

Judiciary Squares: Recent Developments in Virginia Law

Sponsored by the Young Lawyers Conference

Speakers:

Hon. LeRoy F. Millette, Jr.

Hon. William C. Mims

Hon. Glen C. Huff

Hon. Tanya Bullock

Hon. Lawrence B. Cann

Hon. Stephen C. St. John

Hon. John M. Tran

Hon. Victoria A.B. Willis

Hon. John A. Gibney, Jr.

Saturday, June 20, 2015

Sheraton Oceanfront Hotel, Virginia Beach

9:45-11:45 AM

2.0 MCLE Credits; including .5 Ethics from 11:15 a.m. to 11:45 a.m.

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Hon. LeRoy F. Millette, Jr. serves as a Justice of the Supreme Court of Virginia. Justice Millette was appointed to the Court by Virginia Governor Tim Kaine to fill a vacancy created by the retirement of Justice G. Steven Agee, who had been appointed to the Fourth Circuit Court of Appeals. On February 11, 2009, Justice Millette was confirmed for a full 12 year term by the Virginia General Assembly beginning retroactive to February 1, 2009. Millette previously served for less than one year on the Court of Appeals of Virginia, also having been appointed by Gov. Kaine and then being subsequently confirmed by the General Assembly. Prior to that, he served as a judge of the Circuit Court of Prince William County, Virginia, in which position he presided over the capital murder trial of John Allen Muhammad, the infamous Beltway Sniper. Millette confirmed the jury's sentence of death of Muhammad. Millette also was involved in some of the proceedings of the Lorena Bobbitt trial in 1993. Prior to serving on the Circuit Court, Judge Millette was a General District Court Judge, making him one of only three Virginia jurists, along with Justice Lawrence L. Koontz, Jr. and Justice Barbara Milano Keenan, to have served at all four levels of courts in Virginia. He received his undergraduate degree from the College of William and Mary and his law degree from the Marshall-Wythe School of Law at William and Mary.

Hon. William C. Mims serves as is a Justice of the Supreme Court of Virginia. He served in the Virginia House of Delegates from 1992 to 1998; and in the Senate of Virginia from 1998 to 2006, when he was appointed Chief Deputy Attorney General by then-Attorney General Bob McDonnell. When McDonnell resigned in February 2009 to run for governor, the Virginia General Assembly elected Mims to complete McDonnell's term as Attorney General of Virginia. Mims did not seek election to a full term and was succeeded by Ken Cuccinelli in January 2010.

The General Assembly elected Mims to the Supreme Court of Virginia in March 2010, to fill a vacancy created by the retirement of Justice Barbara Milano Keenan upon her appointment to the Fourth Circuit Court of Appeals.

Hon. Glen A. Huff serves as Chief Judge of the Court of Appeals of Virginia. Judge Huff was appointed to the court by the Virginia General Assembly in July 2011. Before joining the court, he practiced law with the firm of Huff, Poole & Mahoney PC, in Hampton Roads, for more than thirty-five years. Judge Huff received his bachelor's degree from the University of Maine and his law degree from the University of New Hampshire Law School, formerly the Franklin Pierce Law Center.

Biography
Judge Tanya Bullock
Virginia Beach Juvenile & Domestic Relations District Court

Judge Bullock is a native of Virginia Beach, Virginia. She is a graduate of Bayside High School and North Carolina State University where she received a Bachelor of Arts Degree in political science with a concentration in criminal justice. She received her Juris Doctor degree from Regent University School of law in 2000. Upon graduation from law school, Judge Bullock worked as a prosecutor in Norfolk and Virginia Beach. Subsequently, she entered into private practice and started her own law firm, Bullock & Cooper, with her identical twin sister, Wanda Cooper. As a practicing attorney, her primary practice areas were criminal defense and federal civil litigation. Judge Bullock developed a niche in litigating what has become known as foreclosure rescue scams. In fact, she was at the forefront of getting Virginia's first foreclosure rescue scam statute passed in 2008.

Judge Bullock and her firm received numerous honors and awards. She received the Hampton Road's "Top 40 Under 40" Award by Inside Business, the Partners in Education Award from the Virginia Beach School System (where her firm has taken well over 100 interns), the Urban League Silver Star Legacy Award, Outstanding Professional Woman Award and her firm was named, Virginia Beach's Business of the Year by the Department of Economic Development in 2011. In 2013, Judge Bullock was given the Trailblazers Under 40 Award by the National Bar Association.

Integrally involved in her community, Judge Bullock is a member of Alpha Kappa Alpha Sorority, Inc., was appointed by Governor Bob McDonnell to the Board of Correctional Education, was appointed by the Virginia Beach City Council to the Va. Beach Community Development Corporation which focuses on providing workforce housing, was a member of the Virginia State Bar Association's Disciplinary Committee, Town Bank Leadership Alliance, Virginia Beach Bar Association and Calvary Christian School System's School Board. In addition, she is a proud graduate of the CIVIC Leadership Institute.

In 2012, Judge Bullock was appointed by the Virginia General Assembly as a judge to the Virginia Beach Juvenile and Domestic Relations District Court. She presides over all criminal and civil cases involving juveniles, adults involved in disputes concerning support, custody, visitation, offenses against members of their own family, foster care and protective order cases. She currently serves as the Secretary for the Virginia Council of Juvenile & Domestic Relations District Court Judges and is a board member of the Virginia Association of District Court Judges. She is a member of the National Bar Association's Judicial Council, the Virginia State Bar's Judicial Division and the American Judges Association. In 2014 she was elected by her colleagues to serve as the Chief Judge.

Hon. L. B. Cann, III ("Brad") was appointed to the General District Court of the City of Richmond in 2013. He is a graduate of Princeton University (1974) and the University of Virginia School of Law (1977). Before going on the bench, he was a trial lawyer in Richmond for 36 years concentrating in business and construction litigation and was recognized in those areas by Best Lawyers in America and Superlawyers in various years. Since 2000, his practice focused to a significant degree on construction litigation and he lectured widely on construction law, mold litigation and mechanic's lien issues.

Hon. Stephen C. St. John is the Chief Judge for the U.S. Bankruptcy Court, Eastern District of Virginia. He was appointed to the bench in September 1995, and appointed and designated as Chief Judge effective January 2013. Prior to taking the bench, Judge St. John served as a partner at Williams Worrell Kelly & Greer PC, and later at Faggert & Frieden PC, until he was appointed to the bench. Judge St. John earned his bachelor's degree at the University of Richmond and his Juris Doctor at the University of Virginia.

BIOGRAPHY OF THE HONORABLE JOHN M. TRAN
Fairfax Circuit Court
19th Judicial Circuit
4110 Chain Bridge Road
Fairfax, Virginia 22030

On April 4, 2013, the Virginia General Assembly elected Judge Tran to serve on the Circuit Court of Fairfax County. His term started on July 1, 2013. Judge Tran is the 63rd Circuit Court judge to serve on the Fairfax Circuit Court bench since 1742.

The son of a South Vietnamese diplomat and an immigrant who found refuge in the United States, he spent his entire adult life in the Washington Metropolitan Area and proudly considers himself a Virginian.

Prior to his appointment on the bench, Judge Tran shaped his trial experience as a state and federal prosecutor in Alexandria, Virginia in the late 1980's and eventually joined the highly regarded Old Town Alexandria litigation boutique law firm of DiMuroGinsberg, P.C.

The diversity of his 29-year career as a trial lawyer, starting off as state and then federal prosecutor, was reflective of trial dockets found in state and federal courts throughout the country. Judge Tran has represented businesses and individuals in matters ranging from simple contract disputes to complex commercial and multi-jurisdictional litigation and criminal defense.

Before leaving the practice of law, Judge Tran was an "AV" rated lawyer under Martindale Hubbell, a Virginia Super Lawyer and Best Lawyer in the area of commercial litigation, and inducted into the Class of 2010 Fellow of the Virginia Law Foundation and Class of 2011 Virginia Lawyer's Weekly Leader in the Law.

He has enjoyed his activities in various bar associations including his two term service on the Virginia State Bar Council following his elections in the 18th Judicial Circuit (Alexandria), his 15+ year involvement with the Asian Pacific American Bar Association of Virginia and his participation as a Director on both the Alexandria Bar Association's Law Foundation and most recently the Fairfax Bar Association's Board of Directors. He has received substantial support throughout his career from the various bar associations dedicated to promoting diversity within the legal profession including NAPABA, APABA-DC, APABA- Md, VABA-DC and NCVAA.

Prior to joining the Circuit Court bench, Judge Tran was appointed a substitute judge in 2008 and served on the General District Courts and Juvenile and Domestic Relations District Court throughout Northern Virginia.

Judge Tran is a product of the Arlington County public school system, a 1981 graduate of the George Washington University and a 1984 graduate of the George Washington University Law School.

John A. Gibney, Jr. serves as a judge of the United States District Court for the Eastern District of Virginia, in Richmond. The Senate confirmed his appointment in December 2010.

Prior to his appointment to the bench, Gibney practiced law with several Richmond law firms and also worked in the Office of the Attorney General of Virginia as an assistant attorney general in the litigation department. Judge Gibney received his undergraduate degree from the College of William and Mary (1973) and his law degree from the University of Virginia (1976).

2015 Judiciary Squares Questions
Recent Developments (2.0 CLE/0.5 Ethics)

CIVIL LAW & PROCEDURE

- 1. Attorney's Fees Q: Penny Plaintiff filed a lawsuit to enforce a contract against her business partner, Debbie Defendant. The contract contains a provision that awards attorney's fees to the prevailing party. If Penny non-suits the case, subsequently re-files the case and prevails, can Penny receive attorney's fees for the work performed in the action that was non-suited?**

Answer: No. In *Larry Tureson v. Open Sys. Sciences of Virginia, Inc., et al.*, 86 Va. Cir. 473 (Fairfax Cir. Ct. May 31, 2013) (Maxfield, J.), the court decided that a party cannot receive attorney's fees for work performed in an action that was non-suited because there is no "prevailing party." This is the case even where the suit is subsequently re-filed and the party prevails.

- 2. Right to Privacy Q: True or false, the amount of liquidated damages that may be recovered for a violation of Virginia's wiretapping law doubles if such communications are between a husband and wife.**

Answer: True! On March 27, 2015, the Governor signed into law HB 1308, which amends Va. Code § 19.2-69 to double the amount of liquidated damages in certain confidential relationships, to include those between: (i) husband and wife; (ii) an attorney and client; (iii) a licensed practitioner of the healing arts and patient; (iv) a licensed professional counselor, licensed clinical social worker, licensed psychologist, or licensed marriage and family therapist and client; or (v) a clergy member and person seeking spiritual counsel or advice. The bill increases the allowable liquidated damages from \$400 a day for each day of violation or \$4,000, whichever is higher, to \$800 a day or \$8,000, whichever is higher. Effective July 1, 2015.

