be the G.O.A.T.

2024 Gentry Locke Seminars

Friday, September 20, 2024

Jefferson Hotel | Richmond, Virginia

in Virginia's capitol

Richmond | Norfolk | Lynchburg | Roanoke | gentrylocke.com

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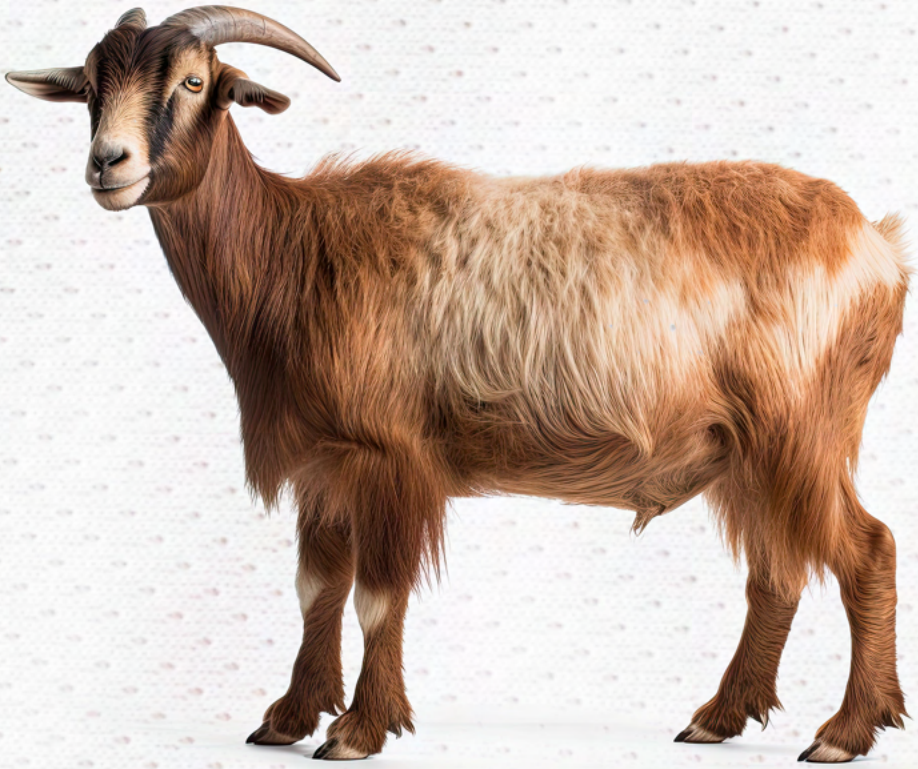
G.O.A.T.
2024 GENTRY LOCKE SEMINARS

Richmond | Friday, September 20

9:15 a.m.	**Welcome**
9:30 a.m.	**Drier than the Dirt: Land Use Permits and Appeals** D. Scott Foster and Karen L. Cohen
10:00 a.m.	**Full Transparency on the Federal Corporate Transparency Act** Clark H. Worthy and G. Wythe Michael
10:30 a.m.	**Break**
10:45 a.m.	**All in the Family Business: Shareholder Oppression Issues in Closely-Held Corporations** Michael V. Moro and Scott A. Stephenson
11:15 a.m.	**Supreme Court of Virginia's Vlaming Decision** Noah P. Sullivan and Todd A. Leeson
11:45 a.m.	**Lunch**
12:30 p.m.	**"Ethics" for $1000, Alex: Helping Your Practice Stay out of Legal Jeopardy** Ryan J. Starks, Kate E. Pollard, T. Tyler Moses, and Emily S. Mordecai
1:00 p.m.	**Special Techniques to Defend Cases: Plea in Bar** Mike J. Finney, John R.L. Roellke, and Monica T. Monday
1:30 p.m.	**Break**
1:45 p.m.	**Keep Calm and Stay Cool – Broom Hilda's Guide to "Civil" Litigation** Melissa E. O'Boyle and Jeff P. Miller
2:15 p.m.	**Privacy and Cybersecurity Compliance in the New Era of Artificial Intelligence** John G. Danyluk and Jessiah S. Hulle
2:45 p.m.	**Gentry Locke Consulting's Legislative Update** Gentry Locke Consulting Team
3:15 p.m.	**Break**
3:30 p.m.	**What's Keeping the Construction Industry Up at Night…and How to Get Some Sleep!** Patricia "P.J." Turner and Andrew O. Gay

4:00 p.m. **Essential Ethics Rules to Use Every Day in Your Legal Practice: Using the Ethics Rules as Best Business Practices**
Greg J. Haley, Jon D. Puvak, and Michael V. Moro

5:00 p.m. - 6:30 p.m. **Reception**



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GENTRY LOCKE
Attorneys

K. Brett Marston

Managing Partner

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

Education

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

Experience

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

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

Affiliations

- Serving on the Virginia State Bar's Budget & Finance Committee, Professionalism Committee, and Standing Committee for Legal Ethics
- Virginia State Bar: Member, 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)
- 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, 2024)
- Named "Roanoke Lawyer of the Year" for Construction Law (2013, 2015, 2017, 2024) by The Best Lawyers in America, and noted in the areas of Construction Law (2006-2024) and Construction Litigation (2011-2024)
- 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 (2009-2024), to the Top 10 List (2015-2017), the Top 100 List (2014-2019, 2020-2024), 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 (2007-2023) and the Young Lawyer category (2004-2006)
- Named a "Legal Eagle" for Construction Law and Litigation – Construction by Virginia Living magazine (2012)
- Named a "Top Rated Lawyer" for Construction law by American Lawyer Media (2013)
- Roanoke Bar Association President's Volunteer Service Award, Silver level, for 249-500 hours of community service (2006, 2007)
- R. Edwin Burnette, Jr. Young Lawyer of the Year Award, Virginia State Bar (2004)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
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Monica Taylor Monday

Chair

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

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

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

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

Education

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

Experience

- Secured final judgment for bank in equitable subrogation case concerning entitlement to funds in deposit account. Arch Insurance Company v. FVCbank, 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 physicians in obtaining restoration of Virginia medical licenses
- Represent medical providers, including physicians, veterinarians, dentists, chiropractors and nurse practitioners in disciplinary and licensure matters before the Virginia Department of Health Professions

Affiliations

- Roanoke Symphony Orchestra Board of Directors (2023)
- Member, Boyd-Graves Conference (2011-present); Member, Steering Committee (2016-present); Secretary (2022-present)
- Member, Virginia Poverty Law Center Advisory Council (2022-present)
- Member, Virginia Trial Lawyers Foundation Board (2022-present)
- Member, Judicial Council of Virginia (2013-2023)
- The Virginia Bar Association Appellate Practice Section Council (2009-present), 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-present)
- Board of Trustees, Virginia Museum of Natural History (2009-2019)
- Member, Virginia Workers' Compensation American Inn of Court (2015-present)
- 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

- “Leading Individual” by Chambers and Partners USA (2021-2024), Band 1, Litigation: Appellate (Virginia)
- “Leading Individual” by Chambers and Partners USA (2017-2024), Band 1, Litigation: Commercial (Virginia)
- Named a “Go To Lawyer for Appellate” by Virginia Lawyers Weekly (2023)
- Recipient of the Gentry Locke J. Rudy Austin Pro Bono Service Award (2023)
- Recipient of the William & Mary Law School Edmund Randolph Award for Excellence in Oral Advocacy (2023)
- “Virginia Business Power 500” (2020, 2021, 2022, 2023)
- “Virginia Business Women of Leadership” (2021)
- “Circle of Excellence” Honoree by Virginia Lawyers Weekly (2024)
- “Roanoke Lawyer of the Year for Appellate Practice” (2020) by Best Lawyers in America
- Peer rated “AV/Preeminent” by Martindale-Hubbell
- Fellow, American Academy of Appellate Lawyers (AAAL, inducted 2015)
- Fellow, American Bar Association (inducted 2013)
- Fellow, Roanoke Law Foundation (inducted 2013)
- Fellow, Virginia Law Foundation (inducted 2011)
- Virginia State Bar Harry L. Carrico Professionalism Course Faculty (2013-2016)
- 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 (2009-2024)
- Named to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2024), listed in Virginia Super Lawyers *Top 100* in Virginia (2013-2024), listed in Virginia Super Lawyers Top 50 Women in Virginia (2015-2024), listed in Virginia Super Lawyers Top 10 in Virginia (2019-2024), 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 (2011-2023)
- 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.

- 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**

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Partner

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Matt Broughton is a Senior Partner and serves on the Executive Board for the firm. Matt heads the Plaintiff's/Personal Injury/Subrogation practice areas at Gentry Locke. He is a licensed tractor-trailer driver, holding a commercial driver's license (CDL), is an ATP rated pilot, and holds a boat operator's license. During his decades of experience, he has tried hundreds of complex cases in the areas of personal injury, trucking accidents, business disputes, worker's compensation, and aviation law, many involving millions of dollars. Matt is consistently noted among the *Best Lawyers in America*® for Plaintiff's Personal Injury and Products Liability litigation. He is also regularly recognized as a *Virginia Super Lawyer* in General Personal Injury litigation representing plaintiffs. Matt is Lead Worker's Compensation counsel for some of the largest and most successful companies in America including Wal-Mart and FELD Entertainment (Marvel, Monster Truck, Disney on Ice).

Education

- University of Richmond, J.D.
- University of Virginia, B.A. with distinction

Special Licenses

- Pilot – ATP Rated Pilot with over 5,000 flight hours in airplanes ranging from Gliders to Jets
- Tractor Trailer Driver – Licensed Tractor-Trailer Driver, holding Commercial Driver's License (CDL) with experience driving on interstates, highways, byways, and rural routes
- Boat Operator's License – owned and operated boats for over 40 years

Experience

- $112.5 million settlement in **False Claims Act whistleblower** case involving **research fraud**
- $75 million settlement in environmental case (coal mining related)
- $14 million settlement in a products liability accident that caused brain injury and blindness
- $8 million settlement in products liability case involving scalp degloving injuries and brain injury
- $7.75 million settlement in a trucking case involving broken bones and head injury
- $5.5 million settlement in brain injury/trucking case
- $5 million verdict in premises liability case involving worker falling down 20' shaft
- $5 million settlement in a legal malpractice case
- $4.5 million settlement against responsible parties for product (wash down nozzle) improperly manufactured in China
- $4.25 million settlement against hazardous material hauler doing illegal U-turn, causing brain injury and horrific orthopedic injuries
- $4 million for brain injured Plaintiff injured in bus accident case in Australia
- $4 million settlement for a boating death case
- $3.5 million trucking case with a back/head injury – un-loading
- $3.5 million settlement in airplane crash case involving death of a passenger
- $3.4 million in expected attendant care benefits for double amputee
- $3 million in expected attendant care benefits for brain injured/blind worker
- $2.45 million settlement in motorcycle accident case involving facial injuries
- $1.6 million verdict in complex business litigation case
- $1.2 million verdict in federal court truck accident case involving fractured spine
- $1.2 million settlement in automobile crash involving brain injury and leading to appointment of guardian and conservator
- $1 million for negligently manufactured auger resulting in amputation

- $1 million settlement against responsible parties for product manufacturing case
- $1 million for ski accident case resulting in quadriplegia
- $975,000 settlement for mechanic's brain injury in automobile accident case
- $700,000 for injured worker in products liability case involving truck lift gate which fractured lower extremity
- $500,000 settlement in traumatic brain injury case
- Resolved multiple brain injury cases for $1 million or more
- Involved in hundreds of cases involving tractor trailer crashes
- Multiple cases tried and settled for amounts below $1 million, involving airplane crashes, medical negligence, car accidents, truck accidents, products liability and commercial matters
- Many years of experience handling complex business transactions
- Represented multiple companies in buying, selling and changing the ownership status of their businesses
- Over 25 years of experiencing handling workers' compensation cases throughout Virginia and subrogation cases arising from such injuries
- Confidential amount in a sexual assault case of a minor
- Multiple aviation related cases to include assisting parties in purchase and documentation information of entities to hold aircraft; Represented pilots in enforcement actions prosecuted by FAA

Whistleblower/Qui Tam

- Served as lead counsel on one of the world's most high-profile research fraud cases
- Speaker at the **5th World Conference on Research Integrity** in Amsterdam, "The Parallel Tracks of Legal Accountability for Research Misconduct in the United States" (Symposium Session 12; 2017)
- Participant in **4th World Conference on Research Integrity** in Rio de Janeiro (2015)

Workers' Compensation

- Tried over 1,000 workers' compensation cases and rated as one of the Best Lawyers in America for Worker's Compensation (1997-2002)
- Mediated hundreds of workers' compensation cases
- Extensive knowledge in complex workers' compensation cases involving catastrophic injuries such as brain injury and quadriplegia
- Extensive knowledge of statutory and case law of workers' compensation gained over the last 30 years
- Extensive knowledge of medicine as it relates to traumatic injuries and treatment
- Frequent lecturer on workers' compensation-related topics

Affiliations

- President, Southwest Virginia Business Development Association (2005-Present)
- Chair, VTLA Aviation Committee (2004-2010)
- Chair, Aviation Committee, Virginia Bar Association (1999-02)
- Chair, Virginia Bar Association/YLD (1995)
- Chair, Virginia Bar Association/YLD Membership Committee (1990-92)
- Plan attorney for the Airplane Owner and Pilots Association (AOPA) (2000-2023)
- Past President of the IFR Pilots Club (1990-2015)
- Member, Lawyer Pilots Bar Association
- Member, Virginia Aviation Trade Association
- Past Member, Aviation and Space Gallery, Virginia Museum of Transportation

Awards

- Named a "Best Lawyer in America" for over 25 consecutive years in plaintiffs for Personal Injury Litigation and Product Liability Litigation (1997-2024)
- Named one of only thirty "Leaders in the Law" statewide, and the sole Roanoke-based recipient, by Virginia Lawyers Weekly (2013)
- Named to Virginia Super Lawyers in the area of Personal Injury General Plaintiff Litigation (2010-2024), and Business Litigation (2008)
- Named a Top Rated Lawyer for Litigation & Civil law by American Lawyer Media (2013)
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly
- Designated as one of the Legal Elite in the Civil Litigation field by Virginia Business magazine (2003-2006, 2019)
- Named "2012 Roanoke Product Liability Litigation Lawyer of the Year" and Best Lawyers in America Business Edition for Plaintiffs (2016), Best Lawyers in America for Workers Compensation Law (1997-2002)
- Named a "Legal Eagle" for Product Liability Litigation by Virginia Living magazine (2012)
- 1998 "Boss of the Year" Award, Roanoke Valley Legal Secretaries Association
- "Attorney of the Year" Award from a top retail entity (2001)

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).
- Co-author, The Law of Damages in Virginia, Chapter 11, Punitive Damages (2nd ed. 2008).

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.

- Aug 25, 2020 — **$8,000,000 awarded in Products Liability Case**
- Apr 23, 2013 — **Blinded Employee Agrees to $14 Million-dollar Settlement ($16.5M Payout)**
- Apr 17, 2013 — **Settlement for Medical Malpractice Injury**
- May 29, 2012 — **Settlement Approved for Girl Hit by Car**

GENTRY LOCKE
Attorneys

D. Scott Foster, Jr.

Partner

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Scott Foster practices in Gentry Locke's Richmond office, helping businesses with their land use, real estate and corporate law needs. Scott is a member of our Legislative Affairs and **Solar and Renewable Energy** teams, and handles solar and battery storage land use matters across the Commonwealth. Scott earned both his undergraduate and law degrees from William and Mary. In 2010, he became the first college student to be elected to the Williamsburg City Council, where he served as Vice-Mayor from 2016-2018. He was instrumental in the adoption of the 2013 City of Williamsburg Comprehensive Plan, advocating for additional residential density in Williamsburg's downtown, which led to major reinvestment and development of that area. Scott currently serves on the William and Mary Real Estate Foundation Board of Directors and remains an active member of the community, always seeking to improve the local and state economies.

Education

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

Experience

- Focuses on land use, zoning, real estate and corporate strategies
- Represents clients in commercial property acquisition, local and state government permitting and land use regulation and successful build out as well as operation of various small businesses
- Represents various small business startups and assists in expansion of existing businesses
- Successfully advocated for the rezoning of a large commercial parcel to residential use resulting in ninety-seven townhome units
- Successfully rezoned older motel property into high-quality, affordable apartment complex

Affiliations

- Virginia Renewable Energy Alliance (VA-REA), Board of Directors (2024- present)
- William and Mary Real Estate Foundation Board of Directors (2020-Present)
- Member, Tourism Development Grant Fund Review Committee, Williamsburg, VA (2018-Present)
- Williamsburg City Council; Council Member (2010-2018), Vice-Mayor (2016-2018)
- City of Williamsburg Economic Development Authority Council Liaison (2016-2018)
- Williamsburg Area Destination Marketing Committee (2016-2018)
- City of Williamsburg Representative, Greater Williamsburg Chamber and Tourism Alliance Board of Directors (2010-2016), Executive Committee (2014-2016)

Awards

- Noted on "Ones to Watch" list by Best Lawyers in America for Corporate Law and Land Use and Zoning Law (2021-2024)
- Named a "Leaders in the Law and Up & Coming" honoree by Virginia Lawyers Weekly (2021)

GENTRY LOCKE
Attorneys

Karen L. Cohen

Partner

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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 to implement the Virginia Clean Economy Act and advises developers on real estate transactions, the entitlement process, commercial leasing, environmental issues, construction, financing and general corporate matters. She also is a member of the firm's outdoor advertising team. Karen serves as Chair of the Virginia State Bar Real Property Section Board of Governors. 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.

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

- Provided zoning analysis in connection with various clients' potential purchase of land for commercial and industrial uses, including evaluation of property within data center opportunity zone in Prince William County, and represented developers and landowners in connection with rezoning and special use permits, sign permits and subdivision approvals.
- Represented commercial property owner in connection with easement acquisition agreement and filing of site plan.
- Represented healthcare facility in connection with obtaining special use permit for an additional building-mounted sign.
- Represented regional shopping mall owner in connection with subdivision and sale of mall parcel and drafted and negotiated complex reciprocal easement and operating agreement in connection with sale.
- Analysis of zoning and restrictive covenant issues in defending operator of farm winery in land use litigation brought by homeowners to prevent operation of winery on historic property
- Represented religious institution in connection with special permit amendment for "church with school" zoning classification in Fairfax County.
- Represented developer in connection with application for mixed-use rezoning.
- 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.
- Representation of 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.
- Representation of 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)
- Chair of the Real Property Section of the Virginia State Bar (present)
- Vice Chair, Virginia State Bar Real Property Section Board of Governors (2021)
- Secretary, Virginia State Bar Real Property Section (2020 – 2021)
- Board of Governors, Virginia State Bar Real Property Section (2017 – present)

- 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)
- Virginia Women Attorneys Association (2013 – present)
- Board of Directors, Legal Services of Northern Virginia (2017 – 2021)
- Racial Justice Committee, Legal Services of Northern Virginia (2020 – 2021)
- Black Family Land Trust Legal Services Advisory Committee (2020 – present)
- Women's Impact Network, Jewish Women International (2020 – present)

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)
- AV Preeminent Peer Rated, Martindale-Hubbell®
- Super Lawyers, Thomson Reuters (2020, 2023, 2024)
- Virginia Legal Elite, Virginia Business (2018 – 2020, 2023)
- 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**

GENTRY LOCKE
Attorneys

Clark H. Worthy

Partner

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Clark Worthy has a B.S. in Finance from the University of Virginia, McIntire School of Commerce and has spent over 30 years working with private corporations on governance, merger and acquisition, real estate, and financing matters, and with individuals on their personal financial matters. For the past 25 years, Clark has primarily devoted his practice to commercial real estate matters including purchases, sales, leases, tax-free exchanges, and financings. A partner in the firm, Clark is recognized among the *Best Lawyers in America* for Real Estate Law.

Education

- Washington and Lee University School of Law, J.D. magna cum laude
- University of Virginia, McIntire School of Commerce, B.S. in Finance

Experience

- Frequently serves as local counsel for multi-state real estate and financial projects
- Worked on both the acquisition by and the sale of commercial properties to local banks for the location of new branch banks
- Worked on the acquisition and sale of several local businesses including a veterinary practice, dental practices and manufacturing companies
- Worked with individuals and corporations in 1031 Like-Kind and Reverse Like-Kind Exchange transactions
- Assist a large non-profit organization with low-income housing projects, general corporate work, and loan programs
- Corporate counsel for several local businesses including physician practices, a landscaper and developer, insurance agents, contractors and subcontractors, provider of assistance programs to disabled individuals and a mortgage broker

Affiliations

- Member, Board of Directors, Child Health Investment Partnership of Roanoke Valley (2015-Present); Board Chair (2018-2019)
- Past Member, Board of Directors, Apple Ridge Farm (2006-2014); former Board Chair
- Past Board Chairman, Presbyterian Community Center in Roanoke
- Past Board Member, Roanoke Regional Chamber of Commerce
- Graduate, Leadership Roanoke Valley
- Law Clerk to the Honorable H. Emory Widener, Jr., U.S. Court of Appeals, 4th Circuit, 1992-1993

Awards

- Named a “Go To Lawyer” for Commercial Real Estate by Virginia Lawyers Weekly (2023)
- Named “Roanoke Lawyer of the Year” for Real Estate Law (2022)
- Named one of The Best Lawyers in America® in Real Estate Law (2012-2024)
- Designated as one of the “Legal Elite” by Virginia Business magazine in Real Estate/Land Use (2017, 2021-2023)
- Named a “Legal Eagle” for Real Estate Law by Virginia Living magazine (2012)

GENTRY LOCKE
Attorneys

G. Wythe Michael

Partner

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Wythe Michael is a Partner in the firm's General Commercial practice group where he advises closely held companies on business law matters including mergers and acquisitions, commercial transactions, security 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. He regularly acts as outside "general counsel" assisting privately held companies close deals, evaluate and manage risk, and pursue new opportunities. Wythe frequently works with healthcare providers, manufacturing, construction, technology, real estate, dental, and veterinary 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 numerous issuers in structuring and implementing private securities offerings, raising in excess of $750 million in equity since 2003.
- 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 clients in the strategic acquisition or sale of distressed technology companies involving structured payments to creditors and potential shareholder earn-outs.
- 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

- Virginia's Legal Elite®, in Business, Virginia Business Magazine

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

GENTRY LOCKE
Attorneys

Michael V. Moro, II

Partner

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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 commercial transactions, mergers and acquisitions, and corporate governance matters. 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

- Handled all aspects of mergers and acquisitions transactions for a publicly traded company, including acquisitions in Europe and South America
- Represented client in the successful renegotiation of its syndicated credit facility
- Represented client in the negotiation of software license agreements and cloud services agreements with national retailers
- Negotiated complex IT service agreements with global sports federations and broadcasters
- Assisted clients with entity formation and the preparation of governing documents, including bylaws, shareholder agreements and operating agreements
- 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
- Sandler Center Foundation Giving Circle
- Hampton Roads Community Foundation Community Leadership Partners

Admissions

- Virginia State Bar
- The Florida Bar

GENTRY LOCKE
Attorneys

Scott A. Stephenson

Partner

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

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

Education

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

Experience

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

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

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

Affiliations

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

Admissions

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

Awards

- Noted on "Ones to Watch" list by Best Lawyers in America for Commercial Litigation, Antitrust Law, and Energy Law (2021-2024)

GENTRY LOCKE
Attorneys

Noah P. Sullivan

Partner

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Noah Sullivan has a diverse litigation practice, focused on high-stakes commercial, government, and regulatory litigation. 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. At Gentry Locke, Noah combines his commercial litigation experience and Virginia-government experience to help clients navigate their most significant litigation, regulatory, and government-facing challenges.

Education

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

Experience

- Represented clients in numerous cases in federal and state courts, tackling significant matters on a broad spectrum of legal and factual issues, including:
  - 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

- Rated AV Preeminent by Martindale-Hubbell

GENTRY LOCKE
Attorneys

Todd A. Leeson

Partner

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Todd Leeson is the Chair of Gentry Locke's Employment law practice group. He has almost 35 years of experience representing and advising Virginia employers in employment and labor law matters and litigation. He regularly defends employment claims in Virginia courts and before agencies including the EEOC, National Labor Relations Board (NLRB), DOL, OSHA (whistleblower and retaliation claims), and the corresponding Virginia agencies (DOLI, OCR). His experience includes the defense of companies as to alleged violations of Title VII, ADA, ADEA, FLSA, FMLA, the NLRA, and Virginia employment laws. Todd regularly drafts, enforces, and/or litigates non-compete agreements and executive employment contracts. In addition, he has considerable experience representing management in labor union matters including union avoidance campaigns, unfair labor practice charges and labor arbitrations. He also represents Virginia colleges in various student conduct matters including Title IX and sexual misconduct complaints.

Todd is rated "AV/Preeminent" by Martindale-Hubbell, is repeatedly named one of the *Best Lawyers in America* in Labor & Employment Law, and has regularly been named to various lists, including Virginia Legal Elite. As recent examples, in 2022, Virginia Lawyers Weekly named Todd a "Go-To Lawyer for Employment Law, and in 2022 Best Lawyers in America named Todd the "Lawyer of the Year" (Labor law-management) in Roanoke. Todd was also honored by Virginia Lawyers Weekly in 2021 as a "Leader in the Law."

Education

- University of Notre Dame Law School, J.D. cum laude
- College of William and Mary, B.A.

Experience

- Represents employers in employment-related litigation in federal and state courts in Virginia
- Has been counsel of record in over 90 employment cases in the Western District of Virginia
- Extensive advice to employers on various COVID-19 workplace questions, disputes, and issues
- Successfully defended companies in over 240 EEOC charges alleging various forms of harassment, discrimination and/or retaliation
- Obtained partial summary judgment in Virginia state court in business conspiracy and breach of fiduciary duty employment case that led to $400,000 settlement for corporation.
- Attained early dismissal or resolution of several OSHA whistleblower complaints including MAP-21, AIR-21, STAA and the FSMA
- Led team of lawyers to persuade Federal Government, and opposing counsel, to voluntarily dismiss a False Claims Act Complaint filed against a local company
- Trusted counsel to Board of Directors to negotiate separation of CEO
- Achieved dismissal of wrongful termination case filed against a global manufacturer by a terminated safety manager
- Obtained summary judgment of age discrimination case filed in Federal Court
- Prevailed in grievance hearing before City personnel board in which board upheld significant discipline against long-service manager
- Brokered settlement of challenging Title IX sexual misconduct case on behalf of college in which complainant and respondent had divergent interests
- Collaborated with college counsel to respond to OCR discrimination complaint filed by former student; OCR dismissed complaint
- Defended local restaurant in FLSA collective action tip pooling lawsuit which was recently dismissed by the court
- Moved to quash EEOC document subpoena resulting in dismissal of potential ADA class action
- Obtained dismissal of joint employer Title VII case against local company

- Negotiated early settlement of NLRB protected, concerted activity (PCA) case filed against local company
- Worked with DOL officials to resolve overtime claims filed against area restaurant
- Successful mediation of WARN Act cases filed against coal company
- Prevailed in labor arbitration upholding management right to modify union employee's work schedule
- Successful defense of College in case in which student challenged suspension decision pursuant to College's Student Conduct Code
- Achieved favorable resolution of ADA termination lawsuit filed in Virginia Federal Court
- Prosecution of business competition, trade secret, and business conspiracy case filed against global corporation who hired executive with various restrictive covenants
- Obtained dismissal of FMLA claim investigated by DOL
- Favorable resolution of a non-compete and non-solicitation case filed against a corporation and a newly-hired employee
- Favorable early resolution of an ADA termination lawsuit filed against company by a senior executive
- Successful defense in labor arbitration of management's right to demote a union president
- Attained summary dismissal of race and age discrimination case
- Expediently resolved purported FLSA collective action case filed against a construction company
- Advised company to withdraw recognition of longstanding union and prevailed on union challenge before the NLRB
- Achieved early resolution of challenging federal whistleblower claim filed against corporation
- Obtained summary judgment for nation's largest retail pharmacy chain in ADA disability discrimination lawsuit
- Represented one of the world's leading wealth management companies that was sued in a non-compete case in Virginia
- Successfully prosecuted trade secrets case resulting in $245,000 settlement for local manufacturer
- Persuaded court to dismiss a noncompete and trade secret action filed against an employer that hired a key employee
- Obtained summary judgment in sex discrimination lawsuit filed against global retailer with operation in Virginia
- Procured summary judgment for Fortune 100 insurer in a race discrimination case filed in Roanoke
- Retained by Executive Officer of Fortune 500 retailer to negotiate his executive employment contract with the Company
- Successfully represented management in several Union labor arbitration cases involving discharge or contract interpretation issues
- Acquired summary judgment for local college in tenure denial case
- Litigated significant ULP case with NLRB involving potential back pay or reinstatement of 23 terminated employees; case resolved on favorable terms
- Obtained summary judgment in ADA disability discrimination case against national bank
- Achieved partial summary judgment for Fortune 500 automotive supplier in sexual harassment and retaliation case
- Obtained defense verdict for local sheriff in race discrimination lawsuit; defense verdict affirmed on appeal
- Procured dismissal of wrongful termination case filed against health care employer by terminated nurse
- Obtained summary judgment for Fortune 500 company in Title VII equal pay case
- Procured summary judgment for employer in FLSA overtime lawsuit
- Represented several local businesses faced with Union organizing efforts and/or campaigns.
- Successfully conciliated case against local construction company in which EEOC had found "cause" in support of EEOC charge
- Obtained preliminary injunction for local software company in trade secrets and business conspiracy case
- Successfully represented local utility company as to several unfair labor practice allegations filed against it with the National Labor Relations Board
- Mediated employment-related cases on behalf of local companies in this region
- Obtained dismissal of Family Medical Leave Act (FMLA) case filed against one of the nation's largest food service distribution companies
- Achieved summary judgment in ADEA case arising out of reduction in force by local manufacturer
- Negotiated conciliation of EEOC religious discrimination charge on behalf of large fast food restaurant
- Successful defense of company in non-compete case in which company hired valuable executive from a competitor
- Favorable resolution of trade secrets and business competition case of behalf of a company who sued departing employees and their new employer
- Dismissal of ADA termination case filed against company by executive with alleged alcohol problems

Affiliations

- Board of Directors, Jefferson Center (2023-Present)
- Board of Directors, Downtown Roanoke, Inc. (2014-2023); Chair of board (2021-22)
- Board of Directors, Family Service of Roanoke Valley (2016-2023); Chair of board (2020)
- Council member, Labor Relations & Employment Law Section of Virginia Bar Association (2008-2013, new term beings Jan. 1, 2024)
- Virginia State SHRM Legislative Director (2012-14)
- Board member, Roanoke Valley SHRM (2007-2009); Past President (2000)
- Board of Trustees, Taubman Museum of Art (2007-2012)
- Board of Directors, Roanoke Regional Chamber of Commerce (2010-2012)
- Elder, Salem Presbyterian Church (2011-2013, 2016-2018)

- Member, Federal Bar Association (2011-Present)
- Faculty Member, The Management Institute at Roanoke College (2011-Present)
- Associate member, National Association of College and University Attorneys (2014-Present)
- Past President, Downtown Roanoke Rotary Club (2004-2005)
- Chair, Virginia State SHRM Conference (2002)
- Member, Labor & Employment Section, American Bar Association (1989-2018)
- Member, Labor & Employment Section, Virginia Bar Association (1989-Present)
- Member and Past President, William & Mary Roanoke Alumni Association
- Graduate, Trial Advocacy Institute of UVA Law School (2000)
- Frequent speaker for SHRM, business and college groups in Virginia
- Author of dozens of employment law articles

Awards

- Named “Go-To Lawyer” for Employment Law by Virginia Lawyers Weekly (2022)
- Named “Roanoke Lawyer of the Year” for Labor Law – Management (2022)
- Named one of The Best Lawyers in America® in the areas of Employment Law – Management (2011-2024), Labor & Employment Litigation (2011-2024), and Labor Law – Management (2019-2024)
- Designated one of the “Legal Elite” in the Labor/Employment law by Virginia Business magazine (2016-2017, 2019-2023)
- Named a “Leader in the Law” by Virginia Lawyers Weekly (2021)
- Designated a Virginia Super Lawyer in the area of Employment & Labor Law (2014-2019) and Super Lawyers Business Edition US in the area of Employment & Labor (2014)
- Named a “Legal Eagle” for Employment Law – Management and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Named a Top Rated Lawyer for Labor and Employment law by American Lawyer Media (2013)
- VBA Community Servant with 50 hours or more of certified pro bono legal and nonlegal community service, The Virginia Bar Association (2004-2010)

Published Work

- **Beyond the headlines: Virginia Values Act poses significant legal risks to Virginia Employers**; Law360; May 15, 2020
- **#MeToo and the Male Business Executive: A Call For Proactive Leadership**; Corporate Counsel Magazine; April 27, 2018.
- **Preventing Harassment in the Workplace: An Updated Analysis of the EEOC’s Call for a “Reboot”**; Bloomberg BNA Daily Labor Report; January 6, 2017.
- **Five Steps Virginia Employers Should Take to Help Avoid Whistleblower or Retaliation Claims**; Virginia Human Resources Today; Winter/Spring 2014.
- **EEOC Seeks to Provide Job Protection for LGBT Employees**; Virginia Human Resources Today; Summer/Fall 2013.
- **Policy Prohibiting Wage Discussion Found Unlawful**; Virginia Human Resources Today; Winter/Spring 2013.
- **Employers Face Significant Challenges Complying with the ADA Amendments Act**; Virginia Human Resources Today;Summer/Fall 2012.

Case Studies

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

- May 16, 2014 — **Virginia Company Prevails in Hard-Fought Labor Arbitration Case**

GENTRY LOCKE
Attorneys

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

Education

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

Experience

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

Affiliations

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

GENTRY LOCKE
Attorneys

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Associate

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Kate Pollard is a member of the firm's Commercial Litigation and Civil Defense Litigation practice groups. Prior to joining the firm as an attorney, Kate worked as a Summer Associate with Gentry Locke before graduating from William & Mary Law School. While in law school, Kate also worked as a Judicial Intern for the Arlington County Circuit Court and at the Legal Aid Society of Eastern Virginia. She also worked for a boutique lobbying firm in Washington D.C.

Education

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

Experience

- Through William and Mary's Innocence Project Clinic, worked with the Mid-Atlantic Innocence Project to conduct legal investigation and research of inmate claims of actual innocence. Drafted FOIAs, conducted interviews, reviewed court pleadings and transcripts, and prepared written summaries and analyses of cases.
- Through the William & Mary Family Law Clinic, represented and advised clients in a variety of cases, including divorce, custody, equitable distribution, and adoption.
- Drafted pleadings, motions, and discovery requests and responses.
- Conducted legal research, analyzed facts, and synthesized findings into memoranda.

Admissions

- Virginia State Bar

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T. Tyler Moses

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Tyler Moses is a member of the firm's General Commercial Practice Group. Tyler's practice is focused on estate planning, trusts and estates administration, and taxation maters. Prior to joining Gentry Locke, he worked as an associate at a firm in Charlottesville. Tyler is the YLD Liaison of the Virginia Bar Association Tax Section and a member of the Richmond Bar Association.

Tyler earned his J.D. from the University of Richmond School of Law and his B.A. from the University of Virginia. While in law school, he was admitted to the Order of Barristers and received the Virginia Bar Association Tax Award. Tyler is currently working towards his LL.M. in Taxation from the Georgetown University Law Center.

Education

- Georgetown University Law Center, Taxation LL.M.
- University of Richmond School of Law, J.D.
- University of Virginia, B.A.

Experience

- Represents clients in the structuring and implementation of estate plans, wills, and trusts
- Guides individuals and families through the probate process
- Develops the appropriate operating agreements, assignment of partnership interests, real property deeds, and nonjudicial settlement agreements for business transitions
- Prepares asset purchase agreements
- Assists clients with new business entity formation

Affiliations

- YLD Liaison, Virginia Bar Association Tax Section
- Member, Richmond Bar Association
- Board Member, Theta Chi Xi Chapter Alumni Association

Admissions

- Virginia State Bar
- United States Tax Court

Awards

- Recipient, Virginia Bar Association Tax Award
- Member, Order of Barristers

Published Work

- Author, United States Penal System: Approaches to Rehabilitating Minor Drug Offenders and the Efforts of Governments to Reduce the Number of Incarcerated Individuals, 24 RICH. PUB. INT. L. REV. 167 (2021).
- Co-author, Tax Court Imposing Sec. 6673 Penalty, 21 J. TAX PRAC. & PROC., Oct.–Nov. 2019, at 43.
- Co-author, Exasperation, Frustration, Disappointment, 98 TAX NOTES STATE, Oct. 2020, at 229.

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Emily S. Mordecai

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Emily Mordecai is a member of the firm's Commercial Litigation team. Emily's experience spans nearly every phase of litigation-focused practice, from pre-litigation counseling through trial and appeal. Her subject-matter experience ranges from complex commercial disputes to products liability and personal injury cases to nationwide employment class actions.

Emily maintains an active pro bono practice. Prior to joining Gentry Locke, she argued an appeal before the U.S. Court of Appeals for the Fourth Circuit, which resulted in a favorable outcome for her client and established precedent governing "rough ride" claims by prisoners and arrestees. Emily's pro bono practice also includes housing and contracts cases.

Education

- University of Virginia School of Law, J.D.
- University of Virginia, B.A.; Phi Beta Kappa

Experience

- Represented corporate clients including housing developers and military contractors in complex commercial disputes involving breach of contract, intellectual property, and unfair business practice claims
- Served as national trial counsel for Fortune 500 clients in product liability/personal injury MDLs and other coordinated proceedings
- Advised clients on regulatory compliance issues including COVID-19 workplace safety requirements
- Defended Fortune 100 retailer in early stages of putative nationwide class action asserting claims under Title VII and state employment discrimination laws
- Represented employers in OSHA investigations
- Argued appeal in prisoners' rights case before the U.S. Court of Appeals for the Fourth Circuit
- Representative matters reflect work prior to joining Gentry Locke

Affiliations

- Executive Committee, Richmond Bar Association, Young Lawyers Section

Admissions

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

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 17, 2023 — **STB Holds That Town Can't Thwart Development of Rail Facilities**

GENTRY LOCKE
Attorneys

Michael J. Finney

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

Education

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

Experience

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

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

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

Affiliations

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

Awards

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

Published Work

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

Case Studies

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

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

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Jon Roellke is a member of the firm's Civil Defense Litigation practice group. Prior to joining the firm as an attorney, Jon was a Law Clerk at the Virginia Court of Appeals and the Chesterfield Circuit Court. While in law school at the University of Richmond, Jon worked as an Intern for the Office of the Federal Public Defender, Western District of Virginia and at the Central Virginia Legal Aid Society where he was also a Virginia Law Foundation Fellow.

Education

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

Experience

- Drafted bench memoranda and opinions for state intermediate appellate court judge
- Prepared memoranda and orders in state trial court on all civil matters before the court

Affiliations

- Virginia Bar Association
- Federal Bar Association

Admissions

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

GENTRY LOCKE
Attorneys

Melissa E. O'Boyle

Partner

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Melissa E. O'Boyle is a Partner in Gentry Locke's Criminal & Government Investigations practice group. Previously, Melissa worked for more than 15 years as an Assistant United States Attorney in the Eastern District of Virginia, litigating some of the District's most complex fraud and corruption cases, investigating and prosecuting a broad array of criminal matters, and coordinating relationships with law enforcement and regulatory partners. Most recently, she served as the chief of criminal prosecutions for Norfolk's Criminal Division, where she supervised over 19 federal prosecutors and managed the white-collar unit responsible for authorizing and managing fraud, public corruption, securities, national security, and civil rights investigations. Melissa has handled several high-profile criminal prosecutions, including a public corruption case against former Norfolk Vice Mayor Anthony Burfoot, and a complex bank fraud case against the senior executives responsible for the financial collapse of the Bank of the Commonwealth.

As a member of the firm's Criminal & Government Investigations practice, Melissa will work with clients on developing and implementing effective regulatory compliance programs, internal controls, and ethics programs across a variety of industries including banking, securities, government contracting, cyber security, insurance, and healthcare. Melissa also will work with clients to conduct internal investigations and will provide strategic advice aimed at mitigating any potential negative impacts on business operations, criminal, civil, or regulatory exposure, and reputational harm. Given her extensive trial experience, Melissa also will assist clients in analyzing and developing successful litigation strategies.

Melissa is admitted to practice in Virginia, the District of Columbia, and New York. In 2022, she was recognized with a Top Prosecutor Award by the Women in Federal Law Enforcement (WIFLE) for exemplary achievements in prosecutions of federal crimes. O'Boyle was also recognized with the EOUSA Director's Award for Superior Performance as an Assistant United States Attorney in 2011 and 2016 and received the FBI Director's Citation for Excellence in Prosecution in 2014.

Education

- Washington and Lee University School of Law, J.D. cum laude
- Capital University, B.A. summa cum laude

Experience

- Served as the Criminal Chief of the Norfolk Division of the United States Attorney's Office for the Eastern District of Virginia. Managed white-collar unit with responsibility for authorizing and managing fraud, public corruption, securities, national security, and civil rights investigations.
- Served as Assistant United States Attorney for the Eastern District of Virginia for over fifteen years.
- Investigated and prosecuted a broad array of federal criminal matters including, but not limited to, conspiracy, public corruption, securities fraud, bank fraud, healthcare fraud, wire and mail fraud, money laundering, identity theft and cybercrime.
- Served as lead prosecutor in successful ten-week criminal jury trial involving the former CEO of the Bank of the Commonwealth, other bank executives, and certain favored customers.
- Served as lead prosecutor in numerous successful public corruption jury trials involving local Virginia government officials including a former Vice Mayor, a former Sheriff, a former Police Detective, and a Congressional candidate.
- Served as lead prosecutor in successful five-week criminal securities fraud jury trial involving the CEO of a Virginia-based investment firm.
- Prepared and argued numerous appeals before the United States Court of Appeals for the Fourth Circuit.

Affiliations

- Member: Virginia State Bar

- Member: New York State Bar
- Member: District of Columbia State Bar
- Member: Federal Bar Association, Norfolk Chapter
- Member: Virginia Beach Bar Association

Awards

- Women In Federal Law Enforcement Association – Top Prosecutor Award (2022)
- EOUSA Director’s Award for Superior Performance as an Assistant United States Attorney (2016)
- EOUSA Director’s Award for Superior Performance as an Assistant United States Attorney (2011)
- FBI Director’s Citation for Excellence in Prosecution (2014)
- Office of the Inspector General Board of Governors of the Federal Reserve, Consumer Financial Protection Bureau – Award for Bank of the Commonwealth Prosecution (2014)
- Office of the Inspector General for the FDIC – Award for Bank of the Commonwealth Prosecution (2014)
- Virginia Bank Security Association – Honorary Award (2014)
- Virginia Bank Security Association – Star Award (2010)

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Jeffrey P. Miller

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Jeff Miller is a member of the firm's Civil Defense Litigation practice group. Jeff represents his clients in Virginia's state and federal courts across a wide variety of practice areas, including transportation, hospitality, defamation, and business disputes, both at the trial and appellate level. Jeff has tried dozens of cases, defeated multiple claims at the motions stage, and served as second chair on multi-million-dollar brain injury trials before Virginia juries.

Jeff frequently defends trucking companies in catastrophic injury, brain injury, and wrongful death cases, in addition to his work defending retailers and amusement parks, and litigating various commercial and intentional tort claims. Jeff has extensive experience working with experts in the fields of accident reconstruction, human factors, biodynamics, brain injury medicine, engineering, and other professionals with a range of specialties. Jeff also assists our transportation clients as part of the rapid response team, helping them navigate the crucial minutes and hours immediately after an accident occurs.

Prior to beginning his law career, Jeff studied music and put his talents to use as a professional piano player and entertainer.

Education

- University of Richmond School of Law, J.D., magna cum laude
- Regis University, B.S., summa cum laude

Experience

- Litigated in all Virginia state courts and US District Courts for the Eastern and Western Districts of Virginia
- Tried dozens of General District Court cases to verdict, tried multiple Circuit Court trials to jury verdict as second-chair, and second-chaired two-week federal jury trial resulting in a defense verdict
- Won dismissal of million-dollar premises lawsuit on a pre-discovery motion to dismiss
- Secured dismissal on summary judgement of multimillion-dollar discrimination claim against amusement park security team
- As a research assistant for the Court of Appeals of Virginia, assisted in research and writing for an article on the "do's and don'ts" of appellate advocacy in Virginia, published in the University of Richmond Law Review's 2014 Annual Survey

Affiliations

- President of the Henrico County Bar Association (2023-2024); Board Member since 2017
- John Marshall Inn of Court (2018-Present)
- Richmond Bar Association (2015-Present)
- Virginia Bar Association (2015-Present)
- Virginia Association of Defense Attorneys (2015-Present)
- Defense Research Institute (2015-2020)

Speaking Engagements

- Presenter, "Sit Down and Shut Up: The Art of Self-Awareness and Editing in Jury Trials," Gentry Locke Seminar, Richmond, VA, October 12, 2023
- Co-Presented Defending Freight Brokers and Transportation Intermediaries: New FMCSA Guidance; Preemption Under Ying Ye v. GlobalTranz, a Strafford Webinar on September 28, 2023

- Presenter, “Managing the Insurance Relationship: Making Sure Your Coverage is There When You Need It,” Gentry Locke Seminar, Richmond, VA, September 28, 2022, co-authored by Guy M. Harbert, III.
- Presented the Appellate Section’s Annual Case Law Update: Virginia Cases at the Virginia Association of Defense Attorneys, Spring Sections Seminar 2020

Awards

- Named to Best Lawyers “Ones to Watch” List for Commercial Litigation, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, and Transportation Law (2021-2024)
- Named a Virginia Super Lawyers Rising Star in “Civil Litigation: Defense” (2020-2024)
- Named a Virginia Business Legal Elite “Young Lawyer” (2019)
- Awarded Pro Bono Certificate by University of Richmond (2015)
- Order of the Coif (2015)
- CALI for 1st Amendment Law and Antitrust (2014)
- McNeil Honor Society (Inducted 2014)

Published Work

- Author, The Statute Has No Clothes! How Contemporary Free Exercise Clause Cases Stand to Expose the Failings of the Religious Freedom Restoration Act and the Merits of the Smith Standard, prize winning article in the 2015 McNeil Honor Society legal writing competition
- Co-Author with Laura D. Windsor, Another Hoop For Government Contractors: The Fair Pay and Safe Workplaces Executive Order, Summer 2014 Client Alert
- Research Assistant, University of Richmond Law Review: Appellate Law, authored by The Honorable Marla Graff Decker, published in the University of Richmond Law Review’s 2014 Annual Survey

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.

- Mar 26, 2024 — **United Parks & Resorts Earned a Defense Verdict After Nearly Seven Years of Litigation**
- Mar 26, 2024 — **Defense Verdict Obtained for Western Express in Rear-end Accident**
- Apr 5, 2022 — **Court Grants Summary Judgment from the Bench in Favor of Big Box Retailer**

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John Danyluk practices with the firm's White Collar practice group, ranked Band 1 by Chambers USA. 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 uses his intimate knowledge of federal and military 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), and ITAR.

John also represents both corporate and individual clients during their most difficult times, defending and guiding them through all phases of the criminal process. John conducts internal investigations for organizations of all sizes to identify exposure areas and provide proactive guidance to protect those clients from future litigation or criminal prosecution.

Prior to joining Gentry Locke, John had a distinguished career with the United States Armed Forces, serving for more than four years in the U.S. Army Judge Advocate General's Corps in Texas and Germany. 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

- Advised multiple clients on data privacy compliance, including compliance with the Virginia Consumer Data Protection Act (VCDPA), California Consumer Protection Act (CCPA), and General Data Protection Regulation (GDPR).
- Advised international defense contractors regarding compliance with federal regulations, including FAR, DFARS, ITAR, and CMMC 2.0.
- Advised several clients regarding substantial losses due to cyber-attacks, including business email compromise attacks and cyber-extortion.
- Defended multiple international pharmaceutical companies facing criminal charges or civil lawsuits related to healthcare fraud.
- Represented a key member of management of a major professional sports franchise during federal and state regulatory and criminal investigations.
- 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 a 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 numerous clients accused of state and federal crimes, including fraud, sexual assault, criminal misbranding, Endangered Species Act violations, and violations of the Federal Insecticide, Fungicide, and Rodenticide Act.
- 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

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

GENTRY LOCKE
Attorneys

Jessiah S. Hulle

Associate

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Jessiah practices with the firm's Criminal and Government Investigations practice group where his primary focus is working with clients on federal grand jury investigations and white-collar criminal defense matters. He also assists the Employment, Civil Defense Litigation, and Commercial Litigation practice groups with critical and dispositive motions and appeals.

Prior to joining the firm, Jessiah clerked for the Honorable Mary Grace O'Brien of the Court of Appeals of Virginia.

Education

- Washington and Lee University School of Law, J.D. magna cum laude
- University of Valley Forge, B.A. summa cum laude

Experience

- Assist with conducting internal investigations and defending clients in the life sciences, healthcare, insurance, and hospitality industries against prosecutions, grand jury investigations, and civil enforcement actions.
- Research complex issues involving the Food, Drug, and Cosmetics Act (FDCA), Racketeering Influenced and Corrupt Organizations Act (RICO), Patient Protection and Affordable Care Act (ACA), Endangered Species Act (ESA), False Claims Act (FCA), Social Security Act (SSA), and the Virginia Business Conspiracy Act.
- Coordinate, plan, and execute large-scale document review projects on e-discovery platforms such as Relativity and Logikcull.
- Draft critical and dispositive motions in multimillion-dollar employment law, contract, and tort litigation.
  - Won pre-discovery dismissal of case alleging civil RICO, business conspiracy, breach of contract, conversion, and other torts filed against healthcare company and its owner.
  - Won summary judgment for an employer on four issues of first impression in a case alleging whistleblower retaliation.
- As a law clerk to the Honorable Mary Grace O'Brien, researched issues of state criminal law and federal Constitutional law on appeal to the Court of Appeals of Virginia.
- As a student attorney for a Commonwealth's Attorney's Office, tried cases, drafted motions, negotiated plea deals, and argued at bond hearings.
- As an intern at a United States Attorney's Office, assisted in defending against civil suits and prosecuting a variety of federal crimes including narcotics trafficking, deprivation of civil rights under color of law, and bank, wire, and securities fraud.

Affiliations

- Member, Virginia State Bar (2020-present)
- Member, Roanoke Bar Association (2022-present)
- Member, Federal Bar Association, Western District of Virginia Chapter (2021-present)
- Judge, American Bar Association Client Counseling Competition (2022)
- Judge, National Black Law Students Association Thurgood Marshall Moot Court Competition (2021, 2022)
- Volunteer, Virginia Model Judiciary Program (2021, 2022)
- Judge, National Moot Court Competition, Region 3 (2020), Region 4 (2021)
- Appellate Advocacy Chair, Moot Court Executive Board, Washington and Lee University School of Law (2019-2020)
- Member, National Black Law Students Association (2018-2020)
- Member, American Bar Association, Law Students Division (2018-2020)

Admissions

- Virginia Bar
- United States District Court, Western District of Virginia
- United States District Court, Eastern District of Virginia

Awards

- 40 Under 40, the Roanoker Magazine (2024)
- Pro Bono Honor Roll, Virginia Access to Justice Commission (2023)
- President's Volunteer Service Award: Bronze, AmeriCorps (presented by the Roanoke Bar Association) (2023)
- Best Petitioner Brief Award and Runner-Up Team, National Thurgood Marshall Moot Court Competition (2020)

Published Work

- Author, **AI Standing Orders Proliferate as Federal Courts Forge Own Paths**, Bloomberg Law, 2023
- Author, **Artificial Intelligence, Real Discrimination**, University of Richmond Journal of Law and Technology, 2023

GENTRY LOCKE
Attorneys

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 serves on the firm's Executive Board and is also a litigation partner specializing in complex business cases, representing individuals and companies in courts throughout the Commonwealth of Virginia and the nation.

Education

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

Experience

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

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

Affiliations

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

Awards

- Designated one of the "Legal Elite" in Legislative/Regulatory/Administrative law by Virginia Business magazine (2019-2020, 2022-2023) and for Government & Regulatory Affairs (2021)
- Named a "Leader in the Law" by Virginia Lawyers Weekly (2017)
- Recipient, Client Distinction Award, Martindale-Hubbell (2012)
- Named a Top Rated Lawyer for Commercial Litigation, General Practice, and Products Liability law by American Lawyer Media (2013)
- Named to the Blue Ridge Business Journal's "20 Under 40 List" of the Blue Ridge Region's up-and-coming business leaders (2010)
- Designated as one of the Legal Elite in the Young Lawyer category by Virginia Business magazine (2004 and 2009)
- Recipient, RPV Governor's Award – recognized as Best Chair throughout the Commonwealth of Virginia
- Named a Virginia Super Lawyers for Government Relations (2018-2024); previously named Rising Star in the area of Business Litigation (2008, 2010, 2012-2016), General Litigation and Personal Injury Plaintiff (2008), Commercial Litigation (2011)
- Roanoke Bar Association President's Volunteer Service Award, Bronze level, for 100-249 hours of community service in a calendar year
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

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Partner

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Chip Dicks is a former member of the Virginia House of Delegates, served on the Courts and served on the Virginia Housing Commission as a House member. Since leaving the Legislature in 1990, he has represented associations and businesses on administrative, legislative and regulatory matters before state government agencies and the Virginia General Assembly. He has substantial experience representing developers on solar and a variety of land use applications across Virginia. Chip has extensive experience in the laws and regulations affecting outdoor advertising signs, and in the field of landlord tenant and fair housing laws.

Chip co-chairs the Gentry Locke Solar and Energy Storage Team and in that capacity, represents private companies and industry organizations legislative and regulatory policy initiatives in the Commonwealth of Virginia. The Gentry Locke Solar and Energy Storage Team represents solar and energy storage developers in land use cases throughout Virginia.

Chip joined Gentry Locke in 2018 to practice with our Government & Regulatory Affairs group in Richmond.

Education

- Stetson University College of Law, J.D.
- Methodist College, B.A.

Experience

- Represented Virginia Realtors as Legislative Counsel in the Virginia General Assembly for more than 30 years and has had a hand in writing significant portions of the real estate and landlord tenant state statutes during that time.
- Served as a member of the Virginia Code Commission Work Group to rewrite all of Title 55 of the Code of Virginia, which includes real estate related state statutes. Title 55 will was recodified into Title 55.1 effective on October 1, 2019.
- Served for more than 20 years as a member of each of the three Work Groups established by the Virginia Housing Commission, which acts as a think-tank on real estate and housing related legislation.
- Represented the Outdoor Advertising Association of Virginia as Legislative Counsel for more than 30 years and during that time, has had a hand in writing state billboard related legislation in the Virginia General Assembly and in that capacity, has been recognized as a national expert in sign law by industry groups.
- Represented the Northern Virginia Apartment Association as Legislative Counsel in a major rewrite of the state statutes relating to administrative zoning determinations and variances before the Boards of Zoning Appeals in the Commonwealth.
- Tried numerous declaratory judgment actions and cases before Boards of Zoning Appeals throughout the Commonwealth to obtain favorable outcomes to protect the zoning rights of clients.
- Represented the Virginia Realtors as Legislative Counsel in major rewrites of the state statutes relating to vested zoning rights of private property owners.
- Led the effort to establish the first “Remote Online Notarization” legislation in the United States in the 2011 General Assembly to enable an electronic notary to notarize the signature of a signer not in the physical presence of the notary.
- Represented a coalition of major business and real estate organizations in the substantial rewrites of the eminent domain state statutes in the Virginia General Assembly during the years following the US Supreme Court decision in Kelo v. New London, Conn.
- Represented Lamar Advertising Company in cases in the Richmond Circuit Court and before the Virginia Supreme Court successfully protecting Lamar’s vested zoning rights under state statutes.
- Former Co-Owner of a cell tower company which was sold to a publicly traded company and handled all aspects of developing a wireless cell tower company from the start-up stage through mature operation, and as an attorney, have represented wireless companies in zoning cases in multiple localities in the Commonwealth as well as worked on broadband deployment through fiber deployment.

- Directed an economic development practice for a law firm and in that capacity, participated in foreign trade missions with various Governors of Virginia, and participated in recruiting prospects, structuring deals and closing economic development transactions to benefit the Commonwealth of Virginia.
- Structured a number of complex financing deals monetizing government revenue streams into off-balance sheet transactions to create opportunities to fund government infrastructure otherwise not achievable.
- Represented a multi-national oil company in a tank farm spill in Fairfax City and Fairfax County.
- Represented a major petroleum pipeline company in a significant fuel leak in Fairfax County.
- Represents the Virginia Manufactured and Modular Home Association as Legislative Counsel including positioning this industry as a key player in finding solutions to address the affordable housing crisis in the Commonwealth.
- Represents the Circuit Court Clerks as Legislative Counsel and in that capacity, has written legislation that established a “digital legal framework” for automation of all land records in the Commonwealth, which enables efficiency in private real estate transaction including the ability to conduct all-electronic real estate settlements. In addition, this representation includes writing legislation that streamlines the criminal procedures and the procedures used in civil cases, probate and all other substantive areas of law handled by the Circuit Court Clerks.
- Represented CHESSA (formerly MDV-SEIA), for more than 10 years, a leading solar industry player, in its legislative and regulatory initiatives in Virginia and in that capacity, has had a significant hand in transforming energy policy in the Virginia General Assembly in the Commonwealth in the last 6 years helping to improve the marketplace for development of new solar energy facilities in Virginia.
- Experienced in trying civil cases in numerous circuit courts throughout the Commonwealth and administrative appeals before numerous regulatory agencies in the Commonwealth.
- Experienced in handling cases before the Supreme Court of Virginia.

Affiliations

- The Virginia Bar Association (1990-Present)
- Member, Virginia Apartment and Management Association
- Member, RVA Chamber
- Member, Chesterfield Chamber
- Member, Virginia Chamber
- Former Board Member, Virginia Chamber
- Former Member, Virginia House of Delegates
- Former Chair, Joint Legislative Commission on Infrastructure and Revenue Resources in the Commonwealth
- Former Member, Virginia Alcohol Safety Action Project
- Former Member, Virginia Housing Commission
- Member, Virginia Public Action Project
- Member, Virginia Free
- Former Board Member and Member of the Executive Committee, Virginia Economic Bridge
- Member, Virginia Economic Developers Association
- Former Member, Japan-Virginia Society
- Former Member, Canada-Virginia Business Association
- Former Board Chair, YMCA of Chester
- Former Member, Kiwanis Club
- Former Co-Chair, Epilepsy Society of Virginia
- Former Assistant Commonwealth’s Attorney
- Former Chair, Chesterfield Democratic Committee
- Former Member, Northern Virginia Building Industry Association
- Former Member, Fairfax Chamber
- Former Member, Apartment and Office Building Association
- Former Member, Metropolitan Washington DC Board of Trade
- Former Member, Home Builders Association of Virginia

Awards

- Selected to Virginia Lawyers Weekly Class of 2023 Hall of Fame (2023)
- Designated one of the “Legal Elite” in Legislative/Regulatory/Administrative law by Virginia Business magazine (2019-2020, 2022-2023) and for Government & Regulatory Affairs (2021)
- Designated as a Fellow of the Virginia Law Foundation (2020)
- Named a “Leaders in Law” honoree (2019)
- Named “Outstanding Young Man of Virginia” by the Virginia Jaycees (1988)
- Named Distinguished Alumnus by Methodist University (1988)

GENTRY LOCKE
Attorneys

Carlos L. Hopkins

Partner

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

Education

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

Experience

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

Affiliations

- 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)

Published Work

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

GENTRY LOCKE
Attorneys

Patrice L. Lewis

Government Affairs Director

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Patrice Lewis serves as our Government Affairs Director, using data and strategy to help clients achieve their legal, policy, and communications goals. Patrice's eclectic background fuses law with policy and communications. She recently served as a strategic marketing and communications consultant for SIR, Inc. located in Richmond, VA. Prior to her time at SIR, she worked as an outreach representative for Senator Mark R. Warner, serving Central and South Central Virginia, and as the legislative assistant to former Delegate Onzlee Ware. Patrice is a native of Roanoke, Virginia. She received her undergraduate degree in sociology from the University of Virginia and her law degree from Regent University School of Law. Patrice is also licensed to practice law in 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
- 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

- Lewis F. Powell, Jr. Inn of Court Member
- National Black Professional Lobbyists Association Member
- 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

GENTRY LOCKE
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Zachary R. LeMaster

Government Affairs Director

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Zach LeMaster is our Government Affairs Director. Zach specializes in providing insight on the rules and procedures of the General Assembly to clients who need a comprehensive strategy to support their legislative goals through the biennial budget and legislative process. He is not an attorney. Zach has been involved in nearly every major policy initiative in the Virginia General Assembly since 2014 including the biennial budget, modernizing Virginia's energy policy, criminal justice reform, marijuana decriminalization, and the expansion of gaming and gambling in the Commonwealth. His experience in state policy and strategic communications includes serving as Legislative Aide to Virginia Senator, Thomas K. Norment, Jr. who was both Majority and Minority Leader during Zach's tenure. Zach earned his Bachelor of Science in Public Policy and Administration with a minor in Political Science from James Madison University.

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

GENTRY LOCKE
Attorneys

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. She received her Bachelor of Arts from the College of William & Mary where she studied Government and Arabic.

Education

College of William & Mary, Bachelor of Arts in Government and Arabic

Experience

- Wrote and published op-eds to advance clients' legislative and regulatory interests.
- Representation of clients in various regulatory work groups.
- Developed and executed contribution plans for political action committees.
- Planned and organized fundraisers and community events.
- 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

- Serves as Junior Board Member and Events Chair for the Children's Home Society of Virginia, an adoption and foster care agency based in Richmond.

Published Work

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

GENTRY LOCKE
Attorneys

Patricia "P.J." Turner

Partner

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P.J. Turner is a partner in the firm's Commercial Litigation and Construction Law practice groups where she serves as a trial-level and appellate litigator. PJ focuses her practice in the areas of construction and products-liability litigation but has seasoned experience litigating a variety of complex commercial disputes, including those involving contract breaches, business torts, employment matters, collection matters, defamation, and insurance coverage disputes. In addition, P.J. has successfully handled multiple appeals to the Supreme Court of Virginia and Virginia Court of Appeals, as well as appeals to the Third and Fourth Circuit Courts of Appeals.

Education

- Loyola University New Orleans School of Law, New Orleans, Louisiana, J.D.
- Davidson College, Davidson, N.C., B.A.

Experience

Construction

- Represented owners, manufacturers, and suppliers in alleged design defect matters
- Represented owners, general contractors, and subcontractors in alleged construction defect matters
- Represented owners, general contractors, subcontractors, and suppliers in mediation and litigation in both state and federal courts.
- Represented owners, general contractors, and subcontractors in disputes where significant delay claims, including liquidated damages, were alleged
- Assisted contractors, subcontractors, and suppliers in drafting and negotiating contracts
- Represented sureties, general contractors, and subcontractors in connection with bond claims

Products Liability

- Serves as national trial counsel for product manufacturer in asbestos litigation
- Succeeded on appeal in upholding summary judgment rulings by lower federal courts in several product-liability actions
- Obtained summary judgment for publicly traded corporation client numerous times in various product-liability actions
- Represented product manufacturers, contractors, and premises owners in defense of numerous product-liability actions related to garage doors, pumps, air compressors, boilers, HVAC equipment, turbine-generators, electrical equipment, wood roof trusses, gaskets, packing, automotive brakes and clutches, and other residential and commercial products and equipment
- Assisted in preparing nationwide strategy for publicly traded corporation client in defending products-liability actions concerning certain asbestos-containing electrical products
- Has taken and defended over 100 fact and expert depositions

Affiliations

- Virginia Bar Association, Member
  - Appellate Practice Section; Civil Litigation Section; Construction/Public Contracts Law Section
- Virginia State Bar
  - Litigation Section; Construction Law Section
- Bar Assocation of the City of Richmond, Member
  - Litigation Section, Chair (2019-2020); Executive Committee
  - Judiciary Committee
- Virginia Association of Defense Attorneys, Member

    - Board of Editors, The Journal of Civil Litigation (2013-present)
    - Chair, Appellate Advocacy Section (2015-2016)
    - Chair, Corporate and Commercial Litigation Section (2009-2019)
- Associated General Contractors of Virginia, Member
- Metro Richmond Women's Bar Association
- Defense Research Institute ("DRI")
- National Association of Women in Construction (NAWIC), Member
- Commercial Real Estate Women (CREW), Member
- Greater Richmond Association for Commercial Real Estate (GRACRE), Member

Admissions

- Virginia
- U.S. District Court Eastern District of Virginia
- U.S. District Court Western District of Virginia
- U.S. Bankruptcy Court Eastern District of Virginia
- U.S. Court of Appeals 4th Circuit
- U.S. Court of Appeals 3rd Circuit

Awards

- Virginia Super Lawyers Rising Stars 2014-2020 for Personal Injury – Products: Defense

GENTRY LOCKE
Attorneys

Andrew O. Gay

Partner

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Andrew Gay practices in and is the deputy chair of Gentry Locke's Construction Industry practice group and serves as outside general counsel to his many construction clients. Andrew has experience with contract drafting, contract negotiations, payment disputes, lien and bond claims, performance disputes, licensure compliance, internal investigations, design defects, construction defects, and delay claims. As an active member in the local, state, and national bars, as well as the Virginia Transportation Construction Alliance, Andrew frequently writes and speaks on issues that impact the construction industry. Andrew has a bachelor's degree in construction management, and also worked as an estimator, project manager, and in-house general counsel for real estate and construction businesses. His deep roots and first-hand experiences in the construction industry allow him to provide practical legal and business advice to all his clients.

