defined pedestrian beach access easement on Martha's Vineyard); R & S Investments v. Auto Auctions, Ltd., 725 N.W.2d 871, 879-881 (Neb. Ct. App. 2006) (adopting Section 4.8(3) to approve the unilateral relocation of a sanitary sewer lagoon easement given that the creating instrument did not expressly deny the servient owner the power to relocate, even though the new lagoon was further away from the dominant estate).

[8] Weston St. Hartford, LLC v. Zebra Realty, LLC, 219 A.3d 844, 851-54 (Conn. App. Ct. 2019); Stowell v. Andrews, 194 A.3d 953, 964-66 (N.H. 2018); Alligood v. LaSaracina, 999 A.2d 836, 839 (Conn. App. Ct. 2010); AKG Real Estate, LLC v. Kosterman, 717 N.W.2d 835, 842-847 (Wisc. 2006) (rejecting proposed relocation of right of way easement under, *inter alia*, the

limited its application to undefined easements,[9] sub-surface easements,[10] or non-express easements such as easements by necessity,[11] or prescriptive easements.[12]

In states where reported judicial decisions have yet to confront the issue, either the mutual consent rule or the equitable balancing approach still prevails. In Illinois, the law is in flux but seems to be moving in the direction of the Restatement approach.[13] Finally, it should be noted that prior to the promulgation of the Restatement a handful of courts had also rejected the mutual consent rule in the context of easements created by implication based on prior use,[14] or implied by reliance on recorded subdivision plats.[15]

In the years preceding and following the promulgation of the Restatement, a handful of states also enacted statutes that allow for the relocation of specific kinds of

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unilateral relocation rule found in section 4.8(3)); MacMeekin v. Low Income Housing Institute, Inc., 45 P.3d 570, 578-79 (Wash. Ct. App. 2002); Herren v. Pettengill, 538 S.E.2d 735, 736 (Ga. 2000). *See also* Sweezey v. Neel, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach as applied to surface easement but allowing servient estate owner to "bend the easement" around a new addition to his house).

[9] Lewis v. Young, 705 N.E.2d 649, 653-54 (N.Y. 1998) (relying on tentative draft of Section 4.8(3) and holding that a servient estate owner may unilaterally relocate an easement that lacks a metes and bounds description or other indication of the easement's location); Stanga v. Husman, 694 N.W.2d 716, 718-720 (S.D. 2005) (approving modification of an express ingress and egress easement whose location was not specified in the creating instrument); St. James Village, Inc. v. Cunningham, 210 P.3d 190, 193-196 (Nev. 2009) (adopting section 4.8(3) but limiting its scope to situations when the creating instrument does not define the easement through specific reference to its location or dimensions).

[10] Roy v. Woodstock Community Trust, Inc. 94 A.3d 530, 537-40 (Vt. 2014).

[11] Goodwin v. Johnson, 591 S.E.2d 34, 37-39 (S.C. Ct. App. 2003) (applying Restatement § 4.8(3) to approve unilateral relocation of easement of necessity). Several decisions predating or not citing the Restatement also declined to apply the mutual consent rule to easements of necessity. Bode v. Bode, 494 N.W.2d 301, 302 (Minn. Ct. App. 1992); Huggins v. Wright, 774 So.2d 408, 412 (Miss. 2000).

[12] McNaughton Properties, LP v. Barr, 981 A.2d 222, 225-229 (Pa. Super. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression and limiting *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997), which recognized possibility of unilateral relocation if the new easement location is as safe as the original, the relocation is a *relatively minor change,* and the reasons for relocation are substantial, to prescriptive easements).

[13] *See* McGoey v. Brace*,* 918 N.E.2d 559, 563-567, 569 (Ill. Ct. App. 2009) (holding that the approach of section 4.8(3) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not "substantial" and indicating that when evaluating the "substantiality" of a proposed relocation, courts should examine the burden and harm to the dominant estate owner resulting from the relocation in light of the policy factors set forth in the Restatement); 527 S. Clinton, LLC v. Westloop Equities, LLC, 932 N.E.2d 1127, 1138 (Ill. Ct. App. 2010) (citing *McGoey* and the Restatement and holding that a servient estate owner may modify or relocate an easement "so long as the changes would not cause substantial harm to the dominant estate"); 527 S. Clinton, LLC v. Westloop Equities, LLC, 7 N.E.3d 756, 768 (Ill. Ct. App. 2014) (citing and discussing the "substantiality of the change" analysis stated in *McGoey* approvingly).

[14] Millson v. Laughlin, 142 A.2d 810, 813-816 (Md. 1958).

[15] Enos v. Casey Mountain, Inc., 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988).

easements without the consent of the easement holder as long as the relocated easement provides the same functional benefit to the easement holder. These particularized easement relocation statutes apply to ingress and egress easements in Idaho and Virginia,[16] and to irrigation easements in Idaho and New Mexico.[17] As some form of unilateral easement relocation is currently permitted in 20 states but is either prohibited by the common law or uncertain in the remaining states, U.S. law currently lacks uniformity.[18]

The UERA responds to this disharmony by adopting the approach long practiced in Louisiana, followed by a number of state statutes, embraced by a number of leading state court decisions adopting the Restatement, and even recently embraced by prominent judicial decisions abroad.[19] A number of rationales support the approach to easement relocation adopted in the UERA. First, and most fundamentally, relocation of an easement under the act will increase the overall utility of a servient estate without reducing the functional benefit of an easement to the easement holder. Second, many easement agreements are drafted by parties who give little attention to the immediate location of an easement or to its future relocation. When circumstances change, the mutual consent rule can create a bilateral monopoly that allows the easement holder to demand a ransom payment in exchange for consent to relocate the easement. The UERA provides an important safety valve in this situation by allowing a servient estate owner to relocate an easement, subject to judicial oversight, and thus avoid economic waste of the servient estate. Third, permitting a servient estate owner to relocate an easement under the UERA will rebalance the relationship between the servient estate owner and an easement holder in the context of changed conditions. Under a well-established common law rule, an easement holder is entitled "to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the [easement]," and the "manner, frequency and intensity" of the use can change (and even increase) over time "to take advantage of developments in technology and to accommodate normal development of

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[16] IDAHO CODE § 55-313 (Michie Supp. 2010) (authorizing change of private access roads across private lands at landowner's expense if change is "made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access"); VA. CODE ANN. § 55.1-304 (formerly cited as VA. ST. § 55-50) (authorizing judicial relocation of an easement "for the purpose of ingress and egress," after notice and hearing, if the court finds that "(i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than 10 years").

[17] IDAHO CODE § 18-4308 (Michie Supp. 2010) (allowing owner of a servient estate burdened by an irrigation ditch easement to relocate ditch at its own expense if relocation is achieved without impeding water flow or injuring any water user); IDAHO CODE § 42-1207 (Michie Supp. 2010) (same); N.M. STAT. § 73-2-5 (allowing for relocation of irrigation ditches "so long as such alteration or change of location shall not interfere with the use of or access to such ditch by the owner of the dominant estate").

[18] For a detailed discussion of U.S. case law preceding and following the promulgation of the Restatement, see John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 26-32 (2005).

[19] *Linvestment CC v. Hammersley et al*, 3 S.A. L. Rep. 283 (South Africa Sup. Ct. App. 2008).

the dominant estate or enterprise benefitted by [the easement]."[20] The UERA remedies the imbalance in favor of developing a dominant estate created by the reasonable use rule and the mutual consent rule for easement relocation by establishing flexibility and elasticity on both sides of an easement relationship. It does this by allowing the servient estate owner, as well as the dominant estate owner, to respond to changing conditions that make either parcel ripe for new development. Next, by making it possible for a servient estate owner to relocate an easement in the face of easement holder opposition, the UERA, like the Restatement rule, "will encourage the use of easements and lower their price by decreasing the risk [that] easements will unduly restrict future development of the servient estate."[21] Finally, the UERA will lower the temperature of disputes surrounding recognition of non-express easements, such as easements created by estoppel, implication, necessity, or prescription, because these kinds of easements will also be subject to possible relocation if they prevent future development of the servient estate.

One overarching goal of the UERA is to ensure that relocation of an easement does not cause material harm to the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate and, thus, protects those parties' rights both retroactively and prospectively. The act borrows key ideas from the Restatement but departs in several important respects. First, the act excludes certain categories of easements from relocation and prohibits relocation in several other specific situations. Next, the act adds several substantive conditions for an easement relocation and clarifies a fundamental aspect of the Restatement approach. Third, the act prohibits servient estate owners from engaging in self-help and instead requires servient estate owners seeking to use the act to file a civil action and serve a summons and complaint or petition (and thus provide notice to) the easement holder whose easement is subject to the proposed relocation and other interested persons. The act also specifies the contents of the complaint or petition and specifies the determinations a court must make to approve a proposed easement relocation. Finally, the UERA addresses several other issues that

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[20] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 (2000). The only limitation on this ability to change the use of an easement (or servitude), according to the Restatement, is that "the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." Id. See also JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 8.3 (2020) ("Reasonable use [of an easement] is not fixed at a particular point, but may vary from time to time. . . . Absent specific provision to the contrary, the concept of reasonableness includes a consideration of changes in the surrounding area and technological developments. These factors provide a degree of elasticity in the scope of express easements."); Susan French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PR. PROB. TR. J. 1, 15 (2003) (explaining traditional rule that "the easement holder may increase use of the easement to accommodate normal development of the dominant estate without seeking the consent of the servient owner, subject only to the limitation that the increase in use must not unreasonably burden the servient estate" and pointing out that that the unilateral relocation right granted to the servient owner by Section 4.8(3) is "the reciprocal (though more limited) of the right given to the dominant owner to change use of the easement as needed for development of the dominant estate").

[21] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8, cmt. f (2000).

might arise in a judicial relocation under the act, including expenses, the limited effect of a relocation, waiver, and legal transition.

II. Scope

Section 3(a) makes clear that the substantive provisions of the act will apply to an easement regardless of the easement's method of creation. Thus, the act "applies to an easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method." Section 3(b)(1), however, enumerates three specific categories of easements that cannot be relocated under the act: (1) public-utility easements; (2) conservation easements; and (3) negative easements.

From the beginning of its work on the UERA, the Uniform Law Commission intended to exclude public-utility easements from the scope of the act because of their ubiquity and importance to local development and infrastructure maintenance. Although the substantive provisions of Section 4, standing alone, are sufficient to protect the interests of holders of public-utility easements, the Drafting Committee, following guidance from the Uniform Law Commission's Scope and Program Committee, tailored the act to exclude public-utility easements. A public-utility easement is defined broadly in Section 2(10) to mean "a nonpossessory property interest in which the easement holder is a publicly regulated or publicly owned utility under federal law or law of this state or a municipality." That section also specifies that the term "public-utility easement" includes "an easement benefitting an intrastate utility, an interstate utility, or a utility cooperative" to emphasize the breadth of this important exclusion.

Section 3(b)(2) provides additional protection to holders of public-utility easements by stating that a relocation cannot occur under the act if it "would interfere with the use or enjoyment of a public-utility easement." In other words, even if the easement subject to relocation itself is not a public-utility easement but the proposed new location for the easement would result in interference with a public-utility easement, the proposed relocation could not proceed without the consent of the holder of that public-utility easement.

The UERA excludes conservation easements because of their importance to many constituencies in the United States, because they are already carefully regulated under state law, including versions of the Uniform Conservation Easement Act (UCEA), and because they enjoy favorable state and federal tax treatment essential to their long-term sustainability that could be jeopardized by even the possibility of relocation. The definition of a conservation easement, found in Section 2(2), generally follows the definition of a conservation easement in UCEA but also recognizes that some state statutes allow for conservation purposes other than those specifically enumerated in UCEA. Thus, Section 2(2)(F) recognizes as an animating conservation purpose, whenever applicable in a particular state, "any other purpose under [cite to applicable state law]".

Section 3(b)(2) likewise provides additional protection to holders of conservation easements by stating that a relocation cannot occur under the act if it "would encroach on an area of an estate burdened by a conservation easement or would interfere with . . . an easement appurtenant to a conservation easement." Even if a proposed relocation of an easement would otherwise satisfy the requirements of Section 4 of the act, if the new location of the easement would encroach on an area of an estate burdened by a conservation easement (whether the original servient estate, the dominant estate, or some other estate that will be burdened by the relocated easement), the relocation cannot proceed because it might frustrate the purposes of the conservation easement. The language in Section 3(b)(2) preventing relocation if the new location interferes with the use or enjoyment of "an easement appurtenant to a conservation easement" contemplates, for instance, an easement used to access land burdened by a conservation easement.

Finally, the act also excludes any negative easement from relocation. The kind of negative easements, other than conservation easements, that would be excluded from relocation include easements of light or view and restrictive covenants prohibiting certain kinds of development or economic activity on a servient estate.

Section 3(c) makes clear that this act does not prevent a servient estate owner and an easement holder from relocating an easement by consent. In other words, a servient estate owner and an easement holder are free to relocate an easement outside of this act by mutual consent, unless otherwise limited or prohibited by applicable law. The power to locate an easement by mutual consent outside the act applies to another location on the servient estate or to another estate, assuming that estate owner consents to the relocation.

III. Substantive Criteria for Relocation

Section 4 is the core of the act. This section provides that a servient estate owner may relocate an easement "only if the relocation does not materially" impair the interests of the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate. One goal of the act is to ensure that relocation of an easement does not cause material harm to the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate. The materiality qualification in Section 4 is consistent with that goal because it permits a relocation only if its effects on the interests of the easement holder, security-interest holders, and others owning interests in the servient or dominant estate are immaterial (*i.e.*, negligible or trivial).

Sections 4(1) through 4(3) generally track the core conditions of the Restatement. However, Section 4(3) clarifies what is at stake in a proposed easement relocation—protection of the "affirmative, easement-related purpose for which the easement was created." As comment 7 to Section 4 explains in more detail, this provision means that an easement holder should not be able to block a proposed easement relocation simply by asserting that an easement was actually, though silently, created to give the easement holder some veto power over development on the servient estate. If that is the intention of the owner of another parcel of land or another unit of real property (or any other easement holder for that matter) that person can achieve such a goal by negotiating for

and obtaining a negative easement—precisely one of the property interests exempt from the scope of the act.

Sections 4(4) through 4(6) are substantive conditions not found in the Restatement. They provide additional protection for the easement holder and those who use the easement. Section 4(4) guarantees that a proposed easement relocation will not materially "during or after the relocation, impair the safety of the easement holder or another entitled to use and enjoy the easement." Concerns about the safety of using a relocated easement appear in many judicial decisions involving easement relocation. Section 4(5) assures that a relocation will not materially "during the relocation, disrupt the use and enjoyment of the easement . . . unless the servient estate owner substantially mitigates the duration and nature of the disruption." This section will be significant in any case in which an easement serves a dominant estate that is already in active use, whether commercial, industrial, or residential. Section 4(6) prevents an easement relocation if it would materially "impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate." For example, if a proposed relocation would significantly alter easement access points on the dominant estate and would impair the development potential of the dominant estate or would require material changes to improvements already constructed on the dominant estate, the relocation could not proceed.

Section 4(7) also addresses a subject not covered by the Restatement. It provides protection against impairment of the interest of a security-interest holder of record in the value of its collateral, a real-property interest of a lessee of record in the dominant estate, or a recorded real-property interest of any person in the servient or dominant estate.

IV. Procedural Requirements: Complaint, Parties, Service, Order, Recordation

Sections 5 and 6 are also important safeguards as they codify the rulings of several leading judicial decisions which embraced the Restatement approach to easement relocation but insisted that a non-consensual easement relocation can only occur with judicial approval.[22] Section 5(a) thus requires a servient estate owner seeking to relocate an easement under Section 4 to file a civil action. Section 5(b)(1) requires the servient estate owner to serve a summons and complaint or petition upon the easement holder whose easement is the subject of relocation and other interested persons such as a security-interest holder of record or a lessee of record with an interest in the dominant estate. In essence, Section 5(b)(1) establishes the necessary parties to an easement relocation proceeding and guarantees notice of the proceeding to those persons. Section 5(b)(2) provides a detailed rule addressing the particular kinds of mineral interest holders

[22] *See* Roaring Fork Club L.P. v. St. Jude's Co., 36 P.3d 1229, 1237-38 (Colo. 2001) (stating that a court is the appropriate forum to resolve disputes over easement relocation and advising that "to avoid an adverse ruling of trespass or restoration – the burdened owner should obtain a court declaration before commencing alterations"); M.P.M. Builders LLC v. Dwyer, 809 N.E.2d 1053, 1059 (Mass. 2004) (commenting that "the servient estate owner should seek a declaration from the court that the proposed changes meet the criteria in [Section] 4.8(3)" and "may not resort to self-help remedies").

that are exempt from service under Section 5(b)(1)(4). Section 5(c) details the information that the servient estate owner's complaint or petition must provide, including the requirement, under Section 5(c)(6), that it state "that the servient estate owner has made a reasonable attempt to notify the holders" of the excluded categories of easements of the proposed relocation. Section 5(d) provides a mechanism for waivers and subordination agreements to be filed in a relocation proceeding.

Section 6 focuses on the obligations of a court when confronted with a complaint seeking to approve an easement relocation. Section 6(a) specifies the findings a court must make before approving an easement relocation. Importantly, this section requires the court to make two findings: first, "the easement is eligible for relocation under Section 3;" and, second, the servient estate owner "satisfies the conditions for relocation under Section 4." Section 6(b) addresses the order authorizing the relocation and details the information that must be provided in the order. Section 6(c) gives a court discretion to "include any other provision consistent with this [act] for the fair and equitable relocation of an easement." Finally, Section 6(d) requires a servient estate owner that obtains approval for relocation to record, "in the land records of each jurisdiction where the servient estate is located, a certified copy of the order under subsection (b)." In most cases, this will be the first of two documents that must be recorded to complete an easement relocation. The second document will be the relocation affidavit specified in Section 9, which certifies that the easement has been relocated. When no improvements need to be constructed or altered for use of the relocated easement, the recordation of the order approving relocation under Section 6(d) will constitute completion of the relocation.

V. Other Matters – Expenses, Correlative Duty of Good Faith, Affidavit of Relocation, Limited Effect of Relocation, Non-Waiver, Severability, and Transitional Provision

The rest of the act addresses a number of ancillary yet important issues that may arise under a judicial relocation. Section 7 provides that a "servient estate owner is responsible for reasonable expenses of relocation of an easement under this [act]," and then enumerates in Sections 7(1) through 7(9) what those expenses might include.

Section 8 requires that, once the court issues an order under Section 6, all parties in the civil action must act in good faith to facilitate the relocation of an easement.

Section 9(a) provides that "[i]f an order under Section 6 requires the construction of an improvement as a condition for relocation of an easement, relocation is substantially complete, and the easement holder is able to enter, use, and enjoy the easement in the new location," the servient estate owner must record an affidavit attesting to this fact in the local land records and send, by certified mail, a copy of the affidavit to the easement holder and other parties. Subsection 9(b) assures that the easement holder continues to have the right to enter, use, and enjoy the easement in the current location until the affidavit attesting that the easement has been relocated is recorded and a copy is sent to the parties.

Section 10 addresses the limited effect of relocation of an easement under the act. The provisions in Section 10 are based on the fundamental premise that an easement relocation under the act does not create a new easement. Rather, it merely changes where the easement may be utilized by the easement holder to satisfy the affirmative, easement-related purposes for which the easement was created. Section 10(a)(5), however, provides that a relocation under the act "does not affect the priority of the easement with respect to other recorded real-property interests burdening the area of the servient estate where the easement was located before the relocation." This particular subsection limits the principle that a relocated easement retains the same priority as the original easement. It does so by stating that the retained priority principle has a circumscribed geographic reach. It only applies to "the area of the servient estate where the easement was located before the relocation." If an easement is relocated to some area of the servient estate burdened by another real property interest that was recorded on the servient estate after the establishment of the easement subject to relocation (or to another estate entirely), the relocated easement will not necessarily have priority over the other recorded real-property interests.[23]

Section 11 provides that the servient estate owner's right to relocate an easement "may not be waived, excluded, or restricted by agreement" and specifies that this rule of non-waiver applies "even if: (1) the instrument creating the easement prohibits relocation or contains a waiver, exclusion, or restriction of this [act]; (2) the instrument creating the easement requires consent of the easement holder to amend the terms of the easement, or (3) the location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, acquiescence, estoppel, or implication." Section 11(1), to be clear, deviates from the Restatement by strictly prohibiting the waiver of relocation rights in an instrument creating an easement. Section 11(3) represents a policy choice to reject the narrow approach to easement relocation followed by the courts in several states that limited application of the Restatement to undefined easements.[24] These provisions are all designed to assure that the act remains useful for years to come instead of being easily negated by boilerplate provisions inserted in easement agreements that attempt to restrict application of the act.

Sections 12, 13, and 15 are standard provisions found in many uniform acts promulgated by the Uniform Law Commission. Section 12 addresses uniformity of application and construction of the act. Section 13 addresses the relation of the act to the Electronic Signatures in Global and National Commerce Act. Section 15 is the Uniform Law Commission's standard severability provision.

Section 14 is the transitional provision and specifies that the act "applies to an easement created before, on, or after [the effective date of this [act]]." As explained in Comment 1 to Section 14, a relocation can only proceed under this act if the servient estate owner can "demonstrate that the relocated easement will continue to deliver to the easement holder . . . the same affirmative, easement-related benefits obtained at the

[23] *See* Comment 3 to Section 10 for further discussion and illustration.
[24] Lewis v. Young, 705 N.E.2d 649, 653-54 (N.Y. 1998); Stanga v. Husman, 694 N.W.2d 716, 718-720 (S.D. 2005); St. James Village, Inc. v. Cunningham, 210 P.3d 190, 193-196 (Nev. 2009).

easement's original location." Further, as Comment 2 to Section 14 observes, "[r]etroactive application of the act will not deprive the easement holder . . . of any of the functional benefits of the easement upon relocation and will not cause the easement holder . . . to suffer material harm, even during the relocation process, regardless of whether the act applies to an easement created before, on, or after the effective date of the act." Section 4(6) further assures that the relocation will not materially "impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate." Given all of these protections, retroactive application of the act will not constitute an uncompensated taking of private property under state or federal constitutional principles.[25]

[25] *See Statewide Construction, Inc. v. Pietri*, 247 P.3d 650, 656-57 (Idaho 2011) (holding that application of an Idaho statute, IDAHO CODE § 55-313, which gives a servient estate owner the right to relocate a motor vehicle access easement on terms similar to those found in the Restatement, was not an unconstitutional taking of private property without just compensation under either the Fifth Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly requires that the change must be made in a way "as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access" and because any relocation authorized by the statue will "provide the dominant estate holders with the same benefit they were entitled to under the easement in its original location").

UNIFORM EASEMENT RELOCATION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Easement Relocation Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Appurtenant easement" means an easement tied to or dependent on ownership or occupancy of a unit or a parcel of real property.

(2) "Conservation easement" means a nonpossessory property interest created for one or more of the following conservation purposes:

(A) retaining or protecting the natural, scenic, wildlife, wildlife-habitat, biological, ecological, or open-space values of real property;

(B) ensuring the availability of real property for agricultural, forest, outdoor-recreational, or open-space uses;

(C) protecting natural resources, including wetlands, grasslands, and riparian areas;

(D) maintaining or enhancing air or water quality; [or]

(E) preserving the historical, architectural, archeological, paleontological, or cultural aspects of real property[; or

(F) any other purpose under [cite to applicable state law]].

(3) "Dominant estate" means an estate or interest in real property benefitted by an appurtenant easement.

(4) "Easement" means a nonpossessory property interest that:

(A) provides a right to enter, use, or enjoy real property owned by or in the possession of another; and

(B) imposes on the owner or possessor a duty not to interfere with the entry, use, or enjoyment permitted by the instrument creating the easement or, in the case of an easement not established by express grant or reservation, the entry, use, or enjoyment authorized by law.

(5) "Easement holder" means:

(A) in the case of an appurtenant easement, the dominant estate owner; or

(B) in the case of an easement in gross, public-utility easement, conservation easement, or negative easement, the grantee of the easement or a successor.

(6) "Easement in gross" means an easement not tied to or dependent on ownership or occupancy of a unit or a parcel of real property.

(7) "Lessee of record" means a person holding a lessee's interest under a recorded lease or memorandum of lease.

(8) "Negative easement" means a nonpossessory property interest whose primary purpose is to impose on a servient estate owner a duty not to engage in a specified use of the estate.

(9) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(10) "Public-utility easement" means a nonpossessory property interest in which the easement holder is a publicly regulated or publicly owned utility under federal law or law of this state or a municipality. The term includes an easement benefiting an intrastate utility, an interstate utility, or a utility cooperative.

(11) "Real property" means an estate or interest in, over, or under land, including

structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land whether or not described or mentioned in the contract of sale or instrument of conveyance. The term includes the interest of a lessor and lessee and, unless the interest is personal property under law of this state other than this [act], an interest in a common-interest community.

(12) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Security instrument" means a mortgage, deed of trust, security deed, contract for deed, lease, or other record that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor's interest under a lease, or title to the real property. The term includes:

(A) a security instrument that also creates or provides for a security interest in personal property;

(B) a modification or amendment of a security instrument; and

(C) a record creating a lien on real property to secure an obligation under a covenant running with the real property or owed by a unit owner to a common-interest community association.

(14) "Security-interest holder of record" means a person holding an interest in real property created by a recorded security instrument.

(15) "Servient estate" means an estate or interest in real property that is burdened by an easement.

(16) "Title evidence" means a title insurance policy, preliminary title report or binder, title insurance commitment, abstract of title, attorney's opinion of title based on examination of public records or an abstract of title, or any other means of reporting the state of title to real property which is customary in the locality.

(17) "Unit" means a physical portion of a common-interest community designated for separate ownership or occupancy with boundaries described in a declaration establishing the common-interest community.

(18) "Utility cooperative" means a non-profit entity whose purpose is to deliver a utility service, such as electricity, oil, natural gas, water, sanitary sewer, storm water, or telecommunications, to its customers or members and includes an electric cooperative, rural electric cooperative, rural water district, and rural water association.

Legislative Note: *Paragraph (2)(F) allows a state to refer to a state law that specifies additional purposes that a conservation easement may serve other than those listed in paragraphs (2)(A) through (E).*

Comment

1. The foundational definition of "easement" in Section 2(4) is based on the Restatement (Third) of Property: Servitudes § 1.2(1) (2000) (hereinafter "Restatement"). The definitions of "appurtenant easement" and "easement in gross" used in Sections 2(1) and (6) are based on Restatement §§ 1.5(1) and (2). The definitions of "dominant estate" and "servient estate" used in Sections 2(3) and (15) are derived from Restatement §§ 1.1(1)(b) and (c).

2. The definition of easement in Section 2(4) does not include a license. A license is usually understood to be the permission to do something on the land of another person that, without the authority granted by the permission, would be a trespass or otherwise unlawful. Jon W. Bruce & James W. Ely, *The Law of Easements and Licenses in Land* §§ 1:4, 11:1 (2020). Unlike an easement, a license is generally revocable, can be created orally, is not transferable or assignable unless the parties specifically intend otherwise, and, most important, does not create a property interest in land. Id. §§ 1:4, 11:1. Despite these fundamental differences between an easement and a license, some courts have recognized that, under certain circumstances (when a license is coupled with ownership of personal property located on the land of the licensor or when a licensee has made significant expenditures in reliance on the license), equity can transform a revocable

license into an irrevocable license. Jon W. Bruce & James W. Ely, *The Law of Easements and Licenses in Land* §§ 11:7 - 11:9 (2020). Further, "[a]n irrevocable license is, for most purposes, the functional equivalent of an easement by estoppel." Id. § 11:7. As Section 3(a) makes clear, this act applies to easements created by estoppel. Thus, to the extent a license is recognized by a court as an irrevocable license, it should be understood as an easement by estoppel and thus would be subject to relocation under the act.

3. The definition of "easement" in Section 2(4) does not include any reference as to whether an easement "runs with the land" and benefits successive owners of a dominant estate or burdens successive owners of a servient estate because enforceability of an easement against successive owners depends, *inter alia*, upon compliance with the notice and recordation requirements under the state's recording act. In general, though, assuming compliance with other aspects of state law, an easement will run with the land and the benefits and burdens of an easement will pass automatically to successors. *See* Restatement § 1.1, cmts. a, b.

4. The definition of "conservation easement" in Section 2(2) is based in large part on the Uniform Conservation Easement Act (UCEA) § 1 (1981, last revised or amended 1987). Some modifications to that definition have been made to widen the scope of "conservation purposes" beyond those listed in UCEA. In addition, the definition of a conservation easement used in this section is not linked to a particular definition of a "holder" of a conservation easement as is the case under UCEA because today other entities and persons besides a "charitable organization, charitable association, or charitable trust," or a "governmental body," UCEA §§ 1(2)(i) and (ii), may be entitled to hold a conservation easement. As Section 2(2) makes clear, however, for a non-possessory property interest to be classified as a conservation easement it must serve one of the specific purposes enumerated in Sections 2(2)(A) through (E) or, whenever applicable in a particular state, "any another purpose" specifically authorized under applicable state law. *See* Section 2(2)(F). Further, as Section 2(5)(B) makes clear, the holder of a conservation easement is its grantee or a successor.

5. The definition of "easement holder" in Section 2(5) is derived from Restatement § 1.5 and includes, in the case of an appurtenant easement, the owner of the dominant estate, and, in the case of an easement in gross, a public-utility easement, conservation easement, or negative easement, the grantee of the easement or a successor. When a public-utility easement, conservation easement, or negative easement is an appurtenant easement rather than an easement in gross, the easement holder could be either the owner of the dominant estate or the grantee of the easement or a successor.

6. The definition of "lessee of record" in Section 2(7) substantially parallels the definition of security-interest holder of record in Section 2(14).

7. The term "negative easement" in section 2(8) is generally synonymous with the term "restrictive covenant." Restatement § 1.3, cmt. c. For a discussion of the historical evolution of negative easements and restrictive covenants at common law, see Restatement § 1.2, cmt. h. The Restatement defines a "restrictive covenant" as a

"negative covenant that limits permissible uses of land" and explains that a "'negative easement' is a restrictive covenant." Restatement § 1.3(3). As the Restatement comments further explain, "[t]he most common uses of negative easements in modern law have been to create conservation easements and easements for view." Restatement § 1.2, cmt. h. *See also* La. Civ. Code art. 706 (defining "[n]egative servitudes" as "those that impose on the owner of the servient estate the duty to abstain from doing something on his estate"); Joseph William Singer, *Property* 179 (4th ed. 2014) ("A right to do something on someone else's land is an affirmative easement. A right to prevent others from doing something on their own land is either a negative easement or restrictive covenant."); Jon W. Bruce & James W. Ely, *The Law of Easements and Licenses in Land* § 2:10 (2020) ("An affirmative easement authorizes the holder to make active use of the servient estate in a manner that, if no easement existed, would constitute a trespass. . . . . In contrast, a negative easement enables the holder to prevent the owners of the servient estate from doing things the owner would otherwise be entitled to do.").

8. The definition of "person" in Section 2(9) follows the standard definition of person used by the Uniform Law Commission and thus includes not only individuals and private entities, but also governmental entities, as they can be holders of conventional affirmative easements, conservation easements, negative easements, and public-utility easements.

9. The definition of a "public-utility easement" in Section 2(10) is intended to encompass both an investor-owned but publicly regulated utility as well as a publicly owned utility. A publicly owned utility is one owned by the government, including a state or municipal government or a special governmental entity created specifically to own a utility. The term includes an easement benefitting an interstate utility, an intrastate utility, or a utility cooperative to make clear that a wide spectrum of public utilities in the United States will be excluded from the scope of the act under Section 3(b).

10. The definition of "real property" used in Section 2(11) is taken almost verbatim from the Uniform Nonjudicial Foreclosure Act § 102(13) (2002). The term "real property" is used throughout the definitions found in Section 2, instead of the term "land," as found throughout the Restatement, because an easement will sometimes benefit or burden real property interests other than ownership of land – for example, condominium units or parts of buildings owned by condominium associations. Section 2(11) refers to the interest of a "lessor and lessee," rather than a "landlord and tenant," as in the Uniform Nonjudicial Foreclosure Act § 102(13), for the sake of consistency with other provisions of the act. The general reference to the interest of a lessor or lessee in this section has no bearing on the definition of a "lessee of record" in Section 2(7).

11. The definition of "record," used as a noun, found in Section 2(12), is the standard Uniform Law Commission definition.

12. The definitions of a "security instrument" and "security-interest holder of record" used in Sections 2(13) and 2(14) are based on the Uniform Nonjudicial Foreclosure Act §§ 102(19) and 102(10) (2002).

13. The definition of "title evidence" in Section 2(16) is taken almost verbatim from the Uniform Nonjudicial Foreclosure Act § 102(22) (2002).

14. The definition of "unit" in Section 2(17) is based on the Uniform Common Interest Ownership Act (UCIOA) § 103(35) (2008). *See also* UCIOA § 2-105(a)(5) (specifying the contents of a declaration in the context of a condominium or planned community). The term "common interest community" is defined in UCIOA § 103(9) (2008) as "real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration."

SECTION 3. SCOPE; EXCLUSIONS.

(a) Except as otherwise provided in subsection (b), this [act] applies to an easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method.

(b) This [act] may not be used to relocate:

(1) a public-utility easement, conservation easement, or negative easement; or

(2) an easement if the proposed location would encroach on an area of an estate burdened by a conservation easement or would interfere with the use or enjoyment of a public-utility easement or an easement appurtenant to a conservation easement.

(c) This [act] does not apply to relocation of an easement by consent.

Comment

1. Sections 3(a) and 3(b)(1) specify the categories of easements eligible and ineligible for relocation under the act. Section 3(b)(2) identifies three situations when an easement that is otherwise eligible for relocation cannot be relocated under the act.

2. Section 3(a) makes clear that all easements, other than the excluded categories, whether created by express grant or reservation, or by prescription, implication, necessity, estoppel, or any other method, are eligible for relocation under Section 4.

3. Section 3(b)(1) enumerates the three kinds of easements that may not be relocated under the act: public-utility easements; conservation easements; and negative easements.

4. Conservation easements are often included in the broader category of negative easements. Section 3(b)(1), however, lists both conservation easements and negative easements as excluded categories because of the importance of making clear to all potential users of the act that a conservation easement, as well as any other kind of negative easement, may not be relocated under the act.

5. Another example of a negative easement that would be ineligible for relocation under the act is an environmental covenant designed to restrict certain activities and uses of affected real property as a result of an environmental response project. The Uniform Environmental Covenants Act § 2(4) (2003) defines an environmental covenant as "a servitude arising under an environmental response project that imposes activity and use limitations." The term "environmental response project" is defined in the Environmental Covenants Act § 2(5) (2003). Although an affirmative right of way or parking easement that is connected to an environmental covenant could, in principle, be subject to relocation under this act, the relocation could only occur if the servient estate owner could satisfy the other requirements of the act. However, the environmental covenant itself would be ineligible for relocation because its "primary purpose" is to restrict activities and uses of the affected real property and thus would be characterized as a "negative easement," as that term is defined in Section 2(8) of the act.

6. Section 3(b)(2) explicitly provides that a relocation cannot occur under the act if the new location of the easement "would encroach on an area of an estate burdened by a conservation easement . . . ." This exclusion provides important additional protection to conservation easements. Even if a proposed relocation of an easement might satisfy all of the requirements of Section 4, if the new location of the easement would encroach upon an area of any estate burdened by a conservation easement (whether it is the original servient estate, the dominant estate, or some other estate that will be burdened by the relocated easement), the relocation could frustrate the purposes of that conservation easement. The possibility of such a relocation under the act would jeopardize the deductibility of conservation easements donated in the adopting state under federal tax statutes and regulations and, therefore, such a relocation is prohibited under the act.

7. Section 3(b)(2) also provides that a relocation cannot occur under the act if the relocation "would interfere with the use or enjoyment of a public-utility easement or an easement appurtenant to a conservation easement." This exclusion will prevent a relocated easement from causing any interference with the use or enjoyment of an existing public-utility easement located on the servient estate (or any other estate) or with an affirmative easement that may be appurtenant to a conservation easement, such as an easement providing access to land burdened by a conservation easement.

8. Section 3(c) makes clear that the act does not apply to the relocation of an easement agreed to by the servient estate owner and the easement holder. However, other

applicable law may limit or prohibit the relocation of certain kinds of easements by agreement. For example, federal and state laws generally prohibit the relocation of conservation easements. The freedom to relocate an easement by consent guaranteed by Section 3(c) can be used by a servient estate owner and an easement holder to relocate an easement to a parcel of land other than the servient estate burdened by the easement as long as the owner of the other estate consents.

SECTION 4. RIGHT OF SERVIENT ESTATE OWNER TO RELOCATE EASEMENT. A servient estate owner may relocate an easement under this [act] only if the relocation does not materially:

(1) lessen the utility of the easement;

(2) after the relocation, increase the burden on the easement holder in its reasonable use and enjoyment of the easement;

(3) impair an affirmative, easement-related purpose for which the easement was created;

(4) during or after the relocation, impair the safety of the easement holder or another entitled to use and enjoy the easement;

(5) during the relocation, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the servient estate owner substantially mitigates the duration and nature of the disruption;

(6) impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate; or

(7) impair the value of the collateral of a security-interest holder of record in the servient estate or dominant estate, impair a real-property interest of a lessee of record in the dominant estate, or impair a recorded real-property interest of any other person in the servient estate or dominant estate.

Comment

1. Section 4 sets forth the general rule for relocation of an easement under the act. The conditions in this section are intended to ensure that relocation of an easement does not cause material harm to the easement holder, security-interest holders, or owners of other recorded interests in the servient or dominant estate. Sections 4(1) through 4(3) generally mirror the Restatement. However, by including a materiality qualification applicable to all conditions, this section permits a relocation only if its effects on the interests of the easement holder, security-interest holders, and others owning recorded interests in the servient or dominant estate are "immaterial" (*i.e.*, negligible or trivial).

As the Supreme Judicial Court of Massachusetts explains, the Restatement rule "maximizes the overall property utility by increasing the value of the servient estate without diminishing the value of the dominant estate" and provides the additional benefit of minimizing "the cost associated with an easement by reducing the risk that the easement will prevent future beneficial development of the servient estate." *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004). By eliminating the absolute veto power of an easement holder, the Restatement rule actually "encourages the use of easements." *Id*. *See also Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1236 (Colo. 2001) (emphasizing that the Restatement rule "maximizes the overall utility of the land" because the "burdened estate profits from an increase in value while the benefitted estate suffers no decrease") (citing Restatement § 4.8(3), cmt. f). Section 4 of the act is generally consistent with the purposes of the Restatement but adds a number of additional safeguards. These additional safeguards are found in Sections 4(4) through 4(7), and they further protect the interests of the easement holder, security-interest holders, and owners of other recorded interests in the servient or dominant estate.

2. The introductory portion of Section 4 states that the right to relocate an easement belongs to the owner of a servient estate. Consequently, the act does not change the well-established common law rule that an easement holder may not unilaterally relocate an easement unless that right has been specifically reserved or granted in the creating instrument. *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004) (citing additional authority for rule that easement holder may not unilaterally relocate an easement); Restatement § 4.8(3), cmt. f. *But see McGoey v. Brace*, 918 N.E.2d 559, 563-567 (Ill. App. Ct. 2009) (holding that the approach of Section 4.8(3) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not "substantial").

3. The introductory portion of Section 4 does not require "a strong showing of necessity" as a condition to relocate an easement. *Cf., Kline v. Bernardsville Ass'n. Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993).

4. Sections 4(1), (2), and (3) generally track Section 4.8(3)(a)-(c) of the Restatement with some modification. Section 4(a)(2) specifies that an easement relocation cannot proceed if the new location would, "after the relocation, increase the burden on the easement holder in its reasonable use and enjoyment of the easement." *Cf.*,

Restatement § 4.8(3)(b) ("increase the burdens on the owner of the easement in its use and enjoyment"). Section 4(a)(3) uses the phrase "impair an affirmative, easement-related purpose." *Cf.,* Restatement § 4.8(3)(c) ("frustrate the purpose for which the easement was created"). Sections 4(4) through 4(7) are new substantive requirements not found in the Restatement.

5. One common set of factors that courts routinely consider in determining whether to allow an easement relocation to proceed under the Restatement or an analogous state statute relates to the specific route of the relocated easement (including its access points), its gradient, and its width. *See,* e.g., *Carlin v. Cohen*, 895 N.E.2d 793, 798-99 (Mass. App. Ct. 2008) (affirming trial court ruling that the owner of a servient estate was entitled to relocate a pedestrian beach access easement because the entry point of the relocated easement was not more difficult to reach than under the original easement, and, even though the owner of the dominant estate would have to walk over a knoll, there was no evidence the original easement path was more level); *Belstler v. Sheler*, 264 P.3d 926, 933 (Idaho 2011) (affirming trial court refusal to approve relocation of express ingress and egress easement under Idaho Code § 55-313 because relocation would have rendered road grades on easement substantially steeper than in original location and would have created hazard for owners of dominant estate in using the easement); *Welch v. Planning and Zoning Comm'n of E. Baton Rouge Parish*, 220 So. 3d 60, 65-68 (La. Ct. App. 2017) (holding that developer of new subdivision was not justified in unilaterally relocating a servitude under Article 748 of the Louisiana Civil Code because new rights-of-way provided over public roads were only 20 feet wide and thus diminished utility of servitude which provided for 30 foot wide right-of-way benefitting three enclosed lots). Any facts related to the route (including access points), gradient, and width of the relocated easement could be considered by a court under Sections 4(1) through 4(4) of the act.

6. Other factors that a court could consider in determining whether a proposed relocation satisfies Sections 4(1) through 4(3) include: (1) ease of access to a public road, including any change in the location of an access point on the dominant estate; (2) the length of an easement; (3) any physical damage to the dominant estate that would be caused by the relocation; and (4), in the case of an irrigation or flowage easement, the volume and velocity of liquids that could be transported by the relocated easement. Facts pertaining to possible physical damage to the dominant estate as well as negative effects on access points could also be addressed under Section 4(6).

Furthermore, using these same criteria, a court could consider whether a proposed relocation would have a negative impact on the quality or utility of improvements that already exist on the easement or on the dominant estate and the quality of proposed replacement improvements. Thus, if the owner of the servient estate proposes to build improvements on the relocated easement with materials or methods that would materially lessen the quality or utility of those improvements compared to the improvements used by the easement holder in the easement's current location, the court could reject the proposed relocation.

7. Section 4(3) specifically states that a servient estate owner should be entitled to relocation only if the relocation does not materially "impair an affirmative, easement-related purpose for which the easement was created." This section is intended to distinguish the express and primary entry, use, and enjoyment rights created by an affirmative easement eligible for relocation under the act from any unexpressed and ancillary negative powers that an easement holder might claim in connection with an affirmative easement, such as preventing the owner of the servient estate from developing that estate. *Compare Manning v. Campbell*, 268 P.3d 1184, 1187-88 (Idaho 2012) (holding that servient owner was not entitled to relocate a driveway access easement under Idaho Code § 55-313 because the relocated easement would not have connected to any existing route for vehicular travel and would have required owners of the dominant estate to construct a new driveway on their property across their front lawn, and, thus, would injure the owners of the dominant estate and their property), and *City of Boulder v. Farmer's Reservoir and Irrigation Co.*, 214 P.3d 563, 567-69 (Colo. App. 2009) (refusing to allow alteration of a ditch irrigation easement to facilitate a trail extension because the alteration of the easement would materially and adversely affect the maintenance rights that an irrigation company enjoyed by virtue of the easement), *with, M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). If an owner of a dominant estate actually wants to obtain a property interest in a servient estate that prevents development of that estate in some manner, the owner of the dominant estate can always negotiate for and acquire a negative easement—one of the easements that cannot be relocated under this act. *See* Section 3(b)(1).

8. Section 4(4) refers to the safety of the easement holder or another entitled to use the easement during and after the relocation. Courts have often considered the safety of individuals using the easement and public health and safety more generally, including the potential of a relocated easement to provide public health and safety benefits. *See R & S Inv's v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 876-78, 881 (Neb. Ct. App. 2006) (holding that servient owner could relocate an easement for a sanitary sewer lagoon, even though the new lagoon was located 500 feet farther away from dominant estate than the old one, because, *inter alia*, the servient owner constructed the new lagoon with greater wastewater capacity and all necessary piping and connections and thus alleviated serious environmental concerns related to the age of the old lagoon).

9. Section (4)(5) requires the court to consider whether the proposed relocation will materially, "during the relocation, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the servient estate owner substantially mitigates the duration and nature of the disruption." This section would thus justify a court order requiring an owner of a servient estate to complete construction of a new access road or driveway on the route of the relocated easement before diverting access or traffic away from the current easement location. The duty of the owner of the servient estate to mitigate disruption during the period in which improvements necessary for use and enjoyment of the relocated easement are being constructed is an important safeguard in the relocation process, particularly if a dominant

estate is already developed for active use. This safeguard goes beyond those employed in the Restatement to assure that relocation of an easement under the act does not cause any affirmative easement-related harm to the easement holder.

10. Section 4(6) addresses the interests of the easement holder in the "physical condition, use, or value of the dominant estate or improvements on the dominant estate." For instance, if the proposed relocation requires the construction of a new entry point or driveway on the dominant estate, and if the new entry point or driveway would be materially more expensive to maintain, materially more difficult to use, materially less safe than an existing entry point or driveway already located on the dominant estate, or would materially disrupt the use and enjoyment of the dominant estate in any other way, the proposed relocation could not proceed. Likewise, if a proposed relocation would materially impair, for example, woods, wildlife habitat, or watersheds on the dominant estate, the proposed relocation could not proceed. If a proposed relocation would have no material effect on the physical condition, use, or value of the dominant estate or improvements on the dominant estate, Section 4(6) would not be implicated.

11. Section 4(7) addresses the interests of a security-interest holder of record having an interest in either the servient or dominant estate, a lessee of record having a lessee's interest under a lease in the dominant estate, or the recorded real-property interest of any other person in the servient estate or dominant estate. If a security-interest holder of record having an interest in either the servient estate or dominant estate can show that the value of its collateral will be materially impaired by the proposed relocation of an easement, the relocation could not proceed. Similarly, if a lessee of record having a real-property interest in the dominant estate can show that this interest would be materially impaired by the proposed relocation, the relocation could not proceed.

The reference in Section 4(7) to "a recorded real-property interest of any other person in the servient estate or dominant estate" is intended to encompass persons such as the holder of another easement that burdens the servient estate or dominant estate, the owner of an interest in a common-interest community, or the owner of a mineral interest in the servient or dominant estate. For example, if a proposed relocation of an easement providing vehicular ingress and egress across a servient estate would result in the material impairment of an irrigation or drainage easement that also burdened the servient estate by reducing the volume of water that could be conveyed through that easement, the holder of the irrigation or drainage easement could assert its rights under Section 4(7) and block the proposed relocation. Similarly, if a proposed relocation of a typical access easement would encroach on a well site or other oil and gas facility constructed and operated pursuant to a recorded mineral interest affecting the servient or dominant estate, the proposed relocation could not proceed. Additionally, if a proposed relocation of an easement encroaches on an existing, recorded easement (other than a public-utility easement or conservation easement) and, notwithstanding the limitation found in Section 10(a)(5), would result in a change in the priority of the recorded easement that impaired the real-property interest of the affected easement holder, that person could, in principle, assert Section 4(7) and block the proposed relocation as a material impairment of the recorded easement.