- 3. Torts Q: During a neighborhood barbeque at Ned Nelson's home, 10 kids were jumping on a trampoline, each with parental consent. While Ned was manning the grill, a little girl named Claire fell off and broke her arm. Claire's parents want to bring a negligence claim against Ned for having the trampoline and allowing too many kids to be on the trampoline at one time. Should they prevail?**

Answer: No. The Virginia Supreme Court recently determined the circumstances under which a host is liable for harm to a child social guest when the child's parent is present and supervising. *Lasley v. Hylton*, 764 S.E. 2d 88 (Va. 2014) (Mims, J.). In *Lasley*, the plaintiff was riding an ATV when it tipped over and injured her. There, the host had required her to ask her father's permission before riding the ATV. Once it was granted, the host showed the child how to operate the ATV, even though he admittedly did not advise the parent or the child of the warnings visibly posted on the ATV, including warnings that a child the plaintiff's age should not operate it.

The Court first recognized that Virginia law imposes a duty on a host to conduct his or her activities with reasonable care under the circumstances; therefore, a host is not subject to liability

if the guess knew or should have known of the host's activities and any accompanying risk, including those that are open and obvious. In *Lasley*, the Court rejected the plaintiffs' argument that a host owes a child social guest an absolute duty, and followed other states' court rulings that a parent's duty is superior to that of a social host when the parent is supervising and knows or should know of an obvious danger. The Court determined that the danger to the child social guest was open and obvious, as the father had ample opportunity to observe the warnings affixed to the ATV, and had observed his older daughter's struggle to control the ATV. Moreover, he had every right to refuse to allow his child to ride it.

The Court explained that where a danger is open and obvious, the law places the primary duty to inform, advise, and protect the child on the child's parent. The Court believes this rule is consistent with social norms, given that when a person invites friends and neighbors to their home with their children, the host does not expect the parents to relinquish all parental responsibility. In *Lasley*, the host exercised his obligation to exercise reasonable care when he ensured the child had her father's permission to ride the ATV, explained how to operate it, and ensured that the activity was supervised by the child's father.

New Development: This is the first time the Virginia Supreme Court has articulated the duty that a host owes to a child social guest when the parent is present and supervising.

4. Discovery Requests Q: As of May 1, 2015, how many requests for admission may a party serve on another party without leave of court?

Answer: 30. See Virginia Supreme Court Rule 4:11(e)(1). Absent agreement by the parties or leave by the court, "no party shall serve upon any other party, at any one time or cumulatively, more than 30 requests for admission, including all parts and subparts, that do not relate to the genuineness of documents." Note that limitation does not apply to requests for admission relating to the genuineness of documents (see Rule 4:11(e)(2)). Prior to this amendment, no limit on the number of requests for admission allowed was stated in the Rule.

5. Business Conspiracy Q: Peter brought a business conspiracy claim against David and Donnie based on their alleged tortious interference with Peter's franchise agreement with a third party. The court granted David and Donnie's motion to dismiss holding that Peter's contract based claims did not qualify as the predicate "unlawful act" needed to state a claim under the Virginia business conspiracy statute. Was this correct?

Answer: No. In *Dunlap v. Cottman Transmission Sys.*, the Virginia Supreme Court, answering certified questions of law from the Fourth Circuit, held that it was necessary to "examine the nature" of allegedly contract-based claims. 287 Va. 207, 216, 218 (2014) (Kinser, J.), *answering certified questions of law from* NO. 11-2327 (4th Cir. Aug. 21, 2013). In *Dunlap*, the Court determined that plaintiff's claims were "intentional torts predicated on the common law duty to refrain from interfering with another's contractual and business relationships." *Id.* Because "[t]hat duty does not arise from the contract itself but is, instead, a common law corollary of the contract," the Court held that plaintiff's claims "qualify as the requisite unlawful act to proceed on a business conspiracy claim under [Va.] Code §§ 18.2-499 and -500." *Id.* at 211, 218.

Dunlap distinguished *Station #2, LLC v. Lynch*, 280 Va. 166, 695 S.E.2d 537 (2010) (holding that conspiracy merely to breach a contract does not involve an independent duty arising outside the contract, and thus, cannot serve as the underlying “unlawful act” under Va. Code 18.2-500).

The key to stating a business conspiracy claim is to identify some underlying action that is more than a mere conspiracy to breach the contract itself. For instance, a plaintiff could allege bribery in connection with the award of a contract, or that the defendant hired its employees knowing they were subject to non-compete agreements, or that the defendants conspired to breach the plaintiff’s employees’ fiduciary duties to the plaintiff employer. *See id.* at 218 (citations omitted).

6. Q: What is the applicable statute of limitations period to claims of tortious interference with contract and tortious interference with business expectancy?

Answer: Since these claims allege injuries to property, the five-year statute of limitations period (Va. Code § 8.01-243(B)) applies. To prove a claim for tortious interference with either a contract or a business expectancy, a plaintiff must show an intentional interference that induced or caused a termination of the contractual relationship or business expectancy. “Such interference is directed at and injures a property right, i.e., the right to performance of a contract and to reap profits and benefits not only from the contract but also from expected future contracts or otherwise advantageous business relationships.” *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 221 (2014) (Kinser, C.J.).

Recent Development: This question came to the Virginia Supreme Court on an Order of certification requesting the Court to answer certain questions of law.

7. Diversity Jurisdiction Q: Plaintiff Acme Corporation, a Virginia Corporation whose day-to-day operations take place in Fairfax County, filed a diversity action against David Defendant, a Virginia resident, in the U.S. District Court for the Eastern District of Virginia. Is there diversity jurisdiction if the District Court determines that Acme Corp makes all significant corporate decisions and corporate policy in Texas?

Answer: Yes. In *Hoschar v. Appalachian Power Co.*, 739 F.3d 163 (4th Cir. 2014) (Thacker, J.), the Fourth Circuit held that the “nerve center” test from the U.S. Supreme Court’s decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), is the proper test for assessing the “principal place of business” of a corporation.

Hertz recognized that courts previously employed two tests in determining a corporation's principal place of business: the nerve center test and the place of operations test. *See Athena Auto., Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999). However, the Supreme Court in *Hertz* definitively held that, for purposes of diversity jurisdiction, a corporation's principal place of business is its “nerve center.” *Hertz*, 559 U.S. at 80-81. The Court explained, “administrative simplicity is a major virtue in a jurisdictional statute,” and the nerve center approach “is simple to apply *comparatively speaking.*” *Id.* at 94-95 (emphasis in original).

8. Removal & Consent of Nominal Defendants Q: Is a nominal defendant's consent required to remove an action from state to federal court pursuant to 28 U.S.C. § 1332?

Answer: No. In *Hartford First Ins. Co. v. Harleysville Mut. Ins. Co.*, the Fourth Circuit held, as a matter of first impression, that “nominal” party defendants need not consent to removal in order to satisfy the unanimity requirement. 736 F. 3d 255, 259-60 (4th Cir. 2013) (Wilkinson, J.). However, the court declined to adopt any of the tests applied by other circuits to determine whether a defendant is “nominal”, holding instead that “[n]ominal means simply a party having no immediately apparent stake in the litigation either prior or subsequent to the act of removal” and that “the key inquiry is whether the suit can be resolved without affecting the non-consenting nominal defendant in any foreseeable way.” *Id.*

9. Punitive Damages & Remittitur Q: In a personal injury action, the jury awarded Plaintiff A \$10,000 and Plaintiff B \$50,000 in compensatory damages and awarded each Plaintiff \$100,000 in punitive damages. On Defendant's motion for remittitur of both awards, the court remitted only Plaintiff A's punitive damages to \$50,000 noting the “significant disparity” between the two plaintiffs' compensatory damages awards. Was this proper?

Answer: No. In *Coalson v. Canchola*, the Virginia Supreme Court held that it is improper for a trial court to compare punitive damage awards or consider “relative ratios of compensatory damages to punitive damages” in determining whether to grant remittitur. 287 Va. 242 (2014) (Goodwyn, J.). While the Court noted that it had not previously addressed this issue, it referred to similar rationale laid out in *Allied Concrete Co. v. Lester*, 285 Va. 295, 312, 736 S.E.2d 699, 708 (2013) (holding it improper for a trial court to compare verdicts in assessing whether compensatory damages are excessive) and *John Crane, Inc. v. Jones*, 274 Va. 581, 595 (2007) (holding that the “average verdict rule,” which compares jury verdicts on a statewide or nationwide basis to reach an “average” verdict, “is not probative of whether a verdict is excessive; rather that determination must be made based on the facts and circumstances of each case” and reviewed for abuse of discretion), to declare that whether an award is excessive depends only upon the facts and circumstances of the case at hand.

10. Attorney Sanctions Q: In a civil action, the trial court found Defense Attorney A's arguments during a hearing on Plaintiff's motion to show cause not to be grounded in either fact or law and as a result sanctioned Attorney A under Va. Code § 8.01-271.1. The written brief opposing Plaintiff's motion was filed and signed by Attorney A's co-counsel, Attorney B. Were the sanctions proper?

Answer: No. Virginia Code § 8.01-271.1 applies to “every pleading, written motion, and other paper” signed, as well as every “oral motion made” by an attorney. At the time of the hearing, Attorney A had neither filed nor made orally any motion under consideration by the court.

As the Virginia Supreme Court held in *Shebelskie v. Brown*, to hold that Attorney A's oral argument was nevertheless an “oral motion” under Va. Code § 8.01-271.1 would extend the word “motion” beyond its plain meaning and would mean that any oral argument is a “motion” under the statute. 287 Va. 18, 752 S.E.2d 877 (2014). According to the Court, the General Assembly chose the word

“motion” intentionally, and “we will not construe the term beyond its intended meaning to encompass an argument made in response to an opposing party's motion.” *Id.* (citing *Kummer v. Donak*, 282 Va. 301, 304, 715 S.E.2d 7, 9 (2011) (“This Court assumes the legislature chose [its] words with care and is bound by those words in construing the statute.”)).

Ultimately, the Court held that the circuit court was “influenced by [a] mistake of law” and therefore abused its discretion by imposing a sanction against Attorney A under Code § 8.01-271.1.

11. Late Filing Q: Counsel miscalculates his deadline to file responsive pleadings, but proceeds to notify opposing counsel upon realizing his mistake and serve and file pleadings (late) as soon as possible. Counsel then files a motion for leave to file late responsive pleadings, which is objected to by his opponent. Can the court grant the motion?

Answer: Yes, the court can grant the motion (but does not have to). Specifically in the case of *Yang v. Kim*, CL-2014-6744, Judge Bellows wrote in a letter opinion that when “(1) defense counsel in good faith made a one day calculation error; (2) defense counsel still managed to timely serve plaintiffs with his responsive pleading; (3) defense counsel filed the responsive pleading the morning after the responsive pleading was due and, later that day, filed a motion seeking leave to late file the responsive pleading; (4) defense counsel has demonstrated throughout the litigation a consistent commitment to timely filings (this being the only exception); and (5) plaintiffs have suffered no prejudice” the court was able to grant the motion. In fact, the court stated that “Fortunately, the law recognizes that trial work is a human endeavor, not some robotic computational exercise where miscalculations are impossible and mistakes intolerable. Some times there is simply good cause to excuse a party that misses a deadline. This is one such case.”

New Development: Not hot off the presse, but definitely a case attorneys will want to have at their fingertips. Opinion available at, *Seung M. Yang & Hyun M. Kang v. Jin W. Kim, Jin S. Pak & Pyung 7. Pak*, CL-2014-6744, (Bellows Op. Ltr. Jan. 14, 2015), <http://www.fairfaxcounty.gov/courts/circuit/pdf/opinions/cl-2014-6744-yang-et-al-v-kim-et-al.pdf>.

