# BE THE GOAT

## 2026 GENTRY LOCKE SEMINARS



GREAT WORK STARTS WITH GREAT PARTNERSHIPS

# RICHMOND

THURSDAY, OCTOBER 15
TOPGOLF

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2026 GENTRY LOCKE SEMINARS



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THURSDAY, OCTOBER 15
TOPGOLF

## GREAT WORK STARTS WITH GREAT PARTNERSHIPS

| | |
|---|---|
| 12:00 p.m. | **Lunch and Networking** |
| 12:30 p.m. | **The Augmented Attorney: Using AI to Practice Law Smarter [ETHICS]**<br>John Danyluk, Paul Hawkins, and Callie Loveland |
| 1:30 p.m. | **Your Exit Playbook: The Smart Way to Sell Your Business**<br>Mike Moro and Wythe Michael |
| 2:00 p.m. | **Your Appeal Starts at Trial: Overturning the Largest Verdict in Virginia History**<br>Monica Monday and Noah Sullivan |
| 2:30 p.m. | **Break** |
| 2:45 p.m. | **The Lay of the Land: Effective Communication in Land Use and Real Estate Matters**<br>Karen Cohen and Conor O'Donnell |
| 3:15 p.m. | **Legislative Update: Money, Guns, Power, and Drugs**<br>Greg Habeeb, Patrice Lewis, Zach LeMaster, and Abigail Thompson |
| 3:45 p.m. | **Dealing with Difficult Lawyers Without Becoming One [ETHICS]**<br>Brett Marston and Jon Roellke |
| 4:15 p.m. | **Working With In House Counsel: Same Law Degree, Different Planet**<br>Carlos Hopkins and Tammy Finley |
| 4:45 p.m. | **Reception and Golf** |

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

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# John G. Danyluk

Partner


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

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

An expert in data privacy and cybersecurity, John is a Certified Information Privacy Professional (CIPP/U.S.) with the International Association of Privacy Professionals (IAPP) and guides clients through complex and evolving data privacy and cybersecurity laws and regulations. John provides proactive compliance advice to major corporations and government contractors and guides these clients through their responses to cyber incidents and ensuing investigations. Additionally, John uses his intimate knowledge of federal procurement and trade regulations, which he first developed as an Army JAG Officer, to advise government contractors on a wide variety of compliance requirements under the FAR, DFARS (including CMMC), DOJ's Civil-Cyber Initiative, and ITAR.

Prior to joining Gentry Locke, John had a distinguished career with the U.S. Attorney's Office and the United States Armed Forces, serving for more than four years in the U.S. Army Judge Advocate General's Corps and as a Special Assistant U.S. Attorney (SAUSA). As a federal prosecutor in the Western District of Texas, John served as the lead trial attorney for Fort Hood's exclusive federal jurisdiction and litigated over 1,000 cases, including numerous federal jury trials. As an Administrative & National Security Law Attorney in Grafenwohr, Germany, John advised on internal investigations into a variety of misconduct and financial issues, and advised senior military leaders on regulatory requirements for construction and acquisition of defense equipment.




## Education

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

## Special Licenses

- Certified Information Privacy Professional with a U.S. designation (CIPP-US)

## Experience

- Represented multiple government contractors in responses to cyber incidents, including immediate containment of threats, compliance with reporting obligations, and cooperation with complex DoD investigations
- Regularly advise defense contractors regarding cybersecurity compliance and preparation for CMMC, as well as compliance with other federal regulations, including the FAR, DFARS, ITAR, FOCI, BAA, and TAA.
- Conducted multiple large-scale internal investigations and provided compliance advice for defense contractor pertaining to compliance with NAVSEA requirements and False Claims Act liability.
- Advised software and engineering firm throughout successful bid for government contract to serve as primary data processor for U.S. Food and Drug Administration's IT Infrastructure for State Regulatory Programs, including federal cybersecurity and regulatory compliance and compliance with individual state privacy and security laws for all fifty states.
- Advised large defense contractor providing veterans' services regarding compliance for planning and completion of off-shoring their IT department.
- Represented former defense contractor executive in parallel civil and criminal federal investigations into procurement fraud.
- Represented large identity verification corporation in defending one of the first privacy-based government enforcement actions under the newly implemented Virginia Consumer Data Protection Act.
- Regularly advise private-sector clients on cybersecurity & data privacy compliance, including compliance with the Virginia Consumer Data Protection Act (VCDPA), California Consumer Protection Act (CCPA), and General Data Protection Regulation (GDPR), HIPAA, GLBA, and compliant cross-border data transfers.
- Regularly advise private-sector clients regarding substantial losses due to cyber-attacks, including business email compromise, ransomware, and cyber-extortion attacks.
- Successfully defended multiple website tracking lawsuits targeting clients' digital advertising and monitoring practices, including claims brought under the California Invasion of Privacy Act (CIPA).
- Represented a key member of management of National Football League franchise during federal and state regulatory and criminal investigations.
- Represented prominent NBA player agent throughout fraud investigation
- Counseled corporate client throughout Virginia Department of Treasury investigation into compliance with state regulations to minimize liability and avoid government enforcement action.
- Defended multiple international pharmaceutical companies facing criminal charges or civil lawsuits related to healthcare fraud.
- Represented a non-profit university throughout a 13-month long internal investigation, as part of a team of 70 lawyers, accountants, and IT members investigating the organization's financial and business operations.
- Conducted an internal investigation for a grant-funded non-profit organization during a nine-month long investigation that included allegations of financial misconduct, sexual misconduct, and discrimination.
- Represented Virginia state agency during a U.S. Attorney's Office investigation into violations of the Affordable Care Act.
- Represented a minor student with physical and developmental impairments accused of sexual assault, leading to a finding of "not responsible" in a Title IX investigation.
- Represented a university student in criminal and Title IX investigations who was accused of sexual assault of a minor, leading to a full dismissal of the Title IX investigation and no criminal charges.
- Represented multiple university students in Title IX and student misconduct investigations related to hazing, sexual misconduct, and harassment, leading to full dismissals for each student
- Represented numerous clients accused of state and federal crimes, including healthcare fraud, sexual assault, criminal misbranding, Endangered Species Act violations, and various other regulatory and criminal offenses.
- As a Special Assistant U.S. Attorney, served as lead trial attorney for Fort Hood's exclusive federal jurisdiction within WDTX.
- As a Special Assistant U.S. Attorney, litigated over 1,000 federal cases, including numerous federal jury trials, bench trials, and hearings.
- As a Special Assistant U.S. Attorney, closely advised FBI and Army CID agents on criminal investigations.
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, advised on internal investigations into a variety of issues, including senior leader misconduct, discrimination, sexual harassment, death and suicide investigations, and financial loss investigations.
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, advised on regulatory requirements and reviewed multi-million dollar purchase agreements for construction and acquisition of defense equipment.
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, served as primary legal POC during outbreak of COVID-19 and lead U.S. Army Europe's commanders through complex legal hurdles of exercising command/control of personnel in pandemic.
- As a Military Magistrate, responsible for authorizing law enforcement search warrants and making pre-trial confinement determinations for criminally charged defendants.