12. A servient estate owner's right to relocate an easement eligible for relocation under this act is not affected by a limitation on the term or duration of an easement established by agreement. Although it is unlikely that an owner of a servient estate would seek judicial approval to relocate a short-term easement, nothing in this act prevents such an action.

SECTION 5. COMMENCEMENT OF CIVIL ACTION.

(a) To obtain an order to relocate an easement under this [act], a servient estate owner must commence a civil action.

(b) A servient estate owner that commences a civil action under subsection (a):

(1) shall serve a summons and [complaint] [petition] on:

(A) the easement holder whose easement is the subject of the relocation;

(B) a security-interest holder of record of an interest in the servient estate or dominant estate;

(C) a lessee of record of an interest in the dominant estate; and

(D) except as otherwise provided in paragraph (2), any other owner of a recorded real-property interest if the relocation would encroach on an area of the servient estate or dominant estate burdened by the interest; and

(2) is not required to serve a summons and [complaint] [petition] on the owner of a recorded real-property interest in oil, gas, or minerals unless the interest includes an easement to facilitate oil, gas, or mineral development.

(c) A [complaint] [petition] under this section must state:

(1) the intent of the servient estate owner to seek the relocation;

(2) the nature, extent, and anticipated dates of commencement and completion of the proposed relocation;

(3) the current and proposed locations of the easement;

(4) the reason the easement is eligible for relocation under Section 3;

(5) the reason the proposed relocation satisfies the conditions for relocation under Section 4; and

(6) that the servient estate owner has made a reasonable attempt to notify the holders of any public-utility easement, conservation easement, or negative easement on the servient estate or dominant estate of the proposed relocation.

(d) At any time before the court renders a final order in an action under subsection (a), a person served under subsection (b)(1)(B), (C), or (D) may file a document, in recordable form, that waives its rights to contest or obtain relief in connection with the relocation or subordinates its interests to the relocation. On filing of the document, the court may order that the person is not required to answer or participate further in the action.

Legislative Note: *A state should use the term "complaint", "petition", or both, in subsections (b) and (c) to describe any procedural means by which a cause of action may be asserted.*

Comment

1. Section 5(a) clarifies that an owner of a servient estate may not engage in self-help if it desires to relocate an easement and, therefore, must commence a civil action to obtain judicial approval to relocate an easement under the act. It thus codifies the rulings of the highest courts of several states that have adopted the Restatement approach to easement relocation but stated that judicial approval is required. *See Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1237-38 (Colo. 2001) (stating that a court is the appropriate forum to resolve disputes over easement relocation and advising that "to avoid an adverse ruling of trespass or restoration – the burdened owner should obtain a court declaration before commencing alterations"); *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1059 (Mass. 2004) (commenting that "the servient estate owner should seek a declaration from the court that the proposed changes meet the criteria in [section] 4.8(3)" and "may not resort to self-help remedies").

2. Section 5(b)(1) requires the owner of a servient estate seeking to relocate an easement under the act to serve a summons and a complaint or petition on: "(A) the easement holder whose easement is the subject of the relocation; (B) a security-interest holder of record of an interest in the servient estate or dominant estate; (C) a lessee of record of an interest in the dominant estate; and (D) except as otherwise provided in paragraph (2), any other owner of a recorded real-property interest if the relocation would encroach on an area of the servient estate or dominant estate burdened by the interest." The requirement to serve these persons guarantees that they will receive notice of the proposed relocation in a manner consistent with the applicable rules of civil procedure in the state. Once a civil action has been filed by the owner of the servient estate, the parties served may take advantage of all of the procedural rights provided under the applicable rules of civil procedure.

3. Section 5(b)(2) exempts from the service requirement of Section 5(b)(1)(D) "the owner of a recorded real-property interest in oil, gas, or minerals unless the interest includes an easement to facilitate oil, gas, or mineral development." Without this exemption, the act might be construed to require a servient estate owner to serve a summons and complaint or petition on many fractional mineral interest owners whose interest in severed, sub-surface minerals in either the servient or dominant estate would for, all practical purposes, be unaffected by the proposed relocation. This exemption applies to the holder of any severed interest in minerals, regardless of type, including a mineral interest, royalty interest, overriding royalty interest, net-profits interest, or working interest, unless "the interest includes an easement to facilitate oil, gas, or mineral development." Examples of easements created to facilitate oil, gas, or mineral development include an easement of ingress and egress established to provide vehicular access to a drill site or an easement established to construct, operate, or maintain a gathering line or pipeline. When a recorded mineral interest includes such an easement, Section 5(b)(2) requires services on the mineral interest owner.

If a dominant estate surface owner also holds an interest in minerals, the service requirement exemption found in Section 5(b)(2) would not apply, and thus a servient estate owner would be required to serve a summons and complaint or petition upon such a person.

4. The reference to a security-interest holder of record in Section 5(b)(1)(B) would include a secured party who holds a security interest in all or any part of either the servient or dominant estate.

5. The service requirement imposed under Section 5(b)(1)(D) contemplates, for example, a person who holds another recorded easement in the servient estate, if the proposed relocation would encroach on an area of that estate burdened by the easement. This section would give the other easement holder an opportunity to argue that the proposed relocation would result in a material impairment of the easement holder's real-property interest under Section 4(7).

6. Section 5(c) sets forth the required contents of the complaint or petition seeking relocation. The general purpose of these requirements is to provide an easement holder and other interested persons entitled to service with sufficient information to decide whether to consent or object to the proposed relocation.

7. Section 5(c)(6) specifically requires that the servient estate owner's complaint or petition state that the servient estate owner made a reasonable effort to provide notification to the holder "of any public-utility easement, conservation easement, or negative easement on the servient estate or dominant estate of the proposed relocation." As these categories of easements are excluded from the scope of the act under Section 3(b)(1) and conservation easements and public-utility easements are further protected from encroachments and interference under Sections 3(b)(2), the holders of such easements need not be served a summons and complaint or petition and thus become parties to a judicial easement relocation proceeding. If the act required such an easement holder to be served, there is a risk that a final judgment adverse to that holder's interests would be binding on that party. Section 5(c)(6), however, provides a mechanism to assure that the servient estate owner will provide notice to the holders of such easements so that a holder could intervene in the judicial proceeding if it saw a need.

8. Section 5(d) provides a mechanism for the filing of waivers and subordination agreements by parties who wish to consent to a proposed relocation and be dismissed from a judicial easement relocation proceeding.

SECTION 6. REQUIRED FINDINGS; ORDER.

(a) The court may not approve relocation of an easement under this [act] unless the servient estate owner:

(1) establishes that the easement is eligible for relocation under Section 3; and

(2) satisfies the conditions for relocation under Section 4.

(b) An order under this [act] approving relocation of an easement must:

(1) state that the order is issued in accordance with this [act];

(2) recite the recording data of the instrument creating the easement, if any, [and] any amendments[, and any preservation notice as defined under [cite to this state's marketable title act]];

(3) identify the immediately preceding location of the easement;

(4) describe in a legally sufficient manner the new location of the easement;

(5) describe mitigation required of the servient estate owner during relocation;

(6) refer in detail to the plans and specifications of improvements necessary for the easement holder to enter, use, and enjoy the easement in the new location;

(7) specify conditions to be satisfied by the servient estate owner to relocate the easement and construct improvements necessary for the easement holder to enter, use, and enjoy the easement in the new location;

(8) include a provision for payment by the servient estate owner of expenses under Section 7;

(9) include a provision for compliance by the parties with the obligation of good faith under Section 8; and

(10) instruct the servient estate owner to record an affidavit, if required under Section 9(a), when the servient estate owner substantially completes relocation.

(c) An order under subsection (b) may include any other provision consistent with this [act] for the fair and equitable relocation of the easement.

(d) Before a servient estate owner proceeds with relocation of an easement under this [act], the owner must record, in the land records of each jurisdiction where the servient estate is located, a certified copy of the order under subsection (b).

Legislative Note: *The bracketed language in subsection (b)(2) is applicable only in a state that has a marketable title act. The additional language requires a servient estate owner seeking to complete a relocation under the act to include in the order required by this section the recording data regarding a preservation notice filed by an easement*

holder that recorded the notice to preserve the effectiveness of an easement originally recorded before the title transaction that is the root of title.

Comment

1. Section 6(a) specifies the determinations a court must make before authorizing a proposed relocation under this act. Section 6(a)(1) effectively requires the court to make the following threshold determinations: the easement proposed for relocation is, in fact, eligible for relocation under Section 3(a); the easement is not one of the easements excluded from the scope of the act in Section 3(b)(1); and the proposed relocation will not result in an impermissible encroachment or interference with a conservation easement or public-utility easement under Section 3(b)(2). Section 6(a)(1) thus provides additional protection to holders of public-utility easements, conservation easements, and negative easements by drawing the court's attention to the scope of the act. Section 6(a)(2) mandates that the court determine that the proposed relocation satisfies the substantive conditions for relocation under Section 4.

2. Once a court makes the required determinations under Section 6(a), Sections 6(b)-(d) require the court to issue an order authorizing the relocation and the owner of the servient estate to record a certified copy of that order along with an explanatory statement in the relevant public records of the state. Sections 6(b)(1) through (7) set forth some of the important information that must be included in the court's order. These provisions adopt the approach of *R & S Inv's v. Auto Auctions Inc.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006), which requires an owner of a servient estate that satisfies the criteria for easement relocation under the Restatement to execute a new document setting forth the new location and other relevant terms of the relocated easement. All implied and express duties and obligations imposed on the owner of the servient estate at the previous location shall apply in the new location, unless a court determines they are no longer applicable.

3. Sections 6(b)(8) and (9) require the court's order approving relocation to provide for payment of the expenses authorized under Section 7 and compliance with the obligation of good faith under Section 8.

4. Section 6(b)(10) includes one final element of an order approving relocation of an easement—an instruction to record, in the land records of each jurisdiction where the servient estate is located, an affidavit, if required under section 9(a), when the servient owner substantially completes relocation.

5. Section 6(c) recognizes a court's equitable power to issue other incidental orders necessary to implement a fair and equitable relocation. For example, under this section, a court could require the owner of the servient estate to complete the relocation within a fixed period of time or lose the right to relocate.

6. Section 6(d) requires, before the servient owner proceeds with relocation, that the servient owner "record, in the land records of each jurisdiction where the servient estate is located, a certified copy of the order under subsection (b)." If no improvements

must be constructed to complete the relocation, recordation of the Section 6(b) order, as provided under Section 6(d), will be the final step in a judicial relocation. When improvements must be constructed for the entry, use and enjoyment of the easement in its new location, however, the servient owner must comply with the additional requirement of recording the relocation affidavit described under Section 9(a) when "relocation is substantially complete, and the easement holder is able to enter, use, and enjoy the easement in the new location."

SECTION 7. EXPENSES OF RELOCATION. A servient estate owner is responsible for reasonable expenses of relocation of an easement under this [act], including the expense of:

(1) constructing improvements on the servient estate or dominant estate in accordance with an order under Section 6;

(2) during the relocation, mitigating disruption in the use and enjoyment of the easement by the easement holder or another person entitled to use and enjoy the easement;

(3) obtaining a governmental approval or permit to relocate the easement and construct necessary improvements;

(4) preparing and recording the certified copy required by Section 6(d) and any other document required to be recorded;

(5) any title work required to complete the relocation or required by a party to the civil action as a result of the relocation;

(6) applicable premiums for title insurance related to the relocation;

(7) any expert necessary to review plans and specifications for an improvement to be constructed in the relocated easement or on the dominant estate and to confirm compliance with the plans and specifications referred to in the order under Section 6(b)(6);

(8) payment of any maintenance cost associated with the relocated easement which is greater than the maintenance cost associated with the easement before relocation; and

(9) obtaining any third-party consent required to relocate the easement.

Comment

1. Section 7 first states the general obligation of the servient estate owner to pay for reasonable expenses of relocation as determined by the court. The subsections provide courts with guidance as to the items that might constitute an expense chargeable to the servient estate owner under this general obligation and which must be specified in the court's order under Section 6(b)(8). The enumerated items represent an illustrative, not exhaustive, list of chargeable expenses.

2. The UERA does not alter the general American rule for attorney fees. Thus, each party to an easement relocation action under the act is responsible for its own litigation-related attorney fees.

SECTION 8. DUTY TO ACT IN GOOD FAITH. After the court, under Section 6, approves relocation of an easement and the servient estate owner commences the relocation, the servient estate owner, the easement holder, and other parties in the civil action shall act in good faith to facilitate the relocation in compliance with this [act].

Comment

1. The duty of an owner of a servient estate and easement holder to act in good faith to facilitate the relocation of an easement is grounded in an understanding of an easement as a long-term, concurrent property relationship that imposes mutual duties of accommodation on both parties—the owner of the servient estate and the easement holder. For a general discussion of the principle of mutual accommodation in the law of easements and servitudes at common and civil law, see John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 36-47 (2005).

2. For judicial endorsements of the principle of mutual accommodation and the duty to consider the rights and interests of the other party in an easement relationship in the specific context of easement relocation, see *Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1232 (Colo. 2001) (explaining that Colorado law increasingly recognizes that when there are two competing interests in the same land, those interests "should be accommodated, if possible," and endorsing the Restatement approach to easement

relocation as consistent with that "accommodation doctrine"); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose," and quoting *Roaring Fork Club L.P.*, 36 P.3d at 1237 for the proposition that "[c]learly, the best course is for the owners to agree to alterations that would accommodate both parties' use of their respective properties to the fullest extent possible"); *R & S Inv's v. Auto Auctions Ltd.*, 725 N.W.2d 871, 880 (Neb. Ct. App. 2006) (stating that "Nebraska case law provides that the owner of a servient estate and the owner of a dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration of the rights of the other demands").

3. The imposition of a duty to act in good faith in the context of long-term property relationships is not new to uniform acts promulgated by the Uniform Law Commission. *See, e.g.*, Uniform Common Interest Ownership Act § 1-113 (2008) ("Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement.); Uniform Home Foreclosure Procedures Act § 105 (2015). *See also* Uniform Simplification of Land Transfers Act § 2-103(i)(b) (1980).

SECTION 9. RELOCATION AFFIDAVIT.

(a) If an order under Section 6 requires the construction of an improvement as a condition for relocation of an easement, relocation is substantially complete, and the easement holder is able to enter, use, and enjoy the easement in the new location, the servient estate owner shall:

(1) record, in the land records of each jurisdiction where the servient estate is located, an affidavit certifying that the easement has been relocated; and

(2) send, by certified mail, a copy of the recorded affidavit to the easement holder and parties to the civil action.

(b) Until an affidavit under subsection (a) is recorded and sent, the easement holder may enter, use, and enjoy the easement in the current location, subject to the court's order under Section 6 approving relocation.

(c) If an order under Section 6 does not require an improvement to be constructed

as a condition of the relocation, recording the order under Section 6(d) constitutes relocation.

Comment

1. Section 9 clarifies when a proposed easement relocation is considered to be final and complete as a legal fact. When an easement includes existing improvements that are necessary for use and enjoyment of the easement, an easement relocation will not be final and complete until the servient estate owner finishes construction of all the improvements necessary for the easement holder to enter, use, and enjoy the easement in its new location. When these improvements are complete, the servient estate owner must record, in the land records of each jurisdiction where the servient estate is located, the relocation affidavit specified in Section 9(a) and send the affidavit to the easement holder and other parties by certified mail. Until this affidavit is recorded and sent, Section 9(b) makes clear that the easement holder continues to have the right to enter, use, and enjoy the easement in its current location.

2. Section 9(c) is intended to apply to easements that can be used and enjoyed without any improvements on the servient estate or that exist without any improvements on the servient estate. An example is an easement providing pedestrian access or recreational access over a specified portion of a servient estate unmarked by a path or trail. Another example is an easement for which improvements on the servient estate have not yet been constructed by the easement holder. In such cases, the order approving relocation of the easement under Section 6(b) might justifiably not mention construction of any improvements on the servient estate in its new location. Thus, when the servient estate owner records the order approving relocation under Section 6(b), as required by Section 6(d), that recording will constitute relocation.

SECTION 10. LIMITED EFFECT OF RELOCATION.

(a) Relocation of an easement under this [act]:

(1) is not a new transfer or a new grant of an interest in the servient estate or the dominant estate;

(2) is not a breach or default of, and does not trigger, a due-on-sale clause or other transfer-restriction clause under a security instrument, except as otherwise determined by a court under law other than this [act];

(3) is not a breach or default of a lease, except as otherwise determined by a court under law other than this [act];

(4) is not a breach or default by the servient estate owner of a recorded document affected by the relocation, except as otherwise determined by a court under law other than this [act];

(5) does not affect the priority of the easement with respect to other recorded real-property interests burdening the area of the servient estate where the easement was located before the relocation; and

(6) is not a fraudulent conveyance or voidable transaction under law.

(b) This [act] does not affect any other method of relocating an easement permitted under law of this state other than this [act].

Comment

1. The relocation of an easement under this act redefines where the easement is located. As Section 10(a)(1) makes clear, the relocation does not constitute a new transfer or grant of an interest in either a servient estate burdened by the easement or a dominant estate benefited by the easement. Consequently, as Sections 10(a)(2) through (4) clarify, an easement relocation that occurs pursuant to this act is not a breach or default of, and does not trigger, a due-on-sale clause, or other transfer-restriction clause under an applicable recorded document.

2. The enforceability of due-on-sale clauses was substantially altered with Congressional adoption of Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 (The Garn Act, 12 U.S.C.A. § 1701j-3(b)). The Garn Act was adopted to preempt state laws that restrict the enforcement of due-on-sale clauses and thus render such clauses generally enforceable. Grant S. Nelson, et al., *Real Estate Finance Law* § 5.24, at 336 (6th ed. 2015). However, Congress also exempted certain transfers from the act and thus effectively declared that these types of transfers may not be used as the basis for due-on-sale clause acceleration. 12 U.S.C.A. § 1701j-3(d)(1)-(9). In the words of leading authorities on the subject: "When a transfer of one of these types is involved, the Act is preemptive; acceleration under a due-on-sale clause is prohibited even if permitted by state law." Grant S. Nelson et al., *Real Estate Finance Law* § 5.24, at 344 (6th ed. 2015). It should be noted, however, that these exclusions "only apply if the mortgaged real estate contains 'less than five dwelling units.'" Id. (quoting 12 U.S.C.A. § 1701j-3(d)).

As the Garn Act is generally concerned with transfers of occupancy of mortgaged, residential real estate, the Garn Act will not commonly be applicable to easement relocations under this act. See generally Grant S. Nelson et al., *Real Estate Finance Law*

§ 5.24, at 344-47 (6th ed. 2015). This conclusion is buttressed by recognition that an easement relocation does not create a new property interest burdening the servient estate or benefitting the dominant estate; it simply changes the location of the existing easement. It is conceivable, however, that a specialized loan document—for example, a commercial loan document—might expressly characterize an easement relocation that occurs without the consent of the lender as an event triggering a default, a due-on-sale clause, or some other transfer-restriction clause. Whether the preemption provisions of the Garn Act, 12 U.S.C.A. §1701j-3(b), or any other law for that matter, would allow enforcement of such a clause is a question that state and federal courts would have to resolve in an applicable case. However, as standard residential loan documents do not specifically characterize an easement relocation as an event triggering a default or due-on-sale clause, Section 10(a)(2) clarifies that, in such a case, an easement relocation will not have the effect of triggering a breach or default or application of a due-on-sale clause or other transfer-restriction clause. Parties considering the impact of the Garn Act should consider the concluding thoughts of several experts on the subject:

> It is easy but dangerous to suppose that the passage of the Garn Act solved all problems associated with due-on-sale clauses, or that all aspects of them are now governed by the Act. The Act declares that the clauses are generally enforceable, and it lists certain exceptional situations in which the courts may not enforce them; both of these provisions preempt any contrary state law. *But lenders are still bound by the language of the clauses they use, and state law governs the interpretation of that language*. For example, words like "transfer" and "sale" are defined by state case law. A clause under which the lender covenants not to withhold consent to a transfer "unreasonably" must be tested under state concepts of reasonableness. . . . . *Conflicts and ambiguities in the documents must be settled using traditional state law techniques*.

Grant S. Nelson et al., *Real Estate Finance Law* § 5.26, at 360 (6th ed. 2015) (footnotes omitted) (emphasis added).

3. As stated under Section 10(a)(5), the relocation of an easement under this act "does not affect the priority of the easement with respect to other recorded real-property interests burdening the area of the servient estate where the easement was located before the relocation." The purpose of Section 10(a)(5) is to clarify that the easement subject to relocation will retain its priority over other recorded real-property interests, but only to the extent those recorded real-property interests burden the same area of the servient estate where the easement was located before the relocation. In other words, Section 10(a)(5) establishes a general principle of retained priority in the context of easement relocation under the act, but it limits the geographic reach of this principle. This limitation will be important in specialized cases: for example, when an easement is relocated, in whole or in part, to another portion of the original servient estate burdened by recorded real-property interests that do not burden the area of the servient estate where the easement was originally located; or when an easement is relocated, in whole or in part, to an entirely different legal parcel or parcels that are burdened by recorded real-

property interests that do not burden the parcel or parcels where the easement was originally located. In either of these situations, the concept of retained priority is limited to "the area of the servient estate where the easement was located before the relocation."

Consider the following example. Suppose the easement subject to relocation originally burdens parcels A and B. After relocation the easement will burden parcels A, B, and C. Mortgage 1 was recorded on parcels A, B, and C subsequent to the recording of the easement on parcels A and B. Mortgage 2 is recorded only against parcel C. Under Section 10(a)(5), the relocated easement, which is now located on parcels A, B, and C, will have priority over Mortgage 1 but will be subordinate to Mortgage 2.

4. Section 10 does not affect the right of a security-interest holder of record to challenge a proposed easement relocation under Section 4(7) on the ground that the relocation will impair the interests of the security-interest holder by reducing the value of its collateral. Section 5(b)(2) guarantees that any security-interest holder of record having an interest in the servient or dominant estate will receive a summons and complaint or petition and be a party to the proposed relocation action.

SECTION 11. NON-WAIVER. The right of a servient estate owner to relocate an easement under this [act] may not be waived, excluded, or restricted by agreement even if:

(1) the instrument creating the easement prohibits relocation or contains a waiver, exclusion, or restriction of this [act];

(2) the instrument creating the easement requires consent of the easement holder to amend the terms of the easement; or

(3) the location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, acquiescence, estoppel, or implication.

Comment

1. Section 11 provides that the core relocation right established by Section 4 is not subject to waiver, exclusion, or restriction by contracting parties. In other words, an owner of a servient estate and an easement holder of an easement otherwise eligible for relocation cannot agree *ex ante* to prohibit relocation or waive, exclude, or restrict application of the act. Further, if the parties to a proposed easement relocation agree to relocate an easement, the newly relocated easement would still be subject to relocation in the future to the extent the servient estate owner could satisfy the requirements of this act.

2. Section 11(1) contemplates that after enactment of this act some easement forms may be revised in an attempt to avoid application of this act by including an express term prohibiting easement relocation or by including an express waiver, exclusion, or restriction of this act. Such terms are ineffective under Section 11(1). Section 11(1) thus differs from Section 4.8(3) of the Restatement, which provides that the servient estate owner's right to relocate an easement can be "expressly denied" by the terms of an easement. The comprehensive substantive and procedural safeguards included in this act remove any justification to allow the waiver of a servient estate owner's relocation right under this act.

3. Section 11(2) clarifies that even when an easement contains a general clause requiring easement holder consent to amend the easement, the easement will remain subject to relocation under this act.

4. Section 11(3) specifies that even when an easement has been localized by a metes and bounds description in the instrument that creates the easement, by another agreement, by previous conduct of the parties, or by acquiescence, estoppel, or implication, the easement remains subject to relocation under the act. Accordingly, Section 11(3) specifically rejects the narrow approach to easement relocation adopted by several courts that limit application of Section 4.8(3) of the Restatement to undefined easements, *i.e.*, those that lack a metes and bounds description or other specific indication of the easement's original location in the creating instrument. *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998); *Stanga v. Husman*, 694 N.W.2d 716, 718-881 (S.D. 2005); *St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 193-96 (Nev. 2009).

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 14. TRANSITIONAL PROVISION. This [act] applies to an easement created before, on, or after [the effective date of this [act]].

Comment

1. Section 14 clarifies that the act will have retroactive effect and thus will apply to all eligible easements created prior to the effective date of the act as well as to easements created on or after the effective date of the act. As an owner of a servient estate can only obtain judicial approval for a proposed relocation by satisfying all of the conditions set out in Section 4, an owner of a servient estate must demonstrate that the relocated easement will continue to deliver to the easement holder and others entitled to use and enjoy the easement the same affirmative, easement-related benefits obtained at the easement's original location and that the relocation will not materially impair the interests of the easement holder, security-interest holders, or other owners of interests in the servient or dominant estate.

2. Retroactive application of the act will not deprive the easement holder or others entitled to use and enjoy the easement of any of the functional benefits of the easement upon relocation and will not cause the easement holder, security-interest holders, or other owners of recorded interests in the servient or dominant estate to suffer material harm, even during the relocation process, regardless of whether the act applies to an easement created before, on, or after the effective date of the act. Consequently, an easement holder, others entitled to use and enjoy the easement, security-interest holders, or other owners of recorded interests in the servient or dominant estate will not suffer an uncompensated taking of a property interest upon a relocation under the act. *See Statewide Construction, Inc. v. Pietri*, 247 P.3d 650, 656-57 (Idaho 2011) (holding that application of an Idaho statute, IDAHO CODE § 55-313, which gives a servient estate owner the right to relocate a motor vehicle access easement on terms similar to those found in the Restatement, was not an unconstitutional taking of private property without just compensation under either the Fifth Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly requires that the change must be made in a way "as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access" and because any relocation authorized by the statute will "provide the dominant estate holders with the same beneficial interest they were entitled to under the easement by its original location"); *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). *See also* Susan French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 5 and 9 (2003) (responding to criticism that the Restatement approach to easement relocation could lead to windfall gains for owners of servient estates by observing that (i) in most easement negotiations parties give little, if any, attention to the future location of an easement or relocation rights, (ii) if requirements imposed by Restatement § 4.8(3) are satisfied, the relocated easement increases overall utility without decreasing the easement's utility to the easement holder, and (iii) if the easement holder

has some non-access related interests in mind at the time of creation, those interests can be served by restrictive covenants).

[SECTION 15. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

[SECTION 16. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .]

SECTION 17. EFFECTIVE DATE. This [act] takes effect . . . .

COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Chief Judge Decker, Judges AtLee and Bernhard
Argued at Lexington, Virginia

DARLENE S. SMITH, ET AL.

v. Record No. 0850-24-3

ALLEN CREEK ASSOCIATES, LLC

OPINION BY
JUDGE RICHARD Y. ATLEE, JR.
AUGUST 19, 2025

FROM THE CIRCUIT COURT OF NELSON COUNTY
Michael R. Doucette, Judge

Maynard L. Sipe (Boyd & Sipe PLC, on brief), for appellants.

Stephen K. Strosnider (Franklin, Denney, Ward & Strosnider PLC, on brief), for appellee.

This case involves Allen Creek Associates, LLC's ("ACA") petition to relocate two easements under Code § 55.1-304, which the circuit court granted. Darlene Smith, William Smith, and Maxine Small (collectively "appellants") appeal the circuit court's ruling. Appellants raise three issues on appeal. First, they argue that there was no justiciable controversy ripe for adjudication. Second, they argue that the relocation amounted to an unconstitutional taking of private property for the benefit of a private party. Finally, appellants argue that the circuit court "misinterpreted and misapplied" Code § 55.1-304. For the following reasons, we disagree and affirm the decision of the circuit court.

I. BACKGROUND

A. *The Properties*

ACA owns a parcel of land consisting of 19.35 acres located just off Route 151 in Nelson County, Virginia. ACA planned to develop the property and build a residential community. As part of its plans, ACA sought to relocate two easements that run across the property: the Allen

Creek Right of Way ("Allen Creek ROW") and the Eastern Right of Way ("Eastern ROW"). These easements serve the properties of Darlene and William Smith and Maxine Small.[1]

Darlene and William Smith own 10.2 acres north of ACA's property. The Smiths live on their property. Maxine Small owns a separate 10.2-acre parcel of land also north of ACA's property. She does not live on her property. Both the Smiths and Small use their property for agricultural purposes, currently growing hay. The easements running across ACA's property give appellants access to their properties from Route 151.

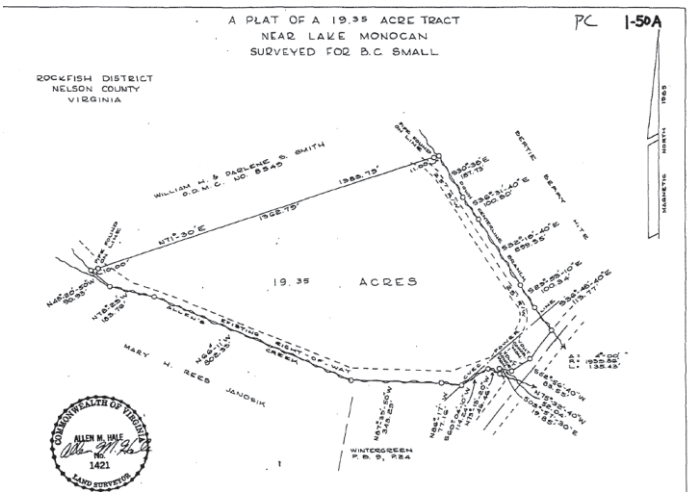
B. *The Easements*

The Allen Creek ROW runs from Route 151 along the southern and western edge of ACA's property, and it generally follows along Allen Creek. It varies in width, ranging from 18 to 30 feet wide. Though originally 30 feet wide at its narrowest point, due to erosion the narrowest point is currently 18 feet wide. Within the easement, there is a paved surface about nine feet wide. The distance from the edge of the paved surface to the bank of Allen Creek is generally between two and three feet, though the distance is approximately one foot at the narrowest point. Both the Smiths and Small use the Allen Creek ROW as the primary access point to their properties.

The Eastern ROW starts at Route 151 and runs along the eastern edge of ACA's property. The deed describes the Eastern ROW as "a right-of-way 25 feet in width running along and near the eastern boundary of the subject property." There are no roadways or other improvements within the easement. Some parts of the Eastern ROW contain trees, and it meets the Small property at a heavily wooded area with a steep hill.

[1] Pacific Group Resorts, Inc., also owns property served by the easements, and it too was served with the petition to relocate the easements. Pacific Group, however, did not object to the relocation of the easements, and it is therefore not a part of this appeal.

The following image depicts ACA's property and both the Allen Creek ROW and the Eastern ROW.

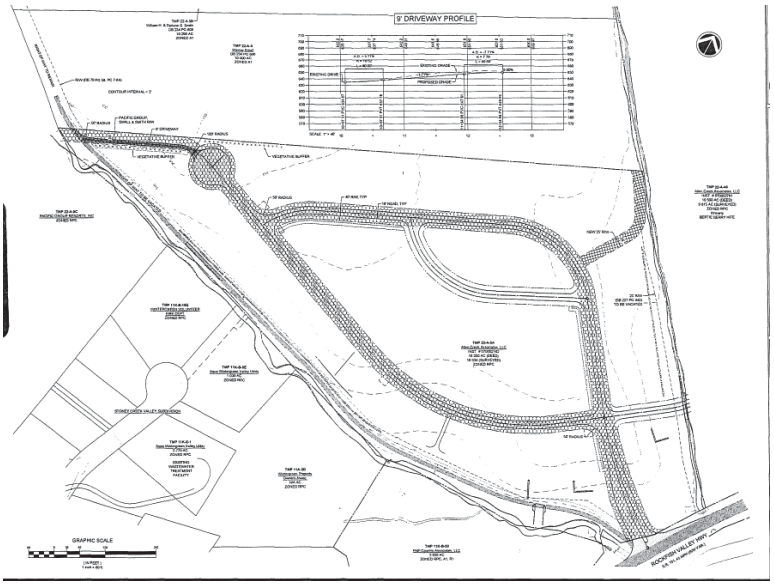


C. *The Petition to Relocate the Easements*

ACA spent a year trying to reach an agreement with appellants to relocate the easements. When those efforts were unsuccessful, ACA filed a petition to relocate the easements under Code § 55.1-304. Under the statute, the circuit court "shall" grant the petition if, after a hearing, the court finds that "the relocation will not result in economic damage to the parties in interest," "there will be no undue hardship created by the relocation," and the easement has existed for "not less than 10 years." Code § 55.1-304.

At the hearing, ACA submitted a site plan showing the proposed location for the easements. Under ACA's plan, the relocated easements would align with the roadways that would serve the residential development. The proposed easements would run from Route 151 through to a cul-de-sac near Small's property where the road would join the current driveway within the Allen Creek ROW accessing appellants' properties. Appellants could take either of two routes from Route 151 to the cul-de-sac, one that turns and runs parallel to Allen Creek or

one that continues straight before curving back towards the cul-de-sac.[2] The site plan showed a minimum width of 40 feet for the proposed easements, containing a paved surface at least 18 feet wide with 4-foot shoulders. The site plan is included below for reference:



To support its petition, ACA presented testimony from Timothy Hess, ACA's managing member, who explained that ACA attempted to work with appellants to relocate the easements, but that its efforts were unsuccessful. Hess testified that ACA sought information about the agricultural equipment appellants used to farm their land and what the equipment required, but appellants did not respond. Even so, ACA's engineer designed the plan to accommodate large agricultural equipment.

Hess acknowledged that ACA's initial petition included a different site plan that would have largely left the Allen Creek ROW in place, shifting only a portion of the easement. He explained that the initial site plan was changed for two reasons. First, the Virginia Department of Transportation ("VDOT") wanted the entrance moved because it "deemed that entering from the existing driveway would not be a safe entrance" and did not want two entrances merging.

[2] The latter route also has a 25-foot right of way branching off to the east and connecting to the eastern end of Small's property, replacing the Eastern ROW.

Second, because of the Chesapeake Bay Act, the Department of Environmental Quality ("DEQ") would not permit a roadway that close to Allen Creek.

Both Hess and Stephen Driver, the civil engineer who designed the site plan, testified that neither Nelson County nor VDOT would approve ACA's site plan while the current easement entrance onto Route 151 existed. Driver explained that Nelson County would not approve the site plan until VDOT signed off, and VDOT, for safety reasons, would not grant site approval without a "shared entrance agreement." But Driver testified that once they had the shared entrance agreement, VDOT told them they would be "good to go."

Driver then asserted that the proposed easements and roadways were superior to the existing ones and would be "sufficient for ingress and egress of agricultural equipment to the Smith and Small parcels." Driver explained that the standard turn radius for a residential subdivision is 25 feet but that he designed the roads to include turn radii sufficient for large agricultural equipment; he testified that the first turn included a 50-foot turn radius and the second turn included a 100-foot turn radius. A vehicle 12 feet wide could navigate the proposed roadways. Further, the grades of the proposed roads would be safe for both personal and farm vehicles.

Driver also testified that the existing easements were insufficient "for an intensive development or subdivision of the Smith property or the Small property," and he explained that the current easement was not wide enough to construct a street of the width required to develop property under the Nelson County code. Driver testified that the existing roadway within the Allen Creek ROW was "unsafe because there is one location along that driveway where the distance between the edge of the existing paved surface and the top of the bank on Allen Creek is 1 foot" and there are other locations where the distance is only 2-3 feet. These distances do not

meet road safety standards and "the bank along Allen Creek is very steep, drops off abruptly, and, for the majority of its length, is a distance of 4 to 6 feet."

Following ACA's evidence, appellants called their own witnesses. Among them, they called Michael Raynes, the man who cuts the hay on appellants' property. That process requires him to "fertilize the fields, and then . . . travel in and out with the tractors, the cutters, the rakes, the balers, [and] trailers to haul the hay out." The widest piece of equipment he uses is 12 feet wide. Typically, he takes his equipment to and from appellants' properties twice in the spring and twice in the fall. He typically does not use the Eastern ROW to access the properties because of the steep hill and the trees. When Raynes leaves the Allen Creek ROW on to Route 151, his ultimate destination is to the right. He testified, however, that with the current driveway, he cannot safely make that right turn and instead must turn left, drive up the road to a parking lot, turn around, and come back out.

Donna Small also testified for appellants. She is Maxine Small's daughter and has her mother's power of attorney to deal with the Small property. Darlene Smith is her sister. Donna testified that they use the properties for agricultural purposes, which involved growing hay to feed their cattle. According to Donna, appellants objected to the relocation of the easements because they were concerned about their ability to continue farming activities on the land. They had also considered other uses for their property, such as a corn maze or a brewery. She acknowledged that appellants did not have any "fixed plan," explaining that they just wanted to maintain the right and ability to do "farming activit[ies]." She also confirmed that the Small property did not have water service to it. And on cross-examination, she agreed that her mother would be in the same position if the easement was relocated so long as it was 25 feet the entire length.

Finally, appellants called Massie Sanders, a land surveyor and civil engineer, to testify about the road designs. He opined that a truck and trailer used to haul hay could not safely turn in a 50-foot turn radius, such as the one on the site plan, without running onto the grass or shoulder. He would not suggest what turning radius would be sufficient; he only looked at what was set out in the plan. In his opinion, the width of the proposed roads would be sufficient if used exclusively for farm equipment, but it would not be safe if used for residential purposes also.

Appellants argued that an order relocating the easement would be an improper advisory opinion because ACA had not yet received any governmental approvals or permits, and obtaining those approvals could require changes to the site plan. Thus, they argued that the issue was based on speculative facts rather than an actual controversy. Appellants also argued that the relocation of the easements would cause both economic damage and undue harm. They contended that the alleged road improvements would not be safer for the agricultural equipment because of the additional residential traffic, which could render the road "impassable" for the agricultural equipment. They argued that the equipment would be required to go into the shoulders to make turns on the proposed roads and that the plan would decrease the number of trips per day that they were permitted. Finally, appellants argued that an order relocating the easements would constitute an unconstitutional taking for private purposes.

ACA argued that the evidence established that it could not proceed further without relocation of the easements and that the plan would be approved once a shared entrance agreement was submitted. Thus, ACA argued that the matter was ripe for adjudication, analogizing to a court's authority to issue a declaratory judgment. It also argued that the relocation would not cause economic damage or undue hardship, noting that the relocated easements had been designed for agricultural equipment and would be safe for such equipment.

It added that the proposed roads were safer than the current roadway used by appellants, and the roads would be maintained at no cost to appellants, which would economically benefit them. ACA also argued that the relocation would not prevent future permitted uses of the property.

The circuit court issued a letter opinion finding in ACA's favor. The circuit court first concluded that it had jurisdiction to decide the issue. Relying on its declaratory judgment authority, the circuit court noted that the controversy rose "above the level of speculation" and would "likely occur if things [we]re left to their normal course." Relying on dictionary definitions of "economic damage" and "undue harm," the circuit court concluded that relocating the easements would not cause either economic damage or undue harm.[3] Based on that conclusion, it also found that relocating the easements would not constitute a taking and would leave appellants with all the same benefits they enjoyed before the relocation. Thus, it ordered relocation of the easements.[4] Appellants now appeal.

II. ANALYSIS

A. *ACA established that there was a justiciable controversy.*

Appellants argue that there was no justiciable controversy ripe for adjudication and the circuit court therefore erred by "rendering a judgment that significantly altered appellants' property rights." They contend that the petition was based only on future or speculative facts

[3] The circuit court found that the issues revolved around the safety of the roads for the agricultural equipment, the turn radii, the incline grades on the roadway, and whether the relocated easements would impair future economic development potential.

[4] As part of its order, however, the court stated that appellants could continue using the current easements until the roadways in the relocated easements were completed.

rather than present facts. We disagree and find that ACA established that the issue was ripe for adjudication.

Whether a justiciable controversy exists is a question of law that we review de novo on appeal. *See Platt v. Griffith*, 299 Va. 690, 692 (2021) (reviewing the question of standing, a justiciability question, de novo).

"[A]n actual controversy is a prerequisite to a court having authority." *Martin v. Garner*, 286 Va. 76, 82 (2013) (alteration in original) (quoting *Charlottesville Area Fitness Club Operators Ass'n v. Albermarle Cnty.*, 285 Va. 87, 98 (2013)). This prerequisite can be "referred to as the requirement of a 'justiciable controversy.'" *Id.* (quoting *Fitness Club Operators*, 285 Va. at 98). Without an actual controversy, any opinion rendered by the court is advisory, which the court lacks jurisdiction to render. *Id.*

"A justiciable controversy 'involves an actual adjudication of rights' resolving 'specific adverse claims, based upon present, rather than future or speculative facts.'" *Highlander v. Va. Dep't of Wildlife Res.*, 84 Va. App. 404, 427 (2025) (quoting *Daniels v. Mobley*, 285 Va. 402, 408 (2013)); *see also Berry v. Bd. of Supervisors*, 302 Va. 114, 131 (2023) (defining "justiciable controversy" as "an actual controversy between the parties that is not based solely on speculation or purely hypothetical scenarios that may (or may not) occur at some undefined point in the future"). "For a justiciable controversy to exist, it must be possible for the circuit court to render a decree yielding specific relief, such that the plaintiff's rights will be thereby affected." *Highlander*, 84 Va. App. at 408 (quoting *Daniels*, 285 Va. at 408).

Here, ACA has established the existence of a justiciable controversy. Code § 55.1-304 is a statutory cause of action. The statute permits relocation of the easement by written agreement of the parties. In the absence of such an agreement, the statute expressly permits the servient landowner to petition the circuit court to relocate the easement. That is exactly what ACA did.

ACA spent nearly a year trying to negotiate an agreement with appellants. When that did not pan out, ACA petitioned the circuit court to relocate the easement. Nothing in the statute requires any governmental approvals or other prerequisite prior to petitioning the circuit court for relocation.

Beyond the lack of statutory requirements, the evidence established that the controversy involved present facts rather than future or speculative facts. ACA presented evidence that it attempted to develop a site plan leaving the easements largely in their original positions, but that VDOT, DEQ, and Nelson County would not approve the plan because of the existing entrance from the Allen Creek easement onto Route 151. Though ACA had not yet submitted a plan to Nelson County, it established that Nelson County would not grant the necessary approvals "without site plan approval from VDOT." VDOT would not approve a plan with multiple entrances onto Route 151, and for ACA to obtain VDOT's approval, it needed to submit a shared entrance agreement. ACA tried, unsuccessfully, to negotiate a shared entrance agreement with appellants for approximately a year.

Further, ACA developed its current plan in consultation with DEQ, VDOT, and Nelson County to comply with all governmental regulations, and it presented evidence that VDOT would approve the site plan once there was a shared entrance agreement or court order relocating the easement. Based on ACA's evidence, the only thing stopping ACA from proceeding was appellants' refusal to enter a shared entry agreement. ACA's only alternative was to proceed with the petition to relocate the easement. Thus, ACA has established that there were actual adverse claims based on present, rather than future or speculative facts. Accordingly, we find that the circuit court did not err in concluding that there was a justiciable controversy.

B. *The circuit court properly applied Code § 55.1-304.*

Appellants argue that the circuit court "misinterpreted and misapplied" Code § 55.1-304 and that it erred when it found that relocating the easement "would not result in loss or injury to any real or potential economic benefits and would not cause excessive or unwarranted hardship or adversity."[5]

Issues related to statutory interpretation are reviewed de novo. *Va. Elec. & Power Co. v. State Corp. Comm'n*, 300 Va. 153, 161 (2021). "We are bound by the trial court's factual findings unless those findings are plainly wrong or unsupported by the evidence." *Malbrough v. Commonwealth*, 275 Va. 163, 168 (2008). But we "review the [circuit] court's application of the law to facts de novo." *Heald v. Rappahannock Elec. Coop.*, 80 Va. App. 53, 74 (2024) (quoting *Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n*, 289 Va. 34, 59 (2014)).

When interpreting a statute "our primary objective is 'to ascertain and give effect to legislative intent,' as expressed by the language used in the statute." *Geico Advantage Ins. Co. v. Miles*, 301 Va. 448, 455 (2022) (quoting *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012)). "[W]e determine the General Assembly's intent from the words contained in the statute." *Id.* (alteration in original) (quoting *Williams v. Commonwealth*, 265 Va. 268, 271 (2003)). "Consequently, we 'apply[] the plain meaning of the words unless they are ambiguous

[5] On appeal, appellants argue that the trial court misinterpreted Code § 55.1-304. In the court below, however, they argued only that the trial court misapplied Code § 55.1-304. "No ruling of the trial court . . . 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." Rule 5A:18. Thus, on appeal, we consider only whether the circuit court properly applied Code § 55.1-304, and we interpret Code § 55.1-304 only to the extent necessary to make that determination.

Appellants also argue that the circuit court erred by "reform[ing]" the easement, which it contends is not permitted under the statute. But the circuit court did not "reform" the easement, as the order specifically stated that appellants "enjoy the same rights" under the relocated easements as they did under the original easement.

or [doing so] would lead to an absurd result.'" *Eley v. Commonwealth*, 70 Va. App. 158, 164 (2019) (alterations in original) (quoting *Wright v. Commonwealth*, 278 Va. 754, 759 (2009)).

Code § 55.1-304 provides an avenue for relocating an easement, either by written agreement or, absent a written agreement, "upon petition to the circuit court and notice to all parties in interest." Relevant here, such a petition

> shall be granted if, after a hearing held, the court finds that (i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than 10 years.

Code § 55.1-304. There is no dispute that the easements at issue have existed for more than ten years. Appellants challenge only whether the relocation of the easements will result in "economic damage" and "undue hardship." Those terms are not defined in the statute or any relevant provisions.

"Where a 'statute's terms are undefined' by the legislature, we give those terms 'their "ordinary meaning," in light of "the context in which [they are] used."'" *Eley*, 70 Va. App. at 165 (quoting *Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 384 (2014)). "In ascertaining such meaning, dictionary definitions and pertinent analysis in prior case law may be consulted." *Id.*; *see also Jones v. Commonwealth*, 296 Va. 412, 415 (2018) (relying on a standard dictionary definition); *Joseph v. Commonwealth*, 64 Va. App. 332, 338-39 (2015) (relying on multiple legal and non-legal dictionary definitions).

1. Economic Damage[6]

Code § 55.1-304 does not define "economic damage." Generally, "damage" is defined as "loss or injury to person or property." *Damage*, *Black's Law Dictionary* (12th ed. 2024); *see also Damage*, *Webster's Third New International Dictionary* (2002) (defining damage as "injury or harm to person, property or reputation"). Thus, to prevail under this prong of Code § 55.1-304, ACA had to prove that relocating the easement would not cause appellants economic loss or injury.

Here, the record supports the circuit court's finding that the relocation of the easements would not cause economic damage to appellants. Appellants do not point to any evidence in the record showing that they would be unable to continue their farming operations or conduct new agricultural uses (including agrotourism) if the easements are relocated. Nor do they present any evidence of possible cost to them.

The evidence established that appellants would be able to conduct the same agricultural activities that they are currently able to conduct. ACA established that it designed its site plan with appellants' agricultural equipment in mind. The roads and turn radii were designed to accommodate a piece of equipment 12-feet wide, which is the width of the widest piece of equipment used by appellants. There was no evidence that improving the relocated easements would increase the costs for appellants, as the roadways in the relocated easements were to be built and maintained at ACA's cost, and there was no evidence that any cost to improve the relocated easements would cost appellants any more than it would have cost them to improve the existing Allen Creek ROW or the undeveloped Eastern ROW.

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[6] Appellants argue that the circuit court "became caught up in evaluating irrelevant factors," such as the existing physical conditions compared to the new improvements. While these factors may not apply in all cases under Code § 55.1-304, they were relevant here to determine whether relocation would cause economic damage or undue harm. Thus, the circuit court did not err in considering these issues.