12. Return of Engagement Ring Q: Can Peter successfully sue his former fiancé to recover the engagement ring he gave her if the marriage does not occur?

Answer: Yes. Virginia Code Section 8.01-220, otherwise referred to as the Heart Balm Act, prohibits actions for breach of promise to marry. In past, this Act has been interpreted by Virginia Circuit Courts to prohibit the return of property given on the condition of marriage. However, in *Peter v. Langley*, Case No. 89241, 2014 WL 6855383, at *1 (Va. Cir. Ct. Nov. 6, 2014) (Loudoun County), the court found that the intention of the Act was not to prohibit the return of the engagement gifts, but rather to bar actions for damages suffered from loss of marriage (such as: humiliation). The Court held that the engagement ring should be returned upon a broken engagement to avoid unjust enrichment of the donee of the gift.

13. Q: Sally's home in Virginia Beach abuts Harry's beachfront property. The deed of subdivision governing their properties states that "a 4 foot private walk easement is hereby created over each of beachfront Lot" (to include Harry's lot). Sally made regular use of the private walk until one day Harry erected a fence preventing Sally from accessing the walkway. Sally sues to force Harry to remove the fence. Is the deed of subdivision sufficient to create an express easement over the private walk on Harry's property in favor of Sally?

Answer: No. In *Beach v. Turim*, 287 Va. 223 (2014) (Lemons, J.), the Supreme Court held that, because easements must be strictly construed, with any doubt being resolved against the establishment of the easement, to create an express easement, the property which benefits from the easement must be identified in some manner. Merely identifying the location of an easement, or the burdened estate, is not sufficient to create an express easement. *Id.* at 230.

14. Discovery Q: During a deposition, deposing lawyer asks the deponent to identify the general nature of certain communications between the deponent and his lawyer during a certain time period that pertains to the subject matter at issue in the lawsuit. The deposing lawyer does not ask about the substance of the communications. May the defending lawyer instruct the deponent not to answer?

Answer: No. In Virginia, the general rule concerning attorney-client communications "does not mean that the subject matter of the consultation is per se privileged." *Knox Energy, LLC v. Gasco Drilling, Inc.*, No. 1:12CV00046, 2014 U.S. Dist. LEXIS 112794, at *6 (W.D. Va. Aug. 14, 2014) (Jones, J.); *see also id.* at *5 (In making this ruling, Judge Jones applied Virginia law, and not the Federal Rules of Evidence, recognizing that "State law governs an evidentiary privilege where, as here, the underlying claim or defense is governed by state law." (citing Fed. R. Evid. 501)). In what appeared to be the first time this issue has been considered in this regard, the Western District of Virginia acknowledged that the "overwhelming authority from around the country" recognized that the subject matter of an attorney-client communication is not privileged.

This decision seems to suggest that this ruling aligns with the Fourth Circuit's ruling in *United States v. Under Seal (In re Grand Jury Subpoena)*, 204 F.3d 516, 520 (4th Cir. 2000), in which the Fourth Circuit ruled that "[t]he identity of the client, the amount of the fee, the identification of payment by case name file, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege . . . because such information ordinarily reveals no confidential professional communications between attorney and client." *Id.* at *6-*7 (quoting *Under Seal*, 204 F.3d at 520).

EVIDENCE

15. Q: In a divorce matter determining a husband’s adultery and waste of marital assets, husband refuses to produce his iPhone 4 and the hard drive from his home computer, which he claims to have reformatted. May the court apply a negative evidentiary inference against husband as a result?

Answer: It may. According to the court in *Bannon v. Bannon*, No. CL 14000129-00 (Hanover County Cir. Ct. Nov. 5, 2014) (Harris, J.), this missing evidence constitutes spoliation. Thus, the court may apply a negative evidentiary inference, which provides that where one party has within his control material evidence and does not offer it, there is an inference that the evidence, if it had been offered, would have been unfavorable to that party.

A spoliation inference is typically applied if, at the time the evidence was lost or destroyed, a reasonable person in defendant’s position should have foreseen that the evidence was material to a potential civil action. In *Bannon*, the Court found “that relevant and material records kept on digital devices were in the exclusive possession of the [husband] and those records have yet to be produced in discovery.” Relying on the 2003 case of *Wolfe v. Va. Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565 (Va. Ct. App. 2003), dealing with spoliation of evidence, the Court granted the inference “because any of those devices of digital sources could contain or could have contained evidence of [the husband’s] alleged adultery or alleged secretion of marital assets.”

Recent Development: Application of spoliation of evidence to reformatting of computer hardware, cell phone; first use of spoliation in a divorce case.

16. Hearsay Q: In a civil case against Big Corporation, injured grandmother seeks to admit statement of Big Corporation’s employee Ed. Ed made a statement within the scope of his employment regarding a matter that was within the scope of his job duties – though he was not authorized by Big Corporation to speak on behalf of the company. Is Ed’s statement admissible?

Answer: Yes. Virginia Rule 2:803(0) changed the admissibility of a statement of an employee made within the scope of his or her employment. The statement of the employee is considered an admission by a party-opponent.

Conversely, under the Federal Rule of Evidence 801(d)(2)(D) (as amended Dec. 2014), as statement that “was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed” is not hearsay at all.

17. Good Character Evidence Q: Defendant Dan is charged with aggravated sexual battery of two pre-teen girls. Dan is charged in 2015, but the assaults occurred in 2011. During the Commonwealth’s case there is no evidence admitted regarding Dan’s character and reputation. In his defense, Dan seeks to call character witnesses to testify regarding Dan’s reputation in the community as a good caretaker of children and for not being

sexually assaultive or abusive toward them from 2011 to present date. Is the testimony regarding Dan's reputation admissible?

Answer: Yes. Pursuant to *Gardner v. Commonwealth*, 758 S.E.2d 540 (Va. 2014) (Goodwyn, J.), "a defendant is not limited solely to reputation evidence regarding truthfulness, but may offer evidence to prove good character for any trait relevant in the case," and a defendant is also not limited to testimony regarding his character before being criminally charged. (As clarification: If the prosecution is allowed to offer evidence of the defendant's bad character, the prosecution is limited and can only offer evidence before the defendant was accused of the crime or the trial began. The reason for that "is to prevent admission of untrustworthy adverse reputation character evidence engendered by the very fact of the pending charges from unfairly influencing the jury's verdict." *Id.* at 544-45.).

18. Expert Testimony Q: Plaintiffs file wrongful death action against the manufacturer of a plane's auto-pilot system. At trial, Defendant calls a qualified expert to testify that the autopilot system was functioning and he relies, in part, on an accident investigation report prepared by Defendant's engineers. Plaintiffs object that the report is hearsay. Can the expert rely on the accident investigation as an admissible "learned treatise" under Virginia Code 8.01-401.1?

Answer: No. In *Harman v. Honeywell International, Inc.*, the trial Court said yes, the accident investigation was admissible; however, the Virginia Supreme Court reversed and remanded. 758 S.E.2d 515 (Va. 2014) (Mimms, J.). Justice Mims' decision made clear that the accident investigation report "is not the type of authoritative literature contemplated by Code § 8.01-401.1. Learned treatises have sufficient indicia of trustworthiness because their authors have no bias in any particular case and are aware that their work will be read and evaluated by others in their field." The accident investigation performed by the Defendant's own employed engineers here did not meet those requirements.

19. Best Evidence Q: Plaintiff seeks to admit into evidence copies of a contract between Plaintiff and Defendant. Defendant objects asserting that the copy is not the original and therefore not the "best evidence." Plaintiff responds that the Defendant himself tore up the original in a fit of rage and therefore the copy is a true and accurate copy of the original contract. How should the court rule?

Answer: The copy is admissible. Virginia Rule 2:1002 requires production of the original "except as otherwise provided in these rules." Rule 2:1004 permits admissibility of "other evidence of the contents of a writing if ... [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Accordingly, Plaintiff should be allowed to admit into evidence a copy of the contract.

20. Expert Witness Testimony Q: Is a properly qualified physician assistant permitted to testify as an expert witness in a medical malpractice action against a defendant health care provider regarding causation?

Answer: No. Under 2014 Va. Acts 391 (HB 191) (approved Mar. 31, 2014), Code §§ 8.01-401.2 and 8.01-401.2.1 were amended to allow a properly qualified physician assistant to testify as an expert witness on certain matters within the scope of his activities as authorized under Virginia law, except in any medical malpractice action for or against (i) a defendant doctor of medicine or osteopathic medicine regarding standard of care, or (ii) a defendant health care provider regarding causation. Both code sections were amended to add “treatment” and “treatment plan” to those matters about which a chiropractor may testify as an expert witness.

FAMILY LAW

21. Q: Couple marries in 2009 and has one child. In 2009, father's employer issues a \$900,000 loan to incentivize his continued employment. For each year the father stayed with employer, employer would forgive one-ninth of loan. The couple divorced in 2012. In 2013, the mother moved to modify and increase child support, arguing the father's "Back-End Retention Bonus" should be considered as part of his gross income. Does the father's "phantom income" count toward his support obligation?

Answer: Yes. In *Rieger v. Rieger*, Case No. CL-2011-3036 (Feb. 9, 2015), Judge White of the Fairfax County Circuit Court reviewed the definition of income in Virginia's child support statute, Va. Code § 20-108.2(C). He noted in his opinion that "[t]he statute does not specifically address whether loan forgiveness is income. Furthermore, no Virginia case has specifically addressed this issue of 'phantom income.'" However, after reviewing a number of cases both outside and inside Virginia, Judge White ultimately concluded that the loan forgiveness from the father's employer was indeed income that should be considered under the child support statute.

In calculating child support in *Rieger*, the Court found that a forgivable loan, given to Defendant as a benefit of his employment, constitutes gross income for purposes of calculating child support. The underlying character of this "loan" could be considered to be either a bonus or income, which are both included within the definition of income as found in Va. Code § 20-108.2(c). Additionally, this amount of money constitutes nonmonetary income to the Defendant. This is a benefit that Defendant receives because of his employment and as compensation for her services. Like the "room and board" benefit, "loan forgiveness" saves Defendant an amount of money every month that he would otherwise spend repaying the "loan."

Finally, the court stated, this "loan" is more similar to a Pell Grant and is less similar to a loan because, as long as Defendant remains employed by employer, it is not subject to repayment.

New development: First time Virginia law has examined the phantom income issue in this context. Opinion available at, <http://www.fairfaxcounty.gov/courts/circuit/pdf/opinions/cl-2011-3036-rieger-v-rieger.pdf>

22. Divorce Law Q: During a divorce proceeding courts commonly distribute marital property. When determining whether or not an increase in value of a personal asset, such as an investment account, is marital property, is the non-owning spouse required to prove that any increase in value or some portion thereof was caused by contributions of marital property or personal effort?

Answer: No. Under Va. Code Ann. § 20-107.3(A)(3)(a), the non-owning spouse is not required to prove causation. This statute, instead, places the burden of *disproving* causation on the owning spouse, who bears the burden of proving that the increase in value or some portion thereof was *not* caused by contributions of marital property or personal effect. *David v. David*, 287 Va. 231 (Va. 2014) (Goodwyn, J.), on remand and remanded by *David v. David*, 2015 Va. App. LEXIS 19 (Va. Ct. App., Jan. 20, 2015) (Harris, J.).