In addition to his construction practice, Andrew also advises clients on an array of general business and real estate matters as well as residential and commercial landlord tenant issues. He is licensed to practice in Virginia and Florida.

Education

- Liberty University School of Law, J.D.
- Everglades University, B.S. in Construction Management

Experience

- Represented top 50 ENR-ranked specialty trade subcontractor in bid protest for multi-million dollar subcontract on airport expansion project
- Defended multiple national builders in construction defect lawsuits by owners associations
- Represented multi-national satellite manufacturer in claims against the general contractor related to non-performance and delay
- Assisted various road building contractors and subcontractors in preparing, submitted, presenting, and resolving claims on public and private projects
- Defended waterproofing subcontractor on claims by top 50 ENR-ranked general contractor concerning construction defects on high-rise waterfront condominium
- Assisted multiple general and subcontractors in preparation and enforcement of mechanic's liens to secure payment for work performed
- Represented subsidiary company in a dispute regarding owner's claim for liquidated damages against the subsidiary. Obtained a favorable resolution for subsidiary without filing lawsuit
- Conducted multiple internal investigations of alleged employment discrimination in the workplace, all of which resulted in dismissal of the action at either the administrative or court levels
- Investigated and defended company from a civil penalty imposed by the Department of Labor, Mine Safety & Health Administration, which was concluded by the government's vacation of the citations
- Negotiated multiple construction contracts – design build contracts, joint-venture contracts, general contracts, subcontracts – for various road, bridge, industrial, and water/waste water projects
- Assisted in matters relating to Disadvantaged Business Enterprise (DBE) Compliance
- OSHA 30 Certified

Affiliations

- Admitted to practice in Florida, Virginia, and the United States District Courts for the Western and Eastern Districts of Virginia
- Virginia State Bar – Construction Law & Public Contracts Section

- Lynchburg Bar Association
- The Florida Bar – Real Property, Probate and Trust Law Section
- American Bar Association – Forum on Construction Law
- Board Member, Golf Committee Chair of the Rotary Club of Lynchburg-Morning
- Vice Chair of the Associate Leadership Committee of the Virginia Transportation Construction Alliance
- Member of the Political Action Committee and Legislative Council of the Virginia Transportation Construction Alliance

Speaking Engagements

- Presenter, “Virginia Construction Update. What’s Keeping the Industry Up at Night?”, VTCA Winter Meeting (January 2024)
- Presenter, “Virginia’s New Payment Laws Are In Play. What Does That Look Like?”, VTCA Winter Meeting (January 2023)
- Presenter, “What You Need to Know About the New Construction Payment Laws,” Brown Edwards Construction Symposium (December 2022)
- Presenter, “T-Minus 31 Days to the New Payment Laws. Here’s What You Should Know,” VTCA Hampton District Dialogue (November 2022)
- Presenter, “What You Need to Know About the New Construction Payment Laws,” Gentry Locke Webinar (September 2022)
- Presenter, “Virginia’s New Construction Payment Laws,” VTCA Annual Meeting (July 2022)
- Presenter, “Changes to AIA Construction Contracts,” Gentry Locke and Brown Edwards Construction Seminar, Virtual (2020)
- Presenter, “Risk Management,” AGC VA Project Manager Development Program (2020)
- Presenter, Risk Management in Construction Contracts, Associated General Contractors (AGC) Young Construction Leaders (June 2018)
- Presenter, From Project Manager To Attorney At Law: Things I Wish I Knew When I Managed Construction Projects, Brown Edwards’ 2017 Annual Central Virginia Construction Conference (November 2017)
- Presenter, ESI Competence – A Rumsfeldian Approach to Ethical E-Discovery Old School, Meet New Tech – CLE Seminar (September 2017)
- Presenter, Doing Business Together – Ten Things to Consider Before You Sign, Virginia Transportation Construction Alliance (VTCA) Annual Meeting (July 2017)
- Presenter, Intricacies of Construction Schedules and Claims, Gentry Locke and Delta Consulting (June 2017)

Awards

- Named a Lynchburg Business Top Lawyer in Construction Law (2020-2024)
- Named an AV Preeminent Attorney – Judicial Edition (2023)
- Named a Virginia Rising Star in Construction Litigation by Super Lawyers (2023, 2024)

Published Work

- Author, Beware the Duty to Defend Language in Contracts with Architects and Engineers, Gentry Locke (July 2022)
- Author, Supreme Court of Florida Upholds the Frye Standard, Carlton Fields (November 2018)
- Author, Fourth DCA Rules Ch. 558 Notice of Defect Can Constitute Commencement of Action, Carlton Fields (September 2018)

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Gregory J. Haley

Partner

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Greg Haley focuses his practice on commercial litigation and disputes involving local government. Greg has extensive experience in disputes involving contract claims, UCC issues, and corporate governance. Greg represents local governments and businesses in all matters involving local government law.

Greg brings an exceptional level of skill, intensity, engagement, and innovative thinking to his work. He believes the best results can be achieved by extra effort, leveraging expertise, early and accurate case evaluations, accessibility, and good communication. Greg analyzes legal matters not just as a lawyer, but also based on what solution the client needs, whether a business or local government.

Education

- College of William and Mary, J.D.
- Hampden-Sydney College, B.A. cum laude, Phi Beta Kappa

Experience

Commercial and Business Litigation:

Greg has tried numerous cases to verdict or decision. In the area of business litigation, these cases have included contract disputes, UCC issues (purchase and sale of equipment and goods), false claims, land development, government contracting, professional liability, tax disputes, and other matters.

- Represented commercial tenant in action for specific performance of contract for sale of real estate and for related damages
- Represented aircraft owner in action for specific performance of obligation to release escrow funds to pay for post-closing aircraft maintenance obligation and for related damages
- Represented manufacturer in recovery of payments under insurance policy covering liability for claims for potentially defective products
- Represented manufacturers of industrial equipment in litigation matters involving breach of contract, payment, claimed defect issues, and Uniform Commercial Code issues
- Represented relator in major False Claims Act case involving grant funded research
- Represented relators in federal False Claims Act recovery against state level entities for claims for medical services
- Represented seller in dispute under an asset purchase agreement involving post-closing adjustments and environmental indemnification claims
- Represented bank in litigation involving lender liability claims of bad faith loan administration and improper foreclosure
- Represented banks in litigation involving a check-kiting scheme and intercreditor disputes
- Represented tax consulting client in accounting malpractice claim against an international accounting firm
- Represented seller in the enforcement of a real estate purchase and sale contract to require buyer to specifically perform the contract involving large parcel for planned waterfront development
- Represented seller of airplanes in specific performance and breach of contract claims against buyer
- Represented employers in enforcement of noncompetition agreements, customer nonsolicitation agreements, and nondisclosure agreements
- Represented shareholders in corporate governance disputes
- Represented corporate management in shareholder derivative claims litigation.
- Represented engineering firms in professional liability claims

- Represented entities, including a community hospital and large manufacturing company, in real estate and other tax disputes with local governments
- Represented general contractors in defense of extra work claims by subcontractors in construction projects
- Represented owners in construction disputes with general contractors
- Represented owners in condemnation proceedings involving commercial and development properties
- Represented owner in litigation involving the termination of a general construction contract

Transactions:

Greg has significant experience in transactions. In many cases, the transaction work resulted from relationships established in prior litigation matters.

- Represented manufacturers in developing and implementing contract formation practices and managing transaction risk through use of favorable terms of purchase and/or sale
- Represented seller in negotiation of contracts for the sale of customized HVAC equipment for data center projects
- Represented shareholders in sale of stock in large manufacturing company
- Represented buyer in asset purchase transaction involving an animation technology service company
- Represented sellers in real estate transactions involving significant development properties and convenience stores
- Represented European equipment manufacturer in establishing United States operations including the formation of a U.S. subsidiary, establishing business and contract formation practices, and other related matters
- Represented parties in contract manufacturing, cooperative licensing and marketing agreements involving custom industrial equipment
- Represented manufacturer in the sale of a product line and related intellectual property rights
- Represented manufacturers in the development of international sales and marketing agreements
- Represented developers in the negotiation of economic development incentive agreements with local governments for hotel and mixed use projects
- Represented group of stockbrokers in developing new employment agreements with national financial firm

Local Government:

Greg is recognized as a leading attorney for representing local governments in litigation and for special projects.

- Represented local governments in litigation matters involving zoning, subdivision, utility extensions, public contracting and procurement, contract disputes, construction disputes, condemnation proceedings, and personnel matters
- Represented county in action to allow withdrawal from regional public service authority
- Represented county in action to recover cost sharing obligations for shared constitutional officers
- Represented city in enforcement of stormwater fee enforcement litigation against national railroad company
- Represented real estate development companies in matters involving land use regulations and citizen challenges to development approvals by local governments
- Represented local governments in matters involving municipal boundary changes and interlocal revenue sharing and land use regulation agreements
- Represented local governments in land use litigation matters involving shopping centers, subdivisions, zoning appeals, utility extensions, vested rights, nonconforming uses, conditional use permits, economic development agreements, downzonings, code enforcement, wind energy facilities, intensive livestock operations and other matters
- Represented local governments in tax assessment litigation involving manufacturing facilities, a data center, a regional shopping center, a department store, and a regional hotel and conference center
- Represented local governments in litigation involving the administration and enforcement of stormwater management fee ordinances
- Represented local governments in the negotiation of economic development incentive agreements
- Represented local governments in matters involving intergovernmental agreements for schools, jails, solid waste management, water and sewer service, and social services
- Represented local governments in comprehensive revisions of zoning ordinances
- Represented local governments in establishing regional industrial facilities authorities
- Represented numerous localities in code enforcement litigation and administrative disputes

Appellate:

- Significant appellate experience before the Supreme Court of Virginia in commercial disputes and local government matters
- Served as appellate counsel in 18 reported cases decided by the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit

Affiliations

- Fellow, Virginia Law Foundation (2022)
- Fellow, Roanoke Law Foundation (2021)

- Member, Ted Dalton American Inns of Court
- Virginia State Bar: Chairman, Litigation Section (2009-2010); Member, Board of Governors (2004-2012), Secretary (2007); Former Chairman and Member, Local Government Law Section; Former Member, Board of Governors, Environmental Law Section; Member, Professionalism Faculty (2002-2005); VSB Law School Professionalism Faculty (2003-2006); Member, Construction Law Section
- Adjunct Professor, Land Use Law, Masters of Urban & Regional Planning Program, Virginia Polytechnical Institute and State University (2006)
- Member, Local Government Attorneys of Virginia
- Member, Program Committee, Roanoke Bar Association (2001-2003)

Awards

- Named one of the Best Lawyers in America® for Municipal Litigation (2007-2024), Commercial Litigation (2008-2024), Eminent Domain and Condemnation Law, Government Relations Practice, and Land Use and Zoning Litigation (2011-2024), and listed in the Best Lawyers in America Business Edition (2016)
- Designated as one of Virginia's Legal Elite by Virginia Business magazine in the Legislative/Regulatory field (2003, 2004, 2012, 2022-2024), Real Estate/Land Use (2007, 2010 & 2014), Administrative Government (2019), and Municipal & Local Government (2021)
- Distinguished Service Award (1988) and Meritorious Service Award (1989), Office of the Attorney General of Virginia
- Elected a 2009 Top Attorney: Local Government by Roanoke-area attorneys surveyed by the Roanoker Magazine
- Named to Virginia Super Lawyers in the area of Business Litigation (2008, 2010-2019), included in Super Lawyers Corporate Counsel edition (2010) and Super Lawyers Business Edition US in the area of Business Litigation (2012-2014)
- Named a "Legal Eagle" for Commercial Litigation, Eminent Domain & Condemnation Law, Government Relations Practice, and Litigation – Land Use & Zoning by Virginia Living magazine (2012)

Published Work

- Old Dogs Learning New Tricks: The Ethics of Practicing Law Outside the Office; Gentry Locke Seminar (September 2020).
- Who is the Client? The Perils and Practicalities of Representing a Locality and its Constituents (Plus Inadvertent Disclosure and Maintaining the Attorney/Client Privilege); Local Government Attorneys Regional Seminar, Blacksburg, Virginia (June 2020).
- Co-author, The Crime Fraud Exception to the Attorney-Client Privilege: How a Client's Actions Can Eliminate the Privilege; Gentry Locke Seminar (2018).
- Co-author, Client Satisfaction; Gentry Locke (2017).
- The Use of Corporate Depositions at Summary Judgment and Trial; Ted Dalton American Inns of Court (October 2016).
- Co-author, Qui Tam Litigation in the Western District of Virginia; Gentry Locke Seminar, (September 2016).
- Co-author, Procurement Basics and Problem Solving; Brown Edwards Government Conference (January 2016).
- Co-author, Judicial Decision-Making in Local Government Cases; Local Government Attorneys of Virginia, Fall Conference (2015).
- Co-author, Identifying and Litigation False Claims Act Cases; Gentry Locke Seminar (2015)
- Co-author, **Assessing the Assessor: Practical Points for Defending a Real Estate Tax Assessment Case**; Journal of Local Government Law, Vol. XXIV, No. 3 (Winter 2014).
- You Can't Fight City Hall – So Here's How to Get What You Want Without the Fight; Gentry Locke Seminar (September 2014).
- Co-author, Trying and Defending Breach of Contract Cases: Ten Recurring Themes and Techniques in Defending Breach of Contract Cases; Virginia CLE. Advanced Business Litigation Institute, (June 2014).
- Co-author, Winning Zoning Litigation Before the Lawsuit is Filed: Measuring Success by Things that Do Not Happen; Journal of Local Government Law, Vol. XXIII, No. 3 (Winter 2013).
- Twelve Ways for Local Governments to Stay Out of Trouble in Contract Matters; 16th Annual Governmental Conference, Brown Edwards (January 2013).
- Co-author, How to Obtain Preliminary and Permanent Injunctions and Temporary Restraining Orders; Gentry Locke Seminar, (September 2012).
- Co-author, Managing Your Land Use Regulations to Avoid Vested Rights Problems and Other Unforeseen Circumstances; Local Government Attorneys Association (June 2011).
- Co-author, A Sign of the Times: Billboard Valuations and Ownership Issues in Eminent Domain Proceedings; CLE International Annual Conference, Eminent Domain (April 2011).
- Co-author, Assessing Business License Taxes on Contractors; Virginia Association of Local Tax Auditors (August 2010).
- Co-author, Winning Your Locality's Zoning Litigation Before the Lawsuit Ever Gets Filed (or Afterwards); Local Government Attorneys Association Regional Seminar (June 2010).
- Co-author, Caught Between a Rock and a Hard Place: Modifying Local Government Contracts Without Violating the VPPA – A Cautionary Tale; Journal of Local Government Law (Vol. XXI No. 1, Summer 2010).
- Co-author, Addressing and Correcting Zoning Administrator and Staff Mistakes; Virginia Association of Zoning Officials (September 2009).
- Special Topics in Site Plan Review; Virginia Association of Zoning Officials Annual Conference (September 2009).

- Local Government Land Use Concerns and the Right to Farm Act; Virginia Association of Zoning Officials Annual Conference (September 2009).
- Vested Rights and Nonconforming Uses. Virginia Association of Zoning Officials. Annual Conference. (September 2009).
- Co-author, Taking Your Practice to the Next Level: The Ethics of Building Your Practice and Establishing Your Reputation; Virginia State Bar Young Lawyers Conference Professional Development Conference (September 2009).
- Co-author, From Courtroom to Conference Room, Reflections of Mediation; 57 Virginia Lawyer 28 (February 2009).
- Co-author, Materials. The Bermuda Triangle of New Litigation Pitfalls: Sanctions, Waivers, and Pleadings; Virginia State Bar Annual Meeting. Litigation Section (June 2008).
- Co-author, Survey of Recent Cases; Local Government Attorneys Association (October 2006).
- Conducting the Deposition of an Expert Witness; Gentry Locke Rakes & Moore (January 2007).
- Ten Lessons Learned From a Year of Local Government Litigation, Survey of Significant Recent Cases; Local Government Attorneys Conference (October 2006).
- In Search of Whales Not Minnows: Casting the Noncompete Net After Omniplex; Gregory J. Haley and Scott C. Ford; 54 Virginia Lawyer 28 (February 2006).
- The Life Cycle of a Professional Malpractice Case; Gentry Locke Rakes & Moore (March 2005).
- It's the Sneaking Around that Gets You in Trouble: The Key to Unlocking Fiduciary Duty Litigation Claims; 53 Virginia Lawyer 39 (December 2004).
- Virginia State Bar Professionalism Course for Law Students; Washington & Lee University School of Law (2004 – 2006).
- Section 1983 Local Government Liability: An Overview and General Principles ; Virginia CLE/Virginia Law Foundation (2004).
- Practical Issues in Responding to Procurement Protests; Virginia CLE/Virginia Law Foundation (2004).
- Ten Ways to Stay Out of Trouble When Serving as an Expert in Litigation; Virginia Society of Certified Public Accountants (Oct. 2004).
- Ten or More Ways to Stay Out of Trouble; Virginia Certified Planning Association and Zoning Conference (Oct. 2004).
- Contractor Claims on Public Projects; Qui Tam Comes to Virginia: The Virginia Fraud Against Taxpayers Act; Practical Issues Regarding Procurement Protests; Gregory J. Haley and J. Barrett Lucy; Public Contracts and Competitive Bidding in Virginia (Aug. 2004).
- How to Obtain and Maintain Clients: The Lawyer's Role as a Business Person and Counselor at Law ; Virginia State Bar Professionalism Course (Fall 2004, 2003, 2002)
- Taking the Heat: Practical Issues in Responding to Procurement Protests; Journal of Local Government Law (Fall, 2002).
- Managing Ethical Issues & Practical Problems in Local Government Representation; Local Government Attorneys of Virginia, Abingdon (August, 2002).
- Managing Risk to Promote Effective Emergency Response Efforts; Legal Issues Related to a Local Government Response to Natural Disasters and Emergency Situations; Virginia Emergency Management Conference, Virginia Emergency Management Association, Virginia Department of Emergency Management; (Williamsburg, March, 2002).
- Ten or More Ways to Stay out of Trouble; Virginia Association of Zoning Officials (January, 2002).
- The World Can Change in the Blink of an Eye: Local Government Response to Natural Disasters; Local Government Attorneys of Virginia, Roanoke (September, 2001).
- Eye of Toad, Tail of Newt, Stirring the Soup of Creative Lawyering; Gentry Locke Rakes & Moore (March, 2000).
- Moneta Building Supply: Building an Addition to the Virginia Corporate Governance Rules; Litigation News, Virginia State Bar (Spring, 2000).
- Ten Ways to Stay Out of Trouble; The Legal Foundations of Planning; Virginia Certified Planning Commissioner's Program (June, 2000).
- Section 1983 Local Government Liability; (W. David Paxton & Gregory J. Haley); Virginia CLE, Virginia Law Foundation (May, 1999).
- A Lawyer's Guide to Nonverbal Communication; Gentry Locke Rakes & Moore (October, 1999).
- What a Tangled Web We Weave; Sovereign Immunity and Special Purpose Authorities; (Gregory J. Haley and Lori D. Thompson); Journal of Local Government Law (1998).
- Contract Drafting: An Eye to Litigation to Avoid Litigation; Gentry Locke Rakes & Moore (May, 1998).
- Annual Survey of State and Federal Litigation: Recent Developments: Constitutional Law and Freedom of Association; Local Government Attorneys of Virginia (October, 1998).
- Trips, Traps & Tumbles: Eight Points to Consider in Settling Cases; Virginia Lawyer (October, 1997).
- The Troubled Business Transaction: A Tragic Comedy in Three Acts; Gentry Locke Rakes & Moore (May, 1997).
- Lender Liability Issues Resolved; Gentry Locke Rakes & Moore (May, 1996).
- The Duty, The Client, The Privilege; The Local Government Attorney and the Virginia Attorney-Client Privilege; Local Government Attorneys of Virginia (April, 1995).
- Confidentiality of Law Enforcement Records; Virginia Association of Chiefs of Police; Executive Development Program; Radford University (June, 1995).
- Update on Local Land Use and Development; Local Government Law Section, Virginia State Bar (June, 1995).
- From There to Here to Where: Developments in Virginia Land Use Law; Journal of Local Government Law (November, 1995).
- Protected First Amendment Rights of Government Employees; (W. David Paxton & Gregory J. Haley); Local Government Attorneys of Virginia, Blacksburg, Virginia (April, 1994).

- Procedural Due Process and Government Employment; (W. David Paxton & Gregory J. Haley); Local Government Attorneys of Virginia, Blacksburg, Virginia (April, 1994).
- Qualified Immunity: Issues in Federal Civil Rights Litigation Involving Government Employees; (W. David Paxton & Gregory J. Haley); Local Government Attorneys of Virginia, Blacksburg, Virginia (April, 1994).
- The Judging of Judges: The Defense of Proceedings Initiated By the Judicial Inquiry and Review Commission; (William R. Rakes & Gregory J. Haley); Judicial Conference of Virginia (May, 1994).
- Annual Survey of State and Federal Litigation; Constitutional Law and Freedom of Association; Local Government Attorneys of Virginia (September, 1994).

GENTRY LOCKE
Attorneys

Jonathan D. Puvak

Partner

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Jon Puvak advises business organizations and governmental entities concerning commercial transactions, mergers and acquisitions, real estate and land use, and corporate governance matters. Jon regularly works with public and closely held entities to assist with their corporate governance and contract needs. Jon is a partner in Gentry Locke's corporate practice. Prior to law school Jon gained corporate and real estate development experience by working with NVR, Inc., one of the nation's largest homebuilders. In 2020, Jon was named an "Up and Coming Lawyer" by Virginia Lawyers Weekly. Jon has been recognized for his service to the Virginia State Bar and Virginia Bar Association. He is also a member of the New York State Bar.

Education

- College of William and Mary, Marshall-Wythe School of Law, J.D.
- Bridgewater College, B.A. summa cum laude

Experience

Business & Corporate

- Represented businesses in negotiation, preparation, and closing of asset and stock mergers and acquisitions
- Represented corporate clients in corporate governance matters
- Represented individuals with new business entity formation and succession planning
- Represented lenders and borrowers with lending and refinancing transactions
- Represented parties in the drafting of complex domestic and international contracts
- Represented businesses in the design, implementation, and operation of retirement plans and executive compensation plans

Real Estate/Land Use/Municipal & Local Government

- Represented businesses and individual clients in real property transactions
- Represented local governments and authorities in land use and environmental matters
- Assisted clients in obtaining land use approvals and appeared before Planning Commissions, Board of Supervisors, County Boards, City Councils, and Boards of Zoning Appeals
- Guided developers through the zoning entitlement process and coordinated with architects, engineers, and other consultants
- Conducted feasibility and due diligence analyses for commercial real estate transactions

Affiliations

- Chamber Ambassador, Roanoke Regional Chamber of Commerce (2016-Present)
- Member, Virginia State Bar: Young Lawyers Division (2011-Present); Past Chair, Roanoke, Professional Development Conference; VSB Young Lawyers Conference (2016-Present); Member, VSB Communications Committee (2016-2018); Member, VSB Standing Committee on Professionalism (2018-2021)
- Member, American Bar Association, Young Lawyers Division
- Member, The Virginia Bar Association: Young Lawyers Division (2011-Present); Past Chair, Young Lawyers Division CLE Committee (2016-2018)
- Member, Roanoke Bar Association (2014-Present); Barrister Book Buddy (2015-Present); President-Elect (2024)
- Member, The New York State Bar (2021-present)

- Firm Campaign Chair, United Way of Roanoke Valley (2015-2017)
- Graduate of Leadership Arlington, Young Professionals Program (2013)
- Member, Urban Land Institute (2011-2015)

Awards

- Named a “Leaders in the Law” honoree by Virginia Lawyers Weekly (2020)
- Named an “Up and Coming Lawyer” by Virginia Lawyers Weekly (2020)
- Named a “Virginia Super Lawyers Rising Star” in **Land Use**/**Zoning** (2018-2021)
- Designated a Legal Elite by Virginia Business in the area of Real Estate Land Use (2019)

Published Work

- Note, Executive Branch Czars, Who are They? Are They Needed? Can/Should Congress do Anything About These Czars?, 19 WM. & MARY BILL RTS. J. 4 (2011).

Case Studies

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

- Jan 14, 2016 — **Approval for Eight Special Use Permits will Improve Wireless Communications in Montgomery County**

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1

Drier than the Dirt: Land Use Permits and Appeals

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Drier than the Dirt:

Land Use Permits, Rezonings and Appeals

Scott Foster & Karen Cohen

I. Introduction

Zoning amendments and land use permits are important development tools. These zoning actions allow landowners to expand the development potential of their land and, subject to approval from the local elected governing body, establish uses not otherwise permitted by right under the locality's zoning ordinance. The law pertaining to these zoning actions is grounded in state and local law. The "yes or no" on a landowner's or developer's request for approval is at the discretion of the local elected governing body; therefore, in addition to the law, there are significant elements of retail politics, grassroots organizing and strong public advocacy involved.

The law surrounding land use permits is constantly evolving—particularly to address the development impacts of new and emerging technologies. Full coverage of the many applicable laws – from constitutional law to environmental law to local government law (just to name a few) – is beyond the scope of this outline. Instead, this outline is divided into two sections. *First*, the outline provides an overview of the zoning amendment and land use permit application and approval process. *Second*, the outline addresses the process for challenging the grant or denial of these local land use decision, including common issues and recent case decisions.

II. Zoning Amendment and Land Use Permit Application Process

A. General Background

1. There are two types of zoning amendments: zoning text amendments and zoning map amendments. A zoning text amendment occurs when the regulations of the zoning district are amended. A zoning map amendment (often referred to as a "rezoning") occurs when the zoning district applicable to a specific property is changed. *See* Va. Code Ann. § 15.2-2286(A)(7).

2. Land use permits are issued by a locality on a discretionary basis for land uses not permitted by right but authorized by the zoning ordinance by such permit. *See* Va. Code Ann. § 15.2-2201. There are three primary types of land use permits: special use permits, conditional use permits, and special exceptions. Uses allowed by a land use permit are those typically considered to have a greater potential impact on surrounding properties or the public generally, and as such, should be subjected to a case-by-case review. This review often generates specific conditions attached to the land use permit designed to address the impacts of the given use.

3. The approval of zoning text amendments, rezonings and land use permits is a *legislative act* by the elected governing body of the jurisdiction. *See Rowland v. Town Council of Warrenton*, 298 Va. 703, 718 (2020);

Newberry Station Homeowners Ass'n v. Bd. of Supervisors of Fairfax Cnty., 285 Va. 604, 621 (2013).

B. Application Process

1. Initial Application Process

a. Zoning text amendments may be initiated by: (i) resolution of the governing body; or (ii) by motion of the local planning commission. *See* Va. Code Ann. § 15.2-2286(A)(7).

i. In practice, subject to the language of the jurisdiction's zoning ordinance and local practice, an owner or contract purchaser may also initiate a zoning text amendment through the locality's application process. Some jurisdictions require the elected governing body to endorse the proposed amendment before the matter is sent to planning commission for review. Before initiating a zoning text amendment, it is essential to confirm the process with the given jurisdiction.

ii. Va. Code Ann. § 15.2-2286(A)(7) enables localities to provide for specified intervals at which zoning text amendments are considered.

b. Rezonings may be initiated by: (i) resolution of the governing body; (ii) by motion of the local planning commission; or (iii) petition of the owner, contract purchaser with the owner's written consent, or the owner's agent. *See* Va. Code Ann. § 15.2-2286(A)(7).

c. Applications for land use permits may be made by any property owner, tenant, government official, department, board, or bureau. *See* Va. Code Ann. § 15.2-2310.

d. Most jurisdictions require a "pre-application" meeting, where the application concept is discussed and zoning ordinance compliance is confirmed. This initial meeting also offers an opportunity for an applicant and the locality's planning staff to discuss the proposed project and the applicable rules and regulations. This meeting, along with the provisions of the locality's zoning ordinance, typically helps form the "scope" of an application, including the applicable studies and reports required to process the application. This initial meeting begins what often becomes multiple meetings and exchanges on a given application, depending on its complexity. Typically, the locality's staff will route the application to multiple agencies for comment, including environmental, safety (police and fire), transportation, economic development, etc.

e. The jurisdiction generates a "staff report" on the application, providing the planning commission and the local governing body with a summary of the application, its strengths and weaknesses, suggested conditions of approval (discussed below), and, at times, a "staff recommendation" suggesting approval or disapproval of the respective application.

i. A rezoning, where an applicant applies to change the zoning of certain property to a different district, may also include "proffers" which are conditions that supplement the regulations of the zoning district and often relate to improvements to public infrastructure necessitated by a given development or project. *See* Va. Code Ann. § 15.2-2296-15.2-2303. These conditions are *offered by the owner of the subject property* (or by their authorized agent). Statutes and case law around proffers is complex, and the drafting and negotiation of proffers should be done with great care by both the applicant and the locality.

ii. A zoning text amendment, where an applicant seeks to modify the zoning ordinance applicable to a certain district, typically includes specific language proposed by the applicant to modify the district to allow for or better facilitate a given use. Often the locality's planning staff will suggest modifications to this language, which may or may not generate consensus on the proposed change between the applicant and the jurisdiction.

iii. A land use permit will also likely include conditions of approval, but these conditions are typically generated by the locality's planning department and, ultimately, are imposed by the applicable authority as part of the issuance of the permit, although applicants often submit suggested conditions with their permit applications. These conditions, like proffers, are negotiated between the Applicant and planning staff to address specific development related issues that are not covered by the zoning ordinance.

C. Review Process

1. Review by the Planning Commission

a. Every locality is required to have a local planning commission. *See* Va. Code Ann. § 15.2-2210. Members of the planning commission are appointed by the elected governing body of the locality, which can range in size between five and fifteen members, for a maximum term of four years. The members must be residents of the locality,

and one half of the membership must be owners of real property. Some localities have a member of the elected governing body on the planning commission. *See* Va. Code Ann. § 15.2-2212. Planning commissions are, generally, tasked with "promot[ing] the ordinerly development of the locality and its environs." Va. Code Ann. § 2210. The planning commission has a myriad of responsibilities including, but not limited to, preparation of the comprehensive plan, periodic preparation of the locality's official zoning map, changes to zoning districts, preparation of the zoning ordinance and amendments thereto, and review of land use permits. *See* Va. Code Ann. §§ 15.2-2223, 15.2-2233, 15.2-4311, 15.2-2285. The planning commission is primarily an *advisory* body to the locality's governing body. Va. Code Ann. § 15.2-2210.

b. Zoning Text Amendments and Rezonings. Zoning text amendments and rezonings must be reviewed by the planning commission, who, in most scenarios, will make a recommendation of approval or denial to the elected governing body of the locality. This review takes place at a public hearing (discussed below in Section F). Planning commissions have 100 days to act on an application after it has been presented for their consideration. If they fail to act within that time, the application is deemed to have been recommended for approval. *See* Va. Code Ann. § 15.2-2285(B). Planning commissions often recommend additional conditions, modifications of development terms, etc. as part of their recommendation to the elected governing body on a rezoning.

c. Land Use Permits. Most jurisdictions have their planning commission review and make a recommendation on applications for land use permits. Some localities choose to bypass review by the planning commission, pursuant to Va. Code Ann. § 15.2-2286(3), allowing the elected governing body to be the sole arbiter of these applications, but this practice is limited. Some localities delegate the review and approval of land use permits to a board of zoning appeals, but this, too, is relatively infrequent. *See* Va. Code Ann. § 15.2-2309(6). Like zoning text amendments and rezonings, planning commissions will hold a public hearing on the application and then, in most scenarios, will make a recommendation of approval or denial of the land use permit to the elected governing body. This recommendation must also be made within 100 days. *See* Va. Code Ann. § 15.2-2285(B). Planning commissions often will recommend additional conditions, modifications of development terms, etc. as part of their recommendation to the elected governing body.

d. Public Facilities Review. Certain "public facilities" require a separate review by the planning commission for consistency with

the locality's comprehensive plan. *See* Va. Code Ann. § 15.2-2232. Most private applicants will not encounter this requirement for typical residential or commercial developments, but some uses, including solar and energy storage facilities and certain telecommunications facilities, are deemed to be "public facilities" and must be subjected to this review by planning commission. In this instance, the planning commission will review the project and make a determination whether or not the project's location, character and extent are "substantially in accord" with the locality's comprehensive plan. The planning commission must transmit its findings to the locality's governing body, which may choose to overrule the planning commission upon a majority vote. If the planning commission determines that the proposed land use is not substantially in accord with the comprehensive plan, the applicant may appeal the determination to the elected governing body within ten (10) days of action by the planning commission. The local governing body must hear the appeal within sixty (60) days unless this timing requirement is waived by the applicant. If the applicant fails to appeal and the elected governing body chooses not to overrule the planning commission's determination, the planning commission's determination becomes binding. This is one of the few scenarios where a planning commission action is *legislative*, making attention to this process of significant importance.

2. Review by the Elected Governing Body

a. All zoning amendments will be reviewed and approved or denied by a majority vote of the elected governing body (the board of supervisors, city or town council, as applicable). Unless a locality has opted to delegate review of land use permits to a board of zoning appeals, the elected governing body will also review and approve or deny applications for land use permits. Action on these applications can only occur once a public hearing has been held, as discussed below.

b. A governing body is required to make a decision on a resolution, motion, or petition within a reasonable time not to exceed 12 months, unless the applicant requests or consents to a later time. *See* Va. Code Ann. § 15.2-2286(A)(7).

i. The general consensus on calculation of this 12 month period is that it commences either on (a) the subject application having been deemed complete by the locality, or (b) having been reviewed by Planning Commission at a public hearing. Opinions differ based on the locality.

ii. While this 12-month time period derives from the code section on rezonings, many localities have ordinances that apply this same time period to land use permits. Even in the absence of such an ordinance, the general view is that the due process requirement to be heard in a reasonably timely manner should apply with equal force to any hearing on a legislative land use approval.

D. Role of the Comprehensive Plan in Evaluating Rezoning and Land Use Permits.

1. The comprehensive plan is a guide for the physical development of the jurisdiction, with the "purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory, which will, in accordance with present and probably future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities." Va. Code Ann. § 15.2-2223. Because it is a general guideline and advisory in nature, it does not have the legal status of a zoning ordinance. *Bd. of Supervisors of Fairfax Cnty. v. Allman*, 215 Va. 434, 441 (1975).

2. Consistency with the locality's comprehensive plan is often the most important factor in approving a rezoning or land use permit. As a result, in approving any rezoning or land use permit, consistency with the comprehensive plan is always a factor that the elected governing body must consider and may be the basis for approval or denial of an application. *Bd. of Supervisors of Loudoun Cnty. v. Lerner*, 221 Va. 30, 36-37 (1980) (application to rezoning); *Nat'l Mem'l Park, Inc. v. Bd. of Zoning Appeals of Fairfax Cnty.*, 232 Va. 89, 92-93 (1986) (application to land use permit). That being said, because it is used as a "guide," inconsistency with the comprehensive plan does not mandate denial of the application. *Bd. of Supervisors of Fairfax Cnty. v. Robertson*, 266 Va. 525, 536 (2003). Reliance on the comprehensive plan is a reasonable basis on which a jurisdiction can base its decision, but it need not be the only factor. *City Council of City of Salem v. Wendy's of W. Va., Inc.*, 252 Va. 12, 18 (1996).

   a. General questions often asked:

      i. Is the proposed zoning of the parcel subject to an application for rezoning consistent with the comprehensive plan and the plans for future land use contained therein?

      ii. Does proposed use conform with the surrounding uses and vision for the area of the jurisdiction where the property is located?

3. Topics covered in Comprehensive Plans (Va. Code Ann. § 15.2-2223)

a. General development patterns and areas of focused future growth and redevelopment.

b. Transportation and Road and Transportation Mapping including specific infrastructure needs and recommendations for future projects.

c. Affordable housing

d. Implementation of Broadband

e. Road impact fees (if the locality has adopted such a regime)

f. Traditional Neighborhood Design (if the locality has designated urban development areas in their plan)

g. Planning for sea level rise and recurrent flooding (applicable to the Hampton Roads Planning District)

h. Transit oriented development (applicable to cities greater than 20,000 in population and counties over 100,000)

i. Manufactured Housing

j. Land Use, designating areas for public and private development and uses and associated activities.

k. Community Amenities

l. Capital Improvement Programs

m. Areas designated as historic or areas for urban renewal or other redevelopment.

n. Protection of Groundwater and Surface Water

o. Utility Line Corridors

p. Urban Development Areas

E. Standard of Review Applicable to Zoning Text Amendments and Rezonings

1. Factors to be Considered When Drawing Zoning Districts (Rezoning). Pursuant to Va. Code Ann. § 15.2-2284, the following factors must be given reasonable consideration when a parcel is considered for rezoning, and it is an applicant's obligation to demonstrate how their proposal aligns with these factors:

a. The existing use and character of the property;

b. The comprehensive plan;

c. The suitability of property for various uses;

d. The trends of growth or change;

e. The current and future requirements of the community as to land for various purposes as determined by population and economic and other studies;

f. The transportation requirements of the community;

g. The requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services;

h. The conservation of natural resources;

i. The preservation of flood plains;

j. The protection of life and property from impounding structure failures;

k. The preservation of agricultural and forestal land;

l. The conservation of properties and their values and;

m. The encouragement of the most appropriate use of land throughout the locality.

2. Unlawful Discriminatory Housing Policies. Pursuant to Va. Code Ann. § 36-96.3, localities are prohibited from discriminating in the application of land use ordinances:

a. On the basis of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, or disability;

b. Because a housing development containing affordable housing units; or

c. By prohibiting or imposing conditions upon the rental or sale of dwelling uses, except for short-term rentals as defined in Va. Code Ann. § 15.2-983.

3. Standard of Review Applicable to Land Use Permits.

a. Suitable Regulations and Safeguards

i. Va. Code Ann. § 15.2-2286(3) states that a zoning ordinance may provide for the granting of land use permits *under suitable regulations and safeguards*.

ii. This phrase has been interpreted to mean that "[a] locality may unilaterally impose reasonable conditions on the issuance of such permits or exceptions, in contrast to proffers that must come voluntarily from the applicant." *Stapes v. Prince George Cnty.*, 81 Va. Cir. 308, 320 (Prince George County 2010) (quoting John H. Foote, *Planning and Zoning*, in Handbook of Virginia Local Government Law 1-1, 1-48 (Susan Warriner, ed. 2001)).

iii. The General Assembly amended Virginia Code § 15.2-2286(3), which became effective on July 1, 2024, stating that "[c]onditions may include the period of validity for a special exception or special use permit; however, in the case of a special exception or special use permit for certain types of projects, the legislature has set a minimum." *See e.g.* 2024 Va. H.B. 650 (residential projects, the period of validity shall be no less than three years).

F. Advertisement of Public Hearings for Zoning Text Amendments, Rezonings, and Land Use Permits

1. Hearing and Notice Requirements.

a. The notice and hearing requirements of Virginia Code § 15.2-2204 must be met before a zoning text amendment, rezoning, or land use permit may be authorized. It is key for any applicant to work with the attorney representing the jurisdiction to ensure the notice associated with the public hearings on their proposal complies with this statute, as defects in this process can lead to additional required hearings or, if a project is approved, potential challenges to the approval.

b. Notice under Virginia Code § 15.2-2204(A)

i. Content of Notice. The descriptive notice standard comes from now amended Virginia Code § 15.2-2204(A) which previously stated that "[e]very such advertisement shall contain a descriptive summary of the proposed action and a reference to the place or places within the locality where copies of the proposed plans, ordinances or amendments

may be examined." Va. Code Ann. § 15.2-2204(A), *amended by* 2022 Va. S.B. 1151.

ii. This standard was interpreted by the Supreme Court of Virginia to require the locality to provide notice of what action was going to be taken, the nature of the action, and the affected properties so that the public could determine whether it was of any interest to them. *See Gas Mart Corp. v. Bd. of Supervisors*, 269 Va. 334, 345 (2005); *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554-55 (2003).

iii. In 2023 the section was amended striking the language "contain a descriptive summary of the proposed action and a reference to" and replacing it with the word "identify." 2022 Va. S.B. 1151.

iv. Thus, the statute now reads "[e]very such advertisement shall identify the place or places within the locality where copies of the proposed plans, ordinances, or amendments may be examined." Va. Code Ann. § 15.2-2204(A).

v. The second enactment clause of Senate Bill 1151 states that a work group of the Virginia Code Commission shall convene and review the requirements in the Code for providing notice of hearings, and other intended actions. One of the things to be examined was "(iii) the amount of information required to be contained in each notice." Thus, it would ostensibly seem that the General Assembly was acting to require less information to be provided in notices for hearings on land use permits.

vi. Notice Under Amended § 15.2-2204(A) effective July 1, 2024. Virginia Code § 15.2-2204(A) requires that notice of a hearing for a land use permit must be published twice in a newspaper published or having general circulation in the locality.

1) The first notice must appear no more than 28 days before the date of the meeting referenced in the notice.

2) The second must appear no less than seven days before the date of the meeting referenced in the notice.

3) If a locality submits a correct and timely notice request to a newspaper and the newspaper fails to publish the notice, or publishes the notice

incorrectly, such locality shall be deemed to have met the notice requirements so long as the notice was published in the next available edition of a newspaper having general circulation in the locality.

4) The locality itself may impose other notice requirements. The local zoning ordinance must examined to ascertain such requirements, typically mandating placement of signs on the property at designated locations and providing notice to adjoining landowners.

G. Special Provisions Regarding Land Use Permit Validity

1. Va. Code § 15.2-2209.1:1. Automatic extension until July 1, 2025 all Conditional Use Permits, Special Use Permits and Special Exception Permits which meet certain date requirements.

   a. Section 15.2-2209.1:1 provides that "for any valid special exception, special use permit, or conditional use permit, or any modifications thereto, outstanding as of July 1, 2020, any deadline in the exception permit, . . . is extended until July 1, 2025, or such longer period as may be agreed to by the locality. "

2. Role of the "Enactment Clause"

   a. Enactment clauses are not shown in the official code posted on the Legislative Information System or in the Virginia Code Annotated. Instead these provisions are found in the Acts of Assembly published upon the passing of the legislation.

   b. A enactment clause is "part of the body of the act which states the precise action taken by the legislature, thereby establishing the jurisdiction and the authenticity of the act." *Gilmore v. Landsidle*, 252 Va. 388, 394 (1996).

   c. Courts may rely on enactment clauses to "determine the precise content of legislation." *Id.* at 395.

3. Enactment Clause in § 15.2-2209.1:1

   a. The third enactment clause of this section states that "any extension for approvals outstanding as of July 1, 2020, shall apply to any such approvals granted subsequent to July 1, 2020, that expire prior to July 1, 2025. This provision is declarative of existing law."

   b. The Supreme Court of Virginia has noted that the term "declarative of existing law" is "used occasionally by the General Assembly

when it wishes to clarify a statute or correct an interpretation of a statute with which it disagrees." *Va. Int'l Gateway, Inc. v. City of Portsmouth*, 298 Va. 43, 54 n.1 (2019).

III. Appeals & Litigation

Litigation generally arises in two scenarios.[1] *First*, the locality **grants** the zoning text amendment, rezoning, or land use permit, and a thirty party challenges that approval. *Second*, the locality **denies** the zoning text amendment, rezoning, or land use permit, and the applicant challenges that denial. The same standards and principles apply to litigation of these land use decisions.

A. Statutory Basis

The process for challenging the grant or denial of a land use decision depends on which local governing body made the decision. Substantively, the process is the same, but the statutory cause of action depends on whether the locality's governing body or its board of zoning appeals issued the decision.

1. Decision by Locality's Governing Body

Code § 15.2-2285(F) provides for a right of action to contest the decision of a local governing body—for example, a county's board of supervisors or city council—"adopting or failing to adopt a proposed zoning ordinance or amend thereto or granting or failing to grant a special exception." This statute applies to zoning text amendments, rezonings, as well as land use permits (including special use permits and conditional use permits). *See Rinker v. Fairfax*, 238 Va. 24, 30 (1989) (holding the "terms 'special exception' and 'special use permit' are interchangeable."); *cf. Boyer v. Frederick Cnty. Bd. of Supervisors*, Record No. 0846-23-4, 2024 Va. App. LEXIS 313, at *1 (Va. Ct. App. June 4, 2024) (appeal of conditional use permit under Code § 15.2-2285(F)). An appeal must be filed with the circuit court within thirty (30) days of the date of the local governing body's decision. *See* Va. Code Ann. § 152-2285(F).

2. Decision by Locality's Board of Zoning Appeals

Where a locality has delegated authority to its Board of Zoning Appeals ("BZA"), Code § 15.2-2314 provides a right of action to contest the BZA's land use decisions. A petition under Code § 15.2-2314 must be filed with the circuit court within thirty (30) days of the BZA's decision.

3. Declaratory Judgments

The longstanding, traditional manner in which to bring an appeal under Code §§ 15.2-2285(F) or 15.2-2314 is through a declaratory judgment action. *See Berry v. Bd. of Supervisors*, 302 Va. 114, 133-34 (2023) (holding a declaratory judgment is "the proper vehicle for challenging" a land use decision); *see, e.g., Friends of Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 286 Va. 38, 45 (2013) (same). Recently, however, in *Boyer v. Frederick Cnty. Bd. of Supervisors*, the Court of Appeals seemed to question this well-established process, potentially suggesting there may be a

[1] There are rare instances where a local governing body has initiated litigation against its own planning commission or local governing body. Such litigation is beyond the scope of this outline.

difference whether the case was is styled as a declaratory judgment action or as "an appeal under Code § 15.2-2285." 2024 Va. App. LEXIS 313, at *6-7. This appears to be a distinction without a difference.

B. Threshold Issue: Standing

When a locality has approved a land use application (zoning text amendment, rezoning, or land use permit), and an individual wishes to challenge that decision, the most important threshold issue to consider is standing. When a plaintiff does not claim an ownership interest in the specific property subject to the land use decision, courts apply the test set forth in *Friends of the Rappahannock v. Caroline County Board of Supervisors* to determine whether that individual or entity has standing to bring the lawsuit. *See* 248 Va. at 48-49. The plaintiff must satisfy two elements:

1) The plaintiff must own or occupy real property "within or in close proximity to the property that is subject of the land use determination." *Id.* at 48.

2) The plaintiff must demonstrate a particularized harm to "some personal or property right, legal or equitable, or imposition of a burden or obligation upon the plaintiff different from that suffered by the public generally." *Id.* at 48-49.

A plaintiff's failure to satisfy either (or both) of these elements means the plaintiff does not have standing to bring the lawsuit challenging the decision.

1. Close Proximity

The "close proximity" inquiry usually looks at the distance between the property owned or occupied by the plaintiff and the property subject to the land use decision. There is no bright line rule about what constitutes "close proximity," but several decisions provide guideposts.

- **Adjacent properties**. Parcels that are contiguous or immediately adjacent to the parcel subject to the land use decision are in "close proximity" sufficient to confer standing. *See Anders Larsen Tr. v. Bd. of Supervisors*, 301 Va. 116, 122 (2022); *Cumberland v. Bd. of Supervisors*, Rec. No. 0769-22-2, 2023 Va. App. LEXIS 630, at *14 (Va. Ct. App. Sept. 19, 2023).

- **Close proximity is determined in feet, not miles**. Virginia courts generally require a plaintiff's property to be within one (1) mile of the land use decision. The Supreme Court of Virginia has held a plaintiff who owned/occupied property up to 2,000 feet away was in "close proximity" to the land use decision. *See Riverview Farm Assocs. Va. Gen. P'ship. v. Bd. of Supervisors*, 259 Va. 419 (2000) (holding plaintiff who was 2,000 feet away was in "close proximity"); *Morgan v. Bd. of Supervisors*, 302 Va. 46, 52, 62 (2023) (holding plaintiff who was 1,200 feet away was in "close proximity"). One circuit court decision has held that a landowner who owned/occupied property that was approximately 4,100 feet away was sufficiently in "close proximity" to have standing. *Nat'l Tr. for Hist. Pres. v. Orange Cnty. Bd. of Supervisors*, 80 Va. Cir. 321, 325 (Orange 2010); *see also Grenata Homeowners Ass'n v. Loudoun Cnty.*, 93 Va.Cir. 192, 211 (Loudoun 2016) (holding plaintiff that was 480 feet away was in "close proximity").

- **Properties further away**. The Supreme Court of Virginia has not considered what constitutes the outer limits of "close proximity." One circuit court held that a plaintiff who owned/occupied property approximately two (2) miles away from the land use decision was not in proximity. *Hefflin v. Caroline Cnty.*, 83 Va. Cir. 507, 520 (Caroline Cnty. Cir. Ct., 2010); *see also Friends of the Meherrin, LLC v. Bd. of Supervisors*, Case No. CL22-181 (Lunenburg Cnty. Cir. Ct. May 2, 2023) (holding plaintiffs who resided over nine (9) miles away from land use decision did not have standing). Another circuit court considered certain factors in determining whether a plaintiff was in "close proximity" to the land use decision, including whether the challenged use "could be seen, smelled, or heard on his property, or that it [would] discharge emissions onto his property." *Carolinas Cement Co. v. Zoning Appeals Bd.*, 52 Va. Cir. 6, 16 (Warren Cnty. Cir. Ct. 2000).

2. **Particularized Harm**

The "particularized harm" inquiry examines whether the plaintiff has demonstrated a harm to "some personal or property right, legal or equitable, or imposition of a burden or obligation upon the plaintiff." *Friends of the Rappahannock*, 286 Va at 48-49. Importantly, this harm must be "different from that suffered by the public generally." *Id.*

The easiest way to satisfy this standard is to allege that the harm has already occurred. *See, e.g., Seymour v. Roanoke Cnty. Bd. of Supervisors*, 301 Va. 156, 169 (2022) (holding "[i]n this case, however, the appellants have alleged that they have already sustained several forms of harm"). Examples of "particularized harms" include, but are not limited to: (i) additional maintenance costs due to increased vehicular traffic associated with the use; (ii) increased danger due to vehicular traffic associated with the use; (iii) dust, noise, and light pollution associated with the use. *See id.*

The plaintiff need not have already incurred the harm. *See id.* at 169. An "allegation of future injury may suffice if the threatened injury is 'certainly impending' or there is a 'substantial risk' that the harm will occur." *Morgan*, 302 Va. at 61 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). This inquiry requires "specific allegations" of harm arising out of the use in question. *Id.* Allegations which are abstract, generalized, or speculative do not suffice. *Id.*

In *Friends of the Rappahannock v. Caroline County Board of Supervisors*, the plaintiffs alleged various forms of harm, including: (i) land disturbance, noise, and industrial activity will frighten away wildlife, prevent or deter new wildlife from entering the area, and render property useless for hunting; (ii) nonspecific allegations that the use will interfere with a right of way, create noise, and increase airborne particulates; and (iii) the use will end the scenic beauty of the location, harm recreational use of a river, and increase dust, noise, and traffic from river barges. *See* 286 Va. at 42-43. The Court held these allegations did not meet the "particularized harm" standard because they lacked "factual background" that tied the "particular use of the property" to specific "off site" harms. *Id.* at 49-50. The Court noted that the land use permit contained conditions requiring the particular use to comply with the locality's restrictions on noise, particulate matter, and pollution, and the plaintiffs did not allege facts indicating the permit conditions were inadequate. *Id.* at 50.

By contrast, *in Morgan v. Board of Supervisors*, the plaintiffs included "specific allegations of particularized harm" arising out of the use. 302 Va. at 61. These harms included: (i) increased noise levels due to vehicle back-up alarms, in violation of the local noise ordinance; (ii) anticipated

flooding due to the topography of the project; and (iii) night-sky pollution due to taller lighting poles. *Id.* The Court held that these allegations were not speculative, but rather asserted "a direct cause-and-effect relationship" between the zoning decision and the harm. *Id.* at 67-68.

Interpreting these decisions, in *Cumberland v. Board of Supervisors*, the Court of Appeals analyzed whether a plaintiff's allegations that the BZA's decision "authorized an encroachment of tree limbs" onto his property, "thereby obstructing his view of the waterfront and diminishing the value of his own land." 2023 Va. App. LEXIS 630, at *9. The Court held these allegations were not "sufficiently definite" to satisfy the particularized harm standard. *Id.* at *20. The Court noted the plaintiff "merely contends that encroachment will inevitably occur," "[w]ithout explaining how or when." *Id.* Therefore, while the Court accepted that the encroachment "could" occur, it held that such encroachment was not "reasonably certain to occur." *Id.* at *20-21.

Practice Note: The Supreme Court of Virginia, in *Morgan*, analyzed the plaintiffs' allegations of particularized harm, "assumed to be true," for purposes of demurrer. 302 Va. at 62. The Court specifically left open the question of "[w]hether the [plaintiffs] can actually prove these allegations." *Id.* at 68. Therefore, while a plaintiff's allegations of particularized harm may be sufficient to survive demurrer, the plaintiff must ensure these allegations can be proven at trial, or if also challenged via plea in bar.

C. Procedural Issues

Appeals of land use decisions have a unique procedure:

1) The locality's decision is presumed to be reasonable.

2) The plaintiff bears the initial burden to show probative evidence that the locality's decision was unreasonable.

3) The burden then shifts to the locality to produce "some" evidence of reasonableness sufficient to make the question fairly debatable.

These presumptions and burdens make appeals of land use decisions extraordinarily difficult to prosecute and more suitable to defend. The nuances of each of these procedural steps is set out below.

1. Presumption of Reasonableness

A locality's land use decisions are a legislative function. *Bd. of Supervisors v. Jackson*, 221 Va. 328, 333 (1980); *Fox Spring Farm Ltd. P'ship v. Caroline Cnty. Bd. of Supervisors*, Rec. No. 181276, 2020 Va. Unpub. LEXIS 9, at *7 (Va. St. Ct. Apr. 16, 2020) (quoting *Bd. of Supervisors v. McDonald's Corp.*, 261 Va. 583, 589 (2001)). This presumption applies to both decisions by the locality's governing body and its BZA. *Jackson*, 221 Va. at 333; *Trs. of the Christ & St. Luke's Episcopla Church v. Bd. of Zoning Appeals*, 273 Va. 375, 380 (2007).

2. Probative Evidence of Unreasonableness

The party challenging the locality's decision bears the burden of presenting "probative evidence of unreasonableness." *City Council of Va. Beach v. Harrell*, 236 Va. 99, at 102 (1988); *Richmond v. Randall*, 215 Va. 506, 511 (1975). This requires a two part showing:

1) The applicant must show that the use proposed in the application is reasonable; and

2) The zoning ordinance, as applied to the land, is unreasonable.

Harrell, 236 Va. at 102; *see also EMAC, LLC v. Cnty. of Hanover*, 291 Va. 13, 22 (2016); *Randall*, 215 Va. at 511; *Bd. of Supervisors v. Int'l Funeral Serv., Inc.*, 221 Va. 840, 842-43 (1981).

a. Reasonableness of the proposed use.

Few Virginia courts have analyzed the first element—whether the requested use is reasonable. In the case of land use permits, some—perhaps most—zoning ordinances identify land uses which are permitted by such permits. *See, e.g.*, Roanoke City Zoning Ordinance, §§ 36.2-310, 36.2-315, 36.2-322, 36.2-327 (stating uses permitted by special exception); Richmond City Zoning Ordinance, §§ 30-413.12; 30-420.1:1; 30-426.1:1; 30-428.2; 30-433.3; 30-433.11.1; 30-436.2; 30-438.2; 30-440.2; 30-442.1:1; 30-444.2:1; 30-446.3 (stating uses permitted by conditional use permit); Henrico County Zoning Ordinance, §§ 24-4202(B), 24-4205 (stating uses permitted by conditional use permit). Given the locality has identified these uses as permitted by permit, such uses are likely reasonable. *Cf. Cnty. of Lancaster v. Cowardin*, 239 Va. 522, 526 (1990) (assuming proposed use is reasonable because it was specifically allowed under the zoning ordinance).

b. Unreasonableness of the locality's decision.

Most Virginia courts focus their analyses on the second element—whether the locality's land use decision was unreasonable. This generally requires "clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare." *EMAC, LLC*, 291 Va. at 21.

i. Challenging the locality's process for issuing the decision.

1) Compliance with Zoning Ordinance.

One method to establish the unreasonableness of a locality's land use decision is to prove the locality failed to follow its own zoning ordinance. Localities are "not at liberty to disregard" their own zoning ordinance. *Northampton Cnty. Bd. of Zoning Appeals v. Eastern Shore Dev. Corp.*, 277 Va. 198, 203 (2009). If a "permit is issued in violation of law, it confers no greater rights up on a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance, or authorize a structure at a location prohibited by the ordinance." *Hurt v. Caldwell*, 222 Va. 91, 97 (1981) (quoting *Segaloff v. City of Newport News*, 209 Va. 259, 261 (1968)). Therefore, "[a]cts of a local governing body that are in conflict with its own ordinances exceed its authority and are void and of no effect." *Eastern Shore Dev. Corp.*, 277 Va. at 203.

For example, in *Renky v. Cnty. Bd.*, the Supreme Court of Virginia considered a locality's decision to rezone property without complying with the zoning classification eligibility requirement set out in its ordinance. 272 Va. 369, 376 (2006). Therefore, the Court held the locality's failure to follow its own zoning ordinance meant "its action was arbitrary and capricious, and not fairly debatable, thereby rending the re-zoning void and of no effect." *Id.* These same principles govern the grant or denial of a land use permit. *See, e.g., Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 621-22 (2013).

2) **Compliance with Virginia law.**

Another method to establish the unreasonableness of the locality's land use decision is to prove the process did not comply with Virginia law. For example, the locality's failure to comply with statutory notice requirements renders the zoning decision invalid. *See, e.g., Lawrence Transfer & Storage Corp. v. Bd. of Zoning Appeals*, 229 Va. 568, 571-72 (1985) (invalidating special use permit for failure to give statutory notice); *Parker v. Miller*, 250 Va. 175, 175 (1995) (invalidating variance for failure to give statutory notice).

ii. **Challenging the basis for the locality's decision.**

There are few Virginia cases discussing what constitutes an unreasonable land use decision. The most common argument is that a locality's decision was unreasonable because it was discriminatory.

1) **Compliance with Zoning Ordinance or Use Regulations.**

When a party challenges a locality's decision denying a proposed use, the challenging party must establish ***something more than*** the proposed use complied with the locality's zoning ordinance or use regulations. *See Cnty. Bd. of Arlington County v. Bratic*, 237 Va. 221, 229 (1989).

2) **Discrimination based on prior approvals.**

"Discrimination in zoning decisions is impermissible if it is unjustified." *McDonald's Corp.*, 261 Va. at 591. "[I]mpermissible discrimination in zoning actions is unreasonable, arbitrary, and capricious." *Id.* "To sustain a claim of impermissible discrimination, the party contesting the zoning action must show that 'a land use permitted to one landowner is restricted to another similarly situated.'" *Id.* (quoting *Bd. of Supervisors v. Rowe*, 216 Va. 128, 140 (1975)). Where the challenging party fails to establish the properties are similarly situated, it has failed to carry its burden of presenting probative evidence of unreasonableness. *Id.* at 593.

- **Similarly Situated.** The mere fact that two properties "are adjacent to one another is insufficient alone to establish" the properties are similarly situated. *McDonald's Corp.*, 261 Va. at 591 (quoting *Helmick v. Town of Warrenton*, 254 Va. 225, 231 (1997)). Rather, this is a highly fact-specific inquiry that focuses both on the characteristics of the property—both physical characteristics as well as zoning.
    - A primary consideration is the physical characteristics of the sites, including, but not limited to: size, layout/configuration, road or street access, and usage. For

example, in *Bd. of Supervisors v. McDonald's Corp.*, the Court examined a number of factors distinguishing the subject property with the comparators, including:

- The subject property was much smaller than the comparison properties;
- The subject property was a single tenant site, whereas the comparison properties were multi-user shopping centers;
- The subject property had direct access to public roads, whereas the comparison properties did not;
- The subject property had only one access point, whereas the comparison properties had multiple access points;
- The subject property's entrance was much closer to an intersection than the comparison properties;
- The subject property had significantly higher estimated vehicular usage than the comparison properties, after adjusting for the differences in property size.

261 Va. at 591-93.

- Two properties which have different zoning may not be similarly situated. In *EMAC LLC v. County of Hanover*, the Court held two parcels were not similarly situated where the subject property did not have a validly issued conditional use permit, while the comparison property did. 291 Va. at 23-25. Similarly, in *Helmick v. Town of Warrenton*, the Court held parcels were not similarly situated where the subject project was subject to an approved subdivision plat which had to be vacated, while the comparison properties were not. 254 Va. at 231.

3) **Reasonable grounds to deny a land use application.**

By contrast, Virginia courts have identified numerous grounds as a reasonable basis to deny a land use application, including:

- The landowner or applicant failed to meet the requirements in the zoning ordinance. *See Cowardin*, 239 Va. at 526.
- The proposed use is inconsistent with the locality's comprehensive plan. *See Nat'l Mem'l Park, Inc. v. Bd. of Zoning Appeals*, 232 Va. 89, 92-93 (1986).
- The proposed use would have an adverse impact on the nature or character of the area. *See Bractic*, 237 Va. at 228-29.
- The proposed use would hinder or discourage the appropriate use of adjacent or nearby properties. *See Nat'l Mem'l Park, Inc.*, 232 V a. at 93.

- The proposed use would have an adverse impact on roads. *See Loch Levan Land Ltd. P'ship v. Bd. of Supervisors*, 297 Va. 674, 693 (2019).

3. Reasonableness and the Fairly Debatable Standard

"If the challenging party presents probative evidence of unreasonableness, the locality must present sufficient evidence to show that the reasonableness of the decision." *EMAC, LLC*, 291 Va. at 22. "If the evidence of reasonableness is sufficient to make the question fairly debatable, the zoning action must be upheld upon judicial review. If the evidence of reasonableness is insufficient, the presumption of reasonableness is overcome and the zoning action cannot be sustained." *McDonald's Corp.*, 261 Va. at 590 (citing *Jackson*, 221 Va. at 333).

"An issue is said to be fairly debatable 'when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.'" *McDonald's Corp.*, 261 Va. at 590 (quoting *Williams*, 216 Va. at 58). This does not require the locality to prove reasonableness by a preponderance of the evidence. *See Bd. of Supervisors v. Stickley*, 261 Va. 1, 7 (2002). The dispositive question is whether there was "***any*** evidence" sufficient to make the issue fairly debatable. *Bd. of Supervisors v. Robertson*, 266 Va. 525, 536 (2003) (emphasis added). This is a low burden of proof. *Cf. Town of Leesburg v. Giordano*, 280 Va. 597 (2010). "If the reasonableness of the enactment is fairly debatable, a court will not substitute its judgment for that of the legislative body, and the legislation will be sustained." *Harrell*, 236 Va. at 101-102.

When evaluating the locality's evidence of reasonableness, there are a few critical takeaways:

- The locality is not bound by the evidence presented at a public hearing or the statements of the elected officials at the time of the vote—all competent evidence must be considered.
- The motives of the elected officials are irrelevant.
- A locality's staff reports are a critical source of evidence of reasonableness.
- Competing evidence, including a battle of the experts, is likely sufficient to establish reasonableness.
- Localities usually only fail to carry their burden when they do not have present evidence of reasonableness.

a. The locality is not bound by the legislative record.

When evaluating the reasonableness of the locality's decision, courts are not limited by the evidence presented at the public hearing or the statements of the elected officials at the time of the vote. Rather, "[i]n determining 'reasonableness,' . . . a court must look not to what a legislative body was told or to what it knew when it acted, but to what ***it could have known at the time.***" *Indus. Dev. Auth. v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 282 (1975). Therefore, the court "must consider all competent evidence adduced at trial concerning facts and circumstances existing at the time the legislative action was taken," even if that evidence does not exist in the legislative record or was not expressly considered at the time of the vote. *Id.*

b. **Motives of legislative bodies are irrelevant.**

The Supreme Court of Virginia has held: "Judicial review of legislative acts must be approached with particular circumspection because of the principle of separation of powers, embedded in the Constitution." *Ames v. Painter*, 239 Va. 343, 349 (1990).

> Courts are not concerned with the motives which actuate members of a legislative body in enacting a law, but in the results of their action. Bad motives might inspire a law which appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and sometimes is, passed with good intent and the best of motives.

Blankenship v. Richmond, 188 Va. 97, 105 (1948). These principles, therefore, "preclude[] judicial inquiry into the motives of legislative bodies elected by the people." *Ames*, 239 Va. at 349 (citing *Tel. Co. v. Newport News*, 196 Va. 627, 639 (1955)).

c. **Staff reports often provide evidence of reasonableness.**

Localities usually consider staff reports—memoranda prepared by the locality's staff summarizing their analysis of the application, its compliance with laws, ordinances, and regulations, views of interested parties, and proposed recommendations—when making their decision on the application. These reports are part of the legislative record of the locality's decision and, therefore, may be made part of the pleadings by motion craving oyer. *See Byrne v. City of Alexandria*, 298 Va. 694, 699-701 (2020). Staff reports may then be a source of evidence demonstrating the reasonableness of the locality's decision. *See, e.g., id.*, at 701-702 (considering staff report as evidence of reasonableness of locality's decision); *Eagle Harbor LLC v. Isle of Wight Cnty.*, 271 Va. 603, 618 (2006) (considering staff report as probative evidence of reasonableness); *Hartley v. Bd. of Supervisors*, 80 Va. App. 1, 22 (2024) (considering planning commission's staff report as evidence of reasonableness of the locality's decision).

d. **Competing evidence and "battle of the experts."**

A locality's decision is "fairly debatable" where there is evidence on both sides of the issue—both for and against the decision. *See Bell v. City Council of Charlottesville*, 224 Va. 490, 495 (1982). The quintessential example is the "battle of the experts" whereby both the locality and the challenging party have expert witness testimony concerning the reasonableness of the decision. When presented with such competing evidence, the Supreme Court of Virginia has held:

> The question in this case is not who presented the greatest number of expert witnesses or even who won the battle of the experts. Rather, the question is whether there is any evidence in the record sufficiently probative to make a fairly debatable issue of the Board's decision to deny [the applicant] a special use permit.