Appellants' argument that the relocation of the easement would hamper their ability to develop the property in the future is speculative. *See Shenandoah Acres v. D.M. Conner*, 256 Va. 337, 342 (1998) ("[T]he party seeking relief must show that the alleged harm is imminent, and not merely speculative or potential."). Appellants had no fixed plan on how they wanted to develop the property, listing multiple ideas (such as a brewery, corn maze, or pumpkin patch), but the only consistent evidence was that it would be a "farming activity." They presented no evidence on when they planned to develop the property, and they presented no evidence describing how any potential plans would be hampered by relocating the easement. Donna Small, the daughter of Maxine Small, even agreed that her mother would be in the same position if the easement was relocated so long as it was the same 25-foot width for the entire length of the relocated easement. And the Small property did not even have water service to it.

Further, ACA presented evidence that the current easements were insufficient for "an intensive development or subdivision" of either of appellants' properties. The current Allen Creek ROW, originally 30 feet wide, was now only 18 feet wide at the narrowest due to erosion, which would be insufficient for certain subdivision zoning requirements. Moreover, the roadway through that easement was unsafe for potential commercial use, as there was only one foot between the edge of the road and the bank of Allen Creek, and the bank was four to six feet tall. And the entrance from the Allen Creek ROW to Route 151 was a safety concern due to its proximity to the bank of Allen Creek. Thus, there was no evidence that the relocation of the easements would cause *any* economic damage to appellants. Accordingly, the circuit court did not err in so finding.

2. Undue Hardship

Likewise, Code § 55.1-304 does not define "undue hardship." In determining the meaning of hardship, we look first to the definition of "hardship," which is defined as

"[p]rivation; suffering or adversity." *Hardship*, *Black's Law Dictionary*, *supra*; *see also Hardship*, *Webster's Third New International Dictionary*, *supra* (same). "Undue" modifies "hardship" in the statute and is defined as "excessive or unwarranted." *Undue*, *Black's Law Dictionary*, *supra*. Undue hardship then means an excessive or unwarranted privation or adversity. As the circuit court concluded, some level of hardship is permitted given that "undue" qualifies "hardship" and cannot be ignored when interpreting the statute. *See City of Emporia v. Cnty. of Greensville*, 81 Va. App. 28, 38-39 (2024) ("[W]e disfavor a construction of statutes that renders any part of the statute useless or superfluous." (quoting *Shoemaker v. Funkhouser*, 299 Va. 471, 487 (2021))).

But we need not determine the exact level of hardship permissible under the statute,[7] as the evidence, viewed in the light most favorable to ACA, shows that the relocation of the easement would cause no undue harm, and even some benefit, to appellants. Appellants' argument related to their use of the land for agricultural purposes and their ability to get agricultural equipment across the right of way onto their properties. ACA presented evidence that the site plan was developed with appellants' agricultural equipment in mind. The engineer who designed the plan testified that the new easements and roadways were "sufficient for ingress and egress of agricultural equipment" to appellants' properties.

The widest piece of equipment used by appellants is 12 feet, which is wider than the 9-foot paved surface in the current Allen Creek ROW. The roadway in the proposed easement would be 18 feet with 4-foot shoulders. Although the standard turn radius for residential areas is 25 feet, ACA's engineer designed the development with 50-foot and 100-foot turning radii. Thus, by design, appellant's farm equipment should not have to encroach into the opposite lane

[7] *See Baum v. Lunsford*, 235 Va. 5, 8 (1988) (assuming without deciding that "undue hardship" might mean something different in different contexts, such as subdivision versus zoning).

of the road to complete turns. And if there were some obstructions in the road due to the residential nature of the development, such as a car parked in the street, the agricultural equipment could make use of the other lane of the road. Thus, the evidence does not establish that there would be any hardship, let alone undue hardship, to appellants.

Additionally, Michael Raynes, the farmer who drives the agricultural equipment for the appellants, testified that he often could not safely turn the agricultural equipment right on to the highway from the current easement. He testified that he would turn left, drive until he reached a parking lot where he could turn around, and then double back towards his destination. Under the proposed plan, however, the new roadway would include separate turn lanes that would allow safer and easier turns. Thus, contrary to appellants' arguments, the evidence establishes that the proposed easement locations would not cause hardship to appellants and would be safer. Accordingly, the circuit court did not err in concluding that the relocation would not cause undue harm to appellants.

C. *The evidence established that there was no taking.*

Appellants next argue that the circuit court's order relocating the easements constituted an "unconstitutional taking by the state of private property rights for the private gain and benefit of another private party."

The Virginia Constitution[8] provides that "[t]he General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just

[8] On brief, appellants also make an argument under the federal constitution. Their argument below, however, references only the Virginia Constitution. Therefore, we will not consider their argument under the federal constitution. *See* Rule 5A:18 ("No ruling of the trial court . . . 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.").

compensation to the owner thereof." Va. Const. art. I, § 11. "Whether a taking has occurred is a question of law that [appellate courts] review de novo." *Johnson v. City of Suffolk*, 299 Va. 364, 370-71 (2020).

"A threshold question in any takings case is whether the government action has affected a property interest that is cognizable under the pertinent clauses of the United States and Virginia constitutions." *Id.* at 370. "In other words, does the plaintiff have an interest that is recognized as a property interest?" *Id.* "To state a claim, the property owner must allege that a 'right connected to the property is adversely affected by governmental action.'" *Id.* (quoting *Livingston v. Va. Dep't of Transp.*, 284 Va. 140, 157 (2012)). "To take or damage property in the constitutional sense does not require that the sovereign actually invade or disturb the property. Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner's ability to exercise a right connected to the property." *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 602 (2004).

Appellants argue that the circuit court's order relocating the easement constituted a governmental act.[9] Assuming without deciding that the circuit court's order constituted a governmental act and that the appellants had a cognizable property interest in the easement, we find that no taking occurred because the relocation did not adversely affect appellants' rights connected to the easement. *See Butcher v. Commonwealth*, 298 Va. 392, 396 (2020) ("As we have often said, 'the doctrine of judicial restraint dictates that we decide cases "on the best and narrowest grounds available."'" (quoting *Commonwealth v. White*, 293 Va. 411, 419 (2017))).

The original easement granted appellants the right of ingress and egress, and they still enjoy that right. The circuit court's order specifically stated that appellants "shall enjoy the same

[9] Appellants also argue that the taking occurred for a private purpose, which is prohibited under Virginia law. Because we find that no taking occurred, we need not determine the purpose of any alleged taking.

rights over and upon the relocated easements that are contained in [appellants'] chains of title, including but not limited to, the right to drive across the relocated easements fifty (50) times per day, per parcel." ACA's evidence established that appellants' agricultural equipment could still access the property through the relocated easements, which were specifically designed to accommodate the equipment. It also established that the relocated easements and roadways would be safer than the current easement and roadway. The relocated easements and roads would likely improve the development potential of appellants' property, and the relocation does not limit or inhibit appellants' use of their own property. Further, appellants are not required to build or maintain the roads in the new easements. Thus, the evidence established that a taking did not occur because appellants' rights are not adversely affected. Accordingly, the circuit court did not err.

III. Conclusion

For the foregoing reasons, we hold that the circuit court did not err in relocating the easements. Therefore, we affirm the decision of the circuit court.

Affirmed.

EASEMENTS AND CHANGE

John A. Lovett*

Disputes over easement relocation have a long and tortured history in American law, much more complex than the orthodox view of easement law has acknowledged. The majority mutual consent rule evolved over two centuries, but courts and judges in some states have always resisted remorseless application of the rule. Outside of the United States, many countries have employed versions of the civil law servitude relocation rule first adopted in France in 1804 and used in Louisiana for two centuries. Promulgation of Section 4.8(3) of the Restatement (Third) of Property: Servitudes in 2000 lead to a significant re-evaluation of easement relocation law in the United States. Today some form of unilateral relocation is permitted in at least half of the states and courts in five states have adopted robust versions of the Restatement approach to easement relocation.

The Uniform Easement Relocation Act ("the U.E.R.A."), approved and recommended to state legislatures by the Uniform Law Commission in July 2020, offers state legislatures a chance to unify American easement relocation law. The U.E.R.A. builds upon the doctrinal innovation of the Restatement but refines and strengthens the Restatement approach to easement relocation. It establishes a significant but nuanced easement relocation right and nests it within a carefully constructed easement relocation procedural regime. The U.E.R.A. will provide greater flexibility for servient estate owners, allow for useful development of servient estates, but will not impose any material easement-related harm on an easement holder. The U.E.R.A. promises to promote more mutual accommodation between servient estate owners and easement holders. It also more accurately situates easements in the architecture of American property law.

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INTRODUCTION

Imagine a parcel of land burdened by an easement established sixty years ago in favor of an adjoining parcel of land. The easement gives the owner of the dominant estate, the adjoining parcel, a right of access across the burdened parcel, the servient estate, to and from a nearby public road. Although the servient estate is located near a growing population center and the local zoning ordinance would allow construction of seven new houses on the servient estate, the current location of the easement bisects several of the potential lots and thus would prevent construction of several of the houses.[1]

Now, suppose the servient estate owner develops a plan to relocate the easement. The easement's new location will make room for all seven lots and houses. The new driveway on the relocated easement will be just as wide and safe to use as the current one. The easement will terminate at the same points on the public road and the dominant estate. The servient estate owner will pay all costs of relocating the easement, including planning, construction, and preparation and recordation of a written instrument documenting the relocation. The servient estate owner will also assure that the dominant estate owner enjoys uninterrupted use of the easement in its current location until the new driveway is inspected and complete.

If the dominant estate owner rejects these plans, does the servient estate owner have any recourse? In some U.S. states, the servient estate owner would have a reasonable prospect of obtaining judicial relief because a servient estate owner enjoys a right—quite robust in some states and more

[1] This hypothetical is loosely based on the facts of M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053 (Mass. 2004). For detailed discussion of *M.P.M. Builders*, *see infra* notes 188–92.

limited in others—to relocate an easement to a more convenient location, at the servient estate owner's expense, provided the new location offers the same functional benefit to the easement holder.[2] In the other states and the District of Columbia, the opposite rule, commonly known as the "mutual consent rule," generally prevails: even if the proposed relocation will not cause any material harm to the easement holder and will greatly benefit the servient estate owner, a servient estate owner cannot relocate an easement unless the easement holder consents.[3]

This predicament has frustrated servient estate owners seeking to develop their land, not to mention their real estate lawyers, for many decades. Fortunately, a practical solution to this problem and the resulting disharmony in American property law is now at hand. On July 15, 2020, the Uniform Law Commission (the "ULC," formerly known as the National Conference of Commissioners of Uniform State Laws), approved and recommended to the states a new uniform act, the Uniform Easement Relocation Act ("the U.E.R.A." or "the Act") that offers a carefully balanced, judicially controlled mechanism to help landowners, their lawyers, and courts solve this recurring problem that has interfered with the productive development of land burdened by an easement in many states.[4] During the past two years, the U.E.R.A. was introduced in five state legislatures[5] and has been adopted in Nebraska and Utah.[6] Other state legislatures will likely consider the Act in the near future as they focus on reigniting stagnant economies and addressing the chronic undersupply of housing in the United States.

The U.E.R.A. solves the problem presented by the mutual consent rule by giving the owner of a servient estate the right to relocate an easement to another location on the servient estate, or to other land, at the servient estate

[2] *See infra* Parts I.B, I.C.1, I.E.1, and I.F.

[3] *See infra* Part I.E. 2–3.

[4] UNIF. EASEMENT RELOCATION ACT (UNIF. L. COMM'N 2020); *see also* Easement Relocation Act, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?communitykey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=groupdetails (last visited July 20, 2021).

[5] S.B. 164, 73d Gen. Assemb., Reg. Sess. (Colo. 2021); L.B. 501, 107th Leg., Reg. Sess. (Neb. 2021); S.B. 106, 81st Leg., Reg. Sess. (Nev. 2021); H.B. 414, 64th Leg., Gen. Sess. (Utah 2021); S.B. 266, 85th Leg., Reg. Sess. (W. Va. 2021); For more details see Easement Relocation Act, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=groupdetails (last visited July 20, 2021).

[6] 2021 Neb. L.B. 501 (enacting NEB. REV. STAT. § 76-2,128 et seq.); 2022 Utah H.B. 132 (enacting UTAH CODE § 57-13c-101 et seq.).

owner's expense, provided the relocation does not materially reduce the utility of the easement, increase the burden on the easement holder in its use or enjoyment of the easement, impair the easement-related purpose for which the easement was created, or impair the physical condition, use, or value of the dominant estate served by the easement.[7] The U.E.R.A. carefully circumscribes this right by requiring a servient estate owner to obtain judicial approval for an easement relocation opposed by an easement holder.[8] The Act also excludes several categories of easements from its scope.[9] Finally, the Act provides many other important safeguards for the easement holder and other potentially affected interest holders.[10]

As with all uniform acts promulgated by the ULC, wide adoption of the U.E.R.A. will resolve significant conflicts between the states. As intimated above, before 2000, courts in many states employed the mutual consent rule.[11] This rule, however, was not uniformly followed. From time to time some state courts permitted unilateral easement relocation by a servient estate owner when the benefits of relocation for the servient estate owner were large and the impact on the easement holder was minimal or non-existent.[12] Other courts effectively condoned unilateral easement relocations by rejecting a dominant estate owner's request for injunctive relief based on equitable balancing principles.[13] Further, a number of state statutes allow easement relocation in particular circumstances.[14] One state, Louisiana, has always allowed a servitude (the civil law analogue of an easement) to be relocated at the servient estate owner's expense as long as the new location is equally convenient for the dominant estate owner.[15]

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[7] UNIF. EASEMENT RELOCATION ACT §§ 4(1)–(3), (6); *see also id.* § 7 (assigning expenses of relocation to the servient estate owner).

[8] *See generally id.* §§ 5–6.

[9] *See id.* § 3(b)(1).

[10] *See id.* § 5(b)(1)(B)–(D) (requiring service of summons and complaint); *id.* § 8 (imposing duty of good faith); *id.* § 9(a) (requiring recordation of relocation affidavit and protecting easement holder's ability to use easement until necessary improvements are complete); *id.* § 9(b) (detailing limited effect of relocation and addressing priority).

[11] *See infra* Part II.A.

[12] *See infra* Part II.B(1).

[13] See *infra* Part II.B(2).

[14] *See infra* Part II.F.

[15] LA. CIV. CODE ANN. art. 748 (2021), discussed *infra* Part II.C. The Commonwealth of Puerto Rico has also long employed the same civil law servitude relocation rule. P.R. LAWS ANN. tit. 31 § 1673 (2020); P.R. CODIGO CIV. 481 (1930).

In 2000, the American Law Institute, following Louisiana's civil-law-inspired servitude relocation rule, promulgated Section 4.8(3) of the *Restatement Third of Property: Servitudes* ("the Restatement").[16] The Restatement rule allows a servient estate owner to relocate an easement, at the servient estate owner's expense, if the relocation does not lessen the utility of the easement, increase the burden on the easement holder in its use or enjoyment of the easement, or frustrate the easement's purpose.[17] Following the promulgation of Section 4.8(3), a number of state courts, including the state supreme courts of Colorado, South Dakota, and Massachusetts, adopted a robust version of the Restatement.[18] Some courts adopted the Restatement but limited its application to undefined easements or other particular kinds of easements.[19] Other state courts rejected the Restatement approach.[20] The U.E.R.A. builds upon Section 4.8(3) of the Restatement but adds new substantive and procedural safeguards and addresses issues not addressed by the Restatement but implicated by a statutory unilateral relocation right.[21]

This Article makes the case for adoption of the U.E.R.A. It argues that the U.E.R.A. establishes a carefully balanced statutory regime that protects the interests of an easement holder in its use and enjoyment of an easement and protects the physical condition, use, and value of a dominant estate but also offers a servient estate owner a crucial safety valve. It allows a servient estate owner to escape the deadlock than can result from application of the traditional mutual consent rule, particularly to the extent that rule allows an easement holder to permanently block a reasonable easement relocation request or demand a ransom payment.[22] At a broader level, the U.E.R.A. will enable the legal system to achieve the often significant aggregate social and economic benefits that can result from a successful easement relocation

[16] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (Am. L. Inst. 2000), discussed *infra* Part II D.

[17] *Id.*

[18] *See infra* Part I.E.1.

[19] *See infra* Part I.E.2.

[20] *See infra* Part I.E.3.

[21] In addition to excluding certain categories of easements from its scope and requiring that a servient estate owner file a civil action, Unif. Easement Relocation Act §§ 3–4, the act also protects the easement holder's interest in maintaining uninterrupted use and enjoyment of the easement until necessary improvements are complete. *Id.* § 9(b).

[22] *See generally infra* Part III.A–B.

without imposing any material harm on the easement holder.[23] Rather than produce more litigation and uncertainty as some critics of the Restatement (or any deviation from the mutual rule have suggested), the U.E.R.A. will lead to greater cooperation and accommodation between servient estate owners and easement holders, could well lower the cost of easements, and will ultimately facilitate the use of easements in private land use planning.[24] Finally, the U.E.R.A. helps rebalance the rights of both parties in an easement relationship by giving the servient estate owner, as well as the easement holder, a reasonable opportunity to adopt to changing circumstances, particularly economic and land use changes that might not have been anticipated at the time the easement was created.[25]

Part I of this article lays out the legal landscape prior to promulgation of the U.E.R.A, including: (A) the development of the mutual consent rule over two centuries of American case law; (B) the emergence of minority approaches allowing unilateral easement relocation in certain circumstances; (C) Louisiana's lengthy experience with servitude relocation under its Civil Code; (D) the dispersion of the civil law rule originating in France to other civil law jurisdictions and the appearance of flexible approaches to easement and servitude relocation in other common law and mixed jurisdictions; (E) the arrival of Section 4.8(3) of the Restatement; (F) judicial reactions to the Restatement, including decisions adopting its approach in whole or in part and decisions rejecting it; and finally; (F) other state statutes that already allow for easement relocation in specialized circumstances.

Next, Part II provides a section by section exposition of the Act, highlighting not only the benefits the Act provides to a servient estate owner but also the numerous substantive and procedural safeguards for easement holders and other interested parties. By explaining the structure and details of the Act and demonstrating the Act's responsiveness to objections raised about the Restatement, the article reveals that the U.E.R.A. establishes a meaningful but nuanced easement relocation right, nested within a carefully constructed procedural regime that enhances flexibility for a servient estate owner and allows useful development of a servient estate without imposing any material easement-related harm on an easement holder. Part III articulates the primary justifications for adoption of the U.E.R.A while

[23] *See generally infra* Part III.B.

[24] *See generally infra* Part III.A.

[25] *See generally infra* Part III.C–E.

responding to other arguments made in opposition to the Restatement. Part IV concludes.

I. EASEMENT AND SERVITUDE RELOCATION BEFORE THE U.E.R.A.

A. The Rise of the American Mutual Consent Rule

Before 2000, under the majority common law rule, a servient estate owner whose property was burdened by an easement could not relocate the easement without the easement holder's consent.[26] This rule emerged early in the nineteenth century, sometimes in response to an attempt by an easement holder to change the location of an easement without the burdened landowner's consent.[27] In the second half of the nineteenth century, and particularly in the twentieth century, the rule hardened into its current categorical form that rigidly requires a servient estate owner to obtain consent for an easement relocation even when a proposed relocation would not cause any material harm to the easement holder and would provide substantial benefits to the servient estate owner.[28] As the following discussion also reveals, this rule is somewhat anomalous in the law of easements. In many other situations, the law of easements relies—without controversy it seems—on open-textured reasonableness standards to govern the long-term relationship between the servient estate owner and the easement holder.[29]

1. The Nineteenth Century: A Tentative Start Toward Formalism

Although its precise origins in the common law are unclear,[30] the mutual consent rule emerged in U.S. case law during the first half of the nineteenth century. One early decision restricting unilateral easement relocation appears

[26] *See, e.g.*, Stamatis v. Johnson, 224 P.2d 201, 202–03 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1951); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980); R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581, 588 (Wyo. 1999). *See also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7.13 (2021).

[27] *See generally infra* Part I.A.1.

[28] *See generally infra* Part I.A.2.

[29] *See generally infra* Part I.A.2.

[30] The origins and history of the English version of the mutual consent rule are beyond the scope of this article. However, the first edition of Gale's influential treatise on the law of easements, published in 1839, acknowledges the rule in the context of ways of necessity. *See* C.J. GALE & T.D. WHATLEY, A TREATISE ON THE LAW OF EASEMENTS 248 (1839) (observing, without citation to any authority, that "[i]f, however, the right of way has once been assigned, its course cannot be altered by either party without the consent of the other").

in an 1815 New York case, *Wynkoop v. Burger*, in which the owner of land burdened with a right of way sought to alter a portion of its route, after the route had been established by the initial parties' conduct.[31] Although the easement holder tacitly accepted one alteration, the court rejected the servient estate owner's attempt to make another, noting that "it would be extremely unjust to allow the plaintiff in error to be changing this road whenever he pleased" and that the proposed second alteration "is evidently injurious to the defendant in error, as it increases the distance of travelling, in a small degree."[32] As it may only reflect a narrow, context-specific finding that the proposed relocation would burden the easement holder, *Wynkoop* hardly stands for an immutable rule denying a servient estate owner the right to relocate an easement in all cases.

In 1858, the Supreme Judicial Court of Massachusetts rendered another important easement relocation decision in *Jennison v. Walker*.[33] In this case, the servient estate owner had granted an easement to a neighboring property owner in 1800, allowing the neighbor the right to lay and maintain an aqueduct from a spring located on the servient estate to the dominant estate.[34] After 1818, however, the dominant estate owner stopped using the aqueduct, and the servient estate owner destroyed a portion of the aqueduct.[35] In 1855, the dominant estate owner, "the grantee" of the easement in the court's phrasing, went on the servient estate unilaterally, cleared out and walled up a reservoir that served as the water source for the aqueduct, and laid lead pipes to his own land in a direction different from the former aqueduct because a railroad now crossed that route.[36] After the servient estate owner sued and the trial court ruled in his favor granting nominal damages, the Massachusetts Supreme Judicial Court affirmed.[37]

Writing for the majority, Justice Bigelow not only found that the easement had likely terminated due to non-user,[38] but also stated that once an easement's location has been effectively fixed by the conduct of the parties, "it cannot be changed at the pleasure of the grantee."[39] Justice Bigelow

[31] 12 Johns 222, 223 (NY 1815).

[32] *Id.*

[33] *See* 77 Mass. (11 Gray) 423 (1858).

[34] *Id.* at 423.

[35] *Id.*

[36] *Id.* at 423–24.

[37] *Id.* at 423–25.

[38] *Id.* at 425–26.

[39] *Id.* at 426.

framed his rationale for limiting the ability of the grantee, the dominant estate owner, to modulate the location of an easement in terms of "[c]onvenience and justice," recognizing that if the court were to establish a rule indulging the dominant estate owner here "it would be open to questions of great doubt and difficulty, and would make the servient estate in great measure subject to the unrestrained control of the owner of the easement."[40] Citing *Wynkoop* and one other decision similarly restraining an easement grantee, the court added, "[i]t has therefore been held that the course of a way, when once established, cannot be altered by either party without the consent of the other."[41] The decision in *Jennison* reveals the glimmering emergence of the mutual consent rule, but apparently as dicta, and, quite significantly, only after the court rejected the notion that a *dominant estate owner* could claim an unfettered right to relocate an easement, reasoning that such a rule would excessively subjugate the servient estate to the dominant estate owner's control.

In his 1863 monograph, *A Treatise on the American Law of Easements and Servitudes*, Emory Washburn, the Busby Professor of Law at Harvard, did not articulate the mutual consent rule but cited two other decisions in support of the proposition that a servient estate owner and an easement holder could enter an oral agreement to discontinue an old right of way and replace it with a new one in a different location and that the agreement would be binding once the physical relocation took place.[42] A more stringent version of the mutual consent rule, however, began to emerge soon after publication of Washburn's treatise.

In its 1866 decision in *Gore v. Fitch*, the Supreme Judicial Court of Maine addressed the obstruction of a right of way created by express grant in 1849.[43] The right of way at issue in *Gore* featured a defined width and passed by the rear of two houses in a particular direction.[44] The court ultimately rejected the servient estate owner's attempt to change the right of way from its well

[40] *Id.*

[41] *Id.* at 426–27. The other decision cited in *Jennison* was Jones v. Percival, 22 Mass. (5 Pick.) 485, 494–95 (1827) (rejecting a plea that a landowner acquired an unrestricted right to pass anywhere over a neighbor's salt marsh by prescription and adding that, even if the claimant had been granted such an easement, once its location had been fixed, the grantee should not have a right to change its course unilaterally).

[42] EMORY WASHBURN, TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 200 (1863) (discussing and quoting Pope v. Devereaux, 71 Mass. (5 Gray) 409 (1855), and Smith v. Lee, 80 Mass. (14 Gray) 473, 480 (1860)).

[43] 54 Me. 41, 43 (1866).

[44] *Id.*

understood position to a new one.[45] Adopting a more formalistic approach that would be repeated many years later by the same court,[46] the court in *Gore* reasoned:

> The day after its execution the rights of the grantee were the same as plaintiff's rights [today]. Whatever was conveyed could not be reclaimed and new rights substituted. The conveyance left nothing optional with the grantor. It was absolute; it was unchangeable by him alone.[47]

Thirty years later, Leonard Jones' *Treatise on the Law of Easements*, published in 1898, stated an equally abstract, concise, and categorical version of the rule—"[a] way once located cannot be changed by either party without the consent of the other."[48] Interestingly, Jones relied heavily on *Jennison*, which, as noted above, actually involved judicial restraint on the ability of a dominant estate owner to change the location of an easement once the location had become fixed.[49] In addition, although he cited five other nineteenth century decisions involving a servient estate owner seeking to relocate an easement in support of his version of the mutual consent rule,[50] Jones also cited several decisions, besides *Jennison*, that similarly concerned an easement holder (often a railroad company) seeking to change the route of an easement or otherwise change the terms of a right of way agreement.[51]

2. The Twentieth Century: Crystallization and its Discontents

The categorical version of the mutual consent rule crystalized over the course of the twentieth century, particularly in several frequently cited

[45] *Id.* at 45–46.

[46] Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980) (quoting *Gore*, 54 Me. at 45).

[47] *Gore*, 54 Me. at 45.

[48] LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS § 352, at 283 (1898).

[49] *See id.* (citing Jennison v. Walker, 77 Mass. (11 Gray) 423, 426 (1858*)*; *id.* § 344, at 279–80.

[50] JONES, *supra* note 48, § 352, at 283, n.3 (citing Manning v. Port Reading R. Co., 33 A. 802 (N.J. 1896); Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544, 550 (1878); Bannon v. Angier, 84 Mass. (2 Allen) 128, 129 (1861); Smith v. Lee, 80 Mass. (14 Gray) 473, 480 (1860)).

[51] JONES, *supra* note 48, § 352, at 283, n.3 (citing Wood v. Mich. Air-Line Ry. Co., 51 N.W. 263, 264–65 (Mich. 1892); Palfrey v. Foster, 17 So. 425, 426 (La. 1895); St. Joseph Cnty. v. S. Bend & M. St. Ry. Co., 20 N.E. 499 (Ind. 1889); *but see id.* (also citing Keating v. Hayden, 30 Ill. App. 433, 434–35 (1888) (dominant estate owner was justified in refusing to use old road across servient estate after parties had agreed to and implemented a new road in slightly different location)).

appellate court decisions.[52] Interestingly, though, a number of these decisions reveal the tenuousness of the rule as a matter of legal policy. Appellate courts often had to reverse rulings of trial court judges who resisted a remorseless application of the mutual consent rule, especially in cases involving easements created in the distant past, long before the current owners acquired their property, and when the current easement location caused either actual harm to the servient estate owner or prevented useful development of the servient estate and a relocation would have caused little or no injury to the easement holder.[53] Some of the cases also reveal a crucial asymmetry at the heart of easement relationships. On one hand, under the common law, an easement holder generally can make any use of an easement that is reasonably convenient or necessary to enjoy an easement for its intended purpose,[54] and can even alter the manner, frequency, and intensity of use of an easement in light of changing technological developments.[55] On the other hand, under the mutual consent rule, the servient estate owner cannot alter the location of an easement to facilitate development of the servient estate regardless of any exogenous changes in the surrounding area or the reasonableness of the proposed relocation.[56]

The Washington Supreme Court's decision in *White Bros. & Crum Co. v. Watson* is the first twentieth century decision that played a significant role in entrenching the mutual consent rule but also reveals its potential for abuse and social and economic waste.[57] Ironically, like many of its nineteenth century precursors, the dispute actually involved a dominant estate owner seeking to relocate an easement,[58] in this instance an irrigation easement over mountainous land acquired by the dominant estate owner's predecessors under the doctrine of prior appropriation.[59] The dispute arose after a severe

[52] *See, e.g.*, Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1952); Davis v. Bruk, 411 A.2d 660, 664 (Me. 1980).

[53] *See, e.g.*, Smith v. Jackson, 104 S.E. 169, 170 (N.C. 1920); Sakansky v. Wein, 169 A. 1, 2 (N.H. 1933); Davis, 411 A.2d at 661–62, 664–66.

[54] *See* BRUCE & ELY, *supra* note 26, § 8.3 (emphasizing the open-ended, flexible, even "elastic" nature of an easement holder's right to use an easement and the correlative nature of judicial inquiry into the scope of easement holder's use rights).

[55] *Id.* §§ 8.3–8.4; 25 AM. JUR. 2D *Easements and Licenses* § 74 (2021). The well-established rule allowing an easement holder significant flexibility to intensify the use of an easement also appears in the RESTATEMENT, *supra* note 16, at § 4.10.

[56] BRUCE & ELY, *supra* note 26.

[57] *See generally* 117 P. 497 (Wash. 1911).

[58] *Id.* at 498.

[59] *Id.*

flood destroyed the dominant estate owner's flume and ditch and washed away a creek's banks at the source of the waters located on the servient estate.[60] If the easement could not be modified in response to the flood, most of the water flowing to the dominant estate would be lost to percolation and evaporation, thus rendering the dominant estate unfit for cultivation.[61] When the dominant estate owner proposed to move the point of diversion a modest distance upstream, construct a cement dam, and lay a pipe along the existing right of way, the servient estate owners refused to consent even though it presented no risk of injury to the servient estate.[62]

After a great deal of turmoil, the Washington Supreme Court eventually affirmed a trial court judgment in favor of the servient estate owners, holding that the dominant estate owner could not make any change in the source point for the water, or the length, location, or means of the water's conveyance through the easement, without the consent of the servient estate owner because the easement became "fixed and determined" at the time of its creation.[63] Indeed, the court unconditionally sustained the servient estate owners' refusal to cooperate and rejected the dominant estate owner's request for a flexible interpretation of the parties' rights, effectively rendering the easement's location unalterable and treating the dominant estate owner's request for an equitable adjustment to the easement's location and other attributes as a potentially coercive private taking despite the potential benefits for all parties.[64] Warning that "[n]o amount of hardship in a given case would justify the establishment of such a precedent,"[65] the court denied it had any capacity "to measure the comparative needs of private parties and compel a transfer to the one most needing and who might best utilize the property."[66]

Nine years later, in *Smith v. Jackson*, a trial court would have allowed a servient estate owner to plough an ancient right of way established by prescription that was causing erosion and interfering with the servient owner's farming activities.[67] Even though the servient estate owner had constructed a new right of way providing the dominant estate even shorter

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 499.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Smith v. Jackson, 104 S.E. 169, 169–70 (N.C. 1920).

access to a public road,[68] the North Carolina Supreme Court reversed the trial court, castigating the judge for even permitting the relevant testimony and emphasizing that "[i]t was the title to the easement which was the issue to be decided, and not whether it was injurious to the defendants' farm."[69] According to the court, all that matters in a case involving a problematic easement location is the "title," not the easement's mode of creation or its ongoing impact on the servient estate.

In *Sakansky v. Wien*, another crucial building block in the emerging mutual consent wall, the New Hampshire Supreme Court applied similar logic to reject a special master's recommendation allowing a servient estate owner to make adjustments in an eighteen-foot-wide right of way established by an 1849 deed.[70] To develop his property the servient estate owner proposed a building, albeit one that would include an eight-foot-high opening for the right of way in its original location, and a new right of way next to the building that would provide additional access to the dominant estate for any vehicles that could not fit through the opening.[71] Noting that "neither party had any absolute or unlimited right in the old right of way," the special master approved the plan using a "rule of reasonableness."[72] The New Hampshire Supreme Court rejected this equitable solution, however, acknowledging that although a "rule of reason" should govern the rights of the dominant and servient estate owner generally,[73] the dominant estate owner could insist upon use of the easement in its original location, no matter how unreasonable that insistence might be.[74] The rigidity of the mutual consent rule, as formulated here in *Sakansky*, stands out amidst the general fluidity of other rules governing an ongoing easement relationship, particularly the rule that an easement holder is generally entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servient estate,[75] and rules that give an easement holder fairly wide discretion to use, repair, and maintain an easement based on open-textured reasonableness standards

[68] *Id.* at 170.

[69] *Id.*

[70] 169 A. 1, 1–2 (N.H. 1933).

[71] *Id.* at 2.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 3.

[75] RESTATEMENT, *supra* note 16, at § 4.9. *See also* BRUCE & ELY, *supra* note 26, § 8.3, discussed *supra* note 54.

that take account of the use-based interests of the servient estate owner or other easement holders.[76]

As the twentieth century unfolded, courts increasingly applied the mutual consent rule in this rote and formalistic fashion, disregarding any benefits that an easement relocation could produce for the proponent and the insignificance of harm to the objector.[77] General treatises like *Corpus Juris* and *American Jurisprudence* reinforced judicial perceptions of the immutability of the mutual consent rule with terse statements of their own.[78] One of these frequently cited treatises, *American Jurisprudence*, also offered what turned into a commonplace rationalization for the rule by suggesting that "treating the location as variable would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged."[79] Although it offered essentially no justification for this rationalization,[80] the treatise's suggestion that variability of an easement would lessen the burdened estate's value and impede development makes sense only in the context of cases, like *Jennison v. Walker*, involving a

[76] RESTATEMENT, *supra* note 16, at § 4.10 (stating that a servitude holder is "entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude" and that "the manner, frequency, and intensity of use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate), § 4.12 (stating that "holders of separate servitudes creating rights to use the same property must exercise their rights so that they do not *unreasonably interfere* with each other") (emphasis added), § 4.13 (stating that except to the extent the terms of an instrument provide otherwise, a servitude holder has a duty "to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude . . . to the extent necessary to (a) prevent *unreasonable interference* with the enjoyment of the servient estate . . . .") (emphasis added).

[77] *See, e.g.*, Beville v. Allen, 237 P. 184, 185 (Ariz. 1925); Edgell v. Divver, 402 A.2d 395, 397–98 (Del. Ct. Ch. 1979).

[78] 19 C. J. *Easements* § 215, at 973 (1920); 17 AM. JUR. *Easements* § 87, at 988–89 (1938).

[79] 17 AM. JUR. *Easements* § 87, at 989.

[80] The only authority cited by the *American Jurisprudence* authors for this important claim is "Annotation: 5 L.R.A. (N.S.) 854 [1907]", which actually refers to a long-forgotten, annotated case report series known as *Lawyers Reports Annotated (New Series)* whose own references are quite obscure, citing merely one California Supreme Court decision, Winslow v. City of Vallejo, 84 Pac. 191 (Ca. 1906), which held that a city enjoying a right of way to lay a pipe on a servient estate did not have the right to lay additional pipes unless that right was clearly given by grant. It seems that the *American Jurisprudence* authors invented their litigation incitement and property value depreciation rationalizations more or less out of thin air.

dominant estate owner's attempt to relocate an easement[81] or attempts to transform a fixed easement into a floating easement.[82]

Two more notable decisions, one from Arizona and the other from Maine, consolidated this drift toward formalism, property abstraction, and disregard for social and economic waste in easement relocation doctrine by restating the mutual consent rule in the context of easement relocation proposals that would have clearly facilitated useful development on servient estates.[83] Moreover, by adding new rationalizations for the mutual consent rule, these two decisions substantially impeded the development of an alternative, more flexible approach.

First, in *Stamatis v. Johnson*, the Arizona Supreme Court rejected a servient estate owner's proposal to relocate a prescriptive irrigation easement only twenty-six feet to facilitate a plan to build a residential subdivision, even though the servient owner estate offered to replace the irrigation ditch located in the original right of way with a modern, underground, concrete pipeline that would have furnished water in the same quantity and just as conveniently as the old ditch.[84] Importantly, the supreme court justified its application of the mutual consent rule by pointing to several of the earlier twentieth century decisions discussed above,[85] and by asserting, in reliance on the thinly supported *American Jurisprudence* rationalization mentioned above, that the opposite approach, allowing the location of an easement to be varied when the benefits of relocation are substantial and the relocation would not harm the easement holder, would "incite litigation" and lower the value of and discourage investment in the parcels affected by the easement.[86] Writing in dissent, however, Justice Udall expressed frustration with the majority's holding, which effectively ordered the "reopening of an old, unsightly,

[81] *See generally* 77 Mass. (11 Gray) 423 (1858).

[82] *See* Hannah v. Pogue, 147 P.2d 572, 575 (Cal. 1944) (justifying the rule that an easement holder cannot change location of an easement, even if the proposed change would cause no harm to or actually benefit the servient estate owner, because such a right would transform an easement with a fixed location into a "floating easement").

[83] Stamatis v. Johnson, 224 P.2d 201 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1952); Davis v. Bruk, 411 A.2d 660 (Me. 1980).

[84] 224 P.2d at 202–03.

[85] *Id.* at 203 (citing and discussing White Bros. & Crum Co. v. Watson, 117 P. 497, 497 (Wash. 1911), Beville v. Allen, 237 P. 184, 185 (Ariz. 1925), and *Hannah*, 147 P.2d at 575).

[86] *Stamatis*, 224 P.2d at 203 (quoting 17 AM. JUR. *Easements* § 87 (1938)). As discussed *supra* note 79, the *American Jurisprudence* treatise writers were likely contemplating cases in which an easement holder sought to change the location of an easement, rather than, as in *Stamatis*, a proposal by a servient estate owner to relocate an easement.

wasteful, open irrigation ditch down the center of a 'blacktop public street' . . . just to satisfy the whim of the plaintiff," commenting that it "shocked [his] conscience."[87] According to Justice Udall, the court could have easily exercised "its broad, equitable powers" and found a way to do "justice between the parties, without perpetuating for all times an archaic and dangerous instrumentality of irrigation."[88]

Thirty years later, in *Davis v. Bruk*, the Maine Supreme Court vacated a trial court judgment permitting a servient estate owner to relocate, at her own expense, a vehicular right of way that passed close enough to her house to put it at risk of damage and put the servient owner and her guests in physical peril.[89] The Maine Supreme Court bolstered its reliance on the mutual consent rule by first quoting or discussing several of the leading decisions cited above,[90] including the absolutist conception of an easement offered more than a hundred years earlier in *Gore v. Fitch*.[91] More important, the court rejected the servient estate owner's plea to narrow the scope of the mutual consent rule and permit unilateral relocation by the servient estate owner when (1) the change of location is slight, (2) the servient owner bears the expense of relocation, (3) the relocated easement retains the same terminal points, and (4) the new location is just as or more convenient than the old location to the dominant estate owner.[92] Echoing *Stamatis*,[93] the *Davis* court rejected this plea for moderation and flexibility because it would introduce "uncertainty into land ownership" and "proliferate litigation which the general rule as prevails in Maine has tended to prevent."[94] In addition, the court suggested that allowing any scope for unilateral easement relocation by the servient estate owner would deprive the dominant estate owner "of the security of his property rights in the servient estate" and could lead to "harassment."[95] Finally, the *Davis* court advanced another rationale for maintenance of the mutual consent rule, one that would become a staple of future law and economics-oriented defenses of the rule—the notion that all

[87] *Id.* at 204 (Udall, J., dissenting).

[88] *Id.*

[89] 411 A.2d 660, 661–62, 664–66 (Me. 1980).

[90] *Id.* at 664–65 (quoting Sakansky v. Wein, 169 A. 1, 3 (N.H. 1933)) (citing and discussing Smith v. Jackson, 104 S.E. 169, 170 (N.C. 1920)).

[91] *Id.* at 665 (quoting and discussing Gore v. Fitch, 54 Me. 41, 45 (1866)).

[92] *Id.* at 665 (emphasis added).

[93] 224 P.2d at 203.

[94] 411 A.2d at 665.

[95] *Id.*

market participants in transactions involving land burdened and benefitted by an easement have fully incorporated the common law default rule into their bargains.[96] As the *Davis* court explained:

> A unilateral relocation rule could confer an *economic windfall* on the servient owner, who presumably purchased the land at a price which reflected the restraints existing on the property. Such a rule would relieve him of such restraints to the detriment of the owner of the dominant estate whose settled expectations would be derailed with impunity.[97]

It is worth noting that the *Davis* court did not offer any empirical evidence for this claim.

In short, with *Stamatis v. Johnson* and *Davis v. Bruk*, the common law mutual consent rule crystallized into a seemingly iron-clad, formalistic "property rule" prohibiting any kind of judicially controlled, *ex post* readjustment of an easement's location using an "in-kind" liability rule.[98] Courts justified the rule with a cluster of repeated arguments: (1) allowing any non-consensual *ex post* relocation by the servient owner will "incite litigation" and produce "uncertainty" for easement holders;[99] (2) an easement represents an absolute property right, no less robust than a fee simple absolute;[100] and (3) allowing any form of unilateral easement relocation for servient estate owners, no matter how constrained, could produce windfall gains and losses because all market participants presumably have perfect knowledge of the common law default rule when they enter into transactions involving land burdened and benefited by an easement.[101] Years later, academic commentary critical of Section 4.8(3) of the Restatement

[96] *See infra* Part III.B.

[97] 411 A.2d at 665.

[98] *See* John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 9–26, 43–77 (2005) (conceptualizing the debate over Section 4.8(3) of the Restatement in light of the "property rule" and "liability rule" paradigm and arguing for a refined "pliability rule" approach to easement relocation).

[99] Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1952); *Davis*, 411 A.2d at 665.

[100] White Bros. & Crum Co. v. Watson, 117 P. 497, 499 (Wash. 1911); Smith v. Jackson, 104 S.E. 169, 170 (N.C. 1920); *Davis*, 411 A.2d at 665.

[101] *Davis*, 411 A.2d at 665.

essentially repeated these same arguments, with only modest additional justifications.[102]

B. Judicial Resistance to the Mutual Consent Rule

Although the mutual consent rule assumed a dominant position in American common law by the middle-to-late twentieth century,[103] the rule was never quite as monolithic and universal as its judicial and academic advocates have claimed. Some courts always refused to follow the rule and approved unilateral easement relocation by a servient estate owner in a variety of factual circumstances. Some courts carved out an exception permitting unilateral easement relocation if the relocated easement provides the same functional benefits to the easement holder, the servient estate owner absorbs all costs, and the relocation does not materially inconvenience the easement holder.[104] Other courts drew on equitable balancing principles and effectively approved a servient estate owner's unilateral relocation of an easement by denying injunctive relief to the easement holder when the degree of change in the location of the easement was modest, the interests of the servient estate owner were substantial, or the easement holder acquiesced to the relocation.[105]

1. Same Functional Benefit and No Inconvenience

A number of decisions, sometimes overlooked by subsequent commentators or courts, refused to follow the majority mutual consent rule and adopted a more flexible approach to easement relocation that focused on the functional purpose of an easement rather than formalistic conceptions. For example, in *Brown v. Bradbury*, a 1943 decision, the Colorado Supreme Court affirmed a unilateral easement relocation by relying on equity and earlier Colorado case law indicating that an irrigation ditch could be modified if it still provided "adequate and satisfactory means" for an easement holder

[102] *See infra* Part IV.

[103] *See, e.g.*, 28A CORPUS JURIS SECUNDUM §§ 211–12, at 420–23 (2008); 25 AM JUR. 2D. *Easements and Licenses* § 69, at 565–66 (2004); 7 THOMPSON ON REAL PROPERTY § 60.04(c)(ii) at 460 (David Thomas ed. 1994). Curiously, one particularly influential mid-twentieth century treatise did not mention the problem of easement relocation at all in its lengthy chapter on easements. JAMES A. CASNER, ED., AMERICAN LAW OF PROPERTY, VOL. II, § 8.1 et seq. (1952) (authored by Oliver S. Rundell).

[104] BRUCE & ELY, *supra* note 26, § 7:16, at 489. *See infra* Part I.B.1.

[105] BRUCE & ELY, *supra* note 26, § 7:16, at 489. *See infra* Part I.B.2.

to receive its water.[106] In *Brown*, the servient estate owner unilaterally filled an old, unmaintained irrigation ditch easement located in the middle of his estate next to his house, and constructed a new ditch next to another reserved right of way at the edge of his estate, to reduce the risk that his young child would slip and drown in the old ditch and to enhance the land's overall utility.[107] Finding that the relocated ditch was "equal in efficiency to the old one for the purpose intended" and that the dominant estate owner suffered no resulting injury, the Colorado Supreme Court affirmed the trial court's rejection of the dominant estate owner's request for an injunction requiring the servient estate owner to reconstruct and restore the ditch to its former location, concluding that the trial court decision was "extremely fair."[108] In a subsequent decision, the Colorado Supreme Court partially limited the *Brown* doctrine but still relied on it to hold that a trial court could refuse to order a servient estate owner to restore a relocated ditch easement to its former location and instead fashion alternative relief "where other equities have arisen."[109]

In *Cozby v. Armstrong*, a 1947 Texas Court of Civil Appeals decision, the defendant, a servient estate owner, attempted to divert a right of way that passed directly in front of her house to a new location.[110] After a trial, a jury found that (1) the dominant estate owners' use of the old road deprived the servient estate owner of the reasonable and practical use of her residence and a portion of her land, and (2) the new road built by the servient estate owner was just as suitable, convenient, and economical for the dominant estate owners as the old one.[111] After acknowledging the mutual consent rule but also case law suggesting that an easement holder cannot abuse an easement so as to prevent the servient estate owner from making a reasonable use of its property,[112] the Court of Civil Appeals upheld the jury determination and reversed the trial court ruling in favor of the dominant estate owner.[113] The court emphasized that the new location benefited the servient estate owner by preventing automobile dust and light from entering her house and by

[106] 135 P.2d 1013, 1014 (Col. 1943).

[107] *Id.* at 1013.

[108] *Id.* at 1013–14.

[109] Valley Dev. Co. v. Weeks, 364 P.2d 730, 732 (Col. 1961).

[110] 205 S.W.2d 403, 405 (Tex. App.—Fort Worth 1947, writ ref'd n.r.e.).

[111] *Id.* at 407.

[112] *Id.* at 407–08.