23. Q: In a family law case, attorney reports his client's monthly income as \$10K for purposes of calculating child support. His client actually makes \$25K, while his client's ex-spouse makes nothing. Questionable ethical decision aside, does the fact attorney's client make \$25K monthly instead of \$10K matter?

Answer: Yes - for two reasons. During the 2014 General Assembly Session, HB 933 revised and updated the child support guideline statute in Va. Code § 20-108.2. The former statute had a guideline chart ending at \$10K monthly gross income; the new chart goes up to \$35K of combined monthly income. Additionally, the amount of support remains a percentage, so the exact amount of monthly income is directly relevant to the child support calculation.

24. Q: Does a step-grandparent have a legitimate interest in the custody, visitation, and support of their grandchild?

Answer: Thanks to House Bill 359, passed in 2014, they do! This bill amended Virginia Code §§ 16.1-241 and 20-124.1, by broadening the definition of the term "legitimate interest" to include step-grandparents. 2014 Va. Legis. Serv. 653 (West).

25. Q: In a pendente lite hearing, can a court order a party in a family law case to maintain life insurance for the benefit of a spouse?

Answer: While trial courts were thought to lack jurisdiction to order maintenance of life insurance to benefit a spouse (*see Lapidus v. Lapidus*, 226 Va. 575 (1984)), House Bill 141, enacted in 2014 (*see* 2014 Va. Legis. Serv. 55 (West)), permits trial courts in *pendent lite* proceedings "(a) to compel a party to maintain any existing policy owned by that party insuring the life of either party or to require a party to name as a beneficiary of the policy the other party or an appropriate person for the exclusive use and benefit of the minor children of the parties and (b) to allocate the premium cost of such life insurance between the parties, provided that all premiums are billed to the policyholder." Va. Code Ann. § 20-103.

CRIMINAL LAW & PROCEDURE

26. Traffic Stops Q: Daisy Driver is holding her cell phone in her hand while driving, giving the appearance of texting while operating a motor vehicle. Pam the Police officer pulls Daisy over for failing to stop at a stop sign and immediately seizes the cell phone from Ms. Driver to confirm whether she was indeed texting. Is this a legal search?

Answer: No, according to a Feb 6, 2015 official advisory Opinion from Virginia Attorney General Mark Herring, given in accordance with Va. Code § 2.2-505.

In response to a request for legal opinion from David L. Bulova of the Virginia House of Delegates, Attorney General Herring reviewed the recent United States Supreme Court case *Riley v. California*, 134 S. Ct. 2473 (2014) (Roberts, C.J.), to determine what impact, if any, this case had on the warrantless search and seizures of cell phones from drivers suspected of having violated Va. Code Ann. 46.2-1078.1, Virginia's 2013 law prohibiting texting while driving. After balancing privacy rights versus the need to preserve evidence, the Supreme Court in *Riley* ultimately determined that a warrantless search and seizure of a cell phone was an invasion of privacy, given that most individuals' "entire lives" are contained within their cell phone. As such, Herring agreed that a warrantless search and seizure of a cell phone is unconstitutional, unless certain circumstances exist, such as the driver provides consent, the officer expects to receive a warrant, or an emergency requires it.

New Development: AG Opinion available at: http://www.oag.state.va.us/files/14-052_Bulova.pdf.

27. Traffic Stops Q: Driver has a parking tag hanging from his rearview mirror which is 5 x 3 inches in size. A police officer pulls over Driver for violating Va. Code Sec. 46.2-1054, which prohibits objects that "obstruct the driver's clear view of the highway." While stopped, the police officer notices drug paraphernalia in the passenger seat and conducts a search of the car, leading to Driver's arrest for illegal possession of drugs. Was the traffic stop and subsequent search permissible?

Answer: Yes. A sharply divided Court of Appeals recently held in *Mason v. Commonwealth*, following a rehearing en banc, that a 5 x 3 parking tag did indeed cause an officer to reasonably believe the driver's clear view of the highway was obstructed and thus warrant an investigatory stop. 64 Va. App. 292 (2015) (Kelsey, J.) (vacating 63 Va. App. 587 (2014)).

The controversy over this decision was so great that the opinion included a life-size exhibit of the hang tag, and an assurance that such a ruling did not provide a "blank check" to law enforcement to pull over drivers with any object suspended from rearview mirrors. Dissenting opinions sharply criticized the ruling, accusing the Court of creating confusion among the community.

New Development: The hangtag controversy has been developing since last summer and is not likely to go away anytime soon.

28. Q: Will a certification from a doctor that a patient suffers from persistent epileptic seizures serve as an affirmative defense for epilepsy patients arrested and charged with possession of marijuana?

Answer: Yes, on Feb 26, 2015, Governor McAuliffe signed House Bill 1445 and Senate Bill 1235 (codified at Va. Code 18.2-250.1 (Possession of marijuana unlawful)), which decriminalizes the use of Cannabidiol oil and THC-A oil by patients who suffer from persistent epileptic seizures. The new law does not provide a prescription for the substances; however, a certification from a doctor will serve as an “affirmative defense” for epilepsy patients arrested and charged with possession of marijuana. See also Va. Code § 54.1-3408.3 (Certification for use of cannabidiol oil or THC-A oil to treat intractable epilepsy).

29. Q: May a person sitting in a vehicle parked in a private driveway with the auxiliary power running, but not the engine, be convicted of operating a vehicle under the influence of alcohol under Va. Code § 18.2-266?

Answer: Yes. In *Sarafin v. Commonwealth*, 764 S.E. 2d 71 (Va. 2014) (Lemons, J.), a recent case involving similar facts, the Supreme Court of Virginia affirmed the defendant’s DUI conviction because he was in “actual physical control” of the vehicle, even if it was in his own driveway.

Va. Code § 18.2-266 provides, in relevant part: “It shall be unlawful for any person to drive or operate any motor vehicle, engine or train . . . while such person is under the influence of alcohol. . . . For the purposes of this article, the term ‘motor vehicle’ includes mopeds, while operated on the public highways of this Commonwealth.”

The case law requires an operator to be in actual physical control of his vehicle and, therefore, a person seated behind the steering wheel with the key in the ignition switch is sufficient to conclude said person was an operator of the vehicle. The Court has decided several cases under the relevant statute based on whether the driver was in “actual physical control” and what it means to “operate” a vehicle. However, in those previous cases, the vehicles were clearly being operated on a public highway. In this case, the location of a vehicle – a private driveway – was the main issue. The Court decided that there is no explicit language in the statute requiring the operator of a motor vehicle to be “on a highway” to sustain a conviction under § 18.2-266, and further, there is no need for the operator to have an intent to drive. *Sarafin v. Commonwealth*, 764 S.E. 2d 71 (Va. 2014).

Recent Development: The operation of a vehicle while intoxicated, even on private property without intent to drive, can sustain a DUI conviction.

30. Q: May a Virginia trial court judge give jury instructions before the presentation of evidence of in a felony case?

Answer: Yes. Virginia Supreme Court Rule 3A:16 states that in a felony case, the instructions shall be reduced to writing, and in all cases, the court shall instruct the jury before arguments of counsel to the jury. The Rule does not preclude giving a preliminary instruction to the jury before

the evidence is presented and therefore, a court's decision to give instructions to the jury prior to the presentation of evidence does not fundamentally deprive a defendant of his basic protections or vitiate all the jury's findings.

There is no Virginia case law on the matter, so in *Sarwar v. Clarke, Director*, 2014 Va. Cir. LEXIS 104 (Fairfax, Dec. 31, 2014) (Roush, J.), the defendant focused on United States Supreme Court cases that the circuit court found misplaced. Instead, the court focused on academic research on American juries, which explains that juries often have trouble understanding jury instructions. One solution posited is to provide jury instructions at the beginning of the trial. Instructions given earlier can provide a framework by which the jurors can understand the issues. One commentator has described the practice of instructing juries only at the end of the trial as akin to telling jurors to watch a baseball game and then decide who won without telling them the rules until the end of the game.

Recent Development: First interpretation of the timing of jury instructions under Virginia Supreme Court Rule 3A:16.

31. Q: Andy has installed certain peer-to-peer file sharing software on his personal computer, but has disabled all of the "sharing" features in order to prevent outsiders from accessing any files on his computer. A glitch in the software allows outsiders to access his files anyways. Does Andy have a reasonable expectation of privacy in the files on his computer?

Answer: No. By simply installing file-sharing software onto his computer, Andy cannot demonstrate an expectation of privacy that is reasonable.

In *Rideout v. Commonwealth*, the Virginia Court of Appeals recently affirmed a circuit court's denial of the defendant's motion to suppress and his conviction of possession of child pornography. 62 Va. App. 779 (Va. Ct. App. 2014) (Beales, J.). The Defendant claimed that, despite selecting settings on the file sharing software to prevent sharing, that when he changed the location of the downloads from the default destination, he inadvertently activated the sharing of that folder without receiving any notification that he was actually sharing files. Law enforcement officials were able to access his files, and found child pornography.

The circuit court expressly found that defendant lacked a reasonable expectation of privacy when he installed a software program on his computer which had the primary purpose to share information among other computer users. The Court of Appeals reviewed several federal appellate court decisions, found to be applicable and instructive on this point, and affirmed.

The Court noted that, even assuming that defendant actually had the subjective intention to prevent others from accessing his files, defendant still did *not* have an objectively reasonable expectation of privacy in those files, given his decision to install the file-sharing program on his computer. By installing the file-sharing software, defendant assumed the risk that other users of the software – including the police – could readily access those incriminating files that could be shared through the software.

New Development: No reasonable expectation of privacy after download of file-sharing software.

32. Burglary Statute Q: Has a would-be burglar who mistakenly tries to access a target's home through a door in a crawl space that doesn't connect to the rest of the target's house violated Virginia's burglary statute?

Answer: Yes. A crawl space is part of a "dwelling house" within the meaning of the Virginia burglary statute, Va. Code §§ 18.2-90, 18.2-91, even if there is no direct access to the house through the crawl space. *Grimes v. Commonwealth*, 764 S.E. 2d 262 (2014) (Kinser, J.).

New Development: Here the Virginia Supreme Court expanded on its definition of what constitutes a "dwelling house," previously recognized for the purposes of the burglary statute as "a house that one uses for habitation, as opposed to another purpose." *Giles v. Commonwealth*, 277 Va. 369 (Va. 2009) (Millette, J.).

33. Preserving Objections Q: On appeal in criminal case, Craig asserted that the Commonwealth's proposed jury instructions were incorrect statements of the law based on objections raised during trial by counsel for Craig's co-defendant. May the appellate court properly consider Craig's arguments?

Answer: No. In *Linnon v. Commonwealth*, 287 Va. 92 (2014) (Mims, J.), the Supreme Court held—on a question of first impression, surprisingly enough—"that one party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection."

34. Sixth Amendment Q: Does a court violate the Sixth Amendment if it denies a criminal defendant's request for a continuance on the day of trial based on his desire for his court-appointed counsel to be replaced with retained counsel of his choosing?

Answer: Probably not. While the Sixth Amendment provides the right of a defendant who does not require court-appointed counsel to choose his or her own counsel, the right to choice of counsel does not extend to defendants who require court-appointed counsel.