## Affiliations

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

- Member, American Bar Association
- Judiciary Committee, Richmond Bar Association
- Editor-in-Chief, Richmond Journal of Law and Technology, University of Richmond School of Law (2015-16)

## Admissions

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

## Awards

- Named to Best *Lawyers in America* “Ones to Watch” in Criminal Defense: White-Collar (2026-2027)
- Recognized as an “Up & Coming Attorney” by Chambers and Partners USA (2025-2026), Litigation: White Collar Investigations
- Named a “Legal Elite” for Cybersecurity & Data Privacy Technology law in *Virginia Business* magazine (2024-2025)
- Named a *Virginia Lawyers Weekly* Go To Lawyer for Cybersecurity and Data Privacy (2025)
- Named a Virginia *Super Lawyers* “Rising Star” in Criminal Defense: White Collar (2025-2026)
- Named a “Up & Coming Lawyer” class of 2025 by Virginia Lawyers Weekly



# *Paul D. Hawkins*

Partner


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

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

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

## Education

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

## Experience

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

- Advised clients on compliance and data rights issues under the Small Business Innovation Research (SBIR) / Small Business Technology Transfer (STTR) programs including representing both buyers and sellers in “successor-in-interest” transactions under applicable SBIR/STTR program rules.
- Represented government contractor clients involved in mergers and acquisitions on both the buy and sell side advising on various due diligence, structuring, and compliance/notification requirements.
- Assisted clients through efficient navigation of the FAR’s complex novation process, protecting business continuity and contractual relationships.
- Built robust compliance frameworks for clients through development and implementation of comprehensive ethics and compliance programs tailored to government contracting requirements.
- Worked with clients to ensure full compliance with export control regulations, cybersecurity requirements, facility security protocols, and personnel clearance obligations.

## Affiliations

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

## Admissions

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

## Speaking Engagements

- Regular speaker for the Virginia APEX Accelerator (formerly Procurement Technical Assistance Centers) (topics include joint ventures and teaming, the SBA’s All-Small Mentor Protégé Program, SBIR, and export control basics)
- “Navigating Legal Success: When and Why Veteran Owned Small Businesses Need Legal Representation in Government Contracting,” National Veteran Small Business Coalition (NVSBC) Colorado Springs Chapter
- Cohort Speaker, 757 Defend (Defense Technology Accelerator (DTA) under 757 Collab)
- “Minority Owned Business in Trump 2.0,” Asian Business Association of Hampton Roads
- Panel Moderator, “Planning the Next Chapter: ESOPs, Succession, and Strategic Transitions”

## Awards

- Virginia Business Magazine “Legal Elite” (2023-2025)
- Virginia Super Lawyers “Rising Star, Government Contracts” (2024-2026)
- Named to Coastal Virginia Magazine’s 2026 Top Lawyers list for Government and Administrative Law



# *Callie M. Loveland*

Associate


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

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

## Education

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

## Affiliations

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

## Admissions

- Virginia State Bar

## Awards

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

# *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 Exit Playbook: The Smart Way to Sell Your Business

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

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

## Education

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

## Experience

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

## Affiliations

- American Bar Association, Business Law Section, Mergers & Acquisitions Committee
- Virginia Bar Association, Business Law Section
- Veterans Business Outreach Center, Consulting Attorney
- Virginia Beach Bar Association
- Virginia State Bar, Business Law Section
- Past Member, Sandler Center Foundation Giving Circle

- Hampton Roads Community Foundation Community Leadership Partners, Membership Committee
- Board Member, Association of Corporate Growth (ACG 757)

## Admissions

- Virginia State Bar
- The Florida Bar

## Awards

- Named to *Best Lawyers in America* for Corporate Law (2027)
- Named to Coastal Virginia Magazine's 2025 & 2026 Top Lawyers list for Business Law, Corporate Finance and Mergers & Acquisitions.



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Wythe Michael is the deputy chair of the firm's General Commercial practice group where he regularly acts as outside "general counsel" assisting privately held companies close deals, evaluate and manage risk, and pursue new opportunities. Wythe advises closely held companies on mergers and acquisitions, commercial transactions, private securities offerings, commercial real estate, and business succession planning. Wythe also advises new and existing businesses in connection with governing documents, shareholder agreements, operating agreements, employment agreements, restrictive covenant agreements, and general contract matters. Wythe frequently works with physician practice groups, dental practices and other healthcare practices along with individual healthcare providers. Other industries in which Wythe has experience includes manufacturing, construction, technology, service, and real estate businesses.

Wythe earned his J.D. from the University of Richmond and his B.A. from the College of William and Mary. He has been recognized by Virginia Business Magazine as a "Legal Elite" in Business.

## Education

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

## Experience

- Represented numerous business owners in the acquisition or sale of manufacturing, construction, technology, medical, dental, veterinary and service businesses.
- Represented healthcare practice groups in the purchase and sale of practice assets to both Private Equity backed acquirors and strategic acquirors.
- Assisted numerous business owners with succession planning and the transition of ownership to employees and third-party buyers.
- Prepared and reviewed numerous employment and consulting agreements for physicians and mid-levels working for both practice groups and hospital systems.
- Represented a private equity fund in a $75 million private securities offering for the acquisition of a large, diversified portfolio of commercial real estate properties.
- Assisted a regional construction company in the formation of an ESOP and the purchase and financing of 100% of the company's stock by the ESOP.
- Advised a medical technology company in developing a model for joint venture arrangements with physician-users, including resolving regulatory issues, developing agreements and structuring securities offerings.
- Represented several private equity and hedge funds in offerings targeting real estate and long/short opportunities.
- Represented a regional venture capital firm in numerous "Series A", "Series B" and "Series C" preferred stock investments, as well as several bridge financings in portfolio companies.

## Affiliations

- Member, Virginia State Bar
- Member, American Health Law Association
- Board of Directors, Do-Rights Inc. (local charity providing support to diabetic patients)
- Regional Board of Directors, Chesterfield, Towne Bank
- Member, American Bar Association (Business Law and Health Care Law Sections)
- Past Member, Board of Directors; Past Chair, Personnel Committee; Past Chair, Presidential Search Committee, Chesterfield Chamber of Commerce

- Past Chairman of Advisory Council, Salvation Army Adult Rehabilitation Center

## Admissions

- Virginia
- U.S. District Court for the Eastern District of Virginia
- U.S. Court of Appeals for the Fourth Circuit

## Speaking Engagements

- *Buy-Sell or Succession – What's Your Plan?* (September 2013 presentation to Business Beyond Banking program sponsored by local bank)

## Awards

- Named to *Best Lawyers in America* for Corporate Governance Law, Corporate Law, and Mergers and Acquisitions Law (2027)
- Virginia's Legal Elite®, in Business law, *Virginia Business Magazine* (2023-2025)

## Published Work

- *Using the New Crowdfunding Rules to Raise Capital,* Paradigm Magazine
- *Evaluating Clinically Integrated Networks, What Should My Practice Consider Before Joining,* Hampton Roads Physician Magazine
- *Advertising and General Solicitation Now Permitted for Companies Conducting Private Securities Offerings,* Paradigm Magazine
- *Momentum Continues Toward Advisor and Fund Registration*
- *Traps for the Unwary in TIC Deals*, Co-authored with J.M. Ramey
- *SEC Issues Proposed Rules Regarding Changes to Regulation D*
- *The Virginia Limited Liability Company Act*