[113] *Id.* at 408.

generally expanding the utility of the servient estate.[114] It also noted that, despite its greater length and a new turn, the new route still "did not discommode" the dominant estate owners because the termini had not changed and the number of gates had actually been reduced.[115] In short, the court allowed the relocation to stand because it "was not so drastic as to impair the rights and title of the appurtenant easement."[116]

A decade later, in *Millison v. Laughlin*, the Maryland Court of Appeals drew on similar principles in holding that the holder of a quasi-easement for an electric line had the right to maintain the line across the servient estate but did not have the right to insist that the appurtenances, including the electricity poles, remain in the exact same location.[117] Notably, the court explained its decision by drawing on previous Maryland decisions that supported the proposition that "a servient owner may modify the instrumentalities of the easement if by doing so he does not materially affect the rights of the dominant owner,"[118] and by noting case law from other jurisdictions which "support the doctrine that the owner of a servient tenement may make minor changes in the instrumentalities of the easement so long as he does not interfere in any substantial degree with the enjoyment of the easement by the dominant owner."[119] In the late 1990s, a Pennsylvania court also approved a servient estate owner's request to relocate a prescriptive easement in circumstances reminiscent of all of these decisions.[120] Finally, Kentucky courts have also regularly allowed roadway easements to be modified unilaterally as long as the modification does not alter the termini of the easement and the relocation does not produce material inconvenience for the easement holder.[121]

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] 142 A.2d 810, 813–16 (Md. 1958).

[118] *Id.* at 815.

[119] *Id.* at 816.

[120] Soderberg v. Weisel, 687 A.2d 839, 844 (Pa. Super. Ct. 1997) (approving relocation when new location would not unreasonably interfere with use and enjoyment of easement, termini are unchanged, and the relocated easement would eliminate a safety risk to the servient estate owner's young children).

[121] Wells v. Sanor, 151 S.W.3d 819, 823 (Ky. Ct. App. 2004); Stewart v. Compton, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); Terry v. Boston, 54 S.W.2d 909, 909–910 (Ky. 1932). *But see* Adams v. Pergrem, No. 2006-CA-001861-MR, 2007 WL 4277900, at *3 (Ky. Ct. App. Dec. 7, 2007) (incorrectly citing *Wells* in dicta as supporting mutual consent rule). In *Wells*, the court also suggested in dicta that Kentucky's minority rule allowing unilateral relocation may only apply to

The willingness of courts in this sporadic but never completely repressed line of decisions to modify an easement as long as the modification does not materially affect or substantially interfere with the use of an easement is significant. These decisions reveal that some courts have always been willing to exercise judicial discretion and bend the mutual consent rule to provide a measure of flexibility for servient estate owners.

2. Equitable Balancing at the Remedy Stage

During the last two decades of the twentieth century, a number of judicial decisions also injected flexibility into easement relocation disputes by focusing on remedies or other equitable factors. Several decisions acknowledged the majority mutual consent rule but effectively condoned unilateral easement relocations by rejecting easement holder requests for injunctive relief after a unilateral easement relocation had occurred, typically by noting that the easement holder had suffered no real damage because of the relocation and that the cost of reestablishing the original easement would be substantial.[122] Other decisions allowed unilateral easement relocations to stand primarily on the basis that an easement holder signaled acquiescence by not objecting timely and thus leading the servient estate owner to assume consent had been granted,[123] or because the scope of the relocation was small and an easement holder acquiesced for a relatively long period.[124] Several decisions have also permitted unilateral relocations of non-express easements

easements created by prescription. *Wells*, 150 S.W.3d at 824 n.2 (citing Gabbard v. Campbell, 176 S.W.2d 411 (Ky. 1943)).

[122] Vossen v. Forrester, 963 P.2d 157, 161–62 (Or. Ct. App. 1998); Umphres v. J.R. Mayer Enters., Inc., 889 S.W.2d 86, 90 (Mo. Ct. App. 1994); Kline v. Bernardsville Ass'n, Inc., 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993); Mackin v. Mackin, 439 A.2d 1086, 1088, 1090 (Conn. 1982).

[123] *See, e.g.*, Proulx v. D'Urso, 805 N.E.2d 994, 997 (Mass. App. 2004); Anderson v. De Vries, 93 N.E.2d 251, 255 (Mass. 1950); Bruxton v. Murch, 457 S.E.2d 81, 84 (Vt. 1995); Ericsson v. Braukman, 824 P.2d 1174, 1177 (Or. Ct. App. 1992).

[124] S. Star Cent. Gas Pipeline, Inc. v. Murray, 190 S.W.3d 423, 430–31 (Mo. Ct. App. 2006).

to stand on similar equitable grounds, particularly in the case of easements created by implication [125] or necessity.[126]

C. The Civil Law Approach: Louisiana and the World

1. Louisiana

Grounded in its civil law tradition and borrowing from the first modern civil code in the world, the 1804 French Civil Code (also known as the Code Napoleon),[127] Louisiana has long provided that a conventional servitude may be relocated unilaterally by the servient estate owner.[128] According to Article 748 of the Louisiana Civil Code, a dominant estate owner must accept the relocation of a servitude if three conditions are met: (1) the servitude's original location "has become more burdensome for the owner of the servient estate" or "prevents him from making useful improvements on his estate;" (2) the new location is "equally convenient" for the exercise of the servitude; and (3) "[a]ll expenses of relocation are borne by the owner of the servient

[125] Enos v. Casey Mountain, Inc., 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988); Millson v. Laughlin, 142 A.2d 810, 813–816 (Md. 1958). *See also* Bubis v. Kassin, 803 A.2d 146, 151–52 (N.J. App. Div. 2002) (denying dominant estate owners' request for injunctive relief and allowing relocation of an implied beach access easement because enforcement of the easement in its original location "would have a severe adverse effect upon the [servient owners'] beneficial enjoyment of their property," and this adverse effect "substantially outweighs the inconvenience to [the dominant owners] in being required to walk [a longer distance to the beach]").

[126] Bode v. Bode, 494 N.W.2d 301, 304–05, 305 n.2 (Minn. Ct. App 1992); Huggins v. Wright, 774 So.2d 408, 410, 412 (Miss. 2000); Taylor v. Hays, 551 So.2d 906, 908–10 (Miss. 1989).

[127] C. Civ. (Fr.) art. 701 (Dalloz 2020 ed.). *See also* THE CODE NAPOLEON OR FRENCH CIVIL CODE, translated by a Barrister of the Inner Temple, Art. 701, at 192 (1824) ("Nevertheless if this original assignment has become more burdensome to the proprietor of the estate subjected to the servitude, or if he is prevented from making there advantageous repairs, he may offer to the proprietor of the other estate, a place equally commodious for the exercise of his rights and the latter shall not be at liberty to refuse.").

[128] La. Civ. Code Ann. art. 748 (2021). For a detailed discussion of the history and recent experience of servitude relocation in Louisiana and another mixed jurisdiction with strong civil law roots, see John A. Lovett, *A New Way: Servitude Relocations in Scotland and Louisiana*, 9 EDIN. L. REV. 352 (2005). The source of the current code provision is Article 777 of Louisiana's 1870 Civil Code. La. Civ. Code art. 777 (1870). The 1870 Civil Code provision, and its precursors in the 1825 Louisiana Civil Code and the 1808 Digest of the Laws in Force in the Territory of Orleans, Louisiana's very first civil code, were all copied, practically verbatim from Article 701 of the 1804 French Civil Code (Code Napoleon). *Id.* at 377–80. The inspiration for Article 701 of the 1804 French Civil Code, however, is unclear. *Id.* at 378.

estate."[129] Similarly, the Louisiana Civil Code allows the owner of an estate burdened by a legal servitude of passage benefitting an enclosed estate (the civil law analogue of an easement by necessity) to relocate the servitude "to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate."[130]

Reported appellate court decisions applying the Louisiana Civil Code's servitude relocation regime began to appear in the late 1920s.[131] In an important 1970 concurring opinion in *Denegre v. Louisiana Public Service Commission*, Justice Albert Tate, Jr. clarified that the Civil Code's servitude relocation principles applied to all manner of conventional servitudes, whether created by express agreement, judgment, prescription, or destination of the owner (Louisiana's version of quasi-easements implied by prior use).[132] Citing an important French doctrinal source, Marcel Planiol, Tate emphasized that "the plain intent of [Louisiana's servitude relocation articles] is to permit the court to displace the site of the previous servitude, even if established by agreement or judgment, when the servitude is localized at a place too burdensome on the encumbered estate."[133] Justice Tate concluded with a powerful exposition of the interlocking utilitarian and freedom-promoting rationales for the state's servitude relocation regime, stressing that "the interests of society are furthered by the free use of land by private owners for its most advantageous social utility" and observing that "the full ownership of land is favored, as against restrictions upon its use imposed decades or even centuries in the past, provided that no prejudice is caused to property rights conferred by conventional agreement of the parties or predecessors in title."[134]

Subsequent Louisiana decisions have generally stressed the necessity (or at least the advisability) of a servient estate owner seeking judicial approval before attempting to relocate a servitude without the consent of the servitude

[129] La. Civ. Code Ann. art. 748 (2021).

[130] La. Civ. Code Ann. art. 695 (2021). *See* Lovett, *supra* note 128, at 379–80 (discussing historical sources of Article 695 in prior Louisiana civil codes and noting that this provision did not have a source in the Code Napoleon).

[131] Lovett, *supra* note 128, at 380–83 (reviewing Louisiana case law dating from 1928 through 1965).

[132] Denegre v. La. Pub. Serv. Comm'n, 242 So.2d 832, 835 n.2 (La. 1970) (Tate. J., concurring).

[133] *Id.* at 838–39.

[134] *Id.* at 839.

holder.[135] Over the years, Louisiana courts have frequently applied the Civil Code's servitude relocation articles, in some cases rejecting proposed servitude relocations because the new location would result in substantial inconvenience or loss of servitude utility to the dominant estate owner[136] and in other cases approving relocations to permit servient estate development when the new servitude location would not impair a servitude's utility.[137]

2. International Dispersion

As noted earlier, the flexible, utilitarian civil law approach to servitude relocation first appeared in Article 701 of the 1804 French Civil Code and remains unchanged in French Law today.[138] In North America, two other mixed jurisdictions besides Louisiana have adopted the traditional civil law approach to servitude relocation: Quebec[139] and Puerto Rico.[140]

In Europe and Latin America, many legal systems have either adopted the French approach or expanded it with their own innovations. The Belgium Civil Code, for instance, retained the exact same language (and even same article number) as used in the French Civil Code for two centuries,[141] with only slight modifications in language and a new section reference in its most recent incarnation.[142] The Civil Code of Spain essentially reproduces the text of Article 701 of the French Civil Code without any significant changes.[143] The Greek Civil Code reproduces the same fundamental servitude relocation

[135] Discon v. Saray, Inc. 265 So.2d 765, 772 n.4 (La. 1972); Hotard v. Perriloux, 8 La. App. 476, 477 (La. Ct. App. 1928); Brian v. Bowlus, 399 So.2d 545, 550 (La. 1981) (Lemmon, J., concurring in part and dissenting in part on rehearing) (asserting that servient estate owner should either obtain the servitude holder's consent or "have the relocation approved and the new location fixed by the court").

[136] Welch v. Plan. and Zoning Comm'n of East Baton Rouge Par., 220 So.3d 60, 64–68 (La. Ct. App. 2017); Woodward v. Gehrig, 707 So.2d 1322, 1324 (La. Ct. App. 1998); Fuselier v. Hebert, 526 So.2d 1169, 1172 (La. Ct. App. 1988); Delfice Land Corp. v. Citrus Lands of La., 330 So.2d 631, 623–33 (La. Ct. App. 1976).

[137] Coleman v. Booker, 94 So.3d 174, 177–78 (La. Ct. App. 2012); Ogden v. Bankston, 398 So.2d 1037, 1043–45 (La. 1981); Holiday City Builders v. Acadian Aviation Corp, 386 So.2d 1019, 1020–21 (La. Ct. App. 1980); Ramsey v. Johnson, 312 So.2d 671, 672 (La. Ct. App. 1975).

[138] C. Civ. (Fr.) art. 701 (Dalloz ed. 2020).

[139] Civ. Code (Quebec) art. 1186.

[140] P.R. Codigo Civ. art. 953 (2021); P.R. Codigo Civ. art. 953 (1930).

[141] Code Civil (Belgium) art. 701 (John H. Crabb trans., 1982).

[142] Code Civil (Belgium) art. 3.124 (2020).

[143] Civil Code (Spain) art. 545 (Julio Romanach, Jr. trans., 1994).

principles originally developed in France, though in slightly more abstract, functional terms.[144]

The modern Dutch Civil Code, in force since the early 1990s, also offers the same servitude relocation calculus first articulated in the French Civil Code by stating that a servient estate owner can change the location where an easement is exercised to another location on the servient estate at its own expense provided the relocation does not diminish "the right of the owner of the dominant property to exercise the easement."[145] In another provision, however, the Dutch Civil Code permits a court to modify or even cancel an easement at the demand of a servient owner based on unforeseen changed conditions as long as twenty years have passed since the creation of the servitude.[146]

Interestingly, under the Italian Civil Code and the relatively new Brazilian Civil Code, a servient estate owner and a dominant estate owner are both granted a right to relocate a servitude at their own expense, although the conditions for a dominant estate owner to achieve a unilateral relocation are slightly more demanding.[147] In Italy, the servient estate owner can also transfer the servitude to other land it owns or even to land owned by a third party, provided the servitude continues to be equally convenient to the dominant estate owner.[148]

Under the influential German Civil Code, the BGB, even when the "actual use" of a real servitude is restricted to "a part of the servient piece of land," the servient estate owner may demand removal of the servitude's use "to another location which is equally suitable for the holder of the right, if the use on the present location is especially onerous" and the servient estate

[144] Civil Code (Greece) Sec 1128 (Constantin Taliadoros trans., 2000).

[145] NBW (Netherlands) Book 5, art. 73(2) (1992) (THE CIVIL CODE OF THE NETHERLANDS, Hans Warendorf et al. trans., 2009).

[146] *Id.* art. 78.

[147] C.C. (Italy) art. 1068 (Mario Beltramo et al. trans. and eds., Oceana 2010) (granting servitude relocation right to servient estate owner if "the original use has become more burdensome for the servient land or interferes with work, repairs, or improvements on it," and the new location offers the dominant estate owner "an equally convenient place for the exercise of his rights" and granting same right to dominant estate owner "if he proves that the change produces a considerable advantage for him and does not cause damage to the servient land"); C.C. (Brazil) art. 1384 (2004) (Julio Romañach, Jr. trans. Lawrence Pub. 2011) ("A servitude may be moved from one place to another by the owner of the servient estate, at his own expense, if this does not in any way diminish the advantages of the dominant estate, or by the owner of the latter, at his cost, if there were a considerable increase in the advantages and no prejudice to the servient estate.").

[148] C.C. (Italy) art. 1068 (Susanna Beltramo trans. and ed. West 2012).

owner bears the cost of removal and pays in advance.[149] Moreover, this right to relocate a servitude applies even if "the part of the piece of land to which the use is limited is determined by legal transaction."[150] Finally, the servient estate owner's right to relocate a servitude under this provision "cannot be excluded or limited by legal transaction."[151] The German Civil Code thus treats the servitude relocation principle first announced in the French Civil Code as a mandatory, nonwaivable right.

Finally, the Swiss Civil Code tracks the general principles of servitude relocation first articulated in the French Civil Code and adds that the servient estate owner's relocation right applies "even if the particular place affected by the servitude is entered in the [land] register."[152] Another article in the Swiss Civil Code goes further and provides that a predial servitude can be erased at the servient owner's demand if the servitude has "ceased to benefit the dominant property," and even allows the servient owner to obtain total or partial relief from the servitude by compensating the dominant estate owner if the servitude provides "some benefit to the dominant property, but this benefit if of little importance in comparison with the burden imposed on the servient owner."[153]

Just as noteworthy as these developments in the civil law world, a surprising number of common law jurisdictions abroad (in Australia, New Zealand, Canada, and the United Kingdom) have also effectively embraced the same approach to easement relocation by adopting statutes that grant courts broad authority to modify or even terminate an easement when a modification or termination would not substantially injure the easement holder or changed conditions otherwise justify modification or termination.[154] Other common law jurisdictions, including England and

[149] BGB § 1023 (S. Forrester et al., Rothman & Co. trans., 1975). See also BGB § 1023 (Simon L. Goren trans., 1994).

[150] BGB § 1023 (S. Forrester et al., Rothman & Co. trans., 1975).

[151] *Id.*

[152] C.C. (Switz.) § 742 (Ivy Williams, Oxford trans., 1925).

[153] C.C. (Switz.) § 736.

[154] CONVEYANCING ACT 1919 (New South Wales) § 89(1); PROPERTY LAW ACT 1974 (Queensland) § 181(1); CONVEYANCING AND LAW OF PROPERTY ACT 1884 (Tasmania) § 84C(1); Law of Property Act 2000 (NT) § 177; PROPERTY LAW ACT 2007 (New Zealand) § 317(1); PROPERTY LAW ACT (British Columbia) (RSBC 1996, c 377) § 35; PROPERTY (NORTHERN IRELAND) ORDER 1978 (SO 1978/459 (NI 4) §§ 3(1)(c), 5(1), 6(2). *Cf.* LAND AND CONVEYANCING REFORM ACT 2009 § 50 (Republic of Ireland) (permitting modification or discharge of freehold covenants but not mentioning easements); LAW OF PROPERTY ACT 1958 § 84(1) (Victoria) (same as to restrictive covenants).

Wales and Ontario, have also considered whether existing judicial authority to modify or extinguish restrictive covenants should be expanded to allow for modification or extinction of easements.[155] Scotland, a mixed jurisdiction that has modernized much of its property law in recent decades, has long allowed the owner of land burdened by a predial servitude to apply to its Lands Tribunal for the discharge or modification of the servitude.[156]

Finally, the Supreme Court of Appeal of South Africa recently reconsidered its approach to the subject of unilateral servitude relocation.[157] After surveying developments around the world and noting its inherent power to develop the common law and its new constitutional duty to account for "the interests of justice,"[158] the court discarded South Africa's own early twentieth century version of the mutual consent rule.[159] In its place, the court chose to adopt the flexible approach used in the Netherlands, France, Louisiana, and Scotland, among other jurisdictions, and fashioned a new rule allowing a servient estate owner to relocate a predial servitude without the consent of the dominant estate owner, as long as the servient estate owner

[155] Although Section 84(1) of the Law of Property Act of 1925 allows landowners in England and Wales to apply for and obtain judicial discharge or modification of a restrictive covenant on the grounds of obsolescence or other utilitarian bases, the statute does not apply to easements. THE LAW OF PROPERTY ACT 1925 § 84(1) (as amended by THE LAW OF PROPERTY ACt 1969, Sch. 3, SI 2009/1307). In response to calls for reform from scholars and courts, KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW ¶ 5.1.85, at 636–37 (5th ed. 2009) (criticizing English mutual consent rule, noting Restatement, and recommending that unilateral relocation of an easement be allowed as an insubstantial interference with dominant estate owner's interest "if the relocation causes him no inconvenience or loss of utility and is 'necessary to achieve an object of substantial public and local importance and value'") (quoting *Greenwich Healthcare National Health Service Trust v. London and Quadrant Housing Trust*, 77 P & CR 133, 138–39 (1999)), the Law Commission of England and Wales has recommended that the jurisdiction of the Lands Chamber be extended to allow for the modification or discharge of easements on similar terms on a prospective basis. LAW COMMISSION, MAKING LAND WORK: EASEMENTS, COVENANTS AND PROFITS A PRENDRE, Law. Com. No. 327, §§ 7.27-7.36, at 162–64 (2011). The Ontario Law Commission has also recommended that Ontario provincial courts' power to modify or extinguish covenants be extended to easements. ONTARIO LAW REFORM COMMISSION, REPORT ON BASIC PRINCIPLES OF LAND LAW 154–156 (1996).

[156] TITLE CONDITIONS ACT 2003 (2003 asp 9) (Scotland) § 909(1)(a)(1). For a detailed discussion of Scotland's experience with servitude relocation, see Lovett, *supra* note 128, at 363–76, 389–92.

[157] Linvestment CC v. Hammersley, 3 S.A. L. Rep. 283, 286–93 (Sup. Ct. App. 2008).

[158] *Id.* at 291.

[159] *Id.* at 292–93 (Sup. Ct. App. 2008) (overturning Gardens Est. Ltd v. Lewis, 1920 A.D 144, 150, and Van Heerden v. Coetzee and Others, 1914 AD 167, 171–72).

pays the costs of the relocation and the relocation does not prejudice the owner of the dominant tenement.[160]

Summing up that court's rationale, Judge Heher stressed the importance of permitting a servient estate owner a reasonable opportunity to develop the burdened land, especially when a right of way or a servitude was granted or created by prescription many years earlier, often well before the current owner even acquired the burdened land, the original contracting parties are long gone, and the surrounding environment has changed.[161] As Judge Heher put it: "Properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Nor will it cheapen the value of registered title or prejudice third parties."[162] If a leading South African court can see its way toward a new rule on servitude relocation so forthrightly after considering developments across numerous legal systems, perhaps American legislatures should take note.

D. Restatement (Third) of Property: Servitudes § 4.8(3) (2000)

In 2000, the American Law Institute altered the landscape of easement and servitude relocation law in the United States when it promulgated Section 4.8(3) of the Restatement (Third) of Property: Servitudes and essentially adopted the civil law approach long used in Louisiana and many other countries.[163] Under this rule, a servient estate owner can relocate an easement, without the easement holder's consent, on the following terms:

> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

[160] *Linvestment*, 3 S.A. L. Rep. at 292–93 (citing Lovett, *supra* note 128, as "an instructive comparative survey [that] traces the progress of the law from the common Roman roots of Scotland and the state of Louisiana until the 21st century, showing how the tide is turning from strict adherence to contractual rights toward a utilitarian power of relocation that is judicially controlled or to legislative intervention having similar effect").

[161] *See id.*

[162] *Id.* at 293. For a detailed discussion of *Linvestment*, see AJ VAN DER WALT, THE LAW OF SERVITUDES 421–24 (GJ Pienaar ed., 2016).

[163] *See* RESTATEMENT, *supra* note 16, at § 4.8(3).

> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.[164]

In the revision comments to Section 4.8, the Restatement drafters, including, presumably, the Reporter for the Restatement (Third), Professor Susan French, articulated several rationales for this new approach.[165] Most of the rationales are utilitarian in nature, although one is more historical. First, the drafters argued that because the new rule only allows a servient estate owner to move an easement if the change does not unduly interfere with "the legitimate interests of the easement holder," the new rule would increase aggregate utility by increasing "the value of the servient estate without diminishing the value of the dominant estate."[166] In other words, the drafters claimed that an easement relocation under the calculus of Section 4.8(3) would be "Pareto efficient," meaning that while the servient estate is made better off by the relocation, the easement holder will not actually be any worse off, at least to the extent the easement continues to provide the same easement-related benefits to the holder.[167]

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[164] *Id.* Subsections (1) and (2) of Section 4.8 address a different question—how to determine the *original* location and dimensions of a servitude when those features are not fixed by the instrument or circumstances surrounding creation of a servitude. *Id.* at § 4.8(1)–(2). *See also id.* at cmt. (b) (explaining that subsection (1) gives the servient owner "the power to locate a servitude *in the first instance*") (emphasis added). Unfortunately, some courts have construed the broad statement in the introductory phrase of Section 4.8 ("Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows…") to mean that all of Section 4.8's subparts, including subsection (3) addressing servitude relocation, are inapplicable whenever the location and dimensions of a servitude are set forth in the original instrument or otherwise defined at the outset, thus leading those courts to restrict their adoption of the Restatement to undefined easements. *See, e.g.*, Lewis v. Young, 705 N.E.2d 649, 653–54 (N.Y. 1998); St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 193–96 (Nev. 2009), discussed *infra* notes 207, 393 and accompanying text. *See also* Town of Ellettsville v. DeSpirito, 111 N.E.3d 987, 992–94 (Ind. 2018) (explaining that Restatement drafters probably did not intend for Section 4.8(3) to be restricted to undefined, unfixed easements).

[165] *See* RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

[166] *Id.*

[167] *See* ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT 189 (2004) ("A change in the status quo is considered to be Pareto superior if it makes at least one person better off without making anyone else worse off."). The drafters of the Restatement did not address whether the easement holder might have some subjective reason for rejecting an easement relocation or the

Next, the drafters argued that the new rule would rebalance the rights of the servient estate owner and the easement holder in their ability to respond to changed circumstances. As the drafters noted, an easement holder already benefits from a well-established common law rule, recognized in Section 4.9 of the Restatement, which provides that "the easement holder may increase use of the easement to permit normal development of the dominant estate, if the increase does not unduly burden the servient estate."[168] Allowing a servient estate owner to change an easement's location under Section 4.8(3)'s rule of reason would be "a fair tradeoff," the drafters argued, "for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate."[169]

This argument about achieving a more functional balance between the parties to an easement was paired with a historical claim about the mutual consent rule—namely, the observation, confirmed to some extent by the discussion in Part I.A of this article, that many of the early decisions articulating the mutual consent rule actually involved judicial efforts to prevent an easement holder from unilaterally moving an easement.[170] Thus, the drafters noted that the reasons typically given for constraining an easement holder from being able to move an easement unilaterally (that it "would depreciate the value of the servient estate, discourage its improvement, and incite litigation") did not apply to servient estate owner

theoretical counter-argument that only market exchanges are truly Pareto efficient. *See id.* at 189–90 (observing that the "classic example of a *Pareto efficient* exchange is a voluntary market exchange where, by definition (in the absence of fraud, duress, or the like), both parties are made better off, in their own estimation, by virtue of the exchange").

[168] RESTATEMENT, *supra* note 16, at § 4.8 cmt. f (citing *id.* § 4.9). *See also* BRUCE & ELY, *supra* note 26, § 8:13 (acknowledging that an easement's scope "may be expanded beyond the terms of the grant or the original usage, but the dominant owner may not unreasonably increase the burden on the servient estate") (footnote omitted).

[169] RESTATEMENT, *supra* note 16, at § 4.8 cmt. f. *See also* BRUCE & ELY, *supra* note 26, § 8:13 (observing that in "controversies over expanded usage, courts balance the dominant owner's right to enjoy the easement and take advantage of technological innovations with the servient owner's right to make all use of the servient land that does not interfere with the servitude" and stressing that "[s]ince these rights are relative, courts must strive to protect the interests of both parties").

[170] *See* RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

attempts to move an easement, with the possible exception of the litigation incitement rationale.[171]

Turning to the specific concerns raised in *Stamatis v. Johnson* and *Davis v. Bruk* about the potential for an alternative rule to incite litigation, subject the easement holder to harassment, and, perhaps most important, bestow windfall gains on the servient estate owner while upsetting contractual expectations of the easement holder,[172] the Restatement drafters argued that the "safeguards" contained in Section 4.8(3) would "protect the easement owner's legitimate interests."[173] In a sense, this was a return to the argument about net aggregate utility, but the drafters acknowledged that even if the new rule produced some windfall gains for the servient estate owner (and windfall losses for the easement holder), this potential unfairness was outweighed by the prospect that the new rule would prevent an easement holder from blocking development of the servient estate even when a relocated servitude would serve the easement holder equally well.[174]

Finally, opening out to a much larger field of evaluation, the Restatement drafters suggested that the new rule's capacity to reduce the risk that a localized easement would unduly restrict a servient estate owner's future development value promised to make landowners more willing to grant easements, thus lowering their price in the long run, and thereby encouraging their use in private land use planning.[175] As the next section will show, these arguments proved to be persuasive to some judges, as a number of U.S. courts fully or partially adopted the Restatement approach.

E. Judicial Responses to the Restatement

1. Decisions Adopting the Restatement

During the 2000s, a number of state courts, including the state supreme courts of Colorado, South Dakota, and Massachusetts, and courts of appeal in Nebraska and Illinois, adopted the Restatement approach to easement

[171] *Id.* For a discussion of the reasons the U.E.R.A. does not provide an easement holder with a reciprocal right to relocate an easement without the servient owner's consent, see *infra* Part II.D, notes 295–302 and accompanying text.

[172] *See* Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950); Davis v. Bruk, 411 A.2d 660, 661–62, 664–66 (Me. 1980).

[173] *See* RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

[174] *See id.*

[175] *See id.*

relocation and applied it in a robust manner.[176] In two other states, New York and Nevada, courts adopted the Restatement but limited its application to undefined easements.[177] Other state courts adopted the Restatement but limited its application even more narrowly.[178]

Robust Adoptions: In *Roaring Fork Club, L.P. v. St. Jude's Co.*, a servient estate owner attempting to create a private fishing and golf club could not obtain consent from the owner of an adjacent dominant estate (a ranch) to modify various irrigation easements burdening the land.[179] After the servient estate owner altered the easements (and the accompanying irrigation ditches) unilaterally by realigning channels, diverting water flows, enclosing portions of some ditches in pipes, and making other improvements, the dominant estate owner sued, seeking restoration of the ditches to their original location and removal of any improvements.[180] The Colorado Supreme Court, however, ruled that the servient estate owner did not have to return to the status quo and held more generally that a servient estate owner can move or alter an irrigation easement, without a dominant estate owner's consent, if it obtains judicial authorization under the Restatement.[181]

In *Roaring Fork*, the court justified its adoption of the Restatement by citing the Restatement comments, academic commentary on the Restatement,[182] and prior judicial decisions from Colorado and other states exhibiting flexibility on easement relocation.[183] The court emphasized that an easement relationship should be conceptualized in terms of mutual

[176] *See, e.g.*, Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1237–39 (Colo. 2001); Clinger v. Hartshorn, 89 P.3d 462, 469 (Colo. App. 2003); M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057–59 (Mass. 2004); Carlin v. Cohen, 895 N.E.2d 793, 796–99 (Mass. App. Ct. 2008); Burkhart v. Lillehaug, 664 N.W.2d 41, 43–44 (S.D. 2003); Stanga v. Husman, 694 N.W.2d 716, 718–20 (S.D. 2005); R & S Invs. v. Auto Auctions, Ltd., 725 N.W.2d 871, 879–81 (Neb. Ct. App. 2006).

[177] *See* Lewis v. Young, 705 N.E.2d 649, 653–54 (N.Y. 1998) (relying on a tentative draft of Section 4.8(3)); St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 193–96 (Nev. 2009).

[178] *See infra* notes 207–211 and accompanying text.

[179] 36 P.3d at 1230.

[180] *Id.* at 1230–31.

[181] *See id.* at 1230–31, 1237, 1239.

[182] *Id.* at 1232, 1237.

[183] *Id.* at 1235–37. In addition to citing the Colorado decisions in Brown v. Bradbury, 135 P.2d 1013, 1014 (Colo. 1943), and Valley Dev. Co. v. Weeks, 364 P.2d 730, 731 (Colo. 1961), the court discussed the New York Court of Appeals decision in Lewis v. Young, 705 N.E.2d 649, 654–55 (N.Y. 1998) but did not limit its adoption of the Restatement to undefined easements.

accommodation and use maximization, not inflexible property rights,[184] and specifically rejected the windfall gains and losses argument articulated in *Davis v. Bruk* by noting that the mutual consent rule can also lead to windfalls when parties have not anticipated its effect.[185] Returning to its predominant theme of mutual accommodation and flexibility, the court stressed once more that "each property owner ought to be able to make the fullest use of his or her property allowed by law, subject only to the requirement that he or she not damage other vested rights holders."[186]

Although it held that the particular servient estate owner in *Roaring Fork* could be liable for trespass damages because of its failure to secure advance judicial authorization for the proposed relocations,[187] the court expressed its confidence in judicial competence to balance the respective rights of a servient estate owner and an easement holder.[188] Curiously, almost as if to prove that judicial authorization for easement relocation would not be too lightly given in Colorado, several subsequent Colorado judicial decisions applied the *Roaring Fork*-Restatement framework and held that servient estate owners did not satisfy the Restatement's conditions for relocation.[189]

The South Dakota Supreme Court soon followed Colorado's example when it used the Restatement to approve a servient estate owner's unilateral regrading and reshaping of an access road that had occurred many years earlier and that significantly improved the road's quality.[190] In 2005, the same court reaffirmed its reliance on the Restatement when it approved a servient estate owner's prior unilateral modification of an access easement (by

[184] *See Roaring Fork*, 36 P.3d at 1235–37.

[185] *See id.* at 1237 (responding to Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980)).

[186] *Id.*

[187] *See id.* at 1234, 1237–38.

[188] *See id.* at 1231, 1237–38.

[189] *See* Clinger v. Hartshorn, 89 P.3d 462, 469 (Colo. App. 2003) (holding that relocation of a prescriptive easement used for guiding and outfitting purposes would be improper because of the increased burden potentially imposed on the dominant estate owner); City of Boulder v. Farmer's Reservoir & Irrigation Co., 214 P.3d 563, 567–69 (Colo. App. 2009) (holding that city could not alter an irrigation ditch easement by running a hiking trail through a culvert under the ditch because alteration would materially and adversely affect the easement holder's maintenance rights).

[190] *See* Burkhart v. Lillehaug, 664 N.W.2d 41, 42–44 (S.D. 2003). The access road at issue in *Burkhart* was initially noted on a plat at the time of its creation, but the plat did not contain any specific survey information related to its precise location, length, width, slope, grade, or any other qualities. *Id.* at 42. Although the court noted the primitive origins of the easement, nothing in the court's holding suggests that the court's adoption of Section 4.8(3) hinged on the undefined nature of the easement in its original grant. *Id.* at 42–43.

creating two new corners and adding pavement) to facilitate development of an extensive planned community.[191]

Finally, in *M.P.M. Builders, LLC v. Dwyer*, the Supreme Judicial Court of Massachusetts approved a servient estate owner's request to replace, at its own expense, a sixty-two-year-old cartway with two new access easements at another location on the servient estate to permit the construction of houses on three of seven subdivided parcels on the servient estate.[192] Reversing a reluctant land court judgment in favor of the dominant estate owner,[193] the supreme judicial court expressly adopted the Restatement, praising it as "a sensible development in the law," and one that "strikes an appropriate balance between the interests of the respective estate owners."[194] To buttress its holding, the court stressed the general principle that a servient estate owner should be able to make all beneficial uses of a servient estate "as long as the purpose for which the easement was originally granted is preserved," and rejected arguments typically advanced in favor of preservation of the mutual consent rule.[195] Perhaps most significantly, the court in *M.P.M. Builders* addressed the tendency of some dominant estate owners to object to even a narrowly tailored, sensible request to relocate an easement that will have no material impact on the easement holder's use and enjoyment of the easement by emphasizing that an easement only "serve[s] a particular objective" and does not "grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose."[196] This key insight—that a typical easement is created to serve an affirmative purpose and gives

[191] *See* Stanga v. Husman, 694 N.W.2d 716, 718–20 (S.D. 2005). In *Stanga*, the court noted that the dominant estate owner could not prove that the modifications to the easement impeded access to his property. *See id.* at 719. In fact, observing that the modifications likely improved the road and were made for "legitimate planning and development purposes," the court held that the modifications were reasonable and satisfied the Section 4.8(3) criteria. *See id.* at 719–20.

[192] 809 N.E.2d 1053, 1055 (Mass. 2004).

[193] *See id.* at 1059. Apparently sympathetic to the servient estate owner's predicament, the land court judge described the case as "a clear example of an increasingly common situation where a dominant tenant is able to block development on the servient land because of the common-law rule which . . . may well be the result of unreflective repetition of a misapplied rationale." *Id.* at 1056 (alteration in original).

[194] *Id.* at 1057.

[195] *See id.* at 1057–58.

[196] *Id.* at 1058. The court also observed that: (1) the Restatement "does not destroy the value" of the dominant estate; (2) a relocated easement is no less certain as a property interest than the easement in its original location; and (3) the common law mutual consent rule threatened to turn a mere access easement into a possessory interest, "rather than what it is, merely a right of way." *Id.*

the easement holder a limited right to use the servient estate for that purpose but not a general veto power over other uses of the servient estate—is highlighted by the substantive criteria for easement relocation under the U.E.R.A.[197]

Although the court in *M.P.M. Builders* advised that a servient owner should always seek judicial authorization before embarking on a relocation and although it acknowledged that adoption of the Restatement could produce "increased litigation" in the short run, the court reasoned that desirable developments in the law, particularly ones that promote fairness and greater utility, should not be rejected merely because of the possibility of litigation.[198] Indeed, the court predicted that "over time, uncertainties will diminish and litigation will subside as easement holders realize that in some circumstances unilateral changes to an easement, paid for by the servient estate owner, will be enforced by courts."[199] In other words, the court predicted that its adoption of the Restatement would ultimately spur more negotiation than litigation.[200]

The Massachusetts court's prediction in *M.P.M. Builders* also appears to have been on target. Over the next sixteen years, only two other reported easement relocation decisions have appeared in Massachusetts. In one decision, an appellate court applied the Restatement to hold that a servient estate owner could relocate a pedestrian beach access easement to permit construction of a new house because the relocated path still protected the dominant estate owners' privacy and did not lessen the easement's utility.[201] In the second decision, the Massachusetts Supreme Judicial Court reaffirmed its commitment to the Restatement approach to easement relocation and specifically held that an easement is not disqualified from relocation or modification merely because it is located on registered land, as opposed to recorded land, or because it is defined by reference to a land court plan.[202]

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[197] *See* UNIF. EASEMENT RELOCATION ACT § 4(3) (UNIF. L. COMM'N 2020), discussed *infra* Part II.D, note 309312 and accompanying text.

[198] *See* 809 N.E.2d at 1059.

[199] *Id.*

[200] *See id.*

[201] *See* Carlin v. Cohen, 895 N.E.2d 793, 796–99 (Mass. App. Ct. 2008).

[202] *See* Martin v. Simmons Props., LLC, 2 N.E.3d 885, 893–96 (Mass. 2014). In *Martin*, the specific modification concerned a modest narrowing of the width of an access easement, not a relocation, but all parties and judges agreed that the narrowing of the width of the easement did not negatively impact the use and enjoyment of the easement by the dominant estate owner. *See id.* at 894.

A number of other appellate courts have also adopted the Restatement approach to easement relocation. Following the Colorado decision in *Roaring Fork*, the Nebraska Court of Appeals expressly adopted Section 4.8(3) to approve the relocation of a sanitary sewer lagoon easement.[203] As in Colorado, the court observed that Nebraska case law also recognizes that the parties to an easement "enjoy correlative rights to use the subject property" and must have "due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands."[204]

Illinois courts have also been receptive to the Restatement. In 2009, an appellate court held that the Restatement approach is consistent with prior Illinois precedent allowing either party to an easement to make changes to the easement provided the changes are not "substantial," and indicating that in evaluating the "substantiality" of a proposed relocation, courts should apply the factors set forth in Restatement Section 4.8(3).[205] In a later case, another Illinois appellate court again embraced the Restatement approach in deciding whether a servient estate owner could relocate an easement to facilitate a substantial development project.[206] In summary, courts in five states (Colorado, South Dakota, Massachusetts, Nebraska, and Illinois) have adopted strong versions of the Restatement, applying its utilitarian criteria to a wide variety of easements even when the locations of those easements were well established by agreement.

Limited Adoptions: Courts in another five states have partially adopted the Restatement approach to easement relocation by using its criteria but limiting its application to particular categories of easements. Courts in New York and Nevada, for instance, extolled the virtues of the Restatement approach but then limited its application to undefined easements, *i.e.*, those without a specified metes-and-bounds description or some other indication

[203] *See* R & S Invs. v. Auto Auctions, Ltd., 725 N.W.2d 871, 879–81 (Neb. Ct. App. 2006).

[204] *Id.* at 880. Notably, even though the sanitation lagoon's new location was farther away from the dominant estate, the Nebraska court approved the relocation and reconstruction of the sewer easement with new pipes because the relocated easement adequately met the dominant estate's waste disposal needs and, in fact, reduced environmental problems caused by the old lagoon's age. *See id.* at 875–77, 881.

[205] *See* McGoey v. Brace, 918 N.E.2d 559, 563–67, 569 (Ill. App. Ct. 2009).

[206] *See* 527 S. Clinton, LLC v. Westloop Equities, LLC, 932 N.E.2d 1127, 1138 (Ill. App. Ct. 2010) (citing *McGoey* and the Restatement and holding that a servient estate owner may modify or relocate an easement "so long as the changes would not cause substantial harm to the dominant estate"); 527 S. Clinton, LLC v. Westloop Equities, LLC, 7 N.E.3d 756, 768 (Ill. App. Ct. 2014) (citing and discussing *McGoey*'s "substantiality of the change" analysis with approval).

of the easement's location.[207] Although it initially rejected application of the Restatement to surface easements,[208] the Vermont Supreme Court later adopted the Restatement to address relocation of sub-surface easements.[209] Finally, a few courts have limited application of the Restatement to non-express easements. A Pennsylvania court approved use of the Restatement for the relocation of prescriptive easements,[210] and a South Carolina court, though generally praising Section 4.8(3), adopted it to approve the relocation of an easement by necessity but then indicated in dicta that an express easement should be more difficult to relocate.[211]

2. Decisions Rejecting the Restatement

Several state courts, including four state supreme courts, have clearly rejected the Restatement approach.[212] In most of those decisions, courts simply recite the rationales originally given for the mutual consent rule in

[207] *See, e.g.*, Lewis v. Young, 705 N.E.2d 649, 653–54 (N.Y. 1998) (relying on a tentative draft of Section 4.8(3) and holding that easement holder's "mere use" of an undefined easement, without more, does not preclude relocation under its terms); St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 193–96 (Nev. 2009) (citing *Lewis* and also citing introductory language of Section 4.8 ("Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows…") to restrict application of Section 4.8(3) to undefined easements). The Restatement drafters, however, likely intended for the introductory language of Section 4.8 cited by the court in *St. James Village* to apply only to questions surrounding the *initial* location of an easement and not a subsequent relocation. *See* RESTATEMENT, *supra* note 16, at § 4.8 cmt. f (stating that Section 4.8(3)'s relocation right applies "unless expressly negated by the easement instrument").

[208] *See* Sweezey v. Neel, 904 A.2d 1050, 1057–58 (Vt. 2006) (rejecting Restatement approach for surface easement but allowing servient owner to "bend the easement" around a new addition to his house).

[209] *See* Roy v. Woodstock Cmty. Tr., Inc., 94 A.3d 530, 537–40 (Vt. 2014).

[210] *See* McNaughton Props., LP v. Barr, 981 A.2d 222, 225–29 (Pa. Super. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression and limiting Soderberg v. Weisel, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997) to prescriptive easements).

[211] *See* Goodwin v. Johnson, 591 S.E.2d 34, 37–39 (S.C. Ct. App. 2003). *See also* Sheppard v. Justin Enters., 646 S.E.2d 177, 179 (S.C. Ct. App. 2007) (observing that South Carolina courts have not adopted the Restatement with respect to express easements).

[212] *See, e.g.*, Weston St. Hartford, LLC v. Zebra Realty, LLC, 219 A.3d 844, 851–54 (Conn. App. Ct. 2019); Town of Ellettsville v. DeSpirito, 111 N.E.3d 987, 992–97 (Ind. 2018); Stowell v. Andrews, 194 A.3d 953, 964–66 (N.H. 2018); Alligood v. LaSaracina, 999 A.2d 836, 839 (Conn. App. Ct. 2010); AKG Real Est., LLC v. Kosterman, 717 N.W.2d 835, 842–47 (Wisc. 2006); MacMeekin v. Low Income Hous. Inst., Inc., 45 P.3d 570, 578–79 (Wash. Ct. App. 2002); Herren v. Pettengill, 538 S.E.2d 735, 736 (Ga. 2000).

pre-Restatement decisions. For example, the Georgia Supreme Court rejected an attempt to relocate an implied easement to facilitate a housing development on a sixty-six-acre tract of land and rejected the servient estate owner's argument for adoption of the Restatement, claiming that the mutual consent rule promotes certainty and suggesting that at the time an easement is first created, both parties must have "considered all market factors, including their respective costs and benefits," before agreeing to the transaction resulting in the easement.[213] In the court's view, the market should be able to overcome any resistance on the part of an easement holder to a reasonable relocation request and should produce an efficient outcome "if the benefits of relocation become substantial enough."[214]

A Washington appellate court decision rejected any consideration of the Restatement when it prevented a non-profit organization from moving an access easement that had been implied from prior use or created by prescription forty-three years earlier, even though the relocation would have allowed for the construction of a twenty-four-unit affordable housing development.[215] In this decision, the court reviewed most of the case law discussed above, examined the Restatement, and even considered the larger debate surrounding the Restatement (Third) project of incorporating a more robust changed conditions doctrine into the law of easements and servitudes generally.[216] In the end, however, the court adhered to the mutual consent rule because it "favors uniformity, stability, predictability and property rights" as opposed to the Restatement approach, which, in the court's view, favors "flexibility, and the development potential of the servient estate."[217]

The Vermont Supreme Court employed similar reasoning in refusing to adopt the Restatement as applied to an express surface easement, even though it actually sanctioned a modest "bend" in the easement to accommodate a home addition encroaching on the easement.[218] Courts in Connecticut and New Hampshire also recited the same rationales in rejecting invitations to

[213] *See Herren*, 538 S.E.2d at 736.

[214] *Id.*

[215] *See MacMeekin*, 45 P.3d at 578–79.

[216] *See id.* at 575–79.

[217] *Id.* at 579. Although the appellate court in *MacMeekin* noted that the proposed new route involved several ninety-degree turns and its "zig-zag course" passed through the parking lot of the proposed development and thus might have produced significant inconvenience for the dominant estate owner, the trial court never had the opportunity to apply Section 4.8(3) to the merits of the proposed relocation. *See id.*

[218] *See* Sweezey v. Neel, 904 A.2d 1050, 1054–58 (Vt. 2006).

apply the Restatement.[219] The Wisconsin Supreme Court rejected an invitation to relocate a forty-five-year-old express access easement to allow the development of an eighty-acre parcel of land on similar grounds, rejecting not only application of the changed conditions rule offered in Section 7.10 of the Restatement, but also the unilateral easement relocation rule in Section 4.8(3).[220] Finally, the Indiana Supreme Court recently rejected an invitation to apply the Restatement to relocate a private underground sewer easement, even though relocating the easement would have caused only minimal disruption to the dominant estate owner and would have increased the buildable space on the servient estate.[221] That court recited many of the arguments discussed in previous decisions, alluded to confusion about the plain reading of Section 4.8, and also advanced a novel transaction cost argument based on the fact that the Restatement does not require advance judicial approval for a unilateral relocation by the servient estate owner.[222]

3. States Where Courts Continue to Apply the Mutual Consent Rule but Have Not Addressed the Restatement

Over the past twenty-five years, ever since the Restatement or its tentative draft began to be widely discussed in judicial decisions and law reviews, courts in the District of Columbia[223] and six states (Kansas, Maryland, Oregon, Virginia, West Virginia, and Wyoming) continued to apply the mutual consent rule without clearly rejecting or accepting the Restatement.[224]

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[219] *See* Alligood v. LaSaracina, 999 A.2d 836, 839 (Conn. App. Ct. 2010) ("[T]he attributes of the majority rule, namely, uniformity, stability, predictability and judicial economy, outweigh any increased flexibility offered by the Restatement approach."); Weston St. Hartford, LLC v. Zebra Realty, LLC, 219 A.3d 844, 851–54 (Conn. App. Ct. 2019); Stowell v. Andrews, 194 A.3d 953, 964–66 (N.H. 2018) (same, citing most of the decisions discussed above).

[220] *See* AKG Real Est., LLC v. Kosterman, 717 N.W.2d 835, 842–47 (Wisc. 2006).

[221] *See* Town of Ellettsville v. DeSpirito, 111 N.E.3d 987, 988–89 (Ind. 2018).

[222] *See id.* at 992–97. For discussion of the transaction cost-lack of judicial approval argument, *see infra* Part III.A430.

[223] *See* Carrollsburg v. Anderson, 791 A.2d 54, 61–64 (D.C. 2002) (rejecting proposed easement relocation under common law majority rule *and* under Section 4.8(3), but not indicating whether relocation could occur if facts permitted under Restatement approach); Wash. Metro. Area Transit Auth. v. Georgetown Univ., 347 F.3d 941, 946–47 (D.C. Cir. 2003) (applying *Carrollsburg*).