Brown v. Commonwealth of Virginia, 764 S.E.2d 58 (Va. 2014) (J. McClanahan): In this case, Brown established his indigency and received court appointed counsel. On the day of the trial, Brown asked for a continuance for the purported purpose of retaining his own counsel of choice. However, Brown presented no evidence and made no proffer that his financial status had changed and, in fact, it is undisputed that Brown remained an indigent throughout the proceedings. See Code § 19.2-159. Brown's continuance request was deficient as a matter of law because, when made, he established no factual predicate for seeking substitution of other counsel in place of his court-appointed counsel under the authority of the Sixth Amendment. The circuit court therefore did not err in denying Brown's continuance motion or in proceeding to trial with the court-appointed attorney representing Brown.

CORPORATE LAW

35. Corporate Law Q: Ronald, Colonel Sanders and Wendy are minority shareholders in a Virginia Corporation in Abington established as a local franchisee for Chipotle. Officers, Directors and employees of the Chipotle served as majority shareholders. As part of a multi-step deal to sell the assets of the company, the majority shareholders first voted to have Chipotle change its state of incorporation to Delaware. Once that was accomplished, they proceeded to sell off the company's assets. Are Ronald, Colonel Sanders and Wendy entitled to appraisal rights under Virginia law?

Answer: No. "Virginia corporations that decide to domesticate in another state are governed by the laws of that other state of incorporation once the domestication is completed." *Fisher v. Tails, Inc.*, 767 S.E.2d 710 (Va. 2015) (Goodwyn, J.). Despite the fact that the minority shareholders in *Fisher* urged the court to adopt the "step transaction doctrine" which would have treated all the steps in a deal to sell the assets of the company as one transaction, the Court argued that doing so would force the court to ignore the first step of changing domicile, and thus changing the governing law. Delaware law did not permit appraisal rights and because Delaware law applied prior to the sale of the assets, the minority shareholders did not have appraisal rights.

New Development: This was the first time the Virginia Supreme Court had reviewed the "step transaction doctrine."

36. Derivative Action – Written Demand Request Q: Penny and Donny are the sole shareholders of a closely held Virginia Corporation. Penny's counsel sent Donny a letter demanding access to certain corporate financial records. After hearing no response, Penny filed a derivative suit against Donny asserting claims for breach of fiduciary duty and usurping corporate opportunities. If Donny files a plea in bar claiming the allegations in the complaint were not sufficiently addressed in the demand letter, should Donny win?

Answer: Yes. For the first time, a Virginia Circuit Court decided in *Williams v. Stevens*, 86 Va. Cir. 385 (Norfolk Cir. Ct. April 1, 2013) the test for determining whether a document has satisfied Virginia's written demand requirement under Va. Code § 13.1-672.1, which is (1) whether the document at issue identifies an alleged wrong; (2) whether the document demands action on the part of the corporation or its officers to redress the alleged wrong; (3) whether the demands in the document are clear and particular enough to have put the corporation reasonably on notice as to the substance of the alleged wrong and allow the corporation to assess its rights and obligations with regard to the alleged wrong; and (4) whether the alleged wrong and the claims ascertained in the plaintiff's complaint are sufficiently connected. In *Williams*, the court granted the plea in bar for with respect to the allegation that Defendants usurped corporate opportunities after finding that the allegation was not sufficiently connected to the wrongs addressed in the written demand.

TRUST AND ESTATES

37. Botched Will Q: Does a third-party have standing to recover damages from a lawyer who fails to include a full bequest to the third party in a decedent's will?

Answer: Maybe. Despite the long-recognized standard that a Virginia lawyer has no duty to a third-party beneficiary in preparing a client's last will and testament, a Richmond Circuit Judge recently awarded a would-be charitable beneficiary damages in excess of \$600,000 for a botched will. See *Richmond Society for the Prevention of Cruelty to Animals v. Thorsen*, CL11-1864 (Richmond Cir. Ct. Jan., 2015). The drafting attorney failed to include the full bequest to a charity. The Court ruled that the attorney could be held liable for his negligence in drafting the document and was responsible for damages in the amount of the omitted bequest.

38. Presumption of Undue Influence Q: Does the simple existence of a joint-account, established by a decedent, give rise to a "confidential relationship" between the decedent and the joint account holder for purposes of assessing a presumption of undue influence when all of the assets of that account are contributed by the decedent?

Answer: Yes. According to the Virginia Supreme Court in *Ayers v. Shaffer*, 286 Va. 212 (2013) (Koontz, J.), a widow who funded all of the assets of a joint account with a third party created a fiduciary duty between herself and the third party. Despite the fact that the widow created the joint account herself, without the aid of a power of attorney, the Court found that under Va. Code §6.2-619(A) (which imposes a fiduciary duty on the joint owners to one another), doing so was sufficient to establish a confidential relationship creating a fiduciary duty "and a presumption that the self-dealing transactions were unduly obtained." *Ayers*, 286 Va. at 228 (quoting *Parfitt v. Parfitt*, 277 Va. 333, 342(2009)) Such relationship is sufficient to shift the burden of proof to the defendants in an undue influence case.

39. Increases in Statutory Sums Q: Attorney Smith has been asked to advise his client, the Surviving Spouse of the Decedent, about various probate related allowances, including the Exempt Property Homestead and Family Allowances. He remembers that he advised another client on this same issue a few years before, and wants to locate that memo to pass on to the new client. Is Attorney Smith correct that the exemption amounts in place then, remain the same today?

Answer: No. The Code has been updated and the statutory allowances for Exempt Property and Homestead Allowances have increased from \$15,000 to \$20,000 (Va. Code 64.310); Family allowances have also increased under Va. Code 64.2-309 from \$18,000 to \$24,000 (or monthly installments of \$2,000 for up to a year), without court approval. See SB No. 346.

INTELLECTUAL PROPERTY

40. Trademarks Q: DOS Defendant used Princess Software Corporation’s trademark in connection with a fictitious LinkedIn account to disseminate an advertising campaign. Is this usage of Plaintiff’s trademark “in commerce” sufficient to support a trademark infringement claim?

Answer: Yes, in *Avepoint, Inc. v. Power Tools, Inc.*, 981 F. Supp. 2d 496 (W.D. Va. 2013) (Conrad, J.), in denying the defendant’s motion to dismiss the claim of trademark infringement, Judge Conrad held that the Plaintiff sufficiently pleaded a count for trademark infringement under Section 32 of the Lanham Act. The Plaintiff alleged that the Defendant created a fictitious profile on LinkedIn and used Plaintiff’s trademark to attract consumers to the online profile to falsely promote commercial activities offered through the profile and to cause competitive harm to Plaintiff. These allegations were sufficient to satisfy the “in commerce” requirement of the Lanham Act, and sufficient to survive dismissal. This opinion demonstrates that the creation of fictitious LinkedIn profiles may be actionable under Virginia law.

41. Q: Do you have to “compete” to misappropriate trade secrets?

Answer: Under *Collelo v. Geographic Services, Inc.*, 727 S.E.2d 55, 61 (Va. 2012), applying the Virginia Uniform Trade Secret Act, the alleged misappropriator is not required to “compete” with the holder of that trade secret. “[T]he Trade Secrets Act does not require that one who is accused of misappropriating a trade secret use the allegedly misappropriated trade secret to compete with the holder of the trade secret.” (referencing Va. Code § 59.1-336).

42. Q: Does a part maker have standing to sue a toner cartridge manufacturer for false advertising under the Lanham Act, 15 U.S.C. § 1125(a) when the toner cartridge manufacturer sent letters to companies in the toner cartridge remanufacturing business falsely advising those companies that it was illegal to sell refurbished cartridges?

Answer: Yes. The United States Supreme Court in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014), held that Static Control has adequately pleaded the elements of a Lanham Act cause of action for false advertising: an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentation. In *Lexmark*, the Supreme Court created a uniform test for standing for false advertising claims under Section 43(a) of the Lanham Act, advising that a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue under Section 1125(a) and no additional test is needed. Simply put, the Supreme Court held that “To invoke the Lanham Act’s cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.”

43. Tacking/Jury Issue Q: If a trademark Owner wishes to avail themselves of the doctrine of “tacking” – which is the process of using the date of use of a previously established “mark” for a newer, revised mark, creating the same, continuing commercial impression

– and such use becomes a disputed matter, who shall decide whether the use of said “tacking” was proper? A judge or a jury?

Answer: The Supreme Court in *Hana Financial, Inc. v. Hana Bank*, 135 S. Ct. 907 (2015), held that whether tacking is available to a trademark owner in a particular case is a question of fact that the jury should determine, not the court. The rationale for this ruling being that a tacking inquiry operates from the perspective of an ordinary purchaser or consumer, which should be determined by a jury of peers and not the court.

44. Q: Adam, who patented his product design in 2003, sees Betty marketing a similar product while watching Shark Tank one evening in October 2014. He sues Betty for infringement and petitions the court for a preliminary injunction to halt sales and promotional activities. After the injunction is denied and the case is dismissed without prejudice for lack of prosecution, may Betty sue for attorney’s fees as the “prevailing party”?

Answer: No. 35 U.S.C. § 285, which allows prevailing parties to be awarded attorney’s fees in “exceptional cases,” does not define “prevailing party.” On this issue of first impression in Virginia, Judge Moon in *Robinson v. Bartlow*, No. 3:12-cv-00024, 2014 U.S. Dist. LEXIS 75105, at *5, 2014 WL 2468817 (W.D. Va. June 3, 2014) (Moon, J.) applied the ordinary meaning of the term, which requires a party to “have obtained ‘a court order carrying sufficient judicial imprimatur to materially change the legal relationship of the parties,’” such as court-ordered consent decrees that materially alter the parties’ relationships, judgments on the merits, and their legal equivalents. 2014 U.S. Dist. LEXIS 75105, at *6, (quoting *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 440 F. Supp. 2d 495, 502 (E.D. Va. 2006) (internal quotation omitted)). On the other hand, dismissals that do not involve an examination on the merits do not support a finding that a party has prevailed. *See id.* at *6-*9.

As for preliminary injunctions, the Western District of Virginia recognized that the Fourth Circuit in *Smyth v. Rivero*, 282 F.3d 268, 276-77 (4th Cir. 2002) held that granting a preliminary injunction is not sufficient to confer prevailing party status because, despite its enforceability, the merits inquiry “is necessarily abbreviated,” and therefore makes it an unhelpful guide to whether a party has prevailed. *Robinson*, 2014 U.S. Dist. LEXIS 75105, at *9 (quoting *Smyth*, 282 F.3d at 276-77). Looking to a Tenth Circuit opinion for guidance as to the consequences of a denial of a preliminary injunction, Judge Moon determined that the denial of a preliminary injunction cannot make a party a prevailing party for attorney’s fees awards purposes, either.

Recent Development: The Court looked to the general interpretation of “prevailing party” in other states, as well as how other courts have addressed the issue of attorney’s fees in cases where preliminary injunctions were granted and denied, to address how to handle this issue. This decision was issued on reconsideration and has not been further appealed.

Since then, the Eastern District has cited *Robinson* to deny a petition for attorney’s fees in a patent case that was dismissed without jurisdiction for lack of jurisdiction. *See Inline Connection Corp. v. Verizon Internet Servs., Inc.*, No. 2:05cv205, 2014 U.S. Dist. LEXIS 98072, at *4-*5 (July 17, 2014).