**Your Exit Playbook:**
**The Smart Way to Sell Your Business**
2026 Gentry Locke Seminar
Mike Moro and Wythe Michael

## 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.



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

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

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

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

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

## Education

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

## Experience

- In a trade secrets dispute, secured reversal of largest jury verdict in Virginia history. *Appian Corporation v. Pegasystems Inc.*, _Va._, 924 S.E.2d 621 (2026)
- Obtained affirmance of defense verdict in tractor-trailer accident case. *LeDoux v. Western Express, Inc.*, 126 F. 4th 978 (4th Cir. 2025)
- Obtained reversal of trial court's ruling refusing to enforce a personal guaranty. *CSE, Inc. v. Kibby Welding, LLC*, 77 Va. App. 795, 887 S.E.2d 789 (2023)
- Court affirmed trial court's interpretation of post-nuptial agreement. *Worsham v. Worsham*, 74 Va. App. 151, 867 S.E.2d 63 (2022)
- Secured final judgment for bank in equitable subrogation case concerning entitlement to funds in deposit account. *Arch Insurance Company v. FVCbank,* 301 Va. 503, 881 S.E.2d 785 (2022)
- Court affirmed summary judgment in suit alleging discriminatory taxation. *Norfolk Southern Ry. Co. v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019)
- Court affirmed the trial court's decision to set aside a multi-million dollar verdict in a government contracting case. *CGI Federal, Inc. v. FCi Federal, Inc.,* 295 Va. 506, 814 S.E.2d 183 (2018)
- Court held that property owners had a vested right to the use of their property. *Board of Supervisors of Richmond County v. Rhoads,* 294 Va. 43, 803 S.E.2d 329 (2017)

- In question of first impression involving social host duty to child guest, obtained affirmance of motion to strike. *Lasley v. Hylton,* 288 Va. 419, 764 S.E.2d 88 (2014)
- Court reversed dismissal of defamation case and clarified the defenses to qualified immunity. *Cashion v. Smith*, 286 Va. 327, 749 S.E.2d 526 (2013)
- Obtained reversal of workers' compensation case where the Full Commission lacked authority to decide the case with a retired Commissioner. *Layne v. Crist Electrical Contractor, Inc.*, 62 Va. App. 632, 751 S.E.2d 679 (2013)
- Obtained reversal of $25 million jury verdict in maritime case relating to asbestos exposure. *Exxon Mobil Corp. v. Minton*, 285 Va. 115, 737 S.E.2d 16 (2013)
- Obtained reversal of decision striking down water and sewer rates that town charged to out-of-town customers; won final judgment in favor of town. *Town of Leesburg v. Giordano*, 280 Va. 597, 701 S.E.2d 783 (2010)
- In question of first impression, obtained dismissal of domestic relations appeal based upon terms of property settlement agreement, which waived the right of appeal. *Burke v. Burke*, 52 Va. App. 183, 662 S.E.2d 622 (2008)
- Obtained reversal of award of writ of mandamus against municipal land development official in subdivision application case. *Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 650 S.E.2d 527 (2007)
- Secured affirmance of compensatory and punitive damages awards for breach of fiduciary duty, tortious interference, and conspiracy. *Banks v. Mario Industries of Virginia, Inc.*, 274 Va. 438, 650 S.E.2d 687 (2007)
- Successfully represented an individual in a premises liability case involving a question of first impression. *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 626 S.E.2d 428 (2006), *adhered to on rehearing*, 641 S.E.2d 68 (2007)
- Obtained a new trial on damages for injured plaintiff in a medical malpractice case. *Monahan v. Obici Medical Management Services*, 271 Va. 621, 628 S.E.2d 330 (2006)
- Successfully defended decision of the Virginia Workers' Compensation Commission awarding attendant care benefits for employee who lost both arms in an industrial accident and assessing a large award of attorneys fees against opposing party. *Virginia Polytechnic Institute v. Posada*, 47 Va. App. 150, 622 S.E.2d 762 (2005)
- Obtained reversal of summary judgment in federal court negligence case. *Blair v. Defender Services*, 386 F.3d 623 (4th Cir. 2004)
- Successfully defended compensatory and punitive damages jury verdict in malicious prosecution case. *Stamathis v. Flying J, Inc.*, 389 F.3d 429 (4th Cir. 2004)
- Obtained reversal of summary judgment in state malicious prosecution case representing chairman of a school board. *Andrews v. Ring*, 266 Va. 311, 585 S.E.2d 780 (2003)
- Successful defense of jury verdict in a construction case interpreting statutory warranty for new dwellings. *Vaughn, Inc. v. Beck,* 262 Va. 673, 554 S.E.2d 88 (2001)
- Successfully defended federal court's dismissal of First Amendment constitutional challenge in voting rights case. *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998)

## Administration & Litigation

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

## Affiliations

- Boyd-Graves Conference: Chair (2024-2026); Secretary (2022-2024); Steering Committee Member (2016-present); Member (2011-present)
- Member, Advisory Committee on Rules of Court (2024-present)
- Member, Virginia Poverty Law Center Advisory Council (2022-present)
- Member, Virginia Trial Lawyers Foundation Board (2022-present)
- Roanoke Symphony Orchestra Board of Directors (2023-present)
- Member, Judicial Council of Virginia (2013-2023)
- The Virginia Bar Association Appellate Practice Section Council (2009-2023), Chair (2019-2021), Past-Chair (2022-2023)
- Chair, Appellate Committee of the Virginia State Bar Litigation Section (2009-2019)
- Fourth Circuit Rules Advisory Committee; Chair (2017-2018), Virginia Representative (2013-2017)
- Member, Virginia Model Jury Instruction Committee (2012-2020)
- Board of Directors, The Harvest Foundation (2015-2023)
- Member, Special Committee to Study Appellate Mediation in Virginia
- Member, American National Bankshares, Inc., Virginia State Banking Board (2019-2023)
- Board of Trustees, Virginia Museum of Natural History (2009-2019)
- Member, Virginia Workers' Compensation American Inn of Court (2015-2023)
- Member, Virginia State Bar Professionalism Course Faculty (2013-2016)
- Member, Blue Ridge Regional Library Board (2007-2011)
- American Heart Association Roanoke "Go Red for Women" Luncheon; Chair (2017-2018), Co-chair (2016-2017)
- Board of Governors, The Virginia Bar Association (2011-2014)
- Board of Directors, Virginia Law Foundation (2005-2011)
- Member, The Ted Dalton American Inn of Court (2003-2012); Secretary (2007-2012)
- Chair, Committee on Federal Judgeships, Western District, Virginia Bar Association (2004-2008, 2015-present)

- Member, Nominating Committee, The Virginia Bar Association (2004); Membership Committee (2003-2005)
- Board of Directors, Virginia Association of Defense Attorneys (2001-04)
- Co-Chair, Judicial Screening Committee, Virginia Women Attorneys Association (2001-03)
- Member, Board of Trustees, Adult Care Center (1999-04)
- Executive Committee, Young Lawyers Division, Virginia Bar Association (1998-02)
- President, William & Mary Law School Association (2000-01)
- Law Clerk to the Honorable Lawrence L. Koontz, Jr., Chief Judge, Court of Appeals of Virginia (1991-93)