[224] *See* Rogers v. P-M Hunter's Ridge, LLC, 967 A.2d 807, 822–26 (Md. 2009); Chapman v. Catron, 647 S.E.2d 829, 833 (W. Va. 2007); City of Ark. City v. Bruton, 137 P.3d 508, 514 (Kan. Ct. App. 2006) (citing Restatement § 4.8, but observing that "an easement with a fixed location cannot be substantially changed or relocated without the express or implied consent of the owners

In other states where reported decisions have not addressed easement relocation disputes in this period, older decisions that either adopted or applied the mutual consent rule presumably still provide the relevant rule of decision.[225]

F. Specialized Easement Relocation Statutes

Over the years, four states other than Louisiana (Idaho, New Mexico, Utah, and Virginia) have enacted special statutes allowing unilateral relocation of certain kinds of easements as long as the relocated easement provides the same functional benefit to the easement holder and does not injure the holder or other users of the easement. Two Idaho statutes allow a servient estate owner to relocate an irrigation easement at its own expense if the relocation can be achieved without impeding the water flow or injuring any water user.[226] A New Mexico statute similarly allows for the relocation of irrigation ditches "so long as such alteration or change of location shall not interfere with the use of or access to such ditch by the owner of the dominant estate."[227] In 2018, Utah enacted a statute that allows a property owner to "make reasonable changes in the location and method of delivery of a water conveyance facility located on the property owner's real property" after

of both the servient estate and the dominant estate"), *rev'd on other grounds*, 166 P.3d 992 (Kan. 2007); D'Abbracci v. Shaw-Bastian, 117 P.3d 1032, 1040–43 (Or. Ct. App. 2004); Shooting Point, L.L.C. v. Wescoat, 576 S.E.2d 497, 502 (Va. 2003) (upholding Buxton v. Murch, 457 S.E.2d 81, 84 (Va. 1995)); R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581, 588 (Wyo. 1999).

[225] *See* Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950); Edgell v. Divver, 402 A.2d 395, 398 (Del. Ch. 1979); White Sands, Inc. v. Sea Club V. Condo. Ass'n, 581 So. 2d 589, 590 (Fla. Dist. Ct. App. 1990); Fla. Power Corp. v. Hicks, 156 So. 2d 408, 410 (Fla. Dist. Ct. App. 1963); Bagley v. Petermeier, 10 N.W.2d 1, 3 (Iowa 1943); Karmuller v. Krotz, 18 Iowa 352, 360 (1865); Gilder v. Mitchell, 668 A.2d 879, 881–82 (Me. 1995); Davis v. Bruk, 411 A.2d 660, 665–66 (Me. 1980); Ellison v. Fellows, 437 A.2d 278, 280 (N.H. 1981); Sakansky v. Wein, 169 A. 1, 2–3 (N.H. 1933); Sussex Rural Elec. Coop. v. Twp. of Wantage, 526 A.2d 259, 264 (N.J. Super. Ct. App. Div. 1987); Sedillo Title Guar., Inc. v. Wagner, 457 P.2d 361, 363 (N.M. 1969); Holmstrom v. Lee, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.); Samuelson v. Alvarado, 847 S.W.2d 319, 323 (Tex. App.—El Paso 1993, no writ); Hollosy v. Gershkowitz, 98 N.E.2d 314, 316 (Ohio Ct. App. 1950). *But see* Clagg v. Baycliffs Corp., 695 N.E.2d 728, 730 (Ohio 1998) (holding that an implied easement over a road was statutorily limited and could be changed subject to requirements of statute governing changes to a previously recorded plat).

[226] *See* IDAHO CODE ANN. § 18-4308 (West 2021); IDAHO CODE ANN. § 42-1207 (West 2021).

[227] N.M. STAT. ANN. § 73-2-5 (West 2021).

notice and other procedures are followed and limits this right using a version of the three-part test stated in Section 4.8(3) of the Restatement.[228]

Another Idaho statute authorizes a servient estate owner to change the location of a private access road to any other part of the servient estate, at the servient estate owner's expense, if the change is "made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access."[229] Finally, a Virginia statute, originally enacted in 1992 and updated in 2019, authorizes Virginia courts to approve the relocation of an ingress and egress easement without easement holder consent, after notice and hearing, provided the court finds that "(i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than 10 years."[230] Except for its explicit notice and hearing requirement and its ten-year safe harbor period during which a newly created easement cannot be subject to judicial relocation, Virginia's statute resembles the Restatement.[231]

As some form of unilateral easement relocation is now clearly permitted in sixteen states[232] and the Commonwealth of Puerto Rico,[233] is permitted in exceptional situations based on equitable balancing principles or for non-

[228] UTAH CODE ANN. § 73-1-15.5(2)–(4) (West 2021). Just like the U.E.R.A., this Utah statute also requires the property owner to pay for the costs of relocation and requires recordation of a new instrument reflecting the change in the water facility easement's location. *Compare id.* § 73-1-15.5(6), (8), *with* UNIF. EASEMENT RELOCATION ACT §§ 6(b), 7, 9(a) (UNIF. L. COMM'N 2020) (requiring preparation of an order, payment of expenses, and recordation of relocation affidavit).

[229] IDAHO CODE ANN. § 55-313 (West 2021).

[230] VA. CODE ANN. § 55.1-304 (West 2021) (formerly cited as VA. ST. § 55-50) (1992 Va. Acts ch. 373; amended 2019 Va. Acts ch. 712, eff. Oct. 1, 2019). Curiously, in two decisions rendered after the adoption of this statute, the Virginia Supreme Court referenced or applied the mutual consent rule without even acknowledging the existence of the statute. *See* Shooting Point, L.L.C. v. Wescoat, 576 S.E.2d 497, 502 (Va. 2003); Buxton v. Murch, 457 S.E.2d 81, 84 (Va. 1995).

[231] *See* Lovett, *supra* note 98, at 47–55 (suggesting that the Virginia statute might be a useful model for reform efforts based on the Restatement).

[232] Those states are Louisiana, *supra* notes 127–137 and accompanying text; Kentucky, *supra* note 121 and accompanying text; Colorado, South Dakota, Massachusetts, Nebraska, and Illinois, *supra* notes 179–206206 and accompanying text; New York, Nevada, Vermont, Pennsylvania, and South Carolina, *supra* notes 207–211 and accompanying text; and Idaho, New Mexico, Utah, and Virginia, *supra* notes 226–231 and accompanying text. As Nebraska and Utah recently adopted the U.E.R.A., those states counts in this category twice, *supra* note 6.

[233] *See supra* note 140.

express easements in eight other states,[234] but is either prohibited by the common law or uncertain in the remaining states, disharmony prevails in this important area of U.S. property law. Widespread adoption of the U.E.R.A. would reduce this disharmony and provide owners of land burdened by easements across the U.S. with an equal opportunity to improve and develop their land.

II. THE U.E.R.A.

A. Overview

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners of Uniform State Laws, officially approved and recommended the U.E.R.A. for enactment in all U.S. states, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands on July 15, 2020.[235] The ULC drafting committee responsible for preparing the Act considered multiple versions of the Act over a two-year period.[236] Observers from the conservation easement community, title insurance industry, and mortgage banking industry attended numerous drafting committee meetings and contributed to the drafting process.[237] The Drafting Committee's final product received overwhelming support at the ULC's 129th annual meeting, with the delegations of forty-nine states, the District of Columbia, and the U.S. Virgin Islands, all voting to approve and recommend the Act.[238]

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[234] Those states are Oregon, Missouri, New Jersey, and Connecticut, s*upra* note 122 (equitable balancing where the easement holder's injury is small to non-existent and harm to the servient estate owner if it had to reestablish easement would be significant); Florida, Maryland, and New Jersey, *supra* note 125 (implied easements); and Minnesota and Mississippi, *supra* note 126 (easements by necessity).

[235] Official versions of the U.E.R.A. can be found at *Easement Relocation Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=groupdetails (last visited July 22, 2021).

[236] For the U.E.R.A. drafting committee archive, see Archive—Committee, UNIF. L. COMM'N, https://www.uniformlaws.org/viewdocument/committee-archive-118?CommunityKey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=librarydocuments (last visited July 22, 2021).

[237] *Id.*

[238] Nat'l Conf. of Comm'rs on Unif. State L., HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 129TH YEAR 161 (2020). The delegation of commissioners from Texas was the only state delegation that voted against approving and recommending the U.E.R.A., and the delegation from the Commonwealth of Puerto Rico did not vote. *Id.*

Although the U.E.R.A. borrows important elements from Section 4.8(3) of the Restatement, it also departs from the Restatement in several respects that should make the Act even more attractive to state legislatures aiming to achieve the gains in flexibility and aggregate utility promised by the Restatement while maintaining—and even enhancing—protections for an easement holder's interests in the use and enjoyment of an easement. First, the Act excludes certain categories of easements from relocation and prohibits relocation in several specific situations for the purpose of protecting holders of the excluded categories of easements.[239] Next, the Act adds several substantive conditions for a non-consensual easement relocation designed to assure that an easement holder retains all of the functional advantages of the easement and the affirmative, easement-related benefits an easement provides to a dominant estate.[240] Third, the Act prohibits a servient estate owner from engaging in self-help in the absence of easement holder consent by requiring a servient estate owner to file a civil action and serve a summons and complaint (or petition) on the easement holder whose easement is being relocated and on other interested persons.[241] The Act also specifies the contents of the complaint or petition and specifies the determinations a court must make to approve a proposed easement relocation.[242] Finally, the U.E.R.A. addresses several other issues likely to arise in a judicially authorized easement relocation, including expenses,[243] protection of the easement holder's interests during the process of relocation,[244] the limited effect of a relocation under the Act,[245] the mandatory nature of the Act (*i.e.*, nonwaiver),[246] and legal transition.[247] The following discussion reviews all of the crucial substantive and procedural features of the Act.

[239] *See* UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM'N 2020).

[240] *See id.* § 4.

[241] *Id.* § 5 cmt. 1.

[242] *See id.* §§ 5–6.

[243] *Id.* § 7.

[244] *See id.* §§ 6(10), 9 (listing requirements for an order approving relocation, including an affidavit by the servient estate owner).

[245] *Id.* § 10.

[246] *Id.* § 11.

[247] *See id.* § 14.

B. Definitions

Section 2 of the U.E.R.A. defines the Act's key terms.[248] Because they track common understandings in U.S. property law, the Act's basic definition of an easement,[249] as well as of an easement holder,[250] will be uncontroversial. As most of the Act's other definitions are relevant to the extent they interact with the substantive and procedural provisions of the Act, discussion of these definitions, to the extent necessary, is provided below.

C. Scope

Section 3 of the Act sets forth the kinds of easements that are eligible and ineligible for relocation, identifies two scenarios in which an easement eligible for relocation still cannot be relocated, and finally clarifies that the Act preserves party autonomy for consensual easement relocations outside the Act's scope.[251]

Positive Eligibility: First, by specifying that the Act "applies to an easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method," Section 3(a) makes clear that the core relocation right established by the Act will apply to an easement regardless of the easement's method of creation.[252] This should not be controversial as judicial decisions embracing the Restatement and earlier common-law antecedents have consistently allowed servient estate owners to relocate express easements, prescriptive easements, and all manner of implied easements, including easements by necessity and easements implied

[248] *Id.* § 2.

[249] *See id.* § 2(4) (defining "easement" to mean "a nonpossessory property interest that: (A) provides a right to enter, use, or enjoy real property owned by or in the possession of another; and (B) imposes on the owner or possessor a duty not to interfere with the entry, use, or enjoyment permitted by the instrument creating the easement"). This definition is based on RESTATEMENT, *supra* note 16, at § 1.2.

[250] *See* UNIF. EASEMENT RELOCATION ACT § 2(5) (UNIF. L. COMM'N 2020) (defining an "easement holder" to mean "(A) in the case of an appurtenant easement, the dominant estate owner; or (B) in the case of an easement in gross, public-utility easement, conservation easement, or negative easement, the grantee of the easement or a successor"). This definition is based on RESTATEMENT, *supra* note 16, at § 1.5.

[251] UNIF. EASEMENT RELOCATION ACT § 3 (UNIF. L. COMM'N 2020).

[252] *See id.* § 3(a).

by prior use.[253] In addition, Section 4.8(3) of the Restatement did not limit its reach with reference to any particular method of easement creation.[254]

Exclusions: Section 3(b)(1), however, departs substantially from the Restatement by enumerating three specific categories of easements that cannot be relocated under the Act: (1) public-utility easements; (2) conservation easements; and (3) negative easements.[255] The rationale for and scope of each of these exclusions deserve attention.

Public-Utility Easements: From the beginning of its work on the U.E.R.A., the ULC Drafting Committee charged with preparing the Act sought to exclude public-utility easements from its scope because of the ubiquity of public-utility easements and the practical concern that without such an exclusion, large and small utility companies, as well as utility cooperatives, would likely oppose passage of the Act in state legislatures.[256] Moreover, as public utilities generally enjoy the power of eminent domain under federal or state law in the U.S.,[257] the drafting committee understood that a public utility unhappy with any particular easement relocation might be tempted to exercise eminent domain and re-relocate its easement to its original location, thus leading to a potentially infinite round of easement relocations. Consequently, even though the enhanced substantive conditions for relocation established in the Act would certainly protect the holder of a public-utility easement from a harmful relocation, the Act expressly excludes public-utility easements from its scope.[258]

To assure the public-utility industry that its interests are not threatened by the Act, Section 2(10) defines a public-utility easement broadly to mean "a nonpossessory property interest in which the easement holder is a publicly regulated or publicly owned utility under federal law or law of this state or a

[253] *See supra* Parts I.B and I.E.1–2.

[254] *See* RESTATEMENT, *supra* note 16, at § 4.8(3).

[255] UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM'N 2020).

[256] *Id.* prefatory note at 6. The Drafting Committee also learned that when a servient estate owner seeks to move a public-utility easement, the servient estate owner can often obtain consent for the relocation as long as the servient estate owner agrees to pay all expenses. *Id.*

[257] For detailed discussions of the historical evolution of public utilities' eminent domain power to establish electrical transmission lines and oil and gas pipelines and current controversies surrounding the exercise of that power in the U.S., see generally James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659 (2019); Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079 (2013).

[258] UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM'N 2020).

municipality."[259] This definition effectively encompasses two kinds of public utilities, both an investor-owned but publicly regulated utility and a utility owned by a governmental entity, whether a state or municipal government or an entity specifically created to own or operate a utility.[260] The exclusion also extends to an interstate utility, an intrastate utility, or a utility cooperative,[261] another term that is defined broadly to mean "a non-profit entity whose purpose is to deliver a utility service, such as electricity, oil, natural gas, water, sanitary sewer, storm water, or telecommunications, to its customers or members."[262]

Conservation Easements: Section 3(b) of the U.E.R.A. also explicitly excludes conservation easements from the Act's scope.[263] A conservation easement is a land use restriction designed to preserve the current physical status of the burdened land in perpetuity for some conservation purpose.[264] A conservation easement will typically be held by a governmental or non-profit entity that does not own land adjacent to or even in close proximity to the burdened land, and thus it will usually constitute an easement in gross.[265] Many state statutes now explicitly authorize and regulate conservation easements, often through versions of the Uniform Conservation Easement Act (U.C.E.A.), first promulgated by the ULC in 1981 and revised in 1987.[266]

One of the primary, although controversial, features of a conservation easement is that it creates in theory a perpetual restriction on the use of burdened land.[267] Indeed, to qualify for a public subsidy under Section

[259] *Id.* § 2(10).

[260] *Id.* § 2 cmt. 9.

[261] *Id.*

[262] *Id.* § 2(18).

[263] *Id.* § 3(b).

[264] Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1575 (2007); BRUCE & ELY, *supra* note 26, § 12:2.

[265] Korngold, *supra* note 264, at 1575; K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 777–78 (2013).

[266] UNIF. CONSERVATION EASEMENT ACT (UNIF. L. COMM'N 2007); WIS. STAT. ANN. § 700.40 (West 2021); KAN. STAT. ANN. § 58-3810 (West 2021); D.C. CODE ANN. § 42-201 (West 2021).

[267] *See generally* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002) (critiquing the perpetual nature of conservation easements and questioning the assumption that present generation is competent to make land use decisions that constrain acceptable uses of property forever); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV'T. L. REV. 421 (2005) (offering a similar critique

170(H) of the Internal Revenue Code (I.R.C.), the donation of a conservation easement to a non-profit conservation organization must state that the easement is perpetual in nature.[268] If the parties to a conservation easement can extinguish the easement by agreement, then the easement donation will not be deductible under Section 170(h).[269] Congress intentionally imposed complex, strictly construed requirements for the deductibility of conservation easement donations to prevent taxpayer abuse of this legislative benefit.[270] Given that Congress's purpose in establishing this deduction is to provide for the long-term conservation of land and natural resources, non-compliance with Congress's "carefully crafted" rules for the deduction, particularly the perpetual nature of the use restriction, would undermine Congress's purpose,[271] and, consequently, put many sizable deductible conservation easement donations at risk.[272]

To protect the perpetual nature of conservation easements and to assure that a conservation easement cannot be subject to a relocation under the Act and thus jeopardize the tax-deductible status of a conservation easement donation, the U.E.R.A. explicitly excludes conservation easements from its scope.[273] To this end, the U.E.R.A. defines a conservation easement in a manner generally consistent with the definition of a conservation easement

and arguing that courts should have the ability to modify or terminate a conservation easement using doctrine of *cy pres* under the law of charitable trusts); Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673 (2007) (same). For a superb recent summary of the debate over the perpetuity of conservation easements, see Richard J. Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . and Should It Be?*, 52 UIC J. MARSHALL L. REV. 677 (2019).

[268] I.R.C. § 170(h)(2)(C)–(5)(A) (West). *See also* Treas. Reg. § 1.170A-14 (2018); Nancy A. McLaughlin, *Conservation Easements and the Proceeds Regulation*, 56 REAL PROP. TR. & EST. L.J. 111, 159 (2021) (explaining perpetuity requirement); Nancy A. McLaughlin & Ann Taylor Schwing, *Conservation Easements and Development Rights: Law and Policy*, 86 EXEMPT ORG. TAX REV. 539, 540 (2020) (same).

[269] Burnett, *supra* note 265, at 782 (citing Carpenter v. Comm'r, 103 T.C.M. (CCH) 1001, 1005 (2012)).

[270] McLaughlin & Schwing, *supra* note 268, at 539–41.

[271] *Id.*

[272] *See* McLaughlin, *supra* note 268; Nancy A. McLaughlin, *Amendment Clauses in Easements: Ensuring Protection in Perpetuity*, 168 TAX NOTES 819, 819–20 (2020) (discussing *Hoffman Props. II LP v. Comm'r*, 956 F.3d 832 (6th Cir. 2020) (denying taxpayer a fifteen-million-dollar deduction for a conservation easement because an easement clause violated the protected-in-perpetuity requirement)). *See also* Belk v. Comm'r, 774 F.3d 221, 226 (4th Cir. 2014) (denying a $10.5 million deduction).

[273] UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM'N 2020).

in U.C.E.A.[274] However, because some state statutes now allow for conservation purposes other than those enumerated in U.C.E.A.,[275] subsection 2(2)(F) of the Act specifically recognizes that other animating conservation purposes can support a conservation easement, as long as those purposes are recognized under applicable state law.[276]

[274] The U.E.R.A. defines a conservation easement to mean:

> . . . . a nonpossessory property interest created for one or more of the following conservation purposes:
>
> (A) retaining or protecting the natural, scenic, wildlife, wildlife-habitat, biological, ecological, or open-space values of real property;
>
> (B) ensuring the availability of real property for agricultural, forest, outdoor-recreational, or open-space uses;
>
> (C) protecting natural resources, including wetlands, grasslands, and riparian areas;
>
> (D) maintaining or enhancing air or water quality; [or]
>
> (E) preserving the historical, architectural, archeological, paleontological, or cultural aspects of real property[; or(F) any other purpose under [cite to applicable state law]].

Id. § 2(2) (alteration in original). *Compare id.* § 2(2), *with* UNIF. CONSERVATION EASEMENT ACT § 1 (UNIF. L. COMM'N 2007). Note that the definition of a conservation easement used in this section is not linked to a particular definition of a "holder" of a conservation easement, as is the case under U.C.E.A., because now other entities and persons besides a "charitable corporation, charitable association, or charitable trust," or a "governmental body," UNIF. CONSERVATION EASEMENT ACT § 1(2)(i), (ii), (UNIF. L. COMM'N 2007) may be entitled to hold a conservation easement. UNIF. EASEMENT RELOCATION ACT § 2 cmt. 4 (UNIF. L. COMM'N 2020).

[275] *Compare* NEB. REV. STAT. ANN. § 76-2,111 (West 2021) (listing the purposes for a conservation easement as "retaining or protecting the property in its natural, scenic, or open condition, assuring its availability for agricultural, horticultural, forest, recreational, wildlife habitat, or open space use, protecting air quality, water quality, or other natural resources, or for such other conservation purpose as may qualify as a charitable contribution under the Internal Revenue Code"), *with* UNIF. CONSERVATION EASEMENT ACT § 1(1) (UNIF. L. COMM'N 2007) (listing the purposes for a conservation easement as "retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property").

[276] UNIF. EASEMENT RELOCATION ACT § 2(2)(f) (UNIF. L. COMM'N 2020).

Negative Easements: Finally, similar to the Restatement,[277] the U.E.R.A. also excludes a negative easement from its scope.[278] A negative easement is defined to mean "a nonpossessory property interest whose primary purpose is to impose on a servient estate owner a duty not to engage in a specified use of the estate."[279] A conservation easement is an example of a negative easement.[280] Other kinds of negative easements that would be excluded by Section 3(b)(2) include easements of light or view, the right of a dominant estate owner to demand greater lateral support than otherwise provided by the common law, easements preventing a servient estate owner from altering the scenic character of land, and restrictive covenants prohibiting industrial or commercial use of all or part of a servient estate.[281] Similarly, an environmental covenant that restricts certain uses of the burdened land for the purpose of mitigating prior environmental contamination (often called an "environmental response project") would also be excluded under this provision.[282]

Encroachment and Interference Prohibitions: Section 3(b)(2) of the Act provides additional protection to holders of public-utility easements and conservation easements in the context of relocations of eligible easements that might land on or otherwise interfere with use or enjoyment of one of

[277] RESTATEMENT, *supra* note 16, at § 4.8(3) cmt. f (stating that the rule of this section "is limited in its application to easements as defined in § 1.2, which include affirmative rights to enter and use land possessed by another, but do not include negative use rights (negative easements or restrictive covenants)").

[278] UNIF. EASEMENT RELOCATION ACT § 3(b)(1) (UNIF. L. COMM'N 2020).

[279] *Id.* § 2(8). For discussion of the concept of a negative easement, which is generally synonymous with the term "restrictive covenant," and of the historical evolution of negative easements, see RESTATEMENT, *supra* note 16, at §§ 1.3 cmt. c., 1.2 cmt. h. The U.E.R.A. definition of a negative easement also draws on LA. CIV. CODE ANN. art. 706 (2021) (defining "[n]egative servitudes" as "those that impose on the owner of the servient estate the duty to abstain from doing something on his estate").

[280] *See* RESTATEMENT, *supra* note 16, at § 1.2 cmt. h.

[281] *See id.*; BRUCE & ELY, *supra* note 26, § 2:10 (listing a variety of negative easements).

[282] *See* UNIF. ENV'T COVENANTS ACT § 2(4) (UNIF. L. COMM'N 2003) (defining an environmental covenant as "a servitude arising under an environmental response project that imposes activity and use limitations"). The term "environmental response project" is defined in the Uniform Environmental Covenants Act Section 2(5). Although an affirmative easement connected to an environmental covenant could, in principle, be subject to relocation under the U.E.R.A., the relocation could only occur if the servient estate owner could satisfy the other requirements of the Act. However, the environmental covenant itself would be ineligible for relocation because its "primary purpose" is to restrict activities and uses of the affected real property and thus would be characterized as a "negative easement," as defined in Section 2(8) of the U.E.R.A.

these excluded easements. This section states that an easement otherwise eligible for relocation cannot take place under the Act "if the proposed location would encroach on an area of an estate burdened by a conservation easement or would interfere with the use or enjoyment of a public-utility easement or an easement appurtenant to a conservation easement."[283]

With respect to a public-utility easement, this section means that the relocation of an eligible easement cannot occur if that easement's new location would interfere with the use or enjoyment of a public-utility easement, regardless of whether the public-utility easement is located on the original servient estate, the original dominant estate, or another estate to which the easement at issue is being relocated.[284] This provision should give holders of public-utility easements even greater assurance that their easements will not be negatively impacted without their consent.

Section 3(b)(2) provides similar protection for holders of conservation easements but enhances the protection in a different way. Just as with the protection provided to a public-utility easement holder, the relocation of an eligible easement cannot take place if that easement's new location would "encroach" on an area of any estate burdened by a conservation easement, regardless of whether the new location lands on the original servient estate, the original dominant estate, or some other estate.[285] The Act uses the term "encroach" to recognize that the mere placement of an easement, even a relatively benign access easement, on an area of an estate burdened by a conservation easement could theoretically violate the non-development restrictions implemented by the conservation easement and thus jeopardize the tax-deductible status of a conservation easement donation.[286]

Section 3(b)(2) provides one more protection for conservation easement holders by also preventing an easement relocation if the new location of the easement would interfere with "the use or enjoyment of . . . an easement appurtenant to a conservation easement."[287] This language protects a conservation easement holder that might depend on use of an appurtenant affirmative easement for ancillary purposes such as monitoring the land burdened by a conservation easement, enforcing the terms of the

[283] UNIF. EASEMENT RELOCATION ACT § 3(b)(2) (UNIF. L. COMM'N 2020).

[284] *Id.* § 3(b)(2) cmt. 7.

[285] *Id.* § 3(b)(2) cmt. 6.

[286] I.R.C. § 170(h)(2)(C) (West) discussed *supra* notes 268–272 and accompanying text.

[287] UNIF. EASEMENT RELOCATION ACT § 3(b)(2) (UNIF. L. COMM'N 2020).

conservation easement, or providing recreational access to a portion of an estate burdened by a conservation easement.

Consensual Relocations: The last sentence of Section 3 provides that the U.E.R.A. does not prevent a servient estate owner and an easement holder from relocating an easement by mutual consent.[288] In other words, a servient estate owner and an easement holder can always agree to relocate an easement on their own terms, without using the Act, unless a relocation of the particular easement is limited or prohibited by some other applicable law. Thus, a servient estate owner and an easement holder can relocate an easement by mutual consent to any other location on the servient estate, or even to another estate altogether, assuming the owner of that other estate consents to the relocation and the relocation does not interfere with other pre-existing property interests.

D. Substantive Criteria for Relocation

Section 4, the core of U.E.R.A., establishes the servient estate owner's right to relocate an easement eligible for relocation under Section 3 provided the proposed relocation does not materially impair the interests of the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate, or materially disrupt the use and enjoyment of the easement during the relocation.[289] The first three substantive conditions for an easement relocation, Sections 4(1)–(3), are drawn from the Restatement with some minor modification. Sections 4(4)–(7) are innovations not found in the Restatement.[290]

No Initial Showing of Necessity: One immediate difference between Section 4.8(3) of the Restatement and Section 4 of the U.E.R.A. concerns the question of the necessity for the relocation. Recall that the Restatement allows an easement to be relocated by the servient estate owner "to permit normal use or development of the servient estate."[291] Remember also that the Louisiana Civil Code allows a servitude to be relocated when its current location "prevents" the servient estate owner "from making useful

[288] *Id.* § 3(c).

[289] *Id.* § 4.

[290] *Id.* § 4 cmt 4.

[291] RESTATEMENT, *supra* note 16, at § 4.8(3). *See also* Kline v. Bernardsville Ass'n, Inc., 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993) (conditioning pre-Restatement equitable balancing approach to unilateral relocation on "a strong showing of necessity" on the part of the servient estate owner).

improvements on his estate."[292] In contrast, Section 4 of the U.E.R.A. contains no such predicates.[293] The reason for this omission is simple. The many procedural requirements and new substantive conditions for relocation found in the U.E.R.A., but not included in the Restatement or most other statutory relocation provisions, make the process of obtaining judicial approval for relocation under the U.E.R.A. quite demanding. Only a relocation that promises to alleviate some significant harm caused by the current location of the easement or promises significant developmental benefits to the servient estate owner would motivate a servient estate owner to commence a judicial relocation proceeding under the Act.[294] An express necessity requirement would thus be redundant and needlessly complicate a judicial relocation proceeding under the Act.

Right to Relocate Only Belongs to Servient Estate Owner: Section 4 of the U.E.R.A. follows the Restatement, however, in providing that the right to relocate an easement belongs to "[a] servient estate owner," not to the owner of a dominant estate or any other easement holder.[295] Consequently, the Act does not change the well-established common law rule that an easement holder may not unilaterally relocate an easement unless that right has been specifically reserved or granted in the creating instrument.[296] The Act thus does not follow the Italian or Brazilian models, both of which grant a dominant estate owner, as well as a servient estate owner, the right to a servitude relocation under terms roughly similar to the French Civil Code.[297]

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[292] LA. CIV. CODE ANN. art. 748 (2021).

[293] *See* UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM'N 2020).

[294] *See, e.g.*, Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1237–39 (Colo. 2001); Cozby v. Armstrong, 205 S.W.2d 403, 405 (Tex. App.—Fort Worth 1947, writ ref'd n.r.e.); Brown v. Bradbury, 135 P.2d 1013, 1014 (Colo. 1943).

[295] *Compare* UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM'N 2020), *with* Restatement, *supra* note 16, at § 4.8(3) cmt. f (stating that Section 4.8(3) "permits unilateral relocation only by the owner of the servient estate; it does not entitle the owner of the [dominant estate] to relocate the easement").

[296] *See* M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057–58 (Mass. 2004) (citing additional authority for the rule that easement holder may not unilaterally relocate an easement); *but cf.* McGoey v. Brace, 918 N.E.2d 559, 563–67 (Ill. App. Ct. 2009) (holding that the approach of Section 4.8(3) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not "substantial").

[297] *Compare* C.C. (It.) art. 1068 (Mario Beltrano et al. trans. and eds., Oceana 2010), *and* C.C. (Braz.) art. 1384 (2004), *with* C. Civ. (Fr.) art. 701 (Dalloz ed. 2020). For details of the Italian and Brazilian codal provisions, see *supra* note 147.

Although some Restatement critics have argued, perhaps facetiously, that an easement holder should be granted a relocation right reciprocal to that afforded to the servient estate owner Section 4.8(3),[298] the U.E.R.A. drafting committee chose not to follow this path. As the nineteenth-century decisions discussed earlier observed, recognition of such a right would be much more likely to interfere with a servient estate owner's security and ability to plan for future use of the servient estate.[299] More fundamentally, giving the easement holder the right to relocate an easement without the servient estate owner's consent, even on the condition that the relocation does not interfere with the servient estate owner's use and enjoyment of the servient estate, would come to close to transforming the easement holder into a master of the servient estate owner's destiny with respect to use of the burdened land, imposing a quasi-feudal condition that American property law generally abhors.[300]

A final reason not to make the relocation right reciprocal is that it is difficult to envision why an easement holder that has happily used and enjoyed an easement in one location would actually need to change the easement's location. Remember that an easement holder already has a significant ability to respond to changing economic conditions and exogenous technological developments by seeking an intensification of an easement's use under the well-established common law rule allowing changes in the manner, frequency, and intensity of an easement's use, as long as the intensification does not cause unreasonable damage to the servient estate or unreasonable interference with its enjoyment.[301] Of course, nothing in the U.E.R.A. prevents the parties to an easement from contractually specifying that the easement holder will have a right to relocate the easement to another location on the servient estate. After all, this is precisely what a true "floating easement" does, even though courts generally attempt to pin

[298] John V. Orth, *Relocating Easements: A Response to Professor French*, 38 REAL PROP. PROB. & TR. J. 643, 653 (2003) ("Why not simply make the rules symmetrical? . . . After all, the servient owner's utility would be undiminished by the change, the easement owner's utility would be increased, and the general welfare would be maximized.").

[299] *See* cases discussed *supra* Part II.A.

[300] *See* JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION 36–54 (2015) (discussing the anti-feudal principle in American law).

[301] RESTATEMENT, *supra* note 16, at § 4.10 (AM. L. INST. 2000).

down the location of such an easement by examining parties' conduct and other surrounding circumstances.[302]

Material Impact or Disruption: A primary goal of the Act is to ensure that relocation of an easement does not cause *material* harm to the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate. The word "materially" in the introductory portion of Section 4—the "chapeau" in the language of legislation and treaty drafters—is crucial because it modifies all of the substantive criteria articulated in Sections 4(1)–(7).[303] This materiality qualification supports the primary goals of the Act because it permits a relocation to proceed if the relocation will have no effect on the interests of the easement holder, a security-interest holder, or another person owning interests in the servient or dominant estate, *or* if a relocation will have some effect on one of those interests but that effect is *immaterial*, that is, negligible or trivial.[304] In other words, the materiality qualification provides an essential margin of elasticity for a court that must decide whether a proposed easement relocation can proceed. Without a materiality qualification in Section 4, an easement holder might be able to block a well-considered and judicious easement relocation proposal by showing a very modest, even minute, impact on the interests addressed by Sections 4(1)–(7). The presence of the materiality qualification in Section 4 is designed to prevent such an outcome.

Sections 4(1)–(3): Restatement Redux: Sections 4(1) through 4(3) of the Act generally track the core conditions of Section 4.8(3) of the Restatement, with a few modifications. First, Section 4(1) ("lessen the utility of the easement") follows Section 4.8(3)(a) of the Restatement almost verbatim, except that it omits the word "significantly," which is used in the Restatement, because the materiality qualification in the Section 4 chapeau performs the same task by giving the court a margin of elasticity to determine whether an alleged negative impact on the utility of the easement is trivial or not.[305]

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[302] *See* BRUCE & ELY, *supra* note 26, §§ 7:4–7:5 (describing how floating easements arise as undefined easements and explaining how courts use extrinsic evidence to determine an actual location) and §§ 7:7–7:8 (commenting on negative consequences of a floating easement for servient owner and recommending ways to limit scope and duration of a floating easement); *see also* Evans v. Bd. of Cnty. Comm'rs, 97 P.3d 697, 702–04 (Utah Ct. App. 2004) (recognizing a true "floating" or "roving" easement and explaining methods a court can use to fix its location).

[303] *See* UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM'N 2020).

[304] *See id.* § 4 cmt. 1.

[305] *Compare id.* § 4(1), *with* RESTATEMENT, *supra* note 16, at § 4.8(3)(a).

Section 4(2) of the U.E.R.A. departs marginally from Section 4.8(3)(b) of the Restatement in two respects. First, it specifies that the inquiry whether a relocation will "increase the burden on the easement holder in its reasonable use and enjoyment of the easement" should focus on the period "after the relocation" is achieved.[306] This clarification tightens the focus of Section 4(2) while complementing Section 4(5), which provides the court with an opportunity to focus on possible interference with the use and enjoyment of the easement while a relocation is occurring and on the servient estate owner's ability to mitigate any such disruption.[307] Section 4(2) also includes the adjective "reasonable" to modify the easement holder's "use and enjoyment" to preclude an easement holder from inventing a brand new use for the easement not reasonably contemplated at the easement's creation.[308]

Section 4(3) also departs from Section 4.8(3)(c) of the Restatement to clarify the focus of judicial inquiry in an easement relocation proceeding—prevention of material impairment of "an *affirmative, easement-related purpose* for which the easement was created."[309] This provision builds on the teaching of judicial decisions adopting the Restatement as well as insights of Restatement supporters by making clear that an easement holder cannot block a proposed easement relocation simply by asserting that an easement was actually, though silently, created to give the easement holder a veto over development on the servient estate.[310] However, if a proposed relocation would lead to material impairment of the affirmative entry, use, and enjoyment rights created by an easement eligible for relocation under the Act, then Section 4(3) of the U.E.R.A. would be grounds for a judicial determination that the proposed relocation cannot proceed.[311] If a property

[306] UNIF. EASEMENT RELOCATION ACT § 4(2) (UNIF. L. COMM'N 2020).

[307] *Id.* § 4(5).

[308] *Id.* § 4(2).

[309] *Id.* § 4(3) (emphasis added).

[310] M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1058–59 (Mass. 2004); Susan F. French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 10, 15 (2003) (criticizing the mutual consent rule for allowing an easement holder to "demand and, in theory, expect to get almost all the surplus value created by any relocation" and warning that the traditional rule is "inefficient because it provides no exit from an impasse situation and represents bad social policy by rewarding a noncooperating easement holder").

[311] *See, e.g.*, Manning v. Campbell, 268 P.3d 1184, 1187–88 (Idaho 2012) (holding that a servient owner was not entitled to relocate a driveway access easement under Idaho Code Section 55-313 because the relocated easement would not have connected to any existing route and would have required dominant estate owners to construct a new driveway across their front lawn); MacKinnon v. Croyle, 899 N.Y.S.2d 422, 425 (N.Y. App. Div. 2010) (affirming trial court rejection

owner actually wants to prevent a neighbor from using land for a particular use or to prevent any development at all, the property owner can always achieve that goal, to the extent applicable state law provides, by negotiating for and obtaining a negative easement—precisely one of the property interests that are exempt from the Act's scope.[312]

Sections 4(4)–(6): Enhanced Protection for Easement Holder Interests: Sections 4(4) through 4(6) of the Act establish new substantive conditions for relocation not found in the Restatement but consistent with the Restatement's spirit. First, Section 4(4) guarantees that a proposed easement relocation will not materially "during or after the relocation, impair the safety of the easement holder or another entitled to use and enjoy the easement."[313] Although the interest of easement holders and others in using and enjoying the easement safely once a relocation is complete would certainly be considered by a court under Sections 4(1)–(3), Section 4(4) makes this consideration an explicit focus to reflect repeated judicial emphasis on safety concerns in decisions that address proposed easement relocations under the Restatement or similar statutes.[314]

Next, Section 4(5) assures that a relocation will not materially "during the relocation, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the servient estate owner substantially mitigates the duration and nature of the

of proposed relocation of an undefined access easement because the new driveway would be more narrow, have sharp turns, and preclude access by delivery and garbage trucks); City of Boulder v. Farmer's Reservoir & Irrigation Co., 214 P.3d 563, 567–69 (Colo. App. 2009) (refusing to allow alteration of a ditch irrigation easement to facilitate a trail extension because the alteration of the easement would materially and adversely affect the maintenance rights that an irrigation company enjoyed by virtue of the easement).

[312] UNIF. EASEMENT RELOCATION ACT § 3(b)(1) (UNIF. L. COMM'N 2020). For a discussion of the limits on creating and enforcing negative easements or restrictive covenants generally, see RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

[313] UNIF. EASEMENT RELOCATION ACT § 4(4) (UNIF. L. COMM'N 2020).

[314] *Compare* Belstler v. Sheler, 264 P.3d 926, 933 (Idaho 2011) (affirming the trial court's refusal to approve relocation of express ingress and egress easement under Idaho Code Section 55-313 because of steeper grades and hazard for dominant estate owners in using the easement), *with* Carlin v. Cohen, 895 N.E.2d 793, 798–99 (Mass. App. Ct. 2008) (affirming the trial court ruling approving relocation of pedestrian beach access easement because the entry point was not more difficult to reach than under the original easement and the lack of evidence that the original easement path was more level), *and* R & S Invs. v. Auto Auctions, Ltd., 725 N.W.2d 871, 877–78, 881 (Neb. Ct. App. 2006) (holding that a servient owner could relocate an easement for a sanitary sewer lagoon because, *inter alia*, the new lagoon would have greater wastewater capacity, new piping and connections, and would alleviate environmental concerns related to old lagoon).

disruption."[315] This section will be important whenever an easement serves a dominant estate currently in active use as it would justify, for example, a court in ordering a servient estate owner to complete construction of a new road or driveway on the route of a relocated access easement before diverting traffic from the current route. Similarly, this section would justify a court in ordering a servient owner to complete construction of a new irrigation or drainage facility before diverting water from the former easement site. Importantly, Section 9 of the Act reinforces Section 4(5) by entitling the easement holder to enter, use, and enjoy the easement subject to relocation until the construction of all improvements necessary for use and enjoyment of the easement in the new location are complete and the servient estate owner files an affidavit certifying that the easement has been relocated in the relevant land records and sends that affidavit to the easement holder.[316] The final clause in Section 4(5) recognizes that there may be instances when a perfectly justifiable easement relocation cannot avoid all disruption of use and enjoyment of the easement during relocation.[317] In those cases, the servient estate owner should have the opportunity to show that it has substantially mitigated either the temporal duration or the nature of the disruption.[318] It thus leaves the court with a measure of discretion to determine whether those mitigation efforts are sufficient given the scope of the proposed relocation.

Section 4(6) prevents an easement relocation that would materially "impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate."[319] In one sense, this provision simply makes explicit the results of application of Sections 4(1)–(3) of the Act, which are all designed to protect the functional utility of the easement to a dominant estate owner in the case of an appurtenant easement.[320] Thus, for example, if the relocation of an access easement would significantly alter the access points on the dominant estate and this change would impair the current use of the dominant estate or would require material changes to improvements already constructed on the dominant estate, Section 4(6) could justify rejection of the proposed relocation.[321] Similarly, if a change in

[315] UNIF. EASEMENT RELOCATION ACT § 4(5) (UNIF. L. COMM'N 2020).

[316] *Id.* § 9.

[317] *See id.* § 4(5).

[318] *See id.*

[319] *Id.* § 4(6).

[320] *See id.*

[321] *See, e.g.*, Manning v. Campbell, 268 P.3d 1184, 1187–88 (Idaho 2012).

location of access points could be shown to have a material impact on the future development potential—and thus the value—of the dominant estate, Section 4(6) would also justify rejection of the proposed relocation.[322] Finally, if relocation of an easement would result in a material increase in the maintenance costs of the easement to the easement holder and thus materially impair the use of the easement, Section 4(6), would, in conjunction with Sections 4(1)–(3), also prevent the relocation from proceeding.[323]

Other Parties' Interests: Section 4(7) addresses a subject not covered under the Restatement by providing protection against impairment of the interest of a security-interest holder of record in the value of its collateral, a real-property interest of a lessee of record in the dominant estate, or a recorded real-property interest of any person in the servient or dominant estate.[324] If a security-interest holder of record having an interest in either the servient estate or dominant estate can show that the value of its collateral will be materially impaired by the proposed relocation of an easement, the relocation cannot proceed.[325] Similarly, if a lessee of record having a real-property interest in the dominant estate can show that this interest would be materially impaired by the proposed relocation, the relocation cannot proceed.[326]

Section 4(7)'s reference to "a recorded real-property interest of any other person in the servient estate or dominant estate" is intended to address persons such as the holder of another easement that burdens the servient

[322] M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057 (Mass. 2004) (observing that the Restatement approach "maximizes the over-all property utility by increasing the *value* of the servient estate without diminishing the *value* of the dominant estate") (emphasis added).

[323] *See* City of Boulder v. Farmer's Reservoir & Irrigation Co., 214 P.3d 563, 567–69 (Colo. App. 2009) (refusing to allow alteration of a ditch irrigation easement to facilitate a trail extension because alteration of the easement would materially and adversely affect the maintenance rights that an irrigation company enjoyed by virtue of the easement).

[324] UNIF. EASEMENT RELOCATION ACT § 4(7) (UNIF. L. COMM'N 2020).

[325] In most cases, a security-interest holder of record with an interest in the *servient estate* will be unconcerned with a proposed easement relocation because, presumably, the relocation will result in an increase in the value of its collateral. In any event, a security-interest holder of record in either the servient or dominant estate, just like the other persons mentioned in Section 4(7), is entitled to notice of the judicial proceeding under Section 5(b)(1) of the Act. *See infra* Part II.E, notes 324–326 and accompanying text.

[326] A lessee of record with an interest in the servient estate is not addressed by Section 4(7) because, presumably, such a lessee can direct any concerns it has with loss of use or enjoyment of the servient estate to the servient estate owner under the terms of its lease. Of course, the servient estate owner will typically be seeking to enhance the use and enjoyment of the servient estate as a result of the proposed relocation.

estate or dominant estate,[327] a "unit" owner, that is, the owner of an interest in a common-interest community,[328] or the owner of a mineral interest in the servient or dominant estate.[329] Thus, if the proposed relocation of a vehicular ingress and egress easement on a servient estate would materially impair a separate irrigation or drainage easement also burdening the servient estate by reducing the volume of water conveyed through the easement, the irrigation or drainage easement holder could assert Section 4(7) and block the proposed relocation. Similarly, if the proposed relocation of an access easement would encroach on or interfere with a well site or an easement that facilitates oil, gas, or mineral development on the servient or dominant estate, Section 4(7) would prevent relocation from occurring.[330] In summary, the inclusion of Section 4(7) fills a gap in the Restatement by providing security interest holders, such as lenders or other secured parties, holders of significant recorded leasehold interests in the dominant estate, and holders of oil, gas, and mineral interests that could be negatively affected by a proposed relocation, with a specific statutory basis upon which to lodge an opposition to a proposed relocation.

E. Procedural Requirements and Safeguards: Complaint, Parties, Service, Order, Recordation

Sections 5 and 6 are crucial provisions of the U.E.R.A., as they respond to critics who fault the Restatement for appearing to allow a servient estate owner to relocate an easement without prior judicial authorization,[331] and

[327] For a discussion of the interaction between Section 4(7) and Section 10(a)(5) of the Act, which deals with the priority of another recorded easement that might be affected by a proposed relocation, see *infra* Part II.Limited Effect of Relocation and notes 386–87.

[328] *See* UNIF. EASEMENT RELOCATION ACT § 2(17) (UNIF. L. COMM'N 2020). (defining a "unit" to mean "a physical portion of a common interest community designated for separate ownership or occupancy with boundaries described in a declaration describing the common-interest community"). This definition is based on the UNIF. COMMON INT. OWNERSHIP ACT § 103(35) (UNIF. L. COMM'N 2008).

[329] *See infra* Part II.Procedural Requirements and Safeguards: Complaint, Parties, Service, Order, Recordation and notes 339–42 and accompanying text for a discussion of the kind of mineral interest holders entitled to service of a summons and complaint or petition under UNIF. EASEMENT RELOCATION ACT § 5(b)(2) (UNIF. L. COMM'N 2020).

[330] UNIF. EASEMENT RELOCATION ACT § 4(7) (UNIF. L. COMM'N 2020).

[331] *See infra* notes 212431–222 and accompanying text for discussion of criticism of the Restatement.

codify judicial decisions that embrace the Restatement but insist that a non-consensual easement relocation should only occur after judicial approval.[332]

Commencement of Civil Action: Section 5(a) begins by requiring a servient estate owner seeking to relocate an easement under Section 4 to file "a civil action."[333] The precise form of the civil action will depend on the applicable rules of civil procedure in the relevant state.[334]

Section 5(b)(1) then establishes the necessary parties to an easement relocation proceeding under the Act and guarantees notice of the proceeding by requiring the servient estate owner to serve a summons and complaint or petition upon the easement holder whose easement is the actual subject of the relocation proceeding and other interested persons.[335] The other interested persons that must be served include: "(B) a security-interest holder of record of an interest in the servient estate or dominant estate; (C) a lessee of record of an interest in the dominant estate; and (D) . . . any other owner of a recorded real-property interest if the relocation would encroach on an area of the servient estate or dominant estate burdened by the interest."[336] These persons are all necessary parties because each has a right to object to and potentially block a proposed easement relocation on the ground that the relocation would impair collateral or some other real-property interest under Section 4(7) of the Act.[337]

Section 5(b)(2), however, narrows the category of persons who must receive service under Section 5(b)(1)(D) because of a potential encroachment on an area of the servient or dominant estate burdened by that interest in the particular context of mineral interest holders.[338] Thus, only a mineral interest holder whose "interest includes an easement to facilitate oil, gas, or mineral development" is entitled to service.[339] Holders of other mineral interests, particularly fractional mineral interest holders whose interest is only in *severed, sub-surface* minerals in either the servient or dominant estate, are

[332] *See* Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1237–38 (Colo. 2001); M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1059 (Mass. 2004).