Giordano, 280 Va. at 608 (quoting *Stickley*, 263 Va. at 11). This same logic applies to lay witness testimony. *See Harrell*, 236 Va. at 130.

e. Insufficient evidence of reasonableness.

Courts overturn localities' decisions when they fail to present evidence demonstrating reasonableness. Several cases are instructive.

- *Norton v. City of Danville*, 268 Va. 402 (2004). The applicant sought a certificate of appropriateness to install a glass door on his house, which was located in a historic district. The locality denied the application indicating that it "fe[lt] the door was wooden" when the house was built. However, the locality did not determine the appearance or composition of the door when the house was built. Evidence developed through discovery showed the house was built in the 1880s, but the locality's decision was based on photographs of the door from 1992 showing it was all wood. The Court held the locality failed to carry its burden of proof to show the original nature of the door was wooden, particularly where other nearby houses (and other doors in the subject house) were glass.

- *Estes Funeral Home v. Adkins*, 266 Va. 297 (2003). The locality adopted an ordinance levying fees for solid waste disposal, which establishes various classifications and fee structures. The locality failed to present evidence of the locality's basis for establishing the classifications, the manner in which it classified service recipients, or setting the rates. Given this absence of evidence, the Court held the locality did not present evidence of reasonableness sufficient to make the issue fairly debatable

D. Relief

Even if the party successfully challenges the locality's land use decision, the parties simply go back to the application process—in effect, a "do over." That is because Virginia courts cannot compel localities to issue land use permits or make zoning decisions. *See Richmond v. Randall*, 2125 Va. 506, 513 (1875) ("Nor does this Court or any court have power, even when it finds the existing zoning ordinance invalid and a requested use reasonable, to order approval of a special use permit . . ."). Instead, the court will remand the issue back to the locality for a new vote and decision. *See id.* at 514 ("The new decree will . . . remand the cause to City Council for further legislative action."). There is an exception to this where an unconstitutional condition has been proven by the aggrieved applicant to have been a factor in the grant or denial of the approval. *See* Va. Code § 15.2-2208.1 (allowing "any applicant aggrieved by the grant or denial by a locality of any approval or permit, . . . where such grant included, or denial was based upon, an unconstitutional condition pursuant to the United States Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs.").

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2024 Gentry Locke Seminar

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1. Background: Corporate Transparency Act (CTA)

The federal Corporate Transparency Act[1] ("CTA") went into effect on January 1, 2024. It requires all "reporting companies" (as defined by the CTA) to file initial reports and updates with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") disclosing certain information about the reporting company, including the name and address of each owner of the reporting company. The CTA was originally enacted in 2021 under the National Defense Authorization Act (NDAA). Its stated purpose is to enable law enforcement to better counter money laundering and other criminal activity, which it purportedly accomplishes through introducing new reporting requirements applicable to small and mid-size businesses, as well as reforming aspects of the Bank Secrecy Act of 1970 (the "BSA"). FinCEN has published final regulations on the reporting requirements, as well as a number of guidance documents.

2. Introduction to CTA Legislation and Final Regulations

a) The CTA represents the most significant reformation of the BSA since the USA Patriot Act of 2001.

b) The CTA was enacted under the Fiscal Year 2021 NDAA by the Senate, overriding a presidential veto.

c) Section 403 of the CTA amends the BSA by adding a new section, 31 U.S.C. § 5336, entitled "Beneficial Ownership Information Reporting Requirements."

d) On September 30, 2022, FinCEN finalized the reporting requirements to implement the CTA and published guidance on the final regulations.[2] The effective date of these regulations was January 1, 2024.

e) The CTA reporting requirements cast a broad net, affecting all who advise on and carry out entity formation, governance, planning, and tax compliance (*e.g.*, lawyers, accountants, financial advisors, business consultants, and more).

f) The CTA is designed to apply to smaller, private entities, which may not already be subject to other reporting requirements.

   i. For lawyers working with entities that fall under the CTA it is critical to:

      A. Identify and notify existing entities of their filing obligations.
      B. Notify all newly formed entities of their filing obligations.
      C. In connection with any entities formed in 2024 or thereafter, identify "Company Applicants" (as defined by the statute) and disclose such Company Applicants in the initial filing.

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[1] 31 U.S.C. § 5336

[2] *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022).

D. Notify entities of their obligation to file updates when ownership, address, or other information changes.
E. Determine best practices for compliance.
F. Prepare client alerts or letters.

3. General Requirements

a) Reporting: All "Reporting Companies" (see below for definition) must disclose beneficial ownership information and the identity of Company Applicants to FinCEN.

i. In General: In accordance with regulations set forth by FinCEN[3], each reporting company must submit a report that contains the information required by 31 U.S.C. § 5336(b)(2)(A).

A. Existing Entities: Entities that were formed before January 1, 2024, must report the required information before January 1, 2025.

B. New Entities formed in 2024: Entities formed in calendar year 2024 must report the required information within 90 calendar days after formation.

C. New Entities formed in 2025 or After: Entities formed in calendar year 2025 or thereafter must report the required information within 30 calendar days after formation.

ii. FinCEN launched the BOI E-Filing website for reporting beneficial ownership information (https://boiefiling.fincen.gov) on January 1, 2024.[4]

A. The form can be accessed by going to FinCEN's BOI E-filing website and selecting "File BOIR."[5]

B. There is no fee for submitting a beneficial ownership information report to FinCen.[6]

b) Required Information: 31 U.S.C. § 5336(b)(2)(A).

i. In accordance with regulations prescribed by the Secretary of the Treasury[7], the required report must identify each beneficial owner of the applicable reporting company and, if the entity was formed in 2024 or thereafter, each

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[3] *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022).
[4] *Beneficial Ownership Information FAQ*, FINANCIAL CRIMES ENFORCEMENT NETWORK, FinCEN.gov (last visited Jun. 27, 2024).
[5] *Id.*
[6] *Id.*
[7] *See* 31 U.S.C. § 5336(b)(2)

"Company Applicant" with respect to that reporting company. This information includes:

A. Full legal name
B. Date of birth
C. Current residential or business street address; and
D. Unique identifying number obtained from FinCEN; or
E. Unique identifying number from an acceptable identification document:
    1. Driver's license;
    2. Identification document; or
    3. Passport

ii. Reporting Companies are also required to report specific information on the Reporting Company to FinCEN (31 C.F.R. § 1010.380(b)(1)(i)):

A. Full name of reporting company.
B. Business address of reporting company.
C. Jurisdiction of formation of the reporting company.
D. Unique identification number for reporting company.

c) Updates.

If there is a change in previously reported information, reporting companies must file an updated report within 30 days.

4. Definition of Reporting Companies

"Reporting Companies" are defined broadly and include both foreign and domestic companies.

a) Domestic Reporting Companies are:
    i. Created by the filing of a document with a Secretary of State or a similar office under the law of a State or Indian Tribe. 31 U.S.C. § 5336(a)(11)(A)(i).
    ii. This includes all corporations and limited liability companies.
    iii. Note that common law trusts are not considered reporting companies, but some trusts may fall under the definition of "Beneficial Owner" as set forth in 31 C.F.R. § 1010.380(d).

b) Foreign Reporting Companies are:
    i. Formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a Secretary of State or similar office under the laws of a State or Indian Tribe. 31 U.S.C. § 5336(a)(11)(A)(ii).

c) Statutory trusts, business trusts, and foundations;

i. These organizations are considered reporting companies only if they were created by the filing of a document with a Secretary of State or similar office under the laws of a State or Indian Tribe.
ii. Entities should also consider if any exemptions to the reporting requirements apply to them. For example, a foundation may not be required to report beneficial ownership information to FinCEN if the foundation qualifies for the tax-exempt entity exemption.[8]
iii. Trusts are not considered reporting companies if they are registered with a court of law for the purpose of establishing the court's jurisdiction over any disputes involving the trust.[9]

5. Reporting Companies Exemptions

The CTA and FinCEN established 23 types of entities that are exempt from the beneficial ownership reporting requirements. Below is a description of some of the more useful exemptions:

a) "Large operating companies" that employ over 20 employees on a full time basis in the United States, and, in the previous year, had more than $5 million in gross receipts.

b) Public accounting firms registered in accordance with section 102 of the Sarbanes-Oxley Act.

c) Insurance companies.

d) Bank and bank-like entities.

e) Broker dealers, investment companies as set forth in 15 U.S.C. § 80a-3 or an investment advisor as defined in 15 U.S.C. § 80b-2.

f) Any organization described in Internal Revenue Code ("I.R.C.") § 501(c) and exempt from tax under I.R.C. § 501(a).

g) Publicly-traded companies.

h) Subsidiaries of certain exempt entities.

i) Certain inactive entities that were formed before January 1, 2020.

The following is a comprehensive list of the types of entities exempt from reporting.

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[8] *Beneficial Ownership Information FAQ*, FINANCIAL CRIMES ENFORCEMENT NETWORK, FinCEN.gov (last visited Jun. 27, 2024).
[9] *Id.*

- Securities reporting issuer
- Governmental authority
- Bank
- Credit union
- Depository institution holding company
- Money services business
- Broker or dealer in securities
- Securities exchange or clearing agency
- Other Exchange Act registered entity
- Investment company or investment adviser
- Venture capital fund adviser
- Insurance company
- State-licensed insurance producer
- Commodity Exchange Act registered entity
- Accounting firm
- Public utility
- Financial market utility
- Pooled investment vehicle
- Tax-exempt entity
- Entity assisting a tax-exempt entity
- Large operating company
- Subsidiary of certain exempt entities
- Inactive entity

More details on each of these exemptions can be found at FinCEN's *Small Entity Compliance Guide* which can be found at https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf

6. Beneficial Owners

If a Reporting Company is required to file a report with FinCEN, it must disclose its beneficial owners.

a) Beneficial Owner. Under 31 U.S.C. § 5336(a)(3) and 31 C.F.R. § 1010.380(d), "Beneficial Owner" means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—
   i. Exercises "substantial control" over the entity; or
   ii. "Owns or controls" not less than 25% of the ownership interests of the entity.

b) Substantial Control. Under 31 C.F.R. § 1010.380(d)(1)(i), the following are deemed to exercise substantial control:
   i. A senior officer of a reporting company;

ii. Anyone who has authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors of a reporting company; and
iii. Anyone who has direction, determination, decision making of, or substantial influence over, important matters affecting a reporting company, e.g.:
    A. Major expenditures or investments
    B. The selection or termination of business lines or ventures

c) Substantial Control Under 31 C.F.R. § 1010.380(d)(1)(ii), an individual may directly or indirectly, "including as a trustee of a trust or similar arrangement," exercise substantial control over a reporting company through:
    i. Board representation.
    ii. Ownership and control of the majority of the voting power or voting rights of the company, rights associated with a financing arrangement, or interest in a company.
    iii. Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company.
    iv. Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees.
    v. Any other contract, arrangement, understanding, relationship, or otherwise.

d) Ownership/Control is generally an arrangement that establishes ownership rights in the reporting company. Examples of ownership interests include shares of equity, stock, voting rights, or any other mechanism used to establish ownership.[10]

e) An individual may directly or indirectly control an ownership interest in a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including:
    i. Joint ownership with one or more persons of an undivided interest in such ownership interest.
    ii. Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual.
    iii. With regard to a trust, the following conditions indicate that an individual owns or controls ownership interests in a reporting company through a trust:
        A. A trustee or other individual (if any) with the authority to dispose of trust assets;
        B. Beneficiary who (1) is the sole permissible recipient of income and principal; or (2) has the right to demand a distribution of or withdraw substantially all of the assets; or
        C. Grantor/settlor who has the right to revoke the trust or otherwise withdraw the assets.

f) What should a reporting company report if its ownership is in dispute?

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[10] *Beneficial Ownership Information FAQ*, FINANCIAL CRIMES ENFORCEMENT NETWORK, FinCEN.gov (last visited Jun. 27, 2024).

i. If ownership of a reporting company is the subject of active litigation and an initial BOI report has not been filed, a person authorized by the company to file its beneficial ownership information should comply with the reporting requirements.[11]
ii. If an initial BOI report has been filed and if the resolution of the litigation leads to the reporting company having different beneficial owners, the reporting company must file an updated BOI report within 30 calendar days of resolution of the litigation.

g) An initial BOI report should only include the beneficial owners as of the time of the filing. If anything changes the company must update its BOI report.

7. Beneficial Owners Exceptions

a) A Beneficial Owner does not include:

i. A minor child, as defined in the State in which the entity is formed, if the information of the parent or guardian of the minor child is reported.

ii. An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual.

iii. An individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person.

iv. Right of inheritance exceptions:
A. The CTA refers to a "future" interest associated with the right of inheritance, not a present interest that a person may acquire as a result of exercising such a right.
B. The CTA definition of "Beneficial Owner" excludes an "individual whose only interest" in the entity "is through a right of inheritance."
C. FinCEN clarifies that individuals who may in the future come to own ownership interests in an entity through a right of inheritance do not have ownership interests until the inheritance occurs.

v. FinCEN provided more clarity on the application of the inheritor exception:
A. Once an individual has inherited an ownership interest in an entity, that individual owns that ownership interest and is potentially subject to the beneficial owner reporting requirements. 31 C.F.R. § 1010.380(d).
B. Once an ownership interest is inherited and comes to be owned by an individual, that individual has the same relationship to an entity as any

[11] *Id.*

other individual who acquires an ownership interest through another means. 31 C.F.R. § 1010.380(d).

C. The precise moment at which an individual acquires an ownership interest in an entity through inheritance may be subject to a variety of legal authorities, such as the terms of a will, the terms of a trust, applicable state laws, and other valid instruments and rules. 31 C.F.R. § 1010.380(d).

8. Access to Beneficial Ownership Information

a) FinCEN will take a phased approach to providing access to beneficial ownership information.
   i. The first phase, expected to begin in the spring of 2024, will be a pilot program for a handful of Federal agency users.
   ii. The second phase, expected in the summer of 2024, will extend access to Treasury offices and other Federal agencies engaged in law enforcement and national security activities that already have memoranda of understanding for access to Bank Secrecy Act information.
   iii. The third phase, expected in the fall of 2024, will extend access to additional Federal agencies engaged in law enforcement, national security, and intelligence activities, as well as to State, local, and Tribal law enforcement partners.
   iv. The fourth phase, expected in the winter of 2024, will extend access to intermediary Federal agencies in connection with foreign government requests.
      A. The fifth phase, expected in the spring of 2025, will extend access to financial institutions subject to customer due diligence requirements under applicable law and their supervisors.

9. State Agencies and Beneficial Ownership Information Request

a) State, local, and Tribal law enforcement agencies—i.e., government agencies authorized by law to engage in the investigation or enforcement of civil or criminal violations of law—will be able to request beneficial ownership information from FinCEN in certain circumstances. A State, local, or Tribal law enforcement agency, however, can only request beneficial ownership information from FinCEN if authorized by a "court of competent jurisdiction" to seek the information in a criminal or civil investigation. The state, local, or Tribal law enforcement agency also must meet certain other access requirements, including entering into a memorandum of understanding with FinCEN that describes how the agency will protect the security and confidentiality of the information.[12]

[12] *Beneficial Ownership Information FAQ*, FINANCIAL CRIMES ENFORCEMENT NETWORK, FinCEN.gov (last visited Jun. 27, 2024).

b) Additionally, state regulatory agencies that supervise financial institutions for compliance with customer due diligence requirements may also request beneficial ownership information from FinCEN to conduct such supervision. Like other domestic government agencies, to receive beneficial ownership information from FinCEN, state regulatory agencies must also enter into a memorandum of understanding with FinCEN that describes how the agency will protect the security and confidentiality of the information.[13]

10. Company Applicant

a) Under 31 U.S.C. § 5336(a)(2) and 31 C.F.R. § 1010.380(e) the term "Company Applicant" means any individual who—

i. Files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or

ii. Registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States, by filing a document with the Secretary of State or similar office under the laws of a State or Indian Tribe.

iii. Each Reporting Company formed in 2024 and thereafter must have at least one Company Applicant and, depending upon the circumstances, may have up to two Company Applicants.

iv. FinCEN takes the position in its FAQs that "the individual who is primarily responsible for directing or controlling the filing" is a Company Applicant. This means that if an attorney drafts Articles of Organization or Articles of Incorporation or directs a paralegal or legal assistant to make the filing, the attorney is a Company Applicant.

v. In addition, the person who "directly files the document that creates or registers the company" is also a Company Applicant.

FinCEN provides the following example in its FAQs:

For example, an attorney at a law firm that offers business formation services may be primarily responsible for overseeing preparation and filing of a reporting company's incorporation documents. A paralegal at the law firm may directly file the incorporation documents at the attorney's request. Under those circumstances, the attorney and the paralegal are both company applicants for the reporting company.

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[13] *Id.*

b) The initial report of a Reporting Company formed on or after January 1, 2024, must include the required information under the CTA for the Company Applicant, the Reporting Company itself, and all Beneficial Owners under 31 C.F.R. § 1010.380(b)(1).

c) The final rule no longer requires domestic reporting companies created prior to the effective date, or foreign reporting companies registered prior to the effective date, to submit company applicant information. Rather they will only need to report the fact that they were created or registered prior to the effective date and the required Beneficial Ownership Information ("BOI") and reporting company information. 31 C.F.R. § 1010.380(b)(2)(iv).

d) A reporting company is not required to file an updated report for any changes to previously reported personal information about a Company Applicant.

11. Due Dates for Reports

The CTA and FinCEN established the following due dates for filing reports:

a) Domestic reporting companies created or foreign companies registered for the first time on or after January 1, 2024, will have until December 31, 2024, to file their initial report to FinCEN.

b) Companies created on or after January 1, 2024 will be required to file their initial report to FinCEN within 90 days of the date of creation or registration.

c) Companies created on or after January 1, 2025, will be required to file their initial report to FinCEN within 30 days of the date of creation or registration.

d) If there is a change in previously reported information, reporting companies must file an updated report within 30 days.

e) Finally, any inaccurate information must be corrected within 14 days of the date the company knew or should have known of the mistake.

12. Penalties

a) Under 31 U.S.C. § 5336(h) and 31 C.F.R. § 1010.380(g):

It is unlawful for any person to—

i. Willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document; or
ii. Willfully fail to report complete or updated beneficial ownership information.

b) Penalties for Reporting Violations (31 U.S.C. § 5336(h)(3)(A)):

i. Liable for a civil penalty of not more than $500 for each day that the violation continues or has not been remedied; and
ii. May be fined not more than $10,000, imprisoned for not more than 2 years, or both.

c) There are also penalties for unauthorized disclosure of CTA information under 31 U.S.C. § 5336(h)(2):

It is unlawful for any person to knowingly disclose or knowingly use the beneficial ownership information obtained by the person through a report submitted to FinCEN or a disclosure made by FinCEN.

i. Penalties for Unauthorized Disclosure or Use Violations (31 U.S.C. § 5336(h)(3)(B)):

A. Liable for a civil penalty of not more than $500 for each day that the violation continues or has not been remedied; and
B. Either (I) fined not more than $250,000, or imprisoned for not more than 5 years, or both; or (II) while violating another law of the United States or any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

13. Access Regulations

a) Retention and disclosure of BOI by FinCEN under 31 U.S.C. § 5336(c).
i. Retention of Information:
A. BOI relating to each reporting company shall be maintained by FinCEN for no less than 5 years after the date on which the reporting company terminates. 31 U.S.C. § 5336(c)(1).
B. An officer or employee of the United States, State agency or financial institution may not disclose BOI information. 31 U.S.C. § 5336(c)(2)(A).

ii. Scope of disclosure by FinCEN to Federal and State Agencies:
FinCEN may disclose BOI reported only upon receipt of a request, through appropriate protocols---

A. From a federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity; or
B. From a state, local, or tribal law enforcement agency who seeks information in a criminal or civil investigation; or from the federal government acting on behalf of a foreign government.

b) Rejection of Request under 31 U.S.C. § 5336(c)(6).

i. The Secretary of the Treasury shall reject a request not submitted on the FinCEN authored form.

ii. The Secretary of the Treasury may decline to provide information under this section upon finding that:
   A. The requesting agency has failed to meet any other requirement of this subsection;
   B. The information is being requested for an unlawful purpose; or
   C. Other good cause exists to deny the request.

14. Proposed Rulemaking

Rulemaking to Increase Transparency in Residential Real Estate.

FinCEN has issued a Notice of Proposed Rulemaking impacting certain residential real estate transfers. If adopted, FinCEN believes that the rule "would combat and deter money laundering by increasing transparency in the U.S. residential estate sector." [14] The proposed rule would require professionals involved in the closing or settlement of residential real estate transfers to report information to FinCEN.[15] The proposed rule would replace the current Residential Real Estate Geographic Targeting Order Program, which "requires title insurance companies to file reports identifying the beneficial owners of legal entities that make certain non-financed purchases of residential real estate" with a nationwide reporting requirement.[16] "The proposed rule would require businesses, **including attorneys**, performing specified closing or settlement functions for the non-financed sale or transfer of residential real property to an entity or trust, to collect and report information to FinCEN.[17]

FinCEN notes that the beneficial ownership information collected under this new rule, if adopted, would serve a different purpose than the information already collected under the beneficial ownership information reporting rule.[18] This information would be used to enable law enforcement to "directly tie individuals, entities, and trusts of interest to specific non-financed sales and transfers of U.S. residential real estate."[19]

Reportable transfers would include the transfer of single-family houses, townhouses, condominiums, and cooperatives, as well as buildings designed for occupancy by one to four families. Additionally, there is no threshold price for the transfer.

Accordingly, transfers of ownership in the form of a gift would need to be reported. Reportable transfers are defined broadly to include a wide variety of property owning vehicles, including but

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[14] *FINCEN Issues Notice of Proposed Rulemaking To Increase Transparency in Residential Real Estate,* FINANCIAL CRIMES ENFORCEMENT NETWORK, Fincen.gov, (Last Visited Jun. 27, 2024).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

are not limited to LLCs, corporations, partnerships and trusts. [20] Notably, FinCEN has published a list of exceptions for highly regulated types of entities.

Finally, the Real Estate Report would need to be filed within 30 days after the date of the property's transfer and the reporting party would need to keep a copy of the report for a period of five years, along with a form signed by the transferee verifying the BOI is correct.

We will provide updates on this rule if it is adopted by FinCEN.

15. Court Challenges to the CTA

a) On November 15, 2022, the National Small Business Association (NSBA) and a small business owner (Winkles) filed a lawsuit in the U.S. District Court for the Northern District of Alabama challenging the Beneficial Ownership Information Reporting (BOIR) Rule of the CTA. *Nat'l Small Bus. United v. Yellen,* No. 5:22-CV-1448-LCB, 2024 U.S. Dist. LEXIS 36205 (N.D. Ala. Mar. 1, 2024). The plaintiffs sought an immediate injunction against implementation of the BOIR Rule of the CTA.

b) On March 1, 2024 the federal district court entered a declaratory judgement ruling that:
   i. The BOIR Rule of the CTA was unconstitutional because the legislation cannot be justified as an exercise of Congress' enumerated powers.
   ii. As a result the government is not currently enforcing the CTA against the plaintiffs.
   iii. Having concluded that Congress exceeded its enumerated powers in enacting the CTA, the court did not address the constitutionality of the Act under the First, Fourth, an Fifth Amendments to the U.S. Constitution.

c) Consequences of this case
   i. Application of the Court Decision. Since the court did not issue a national injunction, the CTA's BOIR Rule should remain in effect for all other reporting companies other than the plaintiffs.

d) Other pending litigation
   i. Similar Lawsuit. *Robert J. Gargasz v. Yellen, No.1:23-cv-02468 (N.D. Ohio Dec. 29, 2023) (lawsuit seeking a nationwide injunction against enforcement of the CTA) (no updates as of July 25).*

16. Gentry Locke's Practice Tips

a) Organization for dealing with the CTA is half the battle. Below are some organizational steps Gentry Locke has taken in dealing with the CTA:

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[20] *Id.*

i. Send out letters informing clients about the CTA;

ii. Create an inbox for questions specific to the Act

iii. Create a spreadsheet to track the kinds of questions that have been sent and when a response was given;

iv. Review client organizational documents before answering questions and ensure information is up to date.

v. Ensure that when new entities are formed, the client is notified in writing of the filing obligations of the CTA

vi. Consider sending reminder notices to clients in late 2024.

b) The FinCEN web site has a FAQ and a Small Entity Compliance Guide which answers many common questions regarding the CTA and filing obligations.

c) We have found that most clients are able to navigate the FinCEN BOI filing system fairly easily and have not had significant issues with the system. It is possible that this could change later this year as the system could be overwhelmed when many existing companies will file.

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All in the Family Business: Shareholder Oppression Issues in Closely-Held Corporations

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All in the Family Business:
Shareholder Oppression Issues in Closely-Held Corporations

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A. We often think of "corporations" as large, soulless entities with stock traded publicly on the exchanges. In our minds, these entities are driven solely by a profit motive, largely bereft of emotions other than greed that theoretically serves the interests of all owners.

B. In fact, many businesses are "closely-held"—meaning that their ownership is concentrated among just a few private owners—who are often family members. These entities are typically much smaller, but there are glaring exceptions. *See, e.g.,* Cargill, Inc.[1] It is not uncommon for these entities to operate on a hybrid profit motive mixed with family or founder ethos, emotions, and values that are not exclusively profit-oriented.

C. Closely-held businesses are also not necessarily structured in one manner. A business might be organized as a limited liability company ("LLC"), some form of partnership, or a traditional corporation.

D. Multiple generations of family members are often involved in these closely-held businesses, which can and do often contain differing branches of the same original founding family.

E. Different rights, duties, and obligations are associated with or imposed on these owners, depending on the structure of the business. These materials focus on the context of closely-held corporations, but many of the concepts may apply equally to other business forms, like LLCs, which can often be similarly structured. *See, e.g., Remora Invs., L.L.C. v. Orr,* 277 Va. 316, 321-22, 673 S.E.2d 845, 847 (2009) (analogizing duties in the LLC context to those in the corporate context).

F. In large, publicly-traded corporations, shareholders do not owe each other fiduciary duties. And as a general rule, the fiduciaries in control of such corporations (directors, officers) generally owe duties (*e.g.*, duties of loyalty and care) to the corporation, not its individual shareholders. *American General Ins. Co. v. Equitable General Corp.*, 493 F. Supp. 721, 741 (E.D. Va. 1980) (applying Virginia law, and explaining that "the Virginia common law duty owed to the shareholders . . . by its directors was not a fiduciary duty inuring to each shareholder in his individual dealings with [the corporation], but was rather a duty attaching

[1] Cargill, Inc., founded in 1865 by W.W. Cargill as a small grain storage company, is the world's largest privately held company by revenue, and its current owners include a collection of 14 billionaires within the Cargill family. Other large closely held businesses include Koch Industries, Publix, Mars, H-E-B, Pilot Flying J, Trader Joe's, Land O'Lakes, Chic-fil-A, and many other names that might surprise average readers.

only to dealings between the officers and directors of [the corporation] and the shareholders as a class").

G. The rationale behind this principle is that what may be in the best interest of one shareholder is not necessarily synonymous with what is in the best interest of the corporation as a whole. Accordingly, imposing duties on fiduciaries to act in the best interests of both the corporation and its individual shareholders could place them in an untenable position.

H. The world of closely-held corporations is different, because the shareholders can often wear several "hats." They are typically not just passive owners, but are also directors, officers, and/or employees of the corporation. Accordingly, the law imposes a balancing act on such individuals:

    1. On one hand, majority stockholders have rights that are entitled to protection. They have the right to retain their stock, to control the management of the corporation, and to act together to accomplish their legitimate aims. *Glass v. Glass,* 228 Va. 39, 53-54, 321 S.E.2d 69, 78 (1984); *accord Fein v. Lanston Monotype Mach. Co.*, 196 Va. 753, 766, 85 S.E.2d 353, 360 (1955) ("the holders of the majority of the shares of a corporation have the right and the power, by the election of directors and by the vote of their stock, to determine the policy of their corporation and to manage and control its action").

    2. On the other hand, the "minority" shareholder(s) in closely-held corporations are owed a base duty of fair-dealing and fair play by those in control—the "majority" shareholder(s). *See Giannotti v. Hamway,* 239 Va. 14, 23, 387 S.E.2d 725, 730 (1990); *White v. Perkins,* 213 Va. 129, 134, 189 S.E.2d 315, 320 (1972).

I. The duty is breached in instances when those in control—*i.e.*, the "majority"—attempt to "squeeze" or "freeze" out the "minority":

    1. The term "squeeze-out" means the use of strategic position, inside information, powers of control, or the utilization of some legal device or technique by some of the owners or participants in a business, to eliminate one or more of the owners or participants from the enterprise. *Colgate v. Disthene Group, Inc.*, 85 Va. Cir. 286, 295 n.9 (Buckingham County, 2012) (quoting Robert B. Thompson, O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members § 1:1 (rev. 2d ed. 2012)).

    2. A "partial squeeze-out" is an action which reduces the participation or powers of a group of participants in the business, diminishes their claims on earnings or assets, or otherwise deprives them of business income or advantages to which they are entitled. A squeeze-out normally does not contemplate fair payment to the "squeezees" for the interests, rights, or powers which they lose. *Id.*

    3. One of the most commonly used "squeeze" techniques is to withhold dividends. By declaring no dividends at all or keeping dividend payments low, majority shareholders

may force a minority shareholder to sell their minority interest at considerably less than actual value. *Colgate,* 85 Va. Cir. at 296 (citing O'Neal and Thompson, §§ 1:3, 3.4).

4. A similar example is the abrupt removal of a minority shareholder from positions of employment and management. *Jones,* Va. Cir. at 180 (citing O'Neal and Thompson at § 3:06). Many times closely-held companies distribute substantial earnings by salary paid to owner-employees. Termination of such employment can be tantamount to a financial squeeze out.

5. In many instances, a shareholder who also holds a directorship and the chief executive position in a corporation runs the business in a one-person, autocratic manner that may be very helpful in building the business, but less so once the business is established. Generation changes in management can generate confrontations when a business leader in a subsequent generation seeks to "rule" in the same manner as the original founders. We have found that the tolerance for disregard of corporate formalities diminishes substantially with the transition from a founding owner to the subsequent generation. However, ignoring customary corporate procedures and documentation can lead to conflicts with other strong-minded personalities among the shareholders and set the stage for a squeeze-play. *Colgate,* 85 Va. Cir. at 295 (quoting O'Neal and Thompson at § 2:7).

6. A classic example is when the "oppressor(s)" cut off the flow of income for the minority shareholder or refuse to declare dividends, while at the same time maintaining their stream of income through continued salaries or creation of new salaries. *Jones v. A. Town Smoke House & Catering Inc.*, 106 Va. Cir. 168, 180 (City of Waynesboro, 2020) (citing O'Neal and Thompson at § 3:2).

7. In another commonly-used squeeze-out technique, majority shareholders siphon off corporate wealth by causing a corporation to pay its majority shareholders, and perhaps members of their immediate family or other relatives, high compensation for services rendered as directors, officers or employees. Instead of treating all of the stock alike, and distributing the profits fairly and proportionately by way of dividends, the majority first elect themselves directors, then as directors elect themselves officers, and then distribute among themselves a substantial part of the profits in the way of salaries, additional compensation and other devices. *Colgate,* 85 Va. Cir. at 304 (quoting O'Neal and Thompson, § 3:7).

J. Virginia law (and the law of all states in the United States) labels this type of conduct as "oppression," *see* Virginia Code § 13.1-747(A)(1)(b), which is more generally defined as action "by corporate managers toward stockholders which departs from the standards of fair dealing and violates the principles of fair play on which persons who entrust their funds to a corporation are entitled to rely." *Giannotti,* 239 Va. at 23, 387 S.E.2d at 730; *White,* 213 Va. at 134, 189 S.E.2d at 320. As you would expect, the terms "fair dealing" and "fair play" are subject to widely different interpretations.

K. These kinds of scenarios can arise in various ways within family-owned and operated businesses.[2] For example:

1. It is not uncommon for co-owner siblings to "fall-out." If they cannot get along as family members, the odds of them successfully agreeing on how to run the business are extraordinarily slim. This can occur regardless of the precise ownership percentages held by each person in the conflict. In some instance, the founder (father or mother is typical) may have actually structured the ownership such that one sibling owns a controlling interest. However, even if the ownership interests are equal, minority oppression can still be claimed based on the notion that the target owner has teamed up with other similarly-minded owners to form a majority "block" of interests. If that "block" takes action to consolidate control and push the other out of the business, one can expect similar allegations and claims to arise—just as if the targeted owner held an individual majority interest.

2. It is also not uncommon for two branches of a family to share ownership of a business (*e.g.*, two siblings form a company) and subsequently one branch of the family tries to consolidate control of the business in its "faction," and minimize the control or rights of the other side.

L. Oppression cases can also arise from "succession" issues within families and family-owned businesses.

1. "*Death brings out the worst in some people.*" Siblings from the founder generation may start a business built on filial affection and shared ambitions, only to be followed by subsequent family members with whom such affections may not run nearly so deep. Many times that first generation is very attached to the business they built (rightfully so), and they desire to continue it as a going concern into future generations. However, those future generations may have completely different goals and preferences—and they may resent being forced into a permanent financial entanglement with other family members. Because these family members can be inclined to "hold their tongues" during the lifetime of the founder(s), death can often bring big conflicts because it removes the disincentives for open dispute.

2. By the time that this happens, however, the founder(s) likely have involved at least some of their children in the business, granting select members of this "Second Generation" jobs, management responsibilities, officer roles, ownership, etc. *See, e.g., Jordon v. Bowman Apple Prods. Co.*, 728 F. Supp. 409, 411-12 (W.D. Va. 1990).

3. Unfortunately, it is rare for the Second Generation to get along as well as members of the first or "Founding" generation. A company built on strong familial sentiments and bonds of cooperation and trust may find itself transitioning from years of "peace, growth, and prosperity" to years of conflict and litigation.

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[2] The same concepts can apply equally in business interests owned by persons who are not family members.

4. These conflicts can often simmer just below the surface for years, with inwardly-competing family members jockeying for position and power. In this phase, it is not uncommon to see passive aggressive relationships marred by secrecy and the formation of factions. When such owners begin recruiting other (perhaps less involved) family owners to their cause, litigation is never far away. Ultimately, the tensions boil over, someone gets fired, someone gets excluded from choice projects, someone is set up to fail, someone refuses to honor corporate authority, etc. That is when lawsuits happen.

5. Sadly, there is often a competency gap between the founding generation and subsequent generations. And ironically, sometimes this can be traced directly back to the actions and decisions of the founding generation. Regardless of who caused what, it is possible that other owners may recognize an "anointed" successor's inherent weaknesses and flaws, while the patron of the successor (often a parent) is blind to such shortcomings. Other owners may take actions that they believe are fulling aligned with the best interests of the company only to then be confronted with an "oppression" lawsuit.

6. All of these scenarios are further exaggerated if there is a bleed-over of "issues" between the family and the business. Most experts in the field agree that family-owned businesses should not be used to solve family problems. Most often the result is that both the family and the business will suffer in the long run. Additionally, it is often difficult for the subsequent generations to perceive the boundaries between family and business. Family slights can bloom into business litigation.

M. The consequences of a misstep can be severe.

1. If oppressive conduct is found, the remedy can be drastic: dissolution. The judicial dissolution statute, found in § 13.1-747 of the Virginia Stock Corporation Act, provides that the circuit court, in the exercise of its equitable authority, "***may dissolve a corporation***" when a shareholder establishes that "***the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent[.]***" Va. Code § 13.1-747(A)(1)(b) (emphasis added). The only remedy available under this statute is the death penalty for the corporation.[3] In practice, we have found that the vast majority of such claims are designed to force a buyout of the minority owner's interests – and that is what typically happens at some point in the grueling process. However, in order to force that result, most aggrieved shareholders must ostensibly "seek" dissolution (which is often not in anyone's real best interests).

2. The judicial dissolution statute is remedial and intended to protect the rights of corporate stockholders—particularly minority owners. *Baylor v. Beverly Book Co.*, 216 Va. 22, 24, 216 S.E.2d 18, 19 (1975).

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[3] Courts in many other states have attempted to soften the impact of a finding of oppression by interpreting the authorizing statute as allowing "lesser included" equitable remedies such as forced buyout, injunctive relief, reinstatement, etc. However, Virginia has not recognized these as possible remedies due to the plain language of the statute.

3. An aggrieved shareholder may also file a derivative action on behalf of the company against the "oppressor" officers and directors for breach of fiduciary duty. *See* Virginia Code § 13.1-672.1. In contrast to claims of "oppression," which are claims based on harm to the individual shareholder, a derivative action is brought to remedy harms to the corporation, not those of any individual shareholder. Accordingly, derivative actions seek damages and the removal of those in authority on behalf of the corporation.

4. The distinction between direct and derivative claims generally turns on: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive benefit of any recovery or other remedy (the corporation or the stockholders, individually). *See Remora Invs.*, 277 Va. at 323-24, 673 S.E.2d at 848 (approving but not adopting the analysis in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004)).

5. The distinction between the two types of claims is not always clear, and they can go hand-in-hand. Typically, a shareholder alleging oppressive conduct through the acts of a corporation's officers and/or directors would also allege that such acts, taken by the corporation, had no legitimate business purpose other than to harm the minority shareholder, and thus, were breaches of the duties of loyalty and care owed to the corporation and harmful to the corporation as well.

6. One of the challenges with oppression claims is their potential scope. "Oppression" is not defined by what it is, but rather by what it is *not*—a lack of "fair dealing" and "fair play." *Giannotti*, 239 Va. at 23, 387 S.E.2d at 730; *White*, 213 Va. at 134, 189 S.E.2d at 320. And, those terms are incredibly vague. As a result, claims for oppression can potentially include a wide range of conduct that can span **many** years. This has the effect of vastly increasing the litigation costs for such disputes that often take the opportunity to reach back in years to prior perceived injustices.

7. Once an "oppression" lawsuit is filed, the strain on family relationship can be profound and lasting. It is extremely toxic for family members to be recruiting allies among other family members, who feel forced to "pick sides."

N. Estate disputes can also bleed into the *corporate* context. For instance:

   1. The patriarch of the family and the head of the family business dies. Toward the end of his life, he favored one sibling over another in both the business and in his will.

   2. The disfavored and now-disgruntled sibling may attempt to claim that the "golden child" poisoned the patriarch against him/her to remove any testamentary support that he/she may have received under the will to further marginalize him/her in the business.

   3. Thus, a messy corporate dispute between siblings gets even messier when estate issues like testamentary capacity and undue influence get put into the mix.

4. A similar cross-section can happen when a shareholder/family member is also an employee of the business. Here again, good lawyering can transform a claim for wrongful discharge into minority oppression.

5. It's not just business. It's personal. While seemingly "corporate" litigation, these cases are often deeply personal, and can feel more like a divorce proceeding. Suppressed or unresolved relationship issues can be brought to the forefront, and there is frequently palpable bitterness and animosity between parties.

O. So how can families/family businesses prevent these kinds of disputes?

1. Ideally, all family-owned businesses should separate family issues from business issues. Unfortunately, this requires extraordinary discipline on the part of the founding generation that is rarely seen. Work spent keeping family and business issues separate lays the foundation for a more successful transition of ownership and control.

2. Founding members must address transition/succession issues with honesty and direct communication if they hope to successfully transition the family business as a going concern. Often this means being honest with themselves. For example, a parent may have harbored unrealistically substantial ambitions for a particular child. Others may see that child's weaknesses far more clearly than the parent. An atmosphere of honesty (with self and other) is important to bridge this possible divide. The bottom line is management and ownership decisions must be made realistically, fairly, and openly. If there are disappointments to be experienced, it is best that those come while the founding generation is still involved.

    i. Those in control should evaluate the costs and benefits of potential successors with regard to various positions in the business.

    ii. To the extent family members are employees, their roles should be clearly delineated, and a "chain of command" put into place in which there is a final decisionmaker—*i.e.*, a chief executive officer.

    iii. Make sure there is a disinterested or independent (to the extent possible) "tie-breaker" when it comes to board decisions, to prevent potential deadlock in management and ownership.

    iv. Ensure that board or management decisions are largely, if not entirely, accomplished by majority vote—to prevent any single decision-maker wielding unfettered "veto" power or entrenching themselves.

    v. All of these aims can be accomplished through careful planning and drafting of the governing corporate documents. However, no document can fully protect a business or its owners if any owner is immovable or recalcitrant.

3. Remember that legal duties arises from particular roles ***in the corporate context***. They do not extend to all areas of life. Family members do not owe each other a legal duty in every context in which they find themselves simply because they are related. Accordingly, clearly distinguish between corporate and personal transactions, and ensure that timing is not an issue. For example, a change in personal estate documents that comes contemporaneously with corporate changes raises more suspicion.

4. In the event there is a fall-out between shareholders and there is simply no way to resurrect the relationship, a buyout of the dissenter's shares can preclude percolating disputes from developing into litigation. Unfortunately, valuing such interests in a manner that is acceptable to all sides is practically impossible unless a precise formula and methodology has been specified in the governing documents.

    i. The corporate documents can be drawn-up to provide a framework for any purchase. But this is often an area of draftsmanship that is rushed through – with a resulting vague or ambiguous governing document that only aggravates the problem when it is time to refer to such terms in real life. However, there are a few key areas where proper language in the governing document can really make a difference.

    ii. **Fair Value or Fair Market Value?** Do you know the difference? They both sound "fair," but they result in vastly different outcomes.

        a. "*Fair Value*" does not take into account common discounts for marketability or control. In effect, it is a valuation based on the total asset value of the company multiplied by the complaining party's ownership percentage.

        b. "*Fair Market Value*," by contrast, reflects the price at which the shares would change hands between a willing buyer and a willing seller, with neither under a compulsion to engage in the transaction. This standard allows for discounts of marketability and control, and can more appropriately take into account other factors.

    iii. But despite the vast differences in outcome between these two standards of methodology, it is remarkable how many times we see corporate documents where the terms "fair value" are used rather than "fair market value." There are places where this is entirely appropriate—such as in dissenter rights matters. However, in the vast majority of circumstances (including voluntary or forced buyouts in most circumstances that do not give rise to dissenters' rights), the governing documents should specify a purchase based on ***fair market value***. Otherwise, the purchaser is almost certain to overpay for the interests.

    iv. Unfortunately, under the statutory language of the shareholder oppression statute in Virginia, the default methodology is for "Fair Value" rather than "Fair Market Value." If oppression is found, and judicial dissolution is warranted

under Virginia Code § 13.1-747, "the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the ***fair value*** of the shares." Va. Code § 13.1-749.1.

v. But, miraculously, the Code defines "fair value" in this context as if it were "fair **market** value."

vi. Under the default statutory provisions, "Fair value" can be determined by the agreement of the parties, but if they cannot agree, it is determined by the circuit court upon petition. *See* Va. Code § 13.1-749.1(C)-(D).

vii. Virginia Code § 13.1-749.1(D) reveals that its drafters were likely not focused on the meaning of the terms "Fair Value" when they drafted 13.1-749(C)-(D) because the Code further specifies that in determining fair value, the court must consider "all relevant facts and circumstances," including:

a. the petitioner's **minority status**;

b. the **marketability** of the petitioner's shares;

c. the **relevant terms of any shareholders' agreement**; and

d. if the court finds that the value of the corporation has been diminished by the wrongful conduct of controlling shareholders, the petitioner's proportionate claim for any compensable corporate injury.

In other words, the Code defines "fair value" as if it were "fair market value."

viii. However, the court considers these factors ***"unless the court determines it would be unjust or inequitable to do so."*** Va. Code § 13.1-749.1(D) (emphasis added).

ix. Here, either the drafters either did not appreciate that "Fair Value" does not include discounts for marketability and control, or they adopted a hybrid methodology that combines aspects of both standards—because "Fair Value" does **not** include marketability and control discounts.[4]

x. Under the hybrid theory, we would treat Virginia's statutory "fair value" as "fair market value"—subject to judicial modification, which is free to treat application of marketability and control discounts as ***discretionary*** after considering the totality of the circumstances. *Jones*, 106 Va. Cir. at 176.

[4] The general rule in other jurisdictions is to ***reject*** marketability discounts when determining fair value, absent "extraordinary circumstances." *Jones*, 106 Va. Cir. at 178 (citing cases).

xi. Given all of these moving parts—and considering the high significance and impact of these distinctions—we recommend including terms in the Articles of Incorporation and Shareholder Agreement, specifying "Fair **Market** Value" as the standard for any transfer of shares by or between a shareholder and the company or other shareholders, **including** in circumstances presented in Virginia Code § 13.1-749.1.

xii. In addition to having the Articles and Shareholder Agreement specify Fair Market Value as the standard for all transfers by or among shareholders or the company, it is also advisable to spend time and attention to adding even more specificity about how such values will be produced. **The best practice is to have the company conduct regular business valuations (*e.g.*, every three years) and specify that the latest of such valuations shall govern any transfers among shareholders or between shareholders and the company.** Even if the Court allows the petitioning shareholder to present his/her own appraisal, the methodology and results should be judged against the official valuation maintained by the company.

P. If litigation arises, the primary defense to oppression claims is the **business judgment rule**.

1. The business judgment rule is a common law principle that ordinarily insulates board of directors' decisions from judicial interference. *Colgate,* 85 Va. Cir. at 293.

2. "Generally, decisions of a corporate board of directors are protected by the business judgment doctrine, as courts are reluctant to second-guess the judgment of businesses lest they subject an unlimited number of business decisions to judicial scrutiny." *O'Brien v. Midgett,* 96 Va. Cir. 177, 185 (Virginia Beach, 2017).

3. The Virginia Stock Corporation Act has codified the business judgment rule in Virginia Code § 13.1-690, which states, in pertinent part, that "[a] director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation."

4. Further, "[a] director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section" and "[a] ***person alleging a violation of this section has the burden of proving the violation.***" Va. Code § 13.1-690(C)-(D) (emphasis added).

5. The business judgment rule does not abrogate common law fiduciary duties, such as care and loyalty. *See Willard v. Moneta Building Supply, Inc.*, 258 Va. 140, 151, 515 S.E.2d 277 (1999). Rather, it sets the standard by which to discharge those duties. If duties are discharged in accordance with the statute, Section 13.1-690(C) provides a "safe harbor" from liability for those actions. *Id.*

6. Those in control "are presumed to have acted properly and in good faith in the exercise of their business judgment . . . and are called to account for their actions only when

they are shown to have engaged in self-dealing or fraud, or have acted in bad faith." *Giannotti,* 239 Va. at 24, 387 S.E.2d at 731.

7. The essential elements of the business judgment rule are: (1) the absence of personal interest or self-dealing, (2) an informed decision, which reflects a reasonable effort (subject to permitted reliance upon the advice of others) to become familiar with the relevant and available facts as well as an actual decision, (3) a reasonable belief that the decision serves the interests of the corporation, and (4) good faith. The presence of improper motives forecloses a finding that the action was taken in good faith. *Colgate,* 85 Va. Cir. at 293.

8. The rule functions within a burden shifting framework. Those in control "are presumed to have acted properly and in good faith in the exercise of their business judgment." *Giannotti,* 239 Va. at 24, 387 S.E.2d at 731. The shareholder must demonstrate that "a director had an interest in the transaction at issue[.]" *Id.* Then, "the burden shifts to the director to prove that the transaction was fair and reasonable to the corporation." *Id.*

Q. Other practice tips to avoid litigation altogether:

1. **Up front work**. When forming a corporation or LLC for business clients, do not overlook mechanisms to deal with future disputes among owners. It is well worth the attention on the front end, and, once the bloom leaves the rose, it is hard to get owners to unanimously agree to anything.

2. **Arbitration?** Many Circuit Courts are unfamiliar with complicated business dispute issues. Moreover, disputes among closely held business owners can be public, nasty, and extraordinarily expensive. Consider adding an arbitration clause for such disputes (or for all disputes). If you do this, spend real effort on the arbitration clause. You may also want to include a baseball arbitration provision to prevent deadlock (another ground for dissolution). If your client chooses to opt for an arbitration clause in the Shareholder Agreement, consider limiting discovery as well (it can be incredibly expensive in oppression lawsuits given the potential breadth of the claims).

3. **Counseling business clients dealing with "next" generation transition issues**. It is not uncommon for founding business owners to tolerate bad behavior from family member employees. This is not good for the business, its owners, or the other employees.

    i. Businesses should apply the same standards of conduct to owners (family members) and other employees.

    ii. Businesses should not tolerate bad behavior from owners. It will not end when the founders exit the organization. Odds are that it will only get worse.

    iii. Consider hiring professionals to assist with business transitions. These days there are business psychologists and other professionals who do nothing but

work with companies in the process of transitioning management from one generation to the next. Their services are expensive, but not nearly as expensive as litigation among owners.

4. **Consider strong restrictions on transfer in a family owned business**. If you do restrict transferability, do it with precise and unambiguous language. The benefits include:

   i. Discouraging impetuous decisions about departures.

   ii. Reducing the buyout price in the event of a intransigent dispute.

   iii. Possibly assisting with divorce planning. Many disputes indirectly stem from marital discord with an owner. If you want to protect owners from potential future marital property claims, do it up front. In some instances, we have recommended a Shareholder Agreement requirement that owners actively working in the business must have a prenuptial or post-nuptial agreement protecting the ownership interests.

5. **Jury trial?** Consider waiving jury trials in the Shareholder Agreement.

6. **Define the duties owed.** As noted previously, it is difficult to pin down exactly what constitutes "fair play" and "fair dealing"—and even when these are adequately defined in the Code, there is always the argument that the Code is supplemented by principles of common law. In light of these variables, consider defining **precisely** what is required by these terms. This can (and should) include incorporation of uncodified common law. We suggest that such vague references be eliminated by agreement whenever possible.

7. **Clear valuation standards.** Clarity discourages litigation. We recommend that you incorporate precise valuation standards and **exclude** unpredictable valuation standards. For example, instead of just referring to the "fair market value" standard, include a description of what that will include (*e.g.*, control and marketability discounts). If there are substantial restrictions on transfer, consider specifying the amount of the discounts.

8. **Financing provisions.** By Agreement, the shareholders can specify that buyouts by the company or other shareholders will be seller-financed at a particular interest rate for a particular term. It is better to agree on these things before there is a dispute.

9. **Conduct regular appraisals**. These help with inheritance taxes and departures.

10. **Attorneys' fees.** Consider waiver of attorneys' fees in all litigation involving owners.

11. **Liability insurance.** Many (or most, probably) family-owned businesses have a Directors and Officers (or Errors and Omissions) insurance policy that specifically excludes claims by family members—even when the only persons who could potentially bring a claim are family members. Insurance companies will negotiate on

this term. Try to get insurance that does not include family exclusions. An alternative form that insurance companies use is the "major shareholder exclusion" which typically rejects coverage for owners of a certain percentage interest (*e.g.*, 10% or more). That too can be negotiated.

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Supreme Court of Virginia's Vlaming Decision

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On Being Between Rocks and Hard Places: An Update on the Fast-Changing and Sometimes Conflicting Legal Demands on Employers in Religious Cases

By: Todd Leeson and Noah Sullivan[1]

I. Anti-Discrimination Laws and Recent Decisions on Religious and Transgender Issues

A. Title VII and the VHRA

1. Title VII of the Civil Rights Act

- "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;" 42 U.S.C. § 2000e-2(a)(1).

2. Virginia Human Rights Act – Virginia Code § 2.2-3905

- "It is an unlawful discriminatory practice for:
An employer to [f]ail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, military status, disability, or national origin;" VA. CODE ANN. § 2.2-3905(B)(1)(a).
- "'Religion' includes any outward expression of religious faith, including adherence to religious dressing and grooming practices and the carrying or display of religious items or symbols." VA. CODE ANN. § 2.2-3901(E).

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[1] The authors appreciate the assistance of Payton Edwards, a rising 3rd year law student at Liberty University, who researched and drafted this outline.

B. *303 Creative v. Elenis*, 600 U.S. 570 (2023).

1. Facts

- The plaintiff sought to enjoin Colorado from enforcing the Colorado Anti-Discrimination Act ("CADA") against her if she refused to create a website for same-sex weddings. *Id.* at 580–81.
- The plaintiff stipulated that she would not discriminate against same-sex couples for the design of other websites, but that her beliefs precluded her from making websites celebrating same-sex marriage. *Id.* at 582.

2. Lower Courts

- The district court and Tenth Circuit held that the plaintiff was not entitled to an injunction. *303 Creative LLC v. Elenis*, 405 F. Supp. 3d 907, 912 (D. Colo. 2019); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1168 (10th Cir. 2021).
- The district court simply dismissed for lack of standing. *Elenis*, 405 F. Supp. 3d at 911.
- The Tenth Circuit found standing, but held that Colorado satisfied strict scrutiny because it had a compelling governmental interest in ensuring equal access to publicly available services and there was no less restrictive option aside from coercing her to provide her unique services. *Elenis*, 6 F.4th at 1181–82.

3. Colorado's Compulsion of Speech

- The Supreme Court stated that the CADA, as applied under the Tenth Circuit's reasoning, forced the plaintiff either to speak the government's preferred message or face sanctions. *Elenis*, 600 U.S. at 589.
- The court relied on the fact that the CADA could require compulsory attendance of remedial training, filing compliance reports, and paying monetary fines. *Id.*
- The court also relied on past precedents that had held that public accommodations laws could not be used to deny speakers the right to choose their own message, lest they be conscripted to speak the government's message

anytime someone of a protected class was involved. *Id.* at 592.

- The Court also rejected Colorado's contention that the plaintiff was discriminating on the basis of a protected class instead of beliefs. The court looked to the parties' stipulations and found that the plaintiff would agree to create websites for individuals regardless of sexuality, just not websites celebrating same-sex marriage. *Id.* at 594–95.

C. *Kennedy v. Bremerton*, 597 U.S. 507 (2022).

1. Facts

- Kennedy, an assistant coach for a high school football team, had engaged in prayers with students on the field following football games. *Id.* at 514–15.
- At other times he prayed alone on the field. Kennedy also engaged in pregame and postgame prayers in the locker room following some games. The students who joined him did so voluntarily. *Id.* at 515.
- No one had complained about these practices for over seven years. *Id.*
- After the school district learned of his actions, the district sent Kennedy a letter instructing him to avoid any motivational talks with students that included religious expression and to refrain from engaging in, supervising, or encouraging student prayers. *Id.* at 516.
- After the letter, Kennedy ended the tradition of offering locker room prayers and ceased incorporating religious expression or prayers in motivational talks. *Id.*
- After requesting, and being subsequently denied, permission to continue his midfield prayers alone, Kennedy continued the practice while his students were engaged in other postgame activities. *Id.* at 517–18.
- The school district placed him on administrative leave and his evaluation advised against rehiring him, despite years of positive evaluations. *Id.* at 519–20.

2. Lower Court Rulings

- The district court and the Ninth Circuit held that Kennedy's free speech and free exercise rights had not been violated. *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1240 (W.D. Wash. 2020); *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1019–21 (9th Cir. 2021).
- Both courts found that the speech was attributable to his position as a coach and, therefore, was government speech. *Kennedy*, 443 F. Supp. 3d at 1237; *Kennedy*, 991 F.3d at 1016.
- Both courts also found that, even if the prayers were speech as a private citizen, there would be no free exercise or free expression violations because the school district had a compelling interest in avoiding an violation of the establishment clause. *Kennedy*, 443 F. Supp. 3d at 1240; *Kennedy*, 991 F.3d at 1022–23.

3. Supreme Court Finds a Violation of Free Exercise and Speech Rights

- Speech Claims
  - The Court stated that the principal question in determining whether speech is government speech is whether it is ordinarily within the scope of an employee's duties. *Kennedy*, 597 U.S. at 529.
  - The Court then stated that Kennedy was not speaking as a government employee because the speech was not attributable to his ordinary job duties and he was explicitly given time for personal secular activities following a game. *Id.* at 529–30.
  - The Court stated that just because Kennedy chose to use this time for a religious activity, his speech was not transformed into government speech. *Id.* at 531.
- Free Exercise Claim
  - The Court held that the free exercise violation was clear because the school board had specifically targeted the practice for fear of the repercussions

of Kennedy's religious expression. Thus, religion was the entire point of the disciplinary actions against Kennedy. *Id.* at 526–27.

- Failed Establishment Clause Defense
  - The Court also stated that there was no establishment clause violation because the lower courts failed to interpret the establishment clause with reference to historical practices and understandings which were being used in place of the *Lemon* and endorsement tests. *Id.* at 534–36.
    - In a nutshell, the *Lemon* test had previously required three prongs for a government action to be valid under the establishment clause: (1) a secular purpose; (2) the action must not have had the effect of advancing or inhibiting religion; and (3) the action could not create an excessive entanglement between the government and religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).
    - The endorsement test focuses on whether the government has endorsed or disapproved a particular religion. This test was promulgated by Justice O'Connor in her concurring opinion in *Lynch v. Donnely*. *See Lynch v. Donnely*, 465 U.S. 668 (1984) (O'Connor, J., concurring).
  - The Court also rejected the district's argument that Kennedy's conduct was coercive. *Kennedy*, 597 U.S. at 536–37.
  - The Court stated that learning to tolerate religious displays was part of living in a pluralistic society and that the district never raised any coercion concerns in its letters to Kennedy or in the courts below. *Id.* at 538.
  - The court also noted in dicta that there was no rationale shown for why one clause of the First Amendment should be read to trump another and that there was not even a showing that the clauses were in conflict. *Id.* at 542–43.

D. *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

1. Facts

- There were multiple cases consolidated in which employees alleged that they were fired on the basis of their sexual orientation. *Id.* at 652–54.

2. Holding and Reasoning

- The Supreme Court recognized that "sex" discrimination under Title VII includes discrimination based on sexual orientation or gender identity. *Id.* at 661.
- The court reasoned that discrimination on the basis of sexual orientation equated to sex-based discrimination because if an employer had two employees who were attracted to men and the only difference between them was that one employee was a man and the other a woman, then firing the man on such grounds equated to discriminating against him based on sex. *Id.* at 660.

3. Fourth Circuit Applications

- Virginia Federal District Courts have applied Bostock in several sexual orientation and gender identity cases. The courts have also often cited to the fact that only but-for causation is required to establish discrimination. *Flores v. Va. Dep't of Corr.*, 2021 U.S. Dist. LEXIS 31857 (W.D. Va. 2021) (recognizing that employers cannot discriminate based on homosexuality or transgenderism and that only but-for causation is required to establish such discrimination); *Patterson v. Va. Dep't of Corr.*, 2024 U.S. Dist. LEXIS 72197 (E.D. Va. 2024).

E. *Groff v. Dejoy*, 600 U.S. 447 (2023).

1. Facts

- Groff was a mail carrier for the United States Postal Service who refused to work on Sundays based on his religious beliefs. *Id.* at 454.

- For years he had managed to avoid working on Sundays by moving to a more rural area that did not require Sunday deliveries. *Id.*
- Eventually the United States Postal Service entered into an agreement with Amazon for Sunday deliveries that extended even to the rural area where Groff worked. *Id.* at 455.
- Groff refused to work on Sundays forcing other employees, including a post master (who typically was not responsible for making deliveries) deliver mail on Sundays. *Id.*
- Groff faced progressive discipline for his refusal to work on Sundays, which eventually led to his resignation. He then sued under Title VII alleging that his religious belief could have been accommodated. *Id.*

2. Lower Courts

- The district court granted summary judgment to USPS and the third circuit affirmed. *Groff v. Dejoy*, 2021 U.S. Dist. LEXIS 66174, 37 (E.D. Pa. 2021); *Groff v. Dejoy*, 35 F.4th 162, 176 (3d Cir. 2022).
- The lower courts relied on the "more than a de minimis cost" standard and found that accommodating Groff's religion would have imposed an undue hardship. *Groff*, 2021 U.S. Dist. LEXIS 66174 at 31; *Groff*, 35 F.4th at 174.

3. The New Standard

- The Court stated that the de minimis standard (in effect since 1977) was not the standard for Title VII undue hardship determinations. Instead an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Groff*, 600 U.S. at 468.
- The Court also stated that employee animosity to a particular religion, religion in general, or the notion of accommodating religious practice cannot be considered undue hardship. *Id.* at 472.

- Context and facts will be critical in each case—employers should engage in interactive process with employee to evaluate whether it can accommodate.

F. Implications from these Decisions

- The Supreme Courts of both the United States and Virginia have signaled a new age of deference to religious rights.
- Because of this new found deference, it is likely that religious discrimination claims will continue to increase.
- In 2021, there were 2,111 religious discrimination claims (based on the EEOC statistics). There were 13,814 and 4,341 claims of religious discrimination claims in 2022 and 2023, respectively. *Enforcement and Litigation Statistics: EEOC Religion-Based vs Total Charges*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/dat a/enforcement-and-litigation-statistics-0 (last visited 26 June, 2024).
- The large majority of these cases were the result of religious objections to employer COVID-19 vaccine mandates. Under the older "de minimis" harm standard, employers often concluded that they could not accommodate the employee's objections, and the employees were terminated. They then filed religious discrimination charges.
- *See Enforcement and Litigation Statistics: EEOC Religion-Based Resolutions by Type*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/dat a/enforcement-and-litigation-statistics-0 (last visited 26 June, 2024).

All Charges	2021	2022	2023
National	61,331	73,485	81,055
Virginia	4,207	5,299	5,945
Religion Charges			
National	2,111	**13,814**	4,341
Virginia	69	**360**	155

- While there is no right to free speech in the private workplace, employees can still claim that the employer is discriminating based on the employee's religion if the employer is attempting

to force them to say or do something that the employee claims is in conflict with their religious beliefs. It is important to remember that, under *Groff*, the employer's burden is higher than it was previously.

- Recent Fourth Circuit cases have, at the same time, extended protections under *Bostock* , in cases such as *Williams v. Kincaid* (allowing a prisoner the right to stay with women because housing was assigned based on genitalia), *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), and *Grimm v. Gloucester County School Board* (requiring public schools to allow transgender students to use the bathroom of their gender identity), *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).
- Thus, there could be conflict in the workplace in balancing potentially competing interests between religious viewpoints and sexual orientation/gender identity rights.
- As discussed below, these conflicting interests will lead to some difficult questions as employers seek to determine who to accommodate.

G. Recent Religious Discrimination Cases

- Triple Canopy, Inc., a Virginia-based company, agreed to pay $110,759 because of alleged religious discrimination against an employee who believed that men must wear beards and was denied an accommodation. *Triple Canopy, Inc. to Pay $110,759 to Settle EEOC Religious Discrimination and Retaliation Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 26, 2023), https://www.eeoc.gov/newsroom/triple-canopy-inc-pay-110759-settle-eeoc-religious-discrimination-and-retaliation-lawsuit.
- Passages Family Support, a nonprofit in Washington, paid $95,000 to resolve a religious discrimination charge for failing to provide an accommodation. *Passages Family Support to Pay $95,000 to Resolve Religious Discrimination Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 4, 2024), https://www.eeoc.gov/newsroom/passages-family-support-pay-95000-resolve-religious-discrimination-charge.
- Hank's Furniture, a nationwide retailer, agreed to pay$110,000 to settle a religious discrimination suit. According to the suit, Hank's Furniture summarily denied an employee's request for a

religious exemption to taking a COVID-19 vaccine without investigating the feasibility of an accommodation. The company also disputed the validity of the employee's sincerely held beliefs. *Hank's Furniture to Pay $110,000 in EEOC Religious Discrimination Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 18, 2024), https://www.eeoc.gov/newsroom/hanks-furniture-pay-110000-eeoc-religious-discrimination-lawsuit.

II. *Vlaming v. W. Point Sch. Bd.*, 302 Va. 504 (2023).[2]

A. *The Majority Opinion*

1. Facts

- This case was decided on demurrer, so the facts were as alleged in the Complaint.
- Vlaming was a high school French teacher. He learned that a student he taught had determined to identify as male instead of female and changed names. *Id.* at 522.
- Vlaming stated that his religious practice prohibited him from lying and that he believed that referring to a female as a male by using a male pronoun was lying. *Id.* at 523.
- To accommodate student Doe, Vlaming had all of his students pick new "French" names to be used that schoolyear, so as not to draw attention to Doe changing names. Vlaming began to refer to Doe using the French name Doe selected. Vlaming also tried to avoid using any third person pronouns in class, so Doe did not feel singled out. *Id.* at 522–23.
- During a conference with Doe's parents about this new practice, Vlaming was told that he should leave his beliefs out of the matter and use masculine pronouns to refer to Doe. *Id.* at 523.
- Vlaming then had multiple meetings with school officials who all informed him that he needed to refer to Doe

[2] Noah and Todd published an extensive and comprehensive article analyzing *Vlaming* on Gentry Locke's website in February 2024. The article can be accessed at: https://www.gentrylocke.com/article/supreme-court-of-virginias-vlaming-decision-is-a-legal-earthquake-with-major-implications-for-virginia-businesses-organizations-and-government-entities/

using masculine pronouns. Vlaming was ultimately fired after receiving warning letters from the school about his continued failure to use masculine pronouns to refer to Doe. *Id.* at 524–26.