## Awards

- Recipient of the inaugural Circle of Excellence Award by Virginia Lawyers Weekly (2024)
- Recipient of the William & Mary Law School Edmund Randolph Award for Excellence in Oral Advocacy (2023)
- "Leading Individual" by Chambers and Partners USA (2021-2026), Band 1, Litigation: Appellate (Virginia)
- "Leading Individual" by Chambers and Partners USA (2017-2026), Band 1, Litigation: Commercial (Virginia)
- Named a "Go To Lawyer for Appellate" by Virginia Lawyers Weekly (2023)
- "Roanoke Lawyer of the Year for Appellate Law" (2020, 2025, & 2027) by Best Lawyers in America
- Recipient of the Gentry Locke J. Rudy Austin Pro Bono Service Award (2023)
- "Virginia Business Power 500" (2020 – 2024)
- "Virginia Business Women of Leadership" (2021)
- "Circle of Excellence" Honoree by Virginia Lawyers Weekly (2024)
- Peer rated "AV/Preeminent" by Martindale-Hubbell
- Fellow, Litigation Counsel of America (inducted 2026)
- Fellow, American Academy of Appellate Lawyers (inducted 2015)
- Fellow, American Bar Association (inducted 2013)
- Fellow, Roanoke Law Foundation (inducted 2013)
- Fellow, Virginia Law Foundation (inducted 2011)
- *Benchmark Appellate* Local Litigation Star (2013)
- 2013 Class of "Influential Women of Virginia" by *Virginia Lawyers Media*
- Named one of *The Best Lawyers in America* in the field of Appellate Law (2009-2027)
- Named to *Virginia Super Lawyers* for Appellate Law in *Super Lawyers* magazine (2010-2026), listed in *Virginia Super Lawyers Top 100 in Virginia* (2013-2026), listed in *Virginia Super Lawyers Top 50 Women in Virginia* (2015-2026), listed in *Virginia Super Lawyers Top 10 in Virginia* (2019-2026), named to *Super Lawyers Business Edition US* in the area of Appellate Law (2012-2014), and previously was a *Virginia Super Lawyers Rising Star (*2007)
- Designated one of the "Legal Elite" by *Virginia Business* magazine for Appellate Law (2011-2025)
- Named a "Legal Eagle" for Appellate Practice by *Virginia Living* magazine (2012, 2015)
- Named a "Leaders in the Law" honoree by *Virginia Lawyers Weekly* (2006)
- Sandra P. Thompson Award (formerly the Fellows Award), Young Lawyers Division, Virginia Bar Association (2003)
- Best Appellate Advocate, First Place Team, and Best Brief, 1991 National Moot Court Competition

## Published Work

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

## Case Studies

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

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



# *Noah P. Sullivan*

Partner


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Noah Sullivan has a diverse litigation practice, focused on high-stakes commercial, government, and regulatory disputes. Noah has deep litigation experience in federal and state courts across the nation. Prior to joining Gentry Locke, Noah cut his teeth for over nine years at the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. He also previously served as Deputy Counsel and then Counsel to Governor Terry McAuliffe of Virginia overseeing Executive Branch review of all agency regulations. At Gentry Locke, Noah combines these experiences to help clients navigate their most significant litigation, regulatory, and government-facing challenges in Virginia.

## Education

- Stanford Law School, J.D.
- University of Virginia, B.A. with Highest Distinction

## Experience

- Obtained excellent results in high-stakes matters:
  - Obtaining dismissal of declaratory judgment action on exclusive and primary jurisdiction grounds, in a case brought by a major railroad that was represented by a renowned Washington, DC firm.
  - Litigating trademark dispute on behalf of plaintiff in the Eastern District of Virginia, leading to favorable global settlement.
  - Obtaining full defense victory for client in arbitration proceeding arising from tax dispute in a multi-billion dollar transaction.
  - Representing major insurance company in series of cases primarily pending in South Carolina state court related to novel theories of liability in asbestos exposure cases.
  - Defending large retail company in series of wage and hour litigations and arbitrations.
  - Representing Canadian lumber producer in countervailing duties dispute before the Department of Commerce and bi-national review panels.
  - Convincing Department of Health and Human Services to reverse decision to suspend a provider from Medicare program, at the very beginning of the administrative appeal process.
  - Successfully navigating a thorny and complex dispute between numerous primary care providers against a major health insurance provider regarding their participation agreements.
  - Conducting discovery and preparation for retrial in False Claims Act case brought by the United States against a major government contractor, which led to favorable settlement.
  - Representing rail carriers in significant proceedings before the Surface Transportation Board.
  - Defending multiple medical practices in dispute with insurance company regarding termination and amendment rights, involving complex federal and state legal issues.
  - Representing technology company in appeal of major trade-secrets judgment on appeal to the Virginia Court of Appeals.
  - Obtaining reversal of multi-million-dollar False Claims Act judgment in the U.S. Court of Appeals for the Seventh Circuit.
  - Representing non-profit hospital in appeal of enormous False Claims Act judgment in the U.S. Court of Appeals for the Fourth Circuit.
  - Representing health care company in multi-jurisdictional health care fraud investigation.

- Conducting internal investigation on behalf of client in response to sexual misconduct scandal with top executive.
- Noah also maintains an active pro bono practice, which has included defending indigent litigants facing criminal charges in the Eastern District of Virginia and representing plaintiff in Section 1983 suit against locality in the District of Maryland.

- Served as chief legal advisor to the Governor of Virginia and Cabinet on all aspects of state government, including:
  - Overseeing review of all regulatory actions pending before executive branch agencies and took lead role in legislative efforts related to the Virginia Administrative Process Act.
  - Reviewing legislation passed by the General Assembly, as well as developing executive orders and directives to advance the Governor's priorities.
  - Developing legal framework and litigation strategy for Governor's historic restoration of rights program, which successfully restored voting rights to over 175,000 ex-felons in Virginia.
  - Advising Governor and Secretary of Public Safety and Homeland Security on issues surrounding 2017 white nationalist rally in Charlottesville, Virginia and follow-on executive orders and actions.
  - Litigating remedial plan in Congressional redistricting case on behalf of Governor McAuliffe, which resulted in Governor's advocated creation of second minority opportunity district in Virginia.

* Some Representative matters reflect work prior to joining Gentry Locke

## Affiliations

- Member, Virginia State Bar
- Member, District of Columbia Bar
- Member, Virginia Bar Association
  Serve on Administrative Law Section Council
- Member, Richmond Bar Association
  Serve on Pro Bono Committee

## Admissions

- Admitted to practice law in Virginia and the District of Columbia
- Admitted to the U.S. District Courts for the Eastern and Western Districts of Virginia, the District of the District of Columbia, the District of Maryland, and the U.S. Court of Appeals for the Fourth Circuit

## Awards

- Named to *Best Lawyers in America* for Commercial Litigation (2026-2027)
- Named to Best Lawyers "Ones to Watch" List for Administrative/Regulatory Law (2025)
- Rated AV Preeminent by Martindale-Hubbell

## Case Studies

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

- Feb 20, 2025 — **Port Commission Oversteps Its Authority in Pursuing Railroad**
- May 20, 2024 — **Railroad's Track Cannot Be Taken by Local Development District**

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

**Gentry Locke Seminar**

Monica T. Monday
Noah P. Sullivan

## 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 VUTSA, the Court held that a "series of errors" required reversal. CAV Op. at 2.

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

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

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 objections made on the record and that we secured ruling on those objections.

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

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.

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[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 *Saks 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

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[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

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(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." *See* 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)).

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[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]

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[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

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[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.

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[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.

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[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).

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[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. *See 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." *SI 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

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[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.

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[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

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[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.