[333] UNIF. EASEMENT RELOCATION ACT § 5(a) (UNIF. L. COMM'N 2020).

[334] In most states, a servient estate owner would bring a declaratory judgment action. *See, e.g.*, La. Code Civ. Proc. Ann. arts. 1871–83 (2021) (providing for declaratory judgment actions); Cal. Civ. Proc. Code §§ 1060–1062.5 (West 2021) (same).

[335] UNIF. EASEMENT RELOCATION ACT § 5(b)(1) (UNIF. L. COMM'N 2020).

[336] *See id.*

[337] *Id.* § 4(7).

[338] *Id.* § 5(b)(2).

[339] *See id.*

exempt from service.[340] These kinds of mineral interest holders typically have no possessory interest in the surface of the relevant land and thus would be unaffected by the relocation of a surface easement (and most other easements as well).[341] Requiring the servient estate owner to serve all such mineral interest holders would be unwieldy and unproductive. In effect, this section exempts from service most severed mineral interest holders, including holders of a royalty interest, overriding royalty interest, net-profits interest, or working interest, unless, once again, that interest "includes an easement to facilitate oil, gas, or mineral development."[342] When a mineral interest does include an easement to facilitate development, such as an easement created for the purpose of providing vehicular access to a drill site or an easement established to construct, operate, or maintain a gathering line or a pipeline, then the easement holder must be served.[343]

Sections 5(c)(1)–(6) specify the information that the servient estate owner must include in its complaint or petition, such as the servient estate owner's intent to seek relocation, the nature, extent, and anticipated dates of the relocation project, the current and proposed locations of the easement, and reasons the proposed relocation is eligible for and satisfies the Act.[344] This information will give the easement holder and other necessary parties an opportunity to decide whether to consent or object to the proposed relocation.[345] Nothing in the Act, of course, prevents the servient estate owner from providing all of this information to the easement holder and other interested parties in advance of filing a civil action.[346]

Section 5(c)(6) is slightly different in focus. It requires the servient estate owner to state that it "has made a reasonable attempt to notify the holders of any public-utility easement, conservation easement, or negative easement on the servient estate or dominant estate of the proposed relocation."[347] In effect, this provision alerts the court to the possibility that certain kinds of easements are not eligible for relocation under Section 3(b)(1) and whose interests are

[340] *Id.* § 5(b)(2), cmt. n.3.

[341] *See id.*

[342] *Id.* § 5(b)(2).

[343] *See id.*

[344] *Id.* § 5(c)(1)–(5).

[345] *See id.*

[346] In many cases, a prudent servient estate owner will do just that and attempt to obtain all necessary consents before undertaking the costly step of filing an easement relocation lawsuit under the act.

[347] UNIF. EASEMENT RELOCATION ACT § 5(c)(6) (UNIF. L. COMM'N 2020).

also protected under Section 3(b)(2) might burden either the servient or dominant estate.[348] This is crucial because Section 6(a)(1) of the Act requires a court to make a threshold determination that the easement subject to relocation is, in fact, eligible for relocation under Section 3.[349] The U.E.R.A. Drafting Committee intentionally chose not to make holders of the excluded easement categories (public-utility easements, conservation easements, and negative easements) necessary parties out of concern that they might be served with process but then, due to lack of resources or access to legal counsel (particularly in the context of a conservation easement or perhaps a small utility cooperative), might not appear and defend their interests in court.[350] A failure to appear and contest a judicial relocation action after receiving service could then result in the easement holder being barred on the basis of res judicata from attacking a judgment against its interest.[351] Section 5(c)(6) nevertheless provides additional protection for the holders of the excluded easement categories by bringing their existence to the attention of the court so that the court can verify that an excluded easement is not being relocated or otherwise harmed as discussed below.

Section 5(d) is also designed to speed resolution of a judicial easement relocation proceeding by providing a mechanism for all other necessary parties (other than the easement holder whose easement is subject to relocation) to file a document with the court "that waives its rights to contest or obtain relief in connection with the relocation or subordinates its interests to the relocation."[352] Once such a document is filed, the court may excuse that party from answering or participating in the proceeding and thus eliminate any further expense for that party.[353]

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[348] *See id.*

[349] *Id.* § 6(a)(1).

[350] *See id.* § 5, cmt. n.7.

[351] RESTATEMENT OF THE LAW (SECOND): JUDGMENTS § 34(1)–(3) (1980) (stating that the general principle of res judicata applies to a person "who is named as a party to an action and subjected to the jurisdiction of the court" and that a person "who is not a party to an action is not bound by . . . the rules of res judicata"). *See also* MOORE'S FED. PRACTICE §§ 130.40–130.41 (3d ed. 2017) (addressing scope of doctrine of claim preclusion, parties bound, and requirement that for parties to be bound by claim preclusion they must have full and fair opportunity to litigate), and § 131.40[2][a] ("A person . . . may be involuntarily subjected to the court's jurisdiction by proper service of process.").

[352] UNIF. EASEMENT RELOCATION ACT § 5(d) (UNIF. L. COMM'N 2020) (referring to persons listed under subsections 5(b)(1)(B)(C) or (D) who must receive a summons and complaint or petition).

[353] *Id.*

Required Findings; Order: Section 6 focuses on a court's obligations when confronted with an easement relocation proceeding under the Act. First, Section 6(a)(1) mandates that the court determine that "the easement is eligible for relocation under Section 3."[354] This requirement protects the holder of any of the easements specifically excluded from the scope of the Act—a public-utility easement, a conservation easement, or a negative easement—from having its easement improperly relocated in violation of Section 3(b) and also assures that the new location of an easement eligible for relocation will not "encroach on an area burdened by a conservation easement" and will not "interfere with the use and enjoyment of a public-utility easement or an easement appurtenant to a conservation easement."[355] This provision thus provides an important check on a servient estate owner and protection for public-utility and conservation easement holders by preventing an ineligible easement from actually being moved and preventing an eligible easement from landing in an area burdened by a conservation easement or interfering with one of the other exempt easements, all without requiring the holder of an exempt easement to be a party to the judicial easement proceeding.[356]

Section 6(a)(2) requires the court to determine that the proposed relocation "satisfies the conditions for relocation under Section 4."[357] This simply makes clear that Section 4 is the heart of the Act and directs the court to apply all of its substantive conditions in making its ultimate determination as to whether a relocation is permitted.

Once a court determines that a relocation is appropriate, Sections 6(b)–(d) require the court to issue an order authorizing the relocation and the servient estate owner to record a certified copy of that order, along with an explanatory statement, in the appropriate land records of the state.[358] Sections 6(b)(1)–(7) specify the contents of that order, with the most important

[354] *Id.* § 6(a)(1).

[355] *Id*. § 3(b)(1)–(2).

[356] If a court erroneously allows an easement to be relocated in violation of the scope provisions of Section 3(b), then the easement holder could always challenge that ruling in a subsequent proceeding as long as the easement holder was not a party to the earlier proceeding.

[357] UNIF. EASEMENT RELOCATION ACT § 6(a)(2) (UNIF. L. COMM'N 2020).

[358] *Id.* at § 6(b)–(d). These requirements are generally consistent with the approach taken by courts that have adopted the Restatement approach to easement relocation. *See, e.g.*, R & S Invs. v. Auto Auctions, Ltd., 725 N.W.2d 871, 878 (Neb. Ct. App. 2006) (requiring servient estate owner that satisfies Restatement criteria to execute a new document setting forth the new location and other relevant terms of the relocated easement).

information being the immediately preceding and new location of the relocated easement,[359] the kinds of mitigation that the servient estate owner must provide to the easement holder during the process of relocating the easement, [360] the plans and specifications of any improvements that must be constructed so that the easement holder can use and enjoy the easement in its new location,[361] and any other conditions that must be satisfied to complete the relocation.[362]

Sections 6(b)(8)–(9) require the court to include provisions for the payment of expenses under Section 7 and for compliance with the obligation of good faith under Section 8, both of which are discussed below.[363] Section 6(b)(10) requires the court to "instruct the servient estate owner to record an affidavit, if required under Section 9(a), when the servient estate owner substantially completes relocation."[364] Section 6(c) widens a court's discretion in fashioning an order authorizing relocation by allowing it to "include any other provision consistent with this [Act] for the fair and equitable relocation of an easement."[365]

Finally, Section 6(d) requires a servient estate owner that obtains judicial approval for relocation to record, "in the land records of each jurisdiction where the servient estate is located, a certified copy of the order under subsection (b)."[366] In most cases, the Section 6(b) order will be the first of two documents that must be recorded to complete an easement relocation.[367] The second document will be the relocation affidavit specified in Section 9(a)(1), which certifies that the easement has been relocated.[368] When no improvements need to be constructed or altered for use of the relocated

[359] UNIF. EASEMENT RELOCATION ACT § 6(b)(3)–(4) (UNIF. L. COMM'N 2020).

[360] *Id.* § 6(b)(5).

[361] *Id.* § 6(b)(6).

[362] *Id.* § 6(b)(7).

[363] *Id.* § 6(b)(8)–(9). For discussions of Sections 7 and 8 of the Act, see *infra* Parts II.Expenses–G.

[364] UNIF. EASEMENT RELOCATION ACT § 6(b)(10) (UNIF. L. COMM'N 2020). Section 9 is a safeguard added for the benefit of an easement holder to assure that the easement holder enjoys uninterrupted use of the easement subject to relocation in its old location until all of the work necessary for relocation is complete. UNIF. EASEMENT RELOCATION ACT § 9 (UNIF. L. COMM'N 2020), discussed *infra* Part II.Affidavit of Relocation

[365] UNIF. EASEMENT RELOCATION ACT § 6(c) (UNIF. L. COMM'N 2020).

[366] *Id.* § 6(d).

[367] *See id.* § 6(b).

[368] *See id.* § 9(a)(1).

easement, the recordation of the order approving relocation under Section 6(d) will constitute completion of the relocation.[369]

F. Expenses

Section 7 follows the Restatement by declaring that a "servient estate owner is responsible for reasonable expenses of relocation of an easement under this [Act]."[370] It breaks new ground, however, by specifying what some of those expenses might be, including constructing necessary improvements on either the servient or dominant estate, mitigation disruption measures, obtaining governmental approvals or permits, preparing and recording any necessary documents, any title work required to complete the relocation, title insurance premiums, the fees of experts necessary to review plans and specifications of necessary improvements, maintenance costs associated with the relocated easement that exceed those in the former location, and obtaining any necessary third party consents.[371]

Notably, Section 7 does not address litigation-related attorney fees. Thus, the U.E.R.A. does not displace the general American rule for attorney fees, and each party to a contested easement relocation proceeding will still be responsible for paying its own litigation-related attorney fees, in the absence of some other applicable state law.[372]

G. Duty of Good Faith

Once a court issues an order under Section 6 authorizing an easement relocation, Section 8 requires that all parties in the civil action must act in good faith to facilitate the relocation.[373] This duty to act in good faith is grounded in an understanding of an easement as a long-term, concurrent property relationship that imposes mutual duties of accommodation.[374] As noted earlier, a number of U.S. courts adopting the Restatement approach to

[369] *Id.* § 9(c).

[370] *Id.* § 7.

[371] *Id.* § 7(1)–(9). The Supreme Court of Appeal of South Africa also insisted that a servient estate owner that obtains approval to relocate a predial servitude pay the costs involved in amending and registering the title deeds of the servient estate, and if applicable, the dominant estate. Linvestment CC v. Hammersley, 3 S.A. L. Rep. 283, 294 (Sup. Ct. App. 2008).

[372] UNIF. EASEMENT RELOCATION ACT § 7(c), cmt n.2 (UNIF. L. COMM'N 2020).

[373] *Id.* § 8.

[374] *See* Lovett, *supra* note 98, at 36–47 (discussing the principle of mutual accommodation in the law of easements and servitudes at common and civil law).

easement relocation have specifically endorsed this principle of mutual accommodation in an easement relationship.[375] A number of other uniform acts promulgated by the Uniform Law Commission also require parties bound together in a long-term property relationship to act in good faith.[376]

H. Affidavit of Relocation

Section 9 of the U.E.R.A. addresses another potential concern about the Restatement approach to easement relocation—the possibility that a servient estate owner will commence a relocation and destroy improvements in the existing location but never complete the improvements needed to make the relocated easement usable in its new location. This section responds to that concern in two ways.

First, Section 9(a) provides that "[i]f an order under **Section 6 requires the construction of an improvement as a condition for relocation of an easement, relocation is substantially complete, and the easement holder is able to enter, use, and enjoy the easement in the new location**," the servient estate owner must record an affidavit attesting to these facts in the local land records and then send, by certified mail, a copy of the affidavit to the easement holder and other parties.[377] In essence, this section constitutes a means of providing formal notice to the easement holder that all of the work necessary for its use and enjoyment of the relocated easement is complete.[378]

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[375] Roaring Fork Club L.P. v. St. Jude's Co., 36 P.3d 1229, 1234–35 (Colo. 2001) (explaining that Colorado law increasingly recognizes that when there are two competing interests in the same land, those interests "should be accommodated, if possible" and endorsing the Restatement approach to easement relocation as consistent with that "accommodation doctrine"); M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1058–59 (Mass. 2004) (quoting *Roaring Fork Club L.P.*, 36 P.3d at 1237 for the proposition that "[c]learly, the best course is for the owners to agree to alterations that would accommodate both parties' use of their respective properties to the fullest extent possible"); R & S Invs. v. Auto Auctions Ltd., 725 N.W.2d 871, 880 (Neb. Ct. App. 2006) (stating that "Nebraska case law provides that the owner of a servient estate and the owner of a dominant estate enjoy correlative rights . . . and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration of the rights of the other demands").

[376] *See, e.g.*, UNIF. COMMON INTEREST OWNERSHIP ACT § 1-113 (UNIF. L. COMM'N 2008) ("Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement."); UNIF. HOME FORECLOSURE PROCS, ACT § 105 (UNIF. L. COMM'N 2015); UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 1-301 (Unif. L. Comm'n 1976).

[377] UNIF. EASEMENT RELOCATION ACT § 9(a) (UNIF. L. COMM'N 2020).

[378] *See id.*

Perhaps even more important, though, Section 9(b) assures that the easement holder and others will have the right to enter, use, and enjoy the easement in the current location until the relocation affidavit described in Section 9(a) is recorded and sent to the parties.[379] In effect, this requires the servient estate owner to continue to provide access to all of the improvements necessary for use of the easement in its original or current location until all improvements necessary for its use in the new location are complete and until any other conditions of the court's section 6(b) order are satisfied.[380]

In what is likely to be the relatively rare case of an easement that can be used and enjoyed without any improvements on the servient estate—for example, a pedestrian access or recreational access easement unmarked by a path or trail or some other kind of easement for which necessary improvements have yet to be constructed by the easement holder—Section 9(c) simply provides that the recording of the court's Section 6(d) order authorizing a relocation will actually constitute the relocation.[381]

I. Limited Effect of Relocation

Section 10, which addresses the limited legal effect of an easement relocation under the Act, is based on the premise that a relocation under the Act does not create a new easement; rather, it merely changes where the easement may be utilized by the easement holder to satisfy the affirmative, easement-related purposes for which the easement was created.[382] Accordingly, Section 10(a)(1) clarifies that a relocation under the Act does not constitute a new transfer or grant of an interest in either a servient estate burdened by the easement or a dominant estate benefited by the easement.[383]

Furthermore, Sections 10(a)(2) through (4) clarify that an easement relocation under the Act is not a breach or default of, and will not trigger, a due-on-sale clause, or other transfer-restriction clause, under an applicable recorded document, such as a mortgage, a lease, or any other recorded document that might be affected by the relocation.[384] The potential interaction, if any, between Section 10 of the U.E.R.A. and federal legislation designed to preempt state laws that restrict the enforcement of due-on-sale

[379] *Id.* § 9(b).

[380] *See id.*

[381] *Id.* § 9(c).

[382] *Id.* § 10, 4(3).

[383] *Id.* § 10(a)(1).

[384] *Id.* § 10(a)(2)–(4).

clauses in the context of residential real estate is discussed in the comments to Section 10.[385]

Section 10(a)(5) addresses what is likely to be a rare conflict. This section provides that a relocation under the Act "does not affect the priority of the easement with respect to other recorded real-property interests burdening the area of the servient estate where the easement was located before the relocation."[386] Relying on the underlying premise of the entirety of Section 10 (that a relocation under the Act does not create a new easement), Section 10(a)(5) establishes that a relocated easement retains the same temporal priority in the public records as the original easement. Section 10(a)(5) limits this principle of retained priority, however, by confining its geographic reach to "the area of the servient estate where the easement was located before the relocation."[387] Thus, if an easement is relocated to some other portion of the original servient estate not burdened by the easement subject to relocation but burdened by another real property interest that was recorded on the servient estate *after* the establishment of the easement subject to relocation (or if it was relocated to another estate entirely), the relocated easement will not necessarily have priority over the other recorded real-property interest.[388] However, because the holder of such a recorded real property interest in the servient estate would be served and received notice under Section 5(b)(1)(D)

[385] *See id.* § 10, cmt. n.2 (noting that "as standard residential loan documents do not specifically characterize an easement relocation as an event triggering a default or due-on-sale clause, Section 10(a)(2) clarifies that, in such a case, an easement relocation will not have the effect of triggering a breach or default or application of a due-on-sale clause or other transfer restriction clause"). For a thorough discussion of the history, purpose, and application of Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 (Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C.A. § 1701j-3), see Grant S. Nelson, et al., REAL ESTATE FINANCE LAW § 5.24, at 519–43 (6th ed. 2015).

[386] UNIF. EASEMENT RELOCATION ACT § 10(a)(5) (UNIF. L. COMM'N 2020).

[387] *Id.* § 10(a)(5).

[388] Comment 3 to Section 10 illustrates the effect of this provision with an example:

> Suppose the easement subject to relocation originally burdens parcels A and B. After relocation the easement will burden parcels A, B, and C. Mortgage 1 was recorded on parcels A, B, and C subsequent to the recording of the easement on parcels A and B. Mortgage 2 is recorded only against parcel C. Under Section 10(a)(5), the relocated easement, which is now located on parcels A, B, and C, will have priority over Mortgage 1 but will be subordinate to Mortgage 2.

Id. § 10, cmt. n.3.

of the Act, any potential temporal priority conflict could be addressed by the court.[389]

J. Non-waiver

Section 11 of the U.E.R.A. departs from the Restatement by making the Act's core relocation right immune from waiver.[390] As readers will recall, Section 4.8(3) of the Restatement states that "[u]nless expressly denied by the terms of an easement, as defined in Section 1(2), the owner of the servient estate is entitled to make reasonable changes in the location and dimensions of an easement . . . ."[391] A few courts latched on to this portion of the Restatement, and to introductory language in Section 4.8 relevant to determining the initial location of "a servitude,"[392] to hold that a servient estate owner could only change the location of an easement if the easement

[389] *Id.* § 5(b)(1), discussed *supra* note 335335 and accompanying text. The court order under Section 6(b) could include any provisions necessary to address temporal priority vis-à-vis such a recorded real property interest under the authority of UNIF. EASEMENT RELOCATION ACT § 6(c) (UNIF. L. COMM'N 2020).

[390] Section 11 provides:

> The right of a servient estate owner to relocate an easement under this [act] may not be waived, excluded, or restricted by agreement even if:
>
> (1) the instrument creating the easement prohibits relocation or contains a waiver, exclusion, or restriction of this [act];
>
> (2) the instrument creating the easement requires consent of the easement holder to amend the terms of the easement; or
>
> (3) the location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, acquiescence, estoppel, or implication.

Id. § 11.

[391] RESTATEMENT, *supra* note 16, at § 4.8(3).

[392] *Id.* § 4.8(1)–(2):

> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:
>
> (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
>
> (2) The dimensions are those reasonably necessary for enjoyment of the servitude.

Id. (emphasis added). The Restatement drafters, however, likely intended the italicized language simply to indicate that the parties to a "servitude" agreement are always "free to determine the location and dimensions of a servitude" in the initial agreement. *Id.* at cmt. a.

was undefined, that is, if its location was not expressly defined by a metes and bounds description or some other indication of its location in the instrument that established the easement.[393] The Restatement comments also indicate that parties to an easement agreement can expressly agree to negate the Restatement's own terms, and they even advise that "[i]f the purchaser of an easement wishes to retain control over any change in location, the instrument should be drafted to accomplish that result."[394]

Section 11 of the U.E.R.A. unequivocally rejects not only the judicial holdings mentioned above but also the Restatement position that unilateral relocation by a servient estate owner subject to the Restatement's criteria is merely a default rule that can be altered or waived by contractual agreement. Section 11(1), which strictly prohibits the "waiver, exclusion, or restriction" of relocation rights established under the Act, and Section 11(2), which expressly prohibits parties from drafting around the rights established in Section 4 by requiring easement holder "consent . . . to amend the terms of an easement," both make clear that the relocation right established in Section 4 is not subject to waiver or exclusion in any manner and thus departs from the Restatement's lenient default rule position.[395] In effect, these two subsections adopt the German position on waiver and contractual limitation.[396] Furthermore, Section 11(3) expressly rejects the narrow approach to easement relocation followed by the courts that limited application of the Restatement to undefined easements.[397] The strong, anti-waiver provisions of Section 11 assure that the U.E.R.A. will remain useful for years to come instead of being easily negated by boilerplate provisions inserted in easement agreements that would otherwise restrict application of the Act. Section 11 also protects an unsophisticated servient estate owner who might unwarily sign an easement agreement that prevents resort to the

[393] Lewis v. Young, 705 N.E.2d 649, 653–54 (N.Y. 1998); St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 193–94 (Nev. 2009); *but see* Town of Ellettsville v. Despirito, 111 N.E.3d 987, 992–94 (Ind. 2018) (explaining that Section 4.8(3) of the Restatement was most likely not intended to be restricted to undefined easements).

[394] RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

[395] UNIF. EASEMENT RELOCATION ACT § 11(1)–(2) (UNIF. L. COMM'N 2020), cmts. n.1–3. Sections 11(1) and (2) also reject dicta in *M.P.M. Builders* suggesting that parties to an easement agreement could always opt-out of the Restatement approach by express contractual provision. M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1058 (Mass. 2004).

[396] BGB § 1023(1)–(2) (S. Forrester et al., Rothman & Co. trans., 1975), discussed *supra* note 151 and accompanying text.

[397] *Lewis*, 705 N.E.2d at 653–54; *St. James Vill.*, 210 P.3d at 193–94.

Act and will prevent courts from giving a cramped, narrow interpretation of the Act that would limit its application to undefined easements.

The Act's mandatory nature is justified for several reasons. First, the numerous additional substantive and procedural safeguards that have been built into the Act provide greater protection for the easement holder (and other interested parties) than the Restatement and thus assure that the Act cannot impose any material harm on the easement holder.[398] The Act's mandatory nature is also justified because the Act provides a form of consumer protection for grantors of easements. American contract law and property law already feature many mandatory rules designed to protect vulnerable parties from unintended, harmful, long-term consequences of a naïve contractual choice.[399]

Relatedly, Section 11 prevents a servient estate burdened with a poorly located easement from becoming practically inalienable or insusceptible of reasonable future development just because at some point in the past a landowner granted an easement appurtenant or in gross but failed to reserve a right to relocate the easement or a landowner allowed a prescriptive easement to ripen under the laws of prescription. American property law has always been suspicious of direct and indirect restraints on alienation of land because they have the effect of taking property out of commerce or making it unfit for adaptation to new circumstances.[400] While the U.E.R.A.'s exacting substantive criteria and robust procedural safeguards preserve the functional utility of an easement to a dominant estate or easement holder, the non-waiver

[398] *See* UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM'N 2020).

[399] SINGER, *supra* note 300, at 36–54.

[400] JOSEPH WILLIAM SINGER, PROPERTY 281–85, 329 (4th ed. 2014); *see also* RESTATEMENT, *supra* note 16, at § 3.4 ("A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint."), and § 3.5 ("(1) An otherwise valid servitude is valid if even it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property, or by otherwise reducing the value of the property. (2) A servitude that lacks a rational justification is invalid."). In a sense, Section 11 of the U.E.R.A. can be understood as fulfilling the Restatement's general promise to subject all questions about a servitude's validity to a practical and policy-oriented discussion of whether the servitude is illegal, unconstitutional, or violates public policy. *Id.* at ch. 3, intro. note, § 3.1. Section 11 also prevents, consistent with Section 3.4 of the Restatement, any easement, other than those specifically excluded under Section 3(b) of the Act, from becoming perpetually fixed in place based on a contractual waiver of the right to relocate and thus becoming, in effect, a kind of direct restraint on alienation that does not serve a reasonable purpose. *Id.* § 3.4, cmt. c (detailing "harmful effects" that flow from unreasonable direct restraints on alienation).

provision of the U.E.R.A. preserves the alienability, functional flexibility, and long-term development value of a servient estate.[401] Meanwhile, the Act's scope exemptions for conservation easements and negative easements, which can be used to create perpetual restraints on development and which, of course, do limit the alienability of burdened land, will preserve the value of those easements.[402]

K. Standard Provisions

Sections 12, 13, and 15 are standard provisions found in most uniform acts promulgated by the Uniform Law Commission.[403] Section 12 provides that in applying and construing this Act courts should pay heed to "the need to promote uniformity of the law" with respect to the subject matter of the Act among the states that enact it.[404] Section 13 addresses the relation of the Act to the Electronic Signatures in Global and National Commerce Act.[405] Section 15 contains the Uniform Law Commission's standard severability clause.[406] None of these provisions should be controversial in any legislature considering adoption of the Act.

L. Legal Transition – Retroactivity

Finally, Section 14 provides the transitional rule for the U.E.R.A. by specifying that the Act "applies to an easement created before, on, or after [the effective date of this [Act]]."[407] Put simply, the Act applies both prospectively and retroactively. As should be clear by now, an easement relocation can only proceed under the Act if the relocated easement will provide the easement holder with the same "affirmative, easement-related benefits" that the easement's original location delivered to the easement

[401] SINGER, *supra* note 400,400 at 281–85.

[402] UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM'N 2020), discussed *supra* Part II.Scope

[403] *See*, *e.g.*, UNIF. COMMON INT. OWNERSHIP ACT § 1-113 (UNIF. L. COMM'N 2008) (providing an example of the standard provisions in another uniform act).

[404] UNIF. EASEMENT RELOCATION ACT § 12 (UNIF. L. COMM'N 2020).

[405] *Id.* § 13.

[406] *Id.* § 15. Section 15, however, will only be included in a version of the Act if that state lacks a general severability statute or a judicial ruling of the highest court stating a general rule of severability. *Id.* (legislative note).

[407] *Id.* § 14.

holder.[408] In light of the seven substantive conditions that a servient estate owner must satisfy under Section 4, including the condition that the relocation will not materially "impair the physical condition, use, or *value* of the dominant estate or improvements on the dominant estate,"[409] the extensive procedural safeguards in the Act,[410] the obligation of the servient estate owner to pay all reasonable expenses of the relocation,[411] and the protections of the easement holder's continuing right to use and enjoy the easement during the process of relocation,[412] application of the Act will not deprive the easement holder of any functional benefits of the easement and will not cause the easement holder to suffer any material harm, even during the relocation process, regardless of whether the Act applies to an easement created before, on, or after the effective date of the Act.

Despite these substantive and procedural protections, some readers may still wonder whether retroactive application of the Act would constitute an uncompensated taking of private property under state or federal constitutional principles. Fortunately, one state supreme court has already answered this question in the context of a state statute that provides for relocation of an easement on terms similar to, but actually less exacting than, the U.E.R.A. In *Statewide Construction, Inc. v. Petri*, a servient estate owner that sought to develop a fifteen-acre parcel filed a declaratory judgment action to obtain judicial approval to relocate an express vehicular access easement that served seven adjacent parcels. [413] The servient estate owner brought the lawsuit after obtaining a conditional use permit requiring construction of a new road to serve the dominant estates,[414] and it sought judicial authorization for the relocation of the easement under Idaho's private access road relocation statute that grants a private landowner whose land is burdened by an undedicated vehicular access road a "right at their own expense to change such access to any other part of the private lands," as long as the change is made in "a manner as not to obstruct motor vehicle travel, or

[408] *Id.* § 14, cmt.1.

[409] *Id.* § 4(6) (emphasis added).

[410] *Id.* §§ 5–6, discussed *supra* Section II.Procedural Requirements and Safeguards: Complaint, Parties, Service, Order, Recordation

[411] *Id.* § 7, discussed *supra* section II.Affidavit of Relocation

[412] *Id.* §§ 6(5)–(7), 9(b).

[413] 247 P.3d 650, 652 (Idaho 2011).

[414] *Id.*

to otherwise injure any person or persons using or interested in such access."[415]

In affirming the district court order allowing the proposed relocation, the Idaho Supreme Court first ruled that allowing unilateral relocation of an access road under the statute did not amount to a per se injury merely because the result deviated from the traditional common law rule.[416] Moreover, the court also held that relocation of the access road easement was not an unconstitutional taking of private property without just compensation under either the Fifth Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly required the change be made in a manner that does not obstruct vehicular travel over the road or injure any interested person's access over the road.[417] As the court put it, any relocation authorized by the statute will thus "provide the dominant estate holders with the same benefi[cial] [interest] they were entitled to under the easement by its original location."[418] Therefore, the court reasoned, the easement holders would not suffer any specific constitutional injuries that would impair their ability to access their properties if relocation was permitted.[419] Interestingly, the court noted that the dominant estate owners did not cite any authority for their argument that relocation of an easement under the statute constituted a taking.[420] Just as the Idaho Supreme Court ruled in *Statewide Construction*, retroactive application of the U.E.R.A. will not be a taking because the easement holder still has the right to use and enjoy a perfectly functional easement, and the easement holder will not suffer any material harm.

III. JUSTIFICATIONS FOR THE U.E.R.A.

As Part I of this article has demonstrated through its review of the case law preceding and following the Restatement, judicial views concerning

[415] IDAHO CODE § 55–313 (2021).

[416] *Statewide Constr.*, 247 P.3d at 654–56 (finding that legislature intended to modify common law no-unilateral relocation rule as expressed in Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950), because it left intact two other statutes requiring easement holder consent for relocation of other kinds of easements while allowing non-consensual relocation of motor vehicle access easements under IDAHO CODE § 55–313).

[417] *Id.* at 656 (quoting IDAHO CODE § 55–313).

[418] *Id.* at 657.

[419] *Id.* at 657–58.

[420] *Id.* at 656. The court's observation is not surprising as the author of this article has not located any decision holding that retroactive application of the Restatement, or any state statute allowing unilateral easement relocation for that matter, would constitute a taking.

unilateral easement relocation have ebbed and flowed over the years. Further, as Part II has demonstrated, the U.E.R.A. builds on the Restatement's doctrinal breakthrough (and the Civil Law approach followed in Louisiana and elsewhere) but refines the Restatement approach in numerous ways. This final part expands to address policy arguments, both those made by judges and scholars opposed to any kind of unilateral easement relocation right,[421] and those in favor of such an approach,[422] and sets the debate about easement relocation in a broader theoretical framework.

In general, the version of unilateral relocation offered in the U.E.R.A. represents an economically desirable, welfare-enhancing, socially constructive, and fair doctrinal advance in American property law. It is based on an understanding of an easement, not as an absolute, unconditional property right that an easement holder can wield like a Blackstonian stick against a helpless servient estate owner, but rather as a long-term property relationship in which both the easement holder and the servient estate owner owe each other duties of mutual accommodation and respect.[423]

Moreover, the U.E.R.A. recognizes that an easement is not really like a mythical fee simple absolute, entitling its owner to exercise complete dominion with respect to all non-owners, subject only to the limitations of the law of nuisance. Instead, the U.E.R.A. acknowledges that an easement is, in fact, a limited, non-possessory property interest that entails a complex relational matrix of mutual obligations that, from time to time, requires judicial control if the parties cannot reach mutually acceptable compromises on how to respond to changed circumstances.[424]

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[421] BRUCE & ELY, *supra* note 26, §§ 7:13, 7:16 (Spring 2020) (criticizing Restatement); Orth, *supra* note 298 (same); Note, *The Right of Owners of Servient Estates to Relocate Easements Unilaterally*, 109 HARV. L. REV. 1693 (1996) (analyzing tentative draft of section 4.8(3) and favoring traditional mutual consent rule); Joseph Kakesh, *Recent Decisions of the United States Court of Appeals for the District of Columbia, Property Law*, 73 GEO. WASH. L. REV. 918, 927–28 (2005) (criticizing Restatement).

[422] GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, COVENANTS AND EQUITABLE SERVITUDES § 4.13(c), at 196–99 (3rd ed. 2016) (adopting neutral position on Restatement); V. William Scarpato, *"Is" v. "Ought," or How I Learned to Love to Stop Worrying and Love the Restatement*, 85 TEMP. L. REV. 413, 442–46 (2016); Korngold, *supra* 264264, at 1568–69; Lovett, *supra* note 98 (arguing in favor of modified version of section 4.8(3) of the Restatement); French, *supra* note 310; Douglas B. Harris, *Balancing the Equites: Is Missouri Adopting a Progressive Rule for Relocation of Easements?*, 61 MO. L. REV. 1039, 1060 (1996) (supporting tentative draft of section 4.8(3) over the traditional approach).

[423] Lovett, *supra* note 98, at 34–43.

[424] *Id.* at 36–43.

Finally, the U.E.R.A. recognizes that an easement is not a static property *commodity* subject to modification solely through market transactions. Rather the U.E.R.A. appreciates that property law often creates complex, reciprocal duties among the persons affected by an easement. In short, the U.E.R.A. recognizes that an easement is a prime example of "governance property" or property as *propriety*.[425] It will thus help the American legal community appreciate something that many other legal systems around the world have long realized—that an easement or servitude represents an important model for resource sharing and provides opportunities for mutual benefit and just social relations.[426]

This part of the article considers four fulcrums of debate over the desirability of recognizing a unilateral easement relocation right. The first debate fulcrum turns primarily on utilitarian claims about the costs and benefits of the mutual consent rule or the unilateral easement relocation alternative in terms of short-term certainty and long-term flexibility. The second fulcrum addresses similar concerns but stages them in terms of economic fairness and the risk of windfall gains and losses. The third and fourth axes of debate turn on more formalistic claims about symmetry in easement relocation rules and appeals to the ideal nature of an easement as a prototypical property form in the architecture of property law.

A. Short-Term Certainty versus Long-Term Flexibility

The first fulcrum of debate over easement relocation typically begins with the argument that recognition of any kind of judicially sanctioned unilateral easement relocation right will lead to uncertainty, erode trust between the parties to an easement, and provoke unnecessary litigation and potentially even harassment of easement holders.[427] Although judges initially made this

[425] *See generally* Gregory S. Alexander, *Governance Property*, 160 U. PENN. L. REV. 1853, 1862 (2012); GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970 (1997).

[426] *See generally* Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 677–79 (2013) (describing the broad impulse toward sharing in American property law decision making and arguing for greater recognition and formalization of an interest-outcome and sharing-based approach to property disputes); *id.* at 697–99 (detailing this approach in the context of implied easements).

[427] Note, *The Right of Owners of Servient Estates to Relocate Easements Unilaterally*, 109 HARV. L. REV. 1693, 1694–95, 1700–01 (1996); BRUCE & ELY, *supra* note 26, §§ 7:13, 7:16; Stamatis v. Johnson, 224 P.2d 201, 202–03 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz.

claim without any empirical or theoretical support,[428] some commentators have advanced more sophisticated versions of the argument based on Coasian accounts of the presence or absence of transaction cost friction,[429] or speculations as to whether parties to an easement relocation dispute would be members of an effective norm-producing community with thick or intimate relational bonds that could easily resolve intra-community disputes without resort to the formal legal system.[430]

One common feature of all versions of the argument that the Restatement approach to easement relocation will increase controversy and litigation is the observation that the Restatement itself does not require a servient estate owner to seek judicial approval of a proposed relocation before actually moving the easement.[431] This failure, the critics suggest, could produce a cascade of interlocking problems: (1) the servient estate might rush to relocate a burdensome easement without seeking easement holder consent; (2) the servient estate owner's improvements resulting from the unilateral relocation would then turn into sunk costs discouraging the servient estate owner from engaging in fruitful negotiation; and (3) the resulting destabilization of the easement relationship will force the easement holder to litigate to protect its interests in the original easement location.[432]

1951); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980); Herren v. Pettengil, 538 S.E.2d 735, 736–37 (Ga. 2000); MacMeekin v. Low Income Hous. Inst. Inc. 45 P.3d 570, 576 (Wash. Ct. App. 2002).

[428] *Stamatis*, 224 P.2d at 202–03.

[429] Note, *supra* note 421, at 1699–1702 (first acknowledging that because of the small number of parties, their proximity to each another, and the ease of initiating bargaining, that transaction costs might initially appear to be low for easement relocation disputes and thus a default rule setting could be inconsequential in Coasian terms, but then noting that the inherent bilateral monopoly situation created by an easement may increase bargaining costs and thus make the choice of a default rule more significant).

[430] Note, *supra* note 421, at 1702–05 (citing and discussing ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991), and observing that even if the parties to an easement relocation dispute are members of an effective norm-producing community, these kinds of disputes probably do not occur frequently enough for the community to generate applicable norms).

[431] Note, *supra* note 421, at 1700–01; Orth, *supra* note 298, at 647.

[432] Note, *supra* note 421, at 1700–01; Orth, *supra* note 298, at 647; Town of Ellettsville v. Despirito, 111 N.E.3d 987, 996–97 (Ind. 2010) (citing and quoting Note, *supra* note 421, at 1701 for proposition that adoption of Restatement would lead a servient estate owner to "take initial steps to relocate the easement unilaterally because he does not need the dominant estate-holder's prior consent," resulting investment of recourses would produce "sunk costs," and servient estate owner would become 'reluctant to accept an offer from the owner of the dominant estate to cease the relocation, even if doing so would be the most efficient outcome'").

Legislatures contemplating adoption of the U.E.R.A. should consider several counter-arguments to this uncertainty critique. First, as supporters of the Restatement have noted, most servient estate owners are, in fact, likely to be risk-averse property owners themselves and will be reluctant to move an easement without easement holder consent or judicial approval precisely because of their fear of being stuck with improvements that might have to be torn down or removed at considerable expense ex post.[433] In other words, the fear of significant sunk costs may actually discourage hasty relocation by servient estate owners even more in states with the U.E.R.A. than in states without it. Indeed, the possibility that a court might eventually approve a proposed relocation under a substantive reasonableness test like that found in the Restatement or the U.E.R.A. might actually encourage both the servient estate owner and the easement holder to engage in more negotiation, cooperation, and other-regarding accommodation ex ante.[434] This is certainly the view taken by the Massachusetts Supreme Judicial Court when it adopted the Restatement rule and appears to have been the practice in Massachusetts after the Restatement became the universal standard there.[435]

Next, as Professor French once noted, it is quite possible that the easement holder faced with a reasonable relocation request under either the Restatement or the U.E.R.A. might want to consent (assuming, of course the proposed relocation does not materially impair the easement's utility) because the easement holder will understand that in the future she may want to adjust the manner, frequency, and intensity of the easement's use due to technological developments or changes in the neighborhood and would prefer to have the servient estate owner's cooperation rather than risk litigating that question.[436] Finally, legislatures should remember that even if the establishment of a unilateral relocation right does produce some increased

[433] Harris, *supra* note 421, at 1059–61; French, *supra* note 310, at 5.

[434] French, *supra* note 310, at 11–13.

[435] M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1059 (Mass. 2004) (commentating that amicable settlements are still likely to predominate after adoption of the Restatement because a servient owner will be reluctant to seek judicial approval unless it is confident relocation will not harm the easement holder and a dominant estate owner would be unwise to resist a well-considered relocation proposal). For the relatively few Massachusetts decisions after *M.P.M. Builders*, see *supra* notes 201–02 and accompanying text.

[436] French, *supra* note 310, at 11. Of course, the incentives to cooperate can break down when a proposed location really does impair the easement holder's use of the easement, or the easement holder simply tries to take advantage of the servient owner's need for a relocation opportunistically. *Id.* However, it is just these kinds of factors that the U.E.R.A.'s substantive criteria are designed to expose.

litigation initially, the aggregate gains in welfare that will result from breaking the easement holder's bilateral monopoly veto power under the mutual consent rule could, in the long run, still far outweigh the short term friction that might result during the transition to the U.E.R.A.[437]

Taking an even broader, systemic view of this particular debate, legislatures considering adoption of the U.E.RA. should remain focused on the fact that the Act will provide much more flexibility for the proximate and remote successors of servient estate owners in future generations and this will, in the long run, lead to more efficient land allocation generally, without any additional increase in transaction costs or litigation than the mutual consent rule, and likely lead to more efficient land use planning.[438] Indeed, it was precisely this promise of long-term flexibility that proved most persuasive to the Supreme Court of Appeal of South Africa when it adopted the civil law approach to servitude relocation for a post-Apartheid South African property law.[439]

Finally, and quite significantly, legislatures should not overlook the fundamental fact that the U.E.R.A. has responded to the Restatement critics who pointed out the absence of a judicial approval mandate under its regime. As shown in Part II, the U.E.R.A. requires a servient estate owner to bring a civil action to relocate an easement without the easement holder's consent.[440] This requirement and the Act's detailed, carefully modulated rules for an easement relocation proceeding,[441] along with its other protections for easement holder interests during and after the relocation,[442] should alleviate one of the primary concerns that underscored the uncertainty arguments often made by Restatement critics.[443]

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[437] Harris, *supra* note 422, at 1059–61; French, *supra* note 310, at 8.

[438] Korngold, *supra* note 264264, at 1568–69.

[439] Linvestment CC v. Hammersley, 3 S.A.L. Rep. 283, 292–93 (Sup. Ct. App. 2008).

[440] UNIF. EASEMENT RELOCATION ACT § 5(a) (UNIF. L. COMM'N 2020).

[441] *Id.* §§ 5–6.

[442] *Id.* §§ 7–10.

[443] Legislatures considering the U.E.R.A. might also consider an empirical study that gathered evidence on the effectiveness of a similar regime for the judicial modification and termination of servitudes and title conditions more generally. *See* SCOTTISH LAW COMMISSION, REPORT ON REAL BURDENS (Scot Law Com No 106, 1998) §§ 6.1–6.7 (finding that many applications for variation or discharge of old title conditions were not challenged, the Lands Tribunal dispatched most applications at low cost, frivolous applications and oppositions were discouraged by flexible attorney fee award customs, accumulated case law in time provided a basis for predictability and certainty, and the "very availability of the Tribunal served as a spur to negotiation and consensual discharge"). *See also* Lovett, *supra* note 128, at 61–62 (discussing Scottish Law Commission study).

B. Economic Fairness and Aggregate Utility—Of Windfalls, Pareto and Kalder-Hicks Efficiency, Bilateral Monopoly Safety Valves, and the Cost of Easements

The certainty versus flexibility debate has frequently been restaged in somewhat different economic terms—namely the relationship between economic fairness and aggregate utility. Judicial and academic critics of unilateral easement relocation have long contended that any kind of retroactive adoption of a unilateral relocation right could produce a windfall gain for the servient estate owner and a windfall loss for the easement holder based on initial bargaining and subsequent market transactions that factored in the immutability of the mutual consent rule.[444] Consequently, these critics argue, any adjustment of an easement's location should only occur through a market transaction.[445] Legislatures concerned about this economic fairness argument should pause, however, and at least question the critics' assumptions about parties' knowledge of the mutual consent rule at the time of easement creation or in subsequent transactions. They should also not lose sight of other fairness considerations—particularly the problem of hold-outs—and should not forget the potential systemic gains for the entire private land use system that could result from adoption of the U.E.R.A.

First, as Professor French suggested at the beginning of the debate over the Restatement, the parties to an easement often have given very little, if any, attention to the question of easement relocation either at the time of easement creation or in subsequent conveyances of the servient or dominant estate.[446] Expectations about which party might be advantaged years down the road, she argues, may thus have had little, if any, effect on the amount of consideration given or received in any of these transactions.[447] Only in rare

[444] Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950); Herren v. Pettengil, 538 S.E.2d 735, 736 (Ga. 2000); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980); BRUCE & ELY, *supra* note 26, § 7.13; Orth, *supra* note 298, at 646–50; Note, *supra* note 421, at 1695.

[445] *Herren*, 538 S.E.2d at 736; Town of Ellettsville v. Despirito, 111 N.E.3d 987, 992–95 (Ind. 2010).

[446] French, *supra* note 310, at 12–14 (examining cases and noting the unlikelihood that when a servient and dominant estate owner agree to something as practical and utilitarian as a common, shared driveway, as in Lewis v. Young, 705 N.E.2d 649 (N.Y. 1998), or irrigation ditch easements, as in Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229 (Colo. 2001), that the owners were actually bargaining over the right to prevent future development of the servient estates).

[447] French, *supra* note 310, at 12.

cases, when some special feature of an easement's utility related to its precise location or when particularly sophisticated developers or real estate attorneys are involved, she argues, would parties tend to focus on easement relocation rights at the time of easement creation or in subsequent transactions.[448] Indeed, many of the cases reviewed in Part I of this article reveal that easement agreements are often drafted by parties who were at least inattentive to the immediate or future location of an easement.[449]

Because the debate about the extent of any set of understandings of the complexities of easement relocation law at the time of contracting is impossible to resolve without a detailed empirical study, legislatures considering the wisdom of adopting the U.E.R.A. in light of critics' claims about windfall gains and losses should not lose sight of the strong likelihood that a properly constructed easement relocation rule will produce more economic efficiency overall and greater aggregate utility. As French first argued at the time the Restatement rule emerged and as the Colorado Supreme Court eventually concluded in *Roaring Fork Club*, when an easement is relocated under terms similar to the Restatement or, for that matter, under the even more rigorous conditions offered in the U.E.R.A.—when the relocated easement will not materially reduce the easement's utility to the easement holder, impair the affirmative purpose for which the easement was created, or impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate—a relocation will be *Pareto efficient or Pareto superior*—that is, the servient estate owner will be better off, but the easement holder will not actually be any worse off.[450]

Critics of unilateral relocation, however, might object to this Pareto superiority claim with another objection. That objection would likely rest on the notion that, putting aside all of the calculations that a court will make in determining whether a proposed relocation meets the substantive criteria of Section 4 of the U.E.R.A., the mere fact that the relocation will occur non-consensually (or *coercively* as the critics would say), without a market

[448] French, *supra* note 310, at 9.

[449] That was certainly the conclusion of the South African Supreme Court of Appeal in Linvestment CC v. Hammersley, 3 S.A. L. Rep. 292–93 (Sup. Ct. App. 2008).