- Vlaming filed a complaint, based entirely on state law claims, for free-exercise, free-speech, due-process, and breach-of-contract claims. *Id.* at 526.

2. Historical Analysis of Virginia Religion Clauses

- The court began by noting that there are marked differences between the Free Exercise clause of the Virginia and United States Constitutions. Thus, the court concluded, the federal jurisprudence for the First Amendment Free Exercise clause did not apply to the Virginia Constitution. *Id.* at 530.
- The Court then dove into the historical understandings of the free-exercise clauses in the Virginia Constitution, relying on the drafting history, the Virginia Statute for Religious Freedom, and other contemporary writings to divine the meaning.
    - George Mason's proposed version of the text provided a narrower protection for religion, allowing the state to infringe the exercise of religion when that exercise would disturb the "peace, the happiness, or safety of society." *Id.* at 533.
    - James Madison's version provided more protection for religious exercise, allowing it to be infringed only in cases where the "preservation of equal liberty and the existence of the State are manifestly endangered." *Id.* at 533.
    - The Court then implemented the limiting principle found in the 1786 Act for Religious Freedom, which permitted interference with an individual's religious principles only when "[those] principles break out into overt acts against peace and good order." *Id.* at 535–537.

3. The New Test

- The Dissent refers to the new test as a "super scrutiny." *Id.* at 589 (Mann, J., dissenting).
- The new test asks whether a person's religious practice results in overt acts that "'invariably pose some substantial threat to public safety, peace, or order,' and if so, whether the government's compelling state interest in protecting the public from that threat, when examined under the rigors of strict scrutiny, could be satisfied by 'less restrictive means.'" *Vlaming*, 302 Va. at 540. If either prong fails, then the government *must* accommodate the religious practice. *Id.*
- The court also stated that when religious liberty merges with free-speech protections, mere objectionable and hurtful religious speech or non-speech does not satisfy the standard. *Id.* at 541.

B. Implications for Virginia Employers

1. Potential Employer Actions

- While *Vlaming* was decided in the context of an individual's religious beliefs, the Supreme Court of the United States has recognized that organizations can also exercise religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
- Thus, under *Vlaming's* new regime of regulation of religious beliefs, there could be avenues for employers to attack certain laws applicable to businesses on the grounds that they infringe upon that organization's right to the free exercise of its religion.
- It will be up to businesses to determine what legal requirements they wish to challenge on the ground that their free exercise rights have been infringed, and whether the challenge to the law is worth the benefits it may provide.

2. Accommodation of Religious Beliefs and Practices

- But the *Vlaming* decision may also become the manner in which the VHRA is interpreted with respect to workplace religious discrimination claims.
- Remember that the VHRA was significantly enhanced and amended in 2020. There is scant case authority interpreting the VHRA in the Virginia state courts.

3. Further Workplace Protection for Employees Who Allege Discrimination on Basis of Sexual Orientation or Gender Identity.

- Following the *Bostock* case, the Federal EEOC has aggressively published rules and pronouncements emphasizing the legal rights to be accorded in the workplace to transgender employees as well as gay or lesbian employees.
- For example, on April 29, 2024, the EEOC published new final guidance on workplace harassment, "Enforcement Guidance on Harassment in the Workplace." In the guidance, the EEOC makes clear that employers may not subject employees to discrimination or harassment based n their sexual orientation or gender identity.

C. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 2024 U.S. Dist. LEXIS 78340 (S.D. Ind. 2024).

1. Facts

- Case with allegations similar to *Vlaming*. Demonstrates the tension in play for employers.
- Kluge was an orchestra teacher at Brownsburg High School. When the school announced a policy to allow transgender students to use their preferred names in class, Kluge refused to use those preferred names, based on his purported religious beliefs. *Id.* at 5, 10–11.
- Instead, Kluge began to refer to students solely by their last names. *Id.* at 13.

- The school alleged that this caused substantial classroom disruptions and made students feel uncomfortable in class. *Id.* at 15–25
- Kluge had several meetings with the school administration regarding his accommodation. *Id.* at 25–29.
- Eventually he filed what he believed to be a conditional resignation that he could withdraw. However, the school bylaws and state law did not allow the withdrawal of his resignation. *Id.* at 32.
- Mr. Kluge's resignation was not cancelled and he was then unemployed and filed suit based on a failure to accommodate. (There was also a retaliation claim that the court dismissed.) *Id.* at 36.

2. Holding and Reasoning

- The court granted summary judgment for the school.
- The court reasoned that, while Kluge had shown that he had a religious belief that prevented him from acting in accord with the school's name policy, an accommodation for Kluge would have been an undue hardship to the school. *Id.* at 46, 67, 72.
- The court noted that the nature of the school's business was "educating all students," which the school achieved by "fostering a learning environment of respect and affirmation." *Id.* at 51.
- The court reasoned that, because there would be substantial harm to students as a result of the disruptions in class and making other students and staff feel uncomfortable, that qualified as an undue hardship justifying denial of the requested accommodation. *Id.* at 61–62, 67.
- The court also noted that accommodating Kluge's beliefs would have subjected it to potential liability, which also constituted an undue hardship. *Id.* at 72.

D. *Ibanez v. Albemarle Cnty. Sch. Bd.*, 80 Va. App. 169 (2024).

1. Facts

- Albemarle County Public Schools created a curriculum focusing on "Anti-Racism." Under this curriculum, there were a set of pilot program slides that were presented in eighth grade classes. *Id.* at 178.
- No part of this curriculum allowed for the punishment of students for not participating, and it allowed parents to opt out of the curriculum if they chose to do so. *Id.* at 179–81.

2. Equal Protection Claim

- The plaintiffs claimed that the curriculum led to discrimination against their students because the curriculum called for students to make daily choices to work against dominant identities, such as whiteness and Christianity. *Id.* at 196–97.
- The court stated that this was insufficient to show a discriminatory action by the government and that the plaintiffs were, unsuccessfully, attempting to turn a differentiation in governmental messaging into a differentiation in treatment. *Id.* at 197.
- The court stated that for a claim of a "racially hostile educational environment," it was required for the plaintiffs to show objective and subjective proof that the environment was hostile. *Id.* at 201.

3. Compelled Speech and Viewpoint Discrimination Claims

- The plaintiffs also claimed that the school's curriculum forced students to engage in compelled speech and that it discriminated based on viewpoint. *Id.* at 202–03.
- The court found that there was no compelled speech argument. The slides in the curriculum merely called for thought exercises and there was no requirement that students must engage in speech. *Id.* at 205.
- The court distinguished this from the situation in *Vlaming* where the teacher was fired *for what he did not*

say, whereas in *Ibanez* the students were not forced to say anything at all. *Id.* at 206.

- The court also rejected the viewpoint discrimination claim because there were no facts pleaded that showed the students speech was regulated in any way. Instead all questions posed on the slides were thought exercises and not commands to engage in particular speech. *Id.* at 209.
- The court also stated that even if there was viewpoint discrimination, it was not properly pleaded because the plaintiffs had not adduced any evidence of an adverse action against students for engaging in speech against the anti-racist curriculum. *Id.* at 210.
- There was no evidence that the school ever stated that such speech would be deemed a racist act under the new policy and the plaintiffs were only speculating that students would be punished under a separate policy. *Id.* at 211.

4. Implications of the *Ibanez* Decision

- Merely presenting an opposing viewpoint does not constitute a hostile environment in and of itself. However, there still could be instances in which the dissemination or advocation for these views could rise the level of creating a hostile environment.
- While employees in the private sector do not have free speech rights, they could still claim discrimination where an employer is attempting to force them to say something in conflict with their beliefs. However, under *Ibanez*, if there is not an explicitly referenced disciplinary policy, then an employee likely would not be able to bring a discrimination claim, so long as the policy had not been enforced against them because the claim would be too speculative.
    - However, if it rises to the level of creating a hostile environment there could be other issues.
- The Virginia Supreme Court has granted review, so stay tuned!

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"Ethics" for $1000, Alex: Helping Your Practice Stay out of Legal Jeopardy

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"Ethics" for $1000, Alex:
Helping your practice stay out of legal **JEOPARDY**

Gentry Locke Seminar

September 6, 2024 – Roanoke

Presenters:
Emily S. Mordecai
Ryan J. Starks
T. Tyler Moses

Format Overview: The presentation cover topics on various Virginia's Rules of Professional Conduct. The audience will be encouraged to participate through the use of the smartphone application "Poll Everywhere," which enables members of the audience to answer questions while providing a breakdown of the audience's answers.

This outline is in two sections: hypotheticals and answers. There are 16 hypotheticals, which are arranged by topic. The answers are at the end of the presentation along with the text of the applicable Rules.

List of Topics

Communications Concerning a Lawyer's Services (Rule 7.1)

#1. In July 2024, a lawyer at Smith & Jones LLP obtained a $3 million jury verdict in a medical malpractice case, which included $350,000 in punitive damages and $2,650,000 in compensatory damages (the current medical malpractice cap). He shared the verdict in an online advertisement, which stated: "Smith & Jones LLP obtained a $3 million medical malpractice verdict for a severely injured client. Our client came to us with a concern regarding Virginia's $2,650,000 medical malpractice damages cap, but we delivered on our promise to fight to get our client every penny he deserved."

Does this advertisement violate Rule 7.1?

(A) No. Even though it does not disclose the amounts of compensatory and punitive damages included in the verdict, it accurately and truthfully states the total verdict amount.
(B) Yes. The advertisement, although accurate in describing the total verdict amount, misleads the reader and suggests that the firm somehow has the ability to obtain exceptions to Virginia's medical malpractice compensatory damage cap.
(C) It depends on whether anyone who saw the advertisement was actually misled or misinformed by it.

Conflict of Interest: General Rule (Rule 1.7)

#2. Attorney Jones represents a Richmond-area banker in a white-collar criminal case involving the banker's suspected embezzlement of funds from the account of Mr. Rich Rolling, the bank's wealthiest account holder. Three years ago, Attorney Jones represented Mr. Rolling's sister in an unrelated civil case. Attorney Jones' representation of the sister has since concluded.

Is there a potential conflict of interest such that Attorney Jones should obtain a written waiver from the banker?

(A) No, so long as there is no indication that Mr. Rolling's sister would be called as a witness to testify against the banker.
(B) No. Attorney Jones would never need a waiver because the cases are unrelated.
(C) Yes. Attorney Jones is required to obtain a written waiver because, even though there is no indication at present that Mr. Rolling's sister will be called to testify against the banker, that possibility could arise in the future.

Imputed Disqualification: General Rule (Rule 1.10)

#3. Attorney Smith received a phone call from the owner of a chemical plant in town, who urgently needed legal representation in connection with a fire at the plant caused (in part) by defective fire detection systems manufactured and installed by Fire Proof Plus LLC. Attorney Smith sent an email to all lawyers at his firm asking if any of them knew of any conflicts but, in an effort to get back to the potential client as quickly as possible, did not run a formal check through his firm's conflicts check system. After hearing no information indicating a conflict by email, Attorney Smith took the case. The conflicts check would have revealed that a semi-

retired partner opened a matter for the defense of Fire Proof Plus LLC in a similar case two years ago and had since negotiated a settlement but had not yet drafted the agreement.

Is there an imputed conflict under Rule 1.10?

(A) No. Attorney Jones did not have actual knowledge of the conflict, even after he affirmatively checked with all others at his firm.
(B) No. Attorney Jones' diligence in checking for conflicts was reasonable under the circumstances.
(C) Yes. Attorney Jones reasonably should have known of the conflict.

Rules 3.3 and 4.1 (LEO 1900)

#4. Attorney Jones represented a client in a personal injury case against the manufacturer of supplies used in a chemical plant where the client worked for 30 years. The client was able to testify by deposition, but his health quickly deteriorated in the days after. After reviewing the transcripts of the client and the expert toxicologist, the manufacturer offered Attorney Jones a $3 million settlement. The client died the day before the manufacturer relayed the offer to Attorney Jones. In responding to the offer, Attorney Jones disclosed the death of the client and accepted the offer. After paying himself the agreed upon contingency, he paid the remainder of the settlement to the client's family.

Did Attorney Jones violate the ethical rules?

(A) No, because he disclosed the death of the client to opposing counsel and did so before he accepted the offer.
(B) No, because he no longer owes any obligations to the client.
(C) Yes, because he no longer had a client to accept an offer on behalf of.
(D) Yes, because did not tell the client's family that he was going to accept the offer before doing so.

Client with Impairment (Rule 1.14)

#5. You run a trusts and estates practice in a small town in Virginia. One of your first clients, Beth, has consistently changed her will every five years since you have started practicing law and has regularly attended meetings by herself.

Beth recently scheduled a meeting with you with her daughter, Patty. When you meet with Beth, Patty does most of the talking. From speaking with Patty, you learn that Beth would like to drastically change the terms of her will, leaving nearly all of her estate to Patty rather than in equal shares to her three children. Additionally, Patty tells you that Beth has recently been experiencing some memory loss issues, which Beth does not dispute when hearing.

What should you do?

(A) Refuse to alter the provisions of Beth's will due to concerns with her capacity.
(B) Reach out to Beth's other children due to a concern of undue influence.

(C) Make an initial capacity determination during the consultation and a follow up determination when Beth comes in to sign.

Accepting Appointments (Rule 6.2)

#6. Attorney Amanda was recently assigned a pro bono case from its local courthouse. The client assigned to Amanda is a local fisherman, Frank. After speaking with Frank, Amanda learns that Frank was regularly taking his work home with him, which led to an unsatisfactory odor that permeated throughout the building. After numerous requests to refrain from doing so, Frank's landlord served him with an eviction notice. Amanda cannot stand seafood and finds the entire subject matter of the case repugnant. Amanda is afraid that her representation of Frank will be impaired due to her severe distaste for seafood and Frank's line of business. Can Amanda refuse the appointment of this case from the judge?

(A) Yes
(B) No
(C) Maybe

Disciplinary Authority; Choice of Law (Rule 8.5)

#7. Lawyer Lou is licensed to practice law in Virginia and in Maryland. Although Lou lives in Maryland, Lou has long been a member of the Virginia State Bar but has almost entirely focused his practice on Maryland law and maintains his membership with the Virginia Bar as an associate member.

Following the representation of an individual in Maryland, Lou was recently accused by a client of violating one of the Maryland Rules of Professional Conduct and was found to be not guilty of such accusations. However, months later, Lou receives a notice from the Virginia State Bar requesting more information about the accusation and the circumstances surrounding it. Does Lou need to provide additional information?

(A) Yes
(B) No
(C) Maybe

Confidentiality of Information (Rule 1.6)

#8. Your estate planning client has recently gotten into some trouble with the Internal Revenue Service for failing to report certain income on their tax return. You have never practiced in the tax sphere and refer the client to another attorney with a tax background. After the client consults the tax attorney, the tax attorney contacts you requesting documentation and other information about the client. Assuming that the client has in fact retained the new attorney, you decide to send the client's confidential information to them. You later find out that the client sought counsel from a different tax attorney.

True or False: by sharing the confidential information with another attorney who has not yet been retained, you have breached your ethical duty to protect confidential information.

(A) True
(B) False

Fees (Rule 1.5)

#9. Sarah is a longtime client of Larry Lawyer. She recently engaged him to represent her in an employment discrimination dispute. Larry has been a solo practitioner for many years but is unfamiliar with employment law. Larry asks employment lawyer Bob, whom he met at a Bar Conference earlier the same year, whether he would be interested in assisting. Bob agrees, and the two enter into a fee-splitting arrangement. Bob and Larry begin work on Sarah's case, after which Larry informs Sarah of the agreement and discloses the terms of the division of the fee. Sarah readily agrees, and Larry obtains Sarah's consent in writing. Has Larry acted properly?

(A) Yes. Sarah is a longtime client, and Larry fully informed her of the arrangement and obtained her written consent.
(B) No. Sarah's consent must have been obtained prior to rendering legal services.
(C) Maybe, as long as the total fee is reasonable.

#10. You have been hired to represent John Reno in a personal injury lawsuit against his neighbor, Janice Soprano related to an incident wherein Soprano threw a glass dish filled with piping hot baked ziti at Reno. Reno sustained serious burns and lacerations. You have never represented Reno before, but you have represented several of his associates on personal injury matters in the past and have met Reno several times before related to these representations. Because you know Reno and have worked with his colleagues, you call him and tell him that you are happy to represent him at your regular fee. To follow up, you send Reno an engagement letter setting out the terms of the representation but do not include details as to your fee. You've handled several cases like this in the jurisdiction before and feel confident that your fee is reasonable in this matter.

Have you acted properly under the rules?

A) Yes, your fees are likely reasonable under the circumstance and you adequately appraised the client of such fees.
B) No, you did not explain the fees to the client.
C) Yes, because you've handled several personal injury cases for Reno's associates, you did not need to explain the amount, basis, or rate of the fees.

Meritorious Claims and Contentions (Rule 3.1)

#11. You agreed to represent Martin in a claim against Martin's employer for intentional infliction of emotional distress due to insulting remarks about his intelligence and maturity. After researching past court decisions, you concluded that such claims almost always fail in similar employment settings. You now wish to withdraw before filing the complaint because you are convinced Martin is going to lose. However, Martin insists on you filing the complaint to avoid missing the statute of limitations, even if he needs to find another lawyer for discovery and trial. Would it be permissible for you to file the complaint under these circumstances?

(A) No, because your research has led to the conclusion that courts usually disfavor such claims as a rule.
(B) Yes, because Martin's claim has some basis in fact and law.
(C) Maybe, as long as you withdraw after filing the complaint.

12. Attorney Kim is representing Parker in a personal injury case. While Parker was injured, he also informs Kim that he wants to proceed with a lawsuit at this time primarily to harass the defendant, whom he holds a grudge against, and make things as difficult as possible. In addition, the evidence currently available does not fully support Parker's claim, but Kim believes that the necessary evidence will be uncovered during discovery. What is the best course of action for Kim?

(A) Proceed with filing the lawsuit per the client's wishes despite the lack of evidence since it can be developed in discovery.
(B) Advise Parker about the ethical obligation to avoid pursuing actions primarily intended to harass or inconvenience others and recommend alternative legal strategies.
(C) Withdraw from representing Parker immediately due to the insufficient evidence and the client's intent.

Lawyer as Witness (Rule 3.7)

#13. You prepared the will for a longtime client and acted as one of the two subscribing witnesses to its execution. In the will, the client gave everything to the local animal shelter and nothing to his son and sole heir. Upon the client's death one year later, the executor named in the will asks you to represent him in probating the will and administering the estate. He informs you that the son is contesting the probate of the will on the grounds that your client lacked the required mental capacity at the time the will was executed. You believe that your client was fully competent at all times and will so testify at trial. The other subscribing witness to the client's will has also died. Under these circumstances, would it be proper for you to represent the executor in the probate of the will?

(A) No, because you will be called to testify on a contested issue of fact.
(B) No, because you would be representing an interest adverse to the interests of the client's heir.
(C) Yes, because you are the sole surviving witness to the execution of the will.
(D) Yes, because your testimony will support the validity of the will.

Conflicts of Interest: Former Client (Rule 1.9)

#14. While working as an associate at Black & Associates, Lenny Lawyer represented Schrute Farms in a personal injury lawsuit arising from an incident where an invitee sustained food poising after drinking Schrute Farm's complementary beet juice.

About two years after the representation concluded, Lenny started his own firm, LL Attorneys, PLC, and was retained by John Scranton in connection with his personal injury lawsuit against

Schrute Farms, wherein Scranton alleges he was injured because of a negligently maintained tree branch on the property.

Is Lenny's representation proper?

A) No, because a lawyer who has formerly represented a client in a matter cannot represent another person whose interests are materially adverse to the interests of the former client.
B) Yes, provided that Lenny obtains consent from both Schrute Farms and John Scranton after thoroughly explaining the situation and potential conflict.
C) Yes, because the matters are not substantially related.

Communication With Persons Represented by Counsel (Rule 4.2)

#15. Anne represents Green Top, Inc. in a sexual harassment suit filed against it by several former employees. While at the nail salon, Anne strikes up a conversation with a woman sitting a few chairs down. They begin a brief conversation about the unusually warm temperatures they had been experiencing. Their conversation ends quickly because the woman's friend sits down and they begin to talk. Anne does not know that the woman is one of the former employee Plaintiffs. However, while waiting for her nails to dry, Anne overhears the woman say that she "decided to join that bogus lawsuit against Green Top after the others convinced her that the company would never be able to prove their sexual harassment claims were all made up." At this point, Anne realizes the woman is one of the former employee Plaintiffs and quickly walks away and sits in another area of the salon to avoid overhearing any more information.

What should Anne do with this information?

A) Anne should report the woman's fraud.
B) Anne should keep it to herself as this was an improper communication with a party that Anne knows is represented.
C) Anne is not required to report the fraud and should use the information to her advantage.

Reporting Misconduct (Rule 8.3)

#16. Bob Dylan and Tom Petty went to law school together and began practicing in the same jurisdiction. Bob always thought Tom was unorganized and unreliable. They ran into each other at bar events and in court rooms frequently for years. Recently, Bob observed Tom arguing a plea in bar. While he was prepared and argued completely, Tom looked disheveled and tired. About a week later at a law school alumni event, Bob overhears Tom's old law school roommate say that he couldn't "believe that Tom can still get away with those wild all night benders but I saw him do it last week." Bob thought that had to have been the night before that plea in bar hearing. Several months later, Bob learns that Tom has been hired as a senior associate at his law firm. Bob is upset and appalled that the firm would even consider allowing someone as unprofessional as Tom. He considers reporting Tom for misconduct based on Tom's history of inappropriate drinking.

What should Bob do?

A) Bob should report Tom to the appropriate authority. He has first hand knowledge that Tom has a history of unprofessional conduct and knows that he drinks heavily based on Tom's old roommate's statement.
B) Bob should not report Tom. While the information he has raises a substantial question as to Tom's fitness to practice law, the information is not reliable.
C) Bob should not report Tom because the information he has does not raise a substantial question as to Tom's fitness to practice law and it is not reliable.

ANSWERS

QUESTION #1

Answer: B. This is not allowed. The advertisement, even if technically truthful, is misleading because it suggests that the firm has an ability to obtain an exception to the medical malpractice compensatory damages cap.

Comment 1 to the Rule is instructive here: "Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

Text of Rule 7.1

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

QUESTION #2

A. A concurrent conflict does not exist, and Attorney Jones is therefore not required to obtain a waiver so long as there is no indication that the sister will be called to testify against the banker. This case is loosely based on the facts of *Holman v. Commonwealth*, 2022 Va. App. LEXIS 290 (Va. App. 2022), where the Virginia Court of Appeals rejected claims a public defender's representation of a client convicted of murder created a conflict under Rule 1.7 because the public defender had previously represented the victim's sister, brother, and niece in unrelated cases. The court explained: "The mere fact that [the public defender] represented [the victim's] sister, brother, and niece in unrelated matters does not rise to the level of an apparent conflict of interest . . . The record does not reflect that [the public defender] continued to represent [the victim's] relatives through the time of the arraignment, nor does [the client] so allege. [The victim's] sister, brother, and niece were not co-defendants at [the client's] trial, nor were they called as witnesses by the Commonwealth to testify against [the client]—circumstances that, if alleged, could have raised an apparent conflict of interest." *Id.* at *10-11.

Text of Rule 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
    1. the representation of one client will be directly adverse to another client; or
    2. there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. the consent from the client is memorialized in writing.

QUESTION #3

Answer: C. Yes. The attorney reasonably should have known about the conflict. See Comment 2a to the rule: "A lawyer or firm should maintain and use an appropriate system for detecting conflicts of interest. The failure to maintain a system for identifying conflicts or to use that system when making a decision to undertake employment in a particular matter may be deemed a violation of Rule 1.10(a) if proper use of a system would have identified the conflict."

Text of Rule 1.10

(a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).
(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
    1. the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
    2. any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
(d) The imputed prohibition of improper transactions is governed by Rule 1.8(k).
(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

QUESTION #4

Answer: C. This question is addressed by Legal Ethics Opinion 1900, which states that in the event that a lawyer's client dies, "the lawyer must disclose the client's death to opposing counsel . . . before any further substantive communication. If the matter is before a court, the lawyer must disclose the client's death to the court no later than the next communication with, or appearance before, the court."

Legal Ethics Opinion 1900 also overruled former Legal Ethics Opinion 952, which permitted a lawyer to accept a settlement offer after the death his client, and held that a lawyer cannot accept a settlement offer on behalf of a deceased client even if he discloses the death of the client. It explained that "the lawyer has no client and no authority to accept or make a settlement after the client's death unless and until the administrator of the estate or other successor in interest retains the lawyer to pursue any remaining claim on behalf of the estate."

Text of Legal Ethics Opinion 1900 (Approved by the Virginia Supreme Court Jan. 4, 2024)[1]:

LEGAL ETHICS OPINION 1900. LAWYER'S DUTY TO DISCLOSE DEATH OF CLIENT.

QUESTION PRESENTED

When a lawyer's client dies during the representation, what duty does the lawyer have to disclose the client's death to opposing counsel or to the court?

APPLICABLE RULES AND OPINIONS

Rule 3.3. Candor Toward The Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * *

Rule 4.1. Truthfulness In Statements To Others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Legal Ethics Opinion: 952 (1987).

ANSWER

The lawyer must disclose the client's death to opposing counsel or the opposing party if pro se before any further substantive communication. If the matter is before a court, the lawyer must disclose the client's death to the court no later than the next communication with, or appearance before, the court.

ANALYSIS

The ethical duties begin with the legal conclusion that the death of the client terminates the representation and the lawyer's actual authority to act for the client. Restatement (Third) of the Law Governing Lawyers, § 31 Termination of a Lawyer's Authority, Comment e. Given that foundation, any act or omission that perpetuates the belief that the lawyer represents the client or has any authority to act on behalf of a client violates Rule 4.1 either by affirmatively

[1] The text included below includes the relevant excerpt containing the Opinion and Analysis. The full text, including the Virginia Supreme Court's adoption of the Opinion and Clerk's signature memorializing the same, can be found at: https://www.vacourts.gov/courts/scv/amendments/leo_1900.pdf.

misrepresenting the lawyer's authority or by failing to act and therefore passively misrepresenting the lawyer's authority.

In Formal Opinion 397, the American Bar Association Standing Committee on Ethics and Professional Responsibility concluded:

> The death of a client means that the lawyer, at least for the moment, no longer has a client and, if she does thereafter continue in the matter, it will be on behalf of a different client. We therefore conclude that a failure to disclose that occurrence is tantamount to making a false statement of material fact within the meaning of Rule 4.1(a). . . . Prior to the death, the lawyer acted on behalf of an identified client. When, however, the death occurs, the lawyer ceases to represent that identified client. Accordingly, any subsequent communication to opposing counsel with respect to the matter would be the equivalent of a knowing, affirmative misrepresentation should the lawyer fail to disclose the fact that she no longer represents the previously identified client.

The opinion also concludes that an appearance before a court without disclosing the client's death would violate Rule 3.3 by making a false statement of material fact to the court. Therefore, the ABA concluded, the lawyer must inform the opposing lawyer and the court of the client's death in her first communication after learning of that fact.

The committee agrees that the lawyer must disclose the client's death before any further substantive communication with opposing counsel and must disclose to the court no later than the first communication or appearance after learning of the client's death. The lawyer does not violate Rule 4.1 by simply avoiding any substantive communication with opposing counsel while, for example, determining whether there is a representative of the client's estate and whether that representative wishes to hire the lawyer to continue to pursue the client's claim.

LEO 952, which concluded that a lawyer can accept a settlement offer without disclosing the client's death absent a direct inquiry about the client's health, but that the lawyer should disclose the client's death when accepting the offer to "avoid an appearance of impropriety," is overruled by this opinion. The committee concludes that a lawyer cannot accept or make an offer of settlement on behalf of a deceased client, even if the lawyer discloses the client's death at the same time. As stated above, the lawyer has no client and no authority to accept or make a settlement after the client's death unless and until the administrator of the estate or other successor in interest retains the lawyer to pursue any remaining claim on behalf of the estate.

QUESTION #5

Answer: C. Rule 1.14(a) states that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." The attorney in this case could ask a number of qualifying questions to ensure that Beth has capacity both on the day of consult and on the day she signs her will. Such qualifiers should include her orientation to time, place, and the situation, as well as specifics about the will. A client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-

being. Additionally, a cautionary reminder on the potential for undue influence: when necessary to assist in representation, the presence of family members or others generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for authorized protective action, must look to the client and not family members, to make decisions on the client's behalf.

Text of Rule 1.14

a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

QUESTION #6

Answer (C). Rule 6.2 Accepting Appointments states that a lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

1. representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
2. representing the client is likely to result in an unreasonable financial burden on the lawyer; or
3. the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Rule 6.2(c) seems to be implicated here, given that Amanda finds seafood repugnant. If Amanda is able to demonstrate that her representation or her relationship with Frank is likely to be impaired as a result, her seeking to be recused from the appointment would likely be considered acceptable.

QUESTION #7

Answer: C. Rule 8.5 was recently amended to state that a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of Virginia, *regardless of where the lawyer's conduct occurs*. Despite the Maryland State Bar's dismissal of the claim against Lou, he may still be disciplined by the Virginia State Bar following its independent determination of the situation.

Text of Rule 8.5

a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of Virginia, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia. By doing so, such lawyer consents to the appointment of the Clerk of the Supreme Court of Virginia as his or her agent for purposes of notices of any disciplinary action by the Virginia State Bar. A lawyer may be subject for the same conduct to the disciplinary authority of Virginia and any other jurisdiction where the lawyer is admitted.
b) Choice of Law. In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:
    1. for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;
    2. for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred; and
    3. notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply.

QUESTION #8

Answer: True. The attorney may share confidential information from the client with other persons to the extent it is necessary to carry out the representation—this includes "disclosures that are impliedly authorized in order to carry out the representation" under Rule 1.6(a). That said, as a best practice, when referring matters not within your expertise to other attorneys, such as the one contemplated here, you should receive confirmation that they are formally engaged before any confidential information is shared. Express consent from the client in writing would serve as the best evidence of such confirmation. Paragraph (d) also requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.

Text of Rule 1.6

a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
    1. such information to comply with law or a court order;
    2. such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client

was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

3. such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
4. such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
5. such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
6. information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
7. such information to prevent reasonably certain death or substantial bodily harm.

c) A lawyer shall promptly reveal:

1. the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or
2. information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

QUESTION #9

Answer: B. A division of a fee between lawyers who are not in the same firm may be made only if the division of fees and the client's consent is obtained *in advance of* the rendering of legal services. Rule 1.5, Paragraph (e). It does not matter that Sarah is a longtime client and gave her written consent—it came too late. Furthermore, Bob and Larry were not previously associated in a law firm and are working the matter together, so Paragraph (f) does not apply.

Text of Rule 1.5

a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

1. in a domestic relations matter, except in rare instances; or
2. for representing a defendant in a criminal case.

e) A division of a fee between lawyers who are not in the same firm may be made only if:

1. the client is advised of and consents to the participation of all the lawyers involved;
2. the terms of the division of the fee are disclosed to the client and the client consents thereto;
3. the total fee is reasonable; and
4. the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

QUESTION #10

Answer: B. Pursuant to Rule 1.5(a) and (b) a lawyer's fees must be reasonable, and must be adequately explained to the client. While you have represented Reno's colleagues and already know Reno, you have never represented Reno. Thus, you must explain the amount, basis, or rate of the fee.

Text of Rule 1.5

g) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

   9. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
   10. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer
   11. the fee customarily charged in the locality for similar legal services;
   12. the amount involved and the results obtained;
   13. the time limitations imposed by the client or by the circumstances;
   14. the nature and length of the professional relationship with the client;
   15. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
   16. whether the fee is fixed or contingent.

h) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

i) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

j) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

   3. in a domestic relations matter, except in rare instances; or
   4. for representing a defendant in a criminal case.

k) A division of a fee between lawyers who are not in the same firm may be made only if:

   5. the client is advised of and consents to the participation of all the lawyers involved;

6. the terms of the division of the fee are disclosed to the client and the client consents thereto;
7. the total fee is reasonable; and
8. the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

l) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

QUESTION #11

Answer: B. Even though you do not believe Martin's position will prevail, this does not mean the action is frivolous. Comment 1 states you have a duty to use legal procedure for the fullest benefit of the client's cause. In addition, a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Here, it appears there even may be at least some support in existing law for Martin's claims.

QUESTION #12

Answer: B. Comment 2 to Rule 3.1 provides that an action is frivolous if the client desires to have the action taken primarily for the purpose of harassment. Option C is not the best course of action because withdrawing immediately without first advising the client about ethical obligations and exploring alternative strategies is premature. Kim should first counsel Parker about the ethical concerns and seek a resolution that adheres to the rules. If the client still insists on pursuing a frivolous claim by filing a lawsuit, then withdrawal might become necessary.

Text of Rule 3.1

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client

desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

QUESTION #13

Answer: A. It is not proper because you would be called to testify on a contested issue of fact. The other exceptions under the rule to not apply because the testimony does not relate to the nature or value of the legal services rendered and the executor can find another attorney at this juncture without working substantial hardship on the client. The opposing party will be likely to suffer prejudice given the importance of the lawyer's testimony and the fact it conflicts with the son's. Furthermore, both parties can readily foresee the lawyer will be a witness, which is a relevant consideration under Comment 4.

Text of Rule 3.7

a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:
   1. the testimony relates to an uncontested issue;
   2. the testimony relates to the nature and value of legal services rendered in the case; or
   3. disqualification of the lawyer would work substantial hardship on the client.

b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

c) A lawyer may act as advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve

that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] *ABA Model Rule* Comments not adopted.

[6] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Where a lawyer may be called as a witness other than on behalf of the client, paragraph (b) allows the lawyer to continue representation until it becomes apparent that the testimony may be prejudicial to the client. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. *See* Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

QUESTION #14

Answer: C. Under Rule 1.9(a), a lawyer who has formerly represented a client cannot subsequently represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the lawyer consults with both the present and former clients and thereafter receives their consent to the new representation. Here, while both are personal injury lawsuits, the former representation is not substantially related to the new representation. Therefore, Lenny may represent John Scranton and does not need to obtain Scranton's or Schrute Farms' consent to do so.

Text of Rule 1.9

a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.
b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
    1. whose interests are materially adverse to that person; and
    2. about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless both the present and former client consent after consultation.

c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
    1. use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
    2. reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

QUESTION #15

Answer: A. Anne should report the woman's fraud. While this was not an improper communication under Rule 4.2, even if it were, Anne has a duty to report such fraudulent conduct under Rule 3.3(d). However, Anne did not engage in any improper communication for several reasons. First, when Anne spoke with the woman about the weather, Anne did not know that the woman was a represented party in the matter. Second, when Anne overheard that the woman was knowingly pursuing fraudulent claims, she was not actually communicating with the woman. She merely overheard this exchange. Further, she immediately walked away to prevent hearing more.

Text of Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Text of Rule 3.3

a) A lawyer shall not knowingly:
    1. make a false statement of fact or law to a tribunal;
    2. fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
    3. fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
    4. offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

QUESTION #16

Answer: C. Rule 8.3 (a) imposes a duty upon lawyers to report misconduct. At the hearing, Tom was prepared and argued competently. His appearance, while perhaps not the most professional, does not raise a substantial question as to his honesty, trustworthiness, or fitness to practice law. Under Rule 8.3(a), inappropriate drinking is not reportable conduct. A lawyer must have committed a violation of the Rules of Professional conduct. Rule 8.4 lists behavior that constitutes misconduct under the rules. Such conduct is reportable. The comments that Bob overhead Tom's old roommate make are not reliable. The night that the roommate describes, if true, was not necessarily the night before the hearing that Bob observed. At this point, Bob does not have a reasonable basis to report Tom any professional authority.

Text of Rule 8.3

a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.
b) A lawyer having reliable information that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
c) If a lawyer serving as a third party neutral receives reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.
d) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.
e) A lawyer shall inform the Virginia State Bar if:
    1. the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction;
    2. the lawyer has been convicted of a felony in a state, U.S. territory, District of Columbia, or federal court;
    3. the lawyer has been convicted of either a crime involving theft, fraud, extortion, bribery or perjury, or an attempt, solicitation or conspiracy to commit any of the foregoing offenses, in a state, U.S. territory, District of Columbia, or federal court.

4. The reporting required by paragraph (e) of this Rule shall be made in writing to the Clerk of the Disciplinary System of the Virginia State Bar not later than 60 days following entry of any final order or judgment of conviction or discipline.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. *See* Rule 1.6(c)(3).

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[3a] In court-related dispute resolution proceedings, a third party neutral cannot disclose any information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the proceeding. Mediation sessions are covered by another statute, which is less restrictive, covering "any communication made in or in connection with the mediation which relates to the controversy being mediated." Thus a lawyer serving as a mediator or third party neutral may not be able to discharge his or her obligation to report the misconduct of another lawyer if the reporting lawyer's information is based on information protected as confidential under the statutes. However, both statutes permit the parties to agree in writing to waive confidentiality.

[3b] The Rule requires a third party neutral lawyer to attempt to obtain the parties' written consent to waive confidentiality as to professional misconduct, so as to permit the lawyer to reveal information regarding another lawyer's misconduct which the lawyer would otherwise be required to report.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer or judge whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in or cooperation with an approved lawyers or judges

assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The duty to report, therefore, does not apply to a lawyer who is participating in or cooperating with an approved lawyer assistance program such as the Virginia Bar Association's Committee on Substance Abuse and who learns of the confidences and secrets of another lawyer who is the object of a particular assistance effort when such information is obtained for the purpose of fulfilling the recognized objectives of the program. Such confidences and secrets are to be protected to the same extent as the confidences and secrets of a lawyer's client in order to promote the purposes of the assistance program. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to personal use.

[6] The duty of a lawyer to self-report a criminal conviction or professional discipline under paragraph (e) of this rule is triggered only after the conviction or decision has become final. Whether an offense is a felony shall be governed by the state, U.S. territory, District of Columbia or federal law under which the conviction is obtained. Thus, it is possible that an offense in another jurisdiction may be a misdemeanor crime for which there is no duty to self-report, even though under Virginia law the offense is a felony.

Text of Rule 8.4

It is professional misconduct for a lawyer to:

a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;
c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;
d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;
e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
f) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before a lawyer regulatory or disciplinary authority.

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6

Special Techniques to Defend Cases: Plea in Bar

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Gentry Locke Seminar

Special Techniques to Defend Virginia Cases: Pleas in Bar

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I. What is a Plea in Bar?

A plea in bar, sometimes referred to as a special plea in modern jurisprudence, is a responsive defensive pleading that alleges a single state of facts or circumstances which, if proven, constitutes an absolute defense to the claim. *Nelms v. Nelms*, 236 Va. 281, 289 (1988); Rule 3:8(a) of the Rules of the Supreme Court of Virginia.

Other names for the plea in bar under the system of common law pleading included:

- Special plea
- Peremptory pleas
- Pleas to the action
- Pleas to the merits
- Pleas to the issue
- Issuable pleas

14B *Michie's Jurisprudence* § 45. As these names suggest, the plea in bar, unlike a demurrer, does not assert some legal insufficiency in the offensive pleading, but instead asserts that some other dispositive point renders those allegations irrelevant. *Cal. Condo Ass'n v. Peterson*, 301 Va. 14 (2022).

The plea has the effect of shortening the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). A plea in bar offers a unique opportunity for a defendant to short-circuit litigation by proving a disputed issue of fact before trial on the merits of the plaintiff's case in chief.[1]

As the Supreme Court of Virginia helpfully laid out in a recent opinion:

> A plea in bar serves a unique function in our adversarial system. In one sense, it is wholly unlike a demurrer, which merely "'tests the legal sufficiency of' the

[1] But be aware that the Court has discretion to delay resolution on the plea until the trial on the merits. *Ferguson Enters., Inc. v. F.H. Fury Plumbing, Heating ~ Air Conditioning*, 297 Va. 539, 549 (2019) ("While a plea in bar is generally heard pre-trial, it is not always necessary that it be. Also, there is no requirement that a separate hearing be held . . . ."); *see Tidewater Constr. Corp. v. Duke*, 210 Va. 143, 147 (1969) ("[T]he cause of action on the merits [shall] be consolidated for trial with defendants' special plea").

> allegations in a complaint," and in modern practice, "a plea in bar does not point out the legal insufficiency of allegations but rather demonstrates their irrelevance because of some other dispositive point—usually some affirmative defense such as the 'statute of limitations, res judicata, collateral estoppel by judgment, accord and satisfaction, or statute of frauds.'"
>
> But in another sense, a plea in bar is partly like a demurrer. A plea in bar can raise an affirmative defense targeting solely the allegations of the complaint (assumed arguendo to be true), thus obviating any need for an evidentiary hearing.

Cal. Condo. Ass'n, 301 Va. at 20-21 (citations omitted).

II. The History of the Plea in Bar

The plea in bar is a relic of common law pleading, a system largely abolished in most states due to the unwieldy and cumbersome nature of the devices necessary to accomplish the aims of the pleadings.

Under the common law system of pleading, a defendant could usually make one of three pleadings: a plea in abatement, a demurrer, or a plea in bar. Pleas in abatement did not go to the legal sufficiency of the offensive pleading, nor to the substantive merits of the claim, but instead challenged form, time, or place of the action. 1A M.J. § 19.

Pleas in abatement were abolished in 1977 in Virginia by statute, but the defenses that could formerly only be raised by such a plea may simply be made by motion. Code § 8.01-276 ("Any defense heretofore required or permitted to be made by plea in abatement may be made by written motion stating specifically the relief demanded and the grounds therefor. Except when the ground of such motion is the lack of the court's jurisdiction over the person of an indispensable party, or of the subject matter of the litigation, such motion shall be made within the time prescribed by Rules of the Supreme Court. If the motion challenges the venue of the action, the movant shall state therein why venue is improperly laid and what place or places within the Commonwealth would constitute proper venue for the action."). As one commentator notes: "The 1977 statute only removed ancient procedural clogs and gave a modern, simple written motion in place of the traditional, formal written plea." *Friends Virginia Pleading and Practice*, § 8.01(6).

The demurrer, in contrast, accepts as true the factual allegations of the offensive pleading, instead challenging the "legal sufficiency of facts alleged in pleadings." *Seymour v. Roanoke Cnty. Bd. of Supervisors*, 301 Va. 156, 164. The sole question presented by a demurrer is whether the offensive pleading states a cause of action. *See Welding v. Bland Cnty. Serv. Auth.*, 261 Va. 218 (2001). At common law, the demurrer came in three flavors: the demurrer to the evidence, the general demurrer, and the special demurrer. Demurrers to the evidence have been abolished and replaced with the familiar motion to strike the evidence. Code § 8.01-276. Special demurrers attacked pleadings for issues of form and have similarly been abolished. *See* Code § 8.01-275; *Friends Virginia Pleadings and Practice*, § 8.01(8).

The plea in bar came in two flavors: the general plea and the special plea. The general plea denied some fact that the plaintiff was required to prove, *Burks Pleading and Practice*, § 216,

while the special plea raised some new issue that defeated the plaintiff's claim, but which the plaintiff was not required to prove, *Virginia Civil Procedure* § 9.8. General pleas have been abolished by Rule 3:8(a), but the special plea has survived. *See generally*, *Doe v. Va. Church of God*, CL17000049-01, 2022 Va. Cir. LEXIS 33, at *7-8 (Waynesboro Co. March 4, 2022).

III. What Can Properly Be Raised in a Plea in Bar?

There is no definitive list of facts or circumstances which are appropriate for resolution on a plea in bar. The core inquiry is whether the plea is dispositive of the plaintiffs claims and does not merely challenge the plaintiff's ability to prove an element of the case.

Some specific, and certainly non-exhaustive, examples of uncontroversial pleas in bar include issues raising the following defenses: statute of limitations,[2] res judicata, collateral estoppel by judgment, accord and satisfaction, and statute of frauds. *Our Lady of Peace, Inc. v. Morgan*, 297 Va. 832, 847 n.4 (2019). Judge Martin of Virginia's Fourth Judicial Circuit, in an article for the Journal of Civil Litigation, noted that the Supreme Court of Virginia has not taken issue with pleas in bar raising the statute of repose, *Cooper Indu., Inc. v. Melendez*, 260 Va. 578 (2000); sovereign immunity, *Hawthorne v. VanMarter*, 279 Va. 566 (2010); standing to bring a derivative suit, *Jennings v. Kay Jennings Fam. Ltd. P'ship*, 275 Va. 594 (2008); and the judgmental immunity doctrine, *Shevlin Smith v. McLaughlin*, 289 Va. 241 (2015).

In *Nelms v. Nelms*, 236 Va. 281, 289 (1988), the Supreme Court of Virginia cited with approval an equity treatise listing the following other "familiar illustrations" of the use of a plea:

- Absence of proper parties;
- Res judicata;
- Usury;
- Release;
- Award;
- Infancy;
- Bankruptcy;
- Denial of partnership;
- Bona fide purchaser.

Id. (quoting E. Meade, *Lile's Equity Pleading and Practice*, § 199). Other defenses certainly exist, and identifying whether or not your defense can be raised in a plea requires analysis of the facts and circumstances of your case.

Additionally, a plea in bar need not be dispositive of the entire suit. A plea in bar may go to some counts but not others, even if they arise out of the same cause of action but merely allege different theories of liability. *See Shevlin Smith*, 289 Va. at 252.

[2] Even if apparent on the face of a Complaint, a statute of limitations defense cannot be set up by demurrer. Rather, it "can only be raised as an affirmative defense specifically set forth in a responsive pleading." Code § 8.01-235.

In *Shevlin Smith*, the Court held that a plea in bar asserting that "Shevlin Smith 'did not breach the prevailing standard of care and [its] actions [were] protected by the judgmental immunity doctrine'" could have been reached by the trial court despite the fact that the plea only went to one theory of liability for legal malpractice. *Id.* NOTE: The Court did not hold that the plea in bar was otherwise proper; the first half of Shevlin Smith's plea in bar was likely a plea of the general issue, not permitted under Virginia law.

IV. When to Make the Plea

The defendant can make a plea in bar as a responsive pleading to a Complaint, satisfying the requirement of Rule 3:8 to respond to the Complaint with 21 days of service. Rule 3:8(a). Care should be taken, however: while a plea in bar need not be dispositive of all counts to a Complaint to be proper, a plea in bar is "***deemed responsive only to the specific count or counts addressed therein***." Rule 3:8(a) (emphasis added).

Questions remain, however, whether the Plea in Bar ***must*** be contained in the defendants first responsive pleading or be lost.

In *Fayak v. Earl*, CL2023-8795, 2023 Va. Cir. LEXIS 262 (Fairfax Co. Dec. 11, 2023), Judge Michael Devine held that Rule 3:8 requires that ***all*** responsive pleadings be filed within 21 days of service of the complaint. *Id.* at *5. The Court reasoned that the Rule's requirement that the defendant "must file ***pleadings*** in response within 21 days after service" contemplated that the defendant may file multiple concurrent pleadings, and that the rule provided no exceptions for later-discovered pleas. *Id.* at *4. Judge Devine held that the only mechanism for a defendant to file a later-discovered plea was to obtain leave to file a late pleading pursuant to Rule 1:9.

However, there are at least two circuit courts that disagree. In *Carter v. Mazin Alayssami, D.M.D., P.C.*, 82 Va. Cir. 148, 149 (Stafford Co. 2011), and *City of Chesapeake v. Thrasher*, 109 Va. Cir. 149, 150 (Chesapeake City 2021), the Stafford and Chesapeake circuit courts found that the Rule contained ***no*** such requirement that ***every*** responsive pleading be filed within 21 days of service, but simply required that ***a*** responsive pleading be filed within 21 days.

In light of this circuit split, the prudent practitioner should diligently consider any possible grounds to include a plea in bar in his or her first responsive pleading.

V. Evidentiary Hearing

A unique feature of the plea in bar is the ability for the pleader to take evidence on their dispositive motion. **This feature is a significant part of what makes pleas in bar so powerful.** Unlike a demurrer, the plea in bar enables the defendant to rise above the one-sided factual allegations in the offensive pleading and defeat a suit prior to a full adjudication on the merits. In a jurisdiction where summary judgment is rarely entertained, the ability to adjudicate dispositive facts in a narrow, focused proceeding becomes an essential part of defending a Virginia case.

However, the defendant is not required to put on evidence in support of their plea in bar. Where the dispositive issue of fact that represents a complete bar to recovery is on the face of the offensive pleading, the defendant can submit the issue to the court for decision without an evidentiary hearing. *See, e.g.*, *Lostrangio v. Laingford*, 261 Va. 495 (2001). For example, where the facts establish a named defendant's entitlement to sovereign immunity, the defendant can opt to submit the issue for the court's resolution of whether, based solely on the facts alleged in the complaint, the defendant is in fact entitled to immunity. *See Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019).

Whether the defendant opts to present evidence or not impacts what standard of review an appellate court will give to the Court's ruling on the plea. When the "parties present evidence on the plea ore tenus, the circuit court's [or jury's] factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support." *Id.* But "where no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's [complaint] are deemed true." *Id.*

VI. The Jury and the Plea in Bar

Another unique feature of the plea in bar is the ability for either party to demand, by right, that the Court empanel a jury to decide the issue of fact raised by the plea. *See* Code § 8.01-336; Rule 3:21; *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010) (holding that where the facts underlying the plea in bar are contested, a party may demand that a jury decide the factual issues raised by the plea).

In order to assert your jury demand, should you desire to have a jury, you must timely demand a jury. *See Sea Bay Hotel v. Gosnell*, 97 Va. Cir. 250, 254 (Fairfax Co. 2017) ("Unless waived, a jury demand consistent with Va. Sup. Ct. R. 3:21 is sufficient to preserve a jury demand without further notice."). Additionally, the demand should clearly identify the scope of the issues to be presented to the jury.

However, a jury is not available for every plea in bar, and the Supreme Court of Virginia has been clear that "[s]imply holding an evidentiary hearing does not convert all of the arguments for and against the plea in bar into factual disputes," thus "[a]n argument asserting a purely legal bar to the pleaded facts, assumed arguendo to be true, can be and should be decided in that manner—so, too, should a purely legal rejoinder to an argument offered in support of a plea in bar." *Cal. Condo. Ass'n*, 301 Va. at 23. The Boyd-Graves Conference has produced a report on pleas in bar which reveals approximately 10 situations where a jury hearing on a plea in bar is unavailable:

1. The parties have stipulated to all controlling facts;
2. The parties have elected not to offer evidence and will argue the plea on the basis of the pleading;
3. The parties agree to have the matter heard entirely by the Court;
4. There are no disputed facts necessary to adjudicate the legal issue raised by the plea;

5. The plea only raises issues of law;
6. Summary judgment is appropriate;
7. The plea asserts an equitable defense such as unclean hands, laches, or estoppel;
8. The plea challenges the enforceability of contractual provisions as a matter of law;
9. A party asks for a determination that a party's conduct was not grossly negligent; or
10. The plea seeks application of the principles of collateral estoppel or res judicata.

2020 Boyd-Graves Committee Report p. 85.

VII. The Burden of Proof

Who has the burden of proof on a plea in bar is a seemingly simple issue that has led to some of the more confusing cases relating to the procedure. As a general principle, the burden of proof on a plea in bar is on the party asserting that a claim is defeated by the facts or circumstances alleged. *See Tomlin*, 251 Va. at 480.

For most pleas in bar, this will be the prevailing standard. For the typical plea in bar asserting some affirmative defense that presents a complete bar to recovery (*e.g.*, sovereign immunity, statute of limitations, contributory fault, usury, lack of capacity, or assumption of risk, etc.), this burden is logical and uncontroversial. This default rule runs into challenges, however, where there are burden-shifting aspects to a particular defense.

For example, in a case involving the breach of a restrictive covenant, the covenant is only enforceable if it is "no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy." *Modern Env'ts Inc. v. Stinnett*, 263 Va. 491, 493 (2002). Can the defendant attempt to resolve the litigation by asserting that the contract is unenforceable in a plea in bar? And if so, who bears the burden of proof?

Courts are divided. Some hold that because the plaintiff bears the burden of proof, a plea in bar challenging the enforceability of the restrictive covenant is a general plea and therefore not permitted under Virginia procedure. *See Ass'n Res. Grp. v. Lava Tech. Servs.*, No. 2023-8799, 2023 Va. Cir. LEXIS 204 (Fairfax Co. Oct. 10, 2023). Others hold that the case is amenable to a plea as it represents a discrete set of facts that is dispositive of the case, and, although it is the defendant's plea, places the burden of proof on the plaintiff. *See MicroTechnologies LLC v. FedStore Corp.*, No. 2017-08945 (Fairfax Co. Feb. 16, 2018). Still others hold that the parties *share* the burden of proof with respect to specific elements of whether the covenant is enforceable. *Metis Grp., Inc. v. Allison*, 104 Va. Cir. 111 (Fairfax Co. 2020).

Another example of burden-shifting pleas is *Schmidt v. Household Fin. Corp., II*, 276 Va. 108 (2008). There, the Supreme Court of Virginia ruled that it was "apparent on the face of [the plaintiff's] pleadings that the two-year statute of limitations [for fraud claims] had expired." *Id.* at 117. The statute of limitations for fraud claims accrues when the fraud is discovered, or by the exercise of due diligence should have been discovered. *Id.* The Court held that, it being clear that two-years had expired since the date of the fraud itself, the burden then shifted to the

plaintiff to prove that he could not have discovered the alleged fraud within the two-year period before he commenced the action, despite the exercise of due diligence. *Id.*

Other situations certainly exist, and practitioners should keep on the lookout for situations involving burden-shifting defenses when considering bringing, or defending against, a plea in bar.

VIII. Recent Supreme Court of Virginia Cases

***Our Lady of Peace v. Morgan*, 297 Va. 832 (2019)**

Martin, a nursing assistant, molested and raped Gertrude, an elderly resident at Our Lady of Peace nursing home, while engaged in giving her care in her room. *Id.* at 837-38. Martin's job involved undressing residents, changing their undergarments and diapers, and bathing them, usually with the privacy of a curtain and closed bedroom door. *Id.* at 848. Gertrude was ill, partially paralyzed, and noncommunicative. *Id.* at 837-38.

Gertrude's estate sued Martin and the nursing home, asserting vicarious liability. *Id.* at 838. The nursing home filed a plea in bar challenging the *respondeat* superior liability claim. *Id.* At the hearing on this plea, only one witness testified, and she offered no testimony on the facts of the assault. *Id.* at 838-39. The trial court denied the plea in bar and held that Martin committed the tortious acts while he was performing duties for the nursing home. *Id.* at 840. Finding that the scope-of-employment issue was properly before the court on the plea, the court later clarified its earlier ruling and found that Martin's acts were committed in the course and scope of his employment. *Id.* at 840-41. It therefore granted a motion *in limine* preventing the nursing home from introducing evidence at trial challenging the *respondeat* superior finding. *Id.* at 841. At trial, the court instructed the jury that the scope-of-employment issue had already been decided, but evidence of Martin's conduct (including his confession in the criminal case) was admitted on other claims. *Id.* at 842. The jury returned a verdict against both defendants. *Id.* at 843.

The Supreme Court reversed the verdict against the nursing home. *Id.* at 837. It first reviewed the principles governing *respondeat* superior.

Under the job-related-service rule, vicarious liability may be imposed when the employee committed the tort while actively engaged in a job-related service; that is, when the service itself in which the tortious act was done was within the ordinary course of the employer's business. *Id.* at 844-45. Vicarious liability is not limited to those acts of the servant which promote the object of the employment, but no liability can be imposed if the tortious act did not arise out of the very transaction, or service or task, that the employee was being paid to perform. *Id.* (quoting *Parker v. Carlion Clinic*, 296 Va. 319, 336-37 (2018)). It is not enough that the claim arose out of an activity which was within the employee's scope of employment or within the ordinary course of business. *Id.* An employee's act is within the scope of employment if it is actuated, at least in part, by a purpose to serve the master. *Id.* at 845. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer. *Id.* at 846.

The trial court erred in deciding the scope-of-employment issue as a matter of law on the plea in bar. *Id.* at 846. No facts were introduced about the tort to permit such a finding, and fact findings cannot be based on the allegations in a complaint. *Id.*

Further, because the complaint alleged the existence of an employment relationship at the time of Martin's tort, the Estate benefits from a presumption that shifts the burden of production to the employer to present facts sufficient to permit the factfinder to conclude that the employee was not acting within the scope of his employment at the relevant time. *Id.* at 848. However, the burden of persuasion stays with Martin at all times, and the presumption disappears in the face of positive facts to the contrary. *Id.*

The Court concluded that the scope-of-the employment issue in this case was one for the jury. *Id.* at 848-49. This case fell between the two extremes—a bad motive accompanied by a deviation from the employer's business that is marked and unusual versus a deviation that is slight. *Id.* at 847. Such cases present a question of fact for the jury. *Id.* at 846. Here, the unique pleading presumption and the allegations in the complaint were sufficient for the issue to survive the pleading stage. *Id.*

Justices McCullough and McClanahan concurred. They questioned whether rape could ever be within the scope of an employee's employment. *Id.* at 854-55 (McCullough, J., concurring).

Justices Mims and Powell concurred in part and dissented in part. They would have found that the trial court correctly resolved the nursing home's plea in bar based on the evidence before it. *Id.* at 856 (Mims, J., concurring in part and dissenting in part). The nursing home elected to pursue a plea in bar and simply failed to present evidence to rebut the presumption. *Id.* at 857.

***Cal. Condo. Ass'n v. Peterson*, 301 Va. 14 (2022)**

In 2017, a condominium association filed an action against Peterson, the owner of two condominium units, for unpaid special assessments made in 2006 when Peterson and his wife owned the units. *Id.* at 17. The condominium owner alleged that the Condominium Declaration required payment of all outstanding assessments upon conveyance of the condominium unit, which had occurred in 2016 when the property was conveyed to Peterson (by his wife) in connection with their divorce. *Id.* at 18-19.

Peterson filed a plea in bar asserting that the action was barred by the 36-month statute of limitations in former Code § 55-79.84(D). *Id.* at 18. At a hearing on the plea in bar, the condominium association presented testimony from several witnesses, but did not introduce into evidence any exhibits or the Declaration that supported its claim that the statute of limitation began to run in 2016 when the property was conveyed to Peterson. *Id.* at 18-19. Finding that the association failed to introduce the Declaration into evidence, the circuit court granted the plea in bar and dismissed the action. *Id.* at 19.The condominium owner appealed.

The Supreme Court reversed. *Id.* at 17. The Court held it was unnecessary for the condominium association to introduce the Declaration into evidence at the plea in bar hearing. *Id.* at 22. Under Rule 1:4(i), a pleader's "mention in a pleading of an accompanying exhibit, of itself and without more, makes such exhibit a part of the pleading." *Id.* The Declaration was "Exhibit 1" to the Association's amended complaint and was specifically referred to by the allegations of the complaint. *Id.* The same is true of the 2016 conveyance deed as well as the settlement statement at closing. *Id.* These documents were before the circuit court because Peterson stipulated that his plea in bar assumed the "factual allegations" in the amended complaint. *Id.* Further, there is no need to offer evidence at an evidentiary hearing on issues that involve disputes of law concerning undisputed facts alleged in the complaint. *Id.* at 22-23.

The Supreme Court declined to reach the merits Of the statute of limitations question for the first time on appeal. *Id.* at 23. Instead, it remanded the case to the circuit court with instructions to consider the exhibits to the association's amended complaint and to rule on the association's argument that the conveyance provision of the Declaration created an independent right of action accruing on the 2016 date of conveyance. *Id.*

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Keep Calm and Stay Cool: Broom Hilda's Guide to "Civil" Litigation

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Keep Calm And Stay Cool – Broom Hilda's Guide To "Civil" Litigation

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2024 Gentry Locke Seminar
September 6, 2024 – Roanoke
September 20, 2024 – Richmond

Managing Unruly Witnesses Before and During Trial

General Introduction:

This presentation is focused on the great advantages that arise when attorneys stay calm, professional, and kind throughout high-stakes litigation. We live in extraordinary times where members of the legal community sometimes conflate zealous advocacy with being overly aggressive. However, the rules of civil procedure and ethical rules governing Virginia lawyers require attorneys to maintain decorum and professionalism at all times. This presentation focuses on how to successfully advocate for your client when dealing with unruly witnesses and, in some instances, unprofessional opposing counsel. Although this presentation is focused on witnesses, attorneys can and should apply the same principles of civility to dealing with any uncooperative person in the litigation landscape, whether it is another attorney, a party to a matter, or a public official. This presentation will remind all participants of the success that can arise when – in the face of unreasonableness – we keep calm and stay cool.

I. Uncooperative Witness During Deposition

a. Discovery Sanctions Generally: FED. R. CIV. P. 30(d)(2): Depositions by Oral Examination: Sanction. "The court may impose an appropriate sanction – including the reasonable expenses and attorney's fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent."

i. Sanctionable Actions.

1. A court has the authority to issue sanctions on any party that (1) impedes, (2) delays, or (3) frustrates the fair examination of the deponent. FED. R. CIV. P. 30(d)(2).

2. Rule 30(d)(2) is broad in scope. Parties may invoke this rule when an opposing party attempts to use too much time for depositions. *See Nankivil v. Lockheed Martin Corp.*, 216 F.R.D. 689, 691 (M.D. Fla. 2003) (where an individual's request for extra depositions was denied because the individual had not supplied adequate reason to exceed time limits and number of depositions allowed).

a. FED. R. CIV. P. 30(d)(2) advisory committee notes to the 1993 amendments: Paragraph (3) authorizes appropriate sanctions.

i. Sanctions are appropriate when a deposition is unreasonably prolonged, and when an attorney engages in practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving prohibited directions not to answer.

ii. In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections, the refusal of an attorney to agree with other counsel on a fair apportionment of time, or a refusal to agree to a reasonable request for some additional time to complete a deposition may all be grounds for sanctions.

3. Improper suspension of deposition may be sanctionable. *See Pioneer Drive, LLC v. Nissan Diesel Am., Inc.* 262 F.R.D. 552, 556-57 (D. Mont. 2009) (corporation impeded depositions by stopping depositions until professional videographer arrived when LLC was entitled to have counsel videotape by earlier agreement); *Rangel v. Masaro*, 274 F.R.D. 585, 591-92 (S.D. Tex. 2011) (defendant entitled to sanctions because plaintiff's counsel improperly ended deposition of plaintiff).

4. Inappropriate conduct by the witness or attorney:

a. In *Almeida-Graves v. SeaWorld Parks & Ent. LLC*, a federal court awarded monetary sanctions against the witness. The court cited the witness's behavior as an alternate basis for excluding the witness from trial as a sanction. *See generally* 2024 U.S. Dist. LEXIS 46488 (E.D. Va. 2024). In the court's order regarding the sanctions, the court noted that the expert, Martin:

i. Engaged in hostile and uncivil conduct toward Defendant's counsel and others present at the deposition; *id.* at 11; and

ii. Delayed and impeded the deposition by interrupting defense counsel's questioning, making his own

objections, refusing to answer routine questions, and providing uncooperative answers. *Id.*

iii. While defense counsel noted Mr. Martin's track record of dishonesty, the court did not award sanctions on that basis. The court seemed to give him some leeway due to his alleged recent medical diagnosis. *Id.* at 13-14.

iv. Courts generally impose the lowest sanction possible to enforce the rules and procedures. FED. RULES OF CIV. P. 11(c)(4) illustrates this: Sanctions "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."

b. *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008). Court sanctioned a witness for delay and impeding the deposition because the witness cursed, made insulting comments to questioning counsel, and was extremely rude during the entire deposition. The counsel that brought the witness was also sanctioned for not taking steps to control the witness. *See generally id.*

5. VA. SUP. CT. R. 4:12(b)(1): Sanctions by Court in County or City Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or city in which the deposition is being taken, the failure may be considered a contempt of that court.

a. Counsel should educate their witness that if ordered, the witness must answer the question or respond adequately or else be subject to contempt.

b. Rule 4:12's sanctions for violation of a discovery order do not apply until an order has been entered and violated. *Travis v. Finley*, 548 S.E.2d 906, 910 (Va. 2001).

ii. Types of Sanctions Awarded: FED. RULES OF CIV. P. 30(d)(2) does not define or suggest what "appropriate sanctions" might be except for stating that an appropriate sanction may include the reasonable expenses and attorney's fees incurred by any party.

1. Time: Courts have wide discretion in determining sanctions. In *NXIVM Corp. v. O'Hara*, a court granted party an extra day to depose a witness under Rule 30(d)(2). 241 F.R.D. 109, 144

(N.D.N.Y. 2007), *See also Roberson v. Blair*, 242 F.R.D. 130, 138-39 (D.D.C. 2007) (defendant granted extra seven hours to depose witness because plaintiff's deposition could have been more efficient).

2. Terminating Deposition: In *C&F Packing Co. v. Doskocil Cos.*, a court order terminating a deposition was an appropriate sanction. One party disregarded a court's ordered deposition by unilaterally adjourning the ordered deposition in favor of conducting a separate deposition which was not an emergency, not subject of a court order, and had been rescheduled for the same day without notice. The trial court determined that the acting party had lost its chance to continue the court ordered deposition and terminated it. *See* 126 F.R.D. 662, 674 (N.D. Ill. 1992).