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[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

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[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

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[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

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[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

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[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]

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[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

*Monica T. Monday*
*Michael J. Finney*
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## I. ERROR MUST BE PRESENTED TO THE TRIAL COURT FIRST

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

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

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

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

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

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

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

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

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

B. The Scope of the Contemporaneous Objection Rule

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

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

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

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

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

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

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

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

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

C. The Ends of Justice Exception

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

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

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

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

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

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

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

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

D. The Good Cause Exception

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

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

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

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

E. How to Satisfy the Contemporaneous Objection Rule

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

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

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

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

c. *Make the objection on the record:*

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

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

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

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

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

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

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

g. *Objections to Jury Instructions:*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**3. Get a ruling on all objections.**

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

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

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

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

## II. OTHER WAYS TO PRESERVE ERROR IN THE RECORD

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

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

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

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

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

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

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

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

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

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

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

8. Timing of the proffer

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

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

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

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

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

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

B. Motions

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

2. *Motions to Strike*

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

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

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

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

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

3. *Post-trial Motions*

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

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

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

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

4. *Objections to the Final Order*

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

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

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

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

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

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

C. Argument

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

## III. A FEW WAYS TO AVOID THE WAIVER OF ERROR

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

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

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

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

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

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

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

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

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

## IV. RELATED TOOLS FOR APPELLEES

A. *Right Result, Wrong Reason:*

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

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

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

B. *"Bad Brief" Waiver:*

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

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

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

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

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

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

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

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

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

D. *Failure to Adequately Assign Error:*

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

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



# The Lay of the Land: Effective Communication in Land Use and Real Estate Matters

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**Karen Cohen** is a Partner in Gentry Locke's Richmond office and is a member of the firm's Real Estate, Land Use & Zoning and Solar & Renewable Energy practice groups. Karen assists clients obtaining approvals for solar and energy storage projects and advises developers on real estate transactions, the entitlement process, environmental issues, and general corporate matters. Karen co-chairs the Land Use and Environmental Committee of the Real Property Section of the Virginia State Bar and previously served as Chair of the Section. She is a member of CREW (Commercial Real Estate Women) Richmond, GRACRE (Greater Richmond Association for Commercial Real Estate), and WRISE (Virginia Chapter of Women in Renewable Industries & Sustainable Energy). Karen received her B.S. degree in architecture from the University of Virginia, her M.S. in real estate development from George Mason University, and her J.D. magna cum laude from Georgetown University Law Center.

As a featured presenter for the Virginia State Bar Real Property Section's Living Library Series, Karen Cohen delivers a primer on land use law basics, and moderates a lively conversation with real estate bar colleagues, John Foote and Ben Leigh, in these videos: **Real Property Library**.

## Education

- Georgetown University Law Center, J.D., magna cum laude
- George Mason University School of Business, M.S. R.E.D.
- University of Virginia, B.S. Architecture

## Experience

- Represents developers, landowners and businesses on zoning and real estate matters, including mixed use, industrial, data center and solar development.
- Represents developers and renewable energy clients on legislative and administrative land use approvals (local and state).
- Provided opinion letters for financing transactions.
- Provided zoning analysis, zoning determination letters, and vested rights analysis.
- Assisted developers with real estate purchase and sale agreements and resolving title issues.
- Drafted complex easement documents and represented commercial property owners to resolve easement issues.
- Assisted developers with land development processes, including obtaining site plan approval and other administrative permits for project construction.
- Represented healthcare facility in connection with obtaining special use permit for an additional building-mounted sign.
- Advised municipalities in connection with various zoning and land use matters including Virginia's new proffer legislation; sign ordinances after the U.S. Supreme Court's decision in *Reed v. Town of Gilbert*; the Religious Land Use and Institutionalized Persons Act (RLUIPA), federal constitutional issues in connection with zoning ordinances pertaining to certain land uses; and preparation of performance and bonding agreements.
- Represented landlords and tenants in shopping center, office, and industrial leases, including medical building leases for non-profit integrated health system and urgent care facilities, government contractors, professional service firms and retail establishments.
- Represented general contractor in DPOR hearing, avoiding licensure penalty and obtaining a substantial reduction in fines.

## Affiliations

- Co-Chair of the Land Use & Environmental Committee for the Real Property Section of the Virginia State Bar (2019-present)
- Member, Women in Renewable Industries & Sustainable Energy, Central VA Chapter (2023-present)
- Programs Committee, Commercial Real Estate Women (2023-present)
- Chair of the Real Property Section of the Virginia State Bar (2022-2023)
- Vice Chair, Virginia State Bar Real Property Section Board of Governors (2021-2022)
- Secretary, Virginia State Bar Real Property Section (2020 – 2021)
- Board of Governors, Virginia State Bar Real Property Section (2017 – 2023)
- Chair, NAIOP Prince William Government Relations Subcommittee (2016 – 2021)
- Chair, Real Estate Development Committee, Prince William County Economic Recovery Task Force (2020)
- Strategic Planning Committee, Mason Center for Real Estate Entrepreneurship (2017)
- Founding Director, George Mason University School of Business Real Estate Development Industry Group (2016)
- Director-at-Large, George Mason University School of Business Alumni Chapter (2013 – 2017)
- Board of Directors, Legal Services of Northern Virginia (2017 – 2021)
- Racial Justice Committee, Legal Services of Northern Virginia (2020 – 2021)

## Admissions

- Member, Virginia State Bar
- Member, District of Columbia Bar
- Admitted to practice in the following courts:
  - United States Court of Appeals for the Fourth Circuit
  - United States District Court for the Eastern District of Virginia
  - United States Bankruptcy Court for the Eastern District of Virginia
  - Virginia (all state courts)
  - United States District Court for the District of Columbia

## Speaking Engagements

- COVID-19 Government Relations: Federal, State and Local – Commercial Real Estate Development Association Webinar, NAIOP, May 5, 2020
- Land Use and Zoning from Start to Finish: A Practical Guide to Land Use and Zoning Approvals and Issues, National Business Institute, September 10, 2019
- 22nd Annual Advanced Real Estate Seminar, *Lurking in the Weeds – Advanced Covenant Issues*
- Prince William Chamber of Commerce, Powerful Partnerships 2017 Conference
- Virginia Association of Zoning Officials 2017 (Proffer Legislation, RLUIPA, Sign Ordinances)

## Awards

- Named to *Best Lawyers in America* for Land Use and Zoning Law, and Real Estate Law (2024-2027)
- Named as Virginia Lawyers Weekly Go To Commercial Real Estate Lawyer (2025)
- AV Preeminent Peer Rated, Martindale-Hubbell®
- Super Lawyers for Land Use/Zoning, Thomson Reuters (2020, 2023-2026)
- Virginia Legal Elite, Virginia Business magazine for Real Estate/Land Use law (2018 – 2020, 2023 – 2025)
- Member of the Year Award, NAIOP Government Relations (2020)
- Influential Women of Law Award, Virginia Lawyer's Weekly (2019)
- Prominent Patriot, George Mason University School of Business (2017)




## Published Work

- Author, “Vested Rights: Ironing Out the Confusion,” The Fee Simple (December 2020)
- Author, “What Is Land Use Law?” Lay of the Land (Land Use Law Blog Series, 2020)
- Author, “Where Does Land Use Law Come From?” Lay of the Land (Land Use Law Blog Series, 2020)
- Author, “A Good Time for Virginia Developers to Re-Evaluate Approved Plans,” Lay of the Land (Land Use Law Blog Series, 2020)
- Contributor, Dewberry Land Development Handbook Series (McGraw-Hill Education, 4th ed. 2019)
- Co-Author, Finding Common Ground on Proffer Reform, The Fee Simple (November 2018)
- Author, 2012-2017 Strategic Plan for George Mason Master of Science in Real Estate Development (prepared on behalf of the George Mason Center for Real Estate Entrepreneurship)
- Featured in **George Mason University School of Business article**
- Real Estate Development Capstone Project featured in **Viva Tysons magazine**



# Conor H. O'Donnell

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Conor serves as Gentry Locke's Land Use Planner for Renewable Energy and Real Estate. He works alongside real estate attorneys to assist owners, developers, and investors with all facets of land use and zoning, development and operation of residential, commercial, and large-scale mixed-use projects, as well as renewable energy projects.

Prior to joining the firm full time, Conor served as a Land Use Graduate Assistant for Gentry Locke while completing his masters degrees. Previously, he worked for the U.S. Government Accountability Office, as a Legislative Aide for a Delegate in the Virginia House, and as a Virginia Management Fellow at both the Virginia Department of Environmental Quality and the Department of Conservation and Recreation.