REAL ESTATE

45. Q: After his mother passed away without a will, Sonny wanted to assume her mortgage so he called the bank that held her home loan and negotiated a loan modification with the bank employee over the phone. The employee confirmed he was approved for the modification, but a few weeks later the bank proceeded with a foreclosure on Sonny's mother's home. Sonny was not a party to the mortgage. Under Virginia law, is there a separate cause of action for breach of an implied covenant of good faith and fair dealing related to real estate?

Answer: No. While it is true that under Virginia Law every contract contains an implied covenant of good faith and fair dealing, *Enomoto v. Space Adventures, Ltd.*, 624 F.Supp.2d 443, 450 (E.D.Va. 2009), the covenant does not offer an independent tort, but rather only gives rise to a cause of action for breach of a contract. *Morrison v. Wells Fargo Bank*, 30 F.Supp.3d 449, 455-56 (E.D. Va. 2014) (Jackson, J.).

In *Morrison*, under facts analogous to the hypothetical above, the plaintiff filed suit against Wells Fargo Bank, claiming among other things, that the note and deed of trust associated with his mother's home loan contained an implied covenant of good faith and fair dealing that imposed obligations of the holder of the note. Wells Fargo challenged this claim asserting that Virginia does not recognize an independent cause of action for breach of good faith and fair dealing.

The Court noted that Wells Fargo had an express right in the deed of trust to proceed with a foreclosure in the event of nonpayment, though they could not exercise this right in bad faith. However, the plaintiff's allegations in the complaint focused on Wells Fargo's actual exercise of its express contractual right to foreclose, but did not allege that Wells Fargo had proceeded with its contractual rights in bad faith. Additionally, the covenant of good faith and fair dealing does not offer an independent cause of action for breach of contract for a contract involving an interest in real property. *See, e.g., Charles E Brauer Co. v. NationsBank of Va., N.A.*, 251 Va. 28, 33 (1996) (holding "while a duty of good faith and fair dealing exists under the U.C.C. as part of every commercial contract, we hold that the failure to act in good faith under § 8.1-203 does not amount to an independent tort.").

46. Q: Where the reasons for a restrictive covenant on land no longer exists, should the covenant be declared null and void?

Answer: Yes, unless upon further review of the instruments providing for the restrictive covenant, the related plats, and parole evidence, an opposing party could show that an equitable servitude exists, such as a common scheme. Where there is no such evidence presented, the court can declare the restrictive covenant null and void. *Miller v. Grinnan*, 86 Va. Cir. 446, 448 (Va. Cir. Ct. 2013) (Swersky, J.).

In *Miller* there was a building line restriction that was supposed to establish a setback line from a particular road. However, in the ensuing years the road was destroyed by a hurricane and the land was ultimately conveyed back to the waterfront landowners. As noted by the court, covenants to

restrict the free use of land are not favored and must be strictly construed. Although some of the neighbors argued that the change to the building set back line could result in harm to their views, the uniformity of appearance of the surrounding properties, unobstructed air, light, and vision benefits, and possibly destroy their privacy, without such purposes being stated in any of the instruments related to the restriction, the court had to conclude that the clear purpose of the restrictive covenant was to provide a set-back from the streets. Though the other purposes may have been secondary effects, there was no evidence that there was any other intended purpose for the covenant.

BANKRUPTCY

47. Q: After filing for Chapter 13 bankruptcy, but before converting her case to Chapter 7, Debbie Debtor is involved in a car accident. Debbie does not list a personal injury cause of action on her Chapter 7 schedules, but later pursues it in state court. Does she have standing to proceed?

Answer: Yes. In an unpublished decision, the Virginia Supreme Court revived a debtor's personal injury claim which had been dismissed by the Circuit Court on the argument that she lacked standing to pursue a claim which should have been made a part of her converted chapter 7 case. The Court noted that a converted bankruptcy case includes property of the estate as of the date of the original petition, but it only involves property of the estate acquired after the petition date, but before conversion, when there is a showing of bad faith in the conversion. Since the Bankruptcy Court had not found a showing of bad faith, the Court ruled the debtor had standing to pursue her personal injury claim (subject to a ruling of the Bankruptcy Court on a motion for turnover, which may have resulted in a bad faith showing). *Clark v. Health Tech Resources, LLC*, Record No. 132042, 2014 Va. LEXIS 80 (Va. Oct. 24, 2014).

48. Q: You've just filed an adversary proceeding in the Bankruptcy Court for the Eastern District of Virginia, seeking a determination of the validity and extent of your lien on a debtor's property. After the summons is issued, how long do you have under Fed. R. Bankr. P. 7004 to serve the complaint and summons on the debtor/defendant?

Answer: 7 days. An amendment to Rule 7004(e), effective as of December 1, 2014, alters the period of time during which service of the summons and complaint must be made, reducing the period from 14 days to 7 days after issuance of the summons. Because Rule 7012 provides that the defendant's time to answer the complaint is calculated from the date the summons is issued, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond. Therefore, this amendment seeks to ensure prompt service.

Recent Development: Amendment to Fed. R. Bankr. P. 7004(e) effective December 1, 2014.

49. Q: Attorney Adam, a recent law school graduate and computer whiz, believes that he can make the filing of a consumer bankruptcy petition even easier on the debtor. He sets up a website where clients may upload their financial documents from anywhere in the world to the "cloud." He then prepares the bankruptcy petition and schedules, emails it to the client for approval and an electronic signature, and files the petition with the bankruptcy court via CM/ECF. Is Adam's system revolutionary or problematic?

Answer: Problematic, for several reasons. The Bankruptcy Court for the Eastern District of Virginia has, since an opinion in 2002, required that an attorney obtain an original "wet" signature of the debtor on a bankruptcy petition. *See In re Wenk*, 296 B.R. 719 (Bankr. E.D. Va. 2002) (Tice, C.J.) More recently, however, that Court has issued two opinions that require that in addition to a wet signature, an attorney must actually meet with the debtor prior to filing a petition. *See In re Minh*

Tran, No. 14–11837–BFK, 2014 Bankr. LEXIS 4407, 2014 WL 5421575 (Bankr. E.D. Va. Oct. 17, 2014) (Kenney, J.) (citing *In re Smith*, 2014 Bankr. LEXIS 135, 2014 WL 128385 (Bankr. E.D. Va. Jan. 14, 2014) (Phillips, J.)).

In *In re Minh Tran*, Judge Kenney stated that “despite these advances in technology that allow parties to communicate remotely and to file papers electronically with the Court, there is still a fundamental duty to meet with the client and to obtain the client's original signature on the petition. The filing of a bankruptcy petition is an important, life-altering decision. The client must consider the risks (the damage to one's credit, the transactional fees, and the possibility of a failed Chapter 13 plan after paying into the plan for some period of time) with the potential rewards (the automatic stay, a discharge and the possibility of a strip-off of wholly unsecured liens).” 2014 WL 5421575, at *8.

Attorney Adam's conduct would violate the Eastern District of Virginia Bankruptcy Court's Local Rules requiring that a bankruptcy petition be signed by debtors and that the attorney maintain a hard copy of such signature for three years when filing the petition electronically, and the Court's CM/ECF policy. Further, Attorney Adam's conduct would violate Rule 9011(b), which requires counsel to certify that, after reasonable inquiry, the petition is not being presented in bad faith. Judge Kenney stated that it was impossible to comply with Rule 9011 without meeting with the debtor prior to filing the petition.

Recent Development: An attorney must meet with a debtor (and obtain an original signature) prior to filing a bankruptcy petition on his behalf.

50. Q: Company was awarded a judgment against Debby Debtor, and sought debtor's interrogatories against Debby in state court. On the date of the interrogatory hearing, Debby informed Company and the state court judge that she had filed for bankruptcy protection. The state court continued the interrogatory hearing *sua sponte* and set a status conference for several months later. What must the Company do prior to the status conference?

Answer: Ensure the cancellation of the status conference (which could be accomplished by either withdrawing the interrogatories to obviate the need for a status hearing, or by requesting that the state court cancel the status hearing and stay any further proceedings. Failure to do so constitutes a willful violation of the automatic stay under 11 U.S.C. § 362.

In *Skillforce Inc. v. Hafer*, 509 B.R. 523 (E.D. Va. 2014) (Ellis, J.), the District Court was presented the following question: whether a status hearing on the debtor's interrogatories constituted a "continuation" of an action against the debtor and therefore a violation of the automatic stay that appellants had a duty to take action to prevent. Confirming the Bankruptcy Court, the District Court held that Skillforce's failure to cancel the status hearing or discontinue the interrogatories violated the Bankruptcy Code's prohibition against a continuation of an action against a debtor. Further, the District Court held that Skillforce willfully violated the stay because it was aware of the stay and did not affirmatively act to prevent the debtor from being harassed or coerced.

Recent Development: A creditor has an affirmative duty to prevent the continuation of an action against a debtor while the automatic stay is in effect, including the cancellation of status hearings.

51. Q: If a Chapter 13 bankruptcy debtor seeks to strip off a wholly unsecured second deed of trust on a primary residence, is it correct for the court to use the date of the final evidentiary hearing on the strip-off complaint to value the property and pay-off amount of the first deed of trust?

Answer: No, the petition date is the proper date for the valuation of the real property and the pay-off of the first deed of trust. *Reconco v. Partners for Payment Relief DE III, LLC (In re Reconco)*, No. 13-10564, 2014 WL 1295721 (Bankr. E.D. Va. 2014) (Mayer, J.). The Court agreed that the petition date is the best option for valuation because it was consistent with fixing the debtor's and creditors' rights in light of the intended use of the property – largely in the context of a Chapter 13 case, to retain a debtor's principal residence. In a Chapter 13 case, a debtor is required to file a plan within 15 days of filing a petition. The debtor will indicate in the plan whether or not he intends to strip off a second lien, cure any arrearage, or surrender the property.

Additionally, the proper date for determining the pay-off amount is also the petition date. The debtor made his intention clear as of the petition date and provided the creditor with fair notice of his intention. The Court also explained in a footnote that date of the valuation hearing would be inappropriate especially in a close case because that date of such a hearing would be affected by procedural matters largely out of the parties' control. The court's procedures and the demand on its resources should not affect the outcome of such matters and use of the petition date also prevents any potential manipulation of the date.

New Development: Although two other courts in the Eastern District of Virginia have previously indicated that the petition date is the proper date for purposes of valuation, this is the first decision that has specifically ruled on the issue regarding the proper date for the valuation of the real property and the pay-off of the first deed of trust.

52. Q: A former Virginia company was a debtor in bankruptcy and did not include its telephone number and web address as assets in its bankruptcy filing. The case was ultimately closed after a chapter 7 trustee administered the assets and filed a report of no distribution. Is it appropriate for the bankruptcy court to reopen the case in order to sell the phone number and web address because a potential buyer argues they were property of the estate?

Answer: No, under Virginia law there is no recognized interest in telephone number or web addresses. *Alexandria Surveys Int'l, LLC v. Alexandria Consulting Group, LLC (In re Alexandria Surveys Int'l, LLC)*, 500 B.R. 817 (E.D. Va. 2013) (O'Grady, J.).