[450] French, *supra* note 310, at 5 (arguing that a relocation under Section 4.8(3) "makes one party better off without making the other party worse off"); *Roaring Fork Club*, 36 P.3d. at 1236 (observing that the Restatement rule "maximizes the overall utility of the land" because the "burdened estate profits from an increase in value while the benefitted estate suffers no decrease"). As noted earlier, these claims amount to a classic statement of the theory of Pareto efficiency. MALLOY, *supra* note 167, at 189.

transaction, implies that there must be some loss of value to the easement holder or otherwise the easement holder would have consented to the proposed relocation in the first place.[451] In other words, any non-consensual transfer is, by definition, not Pareto optimal.

Supporters of the U.E.R.A. can respond to this objection with two rejoinders of their own. First, as Richard Posner once observed, the requirement of unanimity for Pareto superiority is, "a very austere conception of efficiency, with rather few exceptions in the real world," for the simple reason that most transactions "have effects on third parties."[452] In the context of easement relocation, the unreasonable and unrealistic demands of Pareto superiority are clear. Many third parties, principally all the persons who would likely benefit from the enhanced development of a servient estate resulting from reasonable easement relocation—future homeowners, future residential and commercial tenants, and business consumers and customers to name a few—are left out of the efficiency calculus demanded by a strict rule of unanimity. Second, even if some loss in value resulting from a lack of unanimity in an easement relocation does materialize, a judicial relocation occurring under the strict conditions of Section 4 of the U.E.R.A. will still be Kalder-Hicks efficient; it will lead to a net or aggregate gain in overall utility because the gain in utility to the servient estate owner will be higher than the loss in utility suffered by the easement holder resulting from the mere involuntary nature of the relocation.[453] When third persons' gains are considered as well—the gains of people who could benefit from the enhanced development of the servient estate resulting from a productive easement relocation—the aggregate gain in utility is likely to be even greater.

Legislatures considering adoption of the U.E.R.A. should not lose sight of one more fundamental economic efficiency problem presented by the mutual consent rule. Whatever the parties' original understandings were, when surrounding circumstances do change substantially, the mutual consent rule can easily produce a bilateral monopoly benefiting the easement holder and allowing the easement holder to demand a ransom payment and "extract

[451] MALLOY, *supra* note 167, at 189–90 (observing that the "classic example of a *Pareto efficient* exchange is a voluntary market exchange where, by definition (in the absence of fraud, duress, or the like), both parties are made better off, in their own estimation, by virtue of the exchange").

[452] RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 12 (3d ed. 1986).

[453] MALLOY, *supra* note 167, at 190 (explaining that under "the Kaldor-Hicks theory, a reallocation of recourses is efficient . . . as long as the increased benefit to one party (the winner) more than offsets the decrease in utility (or cost) to the other party (the loser)").

nearly all of the surplus value created by relocation of the easement."[454] Just like the Restatement, the U.E.R.A. will provide a useful bypass around the mutual consent rule roadblock by allowing a servient estate owner to relocate an easement, subject to meaningful judicial oversight, and thus avoid substantial economic waste of the servient estate.

One other long-term economic consideration is also relevant to the critics' claims about windfall gains and losses. By making it possible for a servient estate owner to relocate an easement in the face of adamant easement holder opposition, the U.E.R.A., just like the Restatement rule, promises to "encourage the use of easements and lower their price by decreasing the risk [that] easements will unduly restrict future development of the servient estate."[455] The property law system in general and the system for allocating use rights in neighboring parcels of land, in particular, may thus benefit from greater precision because the risks inherent in granting an easement will be lower. Landowners should be more willing to grant an easement knowing it can be relocated later under the U.E.RA. Consequently, the cost for dominant estate owners and others to acquire easements may come down, thus facilitating their use.

In a similar way, the property law system may also benefit in an adjacent area of easement law—the law concerning prescriptive easements and other kinds of non-express easements. Prescriptive easement disputes are particularly ubiquitous in American law. Every year dozens of prescriptive easement disputes are resolved by reported judicial decisions.[456] As any practicing real estate attorney will likely attest, unreported prescriptive easement disputes are even more common. The U.E.R.A. offers a promising

[454] French, *supra* note 310, at 15. *See also* Harris, *supra* note 422, at 1059–61 (praising the Restatement for offering an escape from the bilateral monopoly power of the easement holder under the mutual consent rule).

[455] RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

[456] *See* John A. Lovett, *Restating the Law of Prescriptive Easements*, 104 MARQUETTE L. REV. 939 (2021) (presenting a fifty-state study focused on one constant controversy in prescriptive easement law—the question of whether alleged prescriptive use is subject to a presumption of adversity or permissive use). A Westlaw search for prescriptive easement decisions in the West reporter system, using the West Key Number "141Key5 (Easements: Prescription. In General)," produces 189 headnotes for the three-year period from June 30, 2018 to June 30, 2021. A similar search for West Key Number "141Key8(2) (Easements: Prescription. Use by permission or agreement)," a frequently contested issue in prescriptive easement disputes, produces fifty-nine headnotes over the same three-year period. A search for West Key Number "141Key36(1) (Easements: Evidence. Presumptions and Burden of Proof)," another related and frequent headnote in prescriptive easement disputes, produces 100 headnotes over the same three-year period.

way to lower the temperature of these disputes and make them easier to settle. Because the U.E.R.A. applies to all kinds of non-express easements, such as easements created by estoppel, implication, necessity, or prescription, as well as express easements,[457] an alleged servient estate owner may be more likely to reach an accommodation with a neighbor claiming the existence of a non-express easement because the servient estate owner can be assured that even if the disputed easement is recognized, it will still be subject to relocation under the U.E.R.A. in the event the initial location imperils future development of the servient estate.

C. Micro-Level Doctrinal Symmetry versus Broader Functional Reciprocity in Response to Changed Conditions

The third major focus of debate over unilateral easement relocation concerns the supposedly advantageous symmetry of the mutual consent rule. As Restatement critics frequently note, one reason to maintain the mutual consent rule is simply that it applies with equal force to both the easement holder and the servient estate owner; thus, absent some express contractual reservation, neither party to an easement can relocate an easement without the other's consent.[458] This justification, seemingly grounded in a notion of correlative rights and an appeal to aesthetic doctrinal symmetry, has also been mentioned in a number of judicial decisions.[459] This justification, however, is subject to a significant doctrinal counterargument.

In states that chose to follow the robust Restatement approach to easement relocation or chose to adopt the U.E.R.A. or some other statutory relocation right, the law actually achieves a more profound functional reciprocity between the servient estate owner and the easement holder. It does this by providing the servient estate owner with a judicially controlled opportunity to respond productively to changing social and economic conditions in a way that matches the easement holder's ability to adjust the manner, frequency, and intensity of an easement's use as long as that adjustment does not unreasonably interfere with the servient estate owner's use of the servient estate.[460] As noted earlier in this article, under a well-

[457] UNIF. EASEMENT RELOCATION ACT § 3(a) (UNIF. L. COMM'N 2020).

[458] Orth, *supra* note 298, at 652–53; BRUCE & ELY, *supra* note 26, § 7.13; Note, *supra* note 421, at 1695.

[459] Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950); Fla. Power Corp. v. Hicks, 156 So.2d 408, 410 (Fla. Dist. Ct. App. 1963); Sakansky v. Wien, 169 A. 1, 3 (N.H. 1933).

[460] French, *supra* note 310, at 10–11.

established but muddy common law rule, an easement holder can "use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the [easement]" and can change the "manner, frequency and intensity" of that use over time "to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefitted by [the easement]."[461]

Although one of the Restatement's most stern critics contends that Professor French misunderstands or misrepresents the meaning of the common law rule formulated in Section 4.10 of the Restatement,[462] another prominent scholar in the field of private land use arrangements, Gerald Korngold, summarizes a wide range of cases falling under this heading and lends support to French's view.[463] Professor Korngold emphasizes that the reasonableness standards used by courts to deal with changes in the use of an easement are vague, judicial application of the standards is unpredictable, and courts do their best to balance three competing interests: (1) honoring the intent of the parties; (2) allowing new uses of the easement to permit efficient use of the dominant estate; and (3) minimizing interference with the productive use of the servient estate.[464] In fact, despite the variety of formulations of this rule, Korngold notices a bias in favor of allowing new productive uses of an easement as long as the new use "seems in the least way related to the prior use."[465]

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[461] RESTATEMENT, *supra* note 16, at § 4.10 cmt. f; *see also* BRUCE & ELY, JR., *supra* note 26, § 8.3 ("Reasonable use [of an easement] is not fixed at a particular point, but may vary from time to time . . . Absent specific provision to the contrary, the concept of reasonableness includes a consideration of changes in the surrounding area and technological developments. These factors provide a degree of elasticity in the scope of express easements."); French, *supra* note 310310, at 15.

[462] Orth, *supra* note 298, at 652 (arguing that what the common law meant by its rule allowing reasonable changes in the use of an easement was simply more frequent use—for example of a right of way—but that it would not permit an "overburden" or "use of an easement beyond its scope").

[463] KORNGOLD, *supra* note 422, § 4.08, at 178–79.

[464] *Id.*

[465] *Id.* at 180. Professor Korngold's examples of judicial bias in favor of new uses include Downing House Realty v. Hampe, 497 A.2d 862, 865 (N.H. 1988) (permitting intensified use a right of way easement, even though dominant estate was originally used as residence and began to be used as a seventeen car parking lot, since both properties and surrounding areas had been converted to commercial use), and Logan v. Brodrick, 631 P.2d 429 (Wash. 1981) (permitting intensified use of a roadway easement after a small lakefront resort on the dominant estate was expanded causing road traffic to increase to eighty vehicles a day and noting "[c]hanges in surrounding conditions and modernization of recreational vehicles are to be reasonably contemplated"). KORNGOLD, *supra* note 422, § 4.08, at 181–82.

Like the Restatement, the U.E.R.A. promises to produce true functional reciprocity in the easement relationship by responding to the common law's grant of flexibility to the easement holder and by embedding flexibility and elasticity on both sides of an easement relationship. It allows the servient estate owner as well as the dominant estate owner to respond to changed conditions that make either parcel ripe for new development.[466] Legislatures should take note that several leading state court decisions have found this particular justification for recognizing unilateral easement relocation rights to be especially persuasive.[467] They should also take note that two of the most prominent critics of the Restatement expressly acknowledge that the traditional common law rule allowing an easement holder to alter the manner, frequency, or intensity of an easement's use is subject to an open-textured reasonableness standard,[468] one that is actually more open-textured than the quite detailed and relatively stringent material impairment standard now offered in Section 4 of the U.E.R.A.

D. Easement as Inviolable Property Right or Long-Term, Concurrent Property Relationship

Another way that some judges and scholars have framed the debate over unilateral easement relocation focuses on the nature of an easement itself and what role, if any, courts should play in adjusting the relationship between a servient estate owner and an easement holder. How should an easement be conceptualized? As a fundamentally unalterable property right—unchangeable without the consent of the easement holder, just like the mythical Blackstonian fee simple absolute—or as a limited non-possessory use right embedded in a mutually reciprocal property relationship?

[466] M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057 (Mass. 2004).

[467] Roaring Fork Club, L.P., v. St. Jude's Co., 36 P.3d 1229, 1237 (Colo. 2001); *Dwyer*, 809 N.E.2d at 1057.

[468] BRUCE & ELY, *supra* note 26, at § 8:13 (observing that the "[s]cope of an easement may be expanded beyond the terms of the grant or the original usage, but the dominant owner may not unreasonably increase the burden on the servient estate," noting that "courts balance the dominant owner's right to enjoy the easement and take advantage of technological innovations with the servient owner's right to make all use of the servient land that does not interfere with the servitude," and advising that "[s]ince these rights are relative, courts must strive to protect the interests of both parties").

Following the lead of several early nineteenth and twentieth century judicial decisions discussed in Part I.A,[469] and even some post-Restatement judicial decisions discussed in Part I.G,[470] supporters of the traditional common law mutual consent rule argue that an easement should be maintained without any modification because an easement is no less dignified and significant a property right as a fee simple absolute.[471] Consequently, the rights of the easement holder should not be subject to any non-consensual alteration by a duty holder (the servient estate owner) even if this alteration does not impose any material economic, social, or aesthetic harm on the right holder. In short, property rights in easements are permanent, unalterable, and static, and any judicial interference with them would demote an easement from a robust, inviolable, fully possessory interest in land, on a par with the fee simple, into an inferior, malleable, mere use right.[472]

The flaw in this traditionalist claim about the inviolable nature of an easement, however, is that generally speaking, or at least outside the narrow debate over easement relocation, an easement has never been understood to be a property interest of equal rank and dignity as a fee simple estate or unencumbered ownership of land. Quite to the contrary, the common law has generally understood an easement to be not only more malleable and limited in nature than a fee simple, but also more dynamic and flexible. Consider just some of the ways that property law regards an easement quite differently than a fee simple interest in land.

First, and most obviously, the common law conceives of an easement as a *non-possessory* interest in land.[473] This does not mean, of course, that an easement holder is precluded from physically using the portion of the servient estate burdened by an easement, but rather that the easement holder cannot possess the rest of the servient estate and cannot possess the land subject to

[469] Gore v. Fitch, 54 Me. 41, 45–46 (1866); White Bros. & Crum Co. v. Watson, 117 P. 497, 499 (Wash. 1911); Smith v. Jackson, 104 S.E. 169, 170 (N.C. 1920); Sakansky v. Wein, 169 A. 1, 1–2 (N.H. 1933).

[470] Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980); MacMeekin v. Low Income Hous. Inst. Inc., 45 P.3d 570, 576 (Wash. Ct. App. 2002).

[471] Orth, *supra* note 298, at 649 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765)).

[472] Orth, *supra* note 298, at 648–49, 653–54.

[473] BRUCE & ELY, *supra* note 26, § 1:1; RESTATEMENT, *supra* note 16, at § 1.2(1) ("An easement creates a non-possessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the used authorized by the easement.").

the easement for purposes unrelated to the easement.[474] As the Restatement itself explains, an easement only "authorizes limited uses of the burdened property for a particular purpose."[475] According to two prominent critics of the Restatement, the easement holder's primary right is simply to insist that the servient estate owner and third parties not interfere with the easement holder's *specific use and enjoyment rights* under the easement.[476]

Another unmistakable sign of an easement's more modest systemic status in property law is the well-established common law principle that an easement holder's rights of use and enjoyment in the easement must be exercised in a manner that imposes the least possible interference with the servient estate owner's residual rights to use and develop the rest of the servient estate not burdened by the easement.[477] This *civiliter* principle, a foundation of the civil law of servitudes under both Roman law and later French law,[478] reveals quite clearly that an easement does not provide its holder with anything like absolute dominion over the servient estate. Note that the *civiliter* principle goes much further than a fee simple estate owner's duty not to cause a nuisance to a neighbor; it means literally a duty to cause the least possible interference with the servient estate owner's ability to use and enjoy the servient estate.[479]

[474] BRUCE & ELY, *supra* note 26, § 1:1 (observing that the "non-possessory feature of an easement differentiates from an estate in land" because the easement holder may "only use the land burdened by the easement" and "may not occupy and possess the realty as does an estate owner").

[475] RESTATEMENT, *supra* note 16, at § 1.2 cmt. d.

[476] BRUCE & ELY, *supra* note 26, §§ 8:18–8:29 (detailing the ways a servient estate owner may be held to interfere with enjoyment of the easement and the easement holder's remedies), § 8:33 (same with respect to third parties).

[477] *See* RESTATEMENT, *supra* note 16, at § 4.10. ("Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment."); BRUCE & ELY, *supra* note 26, § 8:13 (same); Minnkota Power Coop, Inc. v. Lake Shure Props., 295 N.W.2d 122, 127–28 (N.D. 1980) ("The most comprehensive restriction that is imposed upon the use a general right of way by the dominant owner is that he may not use the way as to unduly increase the burden upon the servient tenement."); Delaney v. Pond, 86 N.W.2d 816, 817 (Mich. 1957) ("A principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden.").

[478] Lovett, *supra* note 98, at 38–43.

[479] *Id.*

Finally, consider the various ways that an easement can be terminated, even when it is expressly denominated as perpetual.[480] An easement can be lost by abandonment or by non-use.[481] An easement can end when the specific purpose for which it was created no longer exists,[482] when a building that serves as a dominant or servient estate is destroyed,[483] when an easement holder of a non-commercial easement in gross dies,[484] when an easement holder engages in misuse or overburdens the servient estate,[485] when a servient estate is sold to a bona fide purchaser without notice,[486] or when an easement is created after a mortgage attaches to the servient estate and then a judicial or non-judicial foreclosure occurs and the easement holder is joined or otherwise given notice.[487] And the list goes on.[488] The inference is obvious: an easement is simply not as durable or temporally indefinite as a fee simple estate.[489]

Easements are important property rights to be sure. They can provide long-term value to a dominant estate owner or the holder of an easement in gross. But they are not, and never have been, equivalent to a fee simple interest in land. They are malleable, relational, and contingent at their core.[490] Moreover, the legitimacy of an easement as a staple form of property depends crucially on its capacity to protect the easement holder's interest in the

[480] BRUCE & ELY, *supra* note 26, § 10:1 (observing "numerous other ways," other than when an easement is subject to an express term or is defeasible upon the happening of a certain event, "that easements, both perpetual and non-perpetual, may be terminated").

[481] *Id.* §§ 10:18–10:19; RESTATEMENT, *supra* note 16, at § 7.4; KORNGOLD, *supra* note 422, § 6.09, at 289–93.

[482] BRUCE & ELY, *supra* note 26, § 10:8 (explaining that the "cessation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose").

[483] *Id.* § 10:10–10:13.

[484] *Id.* § 10:16.

[485] *Id.* § 10:26.

[486] *Id.* § 10:31–37.

[487] *Id.* § 10:41.

[488] *Id.* § 10:21–24 (termination by estoppel), § 10:25 (termination by prescription), § 10:27–30 (termination by merger). *See also* KORNGOLD, *supra* note 422, § 6.01–6.16 (reviewing various termination doctrines).

[489] *See* KORNGOLD, *supra* note 422, § 6.02, at 272 (commenting that the multiplicity of easement termination doctrines are "based on public policy considerations" as "the law seeks to terminate obsolete, useless ties that would impair the productivity of the servient land without bringing a corresponding increase in the benefits to the dominant parcel").

[490] *See generally* JENNIFER NEDLESKY, A RELATIONAL THEORY OF SELF, AUTONOMY, AND THE LAW (2013).

productive use of the easement and the correlative and long-recognized limitation that the easement holder's use must not interfere with the servient estate owner's ability to put the rest of the servient estate to productive use as well.[491] In this sense, the U.E.R.A. recognizes and protects both parties' interest in the productive use of their respective properties.

All of these debates over the efficiency and fairness of unilateral easement relocation reflect another broad theme—the extent to which any property right can or should be subject to modification because of exogenous change. Despite the day-to-day incentives for cooperation entailed in an easement relationship, the mutual consent rule can, in moments of transition or disequilibrium, tempt the easement holder to treat an easement as a pure *commodity*. The U.E.R.A., however, limits or counters this tendency because it allows the parties to an easement to reestablish a property relationship based on *propriety*, that is, long-term, other-regarding behavior focused on maintaining norms of community and sharing.[492] In other words, the U.E.R.A. might encourage the parties to an easement to see their relationship as something more than an opportunity for short-term economic exploitation of their easement partner but instead as an unfolding series of opportunities to compromise and reach outcomes that serve both parties' long-term interests.[493]

IV. CONCLUSION

This article has demonstrated that the evolution of easement relocation law in the United States is more complex than the orthodox view of easement law has long acknowledged. Many other countries have long employed versions of the civil law servitude relocation rule first adopted in France and used in Louisiana for two centuries or have allowed for judicial modification of easements under statutory changed conditions doctrines. Promulgation of Section 4.8(3) of the Restatement prompted leading courts in a number of states to adopt robust versions of the Restatement approach, even though other state courts rejected the Restatement relying on rationales provided by early judicial decisions. Some states have adopted narrowly tailored relocation statutes.

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[491] Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C.L. REV. 413, 439–40 (2017) (making a natural rights or Lockean argument for productive use as a core justification for and limitation on property rights).

[492] *See generally* ALEXANDER, *supra* note 425425.

[493] French, *supra* note 310, at 15; Dyal-Chand *supra* note 426426, *passim*.

The U.E.R.A. offers legislatures across the United States a chance to unify American easement relocation law. It builds upon the doctrinal innovation of the Restatement but refines and strengthens the Restatement approach to easement relocation in many ways. The U.E.R.A. establishes a significant but nuanced easement relocation right and, crucially, embeds it within a carefully constructed easement relocation procedural regime that requires advance judicial approval for a non-consensual relocation. The U.E.R.A. will provide greater flexibility for servient estate owners and allow useful development of servient estates, but will not impose any material easement-related harm on an easement holder. The U.E.R.A. promises to produce more mutual accommodation between servient estate owners and easement holders while more accurately situating easements in the architecture of American property law. Finally, the U.E.R.A. protects the interests of both the servient estate owner and the easement holder in the productive use of their property in the face of changing circumstances.

Restatement (Third) of Property (Servitudes) § 4.8 (2000)
Restatement of the Law — Property
Restatement (Third) of Property: Servitudes
Current through June 2010

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Chapter 4. Interpretation Of Servitudes

§ 4.8 Location, Relocation, And Dimensions Of A Servitude

Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:

(1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.

(2) The dimensions are those reasonably necessary for enjoyment of the servitude.

(3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

(a) significantly lessen the utility of the easement,

(b) increase the burdens on the owner of the easement in its use and enjoyment, or

(c) frustrate the purpose for which the easement was created.

Cross-References:

Section 4.9, Servient Owner's Right to Use Estate Burdened by a Servitude; § 4.10, Use Rights Conferred by a Servitude; § 4.11, Use of Appurtenant Easement or Profit to Serve Property Other Than Dominant Estate; § 4.12, Rights of Holders of Separate Servitudes in Same Property; § 7.10, Modification or Termination of a Servitude Because of Changed Conditions; § 8.3, Availability and Selection of Remedies for Enforcement of Servitudes.

Comment:

a. Application. The rules stated in this section apply only as an aid to determining the intent or expectations of the parties under the rules stated in § 4.1, and to supply terms omitted by the parties in creating a servitude. Subject to the limits stated in Chapter 3, Validity of Servitude Arrangements, the parties are free to determine the location and dimensions of a servitude. If their intent to do so is ascertained, it should be given effect.

b. Location of a servitude, subsection (1). The servient owner is given the power to locate a servitude in the first instance because the servient owner is better able to determine the location that will minimize the servitude's interference with current value and future development of the servient estate. The owner of the servitude is protected by the requirement that the location be reasonably suited for the purpose. The primary application of this rule is to easements, but it will also apply when the language or circumstances establish that a profit or other servitude is intended to burden only part of the servient estate and the location is not specified.

If the servient owner fails to designate a suitable location within a reasonable time after requested to do so, the owner of the servitude may proceed to locate it. A location is suitable if it reasonably allows the purpose for which the servitude was acquired to be carried out while inflicting the minimum amount of damage on the servient estate. If necessary, the parties



Freedom or Frustration? Navigating the Freedom of Information Act When Bureaucracy Strikes

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FREEDOM OR FRUSTRATION? NAVIGATING THE FREEDOM OF INFORMATION ACT WHEN BUREAUCRACY STRIKES

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2026 Gentry Locke Seminar

I. Introduction

The Virginia Freedom of Information Act ("FOIA" or the "Act") is a powerful tool for accessing public records, particularly when the information is not readily forthcoming through ordinary channels. Notably, FOIA provides that

> [A]ll public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines within circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester.[1]

In practice, however, navigating FOIA can be less straightforward than the statute suggests—agencies may delay responses, produce heavily redacted documents, or resist disclosure altogether. This outline provides a practical approach to using FOIA effectively, including where to direct requests, how to frame those requests, what obligations are triggered by submitting a request, and how to handle common issues associated with FOIA requests, including non-responsiveness and excessive redactions. This outline also addresses how to strategically use FOIA-produced records, especially in litigation, where these records can inform claims and shape discovery.

II. Who and What Can Be FOIA'd?

The Virginia Freedom of Information Act was enacted to "ensure[] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted."[2] This Section examines which entities are "public bodies" under FOIA, and which types of information may be classified as "public records" for purposes of a FOIA request.

A. What Are Public Records?

The Act defines "public records" as

[1] VA CODE ANN. § 2.2-3704(A) (2026).
[2] VA. CODE ANN. § 2.2-3700(B) (2026).

> ***all writings and recordings*** that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording, or other form of data compilation, however stored, and regardless of physical form or characteristics, ***prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business***.[3]

Therefore, as provided by the statute, FOIA requests may be made for records kept by public bodies or officers/employees. But as explained in subsequent Sections, not all records kept by public bodies fall within FOIA's reach.[4] Before discussing exemptions to FOIA, however, an understanding of "public bodies" is necessary.

B. What Are Public Bodies?

FOIA provides an extensive definition for "public bodies." It describes "public bodies" as

> any legislative body, authority, board, bureau, commission, district, or agency of the Commonwealth or of any political subdivision of the Commonwealth, including counties, cities, and towns, municipal councils, governing bodies of counties, school boards, and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations, or agencies in the Commonwealth supported wholly or principally by public funds….[C]onstitutional officers and private police departments as defined in *§ 9.1-101* shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.[5]

C. To Whom Should These Requests Be Sent?

FOIA requests should be addressed to the custodian of the records sought. FOIA mandates that each state, regional, or local public body appoint and publicly identify a FOIA officer.[6] FOIA officers serve as the primary contact for FOIA requests and ensure that their corresponding public body complies with the requirements of FOIA.[7] In practice, however, locating the name and contact information of such FOIA officers may present difficulties—primarily with regard to regional and local public bodies.

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[3] VA. CODE ANN. § 2.2-3701 (2026) (emphasis added).
[4] *See infra* Section III.
[5] VA. CODE ANN. § 2.2-3701 (2026).
[6] *See* VA. CODE ANN. § 2.2-3704.2(A) (2026).
[7] *Id.*

For instance, while FOIA explicitly requires *state* public bodies to publish the name and contact information of FOIA officers on their website, it does not require *regional* and *local* public bodies to do the same.[8] Notably, the Act only requires that regional and local public bodies make FOIA officer contact information "available in a way reasonably calculated to provide notice to the public, including posting at the public body's place of business, posting on its public government website, *or* including such information in its publications."[9] Because regional and local public bodies are not explicitly required to publish their FOIA officers' contact information on their websites, those seeking to file FOIA requests with these public bodies should also consult publications and/or contact the body directly to acquire the FOIA officer's contact information.

If the search for a FOIA officer's contact information proves unsuccessful, the filing party should identify the custodian of the records they wish to acquire, and file the FOIA request with said custodian. In an advisory opinion, the Virginia FOIA Council explained that qualifying a person as a "custodian" is "dependent on preparing, owning, or possessing public records."[10] In other words, the proper custodian for a FOIA request is "the public official in charge of an office having public records."[11]

In summary, prior to submitting a FOIA request, the requesting party should first attempt to locate the public body's FOIA officer. If such contact information is unavailable, the requesting party may nevertheless determine the custodian of the public records sought, and file the request with them instead.

III. Exceptions to FOIA

FOIA delineates over 150 exceptions to its disclosure requirements.[12] Some exceptions are mandatory, while others are left to the discretion of the public body. While some exceptions relate to the type of public body, other exceptions apply to the type of information sought. Notably, however, the General Assembly has emphasized that these exceptions are to be construed narrowly.[13] FOIA contemplates partial disclosure where feasible. When a record contains both exempt and non-exempt information, the public body generally must redact the exempt material and produce the remainder.[14]

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[8] *See* VA. CODE ANN. § 2.2-3704.2(B)-(C) (2026).
[9] VA. CODE ANN. § 2.2-3704.2(C) (2026) (emphasis added).
[10] *See* Va. Freedom of Info. Advisory Council, Advisory Op. AO-02-14 (Jan. 29, 2014), available at https://foiacouncil.dls.virginia.gov/ops/14/AO_02_14.htm
[11] *See id.* (emphasis removed).
[12] *See Access to Public Records Under the Virginia Freedom of Information Act*, FOIA COUNCIL, https://foiacouncil.dls.virginia.gov/ref/Access%20to%20Public%20Records%202025.html.
[13] *See Harki v. VDOC*, 105 Va. Cir. 72, 78 (Norfolk 2020).
[14] *See* VA. CODE ANN. § 2.2-3704.01 (2026) ("A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.").

Section 2.2-3703 states that FOIA *does not* apply to petit and grand juries, family assessment/planning teams, child sexual abuse response teams, the Virginia State Crime Commission, certain records maintained by the clerks of the courts of record, and/or certain records associated with sexual assault and human trafficking response teams.[15] Section 2.2-3705.1 provides discretionary exceptions to FOIA's disclosure requirements, including exceptions for personnel information, written legal advice, legal memoranda for litigation, appraisals for real property, and proprietary information.[16] Section 2.2-3705.2 provides an extensive list of additional discretionary exceptions for "records relating to public safety."[17] Section 2.2-3705.3 provides discretionary exceptions for "records relating to administrative investigations."[18] Section 2.2-3705.4 delineates discretionary and mandatory exceptions for "educational records and certain records of educational institutions."[19] Section 2.2-3705.5 provides discretionary exceptions for records relating to health and social services, while § 2.2-3705.6 delineates discretionary exceptions for trade secrets and proprietary information.[20] Finally, § 2.2-3705.7 establishes discretionary exceptions for other miscellaneous purposes.[21]

In sum, the Act provides extensive avenues for public bodies to withhold information, irrespective of any FOIA requests filed. Furthermore, even if a record may not be exempt under the Act, public bodies may assert its exemption under other statutory authority.[22]

A. Criminal Investigative Files

Litigators and members of the media often use FOIA to request records relating to a criminal investigation. Section 2.2-3706.1 addresses the disclosure of law-enforcement records and criminal investigative files.[23] "Criminal investigative files" include any documents "relating to a criminal investigation or prosecution."[24] If the criminal investigative files relate to an *ongoing* criminal investigation, then disclosure of the records is not mandatory, but the custodian may still disclose the records in the custodian's discretion.[25] Generally, the same is true for criminal investigative files relating to a criminal investigation that is *not ongoing*.[26] However, criminal investigative files relating to a criminal investigation that is *not ongoing* must be disclosed to the following: (1) the victim, (2) the victim's immediate family members if the victim is deceased, (3) the parent or guardian of the victim if the victim is a minor, and (4) an

[15] *See* VA. CODE ANN. § 2.2-3703 (2026).
[16] *See* VA. CODE ANN. § 2.2-3705.1 (2026).
[17] *See* VA. CODE ANN. § 2.2-3705.2 (2026).
[18] *See* VA. CODE ANN. § 2.2-3705.3 (2026).
[19] *See* VA. CODE ANN. § 2.2-3705.4 (2026).
[20] *See* VA. CODE ANN. § 2.2-3705.5 (2026); VA. CODE ANN. § 2.2-3705.6 (2026).
[21] *See* VA. CODE ANN. § 2.2-3705.7 (2026).
[22] *See Christian v. State Corp. Comm'n*, 282 Va. 392, 398 (2011) ("The [Act] does not, therefore, require that the VFOIA itself be the mechanism of exemption.").
[23] *See* VA. CODE ANN. § 2.2-3706.1 (2026).
[24] *See* VA. CODE ANN. § 2.2-3706.1(A) (2026).
[25] *See* VA. CODE ANN. § 2.2-3706.1(C) (2026).
[26] *See* VA. CODE ANN. § 2.2-3706.1(D) (2026).

attorney representing a petitioner in a post-conviction proceeding, such as a writ of habeas corpus or writ of actual innocence.[27]

Additionally, such records must be disclosed for "the sole purpose of inspection" to "an attorney who provides a sworn declaration that the attorney has been retained by an individual for purposes of pursuing a civil or criminal action and has a good faith basis to believe that the records being requested are material to such action."[28] This provision is particularly important for litigators in civil cases who wish to discover criminal investigative records that may be material, including motor vehicle collision cases and intentional tort cases.

IV. How Do You Frame a FOIA Request?

To submit a FOIA request, the party seeking the records must be either a Virginia citizen or representative of a newspaper, magazine, radio, or television service offering its publications within the Commonwealth.[29] FOIA requests for litigation purposes typically fall under the former. The request need not mention FOIA directly for the Act's response requirements to apply.[30] Because FOIA does not require a requester to cite the Act or even mention FOIA by name, a request for identifiable public records may invoke FOIA's protections and response deadlines even if the requester does not realize that he or she has submitted a "FOIA request." Furthermore, while FOIA requests need not be in writing, as a practical matter, they should be.[31]

The citizen's purpose for requesting the public records need not be disclosed.[32] By extension, relevance of a document does not affect whether the public body must disclose it.[33] Instead, "[t]he proper questions, arising from the language of the Act, itself, concern the status of the request[e]r as a citizen of the Commonwealth, the status of the requested documents as official records, whether any exceptions apply either as listed in the Act or found in other Code provisions, and whether the requestor will pay the cost of production."[34]

Requesters should also describe the desired public records "with reasonable specificity."[35] According to the FOIA Council, "a request needs to be specific enough to enable a public body to begin to process the request and; if clarification is required, to ask relevant questions to understand the scope of the request."[36] In other words, if a request

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[27] *See* VA. CODE ANN. § 2.2-3706.1(D)(1)-(4) (2026).
[28] *See* VA. CODE ANN. § 2.2-3706.1(D)(5)(ii) (2026).
[29] *See Access to Public Records Under the Virginia Freedom of Information Act*, *supra* note 12.
[30] *See id.*
[31] *See id.* ("A written request provides recourse for both parties if there are questions or disputes after the initial request is made.").
[32] *See Associated Tax Serv. Inc. v. Fitzpatrick*, 236 Va. 181, 187 (1988) ("The requester's motivation nowhere comes into play.").
[33] If, however, the requesting party seeks to later admit the requested document into evidence, then such evidentiary rules will, of course, apply.
[34] *See id.*
[35] *See* VA. CODE ANN. § 2.2-3704(B) (2026).
[36] *See Harki v. VDOC*, 105 Va. Cir. 72, 78 (Norfolk 2020) (quoting FOIA Advisory Opinion 03-08 (Mar. 19, 2008)).

"is vague and susceptible to multiple interpretations," it fails the reasonable specificity requirement.[37]

V. What Are the Obligations of a Responding Entity?

A. Duty to Respond

Once a FOIA request has been received by a public body, the entity has 5 business days to respond to the requesting party.[38] Public bodies must either provide the requested documents within the 5 day period, or make one of four FOIA-approved responses:

1. The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days, or in the case of a request for criminal investigative files pursuant to § 2.2-3706.1, 60 work days in which to provide one of the four preceding responses.[39]

If the search for the records involves "an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities," the responding entity may petition the court for additional time for

[37] *Id.*
[38] VA. CODE ANN. § 2.2-3704(B) (2026).
[39] *Id.*

making a response.[40] Before such a petition is made, the public body must "make reasonable efforts to reach an agreement with the requester" regarding the requested documents.[41] Therefore, in any case, the public body must respond to the requesting party—either by producing the requested documents or with one of the four delineated responses outlined above—because a failure to respond constitutes a denial of the FOIA request and a violation of FOIA.[42]

B. Costs of Production

Public bodies are typically permitted to charge the requesting party the reasonable costs of producing the requested documents.[43] Importantly, public bodies may not charge requesting parties any more than the actual costs of production. This includes the costs of "accessing, duplicating, supplying, or searching for the requested records."[44] Said differently, public bodies may not charge requesting parties a general fee to recoup the costs of their general duties as a custodian of the public records.[45]

For example, in *American Tradition Institute v. Rector & Visitors of the University of Virginia*, the Court considered whether a public body may seek reimbursement for the costs associated with reviewing the requested documents to ensure that mandatory or discretionary redaction requirements did not apply.[46] The Virginia Supreme Court held that FOIA's allowance for reimbursement for "searching for the requested records" includes "'inquiring or scrutinizing' whether a disputed document can be released under federal and state law."[47] Therefore, the court concluded that public bodies may charge a reasonable fee for the costs associated with reviewing requested documents for information that could or should be excluded under FOIA.[48]

If requested, the public body must provide a cost estimate prior to producing the documents.[49] During the time between the public body providing the cost estimate and the requesting party responding to said estimate, the public body's 5-day required response period is tolled.[50] If, after 30 days, the requester has not responded to the cost

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[40] VA. CODE ANN. § 2.2-3704(C) (2026). If you expect voluminous records to be responsive to your request, you should consider requesting a cost estimate in your request. *See* VA. CODE ANN. § 2.2-3704(F) ("Prior to conducting a search for records, the public body shall notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and inquire of the requester whether he would like to request a cost estimate in advance of the supplying of the requested records. The public body shall provide the requester with a cost estimate if requested.").
[41] *Id.*
[42] VA. CODE ANN. § 2.2-3704(E) (2026).
[43] *See* VA. CODE ANN. § 2.2-3704(F) (2026) (allowing public bodies to charge the costs of production "[e]xcept with regard to scholastic records requested pursuant to subdivision A 1 of § 2.2-3705.4 that must be made available for inspection pursuant to the federal Family Educational Rights and Privacy Act…and such requests for scholastic records by a parent or legal guardian of a minor student or by a student who is 18 years of age or older").
[44] *Id.*
[45] *Id.*
[46] *See Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330, 344-45 (2014).
[47] *Id*. at 345.
[48] *Id.*
[49] VA. CODE ANN. § 2.2-3704(F) (2026).
[50] *Id.*

estimate, the original FOIA request is considered withdrawn, and the public body is no longer obligated to produce the documents.[51] As such, any party requesting a cost estimate prior to the fulfillment of a FOIA request should be sure to respond to the cost estimate prior to the completion of the 30 day period. If the requesting party determines that the reasonable costs of production exceed what they are willing to pay, they may either withdraw their FOIA request, or meet and confer with the public body to consider narrowing their request. Furthermore, because FOIA permits the inspection of documents, parties seeking to minimize the costs of production may request to inspect the documents first, thus allowing themselves the opportunity to determine which specific documents they would like copied.[52]

If the public body determines in advance that the costs of production will exceed $200, the public body may require the requesting party to pay a deposit prior to processing the request.[53] The amount of the deposit may not exceed the amount of the public body's initial price determination for the costs of production.[54] As with requested cost estimations, "[t]he period within which the public body shall respond…shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester."[55] Additionally, public bodies may require requesting parties to pay any outstanding amounts owed from prior FOIA requests that "remain unpaid 30 days or more after billing."[56]

VI. What If You Don't Get What You Want?

A. Meet and Confer

As discussed above, FOIA provides extensive pathways for public bodies to either redact significant portions of request documents or withhold them entirely. FOIA disputes can often be resolved informally by meeting and conferring with the FOIA officer, the records custodian, or the attorney for the public body. However, there are other avenues of relief if an informal meet and confer does not resolve the dispute.

B. Petition for Writ of Mandamus or Injunction

If a requesting party believes that records have been wrongfully withheld or redacted, FOIA provides an avenue for recovery. Section 2.2-3713 provides that

> Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges

[51] *Id.*
[52] *See* VA. CODE ANN. § 2.2-3700(A) (2026) ("Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute…all public records shall be available for inspection and copying upon request.").
[53] VA. CODE ANN. § 2.2-3704(H) (2026).
[54] *Id.*
[55] *Id.*
[56] VA. CODE ANN. § 2.2-3704(I) (2026).

> conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity.[57]

But in which court should such petitions be filed? § 2.2-3713 provides the following guidance for venue:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district court or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.[58]

Hearings regarding petitions for mandamus enjoy priority on the docket. FOIA provides that "the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing."[59] Such petitions must allege the FOIA violation "with reasonable specificity."[60] Such alleged FOIA violations need not be egregious—"a single instance of denial of the rights and privileges conferred by [FOIA] shall be sufficient to invoke the remedies."[61]

In such proceedings, the public body bears the burden to prove an exception to FOIA applies by the preponderance of the evidence.[62] Courts are not required to give any weight to the public body's determination that an exclusion applies.[63] If the court finds that the public body violated FOIA, the requesting party may be entitled to reasonable costs and attorney fees.[64]

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[57] VA. CODE ANN. § 2.2-3713(A) (2026).
[58] *Id.*
[59] VA. CODE ANN. § 2.2-3713(C) (2026).
[60] VA. CODE ANN. § 2.2-3713(D) (2026).
[61] *Id.*
[62] VA. CODE ANN. § 2.2-3713(E) (2026).
[63] *Id.*
[64] VA. CODE ANN. § 2.2-3713(D) (2026) (providing that such fees are appropriate "unless special circumstances would make an award unjust").

In a recent case in the Richmond Circuit, the court considered whether the School Board's heavy redactions of requested public records were proper under FOIA.[65] In that case, the School Board heavily redacted portions of requested documents, citing the "personnel exception" of FOIA.[66] The court held that the School Board had not met its burden to prove that the redacted documents contained "data, facts, or statements of a private nature" under the objective test for personnel information under FOIA.[67] Because the School Board had not met its burden, the court ordered the documents to be released.[68]

B. Subpoena Duces Tecum

For civil litigators, a subpoena duces tecum may sometimes be a faster and more effective tool than a FOIA enforcement petition for obtaining records from a public body. A subpoena may allow the requesting party to avoid initiating a separate mandamus or injunction proceeding, and, in practice, public bodies often treat subpoenas as more time-sensitive than FOIA requests. Subpoenaed records may also be produced with fewer redactions, although the public body may still assert applicable objections, privileges, statutory protections, or seek court intervention where appropriate.

VII. How Do You Use the Requested Documents Once You Receive Them?

FOIA provides an avenue for bolstering legal research both before and after litigation commences. Because a requester need not disclose the purpose behind filing a FOIA request, FOIA may routinely be used to investigate potential claims, before a complaint is filed.[69] Of course, once those records become relevant to a civil action, they are typically subject to the same discovery and disclosure obligations as any other non-privileged documents in a party's possession. A party intending to rely on FOIA-produced records should ensure compliance with applicable discovery rules, exhibit disclosure requirements, and authentication rules before trial.

FOIA-produced records may also help shape formal discovery. Information obtained through FOIA may identify witnesses, uncover additional sources of documents, narrow the issues in dispute, or reveal gaps in a party's existing factual investigation. In some cases, FOIA-produced records may provide a basis for targeting requests for production, interrogatories, depositions, or subpoenas directed at obtaining related information that would not otherwise have been known.

Documents obtained through FOIA are not automatically authenticated merely because they were produced in response to a FOIA request. Instead, authentication is governed by evidentiary law. If the requested records are certified copies, they are

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[65] Michael Phillips, *The Richmonder Wins FOIA Lawsuit Against School Board Over Redacted Documents*, THE RICHMONDER (June 24, 2026, 19:42 ET), https://www.richmonder.org/the-richmonder-wins-foia-lawsuit-against-school-board-over-redacted-documents/.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *See Associated Tax Serv. Inc.*, 236 Va at 187.

considered self-authenticating.[70] Therefore, if a requester wishes to avoid the hassle of calling a custodian to authenticate the records, they should request authenticated copies when making their FOIA request.[71]

Furthermore, as noted above, FOIA-produced records are subject to the same evidentiary rules as any other exhibit, though certain exceptions to inadmissibility may apply. Notably, both the Federal Rules of Evidence and the Virginia Rules of Evidence provide a hearsay exception for public records.[72]

VIII. Conclusion

The Virginia Freedom of Information Act is a powerful tool for obtaining information that may otherwise remain inaccessible to litigants, journalists, and citizens alike. Although the Act is premised on public access to public records, attorneys must carefully navigate FOIA's requirements, exemptions, deadlines, and enforcement mechanisms to maximize its use. When used strategically, FOIA can uncover facts before litigation commences, guide discovery after a case is filed, and provide valuable documentary evidence throughout a dispute. Understanding not only how to submit a FOIA request, but also how to evaluate responses, challenge improper withholdings, and effectively use the resulting records allows attorneys to transform FOIA from a simple records request process into a meaningful litigation tool.

IX. Practical Checklist

Attorneys should consider the following steps when preparing a FOIA request:

1. Identify the public body and FOIA officer/records custodian;
2. Describe the requested records with reasonable specificity;
3. Explain your right to the requested records;
4. Ask for a cost estimate;
5. Ask for electronic format;
6. Request certified/authenticated copies if records may be used as exhibits at trial; and
7. Calendar the five-working-day deadline.

[70] *See* VA. R. EVID. 2:902(1); FED. R. EVID. 902(2).
[71] *See* VA. R. EVID. 2:901; FED. R. EVID. 901.
[72] *See* FED. R. EVID. 803(8); VA. R. EVID. 2:803(8).

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Working With In-House Counsel: Same Law Degree, Different Planet

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Working With In-House Counsel: Same Law Degree, Different Planet

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Gentry Locke Seminar
October 2026

I. PROGRAM OVERVIEW

This presentation will focus on the practical and ethical obligations for a private firm attorney working with in-house counsel.

II. THE PRACTICAL REALITIES OF WORKING WITH IN-HOUSE COUNSEL

1. In-House Counsel are accountable for a budget and must understand the monetary impact of legal matters.

In-house counsel do not operate with an unlimited budget. They need to understand the potential monetary exposure facing their organization with respect to damages and other related risks. They must take into account the cost of any litigation and how much that costs impacts other business objectives. If in-house counsel works for a publicly traded company, there are also financial reporting requirements to be considered. In-house counsel may have to seek approval from their own stakeholders for certain expenses including the authority to settle any pending legal matter.

2. Explaining the potential timeline of legal matters to In-House Counsel helps them manage their stakeholders. In-House Counsel read (and value) case evaluations … but there is a limit to what they'll pay for.

Understand that in-house counsel may have to discuss the legal matter with the other corporate departments (human resources, real estate, etc.), a Company President, a Board of Directors, a senior General Counsel, a finance officer or all of the above. The more detailed and developed your case analysis, the better for in-house counsel to advise their stakeholders. However, most in-house counsel appreciate a straightforward and concise case evaluation that often does not need detailed case analysis and, if lengthy, should include an executive summary. In-house counsel is relying on your experience to help them navigate the bridge between company operations and the pending legal matter you have been asked to support. In-house counsel must consider the legal ramifications of certain actions as well as how those legal actions potentially impact their company's business decisions.

The in-house counsel helps their senior management team determine what is an acceptable risk for their organization. The more clarity you can provide on the potential legal timeline, the easier for

the in-house counsel to advise their stakeholders on potential solutions that incorporate both business and legal solutions.

3. In-House Counsel do not like surprises – or explaining them to others. In-House Counsel may disagree with you … and expect you to listen to their point of view.

We can never stress this point enough—communicate with in-house counsel often and keep them informed of any actions in the matter you're assisting them with. It is generally preferred to discuss case developments and decisions with in-house counsel prior to sending broader correspondence to a corporate client. They can often help you communicate in a more effective manner and/or recognize business implications of an issue beyond the legal matter.

Never forget Rule 1.4 of the Rules of Professional Conduct:

> **1.4 Communication**
> a. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> c. A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Surprises can also be fiscal in nature—increases in billing rates, costs of document production, travel expenses, witness fees. Much of this information should be included in the engagement agreement, so surprise fees are definitely not appreciated. Maintaining disciplined budgets and providing regular cost estimates are key to avoiding fiscal surprises. Remember, in-house counsel will have to justify any costs to their own stakeholders.

Beware of legislative surprises—companies often have internal government relations teams who work with in-house counsel. If there is the potential for legislative actions to impact the representation make sure you keep counsel aware of the status of any pending changes. For example, charter provision changes impacting the makeup and/or authority of a board or commission, or holding special legislative sessions to address potential corporate mergers. Staying abreast of relevant legislative or administrative actions and touching base periodically with the company's government relations team will help prevent surprises from government entities. This concern is primarily for those companies with a significant amount of government work, but advising in-house counsel of any potential government actions will always be appreciated.