Conor holds two Master's Degrees from the University in Virginia, in both Public Policy and Urban and Environmental Planning. He also holds a Graduate Certificate in Real Estate Design and Development. Conor graduated from the College of William and Mary with his Bachelor of Arts in International Relations and Environmental Studies.

### Education

- University of Virginia, Master of Public Policy
- University of Virginia, Master of Urban and Environmental Planning
- University of Virginia, Graduate Certificate in Real Estate Design and Development
- College of William and Mary, B.A., International Relations
- College of William and Mary, B.A., Environmental Policy

### Experience

- Researched, prepared, and filed rezoning, special use permit, and other land development applications for various land use projects throughout Virginia, including residential, commercial and mixed-use developments, as well as renewable energy projects.
- Managed the land use applications, ensuring exceptionally prepared, efficiently completed, timely submissions with adherence to all filing requirements.
- Conducted thorough research of relevant zoning codes, ordinances, and comprehensive plans.

### Affiliations

- Emergency Medical Technician (EMT), Tuckahoe Volunteer Rescue Squad (2018-Present)

**The Lay of the Land:**
**Effective Visual Communication in Land Use Matters**

Gentry Locke Seminar 2026
Karen L. Cohen and Connor O'Donnell

## 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 covey 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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Code of Virginia
Title 55.1. Property and Conveyances
Subtitle I. Property Conveyances
Chapter 3. Form and Effect of Deeds and Covenants; Liens
Article 1. Form and Effect of Deeds; Easements

# § 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.

Code of Virginia
Title 55.1. Property and Conveyances
Subtitle I. Property Conveyances
Chapter 3. Form and Effect of Deeds and Covenants; Liens
Article 1. Form and Effect of Deeds; Easements

# § 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.

Code of Virginia
Title 8.01. Civil Remedies and Procedure
Chapter 3. Actions

## 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

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[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

# 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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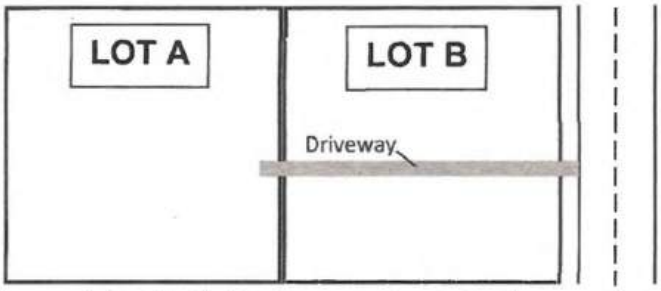
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# THE UNIFORM EASEMENT RELOCATION ACT

*- A Summary -*

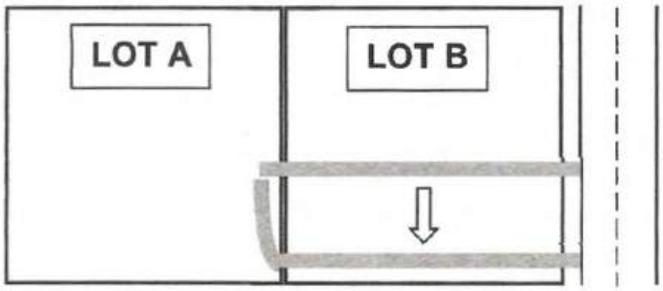
An easement is an interest in real property that gives the easement holder the right to use another person's land. For example, think of two neighboring lots A and B. Lot B is adjacent to a public highway, but Lot A has no access to the road. The owners of the two lots could negotiate an agreement for 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.
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## UNIFORM EASEMENT RELOCATION ACT

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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
>
> (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

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[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 . . . .



# Legislative Update: Money, Guns, Power, and Drugs


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# *Gregory D. Habeeb*

Partner


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

## Education

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

## Experience

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

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

## Affiliations

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

## Awards

- Name to the Virginia Business Power 500 List (2025)
- Designated one of the "Legal Elite" in Administrative/Government/Legislative law by Virginia Business magazine (2019-2020, 2022-2025) and for Government & Regulatory Affairs (2021)
- Named to *Best Lawyers in America* for Administrative/Regulatory Law, and Government Relations Practice (2027)
- Named a *"Leader in the Law"* by *Virginia Lawyers Weekly* (2017)
- Recipient, *Client Distinction Award,* Martindale-Hubbell (2012)
- Named a *Top Rated Lawyer* for Commercial Litigation, General Practice, and Products Liability law by American Lawyer Media (2013)
- Named to the *Blue Ridge Business Journal's "20 Under 40 List"* of the Blue Ridge Region's up-and-coming business leaders (2010)
- Designated as one of the *Legal Elite* in the Young Lawyer category by *Virginia Business* magazine (2004 and 2009)
- Recipient, RPV Governor's Award – recognized as Best Chair throughout the Commonwealth of Virginia
- Named a *Virginia Super Lawyers* for Legislative and Government Relations (2018-2026); previously named *Rising Star* in the area of Business Litigation (2008, 2010, 2012-2016), General Litigation and Personal Injury Plaintiff (2008), Commercial Litigation (2011)
- Roanoke Bar Association President's Volunteer Service Award, Bronze level, for 100-249 hours of community service in a calendar year
- "Largest Verdicts in Virginia" designation (2006) as recognized by *Virginia Lawyers Weekly*

## Published Work

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

## Case Studies

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

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



# *Patrice L. Lewis*

Government Affairs Director


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

## Education

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

## Experience

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

## Affiliations

- Member, African American Advisory Council, VA250
- Lewis F. Powell, Jr. Inn of Court Member
- National Black Professional Lobbyists Association Member
- Past Diversity and Inclusion Committee Chair, Public Relations Society of America – Richmond Chapter
- Past Board Member, Brown Virginia
- Past Member, Government Affairs Committee, Chamber RVA Chesterfield County
- Past Member, Civic Engagement Committee, Urban League of Greater Richmond's Young Professional Network
- Past Advisory Board Member, Black RVA

## Awards

- Named to Best *Lawyers in America* "Ones to Watch" for her Government Relations Practice (2027)



# Zachary R. LeMaster

Government Affairs Director


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

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

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

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

During his time at Gentry Locke Consulting, he has led on emerging issues in blockchain, fintech, and renewable energy. He has worked against legislation which increases the burden on housing providers and presented to the Virginia Housing commission on the negative impact of rent control policies. Lastly, Zach has worked to protect the Commonwealth's historic resources, securing over $11 million in state grant funding for historic preservation programs.

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

## Education

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

## Experience

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

## Affiliations

- Virginia Housing Commission- Local Rent Regulation Workgroup
- Conservatives for Clean Energy – Virginia Advisory Board
- JMU Department of Political Science Alumni Board



# *Abigail E. Thompson*

Government Affairs Manager


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

## Education

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

## Experience

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

## Affiliations

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

## Published Work

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

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

**Greg Habeeb**
**Carlos Hopkins**
**Patrice Lewis**
**Zach LeMaster**
**Abigail Thompson**
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.



# Dealing with Difficult Lawyers Without Becoming One [ETHICS]

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Brett Marston is an experienced construction contracting, dispute resolution, and OSHA attorney. He also serves as Managing Partner at Gentry Locke and is the Immediate Past President of the Virginia State Bar, having served as the 87th President. As a member of the firm's Construction Law practice group, he brings substantial expertise in negotiating and drafting construction contracts, resolving payment disputes, handling mechanic's liens, bond claims, construction defect cases, delay claims, insurance issues, and OSHA matters. Brett represents clients in major construction cases before both federal and state courts, and in mediation and arbitration. He represents general contractors, subcontractors, owners, design professionals, and suppliers. Brett also serves as mediator and arbitrator in commercial disputes, mostly pertaining to construction matters.

Brett has been repeatedly recognized as a *Virginia Super Lawyer*, consistently appearing on their Virginia Top 10 and Top 100 lists. He has also received the Roanoke Lawyer of the Year for Construction Law honor from The Best Lawyers in America three times. In 2019, Brett was inducted as a Fellow of the Virginia Law Foundation. The previous year, Virginia Lawyers Weekly named him to its "Leaders in the Law" class of 2018.

## Education

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

## Experience

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

- Represented highway/bridge contractor in filing protest with federal government agency on project to work on Blue Ridge Parkway
- Represented owner in preparation of package of bid and contract documents for renovation of regional educational facility
- Represented engineering firm in defense of multi-million dollar claims by project developer alleging defective site design and geotechnical errors
- Prepared documents for general contractor for submission as unsolicited proposal under Virginia's PPEA (Public Private Educational Facilities Act)
- Represented commercial subcontractor in analyzing and negotiating subcontract for work on multi-million dollar museum project
- Represented in litigation a national general contractor in defense of a claim regarding installation of allegedly defective exterior cladding on new hospital facility
- Represented commercial contractor in filing mechanic's liens for over $1 million on condominium project for work performed under a cost-plus contract
- Represented HVAC subcontractor in asserting and prosecuting claims against general contractor's payment bond on a government project, relating to delay claims and outstanding payments owed
- Represented governmental owner in negotiating a takeover agreement with general contractor's surety on new building on which construction was far behind schedule
- Represented manufacturing client in defense of alleged Willful OSHA violations arising out of workplace fatality
- Represented engineering firm in defense of alleged Willful OSHA violations arising out of construction site shoring failure
- Represented numerous general contractors, subcontractors, and general industry businesses in defense of OSHA citations, including Willful, Repeat, and Serious Violations
- Represented employer/general contractor in defending, through trial, multiple OSHA citations, including alleged trenching violations
- Successfully defended business owner in day-long hearing before Fire Code Board of Appeals for alleged fire code violations relating to building classification and egress from building

## Affiliations

- Virginia State Bar: Immediate Past President (2026-Present); 87th President (2025-2026); President-Elect (2024-2025); Bar Council representing the 23rd Judicial Circuit (2016-2022); Construction and Public Contracts Section Chair (2012-2013); Board of Governors (2003-2014), Treasurer (2009-2010), Secretary (2010-2011)
- Serving on the Virginia State Bar's Budget & Finance Committee, Professionalism Committee, and Standing Committee for Legal Ethics
- Roanoke Regional Partnership (Economic Development), Board of Directors and Executive Committee (2019-2024); President (2021-2024)
- Virginia Transportation Construction Alliance Board of Directors (2023)
- Roanoke Symphony Orchestra Board of Directors (2013-Present)
- Hidden Valley High School Athletic Boosters, Board member (2012-2017), President (2014-2017)
- The Ted Dalton American Inn of Court, Executive Committee Member, (2009-2011); Member (2006-2014)
- Roanoke Bar Association, President (2006-07); Board of Directors (2001-2008); Chair, Young Lawyers Committee (1999-2001); President-Elect and Chair of Programs (2005-2006); Member (1994-Present)
- Roanoke Bar Association Foundation, Chair of Trustees (2007-2008)
- Roanoke Division of Associated General Contractors of Virginia, Board Member, (2003-2006); Safety Alliance Steering Committee (2005-2007)
- Roanoke Regional Chamber of Commerce Board Member, (2007-2009)
- The Virginia Bar Association Construction and Public Contracts Law Section, Executive Council Member (2004-2006)
- Virginia State Bar Young Lawyers Conference Board of Governors representative for 8th District (1997-2001)
- Law Clerk to the Honorable J. Calvit Clarke, Jr., Senior United States District Judge, Eastern District of Virginia, Norfolk, Virginia (1993-94)
- George Mason University Law Review (1992-93)
- Cave Spring National Little League, President (2008, 2009)
- Roanoke Regional Forum, member of founding steering committee (2009-2014)

## Awards

- Recognized by Chambers USA in Band 4 for Construction Law (2023 – 2026)
- Name to the Virginia Business Power 500 List (2025)
- Named "Roanoke Lawyer of the Year" for Construction Law (2013, 2015, 2017, 2024, 2026) by *The Best Lawyers in America,* and noted in the areas of Construction Law (2006-2027) and Construction Litigation (2011-2027)
- Fellow, Virginia Law Foundation (inducted 2019)
- Named one of the "Leaders in the Law" by *Virginia Lawyers Weekly* (2018)
- Elected a *Top Attorney: Construction* by Roanoke-area attorneys surveyed by *The Roanoker* magazine (2007, 2009, 2012)
- Designated one of the "*40 & Under Movers and Shakers"* by *The Roanoker* magazine for the field of Law (2008)

- Named to *Virginia Super Lawyers* for Construction Litigation (2009-2026), to the *Top 10 List* (2015-2017, and 2026), *the Top 100 List* (2014-2019, 2020-2026), to *Super Lawyers Business Edition US* in the area of Construction Litigation (2012-2014), and was previously named a *Virginia Super Lawyers Rising Star* for Construction Litigation (2007)
- Designated one of the "Legal Elite" by *Virginia Business* magazine in Construction law (2007-2025) and the Young Lawyer category (2004-2006)
- Named a "Legal Eagle" for Construction Law and Litigation – Construction by *Virginia Living* magazine (2012)
- Named a "Top Rated Lawyer" for Construction law by American Lawyer Media (2013)
- Roanoke Bar Association President's Volunteer Service Award, Silver level, for 249-500 hours of community service (2006, 2007)
- R. Edwin Burnette, Jr. Young Lawyer of the Year Award, Virginia State Bar (2004)

## Published Work

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

## Case Studies

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

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



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Jon Roellke is a member of the firm's Commercial Litigation practice group with a broad-based practice focused on complex commercial, contract, and business disputes in state and federal courts. Jon represents businesses, municipalities, contractors, and individuals in high-stakes matters ranging from simple breach of contract actions to multifaceted disputes involving construction and real estate matters, corporate and partnership conflicts, employment and severance issues, and class and multi-party litigation.

## Education

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

## Experience

- Represented electrical contractor in business payment fraud dispute arising from sophisticated third-party hacking scheme that redirected client funds to fraudulent accounts.
- Represented national full-service construction firm in multi-million dollar payment dispute with international conglomerate.
- Obtained favorable resolution for terminated executive in federal court litigation involving trade secrets and post-employment claims.
- Enforcement and defense of mechanic's liens on behalf of contractors, subcontractors, and material suppliers.
- Assisted major tractor-trailer corporations in multiple catastrophic injury claims at all stages of claims process.
- Obtained favorable resolution for delivery company in a disputed liability collision suit involving spoliation defenses.
- Obtained favorable resolution in complex, multi-jurisdictional ERISA fund dispute in the Eastern District of Virginia.
- Obtained pre-appearance dismissal of multi-claimant property damage suit for national tractor-trailer company based on a successful scope of employment defense.
- Obtained favorable resolution for international manufacturing company before the American Arbitration Association in seven-figure Uniform Commercial Code dispute.
- Obtained favorable resolution of major multi-count non-solicitation and non-compete lawsuit in the Eastern District of Virginia.
- Successfully represented underinsured motorist carriers in Virginia state and federal courts.