In *Alexandria Surveys*, the Debtor was a surveying company which filed its Chapter 11 petition in 2010. Soon after the bankruptcy filing, the former operators of the debtor formed a new company, Alexandria Surveys, LLC. The new company operated a similar business out of the Debtor's old location, using the debtor's former telephone number and web address. Two years

later the case was converted to Chapter 7, the Trustee filed a report of no distribution, and the case was closed.

Less than a year later, a competitor of the debtor filed a motion to reopen the case, claiming that it was interested in purchasing some personal property of the debtor that was never scheduled and as such had not been abandoned by the Trustee. The property it wanted to purchase included, among other things, the Debtor's website and phone numbers.

The Bankruptcy Court granted the motion to reopen the case and the Trustee held an auction, at which the competitor was the highest bidder for the telephone number and web address. However, Alexandria Surveys, LLC, asserting these assets were not property of the former debtor's estate, refused to turn over the assets. After the Bankruptcy Court entered a turnover order Alexandria Surveys, LLC appealed.

Judge O'Grady explained that contract rights with service providers such as telephone listings and website addresses are not property of the estate. As already settled by the Fourth Circuit, "the contours of property interests assumed by the trustee are determined by state law." *Id.* (citing *Butner v. United States*, 440 U.S. 48, (1979)). Relying on the Supreme Court of Virginia decision in *Network Solutions, Inc. v. Umbro Int'l*, 259 Va. 759 (2000), which held that a domain name and telephone number could not be garnished by a judgment debtor, Judge O'Grady concluded that Virginia does not recognize an ownership interest in telephone numbers and web addresses. Judge O'Grady also stated that, not even the Debtor had a possessory interest in the phone numbers and website. Those interests arose from executory contracts with the service providers which were rejected by the Trustee before the estate was reopened.

New Development: In the absence of controlling law in the Fourth Circuit, the District Court turned to Virginia precedent to determine what constituted property of the estate.

CONSTITUTIONAL LAW

53. Public Health Q: Is it legal to require airline passengers arriving into Dulles International Airport from Liberia, Sierra Leone and Guinea be screened by face temperature checks using no-touch thermometers and other screening measures in an effort to prevent an Ebola outbreak in the United States?

Answer: Yes. To support a similar decision made late last year, the CDC cited to the Commerce Clause of the United States Constitution, under which the Federal Government is empowered to regulate trade with foreign countries. Additionally, the 1944 Public Health Service Act also allows the Federal Government to take action to prevent communicable diseases from spreading into the country.

54. Same Sex Marriage Q: True or False: Virginia may not recognize the status of a same-sex couple legally married in another state.

Answer: False. In *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (Allen, J.), a U.S. District Court in Norfolk ruled that various “Virginia Marriage Laws” limiting the institution of civil marriage to a union between a man and a woman, and expressly prohibiting marriages between persons of the same sex, are unconstitutional. The Fourth Circuit affirmed on July 28, 2014 in *Bostic v. Schaefer*, 760 F. 3d. 352 (4th Cir. 2014) (Floyd, J.), *stay granted by sub nom. McQuigg v. Bostic*, 135 S. Ct. 32, *and cert. denied*, 135 S. Ct. 314, *and cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286, *and cert. denied Schaefer v. Bostic*, 135 S. Ct. 308.

While the U.S. Supreme Court declined to review of *Bostic*, letting the Fourth Circuit ruling stand, on April 28, 2015, the U.S. Supreme Court heard oral argument in *Obergefell v. Hodges*, No. 14-556, (2015), which was consolidated with three other cases, on the questions of whether the Fourteenth Amendment requires that states grant and/or recognize same-sex marriages. A decision is expected by the end of June, 2015.

STATUTORY CONSTRUCTION/INTERPRETATION

55. Q: Niki’s Hookah Lounge is a retail tobacco products establishment. Customers may purchase tobacco to smoke on-site through "hookahs" available for rent at the café, or to smoke off-site. It also sells food for on-site consumption in the same area where tobacco is smoked. Is Niki’s Hookah Lounge subject to regulation under the Virginia Indoor Clean Air Act even though the café sales are only a small portion of Niki’s business?

Answer: Yes. In *Virginia Dep’t of Health v. Kepa, Inc.*, 766 S.E.2d 884 (Va. 2015) (Mims, J.), the Virginia Supreme Court overturned the Court of Appeals of Virginia’s ruling allowing a Blacksburg Hookah Lounge to exploit a perceived loophole in the Virginia Indoor Clean Air Act, which would allow restaurants within tobacco retail stores to be exempt from regulation. The Court noted that although the Hookah lounge was a tobacco retail store, it also operated as a restaurant, which is broadly defined in the statute as “any place where food is served.”

In order to be exempt from the Virginia Indoor Clean Air Act smoking ban, Va. Code § 15.2-2820 et seq. ("VICAA"), Niki’s must fit into an exception defined in Va. Code § 15.2-2821(A)(1)-(6).

When reading the statute in its entirety, no exemption to the restaurant regulation requirements was made for tobacco retailers; thus, the drafters did not intend to allow tobacco retailers operating a restaurant to avoid regulation. Where a tobacco retailer also operates a restaurant, even in a limited capacity, they must comply with the VICAA, which went into effect on December 1, 2009.

56. Q: Can Virginia Code § 22.1-254, requiring compulsory school attendance, be used to prosecute parents or guardians whose children are repeatedly tardy for school?

Answer: No. In *Blake v. Virginia*, the Supreme Court of Virginia found that the compulsory school attendance statute was ambiguous as to whether it could be applied to a parent’s failure to send a child to school on time, or whether it simply applied to a parent’s failure to have a child enrolled. However, after reading the statute in the context of the related school regulations, it was clear that applying such misdemeanor charges to “tardiness” was contrary to the statute’s meaning. *Blake v. Commonwealth*, 764 S.E.2d 105 (Va. 2014) (Millette, J.). “There would simply be no need for criminal enforcement provisions for the compulsory attendance portion of this statute if parents could already be criminally prosecuted for absences and tardiness alone.” *Id.* at 109-10.

EMPLOYMENT LAW

57. Wrongful Termination Q: In a wrongful termination suit, is the Plaintiff entitled to front pay and compensation for lost pension under Virginia's Fraud Against Taxpayers Act?

Answer: No. Front pay and compensation for lost pension are not expressly mentioned in Virginia Fraud Against Taxpayers Act, Va. Code § 8.01-216.8, which entitles a wrongfully terminated employee to relief that will make him or her "whole." Instead, they fall within the statute's provision for "special damages sustained as a result of the discrimination." The Supreme Court in *Lewis v. City of Alexandria*, 287 Va. 474 (Va. 2014) (McClanahan, J.), determined as a matter of first impression that such damages under the Act constitute equitable relief, which is a matter of the Court's discretion and may properly be denied where other relief makes the plaintiff "whole."

58. Q: An employee who suffers from a social anxiety disorder sues for disability discrimination and failure to accommodate a transfer from her front desk position, claiming that interacting with the public causes her severe anxiety. Can the employer prevail on summary judgment by arguing she is not "disabled" if the employer proves that the employee engages with coworkers and regularly posts on social media?

Answer: Probably not. In *Jacobs v. N.C. Admin. Office of the Courts*, No. 13-2212, 2015 U.S. App. LEXIS 3878, *24-27 (4th Cir. Mar. 12, 2015) (Thacker, J.), the Fourth Circuit reversed the district court's dismissal of employee's claim, rejecting public-sector employer's argument that plaintiff who suffered from such a disorder but appeared to engage socially with peers and coworkers outside of work could not have been substantially limited in a major life activity (the standard for determining whether a plaintiff is disabled within the meaning of the ADA). The Fourth Circuit recognized the federal regulations' definition of "a substantially limiting impairment as one that 'substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.'" *Id.* at *24 (quoting 29 C.F.R. § 1630.2(j)(1)(ii)). "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *Id.* In this case, the plaintiff claimed she was substantially limited in her ability to interact with others.

In *Jacobs*, the employer defendant argued that the plaintiff "could not have been substantially limited in interacting with others because she 'interact[ed] with others on a daily basis,' 'routinely answered inquiries from the public at the front counter,' 'socialized with her co-workers outside of work,' and engaged in social interaction on Facebook. Appellees' Br. at 26, 29." *Id.* at *24-*25. Rejecting this argument, the Court stated that "[a] person need not live as a hermit in order to be 'substantially limited' in interacting with others. . . . [T]he fact that Jacobs may have endured social situations does not per se preclude a finding that she had social anxiety disorder. Rather, Jacobs need only show she endured these situations 'with intense anxiety.' . . . At a minimum, Jacobs's testimony that working the front counter caused her extreme stress and panic attacks creates a disputed issue of fact on this issue." *Id.* at *26. The Court explained that "answering questions at the front counter constitutes a performance situation that is different in character from having lunch with coworkers, and a reasonable jury may conclude that Jacobs's allegedly debilitating anxiety was specific to that situation."

59. May a plaintiff who prevails under a claim for retaliation in violation of the Sarbanes-Oxley Act of 2002 seek an award of front pay, even though it is not expressly mentioned as an available remedy?

Answer: Yes. Although the Sarbanes Oxley Act's anti-retaliation provisions do not expressly mention front pay as among the remedies available to a prevailing plaintiff, the Act does provide that a prevailing plaintiff shall be entitled to all relief necessary to make him or her whole. See 18 U.S.C. § 1514A(c)(1). In *Jones v. SouthPeak Interactive Corp.*, 986 F. Supp. 2d 680, (E.D. Va. Nov. 19, 2013) (Payne), *aff'd*, 777 F.3d 658, 683-85 (4th Cir. 2015), the Eastern District of Virginia looked to guidance in other Civil Rights employment discrimination cases for guidance and, interpreting the statutory language broadly, determined that the Act did allow courts the authority to award front pay to prevailing plaintiffs.

For background purposes, pursuant to 18 USC §1514A(b), a person who alleges discrimination or retaliation may (1) file a complaint with the U.S. Secretary of Labor; or, (2) if the Secretary of Labor has not issued a final decisions within 180 days of filing, bring an action in the appropriate U.S. district court having jurisdiction. The employee only has 180 days after the date of the violation (or from which the employee becomes aware of the violation) to file a complaint. See <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title18/pdf/USCODE-2010-title18-partI-chap73-sec1514A.pdf>.

Recent Development: This issue appeared to be one of first impression, as the Court noted it did not find, and the parties did not cite, any judicial decisions awarding front pay in lieu of reinstatement under the Sarbanes Oxley Act. The Court therefore relied on the Department of Labor's Interim Final Rule on Sarbanes Oxley Retaliation Complaints, which cited two administrative decisions as supportive of the proposition that front pay is a possible remedy for such cases, and also recognized other administrative decisions that had since relied on the Department of Labor's Interim Rule. See *Jones*, 986 F. Supp. 2d at 683. The Court then relied on the Fourth Circuit's award of front pay in Age Discrimination in Employment Act and Family Medical Leave Act cases as "equally applicable." See *id.* at 683-685 (citing *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423-24 (4th Cir. 1991); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 307 (4th Cir. 1998); *Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 504 (4th Cir. 2001)).

60. Civil Procedure Q: May a trial court use a demurrer to decide the enforceability of an employment contract's non-competition and non-solicitation provisions on the merits?