4. Remind In-House Counsel of privilege and work product protections to ensure they properly guide the business and their departments in these areas.

Remember, your in-house counsel may not be a Virginia-licensed lawyer or even licensed within the Fourth Circuit. In-house counsel often wear many hats – legal advisor, compliance officer, business executive, leader of non-legal functions. They may not be as familiar with the law governing privilege in Virginia or how the courts view the difference between the provision of business advice versus legal advice. The attached outline addresses many of the legal concerns surrounding the question of privilege between in-house and outside counsel in Virginia, including how the use of AI may impact questions of privilege.

5. In-House Counsel often needs help with document retention and e-discovery. It's complicated!

It is not enough when communicating with in-house counsel to simply advise them to retain every document as is common with litigation hold letters, or to assume they know what documents or evidence will be relevant in litigation. Communicate with counsel early in the relationship to discuss what documents may be relevant and how they may potentially be provided and retained. Having an early understanding of how you and in-house counsel will preserve and produce relevant documents and information can prevent any future discovery issues.

6. In-House Counsel is using AI…

You should expect that in-house counsel is using artificial intelligence resources in their legal role. These tools are increasingly varied from general productivity tools like Copilot and ChatGPT, to more specific, legal purpose-built tools like Harvey, Lexis+AI, NexLaw, Clio or Ironclad. Regardless of the platform they choose, it is highly likely that in-house counsel has already conducted a preliminary assessment utilizing AI tools of the issue they will bring to your attention. They will be looking to you for either confirmation of their assessment or an explanation as to why their initial assessment is flawed. It is important to ensure that, when working with in-house counsel, both parties understand the importance of protecting the attorney-client privilege and work product when using AI tools. Sharing confidential information through third-party, public sites may be found to have waived any privilege the materials may have had, thereby making them subject to discovery.

In-house counsel will also assume you are using AI and you should discuss this topic early in your representation, including how it may or may not impact your billing practices.

III. ATTORNEY CLIENT PRIVILEGE AND CONFIDENTIALITY ISSUES

The private attorney/in-house counsel relationship can implicate numerous ethics rules that govern the attorney-client privilege and confidentiality. With permission, we are including the attached outline from this summer's Virginia State Bar meeting which provides additional insight on the legal and ethical issues both outside counsel and in-house counsel must navigate in the corporate setting.

Outside counsel must understand (and discuss with in-house counsel) how privilege may be preserved or lost. Counsel must begin their determination by identifying who is the client and what is the purpose of any communication—is it for business purposes or to obtain legal advice? Counsel can then apply the relevant state or federal law to analyze the particular facts which raise a question of privilege or confidentiality. The attached outline also instructs counsel to beware of the potential disclosure of confidential information when using AI platforms.

IV. KEY TAKEAWAYS

Working and communicating effectively with in-house counsel means having an understanding of the many roles they may play within their organization. By maintaining frequent communication, outside counsel can help eliminate surprises during the representation and ensure that work product and privilege protections remain intact.

2026 Virginia State Bar Annual Meeting

Construction, Corporate Counsel, and Litigation Sections

What In-House Counsel Wishes Its Outside Counsel Knew: *Attorney-Client Privilege and Confidentiality in the Corporate Setting*

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Goal: Examine the key attorney-client privilege and related confidentiality obligations as they apply to in-house counsel operating in the corporate setting, comparing state and federal frameworks, and offering practical guidance on how outside counsel can best serve and protect its corporate clients.

I. Who is the Client?

Any privilege question begins with the basic analysis of (i) the recipients of the communication and (ii) its purpose. "Confidential communications **between attorney and client** made **because of that relationship** and **concerning the subject matter of the attorney's employment** are privileged from disclosure, even for the purpose of administering justice." *Burlage v. Summerville Senior Living, Inc.*, No. 1:07cv352, 2007 U.S. Dist. LEXIS 79551, at *2 (E.D. Va. Oct. 25, 2007) (citing *Commonwealth v. Edwards*, 235 Va. 499, 508–09 (1988)). The party asserting the privilege bears the burden of proof. *Edwards*, 235 Va. at 509 (citing *U.S. v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)).

In the corporate setting, identifying the "client" is the foundational privilege inquiry. A corporation can act only through employees and agents, creating tension between individual communications and entity representation. Both federal and Virginia courts recognize that the corporation itself, not its officers or employees, is the privilege holder.

Federal courts apply the framework articulated in *Upjohn Co. v. United States*, while Virginia courts treat *Upjohn* as highly persuasive authority.

Case Notes:

1. **Upjohn Co. v. United States, 449 U.S. 383 (1981):** Upjohn Company conducted an internal investigation after learning that foreign subsidiaries made questionable payments to government officials. At the direction of corporate management, the company's general counsel and outside counsel distributed questionnaires and interviewed employees across multiple organizational levels to gather facts necessary to provide legal advice. During a subsequent tax investigation, the Internal Revenue Service issued a summons seeking production of the questionnaires and attorneys' interview notes. Upjohn refused, asserting attorney-client privilege and work-product

protection. The lower courts applied the "control group" test and ordered disclosure, concluding that communications from non-management employees were not privileged.

The Supreme Court rejected the control group test and held that **attorney-client privilege protects communications between corporate counsel and employees at all levels** when made for the purpose of obtaining legal advice. The Court emphasized that corporate counsel must often obtain information from lower-level employees to render informed legal advice and that limiting privilege to senior management would undermine compliance efforts. The Court determined that the work-product doctrine applies even in IRS summons proceedings and protects attorney mental impressions absent a strong showing of necessity.

- The attorney-client privilege encourages "full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389.
- The privilege applies when the client is a corporation and extends beyond senior management employees. *Id.* at 395-96.
- Privilege protects communications, not underlying facts. *Id*.
- Work product reflecting attorney mental impressions receives heightened protection (*Fed. R. Civ. P. 26(b)(3)*). *Id.* at 400.

Holding: Communications between corporate employees and corporate counsel made at the direction of management to obtain legal advice are protected by attorney-client privilege, and attorney work product is protected from compelled disclosure absent extraordinary need.

2. **Williams v. Big Picture Loans, LLC, 303 F. Supp. 3d 434 (E.D. Va. 2018):** Plaintiffs brought claims against an online lending company and issued a subpoena to a third-party valuation firm seeking documents related to a corporate valuation. Defendant Martorello moved to quash the subpoena, asserting attorney-client privilege and work-product protection over communications shared with the consultant.

The court denied the motion. First, the court found the motion untimely under Federal Rule of Civil Procedure 45 because it was filed after the deadline for objections and after the subpoena's return date. Even if timely, the court held that the privilege claim failed because the asserted **privilege belonged to the corporate entity, not the individual** executive seeking to assert it. The court emphasized that in the corporate context, privilege is controlled by the entity and passes with corporate control.

The court further concluded that disclosure of communications to the valuation firm waived any privilege because the consultant was engaged to provide business and tax valuation services rather than to assist counsel in rendering legal advice. Communications with third parties are protected only when necessary to facilitate legal advice, which was not established here. Work-product protection likewise did not apply because the materials were created in the ordinary course of business rather than in anticipation of litigation.

- The party asserting privilege bears the burden of establishing its applicability. *Williams*, 303 F. Supp. 3d at 444.
- Corporate privilege belongs to the entity and transfers with corporate control. *Id.* at 445 (citing *Weintraub*, 471 U.S. 343).
- Disclosure to third-party consultants waives privilege unless necessary to obtain legal advice. *Id.* at 446.

Holding: Motion to quash denied; privilege was not established and was waived by disclosure to a third-party consultant engaged for business purposes.

3. ***Virginia Elec. & Power Co. v. Westmoreland-LG&E Partners*, 259 Va. 319 (2000):** In a breach of contract dispute between a power company and an independent power supplier, Virginia Power sought discovery of a draft letter prepared by the supplier's CFO memorializing a conversation about contract terms. The letter had been circulated among officers of the supplier's parent companies and then to in-house counsel before being finalized, and was ultimately never sent. Virginia Power argued the letter was not privileged because it did not on its face request legal advice and because it had been shared with individuals outside a single corporate entity.

The Supreme Court of Virginia held the letter was privileged. The privilege attaches to a document **even without a written request for legal advice**, provided the proponent shows the document was prepared with the intention of securing legal advice on its contents. The Court further held that the privilege was not waived by circulation among officers of affiliated entities that shared a common business concern, as their relationship was tantamount to employees of the same entity for privilege purposes.

- The attorney-client privilege attaches to a document even if the document does not contain, or is not accompanied by, a written request for legal advice, if the proponent sustains its burden of proof to show the document was prepared with the intention of securing legal advice on its contents. *VEPCO*, 259 Va. at 326.

Holding: A document prepared with the intention of securing legal advice is privileged even without an express written request for such advice; sharing the document among officers of closely affiliated entities does not waive the privilege where those parties share a common legal concern.

II. What is Privileged?

Virginia state courts have generally adopted the "primary purpose" test, *i.e.*, what is the primary purpose of the communication—legal or business advice? Merely copying an attorney on communications does not "cloak that communication with the attorney-client privilege." *McAirlands, Inc. v. Kimberly-Clark Corp.*, 7:13-CV-193, 2014 U.S. Dist. LEXIS 201138, at *12 (W.D. Va. Sept. 26, 2014).

- Ex. Internal corporate communications are only protected if the party claiming privilege can demonstrate that the **persons to whom the communications were disseminated had a "need to know" the information**; the privilege may be waived where communications are sent to numerous non-attorneys with no showing of their role or need. *McAirlaids, Inc.*, 2014 U.S. Dist. LEXIS 201138, at *12–15.
- Ex. An email chain of communications between various employees and general counsel concerning a business meeting and without reference to any particular legal issue and not seeking legal advice, opinions, or oversight was not subject to attorney-client privilege. *Scott & Stringfellow, LLC v. AIG Commer. Equip. Fin., Inc.*, No. 3:10cv825-HEH-DWD, 2011 U.S. Dist. LEXIS 51028, at *9-10 (E.D. Va. May 12, 2011).
- Ex. A letter that was drafted **with the intent of seeking legal advice** on its contents was treated as privileged. *VEPCO v. Westmoreland-LG&E Partners*, 259 Va. 319, 325–27 (2000).

III. Who Controls the Privilege?

Although employees communicate with counsel, control of the privilege rests with corporate management. Control may shift when corporate authority changes, including bankruptcy, restructuring, or management turnover.

Case Notes:

4. **Gibbs v. Stinson, No. 3:18-cv-676, 2021 U.S. Dist. LEXIS 200198 (E.D. Va. Oct. 17, 2021):** Plaintiffs sought discovery of communications involving a bankrupt lending company's former directors and officers. The defendants attempted to assert attorney-client privilege over corporate communications created while they served in management roles. After corporate control changed, the successor entity asserted ownership of the privilege and sought disclosure.

The court held that in the **corporate context, the company—not individual officers or directors—holds the attorney-client privilege**. Relying on *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985), the Court explained that authority to assert or waive privilege transfers to new management upon change of corporate control. Former directors therefore lacked standing to assert privilege. The Court further authorized *in camera* review to evaluate application of the crime-fraud exception.

- The corporation is the client and holder of the privilege. *Gibbs*, 2021 U.S. Dist. LEXIS 200198, at **18–19*.
- Authority to assert privilege passes with corporate control. *Id* at *19 (citing *Weintraub*, 471 U.S. 343).

- Former management retains no control over corporate privilege after removal. *Id* at *20.

Holding: Corporate privilege belongs to the entity and transfers to successor management; former officers cannot assert privilege on the corporation's behalf.

5. ***Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128 (1992):** A shipyard worker's estate sued an asbestos product manufacturer for negligence and breach of warranty after the worker died of mesothelioma. At trial, the manufacturer sought to exclude a memorandum its medical director had written to in-house counsel, arguing it was protected by attorney-client privilege. The trial court admitted the memorandum, finding the privilege inapplicable because the manufacturer had committed a fraud upon a Texas court by answering interrogatories inconsistently with the memorandum's contents.

The Supreme Court of Virginia affirmed, holding that while confidential communications between a corporation and its in-house counsel are privileged, **the privilege does not permit a litigant to commit a fraud upon a court**. Because Owens-Corning had knowingly submitted a false interrogatory answer under oath five days after receiving the memorandum, the privilege was forfeited as to that document. The Court further held that excluding the memorandum would perpetuate the original fraud.

- Communications between officers and employees of the same entity, or entities in a sufficiently close relationship, relayed to corporate counsel for the purpose of obtaining legal advice are entitled to the attorney-client privilege. *Owens-Corning*, 243 Va. at 141.
- The privilege does not permit a litigant to commit a fraud upon a court; a controlling factor is whether the misconduct tampers with the judicial machinery and subverts the integrity of the court itself. *Id.* at 142.

Holding: The attorney-client privilege protects confidential communications between a corporation and its in-house counsel, but the privilege is forfeited where the client has used the communication in furtherance of a fraud upon a court.

IV. How Privilege is Preserved or Lost

Privilege does not arise automatically merely because lawyers participate in communications. Courts closely examine whether communications were actually made for legal advice and maintained confidentially.

Case Notes:

6. **Deel v. Bank of America, N.A., 227 F.R.D. 456 (W.D. Va. 2005):** In an employment dispute, Bank of America withheld internal audit materials and employee questionnaires claiming attorney-client privilege because in-house counsel participated in the review. The plaintiff moved to compel production, arguing the investigation was

business-related rather than legal. The court conducted an *in camera* review of the materials.

The court held that privilege did not apply where the bank failed to demonstrate that communications were made primarily for the purpose of obtaining legal advice. The questionnaires did not inform employees that information was being collected for legal counsel, referenced business objectives, and indicated review by business managers rather than attorneys. Because the investigation appeared **operational rather than legal**, much of the **material was discoverable**.

- The party asserting privilege bears the burden of proving the communication was made for legal advice. *Deel*, 227 F.R.D. at 459.
- Communications involving attorneys are not privileged when the attorney acts as a business advisor. *Id* at 462.
- Failure to communicate confidentiality expectations undermines privilege protection. *Id* at 462, 464.

Holding: Attorney-client privilege does not apply to corporate investigations primarily conducted for business purposes rather than to obtain legal advice.

V. AI Tools & Privilege Risks

AI tools present evolving risks to attorney-client privilege and work-product protection in the corporate setting. Although AI introduces new modes of communication and data storage, courts are likely to apply existing privilege principles rather than develop new doctrinal frameworks. Privilege analysis therefore continues to turn on confidentiality, purpose of the communication, and attorney involvement under federal common law, Federal Rules of Evidence 501–502, Virginia privilege doctrine, and Virginia Rule Professional Conduct 1.6.

A. Confidentiality and Attorney-Client Privilege

Attorney-client privilege applies only to confidential communications made for the purpose of obtaining legal advice. *Upjohn*, 449 U.S. at 389, 394–95. Disclosure of protected information to unnecessary third parties may waive privilege where confidentiality expectations are not reasonably maintained.

Because many AI systems process user inputs through cloud-based platforms, entry of confidential corporate information into publicly available tools may constitute third-party disclosure. Courts evaluating waiver will likely apply the reasonable-precautions analysis reflected in Federal Rule of Evidence 502 and Va. Code § 8.01-420.7 (outlining factors to be considered regarding waiver and disclosure).

Communications between business personnel and AI tools are not privileged because an AI system is not an attorney and cannot form an attorney-client relationship. Privilege may arise, however, where counsel directs AI use and meaningfully incorporates AI-generated material into legal analysis, consistent with the "primary"

or "significant purpose" test governing mixed communications. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758–59 (D.C. Cir. 2014).

B. Work Product and Ethical Obligations

The work product doctrine protects materials prepared by or for counsel in anticipation of litigation regardless of drafting method. *Hickman v. Taylor*, 329 U.S. 495, 510–12 (1947); Fed. R. Civ. P. 26(b)(3). AI assistance does not defeat protection where litigation purpose and attorney direction are present. Attorney edits, annotations, and strategic analysis incorporated into AI drafts constitute protected opinion work product. *Hickman*, 329 U.S. at 511–12.

Risk arises, however, if AI platforms retain or transmit drafts externally, potentially undermining claims that materials were maintained confidentially. Lawyers must therefore evaluate AI use not only under privilege doctrine but also under broader confidentiality obligations imposed by Va. R. Prof. Conduct 1.6, which protects all information relating to representation.

Case Notes:

7. **Hickman v. Taylor, 329 U.S. 495 (1947):** After a fatal tugboat accident, defense counsel prepared witness interviews and memoranda for anticipated litigation. In the later wrongful death case, the court ordered their disclosure and held counsel in contempt. The Supreme Court reversed, establishing the qualified work-product doctrine.

The Court held that although the Federal Rules permit broad discovery, discovery has "necessary boundaries" where requests intrude into an attorney's preparation of a case. *Id.* at 508. Distinguishing attorney-client privilege from attorney work product, the Court explained that materials prepared by counsel in anticipation of litigation are protected because disclosure would expose counsel's mental impressions, legal theories, and strategic analysis. *Id*. Such materials may be discovered only upon a showing of necessity or undue hardship demonstrating that equivalent information cannot be obtained by other means. *Id.* at 509–11.

The Court emphasized that effective advocacy requires attorneys **to prepare cases with a degree of privacy free from unnecessary intrusion by adversaries**, a principle later codified in Federal Rule of Civil Procedure 26(b)(3).

- Discovery protects access to facts, not opposing counsel's preparation. *Hickman*, 329 U.S. at 508.
- Work product is discoverable only upon showing necessity or undue hardship. *Id.* at 509.

- Attorney mental impressions and legal theories receive heightened protection. *Id.* at 512.

Holding: Materials prepared by counsel in anticipation of litigation constitute protected work product and are not discoverable absent a sufficient showing of necessity or justification.

VI. State vs. Federal Privilege

State (Virginia)	Federal
In Virginia state court, the attorney-client privilege is governed primarily by common law, not statute. Va. R. Evid. 2:502 preserves the common law framework.	In federal court, privilege for federal claims is governed by federal common law under Fed. R. Evid. 501. In diversity cases, state law governs privilege for state law claims.
Privilege applies to in-house counsel communications, but courts narrowly construe it when counsel serves a mixed legal/business role.	Federal courts apply the same "primary purpose" analysis to in-house counsel, asking whether the predominant purpose was legal rather than business advice.
Virginia follows the *Upjohn* standard broadly: communications from employees at any level are potentially protected if made to facilitate legal advice.	*Upjohn Co. v. United States*, 449 U.S. 383 (1981), established the controlling federal standard. The Fourth Circuit applies it without a formal "control group" limit.
No Virginia statute specifically addresses inadvertent disclosure; courts look to common law waiver principles.	FRE 502 limits the scope of privilege waiver from inadvertent disclosures and controls the effect of selective disclosure in federal proceedings.

Key Authorities

Federal Statutes and Rules

Fed. R. Evid. 501,

Governs choice of privilege law in federal proceedings: federal common law for federal claims; state law for state claims in diversity.

Fed. R. Evid. 502,

Limits scope of privilege waiver from inadvertent disclosures; controls effect of selective disclosure; allows courts to enter protective orders ("502(d) orders") binding on all parties.

Fed. R. Civ. P. 26(b)(3),

Codifies work product protection; requires substantial need and undue hardship to overcome ordinary work product; near-absolute protection for opinion work product.

Virginia Statutes and Rules

Va. R. Evid. 2:502,

Virginia adopted rules of evidence effective July 1, 2012. Rule 2:502 preserves common law framework for attorney-client privilege.

Va. Code § 8.01-420.7,

Virginia inadvertent disclosure statute: allows clawback of privileged documents produced inadvertently, subject to specified procedural requirements.

Va. Rule of Professional Conduct 1.6,

Imposes on Virginia attorneys an obligation of confidentiality that is broader than the attorney-client evidentiary privilege—covers all information relating to the representation, not just confidential communications.

Rule 1A:5. Virginia Corporate Counsel & Corporate Counsel Registrants**,**

Outlines process and rules for Virginia- and foreign-licensed attorneys to obtain certificate as Virginia Corporate Counsel to practice law as in-house counsel in this state when employed by an Employer in Virginia.

Foundational Cases

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Foundational corporate privilege case. Rejected the control group test; established that privilege can protect communications from employees at any level when made to facilitate legal advice to the corporation.

Hickman v. Taylor, 329 U.S. 495 (1947)

Established the work product doctrine, protecting materials prepared by attorneys in anticipation of litigation from discovery.

13

Using Actual Intelligence to Solve Ethics Issues [ETHICS]

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Using Actual Intelligence to Avoid Ethics Issues: Conflicts of Interest

Gentry Locke Seminar
October 2, 2026
Travis J. Graham

This is a tool that will help you work through conflict analysis. It is not a substitute for review of the rules, legal research, consultation, or feedback from the Bar. If the use of this process causes you to identify and avoid a conflict, you are probably on safe ground. On the other hand, if using this process leads you to identify a way in which you think you might barely skate by a conflict, further work is required. This is especially true in the case of rules which are based on objective standards of reasonableness, or which require analysis of terms such as "significant," "material," "likely," or similar.

In order to use this tool, you must begin with question 1 for each issue. The process is not necessarily linear; the next step depends on the answer to each question.

Note also that this outline is for lawyers who have been and are in regular private practice. Former prosecutors and government lawyers, former and current judges, and mediators sometimes face special types of conflicts. If these could apply to you, you must research the rules.

THE GOLDEN RULE

Is there a significant risk that the representation of one client will be materially limited by your responsibilities to another client, a former client, or a third person, or by your personal interests?

- Yes. **Conflict.**
- No. **No conflict if none of the other rules say there is.**

Source

VRPC 1.7(a)(2)

Initial Considerations

1) Why are you worried about a conflict?

a. I am almost certain I have a conflict, but I want to see if I can get around it. **Go to 2.**

b. I may have a conflict and want to be careful. **Go to 3.**

2) Do you really, really want to try to get around the conflict?

- Yes. **Go to 3.**
- No. **Decline, withdraw, or do what needs to be done to solve the issue.**

Practice Points

- Conflicts of interest are a chief source of bar complaints.
- Life is too short to invite bar complaints.
- What can you say to a client you are turning down due to a conflict?

If you are turning down a prospective case because you owe duties to a current client, be sure that the process of doing so does not itself harm your client.

3) What kind of conflict do you fear?

a. Between a new client and a current client. **Go to 4.**

b. Between a new or current client and a non-client to whom I have responsibilities, including myself. **Go to 5.**

c. Between a new client and a former client. **Go to 6.**

d. Between an existing client and a person who contacted me about a case, but did not hire me. **Go to 7.**

e. One which might arise because I know certain information. **Go to 8.**

f. One which may be imputed to me because my partner has a conflict. **Go to 9.**

g. One which might arise because a lawyer who used to be at my firm was adverse to a potential client. **Go to 9.**

Practice Points

- You may have more than one kind of potential conflict. Be thorough.

New Client vs. Current Client

4) Will the representation of one client be directly adverse to the other?

- Yes. **Go to 4.1.**
- No. **Go to The Golden Rule.**

Practice Points

- Note that this does not apply to people who are adverse in the same lawsuit. Go to 4.3 for that.

Source

VRPC 1.7(a)(1)

4.1) Do you reasonably believe you can provide competent and diligent representation to both clients?

- Yes. **Go to 4.2.**
- No. **Conflict.**

Practice Points

- Note that this is an objective standard. What would a disinterested lawyer think?

The issue is, can you do your best for both clients? Would you have to hold anything back, or omit any arguments? Can you use all the tools and information you have? This might be a good time to call the ethics hotline: (804) 775-0564 or ethicshotline@vsb.org.

Source

VRPC 1.7(b)

4.2) Is the representation prohibited by law?

- Yes. **Conflict.**
- No. **Go to 4.3.**

Practice Points

- What does this mean?

It isn't clear. The committee comment to VRPC 1.7 identifies several cases were "a lawyer can never adequately provide joint representation." There are child custody, child support, visitation, spousal support, and maintenance or division of property. But there could be others.

Source

VRPC 1.7(b)

4.3) Does the representation involve a claim by one client against the other in the same case?

- Yes. **Conflict.**
- No. **Go to 4.4.**

Practice Points

- You can only sit on one side of the courtroom.

- What about clients participating in personal and fiduciary capacities? Can they be adverse to themselves, and if so, can the same lawyer be on both sides of the case?

There seems to be no law on the question whether an individual acting in a fiduciary capacity, such as an executor, can be adverse to him or herself in an individual capacity, such as that of a beneficiary of an estate. It certainly happens. The wise course would be for a single lawyer to avoid representing the party in both capacities.

- What about advocating for different interpretations of the same law for two clients in two courts? How about two clients in two cases, but in the same court?

There is no bright-line rule. The comment to VRPC 1.7 indicates that an attorney may generally seek different interpretations of the law for different clients in different cases, but should be cautious in doing so before the same tribunal, especially an appellate court.

Source

VRPC 1.7(b)

4.4) Do both clients consent in writing after consultation?

- Yes. **Go to The Golden Rule.**
- No. **Conflict.**

Practice Points

- Can you even ask for consent?

A lawyer must be mindful of the duties to his or her current client in even asking for consent. The very act of asking will reveal to another person that the client is involved in a legal matter. The client may wish to keep this secret. Further, some level of information must be supplied in order for the consent to be informed. This could require the lawyer to reveal facts and circumstances which the current client wishes to keep confidential. If the lawyer faces a conflict in even asking for consent, consent obviously cannot be obtained.

- The clients may need to consult another lawyer.

The requesting lawyer is, to a certain extent, interested in obtaining consent. Therefore, there is a danger that the lawyer will skew the facts or law or downplay the risks of joint representation in order to secure the additional work. Even if the lawyer is careful not to do so, this does not mean that he or she will not be accused of doing it. In some cases it may make sense to have a disinterested lawyer advise both clients.

- What kind of writing is required?

The requirement is for a writing, not a signed writing. Further, the committee comment to VRPC 1.7 *states that the writing could just be the lawyer's own notes, even if the clients never see them. In practice, it would be much better to get a signed written document or email from each client.*

- What if you take on two clients, and they later become adverse?

Conflict analysis does not just occur at the beginning of a case. It is a continuing process. The comment to VRPC 1.7 provides that, in general, if an attorney represents more than one client in a matter and a conflict arises which requires withdrawal, the attorney must withdraw from both representations. This may depend on application of VRPC 1.9 as to former clients.

- If you have two clients, communications with both of them at the same time may not be privileged.

Yet another reason why dual representations are problematic. Perhaps you should refer one client to a colleague.

Source

VRPC 1.7(b)

New or Current Client vs. Non-Client or Myself

5) What type of issue concerns you?

a. A conflict between a new or current client and a non-client to whom I owe some responsibility, or myself. **Go to The Golden Rule.**

b. A transaction of some sort between me and the new or current client. **Go to 5.1.**

Source

VRPC 1.7(a)(2); 1.8

5.1) What type of transaction is it?

a. You want to do business with a client. **Go to 5.2.**

b. You want to use the client's confidential information for some purpose. **Go to 5.4.**

c. The client wants to give you a gift. **Go to 5.8.**

d. The client wants to put you in his or her will, and wants you to draft it. **Go to 5.10.**

e. You want to acquire media rights about some aspect of the representation. **Go to 5.12.**

f. You want to give the client money. **Go to 5.13.**

g. You want to accept a fee from someone other than the client. **Go to 5.14.**

h. You want to settle claims for more than one client at the same time. **Go to 5.15.**

i. You want to represent a client in a matter where he or she will be directly adverse to a client represented by one of your family members. **Go to 5.16.**

j. You want to acquire a monetary interest in the client's case. **Go to 5.19.**

k. You want to have sex with your client. **Take a cold shower, and go to The Golden Rule.**

l. Something else. **Go to the Golden Rule.**

Source

VRPC 1.7(a)(2); 1.8

5.2) Would you be adverse to the client in the deal?

- Yes. **Go to 5.3.**
- No. **Go to The Golden Rule.**

Source

VRPC 1.8(a)

5.3) Can you comply with VRPC 1.8(a)(1)-(3)? (See p. 40.)

- Yes. **Go to The Golden Rule.**
- No. **Conflict.**

Source

VRPC 1.7(a)(2); 1.8(a)

5.4) Is the information protected by VRPC 1.6? (See p. 37-38.)

- Yes. **Go to 5.5.**

- No. **You may use the information. Go to The Golden Rule.**

Practice Points

- What information are we talking about?

VRPC 1.6 is the general rule concerning confidentiality of information. It describes two types. First is "information protected by the attorney-client privilege under applicable law." There is a tremendous amount of law and opinion governing the application of the attorney-client privilege. Technically, it is supposed to apply to information provided by the client to the lawyer under circumstances of confidentiality. However, the privilege is usually held to cover a certain amount of information provided by the lawyer to the client. These fine distinctions may be a legitimate subject of argument in the course of a discovery dispute, but for purposes of the ethics rules and conflict avoidance, the lawyer should use a broad definition.

The second type of information is "other information gained in the professional relationship that the client has requested be held inviolate or disclosure of which would be embarrassing or would likely be detrimental to the client." This is a much broader category than privileged information. Note also that it refers to information "gained in the professional relationship," which is not limited to information provided by the client.

Source

VRPC 1.8(b)

5.5) Are you going to use the information to the advantage of yourself or a third person, or to the disadvantage of the client?

- Yes. **Go to 5.6.**
- No. **You may use the information. Go to The Golden Rule.**

Practice Points

- "Use" does not mean "reveal to others."

Source

VRPC 1.8(b)

5.6) Does the client consent to use of the information after consultation?

- Yes. **Go to The Golden Rule.**
- No. **Go to 5.7.**

Practice Points

- Consultation with whom?

The client may need independent legal advice.

Source

VRPC 1.8(b)

5.7) Can or must the information be revealed pursuant to VRPC 1.6(b)-(c), or 3.3(d)? (See pp. 37-38, 45.)

- Yes. **You may use the information. Go to The Golden Rule.**

- No. **Conflict. You cannot use the information.**

Practice Points

- Note that this concerns information belonging to a current client. In the case of information belonging to a prospective client, go to 7. In the case of information belonging to a former client, go to 8.1.

- Note that we are talking about using the information, not revealing it to others.

Source

VRPC 1.8(b)

5.8) Is the gift substantial?

- Yes. **Go to 5.9.**

- No. **Go to The Golden Rule.**

Practice Points

- Do you really want to litigate what "substantial" means?

The comment to Rule 1.8(c) says a lawyer can accept "ordinary" gifts. Which is not helpful.

Source

VRPC 1.8(c)

5.9) Did you ask for it, or did someone ask for you?

- Yes. **Conflict. Do not take it.**
- No. **Go to The Golden Rule.**

Source

VRPC 1.8(c)

5.10) Would the will give you anything substantial?

- Yes. **Go to 5.11.**
- No. **No conflict. Go to The Golden Rule.**

Practice Points

- Do you really want to litigate what "substantial" means?

Source

VRPC 1.8(c)

5.11) Is the client a spouse, child, grandchild, parent, or other close family member?

- Yes. **Go to The Golden Rule.**

- No. **Conflict. Get someone else to write the will.**

Practice Points

- If you are going to do this, document it well.

Unless the lawyer has a long-standing relationship with the client or the client has no one else to leave his or her estate to, a lawyer who receives a large bequest under a will can expect an uproar. Mere compliance with the ethics rule may not prevent a will contest. Losing a will contest may lead to revisiting the ethics rules. So, if a client is bound and determined to leave a lawyer a large gift, not only should a different lawyer draft the will, there should be exhaustive documentation, perhaps to include a mental status exam and video recording, to prove the client's wishes.

Source

VRPC 1.8(c)

5.12) Is the case over?

- Yes. **Go to The Golden Rule.**

- No. **Conflict.**

Source

VRPC 1.8(d)

5.13) Is the payment in connection with the representation?

- Yes. **Comply with VRPC 1.8(e). (See p. 40.)**
- No. **Go to The Golden Rule.**

Practice Points

- The rule about advancing expenses might not be what you think it is.

Most lawyers were taught in law school that while you may advance costs for a client in a contingency case, the client remains responsible for them, and must not be told differently. This has not actually been the law since 2019. The pertinent rule, VRPC 1.8(e), states that pre-payment of costs and expenses may be contingent on the outcome of the case. In other words, a lawyer may truthfully tell a client that he or she will owe nothing unless there is a recovery.

Lawyers may pay court costs and expenses on behalf of indigent clients under any circumstances.

Source

VRPC 1.8(e)

5.14) Can you comply with VRPC 1.8(f)? (See pp. 40-41.)

- Yes. **Go to The Golden Rule.**
- No. **Conflict.**

Source

VRPC 1.8(f)

5.15) Does each client consent after disclosure of all terms and consultation?

- Yes. **Go to The Golden Rule.**
- No. **Conflict.**

Practice Points

- How often do you think insurance defense lawyers actually do this?

Source

VRPC 1.8(g)

5.16) Are you and the family member in the same firm?

- Yes. **Go to 4.**
- No. **Go to 5.17.**

Practice Points

- All lawyers in the same firm are the same lawyer for almost all conflict purposes. Go to 9 to analyze imputed conflicts.

Source

VRPC 1.8(g)

5.17) Is the family member a parent, child, sibling, spouse, or a romantic partner?

- Yes. **Go to 5.18.**
- No. **Go to The Golden Rule.**

Source

VRPC 1.8(i)

5.18) Does the client consent after disclosure and consultation?

- Yes. **Go to The Golden Rule.**
- No. **Conflict.**

Source

VRPC 1.8(i)

5.19) Is the interest a lien granted by law to secure fees and expenses, or a contingency fee agreement?

- Yes. **Go to The Golden Rule.**
- No. **Conflict.**

Practice Points

- Do contingency fee agreements have to be in writing?

Yes, and there are other requirements as well. See VRPC 1.5(c).

Source

VRPC 1.8(j)

New Client vs. Former Client

6) Are you thinking about representing a new client in the same or a substantially related matter where you personally represented the former client?

- Yes. **Go to 6.1.**
- No. **Go to 6.3.**

Practice Points

- Note the presence of the word "personally." It is there for a reason.

This word is not actually in the rule, which is VRPC 1.9(a). But, the analysis is different depending on whether the lawyer personally represented the former client, or the client was represented by a lawyer's former firm. Keep in mind that a lawyer and his or her current firm are one; if your current firm represents a client, you do, too.

Source

VRPC 1.9(a)

6.1) Are the two clients' interests materially adverse?

- Yes. **Go to 6.2.**
- No. **Go to The Golden Rule.**

Practice Points

- What does "materially" mean? Do you really want to argue with the Bar over this?

Source

VRPC 1.9(a)

6.2) Do both clients consent after consultation?

- Yes. **No conflict in taking the representation, but you still aren't free to use or reveal information from the first representation. Go to 8.1 to analyze this.**

- No. **Conflict.**

Practice Points

- Can you ask?

It may be impossible to ask for consent without revealing secrets which you are bound to keep.

- Does it have to be in writing?

The rule doesn't say that it does. But it definitely should be.

Source

VRPC 1.9(a)

6.3) Are you thinking about representing a client in the same or a substantially related matter where your former firm represented someone?

- Yes. **Go to 6.4.**
- No. **Go to The Golden Rule.**
- I do not know. **Go to The Golden Rule.**

Practice Points

- Why is "I don't know" an option here?

Because a lawyer is not expected to subjectively know all of the clients his or her former firm ever represented. The rule specifically states that "a lawyer shall not knowingly represent a person" under this particular conflict scenario.

While there does not appear to be any law on point, it is fair to assume that a lawyer is deemed to know every client that his or her current firm represents. The comment to rule VRPC 1.7 says that lawyers are required to have an effective conflict management system in place, which today almost certainly means a searchable database.

However, this particular rule concerns clients of a lawyer's former firm, and a lawyer cannot be expected to have access to an old employer's computer system.

Still, the lawyer should use common sense. If it is common knowledge that a firm has represented a particular company for decades, the lawyer should not pretend ignorance.

- Note that this only applies to a former law firm, not your current one. Your current one is the same as you.

Source

VRPC 1.9(b)

6.4) Are the new client's interests and the old client's interests materially adverse?

- Yes. **Go to 6.5.**

- No. **No conflict in taking the representation, but you still aren't free to use information from the first representation. Go to 8.1 to analyze this.**

Practice Points

- What does "materially adverse" mean? Do you want to argue with the Bar over it?

Source

VRPC 1.9(b)

6.5) Did you learn information about the old client that is material to the new case?

- Yes. **Go to 6.6.**

- No. **No conflict. Go to The Golden Rule.**

Practice Points

- What information is at issue?

The rules do not defined "material." However, other rules specifically take about information which is disadvantageous, potential harmful, etc. "Material" would seem to be broader than these. Err on the side of caution.

Source

VRPC 1.9(b)

6.6) Do both clients consent to the representation after consultation?

- Yes. **No conflict in taking the representation, but you still aren't free to use or reveal information from the first representation. Go to 8.1 to analyze this.**

- No. **Conflict.**

Practice Points

- Can you ask for consent without revealing secrets? Does it have to be in writing? Whom do they consult with? (See pp. 6-7.)

- Note the difference in being able to take the new case, and being able to use information.

Source

VRPC 1.9(b)

Current Client vs. Person Who Contacted Me

7) How did the contact occur?

- As an unsolicited letter, email, or voicemail, to which I did not respond. **No conflict. You may use any information you learned.**

- A conversation in which I learned information about the person or the case without realizing the potential conflict. **Go to 7.1 to determine whether you have to withdraw from any current representation.**

  This is a separate inquiry from whether you can use or reveal the information. Go to 8.1 for that.

Practice Points

- It really has to be unsolicited.

The pertinent LEO provides three hypotheticals. In the first, the information was received via voicemail from a stranger. In the second, the information arrived out of the blue via an email. In the third, the information was provided through an interactive website which invites prospective clients to provide details about potential cases.

Only the first two are "unsolicited." The committee stated that, " The key is . . . that neither the lawyer or the firm may do anything that would reasonably cause a potential client to believe that the information shared will remain confidential."

- The analysis to determine whether you have to get out of a current case must be done even if you don't want to use or reveal the information. The problem is that you have it.

- How do you keep the person who called you from claiming he or she told you more than he or she really did?

Source

LEO 1842

7.1) Is your current client materially adverse to the person you spoke with in the matter in which you represent the client?

- Yes. **Go to 7.2.**
- No. **Go to The Golden Rule**.

Source

VRPC 1.18(c)

7.2) Could the information you learned from the person you spoke with be significantly harmful to him or her?

- Yes. **Go to 7.3.**
- No. **Go to The Golden Rule.**

Source

VRPC 1.18(c)

7.3) Do both the person you spoke with and your client give written, informed consent to your continuing the representation?

- Yes. **Go to The Golden Rule.**
- No. **Go to 7.4.**

Practice Points

- You do not necessarily have to get consent; you might be able to get around it. Keep going.

Source

VRPC 1.18 (d)

7.4) Did you take reasonable measures to avoid getting more information than was necessary?

- Yes. **Go to 7.5.**
- No. **Conflict.**

Source

VRPC 1.18(d)

7.5) Can you be screened from the representation of the current client in a way that you reasonably believe would protect the information which could be harmful to the person that called you?

- Yes. **Go to 7.6.**
- No. **Conflict.**

Source

VRPC 1.18(d)

7.6) Did you provide prompt written notice of the subject matter discussed and screening procedure to person who called you?

- Yes. **No conflict. Go to The Golden Rule.**

- No. **Then do it, and go to The Golden Rule**.

Practice Points

- Note that compliance here just means you don't have to withdraw from a current representation. It does not mean you can use or reveal information you learned.

- What is the point of providing the notice? What is supposed to happen next? Can it possibly be anything good?

Source

VRPC 1.18(d)

Conflict Due to Possession of Information

8) How did the information come to you?

a. From a current client. **Go to 5.4.**

b. From a prospective client. **Go to 7.**

c. From a former client of yours, your firm, or your former firm. **Go to 8.1.**

Source

VRPC 1.9(c)

8.1) What do you need to do with the information?

(a) Use it for some purpose, but not reveal it to anyone else. **Go to 8.2.**

(b) Reveal it to someone else, but not use it yourself. **Go to 8.4.**

Practice Points

- This is an important distinction.

The rules vary depending on what the lawyer wants or needs to do with information. Perhaps she doesn't need to tell anyone the information, but finds the information helpful in advising another client. Or perhaps the lawyer does not need to make any particular use of the information, but wants or needs to convey it to a third party for that person's use.

Source

VRPC 1.9(c)

8.2 Is the use disadvantageous to the former client?

- Yes. **Go to 8.3.**

- No. **You may use the information. You still may not be able to reveal it to others. To analyze this, go back to 8.1.**

Practice Points

- Who decides what is disadvantageous?

Like the question of whether something is "material" or "significant," the question of whether something is "disadvantageous" is not one you want to litigate with the Bar.

Source

VRPC 1.9(c)

8.3) Do any of the following apply?

(a) Rule 1.6 or Rule 3.3 allows or requires the disclosure of the information. (See pp. 37-38, 45.)

(b) The information is generally known.

(c) The information consists solely of criminal history information that can be obtained from law enforcement databases or court records.

- Yes. **You may use the information. You still may not be able to reveal it to others. To analyze this, go back to 8.1.**

- No. **Conflict. You may not use the information.**

Source

VRPC 1.9(c)

8.4) What kind of information is it?

(a) Something unrelated to the prior representation, but which was learned in the course of the representation. **No conflict.**

(b) Something related to the prior representation itself. **Go to 8.5.**

Practice Points

- This is an important distinction.

Information related to the prior representation includes the facts of the case or issue and the client's legal position. This information is entitled to more protection than general information which doesn't have to do with the case, but came to the lawyer's attention because of the representation.

For instance, if the case is a dispute over boundary lines, information "related to the prior representation" would include the facts about the actual dispute. On the other hand, if the lawyer happened to learn that land in a particular area is especially valuable because of a planned development, this would be information learned in the course of the representation. There are different rules as to what use may be made of the different types of information.

Source

VRPC 1.9(c)

8.5) Do Rules 1.6 or 3.3 require or allow disclosure of the information? (See pp. 37-38, 45.)

- Yes. **No conflict.**

- No. **Conflict.**

If you got here from 7 because a person contacted you but did not hire you, be sure to also do the analysis to see if you have to withdraw from any current representation because you have the information. Go to 7.1 for this.

Practice Points

- How do we make sense of all the distinctions between the types of information and what we can or can't do with it?

The rules are quite nuanced, and one wonders whether the authors really meant to make them so complicated. However, the plain language of the rules makes clear distinctions between types of information and between what can or can't be done with it. To summarize, if the information relates to the representation, then you can neither use nor reveal it unless allowed by VRPC 1.9(c). If the information does not relate to the representation (i.e., it didn't come from the client) but was merely gained during the representation, you can always reveal it, but cannot use it except as VRPC 1.9(c) allows. When it comes to revealing information learned from the client, all paths lead back to VRPC 1.6 and 3.3.

Again, one must wonder whether these distinctions are all intended. Even if the rules were drafted by law professors who meant to use specific words, it seems possible that these niceties might be lost in the course of an ethics investigation. When in doubt, apply the broadest definition, and err on the side of caution.

Source

VRPC 1.9(c)

Imputed Conflict

9) What kind of conflict do you fear?

(a) One of the lawyers at my firm has a conflict, but I want to know if I or another lawyer at the firm can represent the client. **Go to 9.1.**

(b) A lawyer who was formerly at my firm represented a client who is no longer the firm's client, and I want to know if I can now be adverse to that client. **Go to 9.4.**

Practice Points

- If the other lawyer is still at the firm, this would be a client/former client issue. Go to 6.

- If the client is still at the firm, this would be a client/new client issue. Go to 4.

- What is a law firm, anyway?

It depends. A formal partnership is certainly a law firm. It would be tempting to say something like an office sharing agreement or occasional collaboration could never amount to a law firm. But remember that some of the rules concerning law firms are based on public perceptions and avoidance of an appearance of impropriety. If Smith and Jones share an office and hold themselves out as partners, it would be problematic for Smith to be on one side of a case and Jones on the other, regardless of whether they are legally partners.

Source

VRPC 1.10

9.1) What kind of conflict does the other lawyer have?

(a) One between a current client and new client, or between a former client and a new client. **Go to 9.2.**

(b) One because he or she inadvertently received information from a prospective client. **Go to 9.3.**

(c) One because of a familial relationship with counsel for an adverse party**. These types of conflicts are not imputed to other lawyers per VRPC 1.8(k) and 1.10(d). (See pp. 41, 43.)**

Practice Points

- Be careful a conflict arising solely from a familial relationship does not turn into another kind of conflict. If it does, you must re-analyze.

9.2) Will the conflict be waived using the analysis in 4.1-4.4? (See pp. 4-7.)

- Yes. **The conflict will not be imputed to other lawyers. Go to The Golden Rule.**

- No. **Conflict. All lawyers in the firm are disqualified.**

Source

VRPC 1.10

9.3) Can the lawyer who got the information be screened off in compliance with 7.4-7.6? (See pp. 26-27.)

- Yes. **The conflict will not be imputed to other lawyers or the firm. Go to The Golden Rule.**

- No. **Conflict. All lawyers at the firm are disqualified.**

Practice Points

- What about "the wall"?

There is no such thing. All lawyers in a given firm are deemed to possess the same knowledge and suffer from the same conflicts. There is no such thing as "walling off" the conflicted lawyer. The concept of screening does have application when a lawyer receives information from a prospective client, as governed by Rule 1.18.

Source

VRPC 1.10

9.4) Is the new case the same as or substantially related to the old case?

- Yes. **Go to 9.5.**

- No. **No conflict. Go to The Golden Rule.**

Source

VRPC 1.10

9.5) Does any lawyer still at the firm have information about the former representation?

- Yes. **Go to 9.6.**

- No. **No conflict. Go to The Golden Rule.**

Source

VRPC 1.10

9.6) Is the information material to the potential new case?

- Yes. **Go to 9.7.**

- No. **No conflict. Go to The Golden Rule.**

Source

VRPC 1.10

9.7) Is the information protected by VRPC 1.6? (See pp. 37-38, 45.)

- Yes. **Go to 9.8.**

- No. **No conflict. Go to The Golden Rule.**

Source

VRPC 1.10

9.8) Does any lawyer still at the firm have information protected by VRPC 1.9(c)? (See p. 42.)

- Yes. **Go to 9.9.**

- Maybe. **Go to 8.1 to determine whether the information is protected. If not, no conflict. If so, go to 9.9.**

- No. **No conflict. Go to The Golden Rule.**

Source

VRPC 1.10

9.9) Do you want to try to take the new case despite the conflict?

- Yes. **Go to 4.1 to determine if the conflict can be waived.**

- No. **No conflict. Go to The Golden Rule.**

Practice Points

- The rule says that the conflict exits if the information is protected by Rule 1.6 and 1.9(c). So, if either of them don't apply, possession of the information is not an issue when deciding whether you can take the new case. But, you still may not be able to use or reveal the information if VRPC 1.9(c) applies. Analyze under 8.1.

Source

VRPC 1.10

Rules

1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;

(7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial

injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

(2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

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

1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information protected under Rule 1.6 for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

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

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

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

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

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

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

1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known, or when the information consists solely of criminal history information that can be obtained from law enforcement databases or court records; or

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

1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The imputed prohibition of improper transactions is governed by Rule 1.8(k).

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and

(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

(e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

THANK YOU FOR ATTENDING!



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