3. Judge's Extensive Discretion: Prohibiting an attorney from participating in additional depositions in a case is an available sanction under FED. R. CIV. P. 30(d)(2). *See Howard v. Offshore Liftboats, LLC*, 2015 U.S. Dist. LEXIS 79223, 10 (E.D. La. Mar. 4, 2015) (sanctioned attorney challenged magistrate judge's order prohibiting him from participating in further depositions as not a remedy available under 30(d)(2); on appeal, the district court affirmed, stating that judges have extensive discretion to determine what sanction is appropriate).

iii. Who may be sanctioned

1. FED. RULES OF CIV. PRO. 30(d)(2) "authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent. This could include the deponent, any party, or any other person involved in the deposition." FED. R. CIV. P. 30, advisory committee notes to the 2000 amendments.

2. A court can issue sanctions on *any party*, including lawyers, witnesses, and parties to the action. For a case in which an attorney was sanctioned, see *Higginbotham v. KCS Int'l, Inc.*, 202 F.R.D. 444, 445 (D. Md. 2001) (court sanctioned attorney for retaliating by advising his witness to leave the deposition early after opposing counsel had done the same several weeks earlier, on top of many unprofessional communications).

3. In *GMAC Bank v. HTFC Corp.*, both the deponent witness and his attorney were sanctioned, and both under the same rule, FED. R. CIV. P. 30(d)(2). The witness was sanctioned for his actions and statements that led to delay and impediment of the deposition. 248

F.R.D. 182, 193-94 (E.D. Pa. 2008). The attorney was sanctioned for his inaction in controlling his witness. *See id.* at 194-97.

b. When Your Witness is Being Uncooperative.

i. Duty to intercede or correct witness's objectionable conduct.

1. In *GMAC Bank v. HTFC Corp.*, the court found an attorney violated this rule by not controlling his witness. *See generally* 248 F.R.D. 182.

a. An attorney may be blindsided by a "recalcitrant" client or witness "who engages in unexpected sanctionable conduct at a deposition." *Id.* at 195. "An attorney faced with such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the [witness] when the deposition process breaks down." *Id.*

2. It is when animosity and emotions are high that the rules are most important. *See Redwood v. Dobson*, 476 F.3d 462, 469-70 (7th Cir. 2007).

3. In a case Gentry Locke handled, *Almeida-Graves v. SeaWorld Parks & Ent. LLC*, the opposing counsel's witness, Kenneth Martin, was extremely uncooperative. He banged on the table, knocking over the videographer's equipment, and constantly refused to answer standard deposition questions. Opposing counsel did very little to control him. *See generally* 2024 U.S. Dist. LEXIS 46488 (E.D. Va. Feb. 16, 2024). For the sake of time and the rules, the best thing for the opposing counsel to do would have been to take a break, calm Mr. Martin, and instruct him of the rules and that he may be subject to sanctions if he does not behave, and tell him to cooperate.

ii. Be careful not to stop the deposition early on a whim. *See generally Rangel*, 274 F.R.D. 585 (if an attorney improperly stops a deposition, he or she may be found in violation of Rule 30(d)(2)'s requirement against delay or impediments, and sanctioned accordingly).

iii. VA. RULES OF PRO. CONDUCT:

1. RULE 3.5(f): "A lawyer shall not . . . engage in conduct intended to disrupt a tribunal." "Tribunal" is not defined in the Virginia rules, but it is in the ABA Model Rules. ABA Model Rules of Pro. Conduct, r. 3.3, Comment (1). That definition specifically includes depositions in the meaning of "tribunal."

2. RULE 4.4(a): "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."

c. When an Opposing Witness is Being Uncooperative

i. Stay calm; don't lash out. In *Almeida-Graves v. SeaWorld Parks & Ent. LLC*, defense counsel stayed calm with Kenneth Martin, even though Martin made derogatory comments regarding her sex, education, and general demeanor. Defense counsel kept composure throughout the entire deposition, persevered, did not stop the deposition, and made the best of important evidentiary information she could get from an unpleasant deponent. *See generally* 2024 U.S. Dist. LEXIS 46488 (E.D. Va. Feb. 16, 2024).

1. VA. RULE OF PRO. CONDUCT PREAMBLE: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."

2. VA. RULES OF PRO. CONDUCT, R. 3.4(g): Fairness to Opposing Party and Counsel: "A lawyer shall not . . . [i]ntentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings."

a. Comment 8: Even when ill feeling exists between opposing clients, that "ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system."

b. Examples as discussed above: Improperly designating depositions, lengthy and convoluted objections during depositions, inability to resolve discovery related problems before trial, over-designating exhibits/discovery materials, contesting authenticity of documentary evidence without any basis to do so (i.e., just to force the other side to subpoena records custodians), etc., are examples of conduct that lawyers should avoid.

ii. If you can get client's authorization, use a videographer during deposition.

1. The video keeps a record for a court determining sanctions.

2. The video may be used at trial in place of a live witness if the situation demands it and the court allows it.

3. A video may amplify just how bad a bad actor's behavior was during a deposition.

iii. VA. RULES OF PRO. CONDUCT, R. 3.5(f): "A lawyer should not engage in conduct intended to disrupt a tribunal."

1. Comment 4 (in part): "The advocate's function is to present evidence and arguments so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants."

iv. VA. RULES OF PRO. CONDUCT, R. 8.3(a): Reporting Misconduct. "A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority."

1. If an attorney believes that the counsel to the opposing witness is violating a Rule of Professional Conduct, he or she may report them. However, unless the violation calls the other attorney's honesty, trustworthiness, or fitness into question, an attorney is not required to report the misconduct. *See* VA. RULES PRO. CONDUCT, R. 8.3, Comment (3).

II. Sanctions Motions and Attorneys' Obligations Regarding Uncooperative Witnesses

a. Generally:

i. VA. SUP. CT. R. 4:12(b)(2): Failure to Make Discovery; Sanctions: Failure to Comply with Order, Sanctions by Court in which Action is Pending.

1. If a relevant person fails to obey an order to provide or permit discovery, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the facts or matters related to the order will be taken as established;

(B) An order refusing to allow the disobedient party to take a position on the designated claims or defenses, or prohibiting the disobedient party from introducing designated materials into evidence;

(C) An order striking out pleadings or parts of pleadings, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) Instead of or in addition to any of the foregoing orders, a court may enter an order treating a party's failure to obey as contempt of court;

(E) Where a party has failed to comply with an order under Rule 4:10(a) requiring him to produce another witness for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the orders mentioned in this rule, or in addition thereto, the court must require the party failing to obey the order, or the attorney advising him, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. VA. SUP. CT. R. 4:12(b)(2) (subparagraphs (A)-(D) paraphrased for clarity and brevity).

ii. FED. R. CIV. P. 11(b)-(c). Representations to the Court; Sanctions.

(b) Representations to the Court. By presenting to 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.

(c) Sanctions

(1) In General. If after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

b. When Your Witness is Being Uncooperative at Trial:

i. VA. RULES OF PRO. CONDUCT, R. 3.3: Candor to the Tribunal.

(a) "[A] lawyer shall not knowingly . . . (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . . (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

(d) "A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal."

ii. VA. RULES OF PRO. CONDUCT, R. 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not:

(a) 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.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes the person's interest will not be adversely affected by refraining from giving such information.

iii. VA. RULES OF PRO. CONDUCT, R. 4.4(a): Respect for Rights of Third Persons.

1. "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."

2. Comment 1 (in part): "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons."

c. When an Opposing Witness is Being Uncooperative on Cross Examination:

i. Sidebar Behavior.

1. "Sidebar behavior" refers to a quiet discussion between counsel of all parties and the judge. It occurs in open court without excusing the jury, but the jury cannot hear the discussion.

2. Sidebar conferences may be on or off the record depending on the jurisdiction.

3. While sidebar conferences are preferable to speaking objections, many judges encourage counsel to instead discuss anticipated objections before the trial day begins or during a recess. THE U.S. DISTRICT COURT SPEAKS § 3.3.2 (Mass. Continuing Legal Educ., Inc. 2015).

4. Sidebars should be infrequent and requested only for good reason.

5. VA. SUP. CT. R. 2:104(b): Preliminary Determinations, Relevancy conditioned on proof of connecting facts: Whenever the relevancy of evidence depends upon proof of connecting facts, the court may admit the evidence upon or, in the court's discretion, subject to, the introduction of proof sufficient to support a finding of the connecting facts.

    a. When the decision on the admissibility of evidence requires disclosing material that may end up inadmissible, the jury should not hear that material.

    b. Arguments on admissibility in these situations should occur at sidebar or with the jury excused from the courtroom.

III. Practical Issues

a. Try to avoid sanctions motions generally.

    i. A lawyer does not want to build the reputation of being difficult to deal with and quick to pull the trigger on reporting other lawyers or their witnesses.

    ii. A lawyer may need leeway in a situation in which she or he makes a potentially sanctionable mistake. If you are too quick to report other lawyers, other lawyers may be quick to report you. Extend grace and give others the benefit of the doubt.

    iii. Be able to communicate with opposing counsel. Having an open and honest conversation with opposing counsel about the perceived sanctionable conduct may help clarify any misunderstandings and can lead an agreement regarding future conduct of the parties, witnesses, and attorneys.

    iv. If you are representing a firm with more than a few attorneys, consider a policy in which a partner or an associate must go through a sanctions committee, or something similar, before filing sanctions. A firm can gain a reputation just like an individual can.

    v. Courts do not like frivolous sanctions motions. Limit your filings of sanctions to egregious situations that you can clearly demonstrate. Otherwise, not only might your reputation in the legal community take a hit, but your credibility in the court might suffer.

b. In depositions, make sure you have a good court reporter.

c. When encountering a hostile witness or opposing counsel in a jury trial, an effective strategy is to allow the hostile witness or attorney continue their aggressive behavior or speech while you keep composed and professional. The abusive behavior will likely lead to the jury's perception of the bad actor being tainted, and the jury may hold it against him or her. If the conduct is repugnant enough, the judge may even admonish the hostile attorney or witness in front of the jury.

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Privacy and Cybersecurity Compliance in the New Era of Artificial Intelligence

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Privacy and Cybersecurity Compliance in the New Era of Artificial Intelligence

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Gentry Locke Seminar
September 6, 2024 – Roanoke
September 20, 2024 -- Richmond

I. What is GenAI?

A. What genAI is: "Generative AI refers to deep-learning models that can generate high-quality text, images, and other content based on the data they were trained on."[1]

   a. In other words, at the risk of over-simplification: genAI *creates* new content based on what it *learns* from reviewing curated training content.

   b. Imagine, for instance, a design company that wants to illustrate minimalist corporate logos. The company can train a genAI by showing it thousands of preexisting logos from corporations like Nike. As the genAI attempts to create its own logos based on the inputs, the company can reject or tweak outputs to help the genAI learn what makes a good logo and what makes a bad one (this is called "machine learning"). Once the genAI "learns" how to make a good logo, the company can ask the genAI to create logos with targeted prompts, like: "Draw a company logo for a hunting supplies store. Use a duck in the design."

B. GenAI differs from "traditional" AI. Traditional AI analyzes data, finds patterns, and makes predictions. It appears in a lot of phone applications; think autocorrect and autofill on search engines. In contrast, genAI analyzes data, finds pattern, and actually creates new content from that data.[2]

C. GenAI has been around for a while, but in the last year or two its capabilities and notoriety has increased exponentially, especially following the release of ChatGPT.

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[1] https://research.ibm.com/blog/what-is-generative-AI

[2] https://www.forbes.com/sites/bernardmarr/2023/07/24/the-difference-between-generative-ai-and-traditional-ai-an-easy-explanation-for-anyone/

a. For a primer on the capabilities of genAI now versus a few years ago, compare a notable piece of genAI-generated art from 2018, Edmond de Belamy,[3] with a notable piece from 2023, Théâtre D'opéra Spatial.[4]

b. Or take this example of a "sonnet about artificial intelligence, privacy, and cybersecurity in the style of William Shakespeare" written by ChatGPT for this outline:

i. When circuits hum and data streams do flow, In realms where minds of silicon do dwell, There lies a force both wondrous and aglow, Yet fraught with shadows where our secrets swell.

Oft in this age, where knowledge is the key, We trade our privacy for fleeting gain, And in the web's vast, boundless, azure sea, Our lives are cast, like leaves in autumn's rain.

But lo, the guardians of this digital sphere, With firewalls and codes, they stand on guard, To shield our thoughts, our whispers, and our fear, From those who'd breach our trust and leave us scarred.

Thus, let us tread with caution, yet with might, In cyber realms where day is one with night.

D. Not surprisingly, this increase in genAI's ability has corresponded with an increase in its use and implementation into a variety of industries and professions. In fact, it has become an industry of its own; here as a few numbers:

a. The genAI market is expected to increase in value from $40 billion in 2022 to $1.3 trillion by 2032.[5]

b. "The use of Gen AI in finance is expected to increase global gross domestic product (GDP) by 7% or nearly $7 trillion."[6]

c. 30% of Fortune Global 500 companies are actively investing in genAI.[7]

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[3] https://www.cnn.com/style/article/obvious-ai-art-christies-auction-smart-creativity/index.html
[4] https://www.smithsonianmag.com/smart-news/artificial-intelligence-art-wins-colorado-state-fair-180980703/
[5] https://www.bloomberg.com/company/press/generative-ai-to-become-a-1-3-trillion-market-by-2032-research-finds/
[6] https://www.investopedia.com/economic-impact-of-generative-ai-7976252#:~:text=The%20use%20of%20Gen%20AI,according%20to%20Goldman%20Sachs%20Research.
[7] https://www.bain.com/insights/how-generative-ai-moonshots-can-reach-escape-velocity/

d. Earlier this year, about 13% of professional services firms, including law firms, told the Census Bureau that they use genAI in producing goods or services.[8] That number goes up for larger firms, where 45% of AmLaw200 firms use genAI.[9]

e. According to one study, "44% of of all working hours across industries have the potential to be impacted by generative AI."[10]

E. The impact of genAI on all industries cannot be overstated. Unlike traditional AI, which automates mundane tasks like spellcheck and finding files in a database, genAI also replaces or supplements creative tasks like writing, illustrating, and researching.

II. Privacy Considerations

A. Just as businesses are starting to get up to speed with evolving data privacy laws – which require businesses in many states, including Virginia, to post detailed privacy policies to their webpages, handle and safeguard consumer data responsibly and legally, and offer consumers certain rights over their data – Artificial Intelligence now complicates compliance.

B. Imagine your business's employees engaging with an interactive AI chatbot, sharing sensitive details with it to produce proposals or improve business emails, or your developers asking the AI bot to analyze a proprietary code to fix bugs or suggest improvements. These employees may be sharing sensitive data while not knowing where the data is being stored, who can access it, and how it is protected or anonymized.

C. Generative AI technologies are trained on a large volume of datasets, which potentially were indiscriminately scraped from various internet sources, including social media platforms, forms, threads, public websites, books, journals, public research papers, etc. Take, for instance, GPT4, which has a staggering 170 trillion parameter count.

a. Under most U.S. data privacy laws, data collection and processing is legal as long as there is a reasonable basis to believe that the data is lawfully made available to the general public. However, certain privacy regulations require businesses to have a legal basis for collecting,

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[8] https://news.bloomberglaw.com/business-and-practice/law-firms-arent-behind-the-generative-ai-adoption-curve-yet

[9] https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/biggest-law-firms-making-major-investments-in-generative-ai#:~:text=Moreover%2C%2045%25%20of%20Am%20Law,22%25%20of%20other%20large%20firms

[10] https://hbr.org/2023/12/genai-will-change-how-we-design-jobs-heres-how

storing, and processing even publicly available data. This large-scale collection and processing, therefore, could potentially create data privacy compliance issues if regulators deem training of generative AI is an impermissible legal basis for collection and processing.

D. Another important concern with generative AI technologies is the lack of clarity around individual data privacy rights, especially the "right to be forgotten". For example, in the privacy policy for GenAI giant OpenAI, the automatic collection of data section states:

   a. "We may automatically collect information about your use of the Services, such as the types of content that you view or engage with, the features you use, and the actions you take..."[11]

E. This automatic data collection includes the conversation history between the machine and the user. GenAI technologies, like OpenAI's ChatGPT, leverage the conversations to further train their models. Although the new iteration of OpenAI's model allows users to delete the conversation history, it doesn't clarify whether the model 'untrains' itself after losing that data. Thus, it remains unclear whether OpenAI and other producers of GenAI technology are truly compliant with the basic individual privacy right to delete one's data upon request.

F. The method and implications of training Large Language Models (LLMs), like ChatGPT, also creates a challenge for organizations where employees knowingly or unknowingly feed confidential or proprietary data to the generative AI, breaching the organization's data privacy policies. Examples of employees accidentally leaking sensitive information to the AI model have already been reported.

G. Once personal or sensitive personal data is fed to large language models LLMs,[12] such data becomes an inseparable part of it. This data cannot be – in reality – erased. In other words, LLMs incorporate the data into their highly complex and vast computational frameworks, which cannot be untrained or unlearned, even if the history is deleted.

[11] https://openai.com/policies/privacy-policy/

[12] A Large Language Model is an AI model that is trained on a massive dataset of language, including everything from books to Reddit threads. ChatGPT is a famous example. https://www.ibm.com/topics/large-language-models

III. Data Privacy and Cybersecurity Laws and the Impact of AI

A. The following are legal requirements common to nearly all state, federal, and foreign data privacy laws. While the U.S. currently lacks any legislation regulating AI specifically, the application of these legally required data privacy principles to generative AI is often intuitive. The European Union has already incorporated most of these data privacy requirements into its "Artificial Intelligence Act."[13] While the U.S. will likely follow suit in the near future and apply these privacy principles to the training and operation of GenAI, companies doing business with EU consumers (even if entirely U.S. based) must already be compliant with the following:

1. Data Minimization – Collect, process, and store a minimum amount of data, narrowly tailored to only what is relevant and necessary for the desired purpose.

    a. AI systems must be trained to only collect what is necessary, and data should be deleted once no longer required for its original purpose.

2. Purpose Limitation – Collect and process data only for legally permissible purposes.

    a. AI systems should, likewise, collect and use personal data only for specified purposes.

    b. For example, in its guidance on AI compliance with the EU's comprehensive data privacy law, the General Data Protection Regulation's (GDPR), France's data protection authority, the Commission nationale de l'informatique et des libertés, noted the learning phase and the production phase of an AI system have distinct purposes and each should be "determined, legitimate and clear" to comply with the GDPR's Article 5 principle of purpose specification.[14]

3. Accurate – Data must be up to date and free of errors to ensure consumer data is accurate.

    a. AI systems must allow individuals whose data is being processed to exercise their data protection and privacy rights, including the right to access and correct inaccurate data.

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[13] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206

[14] https://www.cnil.fr/en/ai-ensuring-gdpr-compliance

4. Security – Have appropriate safeguards through implementing technical and access controls.

    a. European Data Protection Authorities have already regulated data protection in the context of AI systems. The EU's data privacy law, the GDPR, already requires data protection assessments for businesses that process EU consumer data. The new AI Act requires data protection assessments for AI systems as well.

    b. These assessments must be executed for each state of the AI life cycle.

B. In the U.S., the Federal Trade Commission has issued guidance at the intersection of privacy compliance and AI, which certainly foreshadows its enforcement priorities.

    a. The FTC emphasized the importance of abiding by the privacy commitments AI companies make in their privacy policies.[15]

    b. It cautioned against "quietly changing privacy policies" to make room for personal data collection and use by AI.[16]

        i. "It may be unfair or deceptive for a company to adopt more permissive data practices—for example, to start sharing consumers' data with third parties or using that data for AI training—and to only inform consumers of this change through a surreptitious, retroactive amendment to its terms of service or privacy policy."[17]

    c. While the U.S. currently lacks a comprehensive AI law (and a comprehensive federal data privacy law, for that matter), U.S. companies must comply with the numerous state and sectoral privacy laws, and use of generative AI can make compliance with these laws even more challenging.

    d. Even the in the absence of a comprehensive federal law, the FTC can bring enforcement actions against companies engaging in unfair or deceptive practices with regard to data.

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[15] https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/01/ai-companies-uphold-your-privacy-confidentiality-commitments

[16] https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/02/ai-other-companies-quietly-changing-your-terms-service-could-be-unfair-or-deceptive

[17] *Id.*

IV. Cybersecurity and Cyber-crime Considerations

The FBI's Internet Crime Complaint Center (IC3) announced $12.5 billion in cyber-attack losses to U.S. entities alone in 2023, representing a 22% year-over-year increase.[18] This only reflects reported cyber-attacks – it does not include indirect losses, like reputational damage causing an eventual loss of profits, trade-secret theft, etc. – so is just the tip of the iceberg.

More than a quarter of all U.S. law firms suffered a data breach in 2023 alone.[19]

A. Deep Fakes

a. The new generation of LLM-powered GenAI creates dangerously high quality photos, audio, and video recordings.

   i. Previously, GenAI could create the same type of deep fake content, but the quality was poor in comparison and unlikely to deceive most viewers.

b. Modern GenAI provides a versatile tool for cybercriminals and fraudsters to write flawless phishing emails, impersonate law enforcement or corporate executives, and even access bank accounts by deceiving bank customer service representatives.

c. GenAI has vastly expanded the pool of potential cybercriminals. Unsophisticated bad actors now have powerful tools at their fingertips and no longer require advanced skills to hack networks and commit cybercrime.

d. FBI has repeatedly warned of the increasing threat posed by cybercriminals utilizing AI to conduct sophisticated phishing and social engineering attacks.[20]

   i. These AI-driven phishing attacks are characterized by their ability to craft convincing messages tailored to specific recipients and containing proper grammar and spelling, increasing the likelihood of successful deception and data theft.

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[18] ImmuniWeb (2023), "Top 5 Cybersecurity and Cybercrime Predictions for 2024", available at: https://www.immuniweb.com/blog/top-5-cybersecurity-and-cybercrime-predictions-for-2024.html.
[19] https://www.americanbar.org/groups/law_practice/resources/tech-report/2023/2023-cybersecurity-techreport/
[20] *See* https://www.fbi.gov/contact-us/field-offices/sanfrancisco/news/fbi-warns-of-increasing-threat-of-cyber-criminals-utilizing-artificial- intelligence#:~:text=Attackers%20are%20leveraging%20AI%20to,reputational%20damage%2C%20and%20compromise%20of.

B. Example Cases

a. Phishing Attacks

i. In the past, phishing attacks could be easy to spot because they were often riddled with poor grammar and spelling errors which tipped readers off to illegitimate phishing emails.

ii. With GenAI (like ChatGPT), anyone in the world can generate a grammatically correct, English language email.

1. Cybercriminals can send automated communications mimicking a bank requesting a username and login or an IRS official demanding personal tax information.

2. One of the most prolific ways that this type of attack presents itself is called "business email compromise" (BEC). One report attributed a 1,265% rise in malicious phishing emails in 2023 to BEC attacks using AI tools.[21]

a. BEC attacks are not particularly complicated or sophisticated: A bad actor first becomes aware of a business transaction, often by hacking one of the party's email servers. Once they have the details of the transaction, the threat actor creates a nearly identical email address to that of the seller in a transaction. Most often, the fake email address domain is one letter different than the real one, typically replacing the letter "I" with the letter "L" or vice versa. The threat actor then communicates regarding the transaction with the buyer, sends payment instructions, and the buyer makes a payment to the bad actor, believing they have wired money to the actual seller.

iii. Toyota Case Example[22] – A simple attack.

1. Bad actor identified names and email addresses of Toyota financial department employees.

2. The bad actor then created a fake email address and impersonated an employee of a Toyota contractor.

[21] https://slashnext.com/the-state-of-phishing-2024/.
[22] https://www.infosecurity-magazine.com/news/toyota-subsidiary-suffers-37m-bec/

a. This is where social engineering is key in these types of attacks. The bad actor often impersonates a known and trusted business partner, which results in the victim lowering their guard in communications with the bad actor.

3. The attackers then changed the payment instructions for a large wire transaction that was intended for the true contractor. Instead, the Toyota employee wired $37 million to the fraudster's bank account.

4. This attack happened in 2019. Five years later, the funds have not been recovered and the attacker has never been identified.

iv. Examples of business email compromise attacks are abundant. Even national governments have fallen victim – Puerto Rico's government was the subject of a BEC attack in 2020 that cost the country $2.6 million.

v. The Eastern District of Virginia recently issued a significant opinion that has major implications for clients who find themselves in this unfortunate position, and may alter financial liability in BEC cases: *Studco Building Systems US LLC v. 1st Advantage Federal Credit Union,* No. 2:20-cv-00417 (Slip. Op.) (Jan. 12, 2023 E.D. Va.).

1. Previously, BEC liability was determined based on the party who was in the best position to prevent the loss but failed to do so, whether the misled party who wired funds to the fraudster or the party whose email domain was compromised and allowed the fraudster to hijack the transaction. However, in *Studco v. 1st Advantage*, the EDVA held the financial institution that received fraudulently directed funds liable for the loss under the Uniform Commercial Code (UCC) Article 4A, which governs fund transfers, because the financial institution failed to act on certain alerts it received about the recipient bank account from its own anti-money laundering (AML) software.

2. This is concerning precedent for financial institutions, which are likely to be viewed by both victims and regulators as potentially financially responsible for BEC losses.

3. In this case, funds sent from Studco's account to financial institution 1st Advantage listed the intended recipient—Stucco's vendor Olympic Steel—but referenced an account number held by an unrelated individual at 1st Advantage. These transactions generated warnings in 1st Advantage's system of the apparent discrepancy between the intended recipient and the accountholder.

4. Significantly, there was little evidence that 1st Advantage had any actual knowledge of the discrepancy when it accepted payment orders. Rather, the court imputed this knowledge to 1st Advantage based on numerous unmonitored alerts generated by the credit union's anti-money laundering software on account opening discrepancies, the fraudulently diverted payments, and their attempted withdrawal by the accountholder, and other commonly known indicia that the account was being used for fraudulent purposes.

5. The court's effective creation of a "should have known" standard into the relevant provision of UCC Article 4A is in sharp contrast to many other court decisions that have required proof of *actual* knowledge by the recipient institution of the discrepancy between named payee and actual accountholder at the time the payment was credited to the designated account.

6. The court also held that 1st Advantage failed to act in a commercially reasonable manner or exercise ordinary care in processing transactions, because Olympic Steel did not have an account at 1st Advantage and 1st Advantage accepted ACH payments from Studco intended for Olympic Steel. The court ruled that 1st Advantage "did not maintain reasonable routines for communicating significant information to the person conducting the transaction. If 1st Advantage had exercised due diligence, the misdescription would have been discovered during the first ACH transfer."[23]

7. In relying on these obligations from the UCC and NACHA Operating rules, the court created additional grounds of recovery for victims of BECs and others whose funds are fraudulently directed to attackers' accounts.

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[23] *Studco* at *33

b. Impersonation Attacks

i. Hackers use ChatGPT and similar tools to impersonate real individuals. They may use these tools to send voice messages pretending to be a friend, family member, or colleague in an effort to obtain money or gain access to financial accounts.

1. E.g. An elderly Canadian couple received a call from someone using AI voice-cloning who pretended to be their grandson. The caller stated that he had been hurt in a car accident, was currently in jail, and needed $9,400 to settle with the owner of the other car to avoid facing charges.[24]

2. On the eve of Chicago's mayoral election, a hacker created a deepfake video and posted it to X, showing candidate Paul Vallas making false incendiary statements. The video generated a significant number of views before it was removed, and the damage to this candidate's campaign was catastrophic.[25]

c. "Commonwealth Legal" Case[26]

i. A journalist received a "DCMA Copyright Infringement Notice" from a law firm called "Commonwealth Legal." The law firm purportedly represented a client who held the copyright to a photo used in the journalist's recent article, and demanded the journalist "add a credit to our client" within 5 business days to remedy the violation. They did not demand payment or removal of the image, just "credit" in the form of a link to their "client's" website.

ii. Commonwealth Legal insisted that removing the allegedly infringing image was not enough, citing DMCA 512(c) (which does actually provide potential relief for an unaware website owner who expeditiously removes infringing material). They had to link to the photo owner's website to give credit to the copyright owner.

iii. Adding to the suspicious nature of the legal demand, Commonwealth Legal's website raised some red flags. While

[24] https://leaderpost.com/news/local-news/regina-couple-says-possible-ai-voice-scam-nearly-cost-them-9400.
[25] https://www.cbsnews.com/chicago/news/vallas-campaign-deepfake-video/
[26] https://arstech-nica.com/gadgets/2024/04/fake-ai-law-firms-are-sending-fake-dmca-threats-to-generate-fake-seo-gains

initially it seemed to be a professional website for an Arizona-based law firm, a closer look revealed some issues.

1. The website was full of stock images (perhaps not that unusual for a law firm) and generic, wordy prose.

2. Attorneys had the classic vacant stares common to AI-generated faces.[27]

3. Attorney's bios were perhaps most revealing. Most went to either the very best law schools – Harvard, Yale, Stanford, etc. – or local Arizona schools. Most practiced in *nearly* realistic practice areas, but were clearly AI-generated: "Copyright Violation and Judicial Criminal Proceedings" and "Artists' Rights and High-stakes Criminal Cases." And their work experience was described in vague, generic, ostentatious, and sometimes self-contradictory language.

4. Despite the Arizona firm's name, Arizona is not, in fact, a Commonwealth.

iv. This criminal enterprise – using GenAI to create fictitious law firms to send fraudulent DCMA claims – is becoming increasingly common. The goal is not to steal money, but to generate profits for a legitimate business by driving search engine optimization for that business. In this case, the goal is to create a valuable "backlink" from a popular journalist's website to the website of the purported owner of the copyright of a stock image.

C. What GenAI CANNOT Do

a. Despite some of the scary capabilities of GenAI, including its ability to create deepfakes, traditional cybercrime is still a far more significant threat for which businesses must be prepared.

i. GenAI cannot conceal the true sources of a cyber-attack by generating and releasing a proxy server.

ii. GenAI cannot launder and cash out ransomware proceeds received in crypto currencies.

[27] https://web.archive.org/web/20240411033218/https://www.commonwealth-team.net/attorneys/

iii. GenAI cannot verify that new "clients" (*i.e.*, the victims) of cyber gangs are not undercover agents of the FBI or the DOJ.

iv. GenAI's malware creation capabilities are primitive, bringing little to no value for experienced cybercrime groups.

b. GenAI may continue to develop and become the weapon of choice for cybercriminals, but at present, it is only one of many methods of attack.

c. Perhaps more importantly, GenAI may prove more valuable to defensive cybersecurity than it is to cybercriminals. For example, the idea of utilizing GenAI to immediately detect software vulnerabilities is an exciting prospect for CISO's in their constant struggle against cyber-attacks.[28]

V. Cybersecurity Tips for Industry

A. Third Party Vendors

a. Modern-day cybercriminals are pragmatic: they try to identify the easiest, least costly, and riskless ways to steal information or compromise systems to eventually demand ransom.

b. For instance, instead of attacking a leading financial institution – that can afford to invest tens of millions in its cybersecurity program and to hire top cybersecurity professionals – astute cybercriminals will compromise one of the financial institution's trusted third party vendors or contractors that have access to exactly the same data as is held by the financial institution itself.

c. Third parties of financial institutions include external accountants, financial auditors, law firms, and all other kinds of external firms and professionals.

d. As a result, hacked law firms – including some of the largest ones – make news headlines with an unenviable frequency.[29]

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[28] https://www.cm.com/news/security/genai-is-a-hit-with-hackers-heres-why-it-will-benefit-the-defense

[29] Skolnik S., Witley S. and Cohen O. (2023), "Law Firm Cyberattacks Grow, Putting Operations in Legal Peril", Bloomberg Law, July 7, available at: https://news.bloomberglaw.com/business-andpractice/law-firm-cyberattacks-grow-putting-operations-in-legal-peril.

e. Organizations must carefully vet their third party vendors to ensure they do business and provide their data only to partner-companies that adhere to appropriate cybersecurity standards.

f. Importantly, most data privacy laws and regulations require companies to include contractual provisions requiring third-parties with access to the company's data to comply with data privacy obligations.

g. Remember that these third parties have access to your corporate crown jewels, so your business's cybersecurity is only as good as theirs.

B. Work from Home

a. Work from home dramatically increases the attack surface of an organization and creates exploitable weaknesses and vulnerabilities in the organization's security infrastructure.

b. Over 80% of cloud data breaches are caused by human misconfigurations of otherwise perfectly securable cloud infrastructure.[30]

c. Cyber-attacks may spread to the company network and lead to the theft or loss of sensitive company information.

d. Malware from downloads onto a personal device may be passed onto the company's network.

e. Privacy risks to confidential company information by persons having unauthorized access to the employee's personal device, such as the employee's family or friends.

f. If an employee's personal device used for business purposes becomes lost or stolen, it would be difficult for the company to monitor, inspect, or remotely wipe it.

[30] Chaudhary A. (2023) "Managing Cloud Misconfigurations Risks", Cloud Security Alliance (CSA), August 14, available at: https:// cloudsecurityalliance.org/blog/2023/08/14/ managing-cloud-misconfigurations-risks.

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Gentry Locke Consulting's Legislative Update

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Gentry Locke Consulting's Legislative Update

Presented by: Abigail Thompson, Carlos Hopkins, Patrice Lewis, Zach LeMaster
Gentry Locke's Roanoke Seminar – September 6
Gentry Locke's Richmond Seminar – September 20

This outline summarizes numerous bills introduced in the 2024 session by topic.

I. Education

A. Elementary and Secondary Education

i. HB 17 Students who receive home instruction; participation in interscholastic programs, fees, etc. (Left in Committee)

A Bill to amend the Code of Virginia by adding in Chapter 1 of Title 22.1 a section numbered **22.1-7.3**, relating to participation in public school interscholastic programs by students who receive home instruction. Prohibits public schools from joining an organization governing interscholastic programs that does not deem eligible for participation a student who (i) receives home instruction; (ii) has demonstrated evidence of progress for two consecutive academic years; (iii) is in compliance with immunization requirements; (iv) is entitled to free tuition in a public school; (v) has not reached the age of 19 by August 1 of the current academic year; (vi) is an amateur who receives no compensation but participates solely for the educational, physical, mental, and social benefits of the activity; (vii) complies with all disciplinary rules and is subject to all codes of conduct applicable to all public high school athletes; and (viii) complies with all other rules governing awards, all-star games, maximum consecutive semesters of high school enrollment, parental consents, physical examinations, and transfers applicable to all high school athletes. The bill provides that no local school board is required to establish a policy to permit students who receive home instruction to participate in interscholastic programs. The bill permits reasonable fees to be charged to students who receive home instruction to cover the costs of participation in such interscholastic programs, including the costs of additional insurance, uniforms, and equipment. The bill has an expiration date of July 1, 2029.

ii. HB 485 School boards; employee criminal history records checks and applications, penalty for noncompliance. (Continued to 2025)

A Bill to amend and reenact **§§ 22.1-296.1, 22.1-296.2, and 22.1-296.4** of the Code of Virginia, relating to school boards; employee background checks and applications; penalty for noncompliance. Clarifies that certain school board employees who are (i) employed in an in-person or remote capacity or some combination thereof or (ii) fully licensed, provisionally licensed, or unlicensed are subject to the requirements in existing law to undergo a criminal history records check and a search of the registry of founded complaints of child abuse and neglect and to disclose certain

criminal history information at the employment application stage and upon arrest. The bill provides that in the event that any school board fails or refuses to perform its duty to require any employee to undergo a criminal history records check as set forth in relevant law, each individual member of such board is guilty of a Class 3 misdemeanor and his position on such school board shall be deemed vacant.

iii. **HB 498 and SB 225 School bd. policy; parental notification of responsibility of safe storage of firearms in household. (Vetoed by Governor)**

A Bill to amend and reenact § 22.1-79.3 of the Code of Virginia, relating to school board policies; parental notification; safe storage of firearms in the household. Requires each local school board to develop and implement a policy to require the annual notification of the parent of each student enrolled in the local school division, to be sent by email and, if applicable, SMS text message within 30 calendar days succeeding the first day of each school year, of the parent's legal responsibility to safely store any firearm present in the household, risks associated with improperly stored firearms, statistics relating to firearm-related accidents, injuries, and death among youth, and other tips and strategies. The bill requires each school board to make such parental notification available in multiple languages on its website.

iv. **HB 571 and SB 235 Sexually explicit content; policies on parental notification of instructional material. (Vetoed by Governor)**

An Act to amend and reenact § 22.1-16.8 of the Code of Virginia, relating to policies on parental notification of instructional material that includes sexually explicit content; scope and use. Provides that nothing in the law requiring the Department of Education to develop and make available to each school board model policies for ensuring parental notification of any instructional material that includes sexually explicit content and requiring each school board to adopt policies that are consistent with but may be more comprehensive than such model policies or that is in such model policies or school board policies shall be construed to permit the censoring of books in any public elementary or secondary school.

v. **HB 573 Student safety and discipline; certain reports to school principals and division superintendents. (Continued to 2025)**

A Bill to amend and reenact § 22.1-279.3:1 of the Code of Virginia, relating to student safety and discipline; certain reports to school principals and division superintendents; form and scope. Requires local law-enforcement authorities to prepare in writing and provide to the principal or his designee and the division superintendent a report on (i) any suspected offense, offense for which any charge has been filed, or offense that is subject to investigation that was committed or is suspected to have been committed by a student enrolled at the school if the offense would be (a) a felony if committed by an adult, (b) a violation of the Drug Control Act and occurred on a school bus, on school property, or at a school-sponsored activity,

or (c) an adult misdemeanor involving certain enumerated incidents and (ii) whether the student is released to the custody of his parent or, if 18 years of age or older, is released on bond. The bill requires division superintendents to report all such incidents to the Department of Education in an annual report that is made available to the public. Current law does not require such reports to be in writing and only applies to student offenses but does not specify whether such reports are required to be made for student offenses that are suspected, charged, or subject to investigation.

vi. **HB 585 Home-based firearms dealers; prohibited near schools, penalties. (Vetoed by Governor)**

An Act to amend and reenact § 54.1-4200 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 54.1-4201.3, relating to home-based firearms dealers; prohibited near schools; penalties. Provides that no home-based firearms dealer, as defined in the bill, shall be engaged in the business of selling, trading, or transferring firearms at wholesale or retail within 1.5 miles of any elementary or middle school, including buildings and grounds. The bill provides that any person who willfully violates such prohibition is guilty of a Class 2 misdemeanor for a first offense and guilty of a Class 1 misdemeanor for a second or subsequent offense.

vii. **HB 617 High school student-athletes; use of name, image, or likeness. (Passed – Chapter 694)**

An Act to amend the Code of Virginia by adding in Article 1 of Chapter 13 of Title 22.1 a section numbered 22.1-212.2:4, relating to high school student-athletes; use of name, image, or likeness. Establishes rights, duties, and prohibitions relating to the use of the name, image, or likeness of high school student-athletes that are equivalent to those established in law for college student-athletes. The bill also requires the Department of Education to publish in a publicly accessibly format on its website information about laws that are applicable to any contract entered into by a student-athlete relating to compensation for the use of his name, image, or likeness.

viii. **HB 625 and SB 608 Community Schools, Office of; established within Department of Education. (Passed – Chapters 797 and 815)**

An Act to amend and reenact § 22.1-199.7 of the Code of Virginia, relating to public education; community schools; Office of Community Schools at Department of Education. Requires the Department of Education to establish the Office of Community Schools as an office within the Department for the purpose of supporting the development and growth of community schools throughout the Commonwealth in accordance with the Virginia Community School Framework.

ix. **HB 1046 School boards; parental notification of certain incidents, Alyssa's law-silent panic alarms. (Left in Committee)**

A Bill to amend and reenact § 22.1-79.4 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 22.1-79.4:1, relating to school boards; parental notification of certain threats, behavior, and unlawful acts; panic alarms. Requires, within four hours of receiving notification of (i) a preliminary determination by the threat assessment team that a student poses a threat of violence or physical harm to self or others; (ii) threatening or aberrant behavior that may represent a threat to the school; or (iii) unlawful acts committed on school property, on a school bus, or at a school-sponsored activity that involve the unlawful use or possession of a weapon, homicide, criminal sexual assault, or trespassing, each division superintendent to notify the parent of each student enrolled in the relevant school of such threat, threatening or aberrant behavior, or unlawful act. The bill requires each school board to equip each public elementary and secondary school building in the local school division with at least one panic alarm that adheres to nationally recognized industry standards, including the standards of the National Fire Protection Association and Underwriters Laboratories, and is installed by a licensed and qualified professional. The bill defines "panic alarm" as a silent security system by which the user manually activates a device that sends a non-audible signal to the local law-enforcement agency that indicates a school security emergency, including a non-fire evacuation, lockdown, or active shooter situation, that requires immediate response and assistance from such agency

x. **HB 1120 K-12 schools and higher educational institutions; student participation in women's sports, etc. (Left in Committee)**

A Bill to amend the Code of Virginia by adding sections numbered 22.1-271.9 and 23.1-408.2, relating to K-12 schools and institutions of higher education; student participation in women's sports; civil cause of action. Requires each interscholastic, intercollegiate, intramural, or club athletic team or sport sponsored by a public school, or any other school that is a member of the Virginia High School League, or by a public institution of higher education to be expressly designated as one of the following based on the biological sex of the students who participate on the team or in the sport: (i) males, men, or boys; (ii) females, women, or girls; or (iii) coed or mixed if participation on such team or sport is open to both males and females. The bill prohibits any such team or sport that is expressly designated for females from being open to students whose biological sex is male. The bill also provides that in the event of a dispute as to the biological sex of any student seeking to participate on any interscholastic, intercollegiate, intramural, or club athletic team or sport that is expressly designated for males or females, such student may establish biological sex by presenting to the school or institution a signed physician's statement that attests to such student's biological sex based solely on (a) the student's internal and external reproductive anatomy; (b) the student's normal

endogenously produced levels of testosterone; and (c) an analysis of the student's genetic makeup.

The bill prohibits any government entity, licensing or accrediting organization, or athletic association or organization from entertaining a complaint, opening an investigation, or taking any other adverse action against any such school or institution of higher education based on a violation of the provisions of the bill and creates a cause of action for any school or institution of higher education that suffers harm as a result of a violation of the bill. Finally, the bill creates a civil cause of action for any student who suffers harm as a result of a knowing violation of a provision of the bill by a school or institution or as a result of the student's reporting a violation of a provision of the bill by a school, institution, athletic association, or organization.

xi. **HB 1260 Public elementary and secondary school students; parents' bill of rights established. (Left in Committee)**

A Bill to amend the Code of Virginia by adding a section numbered **22.1-1.1**, relating to public elementary and secondary school students; parents' bill of rights established. Establishes, consistent with § 1-240.1 of the Code of Virginia, several enumerated rights for the parents of each public elementary or secondary school student in the Commonwealth, including the right to review any books, curricula, or instructional materials being taught or made available to their child and the right to be notified of any situation that directly affects their child's safety at school.

xii. **SB 37 Sage's Law; minor students experiencing gender incongruence, parental notification. (Died in Committee)**

A Bill to amend and reenact **§ 63.2-100** of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **22.1-273.5**, relating to minor students experiencing gender incongruence; parental notification of certain expressions and requests and parental permission for certain plans required; parental care. Requires each public elementary or secondary school principal or his designee to (i) as soon as practicable, inform at least one parent of a minor student enrolled in such school if such minor (a) expresses to any individual who is employed in such school that such minor is experiencing gender incongruence, as defined in the bill, or (b) requests that any such employee participate in social affirmation of such minor's gender incongruence or the transition of such minor to a sex or gender different from the minor's biological sex while at school and (ii) request and receive permission from at least one parent of a minor student enrolled at such school prior to the implementation at such school of any plan concerning any gender incongruence experienced by such minor, including any counseling of such minor at school. Any such plan shall include provision for parental participation to the extent requested by the parent. The bill also clarifies, in the definition of the term "abused or neglected child," that in no event shall referring to and raising the child in a

manner consistent with the child's biological sex, including related mental health or medical decisions, be considered abuse or neglect.

xiii. **SB 558 School choice educational savings accounts; permits parents of qualified students to apply to DOE. (Died in Committee)**

A Bill to amend the Code of Virginia by adding in Chapter 13 of Title 22.1 an article numbered 2.1, consisting of sections numbered **22.1-222.1** through **22.1-222.5**, relating to school choice educational savings accounts. Permits the parents of qualified students to apply to the Department of Education for a renewable school choice education savings account, consisting of a monetary amount that is equivalent to a certain percentage of all applicable annual Standards of Quality per pupil state funds appropriated for public school purposes and apportioned to the resident school division in which the qualified student resides, from which the parent of such student may use the funds to make education-related qualifying expenditures, including tuition, deposits, fees, and required textbooks and instructional materials, at (i) a private elementary or secondary school located in the Commonwealth, (ii) certain nonpublic online learning programs, and (iii) institutions of higher education and requires the Department of Education to establish certain policies, procedures, and processes relating to the savings accounts. The bill defines the term "qualified student" to provide for the annual expansion of the students who are eligible to receive savings accounts, from including for the 2024–2025 school year only students who meet a limited set of criteria and gradually expanding to declare eligible for the 2028–2029 school year and each year thereafter any student who (a) is deemed to reside in a school division in the Commonwealth, (b) for whom compulsory attendance is required pursuant to relevant law, (c) is eligible to enroll in a public elementary or secondary school in the Commonwealth, and (d) is entering kindergarten or was enrolled at and attended a public elementary or secondary school in the Commonwealth during the two semesters immediately preceding the semester for which the child's parent initially applies for a savings account. The bill contains several provisions relating to the terms and conditions to which the parent of any qualified student is required to agree to receive a savings account, requirements relating to renewal of savings accounts and the management of funds remaining when accounts are closed or become inactive, and the consequences of noncompliance with the terms and conditions. The bill also provides that the Department of Education shall be responsible for the administration of the savings accounts, including (1) making quarterly disbursements in the appropriate amount to each savings account and managing retained savings; (2) developing informational materials for interested parents relating to the savings accounts; and (3) developing policies and procedures relating to the administration and management of the savings accounts, the application process, quarterly reviews and annual audits of each savings account, and addressing.

B. Higher Education

i. HB 690 and SB 613 Higher educational institutions; campus safety, governing board of certain educational institutions. (Passed – Chapters 9 and 202)

An Act to amend and reenact § 23.1-818 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 31 of Title 23.1 a section numbered 23.1-3100.1, relating to institutions of higher education; campus safety; governing boards of educational institutions; employment of security services and personnel authorized. Authorizes the governing board of certain educational institutions, including the A.L. Philpott Manufacturing Extension Partnership, the Institute for Advanced Learning and Research, the New College Institute, the Roanoke Higher Education Authority, the Southern Virginia Higher Education Center, and the Southwest Virginia Higher Education Center, to establish and maintain a campus security department and to employ security personnel. Under current law, the governing board of any such educational institution is only authorized to contract for security services.

ii. HB 980 Higher ed. institutions; students who report acts of hazing or bullying, referral for support. (Passed – Chapter 405)

An Act to amend and reenact §§ 23.1-819 and 23.1-821 of the Code of Virginia, relating to institutions of higher education; students who report act of hazing or bullying experienced as result of report of act of hazing; information about on-campus mental and behavioral health support. Requires each public institution of higher education and nonprofit private institution of higher education to provide information about on-campus individuals or entities that are qualified to provide the appropriate ongoing mental and behavioral health support to any student who reports to the institution an act of hazing or an act of bullying experienced as the result of a report of an act of hazing.

iii. HB 1505 Intercollegiate athletics; student-athletes, compensation for name, image, or likeness. (Passed – Chapter 837)

An Act to amend and reenact § 23.1-408.1 of the Code of Virginia, relating to intercollegiate athletics; student-athletes; compensation for name, image, or likeness. Makes several changes to existing provisions of law relating to compensation of a student-athlete at a public or private institution of higher education in the Commonwealth (institution) for the use of the name, image, or likeness of such student-athlete, including (i) prohibiting any athletic association, athletic conference, or other organization with authority over intercollegiate athletics from preventing an institution, its supporting foundations, or an entity acting on its behalf from identifying, creating, negotiating, facilitating, supporting, engaging with, assisting with, or otherwise enabling a name, image, or likeness opportunity for a student-athlete; (ii) requiring each institution to develop and submit to the institution's governing board or similar governing body for approval

institutional policies or procedures that govern the compensation of a student-athlete for the use of his name, image, or likeness; and (iii) permitting any institution to provide assets, resources, or benefits as an incentive to individuals, companies, or other entities to provide money, benefits, opportunities, or services to an outside entity that supports name, image, or likeness opportunities for the institution's student-athletes. The bill also requires the Intercollegiate Athletics Review Commission to review plans and implementation considerations for the provisions of the bill and provide a report on its review to the General Assembly no later than November 1, 2024.

iv. **SB 46 Higher educational institutions, public; admissions applications, legacy admissions, etc. (Passed – Chapter 2)**

An Act to amend the Code of Virginia by adding a section numbered **23.1-407.2**, relating to public institutions of higher education; admissions applications; legacy admissions and admissions based on donor status prohibited. Prohibits any public institution of higher education from providing any manner of preferential treatment in the admissions decision to any student applicant on the basis of such student's legacy status, defined in the bill, or such student's familial relationship to any donor to such institution. This bill incorporates **SB 71** and is identical to **HB 48.**

v. **SB 347 VA Military Survivors & Dependents Education Program; work group to evaluate, etc., Program. (Continued to 2025)**

A Bill to amend and reenact § **23.1-608**, as it is currently effective and as it may become effective, of the Code of Virginia, relating to the Virginia Military Survivors and Dependents Education Program. Directs the Secretary of Finance, in collaboration with the Secretary of Veterans and Defense Affairs and the Secretary of Education, to convene a stakeholder work group for the purpose of evaluating the Virginia Military Survivors and Dependents Education Program and making recommendations on legislative actions and budgetary modifications that could improve the stability, strength, and long-term viability of the Program. The bill requires the Secretary of Finance to submit the work group's recommendations to the Governor and the Chairs of the House Committee on Education and the Senate Committee on Education and Health by November 1, 2024.

vi. **SB 506 Higher educational institutions, public; duties and powers of governing board. (Vetoed by Governor)**

An Act to amend and reenact §§ **2.2-507**, **23.1-1303**, and **23.1-1304** of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **23.1-102.2**, relating to public institutions of higher education; governing boards; duties and powers; legal counsel. Provides that the governing board of each public institution of higher education shall have authority over the employment of all legal counsel for the institution, including decision-making authority in the commencement or termination of any legal counsel, the employment of outside

legal counsel, the oversight and management of any legal counsel, and the appointment of a general counsel to serve as the chief legal officer of the institution. The bill provides that the chief legal officer and the vice president or similarly situated executive officer of such institution shall, under the direction of the governing board of such institution, conduct the legal affairs of and provide legal advice and representation for such institution on any matter that the governing board determines to be in the interest of the institution. The bill clarifies the scope of the involvement of the Attorney General in the legal affairs of public institutions of higher education, providing that the Attorney General may only provide legal service to a public institution of higher education upon request of the governing board of such institution or upon the governing board's decision to delegate all authority in accordance with the provisions of the bill. The bill permits the governing board of any public institution of higher education with less than 7,500 full-time students to delegate all authority over legal counsel conferred pursuant to the provisions of the bill. The bill also provides that the approval of the Attorney General shall be required for any legal settlement involving consideration in excess of $5 million. The bill also clarifies the duties of the governing board of each public institution of higher education in its collective capacity and of the members of such governing board in their individual capacities.

vii. **SB 678 Intercollegiate athletics; student-athletes, compensation and representation for name, image, etc. (Continued to 2025)**

A Bill to amend and reenact § **23.1-408.1** of the Code of Virginia, relating to intercollegiate athletics, student-athletes; compensation and representation for name, image, or likeness.

II. Labor & Employment

A. Wages/Compensation

i. **HB1 and SB 1 Minimum wage; increases wage to $13.50 per hour effective January 1, 2025. (Vetoed by Governor)**

An Act to amend and reenact § **40.1-28.10** of the Code of Virginia, relating to minimum wage. Increases the minimum wage from the current rate of $12.00 per hour to $13.50 per hour effective January 1, 2025, and to $15.00 per hour effective January 1, 2026. The bill satisfies a reenactment clause included in Chapters 1204 and 1242 of the Acts of Assembly of 2020.

ii. **HB 14 and SB 381 Unemployment compensation; employer's failure to respond to requests for information, etc. (Passed - Chapter 165)**

An Act to amend and reenact §§ **60.2-528.1** and **60.2-619** of the Code of Virginia, relating to unemployment compensation; employer failure to respond to requests for information; determinations and decisions by deputy. Provides that an

employer's account shall not be relieved of charges relating to an erroneous payment if the Virginia Employment Commission determines that (i) the employer has failed to respond timely or adequately to a written request for information related to the claim and (ii) the employer has established a pattern of failing to respond timely or adequately to such requests, as described in the bill. The bill requires the Commission to provide written notice for each instance of untimely or inadequate employer response to such requests. The bill provides that upon the Commission's third determination, and for each subsequent determination, within the applicable review period that an employer failed to respond timely or adequately to such a request, the employer shall be considered to have waived all rights in connection with the claim, including participation and appeal rights. The bill requires a deputy examining a claim to provide the reasoning behind the decision, as described in the bill, and a short statement of case-specific facts material to the determination together with any notice of determination upon a claim. The provisions of the bill have a delayed effective date of July 1, 2025. As introduced, this bill was a recommendation of the Commission on Unemployment Compensation.

iii. **HB 149 and SB 391 Employee protections; medicinal use of cannabis oil. (Passed – Chapters 632 and 674)**

An Act to amend and reenact § **40.1-27.4** of the Code of Virginia, relating to employee protections; medicinal use of cannabis oil. Amends the provision that prohibits an employer from discriminating against an employee for such employee's lawful use of medical cannabis oil, with certain exceptions, by specifying that such use must conform to the laws of the Commonwealth and by including the employees, other than law-enforcement officers, of the Commonwealth and other public bodies in such protections.

iv. **HB 990 and SB 370 Employer seeking wage or salary history of prospective employees; prohibited. (Vetoed by Governor)**

An Act to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 40.1 a section numbered **40.1-28.7:11**, relating to prohibiting employer seeking wage or salary history of prospective employees; wage or salary range transparency; cause of action. 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 determining the wages or salary the prospective employee is to be paid upon hire; (iii) relying on the wage or salary history of a prospective employee in considering the prospective employee for employment; (iv) refusing to interview, hire, employ, or promote a prospective employee or otherwise retaliating against a prospective employee for not providing wage or salary history; and (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. The bill establishes a cause of action for an aggrieved prospective employee

or employee and provides that an employer that violates such prohibitions is liable to the aggrieved prospective employee or employee for statutory damages between $1,000 and $10,000 or actual damages, whichever is greater, reasonable attorney fees and costs, and any other legal and equitable relief as may be appropriate.

v. **SB 494 Live-in domestic workers; overtime pay for certain employees. (Vetoed by Governor)**

An Act to amend and reenact § **40.1-29.3** of the Code of Virginia, relating to overtime for certain employees; live-in domestic workers. Adds individuals who are employed in domestic service in a household and reside in such household to provisions related to overtime pay.

B. Employee Benefits/Rights

i. **HB 569 Employment discrimination; employee notification of federal and state statute of limitations. (Vetoed by Governor)**

An Act to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 40.1 a section numbered **40.1-28.7:11**, relating to employment discrimination; employee notification of federal and state statute of limitations. Requires an employer that employs 10 or more employees and that receives an employee complaint alleging sexual assault, harassment, or any other form of discrimination for which the employee may seek enforcement by the U.S. Equal Employment Opportunity Commission (EEOC) or the Office of the Attorney General to notify such employee that a charge may be filed with the EEOC or the Office of the Attorney General within 300 days after the alleged unlawful discriminatory practice occurred. The bill also requires an employer to provide this information as part of any new employee training provided at the commencement of employment or anti-discrimination training provided to an employee.

ii. **HB 770 Retaliatory action against employee prohibited; remedies available. (Vetoed by Governor)**

An Act to amend and reenact § **40.1-27.3** of the Code of Virginia, relating to retaliatory action against employee prohibited; remedies available. Provides that a violation of certain provisions regarding retaliatory action against employees may be alleged in a court of competent jurisdiction within one year of the employer's final prohibited retaliatory action. The bill states that in such cases, double damages may be awarded if such violation was willful.

iii. **HB 737 Paid family and medical leave insurance program; notice requirements, civil action. (Left in Committee)**

A Bill to amend the Code of Virginia by adding in Title 60.2 a chapter numbered 8, consisting of sections numbered **60.2-800** through **60.2-821**, relating to paid family and medical leave insurance program; notice requirements; civil action. Requires the

Virginia Employment Commission to establish and administer a paid family and medical leave insurance program with benefits beginning January 1, 2027. Under the program, benefits are paid to covered individuals, as defined in the bill, for family and medical leave. Funding for the program is provided through premiums assessed to employers and employees beginning January 1, 2026. The bill provides that the amount of a benefit is 80 percent of the employee's average weekly wage, not to exceed 80 percent of the state weekly wage, which amount is required to be adjusted annually to reflect changes in the statewide average weekly wage. The bill caps the duration of paid leave at 12 weeks in any application year and provides self-employed individuals the option of participating in the program.

iv. **HB 1098 Family bereavement leave; employee restoration of position, etc. (Vetoed by Governor)**

An Act to amend the Code of Virginia by adding in Chapter 3 of Title 40.1 an article numbered 2.3, consisting of sections numbered **40.1-33.13** through **40.1-33.17**, relating to unpaid family bereavement leave; required; remedies. Requires that an employer that employs 50 or more employees provide eligible employees, defined in the bill, with up to 10 days of unpaid family bereavement leave in any 12-month period to (i) attend the funeral or funeral equivalent of a covered family member; (ii) make arrangements necessitated by the death of a covered family member; (iii) grieve the death of a covered family member; or (iv) be absent from work due to (a) a miscarriage, (b) an unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure, (c) a failed adoption match or an adoption that is not finalized because it is contested by another party, (d) a failed surrogacy agreement, (e) a diagnosis that negatively impacts pregnancy or fertility, or (f) a stillbirth. The bill requires the employee to provide notice of his intent to take the leave if reasonable and practicable and provides that an employer may require reasonable documentation of the death or event. The bill requires the employer to restore the employee's position following the leave, to continue to provide coverage for the employee under any health benefit plan, and to pay the employee any commission earned prior to the leave. The bill prohibits the employer from taking retaliatory action against the employee for taking family bereavement leave and provides that, if an employer fails to provide unpaid family bereavement leave or engages in such prohibited retaliatory action, an employee may bring an action against the employer in a court of competent jurisdiction.

v. **SB 373 Paid family and medical leave insurance program; notice requirements, civil action. (Vetoed by Governor)**

An Act to amend the Code of Virginia by adding in Title 60.2 a chapter numbered 8, consisting of sections numbered **60.2-800** through **60.2-821**, relating to paid family and medical leave insurance program; notice requirements; civil action. Requires the Virginia Employment Commission to establish and administer a paid family and medical leave insurance program with benefits beginning January 1, 2027. Under the

program, benefits are paid to covered individuals, as defined in the bill, for family and medical leave. The bill specifies that covered individuals shall not include state employees, constitutional and other local officers, and employees of local school divisions and that funding for the program is provided through premiums assessed to employers and employees beginning January 1, 2026. The bill provides that the amount of a benefit is 80 percent of the employee's average weekly wage, not to exceed 80 percent of the state weekly wage, which amount is required to be adjusted annually to reflect changes in the statewide average weekly wage. The bill caps the duration of paid leave at 12 weeks in any application year and provides self-employed individuals the option of participating in the program. Finally, the bill requires the Commission to update its 2021 Paid Family and Medical Leave study to include an assessment of the budgetary impacts of extending the benefits of the program to exempt individuals.

vi. **HB 256 Health care providers & grocery store workers; employers to provide paid sick leave, effective date. (Left in Committee)**

A Bill to amend and reenact §§ **40.1-33.3** and **40.1-33.4** of the Code of Virginia, relating to paid sick leave; health care providers and grocery store workers; waiver for certain employees. Requires employers to provide paid sick leave to health care providers and grocery store workers. Under current law, employers are only required to provide paid sick leave to certain home health workers. The bill removes requirements that workers work on average at least 20 hours per week or 90 hours per month to be eligible for paid sick leave. The bill provides that certain health care providers may waive their right to accrue and use paid sick leave and provides an exemption for employers of certain other health care providers. The bill requires the Department of Labor and Industry to develop guidelines for retail employers that sell groceries to provide sick leave and to publish such guidelines by December 1, 2024. The provisions of the bill other than the requirement for the Department of Labor and Industry to develop guidelines have a delayed effective date of January 1, 2025.

vii. **HB 18 and SB 7 Hate crimes and discrimination; ethnic animosity, nondiscrimination in employment, etc., penalties. (Passed – Chapters 266 and 334)**

An Act to amend and reenact §§ **2.2-3900**, **2.2-3902**, **2.2-3904**, **2.2-3905**, **8.01-49.1**, **18.2-57**, and **18.2-121** of the Code of Virginia, relating to hate crimes and discrimination; ethnic animosity; penalties. Provides that it is the policy of the Commonwealth to safeguard all individuals within the Commonwealth from unlawful discrimination in employment and in places of public accommodation because of such individual's ethnic origin and prohibits such discrimination. The bill also adds victims who are intentionally selected because of their ethnic origin to the categories of victims whose intentional selection for a hate crime involving assault, assault and battery, or trespass for the purpose of damaging another's property

results in a higher criminal penalty for the offense. The bill also provides that no provider or user of an interactive computer service on the Internet shall be liable for any action voluntarily taken by it in good faith to restrict access to material that the provider or user considers to be intended to incite hatred on the basis of ethnic origin. This bill incorporates SB 120.

viii. **HB 782 Virginia Human Rights Act; complaint or charge of discrimination, right to file civil action. (Passed - Chapter 819)**

An Act to amend and reenact §§ **2.2-3901**, **2.2-3907**, and **2.2-3908** of the Code of Virginia, relating to Virginia Human Rights Act; dual-filed civil actions. Clarifies timelines for civil actions alleging unlawful discrimination under the Virginia Human Rights Act and the U.S. Equal Employment Opportunity Commission. The bill requires any civil action for unlawful discrimination under the Virginia Human Rights Act brought in an appropriate general district or circuit court to be filed within 90 days of the complainant receiving a notice of his right to file such action from the Office of Civil Rights of the Department of Law.

ix. **SB 350 Virginia Human Rights Act; right to sue. (Passed – Chapter 784)**

An Act to amend and reenact §§ **2.2-3907** and **2.2-3908** of the Code of Virginia, relating to Virginia Human Rights Act; right to sue. Permits a complainant who has not received a notice of the right to file a civil action from the Office of Civil Rights of the Department of Law or the Equal Employment Opportunity Commission, regardless of whether the complaint was dual-filed, as requested after 180 days have passed from the date the complaint was filed to commence a timely civil action in an appropriate general district or circuit court having jurisdiction over the person who allegedly unlawfully discriminated against the complainant.

x. **HB 160 Veterans; workplace poster for benefits and services. (Passed – Chapter 430)**

An Act to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 40.1 a section numbered **40.1-28.7:11**, relating to Department of Labor and Industry; workplace poster for veterans benefits and services. Directs the Department of Labor and Industry, in consultation with the Department of Veterans Services, to create a poster describing benefits and services available to veterans and allows employers to request and display such poster in the workplace. The bill enumerates a minimum group of resources the poster shall include, including (i) Department of Veterans Services' programs, contact information, and website address; (ii) substance abuse and mental health treatment resources; (iii) educational, workforce, and training resources; (iv) tax benefits; (v) eligibility for unemployment insurance benefits; (vi) legal services; and (vii) the U.S. Department of Veterans Affairs Veterans Crisis Line.

C. Collective Bargaining

i. HB 780 Collective bargaining by public employees; public transportation providers. (Left in Committee)

A Bill to amend and reenact §§ 40.1-55, 40.1-57.2, and 40.1-57.3 of the Code of Virginia, relating to collective bargaining by public employees; public transportation providers. Permits the governing body of a public transportation provider, as defined in the bill, to adopt a resolution authorizing such public transportation provider to (i) recognize a labor union or other employee association as a bargaining agent of public officers and employees and (ii) collectively bargain or enter into a collective bargaining contract with such union or association or its agents with respect to any matter relating to such transportation district or its employees.

ii. HB 1001 and SB 374 Collective bargaining by public employees; labor organization representation. (Left in Committee)

A Bill to amend and reenact § 40.1-55 of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 4 of Title 40.1 an article numbered 2.2, consisting of sections numbered 40.1-57.4 through 40.1-57.23; and to repeal § 40.1-54.3 and Article 2.1 (§§ 40.1-57.2 and 40.1-57.3) of Chapter 4 of Title 40.1, relating to collective bargaining by public employees; labor organization representation. Repeals the existing prohibition on collective bargaining by public employees. The bill creates the Public Employee Relations Board, which shall determine appropriate bargaining units and provide for certification and decertification elections for exclusive bargaining representatives of state employees and local government employees. The bill requires public employers and employee organizations that are exclusive bargaining representatives to meet at reasonable times to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment. The bill repeals a provision that declares that, in any procedure providing for the designation, selection, or authorization of a labor organization to represent employees, the right of an individual employee to vote by secret ballot is a fundamental right that shall be guaranteed from infringement.

iii. HB 1284 and SB 623 Firefighters and emergency medical services; collective bargaining by providers. (Continued to 2025)

A Bill to amend and reenact §§ 40.1-55, 40.1-57.2, and 40.1-57.3 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 4 of Title 40.1 an article numbered 2.2, consisting of sections numbered 40.1-57.4 through 40.1-57.7, relating to collective bargaining by firefighters and emergency medical services providers. Authorizes firefighters and emergency medical services providers employed by a political subdivision of the Commonwealth to engage in collective bargaining through labor organizations or other designated representatives. The bill provides for the appointment of a three-member board of arbitration regarding any dispute arising between an employer and firefighters or emergency medical services

providers. Under the bill, determinations made by such board of arbitration are final on a disputed issue and are binding on the parties involved.