### *Clerkships*

- Law Clerk to the Honorable Robert J. Humphreys, Virginia Court of Appeals
- Law Clerk to the Honorable Edward A. Robbins, Jr., Chesterfield County Circuit Court.

## Affiliations

- Virginia Bar Association
- Richmond Bar Association

## Admissions

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

## Speaking Engagements

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

## Awards

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

# *DEALING WITH DIFFICULT LAWYERS WITHOUT BECOMING ONE*

**Brett Marston**
**Jon Roellke**[1]
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.

## Part I – Civility in the Practice of Law

[1] With special thanks to John Camacho, Sam McGuinn and Carly Carpenter.

## 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.



# Working With In-House Counsel: Same Law Degree, Different Planet

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

## Education

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

## Experience

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

## Affiliations

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

- Board of Directors, Virginia Association of Criminal Defense Lawyers (2010-2013)

## Admissions

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

## Awards

- Designated one of the “Legal Elite” in Administrative/Government/Legislative law by Virginia Business magazine (2023-2025)

## Published Work

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



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Tammy Finley is a member in Gentry Locke's Commercial Litigation group, where she leverages more than 25 years of executive and legal leadership experience to advise clients on complex business and litigation matters. Her practice includes business and commercial litigation, general commercial matters, labor relations, employment law and non-compete issues, cybersecurity and privacy response, legal and regulatory compliance, crisis management and incident response, and enterprise risk management. She advises executives and boards on governance, fiduciary duties, director and officer liability, shareholder engagement and activism, and helps clients navigate high-stakes disputes while balancing legal, business, and reputational considerations.

Prior to joining the firm, Tammy served as Executive Vice President, General Counsel & Corporate Secretary at Advance Auto Parts, Inc. (NYSE: AAP). She guided the company's transformation from a regional retailer into a $10B+ publicly traded organization. During her tenure, she led critical functions including legal, compliance, risk management, human resources, and communications, while advising the company through more than 10 strategic acquisitions. She also served for over six years as an independent director for American National Bankshares Inc. (NASDAQ: AMNB), where she chaired both the Risk and Technology Committees. Tammy currently serves as an Independent Director on the Virginia Transformer Corporation Board of Directors.

Tammy is an active leader in civic and educational initiatives, serving on the boards of the Virginia Chamber of Commerce, the Hotel Roanoke LLC, the Blue Ridge Innovation Corridor, the Southern Virginia Regional Alliance, the Virginia Western Community College Educational Foundation, and the Taubman Museum of Art. Her combination of corporate, governance, and civic leadership experience allows her to provide clients with practical, business-focused solutions that are informed by real-world executive insight.

## Education

- College of William & Mary, Marshall-Wythe School of Law, J.D.
- Virginia Tech, B.A.

## Experience

### Employment, Labor Relations and Non-Compete Issues

Guides organizations through workforce management, employment compliance, and leadership transitions. Provides counsel on general employment matters, non-compete agreements, labor relations, and HR policy development, combining legal experience with practical business insights. Experienced in organizational design, performance management, and succession planning, with significant experience conducting internal investigations, as well as advising on reductions in force, reorganizations, and related severance practices.

### Mergers & Acquisitions

Led HR Integrations and Internal Communications for 10+ acquisitions by Advance Auto Parts, including $2B GPI/Carquest acquisition. Led legal planning, negotiations, and closing of $1.5B Worldpac, Inc. subsidiary divestiture. Expanded IP brand portfolio through negotiation and closing of $200M acquisition of DieHard®, a leading automotive battery brand.

### General Commercial Matters

Advises executives and boards on contracts, compliance, and corporate governance issues. As General Counsel for Advance Auto Parts, led legal strategy supporting enterprise growth, acquisitions, and organizational change, while fostering high-performing legal and corporate teams. Established Global Capabilities Center in India to expand company capabilities and innovation.

### Business and Commercial Litigation

Accomplished legal executive with extensive experience handling complex business and commercial disputes. Provides strategic

guidance on litigation matters, ensuring quality legal advice, cost-effective solutions, and favorable outcomes. Specializes in employment litigation and has significant experience handling class action matters.

### Cybersecurity and Privacy Response

Advises on enterprise preparedness and response for data privacy and cybersecurity incidents. Develops and implements risk mitigation strategies, ensuring alignment with regulatory requirements and best practices, while minimizing operational disruption. Experienced in managing complex cyber incidents and defending related class action litigation.

### Crisis Management and Response

Experience navigating organizational crises, including high-stakes litigation, acquisitions, integrations, and stakeholder communications. Provides counsel on enterprise risk, corporate reputation management, and strategic decision-making during periods of rapid change. Was a key player in the COVID-19 pandemic response, including ensuring automotive aftermarket retailers were deemed essential service providers.

## Affiliations

- Independent Director, Virginia Transformer Corporation
- Board Member, Hotel Roanoke LLC
- Board Member, Virginia Chamber of Commerce
- Board Member, Blue Ridge Innovation Corridor
- Board Member, Southern Virginia Regional Alliance
- Board Member, Executive Committee and Secretary, Virginia Western Community College Educational Foundation
- Board Member, Endowment Committee, Taubman Museum of Art
- Co-Chair of Legal Institute, Virginia Chamber of Commerce
- Past Board Member and Chair, Roanoke/Blacksburg Regional Business Council
- Member, National Association of Corporate Directors

## Admissions

- Virginia State Bar

## Awards

- Named to *Best Lawyers in America* for Litigation – Labor and Employment Law (2027)

# *Working With In-House Counsel: Same Law Degree, Different Planet*

**Carlos Hopkins**
**Tammy Finley**
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*

*Andriana Shultz Daly, McGuireWoods LLP*
*Gretchen Ostroff, Project Counsel, FlatironDragados*
*Michelle West, Partner, Burr & Forman LLP*
*Simone Williams, Associate General Counsel, Amtrak*

**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)

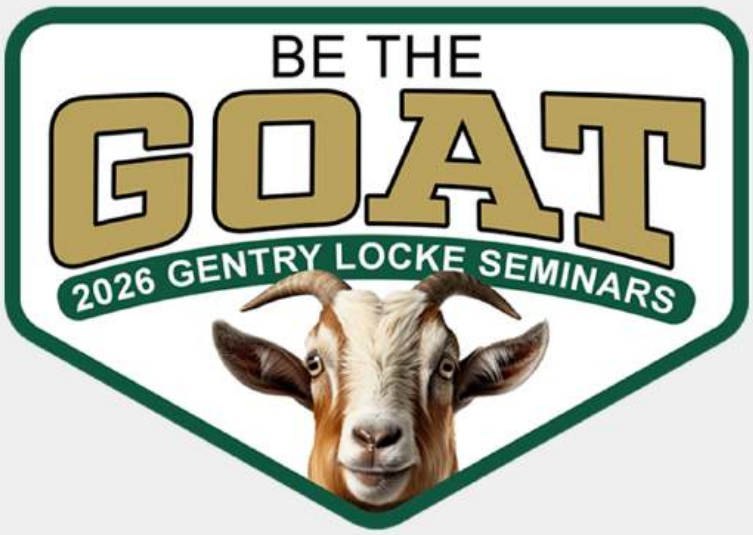
Foundational corporate privilege case. Rejected the control group test; established that privilege can protect communications from employees at any level when made to facilitate legal advice to the corporation.

***Hickman v. Taylor***, 329 U.S. 495 (1947)

Established the work product doctrine, protecting materials prepared by attorneys in anticipation of litigation from discovery.

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