Answer: No. The purpose of a demurrer is solely to test whether a complaint states a cause of action upon which the requested relief may be granted, and thus, only tests the legal sufficiency of the facts pled. It does not test the strength of the proof. *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (Va. 2013) (Kinser, J.). To determine whether an agreement restrains competition, that agreement "must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved," and determined on its own facts. *Id.* at 144 (internal quotations omitted). An employer must be afforded the opportunity to present

evidence of such facts, which cannot be determined solely as set forth in a Complaint. *Id.* at 144-145.

Recent Developments: *Assurance Data* is a strong statement of the Supreme Court of Virginia's position on the use of demurrers to dismiss lawsuits preliminary, and is also, for many, a surprising turn on the treatment of non-competition agreements at this preliminary stage. This ruling reflects that although the Court has taken a very hard line on non-competition and non-solicitation agreements, the Court makes very clear in *Assurance Data* that employers should be given the opportunity to present evidence as to why a particular agreement, when construed under a particular set of facts, is reasonable and not violative of the state law.

61. Q: Glorified State's criminal justice investigative bureau requires all of its agent trainees to pass a physical fitness test. The test uses gender-normed minimum physical fitness standards. Bob has accepted a position as an investigative agent, which is conditioned on his ability to pass the physical fitness test. Does the physical fitness test violate Bob's Title VII right to be free from sex discrimination if he cannot pass the test?

Answer: Possibly. In *Bauer v. Holder*, 25 F. Supp. 3d 842, 858-859 (E.D. Va. June 10, 2014) (Ellis, J.), the Eastern District Court of Virginia examined whether such a test imposed on FBI trainees constituted impermissible disparate treatment in violation of Title VII's anti-sex discrimination provisions. Although Judge Ellis found the gender-normed test used by the FBI to be impermissible, he acknowledged that not all gender-normed physical fitness tests are per se legal or illegal "because there are real physiological differences between the sexes[.] . . . Rather, whether a particular gender-normed physical fitness test is legal and establishes appropriate standards must be analyzed under a more rigorous and exacting legal standard." *Id.* Whether an employer has a legitimate bona fide occupational qualification defense as it pertains to the physical fitness test would arguably justify any facially discriminatory treatment of men and women on the basis of sex. *See id.* at 861-64.

Recent Development: Judge Ellis notes that the issue of whether gender-normed physical fitness tests violate Title VII has not been addressed by the Supreme Court. He therefore looks to analogous cases concerning the requirement for women to pay more for into pension funds based on research that they live longer than men and barring women capable of bearing children from working jobs with a risk of lead exposure for guidance. He also looked to lower court rulings addressing cases that imposed different requirements and standards on the sexes based on physiological differences in addition to analyzing the applicable statutory language in Title VII.

LOCAL GOVERNMENT

62. Q: If an appeal bond's preamble references an appeal, does a party appealing a local governing body's disallowance of claim have to also file a separate written notice of appeal?

Answer: Yes, in the *County of Albermarle v. Carimirand*, 285 Va. 420 (2013) (Millette, J.), the Supreme Court of Virginia held the plain language of Va. Code § 15.2-1246 required both a bond and a separate notice of appeal, and the bond's preamble referencing the appeal is had no independent legal force and did not constitute notice.

63. Zoning Q: Is the "fairly debatable" standard the proper standard for reviewing a board of zoning appeals' decision denying a request for a variance?

Answer: No. The proper standard is found in Va. Code § 15.2-2314, which states that the board's decision is presumed correct, but that presumption may be rebutted by proof that the board either applied incorrect legal principles or that the decision was plainly incorrect. *See Lamar Co., LLC v. City of Richmond*, 287 Va. 322, 757 S.E.2d 15 (2014) (Lemons, J.).

TAX ISSUES

64. Q: Does a clerk of court possess statutory standing to initiate a lawsuit, in his official capacity, to enforce the real estate transfer tax on the recording of instruments imposed by Va. Code Ann. §§ 58.1-801 and 581.-812?

Answer: In *Small v. Fannie Mae*, 2013 Va. LEXIS 102 (September 12, 2013), the Supreme Court of Virginia held that a clerk of court did not possess such statutory standing because the legislature designated the real estate transfer taxes as state taxes to be enforced by the Tax Department, and no statute authorized the clerk of court to collect unpaid real estate transfer taxes by filing an enforcement action.

MENTAL HEALTH LAW

65. Mental Health Policy Q: A mentally ill individual was presented to a local community services facility for treatment of a mental illness. The facility informs the patient and her family that after searching for the allotted six hours, permitted by law, they cannot locate a bed, and therefore must release the individual due to a lack of available space. Is the community facility correct in their assessment of this situation, under current state law?

Answer: No. Under SB 260 (approved by the Governor April 06, 2014, amending Va. Code §§ 37.2-808 and 37.2-817.2), a bill championed by Senator Deeds in the wake of his son's tragic denial of treatment for mental illness, a state facility cannot refuse or fail to admit a patient "who meets the criteria for temporary detention" unless an alternative plan can be enacted. Furthermore, the bill mandates the Department of Behavioral Health and Developmental Services institute an online psychiatric bed registry to "provide real-time information about the number of beds available" in psychiatric facilities.

The bill also increased the time a person may be held following an emergency custody order from 4 hours — with a possible 2-hour extension — to 8 hours plus an optional 4 hour extension.

IMMIGRATION

66. Q: Isaac Leng is a Malaysian man who moved to the U.S. to go to the University of Virginia for college. After college, he married an American woman who was unable to have a child. Thereafter, he also married a Malaysian woman in order to have children. When Mr. Leng applies for naturalization, can his application be denied based on being a practicing polygamist?

Answer: Yes, in *Hassan v. Johnson*, No. 1:14-cv-1190, 2015 WL 747182 (E.D. Va. Feb. 20, 2015) (Brinkema, J.), the court recently ruled that an Egyptian national cannot overturn denial of his application for naturalization based on his history as a practicing polygamist.

ETHICS (0.5 CLE)

Question 1:

Part 1 –

Q: Attorney Tom has practiced at the law firm of Smith Reece, LLP in Richmond, Virginia for the past 10 years, during which time he has worked on many client matters. Tom has just notified Smith Reece that he has decided leave the firm and hang his own shingle as a solo practitioner. Under the newly enacted Virginia Rule of Professional Conduct 5.8, which is effective May 1, 2015, what must Tom and his current Smith Reece do in anticipation of Tom’s departure from the firm?

A: Engage in bona fide negotiations regarding the notification of the firm’s clients of Tom’s anticipated departure from the firm and, if possible, notify all firm clients of Tom’s departure through a joint communication. Tom and/or Smith Reece may only contact firm clients unilaterally if, after bona fide negotiations, the parties are unable to agree on a joint communication concerning Tom’s departure. In the event that no joint communication can be agreed to, then a lawyer’s unilateral notification to the clients may not contain false or misleading statement, and must notify clients of all of its options: that is, remain a client of the law firm, choose representation by the departing lawyer, or choose representation by another lawyer or law firm.

Part 2 –

Q: Tom and Smith Reece were able to agree to a joint letter, which was sent to each of the firm’s clients notifying them of Tom’s departure and their options for representation in the future. Client Clyde, Tom’s law school roommate, was a recipient of that letter. If Clyde fails to respond to the letter, who may continue to represent Clyde?

A: Smith Reece. Where a client fails to respond to a notice given by a departing lawyer, the client remains a client of the law firm unless the engagement is terminated by either the client or the law firm. In a case where the law firm is dissolving and that is the reason for the lawyer’s anticipated departure, the client is deemed to be a client of the lawyer primarily responsible for the client’s legal services.

Question 2: Based on the ABA Ethics 20/20 Commission Proposal, the Virginia Standing Committee on Legal Ethics has proposed changes to Virginia Rule of Professional Conduct Rule 1.1, which governs competence of those practicing law in the Commonwealth. Under the proposed rule, in order to address technological changes that impact the legal profession, what would a lawyer need to do in order to competently represent a client?

A: The lawyer must acquire or possess the skills reasonably necessary to effectively represent a client, including keeping abreast of changes in the law in which the lawyer practices and carrying out discovery where these things might require the lawyer to use technology or the internet.

- Because changes to the law are often published first on the internet rather than in books, this may require a lawyer to understand how to update research online.
- Social media and other online accounts may contain crucial discoverable information and evidence in the case.
- Law office technologies may need to be employed in order to protect the confidentiality of client files and communications.
- Note that the amendment does not necessarily require that a lawyer personally acquire training, skill and expertise in technology required to practice law if the lawyer employs others who are competent and familiar with the relevant technology.

Question 3: Under the current Rule 1.10 the general rule for imputed disqualification of a lawyer is that a lawyer at a firm shall not knowingly represent a client when the lawyer knows or reasonably knows that any one of them practicing alone would be prohibited from doing so. The Ethics Committee has proposed an amendment to Rule 1.10 which is intended to avoid a situation where a lawyer avoids the imputation of a conflict of interest by avoiding the knowledge that another lawyer could not represent that client. What would proposed Rule 1.10 require the lawyer or firm to maintain?

A: A conflict check system. Under the new rule, a lawyer or firm's failure to maintain a system for detecting or identifying conflicts would be deemed a violation of the rule if proper use of a system would have identified the conflict.

The proposed amendment is worded this way in order to acknowledge that there are situations in which a conflict check would fail to identify a conflict. However, a lawyer should not be able to avoid conflicts simply by not maintaining a system or record of parties who they may not represent.

Question 4: Pro Se Polly is currently being sued by her neighbor over her noisy parties. She can't afford to hire a lawyer to represent her, but she finds a Virginia lawyer on the internet who does contract work and pays him to draft a motion to dismiss the lawsuit that she then files, *pro se*, under her own name. Must the lawyer notify the court that he offered substantial assistance to the *pro se* litigant?

A: No, unless a standing rule of the specific tribunal requiring such disclosure, in which case the lawyer may not counsel or assist the client in violating the court's procedural requirement. Rule 3.4 (d).

This rule is based on Legal Ethics Opinion 1874, which reverses LEOs 1127 and 1529 which previously prohibited lawyers from “ghostwriting” pleadings for *pro se* litigants. The Committee took the opportunity to reexamine these LEOs, which were issued before Virginia adopted the Rules of Professional Conduct, including Rule 1.2(b), which allows a lawyer to limit the objectives of the representation, if the client consents after consultation. Rule 1.2(b) and similar rules in other states have been cited in support of “unbundling” legal services so that a lawyer and client could contract on who would perform discrete legal tasks – the lawyer or the client.

Note that certain courts in the Commonwealth do specifically prohibit “ghostwriting”, like some federal courts sitting in the Eastern District of Virginia. LEO 1874 warns lawyers that they must research a particular court’s rules or opinions addressing “ghostwriting” and advise the limited scope client and act accordingly.

Question 5: During a 5 day jury trial, you notice that many of the jurors spend time during their lunch breaks perusing social media sites on their phones. Concerned that these jurors may be posting inappropriate information about the trial on social media, you log in to Facebook and Linked In, and perform a search for each of the jurors. According to the American Bar Association, have you violated any ethical rules?

A: No. According to the ABA’s Formal Opinion 466:

“Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror’s electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of *ex parte* communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror’s or potential juror’s Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.”