D. Worker's Compensation

i. HB 205 Workers' compensation; prompt payment, limitation on claims. (Passed - Chapter 177)

An Act to amend and reenact § 65.2-605.1 of the Code of Virginia, relating to workers' compensation; prompt payment; limitation on claims. Prohibits an employer or workers' compensation carrier from seeking recovery of a payment made to a health care provider for health care services rendered to a claimant unless such recovery is sought less than one year from the date payment was made to the health care provider. Under current law, such prohibition only applies to services rendered after July 1, 2014.
The bill also prohibits a health care provider from submitting a claim to the Virginia Workers' Compensation Commission contesting the sufficiency of payment for health care services rendered to a claimant unless such claim is filed within one year of the date the last payment is received by the health care provider. Under current law, such prohibition only applies to services rendered after July 1, 2014.

ii. HB 531 Workers' compensation; injuries caused by repetitive and sustained physical stressors. (Continued to 2025)

A Bill to amend and reenact § 65.2-400 of the Code of Virginia, relating to workers' compensation; injuries caused by repetitive and sustained physical stressors. Provides that, for the purposes of the Virginia Workers' Compensation Act, "occupational disease" includes injuries or diseases from conditions resulting from repetitive and sustained physical stressors, including repetitive and sustained motions, exertions, posture stresses, contact stresses, vibrations, or noises. The bill provides that such injuries or diseases are covered under the Act and that such coverage does not require that such repetitive or sustained physical stress occurred over a particular time period, provided that the time period over which such physical stress occurred can be reasonably identified.

E. Employment Discrimination

i. HB370 Employment; annual interactive training and education, harassment and workplace discrimination. (Left in Committee)

A Bill to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 40.1 a section numbered 40.1-28.7:11, relating to employment; training and education; harassment and workplace discrimination. Requires each employer with 50 or more employees, including the Commonwealth and its agencies, institutions, and political subdivisions, to provide annual interactive training and education regarding harassment and workplace discrimination, as both terms are defined in the bill, by

July 1, 2025. The bill includes specific training and education requirements for supervisory and nonsupervisory employees, seasonal and temporary employees who are hired to work for less than six months, and migrant and seasonal agricultural workers. The training and education required under the bill must be provided by an educator or human resources professional with knowledge and expertise in the subject matter and must include a method for employees to electronically save a certificate of completion of such training and education. The bill requires the Department of Labor and Industry to make online courses for the required training available on its website beginning January 1, 2025.

ii. **HB 502 Nonbinary sex or gender; all forms or applications to offer any applicant the option to designate. (Continued to 2025)**

A Bill to amend and reenact §§ 8.01-217, 16.1-331, 18.2-308.04, 18.2-308.06, 18.2-308.2:2, 18.2-308.2:4, 19.2-13, 20-88.54, 22.1-287.1, 23.1-405, 23.1-407, 24.2-418, 24.2-444, 30-394, 32.1-261, 32.1-267, 32.1-269.1, 32.1-292.2, 40.1-96, 40.1-102, 46.2-323, 46.2-341.12, 46.2-345, 46.2-345.2, 46.2-2906, 54.1-3319, 54.1-4108, 59.1-118, and 65.2-900 of the Code of Virginia, relating to undesignated sex or gender designation option. Requires all forms or applications to offer any applicant the option of "male," "female," or "nonbinary" when designating the applicant's sex or gender. The bill contains technical amendments.

III. Healthcare

A. Contraception, Pregnancy and Maternal Health

i. **HB 609 and SB 237 Contraception; establishes right to obtain, applicability, enforcement. (Vetoed by Governor)**

A Bill to provide that individuals possess the right to access contraception independently of the requirements of the Constitution of the United States. Establishes a right to obtain contraceptives and engage in contraception, as defined in the bill. The bill creates a cause of action that may be instituted against anyone who infringes on such right.

ii. **HB 781 Maternal Health Data and Quality Measures, Task Force on; State Health Commissioner to reestablish. (Vetoed by Governor)**

A Bill to reestablish the Task Force on Maternal Health Data and Quality Measures; report. Directs the State Health Commissioner to reestablish the Task Force on Maternal Health Data and Quality Measures for the purpose of evaluating maternal health data collection processes to guide policies in the Commonwealth to improve maternal care, quality, and outcomes for all birthing people in the Commonwealth. The bill directs the Task Force to report its findings and conclusions to the Governor and General Assembly by December 1 of each year regarding its activities. The bill directs the Task Force to conclude its work by December 1, 2025. This bill

reestablishes the Task Force on Maternal Health Data and Quality Measures that concluded on December 1, 2023. The bill incorporates **HB 169.**

iii. **HB 819 and SB 238 Health insurance; coverage for contraceptive drugs and devices. (Vetoed by Governor)**

A Bill to amend and reenact § 38.2-3407.5:1 of the Code of Virginia, relating to health insurance; coverage for contraceptive drugs and devices. 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, as defined in the bill, including those available over-the-counter. The bill prohibits a health insurance carrier from imposing upon any person receiving contraceptive benefits pursuant to the provisions of the bill any copayment, coinsurance payment, or fee, except in certain circumstances.

iv. **SB 140 Fetal and Infant Mortality Review Team; created, penalty, report. (Continued to 2025)**

A Bill to amend and reenact §§ **2.2-3705.5**, **2.2-3711**, as it is currently effective and as it may become effective, and **2.2-4002** of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **32.1-283.9**, relating to the Fetal and Infant Mortality Review Team established; penalty; report. Establishes the Fetal and Infant Mortality Review Team to develop and implement procedures to ensure that fetal and infant deaths occurring in the Commonwealth are analyzed in a systematic way. The bill requires the Team to compile triennial statistical data regarding fetal and infant deaths and to make such data available to the Governor, the General Assembly, and the Department of Health. The bill provides that information and records obtained or created by the Team and portions of meetings of the Team at which individual fetal and infant deaths are discussed shall be confidential.

B. Menstrual Issues

i. **HB 78 and SB 16 Search warrants, subpoenas, court orders, or other process; menstrual health data prohibited. (Passed – Chapter 523 and 571)**

An Act to amend and reenact § 19.2-53 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 5 of Title 19.2 a section numbered 19.2-60.2, relating to search warrants, subpoenas, court orders, or other process; menstrual health data prohibited. Prohibits the issuance of a search warrant, subpoena, court order, or other process for the purpose of the search and seizure or production of menstrual health data, as defined in the bill, including data stored on a computer, computer network, or other device containing electronic or digital information. This bill incorporates HB 1359.

ii. **HB 1221 Health education; menstrual education instruction permitted. (Passed – Chapter 741)**

An Act to amend and reenact § 22.1-207 of the Code of Virginia, relating to health education; menstrual education instruction permitted. Permits each school board to provide a program of instruction on menstrual education as a part of any health education instruction offered at such grade level in grades four through eight as the school board deems appropriate.

C. Mental Health

i. **HB 224 Public schools; mental health awareness training. (Vetoed by Governor)**

A Bill to amend and reenact §§ 22.1-207 and 22.1-298.6 of the Code of Virginia, relating to public schools; mental health awareness training and instruction; requirements. Requires each teacher and other relevant personnel, as determined by the applicable school board, employed on a full-time basis to complete mental health awareness training that addresses the needs of youth populations that are at a high risk of experiencing mental health challenges and disorders in accordance with evidence-based best practices developed by the American Psychological Association. Current law requires such teachers and personnel to complete mental health awareness training but does not contain any requirements relating to the specific topics such training must address. The bill prohibits any of its provisions or any policy adopted in accordance with its provisions from being construed to permit biased or discriminatory treatment of any youth population deemed to be at a high risk of experiencing mental health challenges and disorders.

ii. **HB 313 State Inspector General, Office of the; investigations of abuse/neglect at state psychiatric hospital. (Passed – Chapter 638)**

An Act to direct the Office of the State Inspector General to develop a plan and submit reports regarding investigations of abuse or neglect at state psychiatric hospitals. Directs the Office of the State Inspector General to (i) develop a plan to fulfill its statutory obligation to fully investigate all complaints it receives alleging abuse, neglect, or inadequate care at a state psychiatric hospital and (ii) submit such plan to the Chairmen of the House Committee on Health and Human Services and the Senate Committee on Education and Health by November 1, 2024. The bill also requires the Office to submit an annual report to the General Assembly on or before November 1 of each year regarding the number of such complaints received and the number of complaints that were fully investigated by the Office.

iii. **HB 772 and SB 460 Minors; parental admission for inpatient treatment. (Passed – Chapters 695 and 710)**

An Act to amend and reenact §§ 16.1-338 and 16.1-339 of the Code of Virginia, relating to parental admission of minors for inpatient treatment. Clarifies that for the purposes of admission of a minor to a willing mental health facility for inpatient

treatment, the finding required to be made by a qualified evaluator that the minor appears to have a mental illness serious enough to warrant inpatient treatment may include a finding of substance abuse and such inpatient treatment may be related to such mental illness, which may include substance abuse. The bill also specifies that a temporary detention order shall not be required for a minor 14 years of age or older who objects to admission to be admitted to a willing facility upon the application of a parent. As introduced, this bill was a recommendation of the Virginia Commission on Youth.

iv. **HB 988 Correctional facilities; behavioral health services in facilities, report. (Continued to 2025)**

A Bill to amend the Code of Virginia by adding in Article 1 of Chapter 2 of Title 53.1 a section numbered 53.1-31.5 and by adding a section numbered 53.1-68.1, relating to behavioral health services in correctional facilities; report. Requires the Department of Corrections to report to the General Assembly and the Governor on or before October 1 of each year certain population statistics regarding the provision of behavioral health services to persons incarcerated in state correctional facilities. The bill also requires local correctional facilities to report to the State Board of Local and Regional Jails on or before October 1 of each year certain population statistics regarding the provision of behavioral health services to persons incarcerated in local correctional facilities and for the Board to report such statistics to the General Assembly and the Governor on or before December 1 of each year.

v. **HB 861 and SB 515 Weapons; carrying into hospital that provides mental health services. (Vetoed by Governor)**

A BILL to amend the Code of Virginia by adding in Article 4 of Chapter 4 of Title 37.2 a section numbered 37.2-431.2, relating to weapons; possession or transportation; facility that provides mental health services or developmental services; penalty. Makes it a Class 1 misdemeanor for any person to knowingly possess in or transport into the building of any hospital that provides mental health services or developmental services in the Commonwealth, including an emergency department or other facility rendering emergency medical care, any (i) firearm or other weapon designed or intended to propel a missile or projectile of any kind; (ii) knife, except a pocket knife having a folding metal blade of less than three inches; or (iii) other dangerous weapon, including explosives and stun weapons. The bill also provides that notice of such prohibitions shall be posted conspicuously at the public entrance of any hospital and no person shall be convicted of the offense if such notice is not posted, unless such person had actual notice of the prohibitions. The bill provides that any such firearm, knife, explosive, or weapon shall be subject to seizure by a law-enforcement officer and forfeited to the Commonwealth and specifies exceptions to the prohibition.

vi. **HB 1269 and SB 626 Barrier crimes; adult substance abuse and mental health services, exception. (Passed – Chapter 651 and 683)**

An Act to amend and reenact §§ 37.2-314, 37.2-416.1, and 37.2-506.1 of the Code of Virginia, relating to barrier crimes; adult substance abuse and mental health services; exception. Permits the Department of Behavioral Health and Developmental Services, providers of substance abuse or mental health services to adults, and community services boards and behavioral health authorities to hire applicants convicted of certain barrier crimes of misdemeanor assault and battery or involving controlled substances provided that such conviction occurred more than four years prior to the application date for employment.

vii. **SB 395 Public elementary & secondary schools; student athletes, pre-participation mental health assessment. (Continued to 2025)**

A Bill to amend and reenact § 22.1-271.7 of the Code of Virginia, relating to public elementary and secondary schools; student athletes; pre-participation mental health assessment required. Provides that no public elementary or secondary school student is permitted to be a participant on or try out for any school athletic team or squad with a predetermined roster, regular practices, and scheduled competitions with other elementary or secondary schools unless such student has submitted to the school principal a signed report from a licensed physician, licensed advanced practice registered nurse, or licensed physician assistant acting under the supervision of a licensed physician attesting that such student has, within the preceding 365 days, received both a physical examination and a mental health assessment. Current law only requires that the signed report attest that any such student has received a physical examination within the preceding 12 months. The bill prohibits any public elementary or secondary school from becoming a member of any organization or entity that regulates or governs interscholastic programs that does not deem eligible for participation any student who has satisfied the requirements for eligibility in accordance with the provisions of the bill. The provisions of the bill other than the requirement for the Board of Education to convene a work group have a delayed effective date of July 1, 2025.

viii. **SB 575 Discharge plans; copies to public elementary and secondary schools. (Continued to 2025)**

A Bill to amend and reenact §§ 16.1-346.1 and 37.2-505 of the Code of Virginia, relating to discharge plans; copies to public elementary and secondary schools. Provides that, prior to the discharge of any minor admitted to inpatient treatment (i) who is a student at a public elementary or secondary school and (ii) for whom the facility deems (a) such discharge poses a threat of violence or physical harm to self and others or (b) additional educational services are needed, such facility is required to provide to the school's mental health professional or school counselor the portions of such discharge plan relevant to the threat of violence or harm or the necessary additional educational services. The bill requires such facility to, prior to

providing any such portions of any minor's discharge plan, provide to the parent of such minor student reasonable notice of the types of information that would be included in any portions of the discharge plan being provided and of the parent's right to, upon written request, refuse the provision of any such information.

D. Drugs and Substance Abuse

i. HB 516 Prescription drugs; labels provided for blind and disabled users. (Passed – Chapter 725)

An Act to amend the Code of Virginia by adding a section numbered 54.1-3410.3, relating to prescription drugs; labels; blind and disabled users. Requires pharmacies to notify each person who identifies themselves or a patient as blind, visually impaired, or otherwise print disabled to whom a prescription drug is dispensed that an accessible prescription label or alternate accommodation is available to the person upon request at no additional cost. The bill requires the Board of Pharmacy to promulgate regulations implementing the provisions of the bill no later than December 31, 2024.

ii. HB 570 and SB 274 Prescription Drug Affordability Board; established, drug cost affordability review, report. (Vetoed by Governor)

A Bill to amend and reenact § 54.1-3442.02 of the Code of Virginia and to amend the Code of Virginia by adding in Title 32.1 a chapter numbered 7.3, consisting of sections numbered 32.1-276.12 through 32.1-276.21, relating to Prescription Drug Affordability Board established; drug cost affordability review. Establishes the Prescription Drug Affordability Board for the purpose of protecting the citizens of the Commonwealth and other stakeholders within the health care system from the high costs of prescription drug products. The bill requires the Board to meet in open session at least four times annually, with certain exceptions and requirements enumerated in the bill. Members of the Board are required to disclose any conflicts of interest, as described in the bill. The bill also creates a stakeholder council for the purpose of assisting the Board in making decisions related to drug cost affordability. The bill tasks the Board with identifying prescription, generic, and other drugs, as defined in the bill, that are offered for sale in the Commonwealth and, at the Board's discretion, conducting an affordability review of any prescription drug product. The bill lists factors for the Board to consider that indicate an affordability challenge for the health care system in the Commonwealth or high out-of-pocket costs for patients. The bill also provides that any person aggrieved by a decision of the Board may request an appeal of the Board's decision and that the Attorney General has authority to enforce the provisions of the bill. The bill provides that the Board shall establish no more than 12 upper payment limit amounts annually between January 1, 2025, and January 1, 2028.

The bill requires the Board to report its findings and recommendations to the General Assembly twice annually, beginning on July 1, 2025, and December 31,

2025. Provisions of the bill shall apply to state-sponsored and state-regulated health plans and health programs and obligate such policies to limit drug payment amounts and reimbursements to an upper payment limit amount set by the Board, if applicable, following an affordability review. The bill specifies that Medicare Part D plans shall not be bound by such decisions of the Board.
The bill also requires the nonprofit organization contracted by the Department of Health to provide prescription drug price transparency to provide the Board access to certain data reported by manufacturers. The bill has a delayed effective date of January 1, 2025

iii. **HB 1134 and SB 98 Health insurance; if prior authorization request is approved for prescription drugs. (Passed – Chapters 320 and 338)**

An Act to amend and reenact § 38.2-3407.15:2 of the Code of Virginia, relating to health insurance; prior authorization. Requires that any provider contract between a carrier and a participating health care provider contain specific provisions that require that if a prior authorization request is approved for prescription drugs and such prescription drugs have been scheduled, provided, or delivered to the patient consistent with the authorization, the carrier shall not revoke, limit, condition, modify, or restrict that authorization unless (i) there is evidence that the authorization was obtained based on fraud or misrepresentation; (ii) final actions by the U.S. Food and Drug Administration, other regulatory agencies, or the manufacturer remove the drug from the market, limit its use in a manner that affects the authorization, or communicate a patient safety issue that would affect the authorization alone or in combination with other authorizations; (iii) a combination of drugs prescribed would cause a drug interaction; or (iv) a generic or biosimilar is added to the prescription drug formulary. The bill provides that such provisions do not require a carrier to cover any benefit not otherwise covered or cover a prescription drug if the enrollee is no longer covered by a health plan on the date the prescription drug was scheduled, provided, or delivered.

iv. **HB 1336 and SB 568 Crisis stabilization services; facilities licensed by DBHDS, nursing homes. (Passed – Chapters 63 and 513)**

A BILL to amend and reenact §§ 54.1-3401, 54.1-3423, and 54.1-3434.02 of the Code of Virginia, relating to crisis stabilization services; facilities licensed by Department of Behavioral Health and Developmental Services; nursing homes; dispensing and administration of drugs; emergency. Permits facilities licensed by the Department of Behavioral Health and Developmental Services that provide crisis stabilization services to maintain a stock of Schedules II through VI controlled substances necessary for immediate treatment of patients admitted to such facility. Under current law, maintenance of a stock of Schedule VI controlled substances is allowed under certain conditions, but a stock of Schedules II through V controlled substances may be maintained only if authorized by federal law and Board of Pharmacy regulations. The bill also allows automated drug dispensing systems and remote

dispensing systems to be used by state facilities established pursuant to Title 37.2 (Behavioral Health and Developmental Services), facilities that provide crisis stabilization services, nursing homes, and other facilities authorized by the Board of Pharmacy that meet certain conditions. The bill contains an emergency clause, directs the Board of Pharmacy to adopt emergency regulations to implement the provisions of the bill, incorporates HB 1038.

v. **HB 1473 Fentanyl education and awareness informational one-sheet; Department of Education shall develop. (Passed – Chapter 564)**

An Act to amend the Code of Virginia by adding a section numbered 22.1-206.01, relating to Department of Education; development and distribution of fentanyl education and awareness informational one-sheet; requirements. Requires the Department of Education to develop, in collaboration with the Department of Health, a fentanyl education and awareness informational one-sheet designed to promote awareness of the dangers associated with and the prevalence of fentanyl and provide essential information on fentanyl overdose prevention and preparedness among high school-age students. The bill requires the Department of Education to make available to each school board and post in a publicly accessible location on its website such informational one-sheet and to annually review and update such informational one-sheet in collaboration with the Department of Health to ensure its currency and accuracy. The bill requires each public high school or secondary school that includes grades nine through 12 to annually distribute such informational one-sheet to each student in grades nine through 12 within the first two weeks of the school year. This bill incorporates HB 1007.

vi. **SB 119 Drug manufacturers; permitting and registration, certain conditions related to 340B-covered drugs. (Vetoed by Governor)**

A BILL to amend and reenact §§ 54.1-3437 and 54.1-3442.01 of the Code of Virginia, relating to drug manufacturers; permitting and registration; certain conditions related to 340B-covered drugs. Requires a drug manufacturer, as a condition of obtaining a permit or as a condition of registration or renewal of registration, to certify that it does not limit the number of contract pharmacies or covered entities, as defined in relevant law, to which it ships 340B-covered drugs and that it does not impose requirements, exclusions, reimbursement terms, or other conditions on a contract pharmacy or covered entity that differ from those applied to pharmacies or entities that are not contract pharmacies or covered entities on the basis that the pharmacy or entity is a contract pharmacy or covered entity or that the pharmacy or entity dispenses 340B-covered drugs.

vii. **SJ 26 Drugs; JLARC to study scope and cost of penalizing possession as a felony. (Continued to 2025)**

Directing the Joint Legislative Audit and Review Commission to study the scope and cost of the current laws in the Commonwealth penalizing possession of drugs as a

felony. Report. Directs the Joint Legislative Audit and Review Commission to study the scope and cost of the current laws in the Commonwealth penalizing possession of drugs as a felony.

IV. Housing

A. Unlawful Detainer

i. HB 73 Unlawful detainer; expungement of action, entering of an order without further petition or hearing. (Passed – Chapter 372))

An Act to amend and reenact § 8.01-130.01 of the Code of Virginia, relating to unlawful detainer; expungement. Provides that in unlawful detainer actions filed in the general district court, if the 30-day period following the dismissal of such an action has passed or if a voluntary nonsuit is taken and the six-month period following such nonsuit has passed, the court shall, without further petition or hearing, enter an order requiring the expungement of such action, provided that no order of possession has been entered. The bill provides that if a judgment is entered in favor of the defendant, such defendant may petition the court for an expungement pursuant to the petition process under current law. Additionally, the bill retains the petition process existing under current law for unlawful detainer actions commenced prior to July 1, 2024, for which the court still has records.

ii. HB 86 Summons for unlawful detainer; specifies a process by which a plaintiff may amend amount due to him. (Passed – Chapter 268)

An Act to amend and reenact §§ 8.01-126 and 8.01-454 of the Code of Virginia, relating to summons for unlawful detainer; hearing date; amendments to amount due; subsequent filings. Specifies a process by which a plaintiff, plaintiff's attorney, or agent in an unlawful detainer action may amend the amount due to him in an unlawful detainer action. The bill further provides that if such an amendment is permitted the plaintiff shall not subsequently file additional warrants in debt against the defendant for additional amounts if those amounts could have been included in such amended amount. The bill provides that if the plaintiff requests all amounts due and owing as of the date of the hearing or if the court grants an amendment of the amounts requested, the plaintiff shall not subsequently file additional unlawful detainers or warrants in debt against the defendant for such additional amounts if those amounts could have been included in the amended amount.

B. Virginia Landlord and Tenant Act – Tenant's Rights

i. HB 598 Virginia Residential Landlord and Tenant Act; noncompliance with rental agreement, grace period. (Vetoed)

A Bill to amend and reenact § 55.1-1245, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to Virginia Residential Landlord

and Tenant Act; noncompliance with rental agreement; grace period prior to termination. Increases from five days to 14 days the mandatory waiting period 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 before the landlord may pursue remedies for termination of the rental agreement.

ii. HB 442 Va. Residential Landlord & Tenant Act; landlord remedies, noncompliance with rental agreement. (Vetoed)

An Act to amend and reenact § **55.1-1245**, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; landlord remedies; noncompliance with rental agreement; payment plan. 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 bill 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 bill 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.

iii. HB 588 VA Residential Landlord &Tenant Act; fire/casualty damage, landlord requirements for termination. (Vetoed)

An Act to amend and reenact § **55.1-1240** of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; fire or casualty damage; termination by landlord. Requires a landlord, prior to giving a tenant 21 days' notice of his intention to terminate the rental agreement for a dwelling unit that has been damaged or destroyed by fire or casualty, to (i) make a reasonable effort to meet with the tenant to discuss reasonable alternatives and to offer the tenant a substantially similar unit, if one is available, or (ii) determine that the damage was caused by the tenant's failure to maintain the dwelling unit in accordance with certain provisions. Current law allows the landlord to terminate such agreement by giving the tenant 14 days' notice of his intention to terminate on the basis of the landlord's determination that such damage requires the removal of the tenant and that the use of the premises is

substantially impaired. The bill requires the landlord, upon receiving a request from the tenant after the tenant has received such notice, to reevaluate the extent of damage and habitability of such unit unless the landlord has determined that the damage was caused by the tenant's failure to maintain the dwelling unit.

iv. **HB 597 Aird Virginia Residential Landlord and Tenant Act; enforcement by localities. (Vetoed)**

An Act to amend and reenact § **55.1-1259** of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; enforcement by localities. Provides that if a condition exists in a rental dwelling unit that constitutes a material noncompliance by the landlord with the rental agreement or with any provision of law that, if not promptly corrected, constitutes a fire hazard or serious threat to the life, health, or safety of tenants or occupants of the premises, a locality may institute an action for injunction and damages to enforce the landlord's duty to maintain the rental dwelling unit in a fit and habitable condition, provided that (i) the property where the violation occurred is within the jurisdictional boundaries of the locality and (ii) the locality has notified the landlord who owns the property, either directly or through the managing agent, of the nature of the violation and the landlord has failed to remedy the violation to the satisfaction of the locality within a reasonable time after receiving such notice.

v. **HB 721 and SB 366 Local anti-rent gouging authority; civil penalty. (Continued to 2025)**

A Bill to amend the Code of Virginia by adding a section numbered **15.2-959.1**, relating to local anti-rent gouging authority; civil penalty. Provides that any locality may by ordinance adopt anti-rent gouging provisions. The bill provides for notice and a public hearing prior to the adoption of such ordinance and specifies that all landlords who are under the ordinance may be required to give at least two months' written notice of a rent increase and cannot increase the rent by more than the locality's calculated allowance, described in the bill as the maximum amount a landlord can increase a tenant's rent during any 12-month period, in effect at the time of the increase. The bill sets such allowance as equal to the annual increase in the Consumer Price Index or seven percent, whichever is less, states that such allowance is effective for a 12-month period beginning July 1 each year, and requires the locality to publish such allowance on its website by June 1 of each year. Certain facilities, as outlined in the bill, are exempt from such ordinance. The bill also allows a locality to establish an anti-rent gouging board that will develop and implement rules and procedures by which landlords may apply for and be granted exemptions from the rent increase limits set by the ordinance. Finally, the bill provides that a locality may establish a civil penalty for failure to comply with the requirements set out in the ordinance.

vi. **HB 764 Virginia Residential Landlord and Tenant Act; early termination of rental agreement. (Passed – Chapter 302)**

A Bill to amend and reenact § **55.1-1236** of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; early termination of rental agreement; victims of sexual abuse or criminal sexual assault. Provides that a tenant who is a victim of family abuse, sexual abuse, or other criminal sexual assault may terminate such tenant's obligations under a rental agreement if the tenant has obtained a permanent protective order and has given proper written notice of termination. Under current law, there must be a family abuse protective order or a conviction before the tenant may terminate such obligations under a rental agreement.

vii. **HB 817 VA Residential Landlord and Tenant Act and Manufactured Home Lot Rental Act; retaliatory conduct. (Vetoed)**

A Bill to amend and reenact §§ **55.1-1258** and **55.1-1314** of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; Manufactured Home Lot Rental Act; retaliatory conduct prohibited. Adds numerous actions to the list of prohibited retaliatory actions by a landlord against a tenant under the Virginia Residential Landlord and Tenant Act and Manufactured Home Lot Rental Act and specifies actions by a tenant for which a landlord may not retaliate. The bill modifies and expands the list of actions a landlord may take without violating the prohibition on retaliation. The bill allows a tenant, when the landlord has unlawfully retaliated, to recover actual damages and to assert retaliation as a defense in any action brought against him for possession.

viii. **HB 900 and SB 304 Zoning; developmental and use of accessory dwelling units. (Continued)**

A Bill to amend the Code of Virginia by adding a section numbered **15.2-2292.2**, relating to zoning; development and use of accessory dwelling units. Requires a locality to include in its zoning ordinances for residential zoning districts accessory dwelling units, or ADUs, as defined in the bill, as a permitted accessory use. The bill requires a person to seek a permit for an ADU from the locality, requires the locality to issue such permit if the person meets certain requirements enumerated in the bill, and restricts the fee for such permit to $250 or less. The bill prohibits the locality from requiring rear or side setbacks for the ADU greater than that of the primary dwelling or consanguinity or affinity between the occupants of the ADU and the primary dwelling. The bill has a delayed effective date of July 1, 2025.

ix. **HB 950 Uniform Statewide Building Code; temporarily prohibit modifications to Code. (Vetoed)**

A Bill to amend and reenact §§ **36-98** and **36-137** of the Code of Virginia, relating to Uniform Statewide Building Code; evaluation of proposed legislation. Provides that neither the Governor nor the Board of Housing and Community Development shall

modify any regulation in the Uniform Statewide Building Code prior to the conclusion of the Commonwealth's next triennial code development process.

x. **HB 955 Virginia Residential Landlord and Tenant Act; summary of rental agreement provisions. (Vetoed)**

A Bill to amend and reenact § 55.1-1204 of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; summary of rental agreement provisions. Requires landlords to include, upon request, a summary page with any written rental agreement offered to a prospective tenant that includes the duration of the lease, the amount of rent and the date upon which such rent shall be due, an explanation of any deposits and late fees that may be charged, and any termination provisions. The bill also directs the Director of the Department of Housing and Community Development to develop a sample summary page to be used by landlords to summarize the provisions of the lease agreement and to maintain such sample summary page on the Department's website in English and any language for which any locality in the Commonwealth regularly provides official government communications. The bill also requires any landlord who owns or manages more than four rental dwelling units or more than a 10 percent interest in more than four rental dwelling units, whether individually or through a business entity, in any locality in the Commonwealth that regularly provides official government communications in languages other than English to provide, upon request of a prospective tenant, such summary page in any of such languages using the sample summary page developed by the Director.

xi. **HB 957 Virginia Residential Landlord and Tenant Act; tenant's remedies, condemnation of dwelling unit. (Passed – Chapter 825)**

A Bill to amend and reenact § 55.1-1244 of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; tenant's assertion; condemnation of leased premises; remedies. Provides that the landlord shall be liable to the tenant for actual damages if the tenant gave notice to the landlord during the tenancy that his dwelling unit was in violation of an applicable building code, such violation posed a substantial risk to the health, safety, and welfare of a tenant, and such violation resulted in the tenant being excluded from his dwelling unit due to such unit being condemned. The bill includes exceptions to such liability, including negligence by the tenant, an act of God, and termination due to certain fire damage.

xii. **HB 967 and SB 405 Virginia Residential Landlord and Tenant Act; fee disclosure statement. (Passed – Chapters 788 and 826)**

A Bill to amend and reenact §§ 36-139 and 55.1-1203 and of the Code of Virginia, relating to Department of Housing and Community Development; Virginia Residential Landlord and Tenant Act; fee disclosure statement; work group. Requires landlords subject to the Virginia Residential Landlord and Tenant Act to include on

the first page of a written rental agreement, a description of any rent and fees to be charged to the tenant. The bill requires that such rental agreement also contain: No fee shall be collected unless it is listed below or incorporated into this agreement by way of a separate addendum after execution of this rental agreement.

xiii. **HB 993 and SB 422 Virginia Residential Landlord and Tenant Act; prohibited provisions, fees for maintenance. (Vetoed)**

A Bill to amend and reenact § 55.1-1208 of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; prohibited provisions; fees for maintenance and periodic payments. Prohibits landlords subject to the Virginia Residential Landlord and Tenant Act from requiring a tenant to (i) pay any fee for the maintenance or repair of any unit subject to such rental agreement unless necessitated by the tenant's violation of a requirement of the Act or (ii) pay any fee to submit periodic rent payments or other amounts due, unless the landlord offers an alternative method of payment that does not include additional fees.

xiv. **HB 996 VA Residential Landlord and Tenant Act, etc.; definitions, notice of tenant screening criteria. (Vetoed)**

An Act to amend and reenact §§ 55.1-1200, 55.1-1203, 55.1-1303, and 55.1-1311 of the Code of Virginia, relating to Department of Housing and Community Development; Virginia Residential Landlord and Tenant Act; Manufactured Home Lot Rental Act; notice of tenant screening criteria. Requires landlords governed by the Virginia Residential Landlord and Tenant Act or Manufactured Home Lot Rental Act to provide applicants for tenancy with (i) the amount and purpose of fees to be charged to such applicant, (ii) information that will be used to assess such applicant's eligibility for tenancy, and (iii) any criteria that may result in automatic denial of an application. The bill requires such landlords to notify applicants of certain rights protected by the federal Fair Credit Reporting Act if the landlord takes an adverse action, as defined in the bill, after reviewing an application. Finally, the bill requires such landlords to refund any funds received in excess of the landlord's actual expenses and damages, after the landlord's rejection of an application or an applicant's failure to rent a unit upon being notified of his eligibility for tenancy.

xv. **HB 1207 and SB 588 Va. Residential Landlord & Tenant Act; affordable housing, criminal record screening policy. (Failed to Pass)**

A Bill to amend and reenact §§ 36-139, 55.1-1200, and 55.1-1203 of the Code of Virginia, relating to Department of Housing and Community Development; Virginia Residential Landlord and Tenant Act; affordable housing; criminal record screening model policy. Requires the Director of the Department of Housing and Community Development (the Department) to develop a criminal record screening model policy for admitting or denying an applicant for affordable housing covered under the Virginia Residential Landlord and Tenant Act in accordance with the U.S. Department of Housing and Urban Development's guidance on the application of the Fair

Housing Act and maintain such model policy on its website. The bill prohibits a landlord of an affordable housing unit from inquiring about or requiring disclosure of, or if such information is received, basing an adverse action, in whole or in part, on an applicant's criminal or arrest record unless the landlord does so in accordance with the criminal record screening model policy developed by the Department and posted on its website and provides the applicant with a written copy of such policy. The bill directs the Department to convene a stakeholder group to provide input into the development of the criminal record screening model policy.

xvi. **HB 1251 VA Residential Landlord and Tenant Act; material noncompliance by landlord, court escrow account. (Vetoed)**

An Act to amend and reenact § **55.1-1244** of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; material noncompliance by landlord; rent escrow; relief. Removes the requirement that, prior to the granting of any relief, a tenant shall pay into escrow any amount of rent called for under the rental agreement. The bill requires the tenant, during the pendency of the action, to pay into escrow the amount of rent that becomes due subsequent to the initial court date called for under the rental agreement within five days of the date due under such rental agreement, unless or until such amount is modified by a subsequent order of the court. The bill also provides that a failure of the tenant to make timely payments into escrow shall not be grounds for dismissal of the underlying action but may be considered by the court when issuing an order.

xvii. **HB 1272 Virginia Residential Landlord and Tenant Act; copy of rental agreement for tenant. (Passed – Chapter 831)**

A Bill to amend and reenact § **55.1-1204** of the Code of Virginia, relating to Virginia Residential Landlord and Tenant Act; copy of rental agreement for tenant. Requires a landlord to provide a copy of the signed written rental agreement to the tenant within 10 business days of the effective date of the rental agreement and to provide additional hard copies of the rental agreement upon request or to maintain such rental agreement in an electronic format that can be easily accessed by or shared with the tenant upon request. The bill also prohibits a landlord from charging a tenant for any such additional copies of his rental agreement.

C. Virginia Consumer Protection Act

i. **HB 1519 Virginia Consumer Protection Act; fees for electronic fund transfers, prohibited. (Passed – Chapter 838)**

A Bill to amend and reenact §§ **59.1-199** and **59.1-200** of the Code of Virginia, relating to the Virginia Consumer Protection Act; fees for electronic fund transfers; prohibited. Provides that charging any transaction or processing fee or similar surcharge for the purchase of a good or service through the use of an electronic

fund transfer is a prohibited practice under the Virginia Consumer Protection Act. The bill also prohibits landlords subject to the Virginia Residential Landlord and Tenant Act from charging a transaction or processing fee for the payment of a security deposit, rent, or any other amounts payable.

ii. **SB 388 Virginia Consumer Protection Act; prohibited practices, mandatory fees disclosure. (Failed to Pass)**

A Bill to amend and reenact § **59.1-200** of the Code of Virginia, relating to Virginia Consumer Protection Act; prohibited practices; mandatory fees disclosure. Prohibits a supplier in connection with a consumer transaction from advertising, displaying, or offering any pricing information for goods or services without prominently displaying the total price, which shall include all mandatory fees or charges other than taxes imposed. The bill defines "mandatory fees or charges" as any fee or surcharge that must be paid in order to purchase the advertised good or service, that is not reasonably avoidable, and that a reasonable consumer would expect to be included. The bill clarifies that such term does not include shipping fees or taxes or fees imposed by a government or government-approved entity.

iii. **HB 1124 and SB 233 Faith in Housing for the Commonwealth Act; construction of affordable housing. (Continued to 2025)**

A Bill to amend the Code of Virginia by adding in Title 36 a chapter numbered 13, consisting of sections numbered **36-176** and **36-177**, relating to Faith in Housing for the Commonwealth Act. Permits a religious organization, defined in the bill, to construct affordable housing on real estate owned by such religious organization (i) on or before January 1, 2024, or for a period of not less than five years, and (ii) for which the religious organization retains a majority ownership interest.

iv. **HB 925 Towing; vehicles with expired registration, civil penalty. (Passed – Chapter 308)**

An Act to amend and reenact §§ **46.2-1150**, **46.2-1231**, and **46.2-1232** of the Code of Virginia, relating to towing; vehicles with expired registration; civil penalty. Requires a towing operator, defined in the bill, for a parking lot of a multifamily dwelling unit, defined in the bill, to post written notice on a vehicle providing at least 48 hours' notice to a resident prior to removing a resident's vehicle, defined in the bill, from such parking lot of the multifamily dwelling unit for an expired registration or expired vehicle inspection sticker and to provide a copy of such notice to the landlord of such multifamily dwelling unit. The bill provides that a towing operator who fails to comply with these requirements shall be required to reimburse the resident for the cost of the tow and shall be subject to a civil penalty not to exceed $100.

V. Data Privacy and Technology

A. Data Privacy

i. HB 228 Virginia Consumer Protection Act; recycling information on products. (Continued to 2025)

A Bill to amend and reenact § 59.1-200 of the Code of Virginia, relating to the Virginia Consumer Protection Act; prohibited practices; recycling information on products. Prohibits the sale or offering for sale of any product that indicates on the product's container or packaging that such container or packaging is recyclable unless such container or packaging is made out of a material that is recyclable under a majority of regional and local waste management plans. The bill requires the Virginia Waste Management Board to maintain a list of all materials that are recyclable under a majority of regional and local waste management plans adopted and to make such list available on the Department of Environmental Quality's website.

ii. HB 707 and SB 361 Consumer Data Protection Act; protections for children. (Passed – Chapters 840 and 844)

An Act to amend and reenact §§ 59.1-575, 59.1-578, and 59.1-580 of the Code of Virginia, relating to Consumer Data Protection Act; protections for children. Prohibits, subject to a parental consent requirement, a data controller from processing personal data of a known child (i) for the purposes of targeted advertising, the sale of such personal data, or profiling in furtherance of decisions that produce legal or similarly significant effects concerning a consumer; (ii) unless such processing is reasonably necessary to provide the online service, product, or feature; (iii) for any processing purpose other than the processing purpose that the controller disclosed at the time such controller collected such personal data or that is reasonably necessary for and compatible with such disclosed purpose; or (iv) for longer than is reasonably necessary to provide the online service, product, or feature.

The bill prohibits, subject to a parental consent requirement, a data controller from collecting precise geolocation data from a known child unless (a) such precise geolocation data is reasonably necessary for the controller to provide an online service, product, or feature and, if such data is necessary to provide such online service, product, or feature, such controller shall only collect such data for the time necessary to provide such online service, product, or feature and (b) the controller provides to the known child a signal indicating that such controller is collecting such precise geolocation data, which signal shall be available to such known child for the entire duration of such collection. The bill prohibits a data controller from engaging in the activities described in the bill unless the controller obtains consent from the child's parent or legal guardian in accordance with the federal Children's Online Privacy Protection Act.

iii. **HB 744 Consumer protection; automatic renewal or continuous service offers. (Passed – Chapter 452)**

An Act to amend and reenact §§ **59.1-200**, **59.1-207.45**, and **59.1-207.46** of the Code of Virginia, relating to consumer protection; automatic renewal or continuous service offers. Requires a supplier making automatic renewal or continuous service offers that automatically renew after more than 30 days and extend the automatic renewal or continuous service offer for more than a period of 12 months to notify the consumer of the option to cancel no less than 30 days and no more than 60 days before the cancellation deadline or the end of the current contract term.

iv. **HB 821 Consumer Data Protection Act; protections for children. (Left in Committee)**

A Bill to amend and reenact §§ **59.1-575**, **59.1-576**, and **59.1-578** of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **59.1-577.1**, relating to Consumer Data Protection Act; protections for children. Requires a controller or processor to obtain verifiable parental consent, defined in the bill, prior to registering any child with the operator's product or service or before collecting, using, or disclosing such child's personal data and prohibits a controller from knowingly processing the personal data of a child for purposes of (i) targeted advertising, (ii) the sale of such personal data, or (iii) profiling in furtherance of decisions that produce legal or similarly significant effects concerning a consumer. The bill also amends the definition of child for purposes of the Consumer Data Protection Act to include any natural person younger than 18 years of age.

v. **HB 882 Department of Education; model policy on student cell phone use during instructional time. (Continued to 2025)**

A Bill to amend the Code of Virginia by adding a section numbered **22.1-23.4**, relating to Department of Education; model policy on student cell phone use during instructional time; local adoption. Requires the Department of Education to develop, adopt, and distribute to each school board a model policy whereby public elementary and secondary school students are prohibited from possessing or using personal cell phones or other personal handheld communication devices during instructional time at school. The bill requires the Department, in developing and adopting such model policy, to seek to balance the interests of students' academic achievement, cognitive development, safety, and general well-being and permits the Department to include appropriate exceptions in extraordinary circumstances such as emergency situations or situations involving the need to contact the student's parents. The bill requires each school board to develop and adopt a policy that is consistent with such model policy adopted by the Department.

vi. **HB 547 Internet Safety Advisory Council; school boards; Internet safety education program. (Defeated on the Floor)**

A Bill to amend and reenact the second enactment of Chapter 776 of the Acts of Assembly of 2022 and to amend the Code of Virginia by adding a section numbered **22.1-212.1:3**, relating to Internet Safety Advisory Council; school boards; Internet safety education program. Extends from July 1, 2024, to July 1, 2025, the sunset date for the Internet Safety Advisory Council. The bill requires each school board, after considering the model policy, instructional practices, curricula, and other teacher resources that are developed, recommended, or designed by the Internet Safety Advisory Council, to adopt policies (i) requiring all elementary and secondary schools in the local school division to provide an Internet safety education program to each student in grades three through 12 at least once each school year but (ii) permitting the parent of any such student to opt his child out of participating in such program.

vii. **HB 562 Commercial entity offering social media accounts; restricted hours for minors; civil liability. (Left in Committee)**

A BILL to amend the Code of Virginia by adding a section numbered **8.01-40.6**, relating to commercial entity offering social media accounts; restricted hours for minors; civil liability. Provides that no commercial entity that offers social media accounts, as defined in the bill, shall knowingly or intentionally allow a minor to access his social media account during the hours of 12:00 a.m. to 6:00 a.m. unless the minor's parent, guardian, or legal custodian has provided permission for the minor to use such social media account during these hours. The bill provides that any commercial entity that violates these provisions shall be subject to civil liability for damages resulting from the interference with a minor's sleep cycle or mental health by allowing such minor to access to his social media account during the hours of 12:00 a.m. to 6:00 a.m. and reasonable attorney fees and costs.

viii. **HB 877 Virginia Social Media Regulation Act established; penalties. (Left in Committee)**

A Bill to amend and reenact § **59.1-200** of the Code of Virginia to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered **59.1-603** through **59.1-608**, relating to Virginia Social Media Regulation Act established; penalties. Establishes the Virginia Social Media Regulation Act for the purpose of prohibiting minors in Virginia from possessing an account on any social media platform, defined in the bill, without the express consent of a parent or guardian. The bill requires a social media company to provide a minor's parent or guardian with access to the minor's account and all posts and information on such account. The bill also places prohibitions on the type of data and personal information a social media platform may collect from a minor account holder and prohibits the use of any practice, design, or feature on a social media company's platform that the company knows, or should reasonably know, could cause a minor

account holder to have an addiction to the social media platform. Lastly, the bill provides that any violation of the Virginia Social Media Regulation Act shall constitute a prohibited practice and be subject to the enforcement provisions of the Virginia Consumer Protection Act.

ix. **HB 1115 Consumer Data Protection Act; social media platforms. (Left in Committee)**

A Bill to amend and reenact § 59.1-575 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 59.1-577.1, relating to the Consumer Data Protection Act; social media platforms. Prohibits a person that operates a social media platform that has knowledge that a user of the social media platform is a child under the age of 18 from implementing certain practices, designs, and features of the social media platform for any interaction with such child that includes infinite scroll, auto-playing videos, push notifications, gamification, and virtual gifts.

x. **HB 1161 Consumer Data Protection Act; social media; parental consent. (Left in Committee)**

A Bill to amend and reenact §§ 59.1-575 and 59.1-576 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 59.1-577.1, relating to Consumer Data Protection Act; social media; parental consent. Requires social media platforms, defined in the bill, that are subject to the provisions of the Children's Online Privacy Protection Act to obtain verifiable parental consent prior to permitting any minor to create an account with such social media platform and, with such account, use the social media platform. The bill requires such social media platforms to give the parent or guardian the option to consent to the collection and use of the minor's personal data without consenting to the disclosure of such minor's personal data to third parties.

xi. **HB 1214 Civil causes of action; social media platforms; complying with certain requests for information. (Left in Committee)**

A Bill to amend the Code of Virginia by adding a section numbered 8.01-223.3, relating to civil causes of action; social media platforms; complying with certain requests for information. Requires the owner or operator of a social media platform, as defined in the bill, to comply with requests from a party to a civil action concerning (i) any identifying information regarding any person alleged to have published content giving rise to such action on such platform and (ii) restoration of access to any person claiming ownership of an account created on such platform, provided such person can prove original ownership of such account.

xii. **HJ 34 Study; Joint Commission on Health Care; impacts of cell phone possession and use on students. (Continued to 2025)**

Directing the Joint Commission on Health Care to study the impact of cell phone possession and use on students in public schools. Report. Directs the Joint

Commission on Health Care to study the impacts of cell phone possession and use in public schools on student learning outcomes, including the quality of learning and the ability of students to retain and recall information, student attention and focus, and student mental and behavioral health.

xiii. **SB 28 School boards; powers and duties, policies regarding cell phones and other handheld devices. (Left in Committee)**

A Bill to amend the Code of Virginia by adding a section numbered **22.1-79.5:1**, relating to school boards; powers and duties; policies regarding cell phones and other handheld communication devices. Permits each school board to develop and implement a policy to prohibit the possession or use of cell phones and other handheld communication devices during regular school hours.

xiv. **SB 252 Consumer Data Protection Act; controller privacy notice; cookies; consumer consent. (Continued to 2025)**

A Bill to amend and reenact § **59.1-578** of the Code of Virginia, relating to Consumer Data Protection Act; controller privacy notice; cookies; consumer consent. Requires the privacy notice that a controller must provide to consumers to include a method by which a consumer may opt out of the automatic placement of a data file, commonly referred to as a "cookie," on the consumer's computer or web browser and a disclosure of the purposes for which the data files are used. The bill prohibits controllers from using cookies, except those that are strictly necessary, without the prior express consent of the consumer and prohibits controllers from preventing access to their services if such consent is not granted. The bill also requires controllers to document and store proof of such consent and make available an easily accessible method by which consumers may withdraw such consent.

xv. **SB 264 Department of Education; school boards; student online activity; data collection, monitoring. (Left in Committee)**

A BILL to amend the Code of Virginia by adding a section numbered **22.1-23.4**, relating to Department of Education; school boards; student online activity; data collection, monitoring, and restrictions. Requires the Department of Education to establish reporting expectations for school divisions that collect student online activity data and provides that if no school within a school division does so, the school board, upon submission of written documentation to the Department stating that no school within the school division collects student online activity data, shall be deemed to have satisfied such reporting expectations. The reporting expectations include: (i) making certain disclosures to parents, including what online activity is being tracked, monitored, and collected when using school devices on school property and what types of student online activity or online activity data would create an alert; (ii) including in the school division's acceptable use policy for the Internet that student online activity is being tracked and data collected; (iii) providing, to the extent available for the school division, parents the ability to access

any collected student online activity data; (iv) notifying the parent of a student for whom an alert is created or an action taken on such student's online activity or associated data before the student is notified, except as provided in the bill; (v) prohibiting the inclusion of student online activity data in a student's permanent record except in the most severe cases, as defined, set forth, and made publicly available by the Department. The bill requires the Department to create and distribute to each school board (a) a template for making the required parental disclosures and (b) best practices for deleting student online activity data.

xvi. **SB 359 Consumer Data Protection Act; social media platforms; addictive feed. (Continued to 2025)**

A Bill to amend and reenact § 59.1-575 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 59.1-577.1, relating to Consumer Data Protection Act; social media platforms; addictive feed. Prohibits a person that operates a social media platform that has knowledge that a user of the social media platform is a child under the age of 18 from using an addictive feed, defined in the bill, unless such social media platform obtains verifiable parental consent.

xvii. **SB 388 Virginia Consumer Protection Act; prohibited practices; mandatory fees disclosure. (Failed to pass the House)**

A Bill to amend and reenact § 59.1-200 of the Code of Virginia, relating to Virginia Consumer Protection Act; prohibited practices; mandatory fees disclosure. Prohibits a supplier in connection with a consumer transaction from advertising, displaying, or offering any pricing information for goods or services without prominently displaying the total price, which shall include all mandatory fees or charges other than taxes imposed. The bill defines "mandatory fees or charges" as any fee or surcharge that must be paid in order to purchase the advertised good or service, that is not reasonably avoidable, and that a reasonable consumer would expect to be included. The bill clarifies that such term does not include shipping fees or taxes or fees imposed by a government or government-approved entity.

B. Artificial Intelligence

i. **HB 248 Autonomous agent; regulations for an applicant requesting licensure of an agent. (Continued to 2025)**

A Bill to amend and reenact §§ 54.1-201 and 54.1-829.1 of the Code of Virginia, relating to Department of Professional and Occupational Regulation; powers and duties of regulatory boards; autonomous agents. Authorizes regulatory boards to promulgate regulations for an applicant requesting licensure of an autonomous agent that is owned or operated by such applicant. Autonomous agent is defined in the bill as software or hardware that operates independently, without real-time human intervention, and is capable of performing tasks that, when executed by a human, would require licensure by a regulatory board.

ii. **HB 747 Artificial Intelligence Developer Act established; civil penalty. (Continued to 2025)**

A Bill to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered **59.1-603** through **59.1-607**, relating to High-risk Artificial Intelligence Developer Act established; civil penalty. Creates operating standards for developers and deployers, as those terms are defined in the bill, relating to artificial intelligence, including (i) avoiding certain risks, (ii) protecting against discrimination, (iii) providing disclosures, and (iv) conducting impact assessments and provides that the Office of the Attorney General shall enforce the provisions of the bill. The provisions of the bill related to operating standards for deployers have a delayed effective date of July 1, 2026.

iii. **HB 697 Synthetic media; penalty. (Continued to 2025)**

A Bill to amend and reenact §§ **8.01-45**, **8.01-46**, and **18.2-417** of the Code of Virginia to amend the Code of Virginia by adding in Article 7 of Chapter 6 of Title 18.2 a section numbered **18.2-213.3**, relating to synthetic media; penalty. Expands the applicability of provisions related to defamation, slander, and libel to include synthetic media, defined in the bill. The bill makes it a Class 1 misdemeanor for any person to use any synthetic media for the purpose of committing any criminal offense involving fraud, constituting a separate and distinct offense with punishment separate and apart from any punishment received for the commission of the primary criminal offense. The bill also authorizes the individual depicted in the synthetic media to bring a civil action against the person who violates such prohibition to recover actual damages, reasonable attorney fees, and such other relief as the court determines to be appropriate. The bill directs the Attorney General to convene a work group to study and make recommendations on the current enforcement of laws related to the use of synthetic media, including deepfakes, and any further action needed to address the issue of such use in fraudulent acts.

iv. **SB 487 Artificial intelligence by public bodies; Joint Commission on Technology & Science to examine use. (Passed – Chapter 678)**

A Bill to amend and reenact § **2.2-2007** of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 55.3 of Title 2.2 a section numbered **2.2-5514.2**, relating to use of artificial intelligence by public bodies; prohibitions. Directs the Joint Commission on Technology and Science (JCOTS), in consultation with relevant stakeholders, to conduct an analysis of the use of artificial intelligence by public bodies in the Commonwealth and the creation of a Commission on Artificial Intelligence. JCOTS shall submit a report of its findings and recommendations to the Chairmen of the House Committees on Appropriations and Communications, Technology and Innovation and the Senate Committees on Finance and

Appropriations and General Laws and Technology no later than December 1, 2024. This bill incorporates SB 621.

v. **SJ 14 Artificial intelligence; Joint Commission on Technology and Science to study advancements. (Continued to 2025)**

Directing the Joint Commission on Technology and Science to study advancements in artificial intelligence. Report. Directs the Joint Commission on Technology and Science to study advancements in artificial intelligence (AI), including assessing (i) the impacts of deep fakes, data privacy implications, and misinformation; (ii) measures to ensure these technologies do not indirectly or directly lead to discrimination; (iii) strategies to promote equity in AI algorithms; and (iv) ways in which AI can be utilized to improve government operations and services, and to make recommendations on any appropriate legislation for consideration by the General Assembly.

C. Blockchain and Cryptocurrency

i. **SB 339 Blockchain technology, digital asset mining, etc.; Jt. Commission on Technology & Science to study. (Passed – Chapter 707)**

An Act to direct the Joint Commission on Technology and Science to analyze the use of blockchain technology, digital asset mining, and cryptocurrency in the Commonwealth. Directs the Joint Commission on Technology and Science to conduct an analysis of and make recommendations regarding the use of blockchain technology, digital asset mining, and cryptocurrency in the Commonwealth. The bill requires the Commission to submit its findings to the Chairmen of the House Committees on Appropriations and Communications, Technology and Innovation and the Senate Committees on Finance and Appropriations and General Laws and Technology no later than December 1, 2024.

ii. **SB 439 Blockchain and cryptocurrency; Joint Commission on Technology & Science to examine use, etc. (Passed – Chapter 709)**

An Act to direct the Joint Commission on Technology and Science to examine the use of blockchain and cryptocurrency in the Commonwealth and the creation of a Blockchain and Cryptocurrency Commission. Directs the Joint Commission on Technology and Science (JCOTS) to conduct an analysis of blockchain technology and cryptocurrency in the Commonwealth and the creation of a Blockchain and Cryptocurrency Commission. JCOTS shall submit a report of its findings to the Chairmen of the House Committees on Appropriations and Communications, Technology and Innovation and the Senate Committees on Finance and Appropriations and General Laws and Technology no later than December 1, 2024.

VI. Renewable Energy, Environment, and Data Centers

A. Siting & Permitting

i. HB 122 and SB 580 Environmental Quality, Department of; judicial review, authorization of projects, hearing & appeal. (Passed – Chapters 717 and 774)

An Act to amend and reenact § **10.1-1197.7** of the Code of Virginia, relating to Department of Environmental Quality; review and authorization of projects; hearing and appeal. Allows any person aggrieved by the final decision of the Department of Environmental Quality regarding the authorization of a project and who has participated in a proceeding for a permit to construct or operate a small renewable energy project under procedures adopted by the Department to seek judicial review of such action in accordance with the Administrative Process Act in the Circuit Court of the City of Richmond within 30 days of such decision. The bill requires the court to hear and decide such action as soon as practicable after the date of filing.

ii. HB 636 and SB 567 Siting of energy facilities; approval by the State Corporation Commission. (Continued)

A BILL to amend and reenact §§ **15.2-2316.6** through **15.2-2316.9** of the Code of Virginia and to amend the Code of Virginia by adding in Title 56 a chapter numbered 31, consisting of sections numbered **56-626** through **56-636**, relating to siting of energy facilities; approval by the State Corporation Commission. Establishes a procedure under which an electric utility or independent power provider (applicant) is able to obtain approval for a certificate from the State Corporation Commission for the siting of an energy facility rather than from the governing body of a locality. Under the bill, applicants are authorized to submit an application to the Commission if (i) the locality fails to timely approve or deny an application; (ii) the application complies with certain requirements for Commission approval, but a host locality denies the application; or (iii) the locality amends its zoning ordinance after it has notified the applicant that its requirements are compatible with the requirements for Commission approval, and the amendment imposes additional requirements that are more restrictive. The bill provides that an applicant who is issued a certificate by the Commission for an energy facility is exempt from obtaining approvals or permits, including any land use approvals or permits under the regulations and ordinances of the locality. The bill applies to any solar energy facility with a capacity of 50 megawatts or more, any wind energy facility with a capacity of 100 megawatts or more, and any energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more.

iii. HB 650 Zoning; solar photovoltaic and energy storage projects. (Passed – Chapter 301)

An Act to amend and reenact §§ **15.2-2209.1:2** and **15.2-2286** of the Code of Virginia, relating to zoning; solar photovoltaic and energy storage projects; period of

validity for certain projects. Provides that the conditions of a special exception or special use permit may include a period of validity; however, in the case of a special exception or special use permit for residential and electrical generation projects, the period of validity shall be no fewer than three years. The bill provides that for so long as a special exception, special use permit, or conditional use permit remains valid, no change or amendment to any local ordinance, map, resolution, rule, regulation, policy, or plan adopted subsequent to the date of approval of the special exception, special use permit, or conditional use permit shall adversely affect the right of the developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the special exception, special use permit, or conditional use permit unless the change or amendment is required to comply with state law or there has been a mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

iv. **HB 1157 Federally recognized Tribal Nations in the Commonwealth; agencies to consult on permits and reviews. (Passed – Chapter 830)**

An Act to amend and reenact §§ **2.2-401.01**, **10.1-1003**, **10.1-1188**, **10.1-2206.1**, **10.1-2214**, **10.1-2305**, **56-46.1**, and **62.1-266** of the Code of Virginia and to amend the Code of Virginia by adding sections numbered **10.1-104.02**, **10.1-1186.3:1**, **10.1-2205.1**, and **28.2-104.01**, relating to consultation with federally recognized Tribal Nations in the Commonwealth; permits and reviews with potential impacts on environmental, cultural, and historic resources. Requires the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Historic Resources, and the Virginia Marine Resources Commission to establish policies and procedures for consulting with federally recognized Tribal Nations in the Commonwealth when evaluating certain permits and reviews relating to environmental, cultural, or historic resources that potentially impact those federally recognized Tribal Nations in the Commonwealth. The bill directs the Secretary of the Commonwealth to designate an Ombudsman for Tribal Consultation to facilitate communication and consultation with federally recognized Tribal Nations in the Commonwealth and requires the Ombudsman to develop by January 1, 2025, a list of localities in which federally recognized Tribal Nations in the Commonwealth shall be consulted to effectuate the provisions of the bill. The bill codifies Executive Order 82 (2021).

v. **SB 697 Solar and energy facilities; local regulation. (Continued)**

A BILL to amend and reenact § **15.2-2288.7** of the Code of Virginia, relating to solar and energy storage facilities; local regulation. Prohibits a locality from including in an ordinance (i) limits on the total amount, density, or size of any ground-mounted solar facility or energy storage facility until such time that the total area under panels within the locality exceeds four percent of the total area within the locality or (ii) any prohibitions on the use of solar panels that comply with generally accepted national environmental protection and product safety standards, provided that such

installation is in compliance with any provisions of a local ordinance that establishes criteria and requirements for siting.

B. Virginia Clean Economy Act

i. HB 638 and SB 230 Electric utilities; energy efficiency programs; duty to implement the Energy Policy of the Commonwealth; RPS program requirements; competitive procurement. (Continued)

A Bill to amend and reenact §§ 56-576 and 56-585.5 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 56-581.2, relating to electric utilities; energy efficiency programs; duty to implement the Energy Policy of the Commonwealth; RPS program requirements; competitive procurement. Provides that "in the public interest" for the purpose of assessing energy efficiency programs means that the State Corporation Commission determines that the program is cost-effective and directs the Commission to initiate a proceeding no later than December 31, 2025, to establish a single, consistent cost-effectiveness test for use in evaluating proposed energy efficiency programs. The bill provides (i) that "total electric energy" for purposes of the RPS Program requirements does not include energy sold to certain customers purchasing 100 percent renewable energy and (ii) that in any RPS program compliance year, any electric energy that was generated in the previous calendar year from certain nuclear generating plants, or any zero-carbon electric generating facilities, including small modular nuclear reactors and green hydrogen facilities, will reduce the utility's RPS Program requirements by an equivalent amount. The bill provides that the Commission and its staff have the affirmative duty to ensure the Commonwealth implements the Energy Policy of the Commonwealth at the lowest reasonable cost, taking into account all cost-effective demand-side management options and the security and reliability benefits of the regional transmission entity to which each incumbent electric utility has joined. The bill requires that for certain required petitions by Appalachian Power and Dominion Energy Virginia for approvals to construct, acquire, or purchase the generating capacity using energy derived from sunlight or onshore wind, at least 35 percent of such generating capacity is from the purchases of energy from solar or onshore wind facilities owned by persons other than such utilities. Current law requires 35 percent of such generating capacity to be from the purchases of energy from solar or onshore wind facilities owned by persons other than such utilities.

C. Shared Solar

i. HB 106 and SB 253 Shared solar programs; amends existing program provisions to apply to Dominion Energy Virginia. (Passed – Chapters 715 and 763)

An Act to amend and reenact § 56-594.3 of the Code of Virginia, relating to shared solar programs; Phase II Utility; minimum bill; capacity. Amends existing shared solar program provisions applicable to Dominion Energy Virginia. The bill provides that a

customer's net bill for participation in the shared solar program means the resulting amount a customer must pay the utility after the bill credit, defined in relevant law, is deducted from the customer's monthly gross utility bill. The bill divides the shared solar program into two parts, the first of which has an aggregate capacity of 200 megawatts. The bill provides that upon a determination that at least 90 percent of the megawatts of the aggregate capacity of part one of such program has been subscribed, as defined in the bill, and that project construction is substantially complete, the State Corporation Commission shall approve up to an additional 150 megawatts of capacity as part two of such program, 75 megawatts of which shall serve no more than 51 percent low-income customers, as defined in relevant law. The bill directs the Commission to initiate a proceeding to recalculate the minimum bill within 30 days of a final order in a proceeding establishing the value of a solar renewable energy certificate as required by relevant law. The bill specifies that the Commission shall update its shared solar program consistent with the requirements of the bill by March 1, 2025, and shall require each utility to file any associated tariffs, agreements, or forms necessary for implementing the program by December 1, 2025. Additionally, the bill requires the Department of Energy to convene a stakeholder work group to determine the amounts and forms of certain project incentives and to submit a written report to the Chairmen of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor no later than November 30, 2024.

ii. **HB 108 and SB 255 Shared solar programs; American Electric Power; minimum bill; capacity. (Passed – Chapters 716 and 765)**

An Act to amend the Code of Virginia by adding a section numbered 56-594.4, relating to shared solar programs; Phase I Utility; minimum bill; capacity. Requires the State Corporation Commission to establish by regulation a shared solar program, as defined in the bill, through which customers of American Electric Power may purchase electric power through a subscription in a shared solar facility, as defined in the bill. The bill requires the Commission to establish a minimum bill, which shall include the costs of all utility infrastructure and services used to provide electric service and administrative costs of the shared solar program, taking into account certain considerations. The bill directs the Commission to initiate a proceeding to recalculate such minimum bill within 30 days of its final order in a proceeding establishing the value of a solar renewable energy certificate as required by relevant law. The bill specifies that the Commission shall establish the shared solar program consistent with the requirements of the bill by January 1, 2025, and shall require each utility to file any associated tariffs, agreements, or forms necessary for implementing the program by July 1, 2025. Additionally, the bill requires the Department of Energy to convene a stakeholder work group to determine the amounts and forms of certain project incentives and to submit a written report to the Chairs of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor no later than November 30, 2024.

D. Interconnection

i. HB 117 and SB 346 Net energy metering; solar interconnection, cost recovery. (Continued)

A Bill to amend and reenact §§ 56-585.1 and 56-594 of the Code of Virginia, relating to net energy metering; solar interconnection; cost recovery. Provides that an electric distribution company shall pay 33 cents ($0.33) per kilowatt-hour per day for the costs of lost electricity production for any and all delays beyond the regulatory notice period required by the State Corporation Commission related to net energy metering. The bill requires that, for the purposes of net energy metering, an eligible customer-generator shall bear all reasonable costs of equipment required at the eligible customer-generator's premises for the interconnection to the supplier's electric distribution system, including commercially reasonable costs of additional controls, tests, or liability insurance. Additionally, the bill allows for cost recovery by Phase I and Phase II Utilities for electric distribution grid transformation projects that support the interconnection of generating facilities using energy derived from sunlight that are owned or contracted by eligible customer-generators, subject to the Commission finding those costs to be reasonable and prudent in accordance with existing law.

E. Consumer Protection

ii. HB 1280 Consumer protection; failure to honor service warranty. (Continued)

A BILL to amend and reenact § 59.1-200 of the Code of Virginia, relating to consumer protection; failure to honor service warranty. Prohibits a supplier in connection with a consumer transaction from failing to honor a service warranty of another supplier after acquiring the business of such other supplier. A violation of the provisions of the bill constitutes a violation of the Virginia Consumer Protection Act.

F. Rooftop Solar & Net Metering

i. HB 1062 and SB 271 Net energy metering; eligible customer-generators and agricultural customer-generators. (Passed – Chapters 827 and 783)

An Act to amend and reenact §§ 56-594 and 56-594.02 of the Code of Virginia, relating to net energy metering; eligible customer-generators and eligible agricultural customer-generators. Provides that no contract, lease, or arrangement by which a third party owns, maintains, or operates an electrical generating facility on an eligible customer-generator's property shall constitute the sale of electricity or cause the customer-generator or the third party to be considered an electric utility by virtue of participating in net energy metering. The bill prohibits an eligible customer-generator or eligible agricultural customer-generator from being required to provide proof of liability insurance or to purchase additional liability insurance as a condition of interconnection. The bill exempts eligible customer-generators and

eligible agricultural customer-generators that operate a battery storage device of capacity commensurate with and equal to or greater than that of the electrical generating facility and in conjunction with the electrical generating facility from standby charges. The bill provides that any eligible customer-generator or eligible agricultural customer-generator may participate in demand response, energy efficiency, or peak reduction from dispatch of onsite battery service, provided that the compensation received is in exchange for a distinct service that is not already compensated by net metering credits for electricity exported to the electric distribution system or compensated by any other utility program or tariff.

G. Data Centers

i. HB 116 and SB 192 Retail Sales and Use tax; exemption for data centers. (Continued)

A Bill to amend and reenact § 58.1-609.3 of the Code of Virginia, relating to sales and use tax exemption; data centers. Requires data center operators to meet certain energy efficiency standards in order to be eligible for the sales and use tax exemption for data center purchases. Under the bill, a data center operator shall be eligible for the exemption only if such operator demonstrates that (i) its facilities either (a) have a power usage effectiveness score of no greater than 1.2 or (b) for data centers co-located in buildings with other commercial uses, achieve an energy efficiency level of no less than the most efficient 15 percent of similar buildings constructed in the previous five years and (ii) it will procure carbon-free renewable energy and associated renewable energy certificates from facilities equal to 90 percent of its electricity requirements or that its electricity will be otherwise derived from non-carbon-emitting, renewable sources.

ii. HB 338 and SB 285 Siting of data centers; locality may perform site assessment before approval. (Continued)

A Bill to amend and reenact § 58.1-609.3 of the Code of Virginia, relating to sales and use tax exemption; data centers. Allows a locality, prior to any approval for the siting of a data center, to perform a site assessment to examine the effect of the data center on water usage and carbon emissions within the locality.

iii. HB 714 Electric utilities; pilot program for underground transmission lines, additional project. (Continued)

A Bill to amend and reenact § 56-585.1:5 of the Code of Virginia, relating to electric utilities; pilot program for underground transmission lines; additional project. Adds one project to the existing pilot program for underground transmission lines. The bill requires the State Corporation Commission to approve one additional application filed between January 1, 2024, and October 1, 2024, as a qualifying project to be constructed in whole or in part underground, as a part of the pilot program. The bill requires that the added qualifying project be a newly proposed 230-kilovolt

underground line and that (i) an engineering analysis demonstrates that it is technically feasible to place the proposed line, in whole or in part, underground; (ii) the governing body of each locality in which a portion of the proposed line will be placed underground indicates, by resolution, general community support for the project and that the governing body supports the transmission line to be placed underground; (iii) a project has been filed with the Commission or is pending issuance of a certificate of public convenience and necessity by October 1, 2024; (iv) the estimated additional cost of placing the proposed line, in whole or in part, underground does not exceed $40 million or, if greater than $40 million, the cost does not exceed 2.5 times the cost of placing the same line overhead, assuming accepted industry standards for undergrounding to ensure safety and reliability; if the public utility, the affected localities, and the Commission agree, a proposed underground line whose cost exceeds 2.5 times the cost of placing the line overhead may also be accepted into the pilot program; (v) the public utility requests that the project be considered as a qualifying project under the pilot program; and (vi) the primary need of the project is for purposes of grid reliability or grid resiliency or to support economic development priorities of the Commonwealth, including the economic development priorities and the comprehensive plan of the governing body of the locality in which at least a portion of line will be placed, and not to address aging assets that would have otherwise been replaced in due course.

iv. **HB 910 Data centers; energy usage. (Continued)**

A Bill to amend the Code of Virginia by adding in Article 1 of Chapter 17 of Title 45.2 a section numbered **45.2-1701.2**, relating to Department of Energy; data center energy usage. Requires each data center located in the Commonwealth to make a quarterly energy source report to the Department of Energy's Division of Renewable Energy and Energy Efficiency that identifies the amount of energy, disaggregated by the source of energy, consumed by the data center in the previous quarter. The bill requires the Division to publish aggregate deidentified data from such reports on its website. The bill also directs the Secretary of Commerce and Trade to convene a work group to estimate the future energy demands of the data center industry in the Commonwealth. The bill requires the work group to include representatives from the Department of Energy, the Virginia Economic Development Partnership Authority, the State Corporation Commission, the data center industry, electric utilities, and other interested stakeholders. The Secretary is required to report the findings of the work group to the General Assembly by November 30, 2024.

v. **SB 191 Electric utilities; data center demand, allocation of costs among customer classes. (Continued)**

A Bill to direct the State Corporation Commission to ensure consideration of certain costs and to determine if unreasonable subsidies exist regarding data centers. Directs the State Corporation Commission to ensure that any plan, petition, or proposal from a utility to meet demand associated with data centers considers

generation, transmission, and distribution system costs so as to meet such demand at the lowest aggregate reasonable cost. The bill also directs the Commission to initiate a proceeding, on or before December 31, 2024, (i) to determine if the current allocation of costs among customers and the different classifications of customers of electric utilities results in customers that are data centers receiving unreasonable subsidies from other customers or classifications of customers and (ii) if it determines unreasonable subsidies exist, to amend such allocation of costs.

vi. **SB 284 Siting of data centers; impacts on resources and historically significant sites. (Continued)**

A Bill to amend the Code of Virginia by adding in Article 1 of Chapter 22 of Title 15.2 a section numbered **15.2-2209.4**, relating to siting of data centers; impacts on resources and historically significant sites. Provides that any local government land use application required for the siting of a data center shall only be approved in areas where the data center will (i) have a minimal impact on historic, agricultural, and cultural resources and (ii) not be within one mile of a national park, state park, or other historically significant site.

vii. **SB 286 Electric utilities; underground transmission lines. (Continued)**

A Bill to provide that certain underground transmission lines are in the public interest. Provides that the construction and reconstruction of any underground, in whole or in part, electrical transmission lines of at least 69 kilovolts and less than 500 kilovolts along a highway right-of-way under the jurisdiction of the Department of Transportation in Planning District 8 where a data center proposal is under construction in an area located within a half mile of a National Battlefield Park and within one mile of a state forest is in the public interest.

viii. **SB 288 Data centers; noise abatement. (Continued)**

A BILL to amend the Code of Virginia by adding in Article 1 of Chapter 22 of Title 15.2 a section numbered **15.2-2209.4**, relating to data centers; noise abatement. Provides that any local government land use application required for the siting of a data center shall be approved only in accordance with certain notice and noise abatement requirements. The bill provides that residents within a half-mile radius of the parcel shall receive notice of the proposed data center and that the data center operator shall hold two neighborhood meetings. The bill requires a data center operator to design and build the data center to incorporate sound mitigation methods sufficient to prevent the sound levels emanating from the data center from exceeding the ambient noise levels that were observed in a baseline study, as determined by a third-party acoustic engineer. The bill also provides that upon issuance of a certificate of occupancy, and for five years thereafter, the data center operator shall conduct a noise study performed by a third-party acoustical engineer to document noise levels emanating from the data center measured at the property line of the nearest property to the data center property that is planned or zoned for

residential land uses, or other noise sensitive use as reasonably determined by the locality, during peak operation of the data center mechanical equipment. The bill also provides that if the data center operator intends to use backup power generators on the parcel, the operator shall maintain a public website announcing the times when the generators will be in operation.

ix. **SB 289 Stormwater management regulations; enterprise data center operations. (Continued)**

A Bill to amend and reenact § **62.1-44.15:28**, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to stormwater management regulations; enterprise data center operations. Directs the State Water Control Board to adopt regulations that require certain stormwater management techniques for land disturbances related to the construction, expansion, or operation of an enterprise data center operation, as defined in the bill, that is located within one mile of any land owned or operated as a unit of the National Park Service or designated as a Virginia State Park or state forest.

x. **SB 664 Electric utilities; electric distribution infrastructure serving data centers. (Continued)**

A Bill to amend and reenact § **56-585.1** of the Code of Virginia, relating to electric utilities; electric distribution infrastructure serving data centers. Prohibits the costs associated with the construction or extension of any electric distribution infrastructure that primarily serves the load of a data center from being recovered from any other customer.

xi. **SB 708 Underground transmission lines; qualifying projects, pilot program. (Continued)**

A Bill to amend and reenact § **56-585.1:5** of the Code of Virginia, relating to pilot program for underground transmission lines; qualifying projects. Increases the maximum capacity of qualifying electrical transmission lines, for purposes of the pilot project for underground transmission lines, from 230 kilovolts to 500 kilovolts. The bill provides that the State Corporation Commission shall approve additional qualifying projects as part of the pilot program that traverse along highways in developed areas where the route of proposed transmission lines and towers traverse areas protected by a scenic easement, view shed easement, areas of registered historic designation, or areas of conservation easements. Under the bill, existing requirements for qualifying projects shall continue to apply to such new category of qualifying projects.

H. Transportation Electrification

i. HB 107 Electric Vehicle Rural Infrastructure Program and Fund; established and created. (Continued)

A Bill to amend the Code of Virginia by adding in Chapter 17 of Title 45.2 an article numbered 10, consisting of sections numbered **45.2-1735**, **45.2-1736**, and **45.2-1737**, relating to Electric Vehicle Rural Infrastructure Program and Fund created. Creates the Electric Vehicle Rural Infrastructure Program and Fund to assist private developers with non-utility costs associated with the installation of public electric vehicle charging stations in certain localities. The bill provides that a private developer is eligible to receive grants of 70 percent of such non-utility costs for public electric vehicle charging stations installed in a city or county that meets the criteria of a distressed locality, as defined in the bill. The bill has an expiration date of July 1, 2028.

ii. HB 151 and SB 245 Energy, Department of; building standards for certain local buildings. (Passed – Chapters 687 and 706)

An Act to amend and reenact § **15.2-1804.1** of the Code of Virginia, relating to Department of Energy; building standards for certain local buildings. Requires the Department of Energy, upon request, to provide technical assistance to localities, subject to available budgetary resources, as localities implement mandates related to onsite renewable energy generation, energy storage, and resilience standards for construction or renovation of certain public buildings. The bill also makes several technical and clarifying changes to the existing statute, in part by defining or redefining existing terms found in the statute.

I. Transmission

i. HB 862 Electric utilities; integrated resource plans, grid-enhancing technologies and advanced conductors. (Passed – Chapter 532)

An Act to amend and reenact §§ **56-597** and **56-599** of the Code of Virginia, relating to electric utilities; integrated resource plans; grid-enhancing technologies and advanced conductors. Requires an electric utility to include in an integrated resource plan (i) a comprehensive assessment of the potential application of grid-enhancing technologies and advanced conductors, as those terms are defined in the bill, in a manner that ensures grid reliability and safeguards the cybersecurity and physical security of the electric distribution grid and (ii) if applicable, a detailed explanation of why such technologies or conductors are not included in such plan.

J. Energy Efficiency

i. HB 746 and SB 565 Energy efficiency programs; definitions, incremental annual savings. (Passed – Chapters 818 and 794)

An Act to amend and reenact §§ 56-576 and 56-596.2 of the Code of Virginia, relating to energy efficiency programs; incremental annual savings. Provides that for the 2029 program year and all subsequent years, "in the public interest" for the purpose of assessing energy efficiency programs means that the State Corporation Commission determines that the program is cost-effective. The bill directs the Commission to promulgate regulations no later than September 30, 2025, establishing a single, consistent cost-effectiveness test for use in evaluating proposed energy efficiency programs. The bill requires Dominion Energy Virginia and Appalachian Power Company to track, quantify, and report to the Commission the incremental annual savings, as defined in the bill, achieved by such utility's energy efficiency programs.

K. Environment & Conservation

i. HB 529 Trees; conservation and replacement during development process. (Vetoed)

An Act to amend and reenact § 15.2-961 of the Code of Virginia, relating to conservation and replacement of trees during development process. Expands certain existing local government authority to conserve or replace trees during the development process by expanding such authority statewide. The bill allows localities to establish higher tree canopy replacement percentages based on density per acre. The bill also alters the current process for granting exceptions to a local ordinance by altering a provision that requires the granting of an exception when strict application of the ordinance would result in unnecessary or unreasonable hardship to the developer and replacing it with a requirement that the locality concur with such determination. The bill permits localities to monitor and assess the condition and coverage of tree canopies at development sites during the time period up to 20 years' maturity of the planted trees. The bill makes numerous technical amendments.

ii. HB 892 and SB 616 Farmland Preservation, Office of; transfers Office to Dept. of Forestry. (Passed – Chapters 146 and 10)

An Act to amend and reenact §§ 2.2-1509.4, 3.2-102, as it is currently effective and as it shall become effective, 10.1-1105.1, 46.2-749.102, and 58.1-512 of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 11 of Title 10.1 an article numbered 2.1, consisting of sections numbered 10.1-1119.2 through 10.1-1119.7; and to repeal Chapter 2 (§§ 3.2-200 through 3.2-205) of Title 3.2 of the Code of Virginia, relating to Department of Agriculture and Consumer Services; Department of Forestry; Office of Farmland Preservation transferred. Transfers from

the Department of Agriculture and Consumer Services to the Department of Forestry the Office of Farmland Preservation and its powers and duties and reporting requirements, the Virginia Farm Link Program, the Century Farm Program, and the Virginia Farmland and Forestland Preservation Fund. The bill renames the Office as the Office of Working Lands Preservation. The bill makes technical amendments to effectuate the transfer and requires the Department of Environmental Quality to report to the Department of Forestry by July 1 of each year certain enumerated information about nonpoint source nutrient credits certified in the previous year that involve land use conversion.

L. Nuclear & Other Resources

i. HB 1074 and SB 557 Renewable energy portfolio standard; eligibility of hydrogen and nuclear resources. (Continued)

A Bill to amend and reenact §§ 56-576 and 56-585.5 of the Code of Virginia, relating to renewable energy portfolio standard; eligibility of hydrogen and nuclear resources. Provides that, for the purposes of the renewable energy portfolio standard, eligible sources include (i) hydrogen resources that are produced from zero-carbon generating facilities located in the Commonwealth and (ii) zero-carbon nuclear generating facilities located in the Commonwealth that were placed into service after July 1, 2024.

ii. HB 1491 Phase I Utility; recovery of development costs associated with small modular nuclear facility. (Passed – Chapter 836)

An Act to amend the Code of Virginia by adding a section numbered 56-585.1:14, relating to Phase I Utility; recovery of development costs associated with small modular nuclear facility. Permits American Electric Power, prior to the filing of an application for a certificate to construct a small modular nuclear facility, to request the State Corporation Commission to review such utility's decision to incur project development costs, as defined in the bill. The bill has an expiration date of July 1, 2034.

iii. SB 454 Electric utilities; recovery of development costs associated with small modular reactor. (Passed – Chapter 789)

An Act to amend the Code of Virginia by adding a section numbered 56-585.1:14, relating to electric utilities; recovery of development costs associated with small modular reactor. Permits Dominion Energy Virginia to petition the State Corporation Commission at any time for the approval of a rate adjustment clause for the recovery of small modular reactor project development costs for up to one small modular reactor facility. The bill also permits the utility to petition the Commission for project development cost recovery along separate development phases. The bill has an expiration date of December 31, 2029.

iv. **SB 495 RPS eligible sources; falling water generation facilities. (Passed – Chapter 596)**

An Act to classify certain falling water generation facilities as RPS eligible sources. Provides that, notwithstanding contrary provisions of law, any falling water generation facility, as defined in the bill, located in the Commonwealth and commencing commercial operations prior to July 1, 2024, shall be considered a renewable energy portfolio standard eligible source.

v. **SB 508 Renewable energy portfolio standard; geothermal heating and cooling systems. (Passed – Chapter 597)**

An Act to amend and reenact §§ **56-576** and **56-585.5** of the Code of Virginia, relating to renewable energy portfolio standard; geothermal heating and cooling systems; report. Provides that geothermal heating and cooling systems, as defined in the bill, located in the Commonwealth are eligible for compliance with renewable energy portfolio standard requirements. The bill also requires the State Corporation Commission (the Commission) to convene a stakeholder work group to examine the feasibility of establishing renewable energy portfolio standard program (RPS program) requirements that require each Phase I and Phase II Utility to procure and retire renewable energy certificates (RECs) from geothermal heating and cooling systems placed in service after August 16, 2022, as a percentage of the number of RECs used for RPS program compliance. The work group shall include representatives from the geothermal industry, Phase I and Phase II Utilities, the Department of Energy, environmental advocacy organizations, environmental justice organizations, consumer advocates, and other interested stakeholders. The Commission is required to report the findings and recommendations of the work group to the Chairmen of the Senate Committee on Commerce and Labor, the House Committee on Labor and Commerce, and the Commission on Electric Utility Regulation no later than December 1, 2024. Portions of the bill have a delayed effective date of January 1, 2025.

vi. **SB 562 Captured coal mine methane; pilot program, renewable energy portfolio standard. (Continued)**

A BILL to amend the Code of Virginia by adding a section numbered **56-585.1:14**, relating to pilot program for captured coal mine methane; renewable energy portfolio standard. Directs the State Corporation Commission to establish a pilot program for American Electric Power (Phase I Utility) and Dominion Energy (Phase II Utility) to submit proposals to deploy electricity generation from captured coal mine methane. Under the bill, reasonable and prudent costs incurred under the captured coal mine methane project shall be recovered through utility base rates. Additionally, the bill provides that electricity generated using captured coal mine methane with a non-combustion electric generator under the captured coal mine

methane project shall be considered an eligible resource for purposes of the renewable energy portfolio standard program.

VII. Transportation, Rail, and Towing

A. Motor Vehicles

i. HB 20 Photo speed monitoring devices; location. (Continued to 2025)

A Bill to amend and reenact §§ 46.2-208 and 46.2-882.1 of the Code of Virginia, relating to photo speed monitoring devices; location. Authorizes the governing body of any county, city, or town to provide by ordinance for the placement and operation of photo speed monitoring devices in any location deemed necessary by the locality for the purposes of recording violations resulting from the operation of a vehicle in excess of the speed limit. The bill provides the same requirements for such devices, information collected from such devices, and any enforcement actions resulting from information collected from such devices as current law applies to the use of such devices in school crossing zones and highway work zones. The bill requires that two signs, rather than one, be placed warning of such device if the device is placed somewhere other than a school crossing zone or highway work zone.

ii. HB 447 Motor vehicle rental and peer-to-peer vehicle sharing tax; disposition. (Continued to 2025)

A Bill to amend and reenact § 58.1-1741 of the Code of Virginia, relating to motor vehicle rental and peer-to-peer vehicle sharing tax; disposition. Redirects revenues derived from motor vehicle rental and peer-to-peer vehicle sharing taxes from the Commonwealth Transportation Fund to the Special Fund for Administration of Aviation Laws, to be used for the administration of aviation laws and the construction, maintenance, and improvement of airports.

iii. HB 461 Photo speed monitoring devices; pole-mounted speed display sign. (Left in Committee)

A Bill to amend and reenact § 46.2-882.1 of the Code of Virginia, relating to photo speed monitoring devices; pole-mounted speed display sign. Requires a pole-mounted speed display sign, defined in the bill, to be placed between 250 and 1,000 feet from any photo speed monitoring device that is in use.

iv. HB 645 Electric vehicles; signs for parking spaces reserved for charging vehicles. (Vetoed)

An Act to amend and reenact § 46.2-1219.3 of the Code of Virginia, relating to parking spaces reserved for charging electric vehicles; signs. Removes the requirement that signs noting that a parking space is reserved for charging plug-in electric motor vehicles include the civil penalty for parking in violation of such sign.

v. **HB 845 Abandoned vehicles; owner and lienholder information. (Passed – Chapter 645)**

An Act to amend and reenact § **46.2-1202** of the Code of Virginia, relating to abandoned vehicles; owner and lienholder information. Provides that if an abandoned vehicle has been titled in another jurisdiction, the Department of Motor Vehicles, in its search for the owner or lienholder of such vehicle, may rely on information provided by a business in possession of the abandoned vehicle that acquired such vehicle from an insurance company in connection with a total loss unresolved claim, provided that such information is obtained from a nationally recognized title database with access to such jurisdiction's records about all entities having security interest in such vehicle. The bill requires the business to defend, indemnify, and hold the Department and the Commonwealth harmless for damages and costs resulting from such reliance.

vi. **HB 924 Transportation network companies; publishing & disclosure requirements. (Vetoed)**

An Act to amend and reenact § **46.2-2099.53** of the Code of Virginia and to amend the Code of Virginia by adding in Article 15 of Chapter 20 of Title 46.2 a section numbered **46.2-2099.54**, relating to transportation network companies; publishing and disclosure requirements. Requires a transportation network company (TNC) to (i) issue an annual report to the Commissioner of the Department of Motor Vehicles containing the aggregate data regarding the average fare collected from passengers, the total time driven by TNC partners while transporting a passenger, and the total amount earned by TNC partners in connection with prearranged rides and (ii) disclose to TNC partners details about the deactivation process and provide a weekly summary that includes the total fare collected from passengers, the total amount earned, and the percentage earned by such TNC partner that week.

vii. **HB 1072 School crossing zones; expands definition of zones to include areas surrounding schools, etc. (Left in Committee)**

A BILL to amend and reenact § **46.2-873** of the Code of Virginia, relating to school crossing zones. Expands the definition of "school crossing zone" to include areas surrounding schools where the presence of students reasonably requires a special warning to motorists and provides that the term "school" includes public institutions of higher education and nonprofit private institutions of higher education. Currently, the definition of "school crossing zone" includes only areas surrounding schools where the presence of children requires such warning. Existing provisions of law allowing photo speed monitoring devices to be installed in school crossing zones will apply to any location that meets the expanded definition.

viii. **HB 1362 School bus video-monitoring system; citations. (Passed – Chapter 21)**

An Act to amend and reenact § **46.2-844** of the Code of Virginia, relating to school bus video-monitoring system; citations. Prohibits a contract between a private

vendor and a school division for the operation of school bus video-monitoring systems to capture passing stopped school bus violations from requiring a minimum quota of violations captured or citations issued for the video-monitoring system to be deployed.

ix. **SB 336 Photo speed monitoring devices; high-risk intersection segments. (Passed – Chapter 670)**

Permits a state or local law-enforcement agency to place and operate a photo speed monitoring device at a high-risk intersection segment, defined in the bill, located within the locality for the purpose of recording violations resulting from the operation of a vehicle in excess of the speed limit, provided that such law-enforcement agency certifies that a traffic fatality has occurred since January 1, 2014, in such segment. The bill provides the same requirements for such devices, information collected from such devices, and any enforcement actions resulting from information collected from such devices as current law applies to the use of such devices in school crossing zones and highway work zones.

x. **SB 535 School crossing zones; expands definition of zones to include areas surrounding schools, etc. (Left in Committee)**

A BILL to amend and reenact § **46.2-873** of the Code of Virginia, relating to school crossing zones. Expands the definition of "school crossing zone" to include areas surrounding schools where the presence of students reasonably requires a special warning to motorists and provides that the term "school" includes public institutions of higher education and nonprofit private institutions of higher education. Currently, the definition of "school crossing zone" includes only areas surrounding schools where the presence of children requires such warning. Existing provisions of law allowing photo speed monitoring devices to be installed in school crossing zones will apply to any location that meets the expanded definition.

B. Pedestrian and Bicycle Safety

i. **HB 142 Crosswalks; waiving certain requirements for proposed installation. (Continued to 2025)**

A Bill to amend the Code of Virginia by adding a section numbered **46.2-830.3**, relating to installation of crosswalks; waiving certain requirement. Authorizes the Department of Transportation, when determining the need for a crosswalk within a community subject to the Property Owners' Association Act, to waive any requirement that a certain number of individuals cross such highway within a particular period of time if the location of the proposed crosswalk is adjacent to and providing access to a facility that attracts pedestrians or generates an increased pedestrian presence.

C. Towing

i. HB 421 Commonwealth Trespass Towing Rate-Setting Advisory Panel; established. (Left in Committee)

A Bill to amend and reenact §§ **46.2-1233** and **46.2-1233.1** of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **46.2-1233.4**, relating to towing; fees; state and locality rates; Commonwealth Trespass Towing Rate-Setting Advisory Panel established. Creates the Commonwealth Trespass Towing Rate-Setting Advisory Panel to advise the General Assembly and the Governor on statewide trespass towing fees and related ancillary fees. The bill increases from $150 to $190 the maximum statewide hookup and initial towing fee of any passenger car, from $30 to $65 the maximum ancillary fee for towing a vehicle between 7:00 p.m. and 8:00 a.m., and from $30 to $35 the maximum ancillary fee for towing a vehicle on a Saturday, Sunday, or holiday. The bill clarifies that such limitations on fees do not include any reasonable credit card fees. The bill requires localities to set their own towing rates to at least the amounts of the maximum statewide rates and removes requirements specific to Planning Districts 8 and 16 regarding localities setting their own towing rates.

ii. HB 662 Towing; registration for tow truck drivers and obtaining Driver Authorization Document, penalty. (Continued to 2025)

A BILL to amend and reenact § **46.2-116** of the Code of Virginia, relating to towing; registration for tow truck drivers; Driver Authorization Document; penalty. Requires tow truck drivers, prior to registration or the first renewal on or after January 1, 2025, with the Department of Criminal Justice Services, to obtain a Driver Authorization Document, for which such drivers must take instructional courses, the requirements for which are set forth in the bill, and complete a drug test. The bill has a delayed effective date of January 1, 2025.

iii. HB 925 Towing; vehicles with expired registration, civil penalty. (Passed – Chapter 308)

An Act to amend and reenact §§ **46.2-1150**, **46.2-1231**, and **46.2-1232** of the Code of Virginia, relating to towing; vehicles with expired registration; civil penalty. Requires a towing operator, defined in the bill, for a parking lot of a multifamily dwelling unit, defined in the bill, to post written notice on a vehicle providing at least 48 hours' notice to a resident prior to removing a resident's vehicle, defined in the bill, from such parking lot of the multifamily dwelling unit for an expired registration or expired vehicle inspection sticker and to provide a copy of such notice to the landlord of such multifamily dwelling unit. The bill provides that a towing operator who fails to comply with these requirements shall be required to reimburse the resident for the cost of the tow and shall be subject to a civil penalty not to exceed $100.

iv. **HB 959 Towing violations; enforcement. (Passed Chapter 537)**

An Act to amend and reenact §§ **46.2-1232** and **46.2-1233.3** of the Code of Virginia and to amend and reenact the second enactment of Chapter 323 of the Acts of Assembly of 2023, relating to towing violations; enforcement; fuel surcharge fee. Authorizes localities in Planning Districts 8 and 16 to require written authorization of the owner of the property from which the vehicle is towed at the time the vehicle is being towed and regulate the monitoring practices that may be used by towing and recovery operators. Current law authorizes localities other than those in Planning Districts 8 and 16 to require written authorization of the owner of the property from which the vehicle is towed at the time the vehicle is being towed. The bill changes the penalty for certain trespass towing offenses in Planning District 8 from $150 per violation paid to the Literary Fund to 10 times the total amount charged for such removal, towing, and storage to be paid to the victim of the unlawful towing. The bill also changes the expiration date of the authorization for towing and recovery operators to charge a fuel surcharge fee of no more than $20 for each vehicle towed or removed from private property without the consent of its owner and the prohibition on local governing bodies limiting or prohibiting such fee from July 1, 2024, to July 1, 2025.

v. **HB 1073 Tow truck drivers; prohibited acts. (Passed Chapter 409)**

An Act to amend and reenact § **46.2-118** of the Code of Virginia, relating to tow truck drivers; prohibited acts. Prohibits tow truck drivers from driving by the scene of a wrecked or disabled vehicle for which a law-enforcement tow has been initiated by a law-enforcement agency, initiating contact with the owner or operator of such vehicle by soliciting or offering towing services, and towing such vehicle.

vi. **HB 1287 Towing companies; provision of existing law authorizing localities in Planning District 8. (Passed – Chapter 653)**

Clarifies that the provisions of existing law authorizing localities in Planning District 8 to require towing companies that tow from the county, city, or town to a storage or release location outside of the locality to obtain a permit to do so do not restrict or modify the authority of the locality to require that towing companies that tow and store or release vehicles within the county, city, or town to obtain from the locality a permit to do so.

vii. **SB 66 Towing without consent of vehicle owner; prohibited acts by towing and recovery operator. (Passed – Chapter 574)**

Prohibits towing and recovery operators from requiring an individual who appears to retrieve a vehicle towed to provide to the towing and recovery operator, in addition to payment of fees, any document not otherwise required by law before releasing the vehicle to the individual.

viii. SB 94 Tow truck drivers and towing and recovery operators; prohibited acts, certain solicitation. (Passed – Chapter 337)

Prohibits tow truck drivers and towing and recovery operators from causing any other person to solicit or offer towing services in any manner, directly or indirectly, at the scene of any wrecked or disabled motor vehicle upon a highway when such wrecked or disabled motor vehicle reasonably necessitates removal by a tow truck. The bill provides that a violation of such prohibition constitutes a Class 3 misdemeanor for the first offense and a Class 2 misdemeanor for any subsequent offense.

D. Transportation Projects

i. HB 305 Regional gas tax; allocating revenues from tax to certain localities for improving secondary roads. (Stricken)

A Bill to amend and reenact § **58.1-2299.20** of the Code of Virginia, relating to regional gas tax revenues. Provides that in allocating revenues from the regional fuels tax in localities not a part of the Northern Virginia Transportation Authority, the Hampton Roads Transportation Accountability Commission, the Interstate 81 Corridor, or the Central Virginia Transportation Authority, the Commonwealth Transportation Board shall seek to award 50 percent of the revenues generated in each construction district for projects improving or maintaining secondary roads.

ii. HB 532 Transportation project; prohibits initiation of project in an established school crossing zone, etc. (Left in Committee)

A BILL to amend and reenact § **33.2-373** of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 1 of Title 33.2 a section numbered **33.2-121**, relating to transportation projects; highway safety. Prohibits the initiation of any transportation project in an established school crossing zone unless a pedestrian safety-focused road safety audit is conducted, and its recommendations are incorporated into the project plan. The bill requires the Commonwealth Transportation Board, in administering the Virginia Highway Safety Improvement Program, to prioritize infrastructure projects that address a hazardous road location or feature or address an identified highway safety.

E. Transportation Authorities

i. HB 201 Transportation entities, certain; membership. (Passed – Chapter 633)

An Act to amend and reenact §§ **33.2-1904**, **33.2-1907**, and **33.2-2502** of the Code of Virginia, relating to certain transportation entities; membership. Requires, rather than permits, the four members of the Northern Virginia Transportation Commission, the two members of the Potomac and Rappahannock Transportation Commission, and the two members of the Northern Virginia Transportation

Authority who are appointed by the Speaker of the House of Delegates to be members of the House of Delegates. This bill incorporates **HB 1173** and **HB 1175.**

ii. **SB 158 Northern Virginia Transportation Authority; technical advisory committee appointed by Authority. (Passed – Chapter 618)**

An Act to amend and reenact § **33.2-2507** of the Code of Virginia, relating to Northern Virginia Transportation Authority; technical advisory committee; appointments. Provides that six members of the Northern Virginia Transportation Authority's technical advisory committee are appointed by the Authority rather than appointed by localities embraced by the Authority as provided in current law.

F. Rail

i. **HB 1425 Virginia Passenger Rail Authority; exempts railway tunnels and bridges from Building Code. (Passed – Chapter 78)**

An Act to amend and reenact § **36-98.1** of the Code of Virginia, relating to Uniform Statewide Building Code; Virginia Passenger Rail Authority exemption. Exempts railway tunnels and bridges owned by the Virginia Passenger Rail Authority from the Uniform Statewide Building Code and the Statewide Fire Prevention Code Act. The bill requires the Virginia Passenger Rail Authority to report annually to the State Fire Marshal on the maintenance and operability of installed fire protection and detection systems in its railway tunnels and bridges.

ii. **HB 1538 Manufactured home; conversion to real property. (Passed – Chapter 567)**

An Act to amend and reenact § **46.2-653.1** of the Code of Virginia, relating to conversion of manufactured home to real property. Establishes a process whereby a manufactured homeowner who is not listed as the owner of such manufactured home on its title may detitle such manufactured home in order to convert the home to real property.

VIII. Gaming, Cannabis, and ABC

A. Gaming

i. **HB 195 Gaming in the Commonwealth; prohibition on use of term "casino" by non-casino gaming operators. (Defeated in Committee)**

A BILL to amend and reenact § **18.2-340.36:1** of the Code of Virginia and to amend the Code of Virginia by adding sections numbered **58.1-4042.1** and **59.1-404.1**, relating to gaming in the Commonwealth; prohibition on use of term "casino" by non-casino gaming operators; civil penalties. Prohibits any applicant for licensure or any person licensed or permitted to conduct charitable gaming, horse racing, or sports betting in the Commonwealth from using the term "casino" in its entity name,

in any advertisement in association with its product or service, or in any manner prohibited by regulation. The bill provides for a civil penalty of up to $50,000 for each violation.

ii. **HB 525 Casino gaming; limits on required local referendums. (Passed – Chapter 291)**

An Act to amend and reenact § **58.1-4123** of the Code of Virginia, relating to casino gaming; limits on required local referendums. Provides that the governing body of any eligible host city that holds a local referendum on the question of whether casino gaming should be permitted in such city that subsequently fails shall be prohibited from holding another referendum on the same question for a period of three years from the date of the last referendum.

iii. **HB 590 Electronic gaming devices; regulation, penalties. (Defeated in House)**

A Bill to amend and reenact §§ **2.2-3711**, as it is currently effective and as it shall become effective, **18.2-325**, **18.2-334**, **19.2-389**, **37.2-314.2**, **58.1-4002**, **58.1-4003**, **58.1-4006**, and **58.1-4007** of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 3 of Title 11 a section numbered **11-16.3**, by adding a section numbered **18.2-334.7**, and by adding in Title 58.1 a chapter numbered 42, consisting of sections numbered **58.1-4200** through **58.1-4215**; and to repeal § **18.2-334.6** of the Code of Virginia, relating to Virginia Small Business Economic Development Act established; regulation of skill game machines; penalties. Authorizes and specifies the licensing requirements for the manufacture, distribution, operation, hosting, and playing of electronic gaming devices, as defined in the bill, under the regulatory authority of the Virginia Lottery Board. The bill imposes a 30 percent tax on all gross profits from the play of such electronic gaming devices and provides for the use of such tax proceeds. The bill also imposes criminal and civil penalties for violations of the law and regulations related to electronic gaming devices.

iv. **HB 991 and SB 540 Gambling data; use of Cloud Technology. (Passed – Chapters 311 and 358)**

An Act to amend and reenact § **18.2-334.3** of the Code of Virginia, relating to illegal gambling; exemptions. Exempts from the provisions of Code prohibiting illegal gambling the placement or operation of or communication to and from data center equipment in the Commonwealth associated with the hosting of lottery games duly authorized by another state or jurisdiction and regulated and operated consistent with and exclusively for the benefit of such state or jurisdiction, provided that wagering on such games is legally authorized in such other state or jurisdiction and the individuals wagering on such games are required by the laws or regulations of such other state or jurisdiction to be physically located within the geographic bounds of such other state or jurisdiction at the time the wager is initiated or placed.

v. **HB 1131 and SB 541 Casino gaming; removes the City of Richmond as an eligible host city. (Passed – Chapters 318 and 359)**

An Act to amend and reenact § **58.1-4107** of the Code of Virginia, relating to casino gaming; eligible host city. Removes the City of Richmond as an eligible host city for casino gaming establishments in the Commonwealth.

vi. **HB 1478 Casino gaming; cruise ships. (Left in Committee)**

A Bill to amend and reenact §§ **58.1-4100**, **58.1-4101**, **58.1-4102**, and **58.1-4107** of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 41 of Title 58.1 an article numbered 12, consisting of sections numbered **58.1-4142** and **58.1-4143**, relating to casino gaming; cruise ships. Authorizes the conduct of cruise ship casino gaming in the offshore waters of the Commonwealth by a cruise ship operator that applies for and receives a permit from the Virginia Lottery. The bill sets an annual permit fee of $50,000 for any cruise ship that uses a port or other point of anchorage in the offshore waters of the Commonwealth for the purpose of embarkation or disembarkation of cruise ship passengers and an annual permit fee of $125,000 for any cruise ship that transits the offshore waters of the Commonwealth without making a stop in the Commonwealth and conducts casino gaming activities while in such waters.

vii. **HJ 10 Virginia Gaming Commission, Joint Subcommittee studying feasibility of establishing; continued. (Passed - HJ10)**

Continuing the Joint Subcommittee to Study the Feasibility of Establishing the Virginia Gaming Commission to regulate and oversee all forms of gaming in the Commonwealth. Report. Continues the Joint Subcommittee to Study the Feasibility of Establishing the Virginia Gaming Commission for two additional years, through November 30, 2025.

viii. **SB 124 Sports betting; permitted on Virginia college sports. (Continued to 2025)**

A Bill to amend and reenact §§ **58.1-4030** and **58.1-4039** of the Code of Virginia and the fourth enactment of Chapter 1197 and the fourth enactment of Chapter 1248 of the Acts of Assembly of 2020, relating to sports betting; Virginia college sports. Permits betting, with the exception of proposition betting, on Virginia college sports. Under current law, betting other than proposition betting is allowed on all college sports except Virginia college sports.

ix. **SB 212 Virginia Small Business Economic Development Act; established. (Vetoed by Governor)**

A Bill to amend and reenact § **18.2-325** of the Code of Virginia, to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered **59.1-603** through **59.1-617**, and to repeal § **18.2-334.6** of the Code of Virginia, relating to Virginia Small Business Economic Development Act established;

regulation of skill games; registration; penalties. Establishes the Virginia Small Business Economic Development Act for the purpose of providing a regulatory and registration scheme for skill game machines in the Commonwealth. The bill authorizes and specifies the registration requirements for the distribution, operation, hosting, and play of skill game machines, as defined in the bill. The bill imposes a 25 percent tax on the gross receipts from the play of each skill game machine from each distributor and provides for the use of such tax proceeds, with most being deposited into the PreK-12 Priority Fund, established in the bill. The bill directs the Virginia Lottery Board to promulgate regulations no later than January 1, 2027, to implement the provisions of the bill and authorizes the Virginia Alcoholic Beverage Control Authority to grant a provisional registration, beginning July 1, 2024, to any entity that provides a laboratory certification from a laboratory approved by the Authority that the game being distributed, operated, or placed in an establishment meets the definition and requirements of a skill game machine.

x. **SB 307 Electronic gaming devices; regulation, penalties. (Left in Committee)**

A Bill to amend and reenact §§ **2.2-3711**, as it is currently effective and as it may become effective, **18.2-325**, **18.2-334**, **18.2-334.3**, **19.2-389**, **37.2-314.2**, **58.1-4002**, **58.1-4003**, **58.1-4006**, **58.1-4007**, **58.1-4012**, **58.1-4019.1**, and **58.1-4027** of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 3 of Title 11 a section numbered **11-16.3** and by adding in Chapter 40 of Title 58.1 an article numbered 3, consisting of sections numbered **58.1-4049** through **58.1-4075**, relating to the regulation of electronic gaming devices; penalties. Authorizes and specifies the licensing requirements for the manufacture, distribution, operation, servicing, hosting, and play of electronic gaming devices, as defined in the bill. The bill provides that electronic gaming devices are regulated by the Virginia Lottery Board and requires employees of such licensees to be registered with the Virginia Lottery. The bill imposes criminal and civil penalties for violations of the law and regulations related to electronic gaming devices. The bill imposes a 34 percent tax on all gross profits from the play of such gaming devices and provides for the use of such tax proceeds, with most being deposited into the general fund.

xi. **SB 397 Gaming; posting of illegal gaming tip line information. (Passed – Chapter 593)**

An Act to amend and reenact §§ **18.2-340.19** and **59.1-369**, as it is currently effective and as it shall become effective, of the Code of Virginia and to amend the Code of Virginia by adding a section numbered **58.1-4007.3** and by adding in Article 7 of Chapter 41 of Title 58.1 a section numbered **58.1-4122.1**, relating to gaming; posting of illegal gaming tip line information. Requires those legally authorized to sell Virginia lottery tickets or conduct charitable gaming, horse racing with pari-mutuel wagering, and casino gaming in the Commonwealth to post in a conspicuous place on their premises a sign that bears the toll-free telephone number and website of the illegal gaming tip line established and administered by the Office of the Gaming

Enforcement Coordinator in the Department of State Police for members of the public to report concerns about, or suspected instances of, illegal gaming activities.

xii. **SB 675 Casino gaming; eligible host localities. (Continued to 2025)**

A Bill to amend and reenact §§ **58.1-4032**, **58.1-4100**, **58.1-4101**, **58.1-4107**, **58.1-4107.1**, **58.1-4109**, **58.1-4110**, **58.1-4111**, **58.1-4123**, and **58.1-4125** of the Code of Virginia, relating to casino gaming; eligible host localities. Adds Fairfax County to the list of localities eligible to host a casino in the Commonwealth and provides that any proposed site for a casino gaming establishment considered by Fairfax County shall be (i) located within one-quarter of a mile of an existing station on the Metro Silver Line, (ii) part of a coordinated mixed-use project development, (iii) outside of the Dulles airport flight path, (iv) within two miles of a major shopping destination containing not less than 1.5 million square feet of gross building area, and (v) outside of the Interstate 495 Beltway. The bill also requires an eligible host locality in selecting a preferred casino gaming operator to consider and give substantial weight to the proposer's history of or commitment to (a) paying or contracting for the payment of prevailing wages to those individuals providing construction labor during the initial construction of the casino gaming establishment and any hospitality facilities on the premises, and (b) entering into labor peace agreements with labor organizations that are actively engaged in representing or seeking to represent employees in the gaming or hospitality industries in the Commonwealth. The bill also requires an eligible host locality to provide with its submission of its preferred casino gaming operator to the Virginia Lottery an executed agreement with its preferred casino gaming operator certifying that such casino gaming operator and any subcontractor or sublessee responsible for the performance of casino gaming or hospitality operations at the proposed casino gaming establishment will enter into a labor peace agreement with each labor organization actively engaged in representing or seeking to represent employees in the gaming or hospitality industries in the Commonwealth that requests such labor peace agreement, and evidence of all such signed labor peace agreements.

xiii. **SB 628 Casino gaming; eligible host cities. (Passed – Chapter 798)**

An Act to amend and reenact §§ **58.1-4107** and **58.1-4123** of the Code of Virginia, relating to casino gaming; eligible host cities. Amends the list of cities eligible to host a casino in the Commonwealth by replacing Richmond with Petersburg. The bill also provides that the governing body of any eligible host city that holds a local referendum on the question of whether casino gaming should be permitted in such city that subsequently fails shall be prohibited from holding another local referendum on the same question for a period of three years from the date of the last referendum.

xiv. **SB 689 Casino gaming; cruise ship gaming in the offshore waters of the Commonwealth. (Continued to 2025)**

A bill to amend and reenact §§ **58.1-4100**, **58.1-4101**, **58.1-4102**, and **58.1-4107** of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 41 of Title 58.1 an article numbered 12, consisting of sections numbered **58.1-4142** and **58.1-4143**, relating to casino gaming; cruise ships. Exemptions to article; cruise ship gaming in the offshore waters of the Commonwealth.

xv. **SB 694 Skill games; exceptions. (Continued to 2025)**

A bill to amend and reenact § **18.2-325** of the Code of Virginia, relating to skill games; exceptions. Clarifies that skill games are a form of illegal gambling except where relevant Code provides otherwise.

B. Alcoholic Beverage Control

i. **HB 522 and SB 182 Alcoholic beverage control; advertisements. (Passed – Chapters 38 and 139)**

An Act to amend and reenact § **4.1-111** of the Code of Virginia, relating to alcoholic beverage control; advertisements. Directs the Board of Directors of the Virginia Alcoholic Beverage Control Authority to promulgate regulations that prescribe the terms and conditions under which manufacturers, brokers, importers, and wholesalers may advertise and promote alcoholic beverages via the Internet, social media, direct-to-consumer electronic communication, or other electronic means.

ii. **HB 688 and SB 635 Alcoholic beverage control; sale and delivery of mixed beverages & pre-mixed wine off-premises. (Passed – Chapters 105 and 159)**

An Act to amend and reenact §§ **4.1-204**, **4.1-206.3**, and **4.1-212.1**, as they are currently effective and as they shall become effective, § **4.1-230**, and § **4.1-231.1**, as it is currently effective and as it shall become effective, of the Code of Virginia and to repeal § **4.1-212.2** of the Code of Virginia and the second enactment of Chapter 281 and the second enactment of Chapter 282 of the Acts of Assembly of 2021, Special Session I, as amended by the second enactment of Chapter 78 and the second enactment of Chapter 79 of the Acts of Assembly of 2022, relating to alcoholic beverage control; sale and delivery of mixed beverages and pre-mixed wine for off-premises consumption; third-party delivery licenses; sunset; repeal. Repeals the July 1, 2024, sunset on provisions that allow (i) distillers that have been appointed as agents of the Board of Directors of the Virginia Alcoholic Beverage Control Authority, mixed beverage restaurant licensees, and limited mixed beverage restaurant licensees to sell mixed beverages for off-premises consumption and (ii) farm winery licensees to sell pre-mixed wine for off-premises consumption. The bill also repeals, effective July 1, 2026, third-party delivery licenses. The bill requires the Authority to convene a work group to review third-party delivery licenses and report its findings and recommendations to the Chairmen of the House Committee on General Laws

and the Senate Committee on Rehabilitation and Social Services by November 15, 2024.

iii. **HB 1349 Alcoholic beverage control; annual mixed beverage performing arts facility licenses. (Passed – Chapter 111)**

An Act to amend and reenact §§ 4.1-100, 4.1-103, 4.1-206.3, as it is currently effective and as it shall become effective, 4.1-209, 4.1-231.1, as it is currently effective and as it shall become effective, 4.1-233.1, 4.1-309, and 4.1-325 of the Code of Virginia, relating to alcoholic beverage control; annual mixed beverage performing arts facility licenses; on-and-off premises wine and beer licenses. Defines performing arts facility and sports facility and standardizes the eligibility criteria for annual mixed beverage performing arts facility licenses and on-and-off-premises wine and beer licenses for performing arts food concessionaires. Under current law, the eligibility criteria for such licenses varies by location and includes inconsistent ownership, lease, capacity, and seating requirements. The bill also removes provisions that allow the Board of Directors of the Virginia Alcoholic Beverage Control Authority to grant annual mixed beverage motor sports facility licenses and motor car sporting event facility licenses and creates an annual mixed beverage sports facility license, which may be granted to persons operating a sports facility or food concessions at a sports facility and would authorize the licensee to sell mixed beverages during any event and immediately subsequent thereto to patrons within all seating areas, concourses, walkways, concession areas, and additional locations designated by the Board (i) in closed containers for off-premises consumption or (ii) in paper, plastic, or similar disposable containers or in single original metal cans for on-premises consumption. This bill is identical to **SB 180, SB 400, SB 657,** and **SB 724.**

C. Cannabis

i. **HB 698 and SB 448 Cannabis control; establishes a framework for creation of a retail marijuana market, penalties. (Vetoed by Governor)**

An Act to amend and reenact §§ 2.2-2499.8, 3.2-4113, 4.1-352, 4.1-600, 4.1-601, 4.1-603, 4.1-604, 4.1-606, 4.1-607, 4.1-611, 4.1-614, 4.1-621, 4.1-1100, 4.1-1101, 4.1-1121, 4.1-1500, 4.1-1501, 4.1-1502, 4.1-1601, 4.1-1604, 5.1-13, 9.1-1101, 16.1-69.40:1, 16.1-260, 16.1-273, 16.1-278.9, 18.2-46.1, 18.2-247, 18.2-248, 18.2-248.01, 18.2-251, 18.2-251.03, 18.2-251.1:1, 18.2-251.1:2, 18.2-251.1:3, 18.2-252, 18.2-254, 18.2-255, 18.2-255.1, 18.2-255.2, 18.2-258, 18.2-258.02, 18.2-258.1, 18.2-265.1, 18.2-265.2, 18.2-265.3, 18.2-287.2, 18.2-308.012, 18.2-308.4, 18.2-460, 18.2-474.1, 19.2-66, 19.2-81, 19.2-81.1, 19.2-83.1, 19.2-188.1, 19.2-303.01, 19.2-386.22 through 19.2-386.25, 19.2-389, 19.2-389.3, as it is currently effective and as it shall become effective, 19.2-392.02, 19.2-392.6, 22.1-206, 22.1-277.08, 23.1-1301, 46.2-105.2, 46.2-347, 48-17.1, 53.1-231.2, 54.1-2903, 58.1-301, and 59.1-200 of the Code of Virginia; to amend the Code

of Virginia by adding in Chapter 6 of Title 4.1 sections numbered 4.1-629, 4.1-630, and 4.1-631, by adding in Title 4.1 chapters numbered 7 through 10, consisting of sections numbered 4.1-700 through 4.1-1008, by adding sections numbered 4.1-1102 through 4.1-1105, 4.1-1106, 4.1-1113, 4.1-1114, 4.1-1115, 4.1-1117, 4.1-1118, and 4.1-1119, by adding in Title 4.1 a chapter numbered 12, consisting of sections numbered 4.1-1200 through 4.1-1206, by adding in Chapter 13 of Title 4.1 sections numbered 4.1-1300, 4.1-1301, and 4.1-1303 through 4.1-1309, by adding in Chapter 14 of Title 4.1 sections numbered 4.1-1403 through 4.1-1406, by adding in Article 2 of Chapter 1 of Title 6.2 a section numbered 6.2-108, and by adding in Chapter 44 of Title 54.1 a section numbered 54.1-4426; and to repeal §§ 4.1-1101.1, 4.1-1105.1, 18.2-248.1, and 18.2-251.1 of the Code of Virginia, relating to cannabis control; retail market; penalties. Establishes a framework for the creation of a retail marijuana market in the Commonwealth, to be administered by the Virginia Cannabis Control Authority. The bill allows the Authority to begin issuing all marijuana licenses on September 1, 2024, but provides that no retail sales may occur prior to May 1, 2025.

IX. Construction

A. Building Code

i. HB 368 and SB 195 Uniform Statewide Building Code; Board of HCD to convene advisory group to evaluate. (Passed – Chapters 384 and 385)

An Act to direct the Board of Housing and Community Development to convene a stakeholder advisory group to evaluate and recommend revisions to the Uniform Statewide Building Code to permit Group R-2 occupancies to be served by a single exit. Directs the Board of Housing and Community Development (the Board) to convene a stakeholder advisory group including fire code officials to evaluate and recommend revisions to the Uniform Statewide Building Code to permit Group R-2 occupancies to be served by a single exit, provided that the building has not more than six stories above grade plane. The bill requires the stakeholder advisory group to submit its findings and recommendations to the Board and to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology no later than December 1, 2024.

ii. HB 578 and SB 538 Uniform Statewide Building Code; violations, increases fines (Passed – Chapters 641 and 681)

An Act to amend and reenact § 36-106 of the Code of Virginia, relating to Uniform Statewide Building Code; violations; fines. Increases from $2,500 to $5,000 the minimum amount and from $5,000 to $10,000 the maximum amount that any person, firm, or corporation shall be fined when convicted of a third or subsequent offense of violating the provisions of the Uniform Statewide Building Code committed within 10 years of another such offense after having been at least twice

previously convicted of such an offense. The bill also adds penalties for similar violations committed by owners of a blighted multifamily property.

iii. **HB 950 Uniform Statewide Building Code; temporarily prohibit modifications to Code (Vetoed)**

A Bill to amend and reenact §§ 36-98 and 36-137 of the Code of Virginia, relating to Uniform Statewide Building Code; evaluation of proposed legislation. Provides that neither the Governor nor the Board of Housing and Community Development shall modify any regulation in the Uniform Statewide Building Code prior to the conclusion of the Commonwealth's next triennial code development process.

B. Contractors & Subcontractors

i. **HB 576 and SB 313 Contractors, Board for; required regulations and disclosures. (Vetoed)**

A BILL to direct the Department of Professional and Occupational Regulation to convene a work group of relevant stakeholders to develop recommendations for any additional consumer protections regarding the sale, lease, or installation of a solar energy facility with a generating capacity of 25 kilowatts or less. Requires the Board for Contractors to adopt regulations requiring all Class A, B, and C residential contractors, excluding subcontractors to the contracting parties and those who engage in routine maintenance or service contracts, to use legible written contracts that include certain terms and conditions. The bill directs the Board to require a statement of protections be provided by the contractor to the homeowner, consumer, or buyer in transactions involving door-to-door solicitations or any residential rooftop solar installation. The bill requires the Department of Professional and Occupational Regulation to review by July 1, 2025, its licensing exam for alternative energy system contracting to ensure such exam includes questions related to the physical installation of alternative energy systems on preexisting structures. The bill also requires the Board for Contractors to create a disclosure form to be provided in any transaction involving a residential rooftop solar installation to include specific disclosures regarding the risks associated with residential rooftop solar installation. Finally, the bill requires the State Corporation Commission to convene a work group of relevant stakeholders to develop recommendations for any additional consumer protections regarding the sale, lease, or installation of a solar energy facility with a generating capacity of 25 kilowatts or less and report the work group's recommendations to certain committees of the General Assembly by November 30, 2024. The bill has a delayed effective date of July 1, 2025.

ii. **HB 1417 Contractors; workers' compensation requirements. (Passed – Chapter 558)**

An Act to amend and reenact § 58.1-3714 of the Code of Virginia, relating to contractors; workers' compensation requirements. Removes the requirements that the governing body of a locality shall forward a signed certification to the Virginia Workers' Compensation Commission and the Commission shall conduct periodic audits of selected contractors to whom such body has issued business licenses, thereby eliminating the need for commissioners of the revenue to send the Commission 61A forms.

C. Plans & Permits

i. **HB 656 and SB 365 Regulated land-disturbing activities; submission and approval of erosion and sediment control plan. (Passed – Chapters 5 and 104)**

An Act to amend and reenact § 62.1-44.15:55, as it shall become effective, of the Code of Virginia, relating to regulated land-disturbing activities; submission and approval of erosion and sediment control plan. Prohibits a person from engaging in any land-disturbing activity until, where Virginia Pollutant Discharge Elimination System (VPDES) permit coverage is required, the Virginia Erosion and Sediment Control Program (VESCP) authority has obtained evidence of such permit coverage from the Department of Environmental Quality's online reporting system prior to issuing its land-disturbance approval. Current law requires the VESCP authority to obtain such evidence of VPDES permit coverage prior to approving an erosion and sediment control plan.

ii. **HB 1157 Federally recognized Tribal Nations in the Commonwealth; agencies to consult on permits and reviews. (Passed – Chapter 830)**

An Act to amend and reenact §§ 2.2-401.01, 10.1-1003, 10.1-1188, 10.1-2206.1, 10.1-2214, 10.1-2305, 56-46.1, and 62.1-266 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 10.1-104.02, 10.1-1186.3:1, 10.1-2205.1, and 28.2-104.01, relating to consultation with federally recognized Tribal Nations in the Commonwealth; permits and reviews with potential impacts on environmental, cultural, and historic resources. Requires the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Historic Resources, and the Virginia Marine Resources Commission to establish policies and procedures for consulting with federally recognized Tribal Nations in the Commonwealth when evaluating certain permits and reviews relating to environmental, cultural, or historic resources that potentially impact those federally recognized Tribal Nations in the Commonwealth. The bill directs the Secretary of the Commonwealth to designate an Ombudsman for Tribal Consultation to facilitate communication and consultation with federally recognized Tribal Nations in the Commonwealth and requires the Ombudsman to develop by January 1, 2025, a list of localities in which federally recognized Tribal Nations in the

Commonwealth shall be consulted to effectuate the provisions of the bill. The bill codifies Executive Order 82 (2021).

D. Conservation & Environment

i. HB 459 and SB 121 Trees; conservation during land development process in certain localities. (Passed – Chapters 691 and 702)

An Act to amend and reenact § **15.2-961.1** of the Code of Virginia, relating to conservation of trees during land development process in certain localities. Expands authority of certain localities to adopt an ordinance providing for the planting and replacement of trees during the development process by allowing a tree canopy fund that currently applies to the planting of trees on public property to include maintenance of trees on public property and planting and maintenance of trees on private property. The bill removes a provision that requires that any funds collected for the purposes of the tree canopy fund be returned to the original contributor if not spent within five years but maintains the requirement that such funds be spent within five years. The bill also includes an expansion of the canopy credit.

ii. HB 529 Trees; conservation and replacement during development process. (Vetoed)

An Act to amend and reenact § **15.2-961** of the Code of Virginia, relating to conservation and replacement of trees during development process. Expands certain existing local government authority to conserve or replace trees during the development process by expanding such authority statewide. The bill allows localities to establish higher tree canopy replacement percentages based on density per acre. The bill also alters the current process for granting exceptions to a local ordinance by altering a provision that requires the granting of an exception when strict application of the ordinance would result in unnecessary or unreasonable hardship to the developer and replacing it with a requirement that the locality concur with such determination. The bill permits localities to monitor and assess the condition and coverage of tree canopies at development sites during the time period up to 20 years' maturity of the planted trees. The bill makes numerous technical amendments.

iii. HB 985 High polycyclic aromatic hydrocarbon; prohibits pavement sealants that contain, civil penalty. (Passed – Chapter 736)

An Act to amend and reenact § **10.1-2500** of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 20 of Title 62.1 a section numbered **62.1-196.1**, relating to high polycyclic aromatic hydrocarbon pavement sealants; prohibition; civil penalty. Prohibits the sale or distribution of any pavement sealant that contains polycyclic aromatic hydrocarbon concentrations greater than one percent by weight on or after July 1, 2024, except that a retailer may continue to sell any existing inventory that remains in stock on that date. The bill also prohibits the

application or use of such sealants on or after July 1, 2025. Any person who violates either prohibition is subject to a civil penalty of $250, to be paid into the Virginia Environmental Emergency Response Fund.

iv. **SB 581 Environmental Quality, Department of; groundwater and surface water withdrawal permits. (Passed – Chapter 251)**

An Act to amend and reenact §§ **62.1-44.15:22**, as it is currently effective and as it shall become effective, and **62.1-263** of the Code of Virginia, relating to Department of Environmental Quality; data; groundwater and surface water withdrawal permits. Authorizes the Department of Environmental Quality to utilize and incorporate comprehensive groundwater, surface water, and aquifer data in its decision-making processes related to the issuance and renewal of groundwater withdrawal permits and surface water withdrawal permits. Such data may include information relating to water levels, flow rates, and water quality.

X. Civil & Criminal Law

A. Civil

i. **HB 1396 and SB 736 Days of operation of clerks' offices; clerks' authority to close office. (Passed – Chapters 482 and 521)**

An Act to amend and reenact § **17.1-207** of the Code of Virginia, relating to days of operation of clerks' offices; clerks' authority to close office. Allows the clerk of the circuit court of any county or city to close the clerk's Office on (i) Christmas Eve; (ii) any day or portion of a day that the Governor declares as a holiday for state employees; and (iii) any day or portion of a day on which the Governor, Supreme Court, or Judicial Council authorizes state offices to be closed. Under current law, the clerk may only close the clerk's office once a judge authorizes such clerk to do so in these circumstances.

ii. **SB 175 Persons other than ministers who may perform rites of marriage; former Statewide legislators and officials; clerk of a circuit court. (Passed – Chapter 499)**

An Act to amend and reenact § **20-25** of the Code of Virginia, relating to persons other than ministers who may perform rites of marriage; former statewide legislators and officials. Adds any (i) former member of the General Assembly; (ii) former Governor, Lieutenant Governor, or Attorney General of the Commonwealth; or (iii) current or former clerk of a circuit court of the Commonwealth who is a resident of the Commonwealth to the list of persons who may perform the rites of marriage in the Commonwealth without the necessity of bond or order of authorization.

iii. **HB 800 and SB 713 Public service companies; pole attachments; cable television Systems and telecommunications service providers. (Passed – Chapters 822 and 799)**

An Act to amend and reenact § **56-466.1** of the Code of Virginia, relating to public service companies; pole attachments; cable television systems and telecommunications service providers. Requires a public utility, as defined in the bill, to establish and adhere to pole attachment practices and procedures that comply with certain requirements, including determining whether an attachment request is complete before reviewing such request on its merits, complying with certain timelines, and providing notice of a rearrangement to affected existing attachers. The bill provides that a public utility shall not apportion to a telecommunications service provider or cable television system the cost of replacing a red-tagged pole, as defined in the bill, provided that such utility may apportion to such provider or system the incremental cost of a taller or stronger pole that is necessitated solely by the new facilities of such provider or system. The bill authorizes the State Corporation Commission to enforce its provisions and requires the Commission to resolve disputes involving pole access within 90 days and concerning certain other matters within 120 days.

iv. **HB 174 and SB 101 Marriage lawful regardless of sex, gender, or race of parties; issuance of marriage license. (Passed – Chapter 760)**

An Act to amend the Code of Virginia by adding a section numbered **20-13.2**, relating to marriage lawful regardless of sex, gender, or race of parties; issuance of marriage license. Provides that no person authorized to issue a marriage license shall deny the issuance of such license to two parties contemplating a lawful marriage on the basis of the sex, gender, or race of the parties. The bill also requires that such lawful marriages be recognized in the Commonwealth regardless of the sex, gender, or race of the parties. The bill provides that religious organizations or members of the clergy acting in their religious capacity shall have the right to refuse to perform any marriage.

v. **HB 184 Foreclosure procedures; subordinate mortgage, affidavit required. (Passed – Chapter 803)**

An Act to amend and reenact § **55.1-321** of the Code of Virginia, relating to foreclosure procedures; subordinate mortgage; affidavit required. Provides that, when a foreclosure sale is initiated due to a default in payment of a subordinate security instrument, such subordinate mortgage lienholder shall submit to the trustee an affidavit affirming whether monthly statements were sent to a property owner for each period of assessed interest, fees, or other charges and to include in such affidavit an itemized list of the current amount owed. The bill also requires that any purchaser at a foreclosure sale pay off any priority security instrument no later than 90 days from the date that the trustee's deed conveying the property is

recorded in the land records, and, if such purchaser fails to pay, the person originally required to pay such instrument has the right to petition the circuit court of the city or county where the property is located to recover from such purchaser any payments made on such instrument after the date of the foreclosure sale, plus any attorney fees and costs.

vi. **HB 264 and SB 157 Legal notices and publications; online-only news publications, requirements. (Passed – Chapter 277)**

An Act to amend and reenact § **8.01-324** of the Code of Virginia, relating to legal notices and publications; online-only news publications; requirements. Provides that, where any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, such ordinance, resolution, notice, or advertisement instead may be published in an online-only news publication subject to certain requirements specified in the bill. The bill sets out a process by which an online-only news publication shall petition the circuit court of the appropriate jurisdiction to publish such ordinances, resolutions, notices, or advertisements and authorizes the court to grant such online-only news publication the authority to publish such ordinances, resolutions, notices, or advertisements for a period of one year. The bill also describes the process by which an online-only news publication may continue renewing such authority to publish in each successive year.

vii. **HB 243 Judicial Inquiry and Review Commission; availability of complaint forms in courthouses. (Vetoed by Governor)**

An Act to amend and reenact § **17.1-917** of the Code of Virginia and to amend the Code of Virginia by adding in Article 4 of Chapter 3 of Title 19.2 a section numbered § **19.2-43.1**, relating to the Judicial Inquiry and Review Commission; magistrates; availability of complaint forms in courthouses. Requires that paper copies of any standardized form developed and utilized by the Judicial Inquiry and Review Commission or by the Department of Magistrate Services in the Office of the Executive Secretary of the Supreme Court of Virginia for the filing of a complaint be made available to the public in the clerk's office in all state courts of the Commonwealth. The bill also requires that a sign be posted in all such courts, in a location accessible to the public, that notes the availability and location of such forms.

viii. **HB 34 Contract actions; collection of medical debt, definition. (Passed – Chapter 800)**

An Act to amend and reenact § **8.01-246** of the Code of Virginia, relating to contract actions; medical debt. Provides that in any action, including those brought by the Commonwealth, upon any contract to collect medical debt, as defined in the bill, such an action is barred if not commenced within three years from the due date applicable to the first invoice for a health care service unless the contract with a hospital or health care provider is for a payment plan that allows for a longer period

of time for the collection of debt by the hospital or health care provider. The bill specifies that such limitation shall not apply to medical debt arising from services provided by programs administered by the Department of Medical Assistance Services.

ix. **HB 73 Unlawful detainer; expungement of action, entering of an order without further petition or hearing. (Passed – Chapter 372)**

An Act to amend and reenact § **8.01-130.01** of the Code of Virginia, relating to unlawful detainer; expungement. Provides that in unlawful detainer actions filed in the general district court, if the 30-day period following the dismissal of such an action has passed or if a voluntary nonsuit is taken and the six-month period following such nonsuit has passed, the court shall, without further petition or hearing, enter an order requiring the expungement of such action, provided that no order of possession has been entered. The bill provides that if a judgment is entered in favor of the defendant, such defendant may petition the court for an expungement pursuant to the petition process under current law. Additionally, the bill retains the petition process existing under current law for unlawful detainer actions commenced prior to July 1, 2024, for which the court still has records.

x. **HB 115 and SB 290 Guardians and conservators; order of appointment and certificate of qualification, annual report. (Passed – Chapter 17)**

Requires a petitioner to file with a petition for the appointment of a guardian, a conservator, or both a cover sheet on a form prepared by the Office of the Executive Secretary of the Supreme Court of Virginia. The bill requires a guardian to file an initial annual report reflecting the first four months of guardianship since qualification within six months of the date of qualification and to file the second and each subsequent annual report for each succeeding 12-month period within four months from the last day of the last 12-month period covered by the previous annual report. The bill also specifies which documents the clerk shall forward to certain entities upon the qualification of a guardian or conservator.

xi. **HB 171 Signing of pleadings, motions, and other papers; electronic signatures. (Passed – Chapter 20)**

An Act to amend and reenact § **8.01-271.1** of the Code of Virginia, relating to signing of pleadings, motions, and other papers; electronic signatures. Clarifies that an electronic signature or a digital image of a signature shall satisfy the requirement in current law that every pleading, motion, or other paper of a party be signed by at least one attorney of record. This bill is a recommendation of the Boyd-Graves Conference.

xii. **HB 182 Breach of a contract; award of attorney fees, factors. (Stricken)**

A Bill to amend the Code of Virginia by adding in Article 2 of Chapter 3 of Title 8.01 a section numbered **8.01-33.1**, relating to breach of contract; attorney fees; factors. Provides that, for any contract entered into on or after July 1, 2024, if such contract contains a provision allowing the award of attorney fees to a party when the other party to such contract breaches such contract, the court may also allow reasonable attorney fees to be awarded to the party that prevails in any action, whether as plaintiff or defendant, with respect to such contract. The bill requires the court to take into account certain factors in determining such reasonable attorney fees.

xiii. **HB 202 and SB 254 Optometrists; expert witness testimony. (Passed – Chapter 718)**

An Act to amend and reenact § **8.01-401.2** of the Code of Virginia, relating to optometrists; expert witness testimony. Allows an optometrist to testify as an expert witness in a court of law on certain matters within the scope of his practice.

B. Criminal

i. **HB 18 and SB 7 Hate crimes and discrimination; ethnic animosity, nondiscrimination in employment, etc., penalties. (Passed – Chapter 266)**

An Act to amend and reenact §§ **2.2-3900**, **2.2-3902**, **2.2-3904**, **2.2-3905**, **8.01-49.1**, **18.2-57**, and **18.2-121** of the Code of Virginia, relating to hate crimes and discrimination; ethnic animosity; penalties. Provides that it is the policy of the Commonwealth to safeguard all individuals within the Commonwealth from unlawful discrimination in employment and in places of public accommodation because of such individual's ethnic origin and prohibits such discrimination. The bill also adds victims who are intentionally selected because of their ethnic origin to the categories of victims whose intentional selection for a hate crime involving assault, assault and battery, or trespass for the purpose of damaging another's property results in a higher criminal penalty for the offense. The bill also provides that no provider or user of an interactive computer service on the Internet shall be liable for any action voluntarily taken by it in good faith to restrict access to material that the provider or user considers to be intended to incite hatred on the basis of ethnic origin. This bill incorporates SB 120.

ii. **HB 45 Earned sentence credits; incarceration prior to entry of final order of conviction. (Vetoed by Governor)**

A Bill to amend and reenact § **53.1-202.2** of the Code of Virginia, relating to earned sentence credits; incarceration prior to entry of final order of conviction. Provides that a person's eligibility for earned sentence credits shall include any period of time actually spent in any state or local correctional facility, state hospital, or juvenile detention facility for the offense such person was held deducted from such person's term of incarceration or detention. The bill also provides that all time actually spent

by a person in confinement or detention shall be used in calculating such person's earned sentence credits.

The bill provides that the provisions shall apply retroactively to any person who is confined in any correctional facility on July 1, 2025, and if it is determined that, upon retroactive application of the provisions, the release date of any such person passed prior to the effective date of this act, the person shall be released upon approval of an appropriate release plan and within 60 days of such determination unless otherwise mandated by court order; however, no person shall have a claim for wrongful incarceration on the basis of such retroactive application. If a person is released prior to completion of any reentry programs deemed necessary by the Department of Corrections on the person's most recent annual review or prior to completion of any programs mandated by court order, the person shall be required to complete such programs under probation, provided probation is mandated by the court and current community resources are sufficient to facilitate completion of the aforementioned programs. The bill has a delayed effective date of July 1, 2025.

iii. **HB 63 Criminal cases; request for a jury to ascertain punishment. (Vetoed by Governor)**

A Bill to amend and reenact § **19.2-295** of the Code of Virginia, relating to criminal cases; request for a jury to ascertain punishment. Provides that an accused may withdraw a request for a jury to ascertain punishment up until the commencement of the sentencing proceeding. The bill also provides that counsel for either party shall have the right to examine jurors regarding the potential range of punishment regardless of whether the jury will ascertain punishment and that the court or counsel for either party may inform any person or juror during voir dire as to the potential range of punishment to ascertain if the person or juror can sit impartially in the guilt or sentencing phase of the case.

iv. **HB 76 Grand jury; clarifies oaths of foreman, jurors, and witnesses. (Passed – Chapter 713)**

An Act to amend and reenact § **19.2-197** of the Code of Virginia, relating to foreman of grand jury; oaths of jurors and witnesses. Clarifies the oath of the foreman and other grand jurors. This bill is a recommendation of the Judicial Council of Virginia.

v. **HB 77 Robbery; conforms certain provisions of the Code of VA to the degrees of robbery offenses, etc. (Vetoed by Governor)**

A Bill to amend and reenact §§ **16.1-309.1**, **16.1-330.1**, **17.1-805**, **18.2-46.1**, **18.2-50.3**, **18.2-90**, **19.2-297.1**, **53.1-40.02**, **53.1-131.2**, **53.1-151**, **53.1-165.1**, and **53.1-202.3** of the Code of Virginia, relating to robbery. Conforms certain provisions of the Code referencing robbery to the degrees of robbery offenses established by Chapter 534 of the Acts of Assembly of 2021, Special Session I. These changes include: (i) limiting to the three higher degrees of robbery certain non-robbery crimes for which

committing such crime with the intent to commit a robbery is an element of the offenses, (ii) limiting the types of robbery that are included in the definition of "acts of violence" to the two higher degrees of robbery, (iii) clarifying how robbery offenses will be scored on the sentencing guidelines, (iv) allowing persons convicted of the two lesser degrees of robbery to be eligible for conditional release if they are terminally ill and for the enhanced earned sentence credits, (v) allowing persons who are ineligible for parole as a result of being convicted of three certain enumerated offenses to be eligible for parole if convicted of an offense that would constitute robbery by presenting of firearms, and (vi) limiting the application of the three-strikes law to the two higher degrees of robbery and making persons convicted under the three-strikes law eligible for parole if one of the three convictions resulting in the mandatory life sentence would constitute one of the two lesser degrees of robbery. The bill leaves unchanged the current law making all degrees of robbery predicate criminal acts by adding the two lesser degrees of robbery to the definition of "predicate criminal act" and specifying the two higher degrees of robbery are included in the definition of "act of violence." The bill requires the changes made to the eligibility for conditional release of terminally ill prisoners and enhanced earned sentence credits apply retroactively if certain criteria are met.

vi. **HB 102 and SB 356 Court-appointed counsel; raises the limitation of fees. (Passed – Chapters 714 and 770)**

An Act to amend and reenact § **19.2-163** of the Code of Virginia, relating to compensation of court-appointed counsel. Raises the limitation of fees that court-appointed counsel can receive for representation on various offenses in district and circuit courts. The bill also limits the fees charged for the cost of court-appointed counsel or public defender representation to persons determined to be indigent to an amount no greater than the amount such person would have owed if such fees had been assessed on or before June 30, 2024. The bill has a delayed effective date of January 1, 2025.

vii. **HB 156 and SB 638 Jury service; increases from 70 to 73, the age at which a person is exempt from service upon request. (Passed – Chapters 71 and 72)**

An Act to amend and reenact § **8.01-341.1** of the Code of Virginia, relating to exemptions from jury service upon request; age. Increases from 70 to 73 the age at which a person is exempt from jury service upon request.

viii. **HB 167 Special grand juries; circuit court to impanel when an unarmed person is killed by law enforcement. (Left in Committee)**

A Bill to amend and reenact §§ **19.2-206** and **19.2-210** of the Code of Virginia, relating to special grand juries. Directs a circuit court to impanel a special grand jury when an unarmed person is killed by a law-enforcement officer or a correctional officer, as those terms are defined in relevant law, to investigate and report on any

condition that involves or tends to promote criminal activity and consider bills of indictment to determine whether there is sufficient probable cause to return each such indictment as a "true bill." The bill requires the court to appoint a special prosecutor for such special grand jury who may be present during the investigatory stage only when his presence is requested by the special grand jury and may interrogate witnesses provided the special grand jury requests or consents to such interrogation. The bill states that the attorney for the Commonwealth shall not be present during the investigatory stage or interrogate witnesses.

ix. **HB 246 Fines, restitution, forfeiture, penalties, etc.; criminal and traffic cases, itemized statement. (Vetoed by Governor)**

An Act to amend the Code of Virginia by adding a section numbered **19.2-360.1**, relating to fines, restitution, forfeiture, penalties, other costs; criminal and traffic cases; itemized statement. Requires the clerk of the court to provide an itemized statement to any defendant convicted of a traffic infraction or a violation of any criminal law of the Commonwealth or of any political subdivision thereof, or found not innocent in the case of a juvenile, who is sentenced to pay a fine, restitution, forfeiture, or penalty or assessed any other costs in the circuit court or appropriate district court of his county or city at the time such fine, restitution, forfeiture, penalty, or other costs are assessed, or within a reasonable time after assessment. The bill requires the clerk to also provide an updated statement of the outstanding balances of any fines, forfeiture, and penalties, restitution and costs, or payment history upon request of the defendant. The bill has a delayed effective date of January 1, 2025.

x. **HB 290 Attorney General; instituting or conducting criminal prosecutions. (Left in Committee)**

A Bill to amend and reenact § **2.2-511** of the Code of Virginia, relating to Attorney General; instituting or conducting criminal prosecutions for violations of criminal sexual assault and commercial sex trafficking committed against children. Authorizes the Attorney General to institute or conduct criminal prosecutions in cases involving a violation of criminal sexual assault or commercial sex trafficking when such crimes are committed against children.

xi. **HB 452 and SB 362 First offender drug program; previous misdemeanor marijuana conviction, etc. (Passed – Chapters 785 and 811)**

An Act to amend and reenact § **18.2-251** of the Code of Virginia, relating to first offender drug program; previous misdemeanor marijuana conviction. Allows any person to participate in the first offender drug program even if such person was previously convicted of an offense related to misdemeanor possession of marijuana or who has had a previous dismissal of a misdemeanor offense for possession of

marijuana pursuant to the program. Current law prohibits any person with a previous marijuana conviction from participating in the program.

xii. **HB 457 and SB 80 Decreasing probation period; establishes criteria for mandatory reduction (Vetoed by Governor)**

An Act to amend and reenact § **19.2-304** of the Code of Virginia, relating to decreasing probation period; criteria for mandatory reduction; report. Establishes criteria for which a defendant's supervised probation period shall be reduced, including completing qualifying educational activities, maintaining verifiable employment, and complying with or completing any state-certified or state-approved mental health or substance abuse treatment program. The bill provides that a court may decrease a defendant's probation period if warranted by the defendant's conduct and in the interests of justice and may do so without a hearing. The bill also directs the Department of Corrections to meet with relevant stakeholders and provide to the General Assembly by November 1, 2024, a report regarding certain probation practices. The provisions of the bill, other than the requirement that the Department submit a report to the General Assembly, are subject to reenactment by the 2025 Session of the General Assembly.

xiii. **HB 674 Fentanyl; selling, giving, or distributing a substance that contains two mgs. or more, etc. (Left in Committee)**

A Bill to amend the Code of Virginia by adding a section numbered **18.2-248.05**, relating to selling, giving, or distributing a substance containing fentanyl; penalties. Provides that any person who sells, gives, or distributes a substance he knows contains two milligrams or more of any mixture or substance containing a detectable amount of fentanyl, including its isomers, esters, ethers, salts, and salts of isomers, to another person without such person's knowledge that the substance sold, given, or distributed contains fentanyl is guilty of attempted murder of the first degree by poison. The bill also provides that if such sale, gift, or distribution results in the death of the other person from his use of the substance containing fentanyl, then the person who sold, gave, or distributed the substance is guilty of murder of the first degree by poison.

xiv. **SB 504 Police and court records; expungement, term "otherwise dismissed." (Vetoed by Governor)**

An Act to amend and reenact §§ **17.1-205.1**, **19.2-392.2**, as it is currently effective and as it shall become effective, **19.2-392.12**, as it shall become effective, and **19.2-392.16**, as it shall become effective, of the Code of Virginia, relating to expungement of police and court records. Provides that, for the purposes of expungement of police and court records, the term "otherwise dismissed" means to render a legal action out of consideration in a different way or manner than a nolle prosequi or formal dismissal by the trial court. The bill specifies that the term "otherwise dismissed" also includes those circumstances when a person is charged with the

commission of a crime, a civil offense, or any offense defined in relevant law and the initial charge is reduced or amended to another offense, including a lesser included offense or the same offense with a lesser gradient of punishment, so that such person is not convicted of the initial charge and may file a petition requesting expungement of the police and court records relating to the initial charge. Under the bill, unless the subject of the criminal record requests otherwise, any person who files an appeal of a petition for an expungement that was denied shall be allowed to proceed under a pseudonym, and such designation shall apply in the trial court and on any appeal. The bill also allows for the expungement of any emergency or preliminary protective order that was attached or factually related to an expunged charge or offense, provided that a permanent protective order was not ordered as a result of such emergency or preliminary protective order. The bill also provides that if a court finds that the continued existence and possible dissemination of information relating to an arrest may cause circumstances that constitute manifest injustice, including any hindrance to obtain employment, an education, or credit, it shall enter an order requiring the expungement of the police and court records. Under current law, a court shall enter an order of expungement when information relating to an arrest causes or may cause circumstances that constitute a manifest injustice to the petitioner. The bill requires a business screening service, defined in the bill, to destroy all expunged records, as defined in the bill, and to follow reasonable procedures to ensure that it does not maintain or sell expunged records. The bill also provides that an indigent person may file a petition for expungement without the payment of fees and costs and can request court-appointed counsel, who shall be paid from the Sealing Fee Fund. Except for the provisions regarding the filing of an appeal under a pseudonym and the circumstances that constitute manifest injustice, the bill has a delayed effective date of January 1, 2026.

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What's Keeping the Construction Industry Up at Night...and How to Get Some Sleep!

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Virginia Construction Updates: What's Keeping the Construction Industry Up at Night?

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Gentry Locke Seminar
2024

I. Introduction

Virginia is home to a dynamic construction industry. As the law in Virginia continues to develop, owners, contractors, and other construction professionals must be able to make informed decisions for their businesses.

Construction law in Virginia has seen several significant changes in recent years. Along with legislative updates to payment requirements, construction professionals continue to navigate difficult waters when dealing with mechanic's liens. In addition, the law surrounding notice requirements, indemnification, and waiver of claims provisions continues to develop in the courts.

II. Legislative Changes: Payment Requirements and Contractual Provisions

A. *Prohibition of Pay-if-Paid.* In 2022, Governor Youngkin signed Senate Bill 550 into law. This bill adopted changes regarding "pay-if-paid" provisions.

A "pay-*if*-paid" clause typically makes the owner's payment of the general contractor a condition precedent to any obligation for the general contractor to pay its subcontractors.

In contrast, a "pay-*when*-paid" provision typically allows an unpaid general contractor to delay payment to subcontractors for a reasonable time—payment by the owner is not a condition precedent under a "pay-when-paid" provision.

1. Historically, Virginia expressly approved pay-if-paid and pay-when-paid clauses where the contractual language was facially clear.[2]

   The 2022 legislative changes **prohibited pay-if-paid** clauses in both private and public construction contracts and required general contractors to take on an obligation to pay their subcontractors—and so on down the chain of contract.[3]

   In general, under these changes, **a contractor is required to pay its subcontractor within the *earlier* of:**
   a. **60 days after the subcontractor submits its invoice**, or
   b. **7 days after payment** from the owner or contractor above it.[4]

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[1] Special thanks to Carter B. Leverette for his contributions to this outline.
[2] *See Galloway Corp. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 464 S.E.2d 349 (Va. 1995).
[3] *See* 2022 Va. Acts 727.
[4] *Id.*

Pay-when-paid clauses remain valid, subject to the outer requirements of these statutory payment timing provisions.

2. The 2022 legislation had several holes. Effective July 1, 2023, several new revisions help clarify the 2022 changes[5]:

    a. The definitions section of the Virginia Prompt Payment Act (Va. Code § 2.2-4347) has been updated. The revised section now defines a "construction contract," defines "general contractor" alongside "contractor," and cleans up other language.

    b. **Va. Code § 2.2-4354** now expressly provides that a general contractor is obligated to pay its subcontractors, *even though* it has not itself been paid, "within 60 days of the receipt of an invoice following satisfactory completion of the work for which the subcontractor has invoiced."[6]

    If the contractor withholds payment, it must notify the subcontractor in writing within 50 days of receiving an invoice of its intention to withhold payment and the reason for nonpayment. The contractor's notice must specifically identify:

    (i) the contractual noncompliance,
    (ii) the dollar amount being withheld, and
    (iii) the lower-tier subcontractor responsible for the contractual noncompliance.[7]

    c. **Va. Code § 11-4.6** has been modified for consistency with §§ 2.2-4347 and 2.2-4354.

    A "contractor" or "general contractor" under this section is defined by reference to the definition in the contractor licensing statute, § 54.1-1100:

    "'*Contractor*' means any person, that for a fixed price, commission, fee, or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing, managing, or superintending in whole or in part, the **construction, removal, repair or improvement of any building or structure** permanently annexed to real property owned, controlled, or leased by him or another person or any other improvements to such real property."[8]

    A "subcontractor," meanwhile, is defined by reference to § 2.2-4347:

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[5] *See* 2022 Bill Text VA H.B. 2500.
[6] Va. Code § 2.2-4354. *See also id.* (requiring payment to subcontractor or notice of intent to withhold within seven days of receiving payment from owner).
[7] *Id.*
[8] *See* Va. Code § 54.1-1100 (emphasis added).

"'*Subcontractor*' means any entity that has a contract to **supply labor or materials to the contractor to whom the contract was awarded** or to any subcontractor in the performance of the work provided for in such contract."[9]

New language clarifies that an owner must notify the contractor within 45 days of receiving an invoice of the owner's intention to withhold all or part of the invoice, "specifically identifying the contractual noncompliance and the dollar amount being withheld."[10]

Similarly, just as in § 2.2-4354, a contractor must notify a subcontractor in writing within 50 days of receiving an invoice of its intention to withhold payment. The contractor's notice must specifically identify:

(i) the contractual noncompliance,
(ii) the dollar amount being withheld, and
(iii) the subcontractor responsible for the contractual noncompliance.[11]

The contractor's right to withhold payment arises from the "subcontractor's noncompliance with the terms of the contract" rather than the subcontractor's "breach of contract."[12]

References to "higher-tier" and "lower-tier" contractors have been replaced with "general contractor" and "subcontractor."[13]

New language also clarifies that the prompt payment, notice, and interest provisions generally flow down the chain to subcontracts between subcontractors and lower-tier subcontractors or suppliers. Importantly, there is an **exception**: these provisions do not flow down:

(i) if the project is a **single-family residential** project, or
(ii) if the value of the project or aggregate of projects under the construction contracts is **less than $500,000**.[14]

B. Both § 2.2-4354 and § 11-4.6 expressly provide that their restrictions on a contractor's ability to withhold payment **do not apply to retainage provisions**. In addition, § 2.2-4354 does not apply to contracts awarded solely for professional services from an architectural and engineering firm.

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[9] Va. Code § 2.2-4347 (emphasis added).
[10] *See* 2022 Bill Text Va. H.B. 2500.
[11] *See id.*
[12] *See id.*
[13] *See id.*
[14] *See id.*

III. Mechanic's Liens: A Primer on Timing

A. *Mechanic's Lien Perfection.* A person who performs labor or furnishes materials of the value of $150 or more for the construction or repair of a building has a statutorily created lien on the property if it is perfected according to statutory requirements.[15] **Va. Code § 43-4** governs the perfection of a valid mechanic's lien.[16] A mechanic's lien is inchoate unless perfected,[17] and the statutory requirements for perfection of the lien must be **strictly construed.**[18]

1. To perfect the mechanic's lien, the claimant must record a **memorandum of mechanic's lien** with the clerk of court. The lien must show:
   a. the names and addresses of the owner of the property and the claimant of the lien;
   b. the amount and consideration of the claim;
   c. the time or times when the amount is or will be due and payable; and
   d. the date from which interest is claimed.

   The required information must be verified by the oath of the claimant or the claimant's agent, including a statement of the claimant's intention to claim the benefit of the lien and a brief description of the property on which the lien is claimed. The memorandum must also contain the claimant's license or certificate number, if any, and the issue and expiration dates for the license or certificate.

   Va. Code §§ 43-5 (for contractors), 43-8 (for subcontractors), and 43-10 (for lower-tier subcontractors) provide **statutory forms for the memorandum of mechanic's lien**. Included in each section is a safe harbor for a lien claimant who "substantially" complies with the provided form. Va. Code § 43-15 also provides that a lien will not be invalidated if the memorandum is not willfully false, reasonably identifies the property, and "conforms substantially" with the requirements of §§ 43-5, 43-8, and 43-10. The Supreme Court of Virginia has held that a defect is substantial "if it would prejudice a party or if it would thwart one of the purposes underlying the statute."[19]

2. Equally as critical as the memorandum requirements are the **strict timing requirements** for recording the memorandum and claiming payment for completed work. If the lien is not perfected in the statutory manner within the proper time, it is unenforceable.[20]

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[15] Va. Code § 43-3.

[16] § 43-4 governs memorandum requirements for contractors. Subcontractors, as well as claimants providing labor or materials to subcontractors, must meet the requirements of § 43-4 as well as additional notice requirements in §§ 43-7 and 43-9, respectively.

[17] *DeWitt v. Coffey*, 150 Va. 365, 143 S.E. 710 (1928).

[18] *Clement v. Adams Bros.-Paynes Co.*, 113 Va. 546, 75 S.E. 294 (1912).

[19] *Ulka Desai v. A. R. Design Grp., Inc.*, 293 Va. 426, 435, 799 S.E.2d 506, 510 (2017).

[20] *See Wallace v. Brumback*, 177 Va. 36, 46, 12 S.E.2d 801, 811 (1941).

a. The "**90-Day Rule**" provides that a lien claimant may not record the memorandum later than 90 days from the last day of the month in which the claimant last performed labor or furnished materials, and in no event later than 90 days from the time work on the project is terminated.

b. The "**150-Day Rule**" provides that the memorandum may not include amounts due for labor or materials furnished more than 150 days prior to the last day on which labor was performed or material furnished prior to the recording of the memorandum.

(i) This does not apply to sums withheld as retainage up to 10% of the contract price or to sums not yet due because of nonpayment to the party with whom the lien claimant contracted.

3. On one-family or two-family residential projects, the building permit may specify a **mechanic's lien agent** to receive notice from anyone seeking payment for labor performed or material furnished.[21] If the building permit lists a mechanic's lien agent, any contractor or supplier must first provide notice to the mechanic's lien agent **before** performing work or suppling materials, in order to be entitled to perfect and enforce a mechanic's lien later.[22]

B. *Mechanic's Lien Enforcement.* Unlike the perfection requirements, the remedial statutory provisions for enforcing a perfected lien should be liberally construed.[23] In general, the lien must be enforced by filing a complaint in the jurisdiction where the building or structure is situated or where the owner resides.[24] The plaintiff must include an itemized statement of the account, showing the amount and character of work done or materials furnished, the prices charged, any payments made, the balance due, and the time from which interest is claimed on the balance.[25]

IV. Notice Requirements for Claims

A. *Requiring Notice for Claims.* In many cases, a contractor (or owner) may wish to require its subcontractor (or general contractor) to provide specific written notice of any claim under the parties' agreement. Virginia case law protects the ability to impose strict notice requirements, and the parties must comply with such contractual notice requirements. **Actual notice that does not satisfy the contract is insufficient.**

B. AMEC Civil—*General Principles.* In *Commonwealth v. AMEC Civil LLC*, 280 Va. 396, 699 S.E.2d 499 (2010), the Supreme Court of Virginia addressed a notice of claims requirement in a contract between VDOT and AMEC Civil. Though AMEC Civil

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[21] Va. Code § 43-4.01(B).
[22] Va. Code § 43-4.01(C).
[23] *Clement*, 113 Va. 546, 75 S.E. 294 (1912).
[24] Va. Code § 43-22.
[25] *Id.*

provided **actual written notice**, the Supreme Court of Virginia held that this **was insufficient to satisfy the contractual requirements** and the strictly construed statutory requirements on which the contract was based. As to some of AMEC Civil's claims, it purported to have put VDOT on actual notice of its intention to bring claims against VDOT, and it relied upon documented minutes of meetings to constitute written notice. However, the Supreme Court of Virginia held AMEC Civil to the standard of *Va. Code Ann.* § 33.1-386(A), which the parties had incorporated into their contract and required that "a written document [be] delivered to VDOT clearly stating the contractor's intention to file a claim."[26] Furthermore, as to claims for which AMEC Civil had written letters to VDOT declaring its intention to file suit, the Supreme Court held that AMEC Civil had not complied with the timing requirements outlined in the same statute.[27] This case establishes that, in Virginia, parties will be strictly held to agreed-upon notice procedures and timelines.

C. *Subsequent Application.* The strict construction of notice requirements from *AMEC Civil* was later applied to a contract between a contractor and subcontractor in *SNC-Lavalin Am. Inc. v. Alliant Techsystems, Inc.*, 2011 U.S. Dist. LEXIS 118312 (W.D. Va. 2011). There, the court also refused to treat actual notice as sufficient, instead holding that the contractual notice requirements had to be strictly met. The subcontractor argued that because the changes made to the construction plan were at the direction of the general contractor–leading to all parties being aware of delay and increased costs–contractually required written notice should be dispensed with. However, the Court disagreed, emphasizing that the contract did not create an exception for actual notice or contractor-directed changes.

In *Coleman-Adams Construction, Inc. v. Mills Heating & Air Conditioning, Inc.*, 93 Va. Cir. 442 (2016), the Amherst County Circuit Court applied *AMEC Civil* and *Alliant*, reaffirming that contractual notice requirements govern. The court emphasized that, as the Supreme Court had stated in *AMEC Civil*, **a written claim document "must clearly give notice of the contractor's intent to file its claim."**[28] Mills offered communications that were given within the contractually specified time period, but failed to clearly give such notice. Similarly, other communications provided actual notice, but fell outside the prescribed window. Because none of the communications offered by Mills complied with the contract's notice requirements, the court granted Coleman-Adams's plea in bar and dismissed the complaint.

V. Indemnification Provisions: Post-*Uniwest* Updates

A. *Va. Code Ann. § 11-4.1.* Virginia's anti-indemnification provision prohibits any provision contained in any construction contract by which the contractor purports to

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[26] *AMEC Civil LLC*, 280 Va. at 408.

[27] *Id.* (discussing how "[t]he statute also requires that such notice be given at one of two times: 1) 'at the time of the occurrence' of the claim; or 2) at the 'beginning of the work upon which the claim . . . is based.' Code § 33.1-386(A).").

[28] *Coleman Adams Contr., Inc. v. Mills Heating & Air Conditioning, Inc.*, 93 Va. Cir. 442, 445 (Va. Cir. 2016) (citing *Commonwealth v. AMEC Civil LLC*, 280 Va. 396, 408, 699 S.E.2d 499, 506 (2010)).

indemnify another party against liability "**caused by or resulting solely from** the negligence of such other party or his agents or employees."[29]

Anti-indemnity statutes generally fall into one of two categories. Some allow indemnification of a party for the party's own negligence unless that party was *solely* negligent. Others do not allow indemnification of a party for its own negligence under any circumstance, regardless of whether the indemnitee was solely at fault. Based on the presence of the word "solely" in the statute, it would appear that Virginia might bar indemnification only for the indemnitee's sole negligence. However, the decision discussed below reveals that this is not the case.

B. *The* Uniwest *Decision*. The Supreme Court of Virginia, however, has determined that **Virginia's anti-indemnity statute actually prohibits indemnification for the indemnitee's own negligence in *all* circumstances—not just where the indemnitee is *solely* negligent.**

In *Uniwest Construction, Inc. v. Amtech Elevator Services, Inc.*, 280 Va. 428, 699 S.E.2d 223 (2010), the Court treated the phrases "caused by" and "resulting solely from" as disjunctive. Therefore, the phrases should be taken separately, and, as a result, the statute disallows indemnification for damages "caused by" the indemnitee's negligence as well as those "resulting solely from" the fault of the indemnitee. After *Uniwest*, Virginia construction contracts cannot include an indemnity provision for the indemnitee's own negligence, even if the resulting damages are also caused by another party's negligence.

C. *Subsequent Decisions*. Since *Uniwest*, other cases have continued to apply the Supreme Court of Virginia's interpretation of § 11-4.1.[30] The focus of such cases, however, has sometimes shifted from the content of the statute to whether the statute applies at all.

As a preliminary matter, **§ 11-4.1 only applies to "contracts relating to . . . construction."** Several cases have treated the statute as inapplicable because the contract at issue was not related to construction under the meaning of § 11-4.1.

1. For example, courts have held that contracts related to the **sale of materials** for a construction project and **rental contracts for construction equipment** do **not fall within § 11-4.1.**[31]

2. Similarly, the purchase from an architect of **plans for a building** to be constructed without the architect's participation, while related to construction

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[29] Va. Code § 11-4.1.

[30] *See, e.g., Hensel Phelps Contr. Co. v. Thompson Masonry Contractor, Inc.*, 292 Va. 695, 791 S.E.2d 734 (2016); *Morris v. DSA Roanoke LLC*, 2019 Va. Cir. LEXIS 204 (Va. Cir. 2019).

[31] *Travelers Indem. Co. v. Lessard Design, Inc.*, 321 F. Supp. 3d 631, 636 (E.D. Va. 2018); *RSC Equip. Rental, Inc. v. Cincinnati Ins. Co.*, 54 F. Supp. 3d 480 (W.D. Va. 2014).

in the abstract, would not be a "contract related to construction" under § 11-4.1.[32]

3. However, a contract that relates directly to construction and imposes supervisory duties during the construction phase of building falls within § 11-4.1.[33]

Courts have continued to emphasize that § 11-4.1 must be construed narrowly because it is an exception to Virginia's public policy in favor of broad freedom to contract.[34] Moving forward, construction professionals should pay close attention to the characteristics of contracts that may bring them within the anti-indemnity coverage of § 11-4.1. From a practical standpoint, contracts that merely procure designs, materials, or equipment for construction projects, without creating ongoing obligations during the actual building phase, may not be subject to the same anti-indemnity provisions as broader agreements.

D. *Recently an Indemnification Provision was Interpreted to Only Cover Third-Party Claims.* In *5513 6129 Leesburg Pike, Falls Church, LLC v. Paramount Constr. Servs., LLC*, No. CL 2022-411, 2024 Va. Cir. LEXIS 38 (2024), the Court held that the parties' indemnification provision only encompassed third-party claims.[35] Therefore, the Court found that Indemnitor's liability was not triggered when the claim was only brought by the indemnitee.[36] In this case, the Court construed the words "defend" and "claim" in the parties' contract to mean that a duty to indemnify could only arise if the indemnitee had to defend itself from a claim brought against it by a third-party.

This case is the *only* Virginia case to interpret an indemnification provision in this manner. Still, it is important that construction professionals are aware of this decision. The Court ignored the other language in the parties' indemnification provision, such as "hold harmless the Owner … from and against claims, damages, losses, and expenses, included but not limited to attorneys' fees."[37] It would be advisable for parties to include explicit language in their indemnification provisions to avoid this unfortunate outcome, such as "*this provision includes but is not limited to third-party claims.*"

E. *Application.* Contractual indemnity provisions in construction contracts should be structured to avoid running afoul of *Uniwest* by:

1. inserting **savings language**, such as "*To the fullest extent permitted by law*", at the beginning of the indemnity provision; and by

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[32] *Lessard Design*, 321 F. Supp. 3d at 636.
[33] *Id.* at 636-37.
[34] *RSC Equip. Rental*, 54 F. Supp. 3d at 485-86; *Allstate Ins. Co. v. Structures Design/Build, LLC*, 2016 U.S. Dist. LEXIS 34349, *16 (W.D. Va. 2016).
[35] *5513 6129 Leesburg Pike, Falls Church, LLC*, No. CL 2022-411, 2024 Va. Cir. LEXIS 38 at *6.
[36] *Id.* at *7.
[37] *Id.* at *4.

2. inserting at the end of the indemnity provision specific **language which ties the indemnity obligations to the amount of fault of the respective parties**: i.e., "*Contractor shall indemnify the Owner in an amount proportional to the amount of Contractor's own negligence or fault (and the negligence or fault of its subcontractors, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable), compared to the proportional amount of fault, if any, attributable to all parties indemnified hereunder.*"

F. *Duty to Defend Provisions*. Another significant update to Virginia law on indemnification provisions is the legislature's **prohibition of "duty to defend" obligations in contracts with design professionals**. While traditional indemnification provisions often impose a duty to defend claims brought against the indemnitee, the General Assembly adopted changes in 2020 that prohibit such language.

1. **Va. Code § 11-4.4** is the corollary to § 11-4.1 for contracts with architects and engineers. The legislature added a paragraph to § 11-4.4 stating the following:

   Any provision contained **in any contract relating to the planning or design of a building**, structure, or appurtenance thereto, including moving, demolition, or excavation connected therewith, or **any provision** contained **in any contract relating to the planning or design of construction projects** by which any party purports to **impose a duty to defend** on any other party to the contract, is **against public policy** and is **void and unenforceable**.

2. The effect of this change is that, for qualifying contracts after 2020, the **inclusion of a duty to defend obligation renders the entire provision void and unenforceable.**

3. This change **applies to any provision** in a qualifying contract, not just an indemnification provision.

In light of this change, owners, contractors, and design professionals should take care to avoid duty to defend obligations in their contracts. Otherwise, entire provisions of those contracts risk being declared void and unenforceable.

VI. Emerging Issue – *Va. Code Ann.* § 11-4.1:1

A. *Va. Code Ann.* § 11-4.1:1. Virginia's waiver of payment bond claims and contract claims prohibits any provision contained in any construction contract that "waives or diminishes a subcontractor's, lower-tier subcontractor's, or material supplier's right to [1] assert payment bond claims or [2] his right to assert claims for demonstrated additional costs in a contract executed ***prior to*** providing any labor, services, or materials is null and void." [38] Even though this provision is almost ten years old, effective July 1, 2015, its application in the world of construction contracts reamins an emerging issue that construction professionals should be aware of.

[38] *Va. Code Ann.* § 11-4.1:1 (emphasis added).

This provision relies upon *Va. Code Ann.* § 43-1's definition of subcontractor: "all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor."[39] Importantly, this provision does not prevent a subcontractor from waiving or diminishing its right to assert payment bond claims or to assert claims for demonstrated additional costs ***after*** performing its obligations under a construction contract. The provision only prevents a subcontractor from contracting for such waivers ***before*** performing its obligations under a construction contract. Therefore, any provision in a construction contract that purports to make such waivers before the work is performed will be declared ***null and void***.

B. *Emerging Application. Strata Solar, LLC v. Fall Line Constr.*, LLC, No. 4:22cv106, 2023 U.S. Dist. LEXIS 210324 (E.D. Va. Nov. 13, 2023), is the first time a court sitting in Virginia had the opportunity to directly address this new provision. In this case, the general contractor was Strata, and the subcontractor was Fall Line. Strata had made several changes to the project plans, which had led to Fall Line suffering delays and incurring additional costs. When a dispute arose over payment for these extra costs, Strata relied upon a provision in the parties' subcontract titled "no damages for delay," which prevented Fall Line from increasing the price for delays even if caused by Strata.[40] Fall Line argued that this provision was "unenforceable as a matter of Virginia law because [it] 'attempt[ed] to waive and/or diminish Fall Line's right to assert claims for its additional costs … in advance of Fall Line'" performing work on the project.[41] The Court agreed, holding that the subcontract provision "impermissibly diminish[ed] Fall Line's right as a subcontractor to assert claims for demonstrated additional costs" in violation of *Va. Code Ann.* § 11-4.1:1.[42] The Court discussed how such contractual provisions were valid before the enactment of this statute. However, **any provision "that waives or diminishes … [a subcontractor's] right to assert claims for demonstrated additional costs" would be encompassed by and invalidated under this statute.**[43]

C. *Further Illustrations of the Type of Contract Provision Encompassed by § 11-4.1:1.* Like *Strata* above, the Court in *BAE Sys. Ordnance Sys. v. Fluor Fed. Sols., LLC*, Civil Action No. 7:20-cv-587, 2024 U.S. Dist. LEXIS 17020 (W.D. Va. Jan. 31, 2024), invalidated a provision in the parties' agreement. The provision in question was a "Limitation on Damages" provision, which limited the parties' claims for damages to thirty million dollars. Interpreting the parties' contract, the Court ultimately held that this provision did not apply to directed changes that increased or decreased the costs or time required for performance. However, the Court held that even if the liquidated on damages provision did encompass such costs, it would be "null and void under Virginia

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[39] *Va. Code Ann.* § 43-1.
[40] *Strata Solar, LLC*, No. 4:22cv106, 2023 U.S. Dist. LEXIS 210324 at *7–9 (E.D. Va. Nov. 13, 2023).
[41] *Id.*
[42] *Id.* at *8.
[43] *Id.* at *9 (quotations omitted) (alterations in original).

Code § 11-4.1:1 to the extent" that it limited the subcontractor's ability to recover for increased costs.[44]

In *Misc. Metals, Inc. v. Travelers Cas. & Sur. Co. of Am.*, No. 1:16-cv-499 (LMB/MSN), 2016 U.S. Dist. LEXIS 202780, at *4 (E.D. Va. Aug. 10, 2016), the Plaintiff argued that *Va. Code Ann.* § 11-4.1:1 voided a forum selection clause, which required it to bring its claims in state court rather than federal. The Court was unconvinced, reasoning that the "[p]laintiff does not explain how its right to litigate its claim would be waived or diminished by litigation in state court rather than in federal court."[45] The above cases illustrate that a provision that prospectively waives or diminishes a subcontractor's right to assert claims for demonstrated additional costs will be found null and void. Construction professionals should be forward-looking when drafting their subcontracts to ensure that a provision does not waive or diminish such rights.

VII. Conclusion

Given the changing legislative landscape and the potential consequences of these topics, construction professionals should be aware of and on the lookout for these and related issues. Further development in these areas, whether from the legislature or in the courts, could continue to reshape construction law in Virginia. Careful planning, drafting, and communication can help businesses avoid undesirable or unexpected outcomes and keep the industry moving forward.

[44] *BAE Sys. Ordnance Sys.*, Civil Action No. 7:20-cv-587, 2024 U.S. Dist. LEXIS 17020 at *20–21.
[45] *Misc. Metals, Inc.*, No. 1:16-cv-499 (LMB/MSN), 2016 U.S. Dist. LEXIS 202780, at *4.

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Essential Ethics Rules to Use Every Day in Your Legal Practice: Using the Ethics Rules as Best Business Practices

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Gentry Locke Seminar

September 20, 2024 – Richmond

I. Purpose of this program.

The purpose of this program is to suggest ways to implement the Virginia Rules of Professional Conduct (the "Ethics Rules") as part of the practice of law and to benefit clients, achieve better outcomes, promote efficient and effective legal practices, and—of course—to comply with the Ethics Rules.

What do clients expect?

Clients have high expectations of their lawyers. Given the nature of the lawyer's role, these expectations can be daunting. The Ethics Rules put structure and context in how the lawyer must manage the attorney-client relationship. The elements of the relationship include:

1. The duty of loyalty.

2. Effective work to accomplish the objectives of the representation.

3. Professional competence.

4. Good communication. Accessibility and responsiveness.

5. A reasonable fee.

6. The exercise of independent professional judgment.

7. Confidentiality.

The Ethic Rules require specific types of communications with clients in specific circumstances. We have prepared this outline to address the perspectives of the client and the lawyer, in the context of achieving a successful representation. We have not attempted to address every provision of the Ethics Rules. Rather, we have focused on the rules that impact a lawyer's practice every day or in most cases—*i.e.*, the essential rules.

The Preamble to the Ethics Rules states:

> In all professional functions a lawyer should be **competent, prompt and diligent**. A lawyer should maintain **communications** with a client concerning the representation. A lawyer should keep in **confidence** information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

This outline addresses the issues as stated in the Preamble.

II. Establishing the Attorney-Client Relationship: The Engagement Letter and related matters.

Contracts between a client and a lawyer for legal services are a unique type of contract. A client-lawyer contract cannot be analyzed using the conventional modes of commercial contracts. To this point, the Supreme Court of Virginia has stated:

> Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each.

Heinzman v. Fine, Fine, Legum & Fine, 217 Va. 958, 962 (1977).

Any doubts about the effect of or fairness of provisions in the client-lawyer agreement will generally be resolved in favor of the client and against the lawyer.

The Ethics Rules give structure and context to the relationship.

1. The Primary Rules. There are four primary rules that address establishing the attorney-client relationship:

a. Rule 1.7 addresses when a lawyer may have a conflict of interest.

b. Rule 1.2 addresses the scope of the representation.

c. Rule 1.4 addresses the lawyer's duty to communicate with the client on an ongoing basis.

d. Rule 1.5 addresses the lawyer's fees.

2. Rule 1.7. Conflicts of Interests. The Duties of Loyalty and Independent Judgment.

a. Rule 1.7.a provides:

> A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> 1. The representation of one client will be directly adverse to another client; or
>
> 2. There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation; and:

1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation due to each affected client;

2. The representation is not prohibited by law;

3. The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

4. The consent from the client is memorialized in writing.

b. What situations trigger the need for a conflicts analysis?

1. The representation of other parties involved in the same dispute or transaction.

2. The representation of other parties involved in the matter, but in an unrelated matter.

3. The prior representation of other parties involved in the matter.

4. The representation of multiple parties, usually affiliated with each other, in a matter.

5. The lawyer has a business or personal relationship with a party.

6. In cases involving the representation of multiple plaintiffs in a single matter, the lawyer should ask a few questions:

a. Do the defendants have adequate resources to cover all claims by all plaintiffs?

b. Is there insurance coverage available that is adequate to cover the expected claims?

c. In this type of situation, can the lawyer represent multiple plaintiffs when the plaintiffs may be competing for recovery from a limited amount of resources, assets, or insurance coverage?

When these situations exist, the lawyer must analyze the application of Rule 1.7.

c. The Rule 1.7 analysis:

1. **Evaluation**. Will there be a "significant risk" that the representation of the client will be "materially limited" by the lawyer's responsibilities to another client or the "personal interests" of the lawyer?

Think hard about what can go wrong; will either client complain if there is a bad result?

What is the probability of a real problem? Is it possible that one client could claim that the lawyer sacrificed the interests of one client to protect another client or the lawyer's own interests?

2. Determination. The lawyer must conclude that he or she can proceed under the Rule 1.7 standard.

3. Disclosure. The lawyer must make a meaningful disclosure to all of the affected clients.

4. Document the consent. Prepare a letter to each client. Explain the scope of the disclosure and the client's consent. Give notice of the circumstances that may require a lawyer's withdrawal in the future if a potential conflict of interests develops later in the proceeding or representation.

Based on our experience, if you have too many clients with potentially competing interests, it will show up later in the litigation or the representation. If there is a real problem with conflicting interests, it is better to address that problem as early in the representation as is possible.

When there is a real conflict under Rule 1.7, hire separate counsel.

4. The Engagement Letter.

a. The primary tool for establishing and defining the attorney-client relationship is the Engagement Letter.

b. The goals of the Engagement Letter:

1. Define the objectives and the scope of the representation.

2. Define the duties of the client to the lawyer.

3. Establish the lawyer's fee.

4. State the terms and conditions of the representation.

The Engagement Letter should be a positive document; it should be practical and fair to both the client and the lawyer.

A good Engagement Letter takes time and effort; but it can also set the tone for the entire relationship, clarify the expectations of the client and the lawyer, and avoid misunderstandings.

c. What can go wrong?

The lawyer and the client should also consider what can go *wrong*:

1. A bad outcome.

2. A poor relationship between the client and the lawyer.

3. The client fails to cooperate with the lawyer.

4. The client is dissatisfied with the lawyer's work.

5. The client fails to pay the lawyer's fees.

Does the Engagement Letter address what happens when something goes wrong? Under what circumstances may the lawyer terminate the relationship?

d. The Scope of Representation. Rule 1.2.

The Engagement Letter should state the objectives of the representation and the scope of the representation. Rule 1.2 allows the Engagement Letter to define and limit the scope of representation. The Engagement Letter can (and should) limit the scope of the representation.

The scope of representation will vary depending on the nature of the representation and the client:

1. Litigation matters.

2. Transactions and business matters.

3. Fixed fee matters.

4. Trusts and estates.

5. Ongoing representation in business or personal matters.

6. Plaintiff's contingency fees.

7. Domestic relations.

8. Criminal.

9. Insurance defense matters.

10. Other specific types of representation.

In drafting the Engagement Letter, the lawyer should consider the appropriate limitations on the scope of representation:

a. Exclude other disputes.

b. Exclude other transactions that are not identified in the Engagement Letter.

c. Identify the specific documents or work product to be prepared.

d. Exclude appeals.

e. Ongoing client communications. Rule 1.4.

Rule 1.4.a and 1.4.b provide that the lawyer shall keep the client reasonably informed on the status of the matter and explain the matter to permit the client to make informed decisions. The Engagement Letter is the first step in this ongoing communication process. This issue is discussed below.

f. Fees. Rule 1.5.

1. Reasonableness and Disclosure.

The key elements of Rule 1.5 include reasonableness and disclosure. Rule 1.5.a provides that a lawyer's fee shall be reasonable and lists the factors to be considered in determining the reasonableness of the fee. Rule 1.5.b provides that the lawyer's fee shall be reasonably explained to the client, including the amount, basis or rate of the fee.

2. Contingent Fee Arrangements.

Rule 1.5.c provides that, in most types of cases, a fee may be contingent on the outcome of the matter. A contingent fee agreement must state the method by which the fee is determined.

3. Shared Fees.

Rule 1.5.e allows a lawyer to share fees with lawyers in a different firm. The client however, must be advised of and consent to the fee sharing arrangement. See Rule 1.5; Comment 7.

The agreement between two lawyers to share fees should be in writing and state how the fees will be shared and what the role of each lawyer will be in the representation.

In a shared fee arrangement, the referring attorney is not required to participate actively in the representation. Rule 1.5.e allows a law firm to divide a fee with a referring attorney when the referring attorney assumes no responsibility to the client and will provide no further services to the client. LEO 1739.

4. Advance Payments/Retainers.

A fee agreement can include a retainer payment or advance payment of a fee. The lawyer is obligated to return any unearned portion of an advanced fee payment. Rule 1.5, Comment 4.

5. Disputes.

The Engagement Letter can address how disputes about the lawyer's fee will be addressed.

6. LEO 1606 (2016)

Legal Ethics Opinion 1606 (2016) is a "Compendium Opinion" that summarizes the guidelines for fee issues, including: the unique nature of client-lawyer contracts for legal services; the required handling of retainers; the required handling of advanced legal fees; non-refundable legal fees; fixed fees; and contingency fees.

g. Identify the client/multiple clients.

1. The Engagement Letter should identify the client (or clients) in the representation.

2. Disclaim any representation of constituents or affiliates of the client that are not specifically identified as clients. See Rule 1.13 (organization as client) and Rule 1.7, Comment 10 (lawyer to explain who the client is).

3. **Multiple clients.** The Engagement Letter should address the issues involved in matters in which the lawyer is representing multiple clients.

a. How will the lawyer communicate with the clients?

b. Who will make decisions for the clients?

c. Who will pay the lawyer's fee?

d. A statement of the factors under Rule 1.7 that allow the multiple representation; including that there are no material difference in the interests or positions of the multiple clients. See Rule 1.7, Comment 29.

e. An explanation of how the multiple representation may affect the application of the attorney-client privilege as to confidential and sensitive information.

g. Additional matters to consider in an engagement letter.

1. The expectation that the lawyer will communicate with the clients and others by email and other forms of electronic communication.

2. Preserving emails and electronic communications in litigation matters.

3. **Social media.** In litigation matters, advising the client to refrain from or limit participation in social media activities.

4. **Outcomes.** Disclaim any prediction of a specific outcome.

5. **Expected expenses.** Identify any significant expenses that the client will be responsible for.

6. **Expected lawyer's fee.** Disclaim any estimate of the amount of specific legal fees.

7. Disclaim any third party beneficiaries.

8. Explain the rights of the client and the lawyer to terminate the representation.

i. **Possible elements of the Engagement Letter:**

In integrating these provisions of the Ethics Rules, an Engagement Letter could include the following elements:

1. Identify the client or clients.

2. State the objectives of the representation.

3. State the specific subject matter of the representation.

4. Identify the expected legal work required and the plan for executing the work.

5. A discussion of the legal, factual, and business issues involved.

6. A discussion of the expected course of the representation.

7. A discussion of the expected role of the client.

8. A explanation of the lawyer's fee and the billing process.

9. A discussion of the expected significant costs the client will be responsible for.

This type of substantive discussion will help the lawyer and the client to have a clear understanding of the representation and the expectations of both.

5. The organization as the client and the representation of constituents.

Rule 1.13(a), (d), (e). Organization as client. Comments 1, 9, 10, and 12.

a. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

* * *

d. In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

e. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.

Comment 1. The entity as the client. An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations.

Comment 10. Clarifying the lawyer's role. When the organization's interests may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Comment 12. Dual representation.

Paragraph (e) Recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's representation of both is controlled by the confidentiality and conflicts provisions of these rules.

6. Prospective clients. Rule 1.18.

a. Rule 1.18.a provides that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship is a "prospective client".

Rule 1.18.b provides that a lawyer owes a duty of confidentiality to a prospective client.

Rule 1.18.c provides that a lawyer may not represent a client adverse to a prospective client if the lawyer received information from that prospective client that could be harmful to that person.

b. Best practices.

1. Run a conflicts check before any substantive communication with a prospective client.

2. Advise the prospective client not to provide any confidential or sensitive information to the lawyer (to the extent possible) until the lawyer has decided whether to accept the representation.

3. Decline to speak with a prospective client if the lawyer knows that he or she will probably not accept the representation.

4. In appropriate circumstances, document that the lawyer declined the representation and did not receive any confidential or sensitive information from the prospective client.

III. Ongoing Communications With Clients. Rule 1.4

1. Rule 1.4 requires a lawyer to communicate with clients. The Rule has three basic elements:

a. The status of the matter. Rule 1.4.a.

b. Explanations reasonably necessary to permit the client to make informed decisions. Rule 1.4.b.

c. Inform the client of pertinent facts and of settlement communications from another party. Rule 1.4.c.

2. **Preserving the attorney-client privilege.** Rule 1.6. The lawyer should prominently mark confidential communications as protected by the attorney-client privilege.

3. **Means of communications.** The lawyer can keep the client advised of the status of the matter by combination of formal reports (letters, memoranda, substantive emails) and/or less formal communications (copies of communications with others; informal emails; telephone discussions; verbal status reports).

4. **The lawyer's goal**. The lawyer's goal is to allow the client to understand the status of the matter and what the lawyer is doing. The lawyer should avoid the situation where the client is calling the lawyer and asking what is going on. See Rule 1.3, Comment 3 ("Perhaps no professional shortcoming is more widely resented than procrastination.").

5. **Status**. A lawyer's failure to keep the client advised on the status of a matter can be the basis for professional discipline. See *Green v. Virginia State Bar*, 278 Va. 162, 170 (2009); *Bauman v. Virginia State Bar*, 299 Va. 80, 95-97 (2020).

6. **Settlement**. In *State Farm Mutual Automobile Insurance Company v. Floyd*, 235 Va. 136, 144 (1988), the lawyer representing a defendant in an automobile accident, appointed by an insurance company, did not advise the defendant of a settlement offer from the plaintiff during the trial. The Court held that the attorney's failure to communicate the plaintiff's offers to the defendant driver did not, by itself, amount to a furtherance of the insurer's interest with intentional disregard of the financial interest of the insured.

IV. Billing.

1. **Engagement Letter.** The Engagement Letter should state when and how the lawyer will bill the client.

2. **Time entries/billing entries/establishing value.**

a. The lawyer should prepare billing entries with care. The lawyer should use periodic billing as a means to report to the client what the lawyer is doing and the value of the lawyer's work. Clients read lawyer's bills closely; and they have opinions about what and how the lawyer is billing for.

The lawyer's time and task entries, and other work descriptions, should describe the work done. The entries can describe communications between the lawyer and the client to document the lawyer's compliance with the client communication provisions of Rule 1.4.

The client should not be left to wonder what work was done. In this context, detailed billing entries promote a good attorney-client relationship.

3. Timely billing.

Clients expect a lawyer to send timely bills. The lawyer should meet this expectation—a good lawyer takes care of business.

The lawyer should confirm that the bills are sent to the correct person, at the correct address, using the form of communication the client prefers, and including the information the client expects.

4. Large bills. If a lawyer is sending a large bill after a period of significant work or a billing milestone has been reached, consider calling the client and explaining that the bill is coming and what is in the bill. This type of discussion can be awkward, but it is much better than having the client have a moment of frustration or anger when he or she opens the bill—no matter how good the lawyer's work has been.

5. When is a fee earned?

The case law establishes that a court will consider the factors listed in Rule 1.5.a and 1.5.b in evaluating the reasonableness of a lawyer's fee. The key factors include:

a. The time and labor required.

b. The novelty and difficulty of the questions presented.

c. The fee customarily charged in the locality for similar services.

d. The amount of money involved in the dispute.

e. The results obtained.

f. The lawyer's experience.

g. Whether the lawyer adequately explained the fee to the client.

In *Bauman v. Virginia State Bar*, 299 Virginia 80, 95-97 (2020), the Court upheld a disciplinary finding that a lawyer had charged an unreasonable fee under Rule 1.5.a in a dispute involving a trust and estate matter. The lawyer charged the client $7,500 as "flat fee" for the work. The Court's decision was based on several factors, including: the lawyer's failure to accomplish the objectives of the representation; the matter was not complex; the lawyer did not document or use the legal research that he said he had performed; the fee significantly exceeded the fees charged by the other attorneys involved in the case; the fee was based, at least in part, on work the lawyer never performed; the fee was not justified by the time and labor required to resolve the matter; and the lawyer's cursory billing statement of "Professional Services Rendered" did not establish that the charged fee was reasonable.

6. Managing accounts receivable.

The lawyer should follow up with the client on keeping the payment of lawyer fees current. If the client has questions about the billing, answer the questions. No one benefits from overdue or accumulated unpaid lawyer fees.

7. Closing statement in contingency fee cases.

Rule 1.5.c provides:

> Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

8. Closing files.

It is a best practice to notify a client that a matter has been completed and that the lawyer is closing the file.

9. Time entries in contingency fee cases.

Many lawyers do not like to keep time records in contingency fee cases. Nevertheless, time entries in contingency fee cases can be helpful as a time management and organizational tool. Time entries also allow the lawyer to evaluate whether a case, or type of case, has been profitable.

Finally, the time entries are essential to prove the value of the lawyer services in the context of a quantum meruit or attorney's lien situation (Va. Code § 54.1-3932). See *Heinzman v. Fine, Fine, Legum, and Fine*, 217 Va. 958. 964 (1977) ("Having in mind the special nature of a contract for legal services, we hold that when, as here, an attorney employed under a contingent fee contract is discharged without cause and the client employs another attorney who effects a recovery, the discharge attorney is entitled to a fee based on quantum meruit for services rendered prior to discharge and as security for such fee, to the lien granted by Code § 54-70." (now Code § 54.1-3932)).

V. Client Accounting. Rule 1.15.

Rule 1.15.a.1 provides that all funds received or held by a lawyer on behalf of a client or a third party must be held by a lawyer as a fiduciary. The lawyer must deposit all such funds in an identified trust account. Rule 1.15, Comment 2.

A lawyer must keep the lawyer's funds segregated from the client trust accounts. Rule 1.15.a.3 and 1.15.c.

In *Green v. Virginia State Bar*, 278 Va. 162, 178-9 (2009), the Supreme Court held that a lawyer violated Rule 1.15.a.2 by depositing an advance payment of a legal fee into an escrow account and then withdrawing those funds immediately without the funds being earned.

A lawyer must notify the client of the receipt of client funds. Rule 1.15.b.1.

A lawyer must keep accounting records of client funds. Rule 1.15.b.4, 1.15.c, 1.15.d.

VI. Confidentiality. Rule 1.6.

1. Rule 1.6.a provides that a lawyer shall not reveal information protected by the attorney-client privilege or other information gained in the professional relationship.

A lawyer should explain the attorney-client privilege to the client and how the privilege generally allows confidential communications between the client and the lawyer.

A lawyer is authorized to disclose information in order to carry out the representation.

2. Staff. A lawyer must train and supervise staff to reasonably protect the confidential information of clients. See Rule 1.6.c, 1.6.d, Comment 9; Rules 5.1 and 5.3.

3. Technology, third party vendors, facilities. A lawyer must have appropriate safeguards in place to protect the confidential and proprietary information of clients. Rules 1.6.a, 5.1, and 5.3.

These safeguards could include:

1. Contractual agreements with vendors and service providers requiring confidentiality and non-disclosure safeguards.

2. Leases, other agreements, and physical features of facilities that limit access to areas where confidential and sensitive information is kept.

3. Use of passwords and other security measures to protect access to electronically stored information. Rule 1.6, Comment 21.

4. Use of data backup and data storage practices to protect confidential and sensitive information from loss.

5. Inadvertent disclosure. A lawyer must make reasonable efforts to prevent the inadvertent disclosure of confidential information. Rule 1.6.d, Comment 19.

VII. Technology

1. Rule 1.1 provides that a lawyer shall provide competent representation to a client. One element of competent representation is the ability to work reasonably with technology.

The technological tools available in legal practice include: email; word processing; document management; legal research platforms; electronically stored information and discovery platforms; litigation and case management platforms; database and document management platforms; Excel and spreadsheet platforms; PowerPoint and presentation platforms; electronic depositions and trial transcripts; billing and timekeeping platforms; and resources that check conflicts of interests.

A lawyer must work with the appropriate technological tools and be familiar with less essential tools. A lawyer should have technical assistance available to help the lawyer manage the technology.

VIII. Electronically stored information/discovery.

All discovery is now ESI discovery. A lawyer with a litigation practice must be able to manage the discovery of electronically stored information. These skills include: preserving ESI; the preparation of effective document requests; managing the review of documents and compliance with document requests; managing ESI to allow effective review and evaluation; and the use of ESI in discovery and litigation.

There are several platforms and service vendors available to help manage ESI discovery work. The capabilities and cost of these services vary widely.

It takes time, effort and experience to work through the efficient and effective use of these tools to manage the ESI discovery process.

IX. Settlement.

As discussed above, Rule 1.4.c provides that a lawyer shall inform the client of facts and communications that may significantly affect settlement or resolution of the matter. See Rule 1.4, Comment 5.

X. Supervision. Rules 5.1 and 5.3 and 1.6.d.

Rule 5.1 and 5.3 require that a law firm have measures in place giving reasonable assurances that lawyer and staff conform to the rules.

The measures used to meet this provision can include:

1. Continuing legal education for lawyers.

2. Continuing professional education for non-lawyer staff.

3. Policies and procedures in place to protect confidential and proprietary information.

4. The availability of appropriate resources and technology to lawyers and staff.

5. Ongoing training and day to day supervision.

XI. Candor, Cooperation, and Fair Dealing.

The Preamble to the Ethics Rules states:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

The rules require that lawyers respect the rights of others, including the courts, opposing and adverse parties, and third parties. The primary rules implementing these interests include:

1. Rule 3.1. Meritorious Claims.

2. Rule 3.4. Fairness to opposing parties and counsel.

3. Rule 4.1. Truthfulness in statements to others.

4. Rule 4.2. Communicating with persons represented by counsel. In *Zaug v. Virginia State Bar*, 285 Va. 457 (2013), the Supreme Court held that a lawyer did not violate Rule 4.2 when she answered a telephone call from a represented party, spoke briefly with caller, and terminated the call as soon as was practical in a polite manner.

   Rule 4.2 addresses when a lawyer can speak with employees of a represented party. See Comment 7. See Compendium Legal Ethics Opinion on Rule 4:2; LEO 1890 (2021); Communications with Represented Person.

5. Rule 4.3. Dealing with unrepresented parties.

6. Rule 4.4. Respect for rights of third parties.

XII. Termination of the Attorney-Client Relationship. Rule 1.16.

A client can terminate the attorney-client relationship at any time for any reason. Rule 1.16.a.3; Comment 4.

A lawyer can terminate the representation as permitted under Rule 1.3.b and 1.16.

Rule 1.16.a provides that a lawyer **shall** withdrawal from the representation of a client when the representation will result in a violation of the Rules, the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or the lawyer is discharged.

Rule 1.16.b provides that a lawyer **may** withdrawal from representing a client if withdrawal can be accomplished without material adverse effect on the interest of the client, or if: the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; the client used the lawyer's services to perpetrate a crime or fraud; or the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services; the representation will result in an unreasonable financial burden on the lawyer; or other good cause for withdrawal exists.

In litigation matters, a lawyer is allowed to withdrawal only with leave of court after compliance with notice requirements.

XIII. Experts and third party consultants/vendors.

1. Confidentiality. A lawyer should consider including a provision establishing a duty of confidentiality, non-disclosure, and non-use in all contracts and agreements with experts and third party consultants and vendors that may have access to confidential or sensitive business information of a client.

2. Elements of expert agreement. Agreements with experts and third party consultants should address:

a. The scope of the work. This should be done in some detail.

b. The standard of professional care.

c. The fee.

d. Confidentiality, non-disclosure and non-use of confidential and proprietary information.

3. Discovery of expert communications. Rule 4:1(b)(4) provides that discovery of facts known and opinions held by experts may be obtained only by: an expert interrogatory; deposition of the expert; or upon motion, by further discovery. Drafts of expert reports and expert disclosures are not discoverable except on a showing of exceptional circumstances. Communications between a party's attorney and an expert are not discoverable except for compensation issues and to identify facts or assumptions that the expert considered or relied on.

The Supreme Court has characterized the provisions of Rule 4:1(b)(4) as the "exclusive method" for discovery expert opinions. *Flora v. Shulmister*, 262 Va. 215, 222 (2001).

Under these provisions, communications between an attorney and an expert, and draft reports and expert disclosures, are generally protected from disclosure in discovery.

4. Experts as professionals.

The lawyer should work with the expert to make sure the expert meets expectations as a professional. This process includes the engagement, the collection of information and materials, the fact investigation, the professional research and analysis, the conclusions reached, the drafting the expert report or expert disclosure, the deposition of the expert, and trial testimony.

a. Misconduct

A court can sanction an expert for misconduct at a deposition, such as making offensive comments, engaging in hostile and uncivil conduct, and impeding the deposition. See *Almeida-Graves v. Seaworld Parks & Entertainment, LLC*, Memorandum Order, February 16, 2024, E.D. Va., Civil Action No. 4:22 cv 127 (sanctions against expert witness).; See also *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 198-199 (E.D. Pa., 2008) (sanction imposed against expert witness and counsel based on misconduct during deposition).

XIV. Doing business with clients.

Lawyers sometimes are presented with the possibility of entering into a business relationship with a client. These possibilities can create problems for the lawyer and should be carefully considered. If anything goes wrong with the business venture, the client will look to blame the lawyer.

Rule 1.8 governs business transactions between lawyers and clients. In *Shea v. Virginia State Bar Disciplinary Board*, 236 Va. 442 (1988), the Supreme Court stated that Rule 1.8 is intended and designed to maintain the independent judgement of lawyers in the representation of clients.

Rule 1.8.a provides that a lawyer shall not enter into a business relationship with a client unless:

1. The transaction and terms are fair and reasonable to the client and fully disclosed and transmitted in writing to the client.

2. The client has the opportunity to seek independent counsel.

3. The client consents in writing.

Rule 1.8.c provides that a lawyer should not solicit any substantial gift from a client, including a testamentary gift.

Rule 1.8.e provides that a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation; except that a lawyer may advance court costs and litigation expenses.

Rule 1.8.f provides that a lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation.