

# Virginia Lawyer

VOL. 67/NO. 6 • April 2019

## VIRGINIA LAWYER REGISTER

The Official Publication of the Virginia State Bar

A portrait of Todd A. Pilot, a Black man with glasses, wearing a blue suit jacket, a red and white checkered shirt, and a red striped tie. He is smiling slightly and looking directly at the camera. The background is a blurred outdoor scene with a building and trees.

**Todd A. Pilot**  
**The Trademark Institute**

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# Virginia Lawyer

The Official Publication of the Virginia State Bar

April 2019  
Volume 67/Number 6

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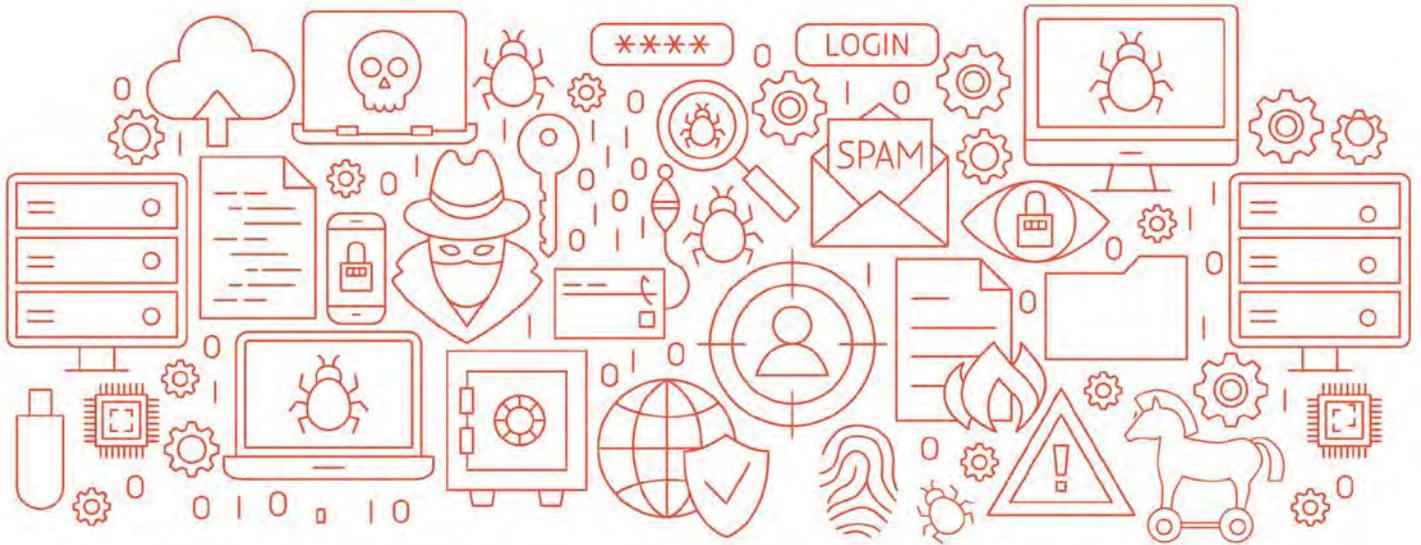
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# THE TOP 5 CYBER SECURITY TIPS



1

## Keep hardware and software as current as possible.

You don't need to be first in line for the latest and greatest, but don't be the last in line either. Once software becomes unsupported, it is unethical to use it because it is no longer receiving security updates and is vulnerable to hackers. Apply patches as soon as they are available to reduce vulnerability to an attack or compromise.

2

## Backup all data.

Don't forget to periodically conduct a test restore of the backup and make sure your backups are impervious to ransomware – either backed up in the cloud or agent-based. Talk to your IT provider to learn more. Backups should be encrypted with a user-defined encryption key, whether on-site, off-site or stored in the cloud. If using a cloud vendor, the vendor should not have access to the decryption key.

3

## Develop a password policy.

The policy should mandate the use of strong passwords (14 characters or more with upper and lower case, numbers, and special characters) and require that passwords be changed on a regular basis. The use of a password manager can make this task quite easy. Consider enabling two-factor-authentication (2FA) when available.

4

## Mandate that all work-related internet sessions be encrypted.

Prohibit the use of public computers and unsecured open public Wi-Fi networks. Access to the office network must always occur through the use of a VPN, MiFi, smartphone hotspot or some other type of encrypted connection.

5

## Provide mandatory social engineering awareness training to everyone at the firm at least once a year.

Technology alone cannot protect your data. The greatest vulnerability comes from the folks who use your network. Cyber attacks are successful because someone did something stupid like clicking on a link, opening an e-mail attachment, or verifying an ID and password when they shouldn't have.



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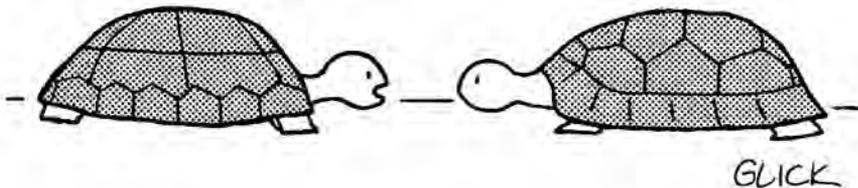
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**Correction**

On page 40 of the February issue caption 7 mistakenly identified lawyer Laura Bladow's mother as Angela. Her name is Sandra. We regret the error.

**Jest Is For All**

by Arnie Glick



*"Don't you just hate it when a contract includes a  
'time is of the essence' clause?"*

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## A Landlord's Point of View

The February article, "A Tale of Two Evictions," by Helen Hardiman and Clarence M. Dunnaville Jr., begs for a response. After 41 years in the general practice of law, I am now what a former partner calls "a recovering lawyer," which means retired. Having acquired several residential rental properties, being a landlord now occupies my time. So, this missive is from that standpoint.

First of all, owning/managing residential rental properties, whether they be apartment units or houses, is a business with the goal of making a profit — it is not a social service benefit to tenants. In both of the cases mentioned in the article, each of the tenants failed to pay their rent in a timely fashion, which puts the landlord/owner in a bind. If no rent money is coming in then how will the taxes, insurance, debt service, repairs and, in some cases, utilities be paid? No other business is expected to provide products or services to those who fail to pay. If you do not make your car payments, the vehicle is repossessed. If you fail to make utility payments, your electricity, gas, water, cable, etc. are eventually cut off. The only way a rental property owner can stay in business is for the properties to bring in the rents. So, if a tenant is not paying, then the landlord has to go through the onerous and sometimes continuous process of having that tenant removed so the property can hopefully be re-rented to someone who pays.

A second bone of contention with the article is that it seems to gloss over the time frame required for a landlord to actually regain possession of a rental property. Generally, a residential lease provides for monthly payments to be made on the first of each month, in advance, with the payment being late if not received by the fifth of the month. Therefore, the earliest a

landlord can send out a "Five Day Delinquent Notice" is the sixth of the month. That is the statutory required notice to the delinquent tenant that the tenant must pay the rent within five days of receipt of the notice or vacate the premises. That day is also the point when the landlord can file, in the General District Court, a Summons for Unlawful Detainer to ask for the unpaid rent and possession of the property. The minimum court cost is \$54. My experience is that a court date is set for about 30 to 45 days hence. Keep in mind the tenant is still in the premises. On that court date, the tenant may appear and ask for a continuance to get representation, or due to illness, or a number of other reasons. That next court date can often be as much as 30 more days. When the case is finally heard, and assuming the landlord prevails, the court will enter judgment for the arrears and possession. As a conservative example with no continuance, say the tenant did not pay January's rent of \$500, the 5-day Notice and the Unlawful Detainer were sent and filed respectively on February 6th, and judgment was entered for the landlord on the first court date of March 6th. The tenant has now been in the premises about 66 days while paying no rent.

Does the landlord then have the right to enter the property and take possession? No, the tenant has a 10-day appeal period. Only after that has expired may the landlord file a Writ of Possession (another \$25.00) with the court. The clerk sends the Writ to the Sheriff who then serves the tenant a copy of the Writ and at the same time notifies the tenant when it will be executed. The Sheriff also notifies the landlord of the date and time. The landlord must have manpower on hand to move the tenant's furniture and other items to the curb, if the tenant has not vacated by that time. This rarely



## Lawyer Well-Being

Newport News attorney Ed Sarfan and Williamsburg attorney Steve Roberts demonstrate just one of many ways Virginia lawyers may implement the Supreme Court of Virginia's wellness initiative by taking the time to relax in nature and fly fish in the Blue Ridge Mountains. In this photo, Sarfan has the fish, because Roberts "advised and counseled him on the details of fly fishing," according to Sarfan.

happens, as the tenant usually moves out before then. This Writ process generally takes about two weeks. So now add 10 days, plus 14 days to the 66 days noted above, and the tenant may have been in the premises for 90 days with no rent having been paid.

Again, generally speaking, a tenant who has been evicted is unlikely to leave the premises in a broom clean condition, resulting in the landlord having to toss out items not taken, while further cleaning the stove, refrigerator, and bathroom before repairing damages in order to re-rent: another day and

Forum continued on page 10



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another expense and/or aggravation incurred.

All of the above gyrations have been to merely regain possession of the rental property in order to make it income producing. Now the landlord has the additional tribulation of trying to recover the three months lost income and expenses.

Ah! Garnishment proceedings, another journey of frustration.

Michael S. Ferguson  
Roanoke

*Editor's note: Part 2 of the article, "A Tale of Two Evictions," by Helen Hardiman and Clarence Dunnville is on page 42 in this issue. See "Renters and Landlords Benefit from Virginia Reforms."*

Letters

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LEGAL SERVICES CORPORATION

Notice of Availability of Grant Funds for Calendar Year 2020

The Legal Services Corporation (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2020. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal, will be available at <http://www.lsc.gov/grants-grantee-resources/grantee-login> during the week of April 8, 2019. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. On or around the week of March 11, 2019, LSC will publish the list of service areas for which grants are available and the service area descriptions at <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas>. Applicants must file a Notice of Intent to Compete (NIC) and the grant proposal through LSC's online application system in order to participate in the grants process. The online application system will be available at [https://lscgrants.lsc.gov/EasyGrants\\_Web\\_LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleConfig&Page=Login](https://lscgrants.lsc.gov/EasyGrants_Web_LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleConfig&Page=Login) during the week of April 8, 2019.

Please visit <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant> for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to [LSCGrants@lsc.gov](mailto:LSCGrants@lsc.gov).

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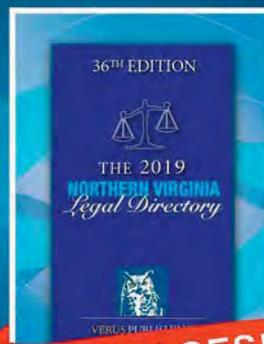
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# President's Message

by Leonard C. Heath Jr.



## Virginia Lawyer Well-Being: “We keep moving forward. . .”

IT MAY BE HARD TO ENVISION, but I used to run long distances. My hometown of Newport News has a wonderful municipal park that has over 30 miles of trails. You can start at the park, run to the back of the park, pick up the Yorktown Victory tour, and go all the way to the Yorktown Battlefield Visitor's Center. Decades ago, I would run this round-trip route several times a year. There were times when I would hit the proverbial wall and have to look down and tell myself “just take one step at a time.” And, I always had a strong belief that I should not stop or let up until I crossed the finish line (even though I was not competing against others but simply against my previous times). Later in life, after my children were born, I would tell them that there are some days where you have to just look down and put one foot in front of the other. But at all times, you keep moving forward. As I write this article, I have come to the realization that these are my last few months as president. As I used to do in my running days, I plan to sprint across the finish line. So, with this column, let's start with what we began in June — lawyer well-being.

I am pleased to report that Virginia has made historic strides in the lawyer well-being initiative. In fact, I just returned from a conference in Miami where Virginia was invited to give a presentation on our initiative to a group of federal and state judges. Of all the trips I have taken over the last two years, I am particularly proud of this one because the invitation was

made not because of my position as president, but because of what Virginia has achieved. So here is our year (or so) in review:

### **Changes to rules and procedures within the VSB**

We have added a new comment 7 to Rule 1.1 of the Rules of Professional Conduct, that calls attention to the fact that maintaining well-being is an aspect of maintaining competence to represent clients. We have further modified rules in our disciplinary process to facilitate retirement for lawyers suffering from a permanent impairment, such as an irreversible cognitive decline, by allowing retirement with dignity rather than suspending lawyers' licenses on impairment grounds. Further, when information of mental health or substance abuse issues are discovered during investigation or prosecution of lawyer regulation matters, we now allow sharing of such information with lawyer assistance programs.

### **Report of the Committee on Lawyer Well-Being of the Supreme Court of Virginia**

This Supreme Court Committee issued a report entitled *A Profession at Risk* on September 17, 2018. The result of the committee's work is that Lawyers Helping Lawyers will now have a contract to provide services as a result of a new Supreme Court of Virginia wellness fee to be paid by Virginia's lawyers on a permanent basis. In addition, the mission of the lawyer assistance

program has been expanded to include judges and Virginia law students.

### **Virginia Board of Bar Examiners changes mental health question**

As of January 1, 2019, a more “wellness-friendly” question will be asked on the bar application. Before the January 1, 2019, change, students were required to report any “condition or impairment” related to substance or alcohol abuse, or mental, emotional, or nervous disorder or condition. That question has now been removed, and the current question asks only the following: “Within the past five years have you exhibited any conduct or behavior that could call into question your ability to perform any of the obligations and responsibilities of a practicing lawyer in a competent, ethical and professional manner?”

### **Revision of MCLE Opinion 19**

While Virginia's MCLE Board had previously granted credit for wellness topics, the MCLE Board re-wrote and expanded Opinion 19 to make it abundantly clear to providers and participants that wellness topics will receive MCLE credit, so long as other requirements of Virginia's MCLE Rule are met.

### **First Annual Law Student Wellness Summit**

On February 5, 2019, at the University of Virginia School of Law, deans and representatives of all eight of Virginia's law schools convened for the First Annual Law Student Wellness Summit.

Also in attendance were our Chief Justice and four other members of the Supreme Court, as well as leaders from the VSB, The Virginia Bar Association, the Virginia Board of Bar Examiners, and Lawyers Helping Lawyers. Next year's summit will be conducted at the University of Richmond Law School.

### **Inclusion of wellness topics in the Harry L. Carrico Professionalism Course**

We have added wellness materials and hypotheticals in the professionalism course that new admittees to the Virginia State Bar must attend during their first year of practice.

### **Legal Talk Network Podcast**

On July 31, 2018, I took part in my first podcast with Sharon Nelson, the 75th president of the VSB, and Jim Calloway, the director of the Oklahoma Bar Association Management Assistance Program, entitled Addressing Lawyer Mental Health Wellness at the Virginia Bar. This podcast can be found at <https://legaltalknetwork.com/podcasts/digital-edge/>.

### **Speeches and presentations**

Members of the Court and the VSB, along with staff from the VSB and members of VSB conferences and sections, have given, and continue to give, speeches, CLEs, and presentations across the Commonwealth of Virginia on lawyer well-being topics.

### **The Virginia State Bar President's Special Committee on Lawyer Well-Being**

This committee will submit its final report at the Annual Meeting of the Virginia State Bar in Virginia Beach on June 14, 2019. The committee's report will address the occupational risks to the practice of law. In addition, the report will describe each risk, provide practice pointers for individuals and law firms, and identify resources available to learn more about each risk. The committee has identified 20 separate occupational risks to the practice of law. The target market for the report are lawyers, judges, law students, and those who care about them. This landmark report should change the way that law students prepare for, and lawyers and judges participate in, the practice of law.

When I was sworn in as president on June 15, 2018, I ended my acceptance speech with the following:

As we move forward this year, the "experts" on lawyer well-being are the attorneys across this great commonwealth who, day in, day out, actually practice law. We are the ones who must participate in critical self-evaluation, not only for ourselves, but for our families, and for those attorneys yet to come. But, most importantly, we are compelled to do this for our clients, for our

system of justice, and for the public trust.<sup>1</sup>

I would like to tell you that we are nearing the finish line on the lawyer well-being journey. However, lawyer well-being remains a marathon, not a sprint. While we have made great strides forward, we still need to remember to look down and put one foot in front of the other . . . and always, always keep moving forward. I promise you that I will continue to be an advocate for you and your well-being.

Being allowed to serve as the president of the Virginia State Bar has been one of the great honors and privileges in my life. There are far too many people to thank for the opportunity so I will simply leave you with my sincerest, heart-felt "Thank you."

And always remember to keep moving forward. ☺

<sup>1</sup> Leonard C. Heath Jr., *Why Lawyer Well-Being is Important to Society*, 31 Regent Univ. L. Rev. 1, 9 (2018)

## **More Resources**

Find information on staying healthy — in your practice and out — on the bar's website at [bit.ly/lawyer-well](http://bit.ly/lawyer-well).

# Executive Director's Message

by Karen A. Gould



## Simplification of Legal Advertising Regulation Means Less Headaches for Virginia's Lawyers

by Karen A. Gould and Seth Guggenheim, ethics counsel

VIRGINIA'S ADVERTISING RULES for lawyers have been simplified, thanks to the foresight of the Supreme Court of Virginia and the Virginia State Bar's Standing Committee on Legal Ethics. Legal advertising is governed by the false and misleading standard, due to rule changes made in 2013 and 2017.

Rule of Professional Conduct 7.1 has been amended to state:

### Communications Concerning A Lawyer's Services

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

The amendments, effective July 1, 2017, significantly rewrote the rule, deleting sections (b) through (d) and incorporating them, along with much of Rules 7.4 and 7.5, in the comments to Rule 7.1.<sup>1</sup> Rules 7.2, 7.4, and 7.5 were deleted. Rule 7.3, regarding solicitation of clients, remains intact, with the exception that it was amended effective July 1, 2017, to more clearly define the term "solicitation" and to expand the comments to more clearly explain how

the rules apply to paying for marketing services, including paying for lead generation.

Just as the advertising rules were simplified, the handling of advertising complaints by the Office of Bar Counsel has been changed and simplified. Advertising complaints are no longer handled through the Office of Bar Counsel, the bar prosecutors. Instead, they are handled by one of the ethics counsel, whose job it is to advise Virginia's attorneys how to comply with the Rules of Professional Conduct.

*Advertising complaints are no longer handled through the Office of Bar Counsel, the bar prosecutors. Instead, they are handled by one of the ethics counsel ...*

In FY2018, a total of five advertising complaints were lodged with the VSB, which were resolved through the proactive measures discussed below.

Very few advertising complaints are received from the public. Those complaints are usually related to direct-mail solicitations. For example, a person receives a solicitation offering legal services respecting a criminal or traffic charge pending in a general dis-

trict court. When the correspondence is misdirected to the wrong person, it alarms the recipient and sometimes his or her family members. The complaints in these instances often express dissatisfaction with the lawyer's nonchalance when the recipient of the misdirected correspondence brings the matter to the lawyer's attention.

When the bar receives complaints related to direct-mail solicitations, the lawyer is contacted, and a suggestion is made to him or her that the information aggregator exercise a greater degree of diligence in determining a defendant's address. The lawyer is invited to apologize to the aggrieved recipient. The lawyer risks an adverse internet review in the absence of greater care.

Most advertising complaints come from other lawyers. Prior to the change in the advertising rules, complaints by other lawyers were common regarding the absence of mandatory disclaimers associated with advertised case results. The complainants resented the allegedly offending lawyer's failure to follow the rules, when the complaining lawyer had taken pains to do so in his or her own advertising. When mandatory disclaimers following certain placement and format were eliminated from Rule 7.1, effective July 1, 2017, there was no longer a basis for such complaints.

Complaints from other lawyers, however, remain focused on allegedly false or misleading statements in

# Executive Director's Message

advertising or on websites regarding the lawyer's experience and/or membership in or ratings given by certain organizations.

Advertising review is now conducted by ethics counsel of the Virginia State Bar (referred to as "ad review"). Ad review urges the allegedly offending lawyer to modify his or her websites and ads to remove or revise content that is false or misleading. Ad review is satisfied if the lawyer responding to a complaint presents information that suggests or establishes that the allegedly offending statements are not in fact false or misleading. Most often, lawyers voluntarily remediate offending content on their websites and in other advertising.

Should you have questions about your responsibilities under Virginia Rules of Professional Conduct related to advertising or other subjects, please consult with one of the VSB ethics counsel through the ethics hotline — either via email or phone. Both services are accessible through this link on the VSB website: [www.vsb.org/site/regulation/ethics](http://www.vsb.org/site/regulation/ethics). This is one of the many services provided to you by the Virginia State Bar. ☺

#### Endnotes:

1 The comments to RPC 7.1 read as follows:

#### Comment

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

[2] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such

specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[3] In communications about a lawyer's services, as in all other contexts, it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law. Rule 8.4(c). See also Rule 8.4(d) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

#### Areas of Expertise/Specialization

[4] A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training, or education, or is certified by a named professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

#### Firm Names

[5] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name such as "clinic" that also includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[6] Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.



## Reasons YOU Should Use the VSB Fee Dispute Resolution Program

1. It's cheap – \$20.
2. It's quick – mediation is scheduled within 30 days of the mediator's appointment, and arbitration is scheduled within 45 days of the arbitrator's appointment.
3. It's smart – many legal malpractice claims arise from disputes over legal fees.
4. It's informal.
5. It's conducted by Supreme Court certified mediators and VSB trained arbitrators.
6. It's confidential – mediation and arbitration are confidential, unless both parties agree otherwise in writing. Attorney arbitrators are subject to Rule 8.3 reporting obligations.
7. It's fair and convenient.
8. It's good for you.
9. It's good for the client.
10. It's good for the profession.

It's one of the VSB's best kept secrets. Let's change this!

For information on the program, go to our website at [www.vsb.org/site/members/fee\\_dispute\\_resolution](http://www.vsb.org/site/members/fee_dispute_resolution) or contact Stephanie Blanton at (804) 775-0576

#### Danny Burk, attorney/mediator:

"The entire program is a solid example of the bar helping maintain its relationship with clients. Lawyers who participate give their clients a chance to present their views in a safe and comfortable environment. I can say that, at least to date, each case that I've mediated ended with a resolution and closure."





## Ethical Duties in Representing Criminal Defendants on Appeal

by Catherine French Zagurskie (right) and Renu M. Brennan (left)\*

THE SIXTH AMENDMENT RIGHT to counsel, a cornerstone of our legal system, applies at all critical stages of a criminal proceeding and extends to state prosecutions via the Due Process Clause of the Fourteenth Amendment. In Virginia, counsel appointed to represent a defendant in the trial court continues that representation for any appeal to the Court of Appeals and Supreme Court of Virginia.<sup>1</sup> As such, court-appointed counsel must handle both trials and appeals diligently and competently.

As court-appointed counsel play a vital role in our criminal justice system, the legal community, in turn, has a responsibility to provide meaningful support to counsel who take on this important work. At the same time, the Virginia State Bar (VSB) also is tasked with ensuring protection for those represented. This article will provide guidance on how counsel can fulfill ethical duties to defendants on appeal.

### Right to Appeal Following A Guilty Plea

A criminal defendant — not counsel — has the right to decide whether to appeal a final conviction.<sup>2</sup> This is true even if the defendant pleaded guilty and signed an appeal waiver.<sup>3</sup> Where the right to appeal exists, counsel must adequately communicate that right to the client so the client can make an informed decision whether to exercise that right.

Consultation with a defendant about his or her appellate rights will be different depending on whether the finding of guilt follows a guilty or not

guilty plea. When a defendant pleads guilty, including a plea of *nolo contendere*, Legal Ethics Opinion (LEO) 1880 (Committee Opinion July 23, 2015) explains that while a defendant always retains the *right* to appeal, the guilty plea necessarily waives certain *grounds* for appeal. Counsel's duty of competence (RPC 1.1<sup>4</sup>) and duty to provide adequate communication (RPC 1.4<sup>5</sup>) require counsel to understand and explain to the client the available and waived grounds for appeal.

To understand available and waived grounds for an appeal following a guilty plea, counsel must stay current with developing law. The Supreme Court of the United States recognized in *Garza v. Idaho*, 586 U.S. \_\_\_ (2019) that even a guilty plea with an appeal waiver cannot serve “as an absolute bar to all appellate claims.”<sup>6</sup> Virginia law presently holds that, because a guilty plea is a “self-supplied conviction,” pleading guilty waives defenses and claims, including constitutional ones, which arise *prior* to the entry of the guilty plea — with the exception of jurisdictional defects.<sup>7</sup> Available grounds of appeal following a guilty plea include whether the defendant knowingly and voluntarily waived his constitutional rights at the time of the guilty plea and whether an error occurred after the plea was accepted, such as with regard to the adjudication or sentencing.

Recent jurisprudence suggests another exception. In *Class v. United States*, 138 S. Ct. 798 (2018), the Supreme Court of the United States held that a guilty plea by itself does

not bar a (federal) criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. Defendants who plead guilty but call into question the government's power to criminalize (admitted) conduct may have a good faith basis under *Class* to raise the constitutionality of the statute on appeal.<sup>8</sup> No Virginia published appellate cases have yet addressed *Class*.<sup>9</sup>

As explained in LEO 1880, court-appointed counsel must advise the client of the potentially adverse consequences of prevailing on appeal, including exposure to a more severe outcome on retrial or resentencing. While pursuing an appeal may result in the government's attempt to treat the appeal as a breach of a plea agreement — and this should be explained to the client<sup>10</sup> — “simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope.”<sup>11</sup>

Under RPC 2.1,<sup>12</sup> counsel has a duty to “render candid advice” including an opinion that it is not in the client's best interest to appeal. Regardless of this advice, if the client adheres to his or her desire to appeal, counsel must timely note an appeal.<sup>13</sup>

### Right to Appeal Non-Meritorious Issues

A misunderstanding that can result in an ethical quandary is the belief that “it is unethical to pursue a frivolous appeal on behalf of a client.” Attorneys mistakenly cite RPC 3.1, meritorious claims and contentions, to support this

position. RPC 3.1 states “[a] lawyer shall not bring . . . a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so which is not frivolous.”<sup>14</sup>

But, only a court, not counsel, may decide if an appeal is frivolous.<sup>15</sup> The “role as advocate requires that he support his client’s appeal to the best of his ability.”<sup>16</sup> Only if defense counsel believes an appeal is “**wholly** frivolous, after a conscientious examination of it,” (emphasis added) should counsel follow the procedure set forth in *Anders v. California*, 386 U.S. 738 (1967).<sup>17</sup> Before filing an *Anders* petition, however, counsel should have a candid discussion with the client about the merits of the appeal and determine whether the client wishes to proceed with the appeal or withdraw.<sup>18</sup> If the client still desires to appeal, counsel must file:

- (1) a petition for appeal that refers to anything in the record that might arguably support the appeal, demonstrates to the respective court counsel’s conscientious examination of the merits of the appeal, and cites to *Anders*;
- (2) a motion for leave to withdraw as counsel, which cites to *Anders*; and
- (3) a motion for an extension of time to allow the appellant’s supplemental petition for appeal.<sup>19</sup>

Counsel must send copies of the petition and motions to the client and the government.<sup>20</sup> Only after the appellate court considers the *Anders* petition and any supplemental petition filed by the client will the court rule on the motion to withdraw and the merits of the appeal.<sup>21</sup>

While *Anders* appeals can be appropriate in some circumstances, court-appointed counsel should guard against overuse. The standard is “wholly frivolous.” A comment to RPC 3.1 explains that an “action is not frivolous even though the lawyer believes that

the client’s position ultimately will not prevail.” If there was a trial, generally, an *Anders* petition should not be filed. Every trial should include a motion to strike after the close of all evidence to raise and preserve sufficiency of the evidence claims. Challenging the sufficiency of the evidence to support a conviction on appeal is in line with RPC 3.1’s directive that “[a] lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established.” Additionally, a comment to RPC 3.1 states that a claim is not frivolous if there is “a good faith argument for an extension, modification or reversal of existing law,” and, therefore, any appeal based on this claim should not be *Anders*. Finally, *Anders* should not be used simply because an issue is unpreserved. Instead, counsel should consider raising the unpreserved issue under the good cause or ends of justice exceptions to Rules 5A:18 and 5:25 in the petition for appeal.

By contrast, *Anders* may be appropriate in appeals where the defendant pleaded guilty or the court revoked a suspended sentence. But, do not just assume these appeals will always be *Anders*. For example, *Cox v. Commonwealth*<sup>22</sup> began as an *Anders* petition but, after new counsel was appointed, resulted in the Court of Appeals finding that a probationer’s due process right to confrontation was violated. Additionally, in *Garza*, the Supreme Court cautions that “a defendant who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest.”<sup>23</sup>

### **Mandatory Deadlines in the Perfection of An Appeal**

A timely filed notice of appeal and petition for appeal are among the necessary elements for an appellate court to acquire active jurisdiction over a case.<sup>24</sup> An appellate court will dismiss an appeal if the notice of appeal or petition is not timely filed. These types of dismissals result in bar complaints against counsel.

Similarly, while timely filing transcripts is not a jurisdictional requirement, an appellate court will not consider an appeal on the merits if a necessary transcript is not timely filed.<sup>25</sup> Missing deadlines in appeals implicates RPC 1.1, competence, and RPC 1.3,<sup>26</sup> diligence. The handling of a case after a missed deadline can make a huge difference for both the client and counsel.

When an appellate deadline has been missed, counsel should first consider whether to seek an extension of time from the court to file the pleading or transcript(s). The Rules allow for extensions of time to file appellate papers *after* the original deadline has passed, if there is good cause.<sup>27</sup> However, the time period to file and obtain an extension is not indefinite. For a notice of appeal, petition for appeal, and transcripts, an extension of time may be obtained from the appropriate appellate court within 30 days following the original due date.<sup>28</sup> Keep in mind that if a motion for an extension of time is filed after the original deadline, counsel must also file the appellate papers at issue within that same extension period. When at all possible, counsel should concurrently file the late document with the motion for the extension. If the appellate court grants the motion for the extension and the document is timely filed under the new deadline, all is well — any mistake has been remedied.

### **Delayed Appeals**

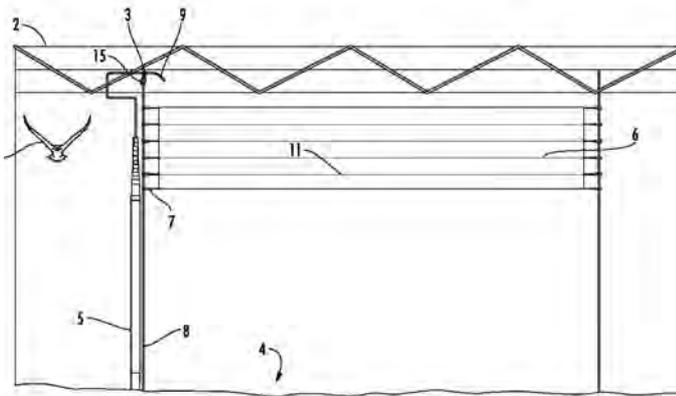
As explained in LEO 1817 (Committee Opinion, August 17, 2005), when counsel is notified by the court of a dismissal of the client’s appeal, and counsel knows or is informed that the dismissal was caused by counsel’s failure to timely file or perfect the appeal, Rule 1.4 requires counsel to notify the client of the dismissal, the reasons for the dismissal, and the client’s right or recourse. If, through no fault of the client, an appeal is dismissed for failure to timely file a pleading, or denied for failure to timely file a necessary transcript, or is never

Bar Counsel *continued on page 56*

# Virginia is for Inventors

Virginians' legacy of invention began in 1790, when President George Washington signed and issued the first patent in America — for a process of making potash, an ingredient in fertilizer. Another Virginian, and himself an inventor, Thomas Jefferson, acted as the primary patent examiner during that time, when he was secretary of state.

Virginians invented the swivel chair, the mechanical reaper, lip balm, camouflage, microphones, bifurcated needles



that made vaccine administration more precise, and the laxative and over-the-counter enemas (thank you, Lynchburg Dr. Charles Fleet).

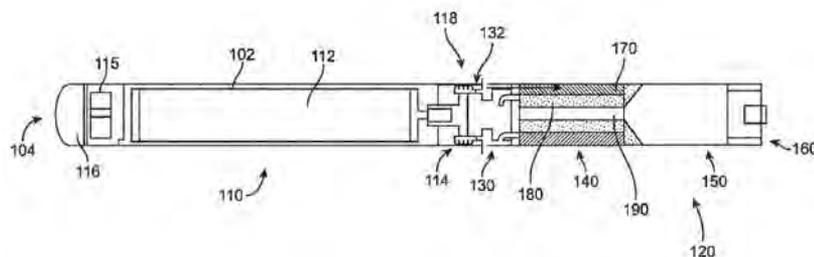
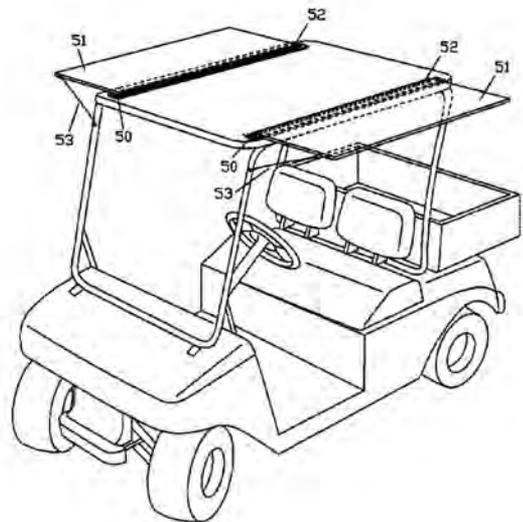
In honor of the Intellectual Property Section's issue, we've pulled some intriguing, recent Virginia patents found in the files of the United States Patent and Trademark Office — oh yeah, that's in the commonwealth, too.

## Patent No. 10,154,663

Two employees of a wildlife removal service based in Christiansburg earned a patent in December for a humane and adjustable bird capture net for use in large buildings like warehouses and malls that tend to attract unwanted nesters.

## Patent No. 10,160,298

Surely promising to many lawyers, three men in Virginia Beach were granted a patent for a rain and sun shield for golf carts in December. "Golf carts, even covered golf carts, do not provide adequate protection to their occupants against sun and rain. ... [M]ost of [the existing] devices are hard to install, interfere with the parking profile of the golf cart when it is stored and cannot be easily used in standard golf cart paths that wind through trees and large shrubbery."



## Patent No. 10,159,288

It might not be surprising to learn that a lot of Virginia-based patents are related to tobacco products — namely, the relatively new tobacco vehicle of electronic cigarettes. For example, a man in Richmond, working for Altria, patented a cartomizer for an e-cig "capable of providing a smoking experience without combusting tobacco."

# Intellectual Property Law Section: Active and Welcoming

by Timothy J. Lockhart, chair, and Robert M. Tyler, chair-elect

With over 1,500 members, the Intellectual Property Law Section is one of the Virginia State Bar's larger sections, and it is also one of the most active. The section's showcase event is its Annual Intellectual Property Seminar, which is held on a Friday afternoon and Saturday morning every fall, usually in September or October, either in Northern Virginia or some other destination area such as Charlottesville or Williamsburg. The 2018 event was the 30th such seminar, featured nationally known speakers, and, with the valuable assistance and co-sponsorship of Virginia CLE, attracted close to 100 attendees.

The annual fall CLE includes announcing the winners of the section's Annual Law Student Writing Competition, with the first-place winner receiving an award of \$5,000, and the runner-up receiving \$2,500. The competition is open to any law student from Virginia and to any student in any Virginia law school, and many of the winners have gone on to become successful IP lawyers.

The IP Section also holds an annual Spring Ethics CLE, which is usually available by webcast and has been presented at various locations, including at the United States Patent and Trademark Office. In addition, the section's members regularly contribute articles to an "IP issue" of *Virginia Lawyer* such as the issue you are reading now.

The section often presents a CLE session during the bar's Annual Meeting in Virginia Beach, either by itself or in conjunction with other sections. This year the IP Section is partnering with the Business Law Section and the Corporate Counsel Section to present a 1.5-hour CLE: *Why Go to Europe When Europe Comes to You? U.S. Data Protection in a GDPR World*. The joint seminar will be held from 8:30 to 10:00 a.m. at the Sheraton Hotel's Henry Ballroom and will feature speakers Corina San-Marina of Willcox Savage, Gerard M. Steamier of Reed Smith, and Michael Bihar of Eversheds Sutherland.

This CLE seminar will help attendees advise clients about their compliance obligations under the European Union's General Data Protection Regulation (GDPR). The seminar will explain the critical elements of the GDPR, identify the steps that clients can take to ensure compliance with the GDPR, and provide information about how to reduce risk of non-compliance with the regulation. The seminar will also cover the compliance challenges associated with the California Consumer Privacy Act of 2018 (CCPA) and highlight the similarities and differences between the GDPR and the CCPA.

Founded in 1970, the IP Section seeks to advance the quality of intellectual property law practice in the Commonwealth of Virginia. Most of the lawyers who belong to the section

practice in one or more of the four classic areas of IP law: copyrights, patents, trade secrets, and trademarks. Some members are primarily litigators, some are primarily transactional lawyers, and still others handle both types of matters. In carrying out its various activities, the section works closely with the leadership and staff of the Virginia State Bar.

The section's key goals are to create networking opportunities, to provide interesting, high-quality CLEs to IP and non-IP attorneys, and to keep our members informed about developments in IP practice in Virginia. A nine-member Board of Governors, diverse geographically as well as in areas of practice and other ways, manages the section. We are always looking for volunteers to join the section and to participate in and help coordinate its activities. Such participation often leads to a volunteer's being elected to serve on the Board and eventually assume a senior leadership position within the section. Visit our website at <http://bit.ly/vsbiip>.



**Timothy J. Lockhart** is a partner at Willcox Savage in Norfolk and heads the firm's Intellectual Property Group. He concentrates his practice on trademark and copyright counseling, registration, and enforcement; software licensing; and intellectual property litigation. The U.S. Secretary of Commerce appointed Lockhart to serve two terms (2008–2011 and 2014–2017) on the Trademark Public Advisory Committee of the U.S. Patent and Trademark Office. A retired Navy Reserve captain, he received a J.D. degree, *cum laude*, from the Georgetown University Law Center, M.A. and B.A. degrees from Auburn University, and has published two novels: *Smith* (2017) and *Pirates* (2019).



**Rob M. Tyler** is associate university counsel at the University of Virginia. He joined the University Counsel's office in 2015 after 20 years in private practice as an intellectual property lawyer. At UVA he is responsible for a wide spectrum of legal issues, including intellectual property, research administration, library/museum/art law, information technology, privacy, communications/marketing/promotion law, First Amendment and speech issues, and Freedom of Information Act.

# How *Inter Partes* Review Estoppel Applies (or Does Not Apply) in District Court

by P. Andrew Riley

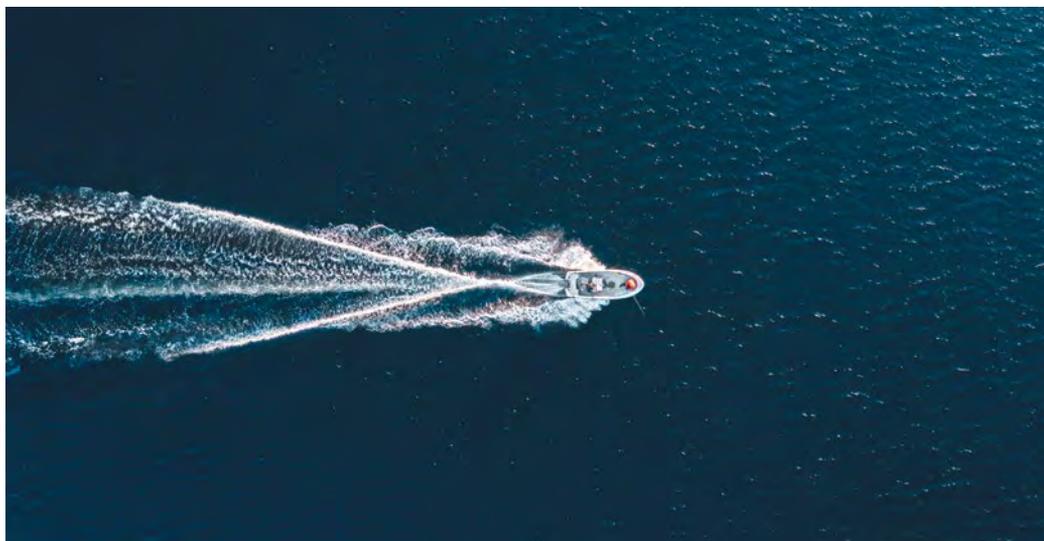


photo by Mikael Stenberg unsplash.com

The America Invents Act gave alleged infringers new post-grant review procedures to challenge the validity of a patent before the Patent Trial and Appeal Board (PTAB) at the U.S. Patent and Trademark Office.<sup>1</sup> One such procedure — *inter partes* review (IPR) — gave alleged infringers a cheaper alternative to litigating in federal district court, among other benefits. But what concessions did Congress give to patent holders in return? Congress included an estoppel provision meant to limit an alleged infringer’s ability to pursue certain invalidity arguments in district court (or in another post-grant proceeding) after petitioning for an IPR proceeding on the patent-at-issue. The courts, however, are still defining the scope of this estoppel provision.

Section 315(e)(2) of title 35 of the U.S. Code contains the estoppel provision:

Civil Actions and Other Proceedings.

The petitioner in an *inter partes* review of a claim in a patent . . . may not assert either in a civil action . . . or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that *inter partes* review.<sup>2</sup>

Using the same language — “raised or reasonably could have raised” — section 315(e)(1) prohibits a petitioner from asserting the same invalidity grounds in a second *inter partes* review petition.<sup>3</sup> The Federal Circuit addressed this language twice in 2016; first in *Shaw Indus. Group, Inc. v. Automated Creel Systems, Inc.*<sup>4</sup> and again in *HP Inc. v. MPHJ Tech. Inv., LLC.*<sup>5</sup>

### Federal Circuit Precedent

In *Shaw Indus.*, the Federal Circuit addressed an appeal from the PTAB's final written decision in IPR2013-00132 and IPR2013-00584. Shaw, the IPR petitioner, sought review of the PTAB's final written decision, including the PTAB's decision not to institute some of Shaw's proposed grounds of unpatentability on redundancy grounds.<sup>6</sup> Rejecting this argument, the Federal Circuit found that it lacked jurisdiction to review the PTAB's institution decision under 37 C.F.R. § 42.108(b).<sup>7</sup>

Shaw also sought a writ of mandamus from the appeals court. Specifically, Shaw wanted the Federal Circuit to order the PTAB to reevaluate its redundancy decision.<sup>8</sup> Shaw sought the writ because it feared the estoppel provision of § 315(e) would prevent it from asserting the prior art rejected by the PTAB as redundant in a later IPR or in district court.<sup>9</sup> The Federal Circuit denied Shaw's request for a writ. The Court found estoppel would not apply because the PTAB never instituted the grounds it found redundant.<sup>10</sup> "Shaw did not raise — nor could it have reasonably raised — the Payne-based ground during the IPR."<sup>11</sup>

A few months after *Shaw Indus.*, the Federal Circuit again addressed estoppel under § 315(e). Like *Shaw Indus.*, the appeal in *HP Inc.* originated from an IPR proceeding before the PTAB.<sup>12</sup> In the IPR proceeding, the PTAB's final written decision ruled in the petitioner's favor on all but one claim — claim 13.<sup>13</sup> HP, the petitioner, challenged the PTAB's decision not to institute an obviousness ground asserted against claim 13.<sup>14</sup> The Federal Circuit found that it lacked jurisdiction to review the PTAB's decision not to institute the obviousness ground asserted against claim 13 under 35 U.S.C. § 314(d). Under that section, institution decisions are "final and nonappealable."<sup>15</sup>

Like Shaw, HP raised the estoppel provision of § 315(e) as another reason why the appeals court should reevaluate the PTAB's institution decision.<sup>16</sup> According to the Federal Circuit, however, estoppel would not apply because "noninstituted grounds were not raised and, as review was denied, could not be raised in the IPR."<sup>17</sup> It would appear

from these interpretations by the Federal Circuit that Section 315(e) would not estop an IPR petitioner from asserting prior art the PTAB did not review, or institute, in a future district court or IPR proceeding.

### Split Decisions Among District Courts Makes IPR Estoppel Unpredictable

Despite the precedent set by the Federal Circuit in *Shaw Indus.* and *HP Inc.* on the meaning of "raised or reasonably could have raised," district courts have applied the estoppel provision of § 315(e)(2) differently. For example, in *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, Judge Henry Coke Morgan Jr. in the Eastern District of Virginia adopted what he characterized as a "narrow reading of *Shaw*" — namely, "that estoppel applies to grounds that the petitioner raised at the IPR itself and could have raised in the IPR petition or at the IPR itself."<sup>18</sup> In Judge Morgan's view, "the broad reading of *Shaw* renders the IPR estoppel provisions essentially meaningless because parties may pursue two rounds of invalidity arguments as long as they carefully craft their IPR petition."<sup>19</sup> Here, Judge Morgan's concern centered on judicial economy and efficiency: "It would waste this Court's time to allow a stay for a year during IPR proceedings and then review invalidity

***IPR is now an all-or-nothing proposition and there will be no grounds raised but not instituted.***

arguments that Defendants could (and perhaps should) have raised in their IPR petition."<sup>20</sup> As of this writing, no other decision in the Eastern District of Virginia addresses IPR estoppel. This leaves alleged infringers in the Eastern District of Virginia with an either/or proposition — pursuing an IPR or pursuing invalidity based on prior art in district court — that alleged infringers in other districts do not face.

Other district courts define the boundaries of Section 315 estoppel differently than Judge Morgan. For example, the District of Delaware—a district that hears a disproportionately large number of patent cases every year—has conflicting intra-district decisions on IPR estoppel.<sup>21</sup>

Judge Sue Robinson addressed estoppel in January 2017 in what she characterized as an issue of first impression in *Intellectual Ventures I LLC v. Toshiba Corp.*<sup>22</sup> Specifically, does Section 315 bar an IPR petitioner, here Toshiba, from asserting an invalidity argument it never raised, but reasonably could have raised, in the IPR? After considering arguments from both the patent owner and Toshiba, as well as the Federal Circuit's decision in *Shaw Indus.*, Judge Robinson concluded that Section 315 did not estop Toshiba. "That outcome appears to be inconsistent with all of the limitations imposed by the PTAB on IPR proceedings (e.g., page limits for petitions, 14 point type, and portrait-view claim charts) and leaves for trial only those references initially rejected by the PTAB."<sup>23</sup> She noted that her options were based on different policy considerations with very different consequences. Judge Robinson allowed Toshiba to present its invalidity arguments at trial because it was not her place to make policy decisions. But she specifically noted that "an appeal may clarify the issue for future judges in future cases."<sup>24</sup> The parties later stipulated to dismiss all claims with prejudice.<sup>25</sup> Therefore, no party appealed Judge Robinson's estoppel decision.

But in another Delaware decision that issued one month after *Toshiba Corp.*, Circuit Judge Kent Jordan from the Court of Appeals for the Third Circuit, sitting by designation, took a narrow view of Section 315 in *Parallel Networks Licensing, LLC v. Int'l Bus. Machs. Corp.*<sup>26</sup> "Allowing [IPR petitioner] IBM to raise arguments here that it elected not to raise during the IPR would give it a second bite at the apple and allow it to reap the benefits of the IPR without the downside of meaningful estoppel."<sup>27</sup> For this reason, Judge Jordan held that Section 315 estopped IBM from asserting "prior art references and combinations that it reasonably could have raised before the PTAB."<sup>28</sup>

In the underlying PTAB proceedings, IBM successfully used the PTAB's joinder rule (37 C.F.R. § 42.122(b)) to join IPRs filed earlier and already instituted by the PTAB. Under § 42.122, a petitioner can request joinder within one month after institution of an earlier-filed IPR by filing a new petition against the same patent and a motion for joinder.<sup>29</sup> IBM opposed estoppel before the district court by arguing that joinder practice before the PTAB required it, as the second (joinder) petitioner, to assert the same grounds of unpatentability (same prior art) as those asserted in the IPRs that IBM sought to join.<sup>30</sup> The court disagreed stating that "there is no 'mirror image' rule for joinder."<sup>31</sup>

In the same opinion, Judge Jordan granted partial summary judgment of no infringement.<sup>32</sup> The parties later entered a stipulation addressing the remaining issues in the case and appealed. On appeal, the Federal Circuit affirmed under Rule 36.<sup>33</sup> The Federal Circuit's Rule 36 affirmance did not resolve the conflicting estoppel decisions within the District of Delaware, leaving parties litigating in this forum without clear guidance.

Alleged infringers in the Northern District of California — another district with a large docket of patent cases—also face some uncertainty on the meaning of Section 315 estoppel. In *Verinata Health v. Ariosa*, the patent owner moved to strike the defendants' invalidity contentions based on IPR estoppel.<sup>34</sup> Judge Susan Illston granted-in-part and denied-in-part plaintiff's motion. The Judge denied the motion for any prior art combinations asserted by defendant, and IPR petitioner, Ariosa where "the PTAB did not institute on this ground."<sup>35</sup> But she granted the motion to strike Ariosa's prior art combination of Bhallan and Binladen because this combination "is simply a subset of the instituted grounds."<sup>36</sup> In the underlying IPR, the PTAB reached a Final Written Decision on the combination of Bhallan, Binladen, plus another reference.<sup>37</sup> Judge Illston applied estoppel to the combination of Bhallan and Binladen even though that combination differed from the ground presented to the PTAB. Judge Illston also applied estoppel to bar Ariosa's anticipation by the Fan prior art reference because the PTAB addressed the Fan reference in its Final Written Decision.<sup>38</sup> A jury

ruled in favor of the patent owner and against Ariosa, and Judge Illston entered Judgement on January 29, 2018.<sup>39</sup> Both parties appealed the decision to the Federal Circuit, and as of this writing, briefing is underway.<sup>40</sup> It does not appear, however, that Ariosa appealed Judge Illston's order applying Section 315 estoppel.<sup>41</sup>

In a second decision in 2017, Judge Illston added another wrinkle to Section 315 estoppel in *Advanced Micro v. LG*. Defendant, and IPR petitioner, LG moved the court for leave to amend its invalidity contentions to add two new prior art references.<sup>42</sup> Judge Illston denied in part LG's motion. In an underlying IPR petition, LG asserted one of the two references it sought to add to its district court contentions — Kurihara. Specifically, LG's IPR petition asserted the combination of prior art reference Rich in view of Kurihara and reference Lindholm in view of Kurihara.<sup>43</sup> The PTAB found against both combinations in its Final Written Decision.<sup>44</sup> Applying Section 315, Judge Illston estopped LG from asserting those two specific combinations LG asserted in the IPR "as well as the assertion of obviousness over Lindholm or Rich as stand-alone references."<sup>45</sup> But, this decision left LG free to amend its contentions to include other prior art combinations that included Kurihara. The parties in this case later stipulated to dismissal of all claims with prejudice, leaving this estoppel decision unreviewed by the Federal Circuit.<sup>46</sup>

### Looking Ahead

A handful of decisions in other district courts also examine the boundaries of estoppel under Section 315.<sup>47</sup> District courts that viewed estoppel narrowly (meaning an alleged infringer can assert prior art not addressed in

a Final Written Decision in an IPR), may need to reexamine their opinions after the Supreme Court ordered the PTAB to institute on all grounds presented in an IPR petition if the PTAB deems any ground worthy of review.<sup>48</sup> This new directive will remove the uncertainty regarding grounds raised but not instituted by the PTAB. IPR is now an all-or-nothing proposition and there will be no grounds raised but not instituted.

Some of the nuances examined above, however, will continue to cause uncertainty. For example, Judge Illston in *Advance Mirco* declined to estop a prior art combination that included one reference that the PTAB considered during IPR. The strong language and judicial economy arguments raised by Judge Morgan in *Cobalt Boats* suggest he would not allow a similar situation. Until the Federal Circuit provides clarity on these and other uncertainties surrounding Section 315 estoppel, alleged infringers must consider these various estoppel decisions as they weigh whether to file an IPR petition and what grounds to assert if they do file an IPR. ☪

#### Endnotes:

- 1 Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (codified at 35 U.S.C. §§ 1-390 (2012)).
- 2 35 U.S.C. § 315(e)(2).
- 3 35 U.S.C. § 315(e)(1).
- 4 *Shaw Indus. Group, Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1299-1300 (Fed. Cir. 2016) (hereafter "*Shaw Indus.*").
- 5 *HP Inc. v. MPHJ Tech. Inv., LLC*, 817 F.3d 1339, 1347-48 (Fed. Cir. 2016) (hereafter "*HP Inc.*").
- 6 *Shaw Indus.* at 1298.
- 7 *Id.* at 1299.
- 8 *Id.*
- 9 *Id.* at 1300.
- 10 *Id.*
- 11 *Id.*
- 12 *HP Inc.* at 1341.
- 13 *Id.*
- 14 *Id.* at 1344-47.
- 15 35 U.S.C. § 314(d); *HP Inc.* at 1344-45.
- 16 *HP Inc.* at 1347.
- 17 *Id.*
- 18 *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, No. 2-15-cv-21, at \*5 (E.D. Va. June 5, 2017).
- 19 *Id.* at \*5-6.
- 20 *Id.* at \*6.
- 21 See, e.g., [https://portal.unifiedpatents.com/litigation/analytics?filed\\_date=2018-01-01--2018-12-31&flag=DC](https://portal.unifiedpatents.com/litigation/analytics?filed_date=2018-01-01--2018-12-31&flag=DC) (2018: Delaware – 24.0%; N.D. California – 9.2%) (last accessed Jan. 21, 2019).
- 22 *Intellectual Ventures I LLC v. Toshiba Corp.*, Civ. No. 13-453, at \*2 (D. Del., Jan. 11, 2017) (hereafter "*Toshiba Corp.*").
- 23 *Toshiba Corp.* at 3.
- 24 *Id.*



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# Virginia Tech's Innovation Campus to Spawn New Patent Ecosystem in Northern Virginia

by Philippe Signore



Innovation Campus conceptual rendering courtesy of Virginia Tech

In mid-November 2018, Amazon grabbed headlines when it announced it will build part of its new headquarters in Northern Virginia.<sup>1</sup> The site for HQ2 had been long-awaited after a national “beauty contest.” Amazon decided to place major new office complexes in the Crystal City section of Arlington, which is being renamed National Landing. This will rejuvenate an area filled with office buildings that were developed in the 1970s, and once housed the U.S. Patent and Trademark Office and various patent law firms that have now relocated to Alexandria.

The HQ2 announcement almost entirely overshadowed another major report that Virginia Tech would be making a historic

commitment to build a one million-square-foot, technology-focused campus just down the road in Alexandria.<sup>2</sup> The \$1 billion project is part of a comprehensive higher-education package, called the Virginia Tech Innovation Campus, that will significantly bolster the technological talent pool in the area. As U.S. Sen. Mark Warner (D-VA) stated, “[it] will transform Virginia’s high-tech economy while also providing a pipeline of talent to industry all over Virginia, including Amazon. Once fully launched, it will benefit educational institutions and regions across the commonwealth.”

This technological development will not start from scratch, but will benefit from Virginia Tech’s long-standing excellence in computer science, engineering, data analytics, and technology. The University ranks No. 8 in the nation for engineering research expenditures, according to the National Science Foundation Higher Education Research and Development Survey, and the College of Engineering ranks No. 13 for its undergradu-

ate program, according to *U.S. News & World Report's* 2019 rankings.

The vision for the Alexandria Innovation Campus is to “offer leading programs in computer science and software engineering. It is expected to be a global center of technology excellence and talent production, supporting graduate education, attracting top-tier faculty, sparking research and partnerships, and igniting the region’s innovation economy.”<sup>3</sup> The program is part of Virginia’s “promise to Amazon that it would double the number of graduates with degrees in computer science and related fields, ensuring the tech giant will have a steady pipeline of talent for the 25,000-plus jobs it plans to bring to the area.”<sup>4</sup> Virginia is also investing \$375 million for new master’s programs at George Mason University’s Arlington campus.

In 2019, we can expect to see the first 100 master’s degree students enroll at Virginia Tech’s Alexandria campus and 50 tenure-line and research faculty will join initially. Within five years, the campus will host about 500 master’s students and eventually enroll 750 master’s candidates, in addition to doctoral students and postdoctoral fellows.

Some of the largest IP law firms in the U.S. are located just minutes from the Innovation Campus and are prepared to assist with these developments. The new graduate school, which will focus on academics, research, and industry, will create an entirely new industrial eco-system in the area. It will provide a new talent pool of top-notch graduates who may want to enter the patent profession; business development opportunities for protecting the innovations emanating from this high-tech hub; and increased value in local real-estate assets. In fact, leasing rates are already increasing. Of the countless benefits Virginia Tech’s Innovation Campus will bring to the greater Alexandria area, the one the intellectual property community is most excited about is the potential influx of new patent work for protecting inventions generated from this high-tech, industrial hub.

The Campus should energize the local start-up culture and create a spawn of spin-off start-up companies that will require robust IP protection for their inventions. Since the institution is focused on research and development, it’s also very likely that

the Campus itself will need to secure patent rights. The Campus’ mix of research, business, and industry partners will create an entirely new patent ecosystem.

According to the Association of University Technology Managers, academic research fuels impressive economic gains. For example, in 2017, a record 1,080 start-ups were formed, and a record 7,459 US patents issued as research institutions invest and protect their IP from academic research.<sup>5</sup> Combining such innovative energy with industry engines creates jobs, economic growth, and innovative new products and services. Such collaborations between academia and industry have repeatedly happened around the country and the world. Understanding the advantages, companies have placed R&D centers near major research universities for decades. Most famously, Silicon Valley, with its proximity to Stanford and University of California, Berkeley, has long been a prime model for an innovation ecosystem. Another example is the large medical-technology clusters in Minneapolis, with the University of Minnesota and its dedicated Medical Devices Center for research. Greater Boston, home to several world-class institutions of higher education, has attracted many health care companies and other industries. These various centers have grown to become patent generators.

As reported in the *Harvard Business Review* by Kenneth Lutchen, the dean of Boston University’s College of Engineering, one key to success in the collaborations between companies and universities is a flexible

**Innovation Campus** *continued on page 53*



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# A Fresh Look: The Defense Trade Secrets Act and Recent Developments

by Charles B. Molster III and Mary C. Zinsner



Trade secrets litigation in the U.S. changed significantly in May 2016 with the passage of the Defense of Trade Secrets Act (DTSA or Act) of 2016. The Act was broadly supported by corporate America and had bipartisan support in Congress (a rarity even then).

Now, almost three years later, some of the dust is settling and the law is developing. The purpose of this article is to provide background regarding the act, identify developments in the trade secret world that have occurred since the passage of the act, and highlight litigation strategies.

## BACKGROUND

### New Federal Cause of Action

The DTSA created a new federal private right of action, and conferred federal question jurisdiction in U.S. District Courts, with no

amount-in-controversy requirement.<sup>1</sup> The act did not preempt state trade secrets statutes, most of which are versions of the Uniform Trade Secrets Act (UTSA), such as the Virginia Trade Secret Statute.<sup>2</sup>

To state a claim under the Defense of Trade Secrets Act, a plaintiff must allege trade-secret misappropriation as follows:

- Plaintiff has information subject to “reasonable measures” of secrecy<sup>3</sup>;
- That information has or had competitive, economic value from “not being readily ascertainable through proper means”<sup>4</sup>; and
- The Defendant acquired, used or disclosed that information through “improper means.”<sup>5</sup>

These elements are very similar to the USTA.

### Interstate Commerce Requirement

The DTSA contains an interstate commerce requirement that the trade secret must be “related to a product or service used in, or intended for use in, interstate or foreign commerce.”<sup>6</sup>

## Remedies Under the Act

The DTSA includes a number of remedies for misappropriation of trade secrets, including injunctive relief; monetary damages; double or punitive damages for willful and malicious misappropriation; and the provision for *ex parte* seizures.

### Injunctions

Regarding injunctions, the DTSA provides that an injunction may be granted “to prevent any actual or threatened misappropriation,”<sup>7</sup> and that a court may require affirmative action to protect the trade secret, bar disclosure of the trade secret, or condition future use of the trade secret upon payment of a reasonable royalty.<sup>8</sup>

The Act also provides for certain restrictions on injunctive relief, including that the injunction may not prevent anyone from entering into an employment relationship (seemingly attempting to eradicate the “inevitable disclosure” doctrine), and the injunction may not conflict with applicable state laws regarding restraints on trade.<sup>9</sup>

### Monetary Damages

The DTSA provides that damages are available under the Act for the recovery of actual losses; any unjust enrichment that is not compensated by the actual losses; a reasonable royalty for unauthorized disclosure or use of the trade secret; and exemplary damages of up to double the compensatory award in the case of willful or malicious appropriation, as well as attorney’s fees for willful or malicious misappropriation.<sup>10</sup>

### Ex Parte Seizures

Upon a showing of “extraordinary circumstances,” the Act provides that an *ex parte* seizure order may be requested to seize “property necessary to preserve evidence or to prevent the propagation or dissemination of the trade secret” at issue. The legislative history reflects that the drafters of the DTSA specifically contemplated the use of the *ex parte* seizure order in cases where “a defendant is seeking to flee the country or planning to disclose the trade secret to a third party immediately or is otherwise not amenable to the enforcement of the court’s orders.”<sup>11</sup>

To seek relief, an applicant must make a proper showing based on an affidavit or verified complaint of immediate and irreparable injury; that the potential harm to the plaintiff

outweighs the interests of the defendant and/or third parties; that a Rule 65 injunction would not be sufficient; likelihood of success on the merits; the person against whom the order is sought has actual possession of the trade secret or property to be seized; and such person “or persons acting in concert with such person, would destroy, move, hide, or otherwise make such matter inaccessible to the court, . . .”<sup>12</sup>

The court must make certain findings (i.e., narrowest seizure possible, require security by applicant), and a neutral law enforcement official serves the seizure order (along with the papers that the applicant submitted to obtain the order).<sup>13</sup>

Any materials seized are retained in the custody of the court; the court must hold a seizure hearing within seven days; and the court must protect the seized materials from being disclosed to the public or destroyed or damaged while in the custody of the court.<sup>14</sup> A motion to dissolve or modify the seizure order may be filed at any time by the person harmed, and if a seizure order is wrongful or excessive, the person harmed may bring a cause of action to recover damages, including punitive damages and attorney fees.<sup>15</sup>

### Whistleblower Protections

The Act also includes protections for whistleblowers, including circumstances where an individual has disclosed the trade secret “in confidence,” directly or indirectly, to federal, state, and local government officials; or to a lawyer and did so “solely for the purpose of reporting or investigating a suspected violation of law;” or in a document filed in court under seal; or in anti-retaliation lawsuits, provided that the information is disclosed only to an individual’s lawyer, is filed under seal, and is not disclosed except by court order.<sup>16</sup>

The DTSA also requires an employer to “provide notice of the immunity . . . in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.”<sup>17</sup> This provision applies to all contracts entered into or updated after the date of enactment (May 11, 2016) and applies to employees, contractors, and consultants.<sup>18</sup> If an employer fails to provide such notice, the employer “may not be awarded exemplary damages or attorney fees under subparagraph (C) or (D) of section 1836(b) (3) in an action against an employee to whom notice was not provided.”<sup>19</sup>

## DEVELOPMENTS SINCE THE PASSAGE OF THE ACT

With that background, and as we approach the D TSA’s third birthday, where are we now? Some observations follow.

### Increase in Federal Court Filings

Not surprisingly, federal court filings of trade secret cases have increased since the Act was passed. In July 2018, the legal data analytics firm Lex Machina released its first ever Trade Secret Litigation Report.<sup>20</sup> The report found that, between 2009 and 2016, trade secret suit filings generally remained within a range of 860 to 930 cases per year. In 2017, however, there was an increase to 1,134, and through the first half of 2018, 581 federal trade secret cases had been filed (in general, about a 25 percent increase in federal filings since the act was passed). Those numbers appear to be the most recent data available.

*... the Act does not require pleading trade secret claims with particularity, while many state trade secret laws contain such a predicate.*

### Interstate Commerce Requirement

To support federal jurisdiction, the Act only applies to trade secrets that are related to “interstate or foreign commerce” through an actual or intended product or service. As anticipated, most courts have found this requirement to be satisfied.<sup>21</sup>

Some courts have questioned whether the interstate commerce requirement is jurisdictional,<sup>22</sup> and some courts have raised the issue of the trade secret’s relationship to interstate commerce *sua sponte*.<sup>23</sup> Another interesting issue raised by a defendant is whether the trade secret must itself relate to interstate commerce, or whether the misappropriation must also relate to interstate commerce.<sup>24</sup>

**Practice Pointer:** Plaintiff’s counsel should be sure to include sufficient allegations of the relationship of the trade secret to interstate commerce — and that the trade secret is a “product or service” if that is accurate. Defense counsel should be on the lookout for infirmities in the complaint regarding the allegations of interstate commerce.

### Pleading Trade Secrets with Specificity and “Reasonable Measures” Litigation

Many trade secret claims have been dismissed where a plaintiff has pleaded trade secrets claims in conclusory fashion without identifying specific trade secrets stolen. Notably, the Act does not require pleading trade secret claims with particularity, while many state trade secret laws contain such a predicate.<sup>25</sup> Pleading trade secrets with particularity can be problematic given that disclosure in a publicly-filed complaint eliminates the secrecy and can destroy the status as secret intellectual property. A careful balance is therefore necessary, and more recent decisions have rejected a “reasonable particularity” standard in favor of the standards articulated by the Supreme Court in *Twombly* and *Iqbal*.<sup>26</sup>

A body of caselaw has also developed over the “reasonable measures” to protect secrecy that a trade secret plaintiff is required to prove for recovery. In *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*,<sup>27</sup> the Eleventh Circuit affirmed a district court’s grant of summary judgment in favor of the former employee/defendant because the plaintiff had failed to instruct the defendant how to secure company information on his personal devices, allowed the defendant to access information after he refused to sign a confidentiality agreement, and failed to mark supposedly trade secret information as confidential.

Similarly, in *Call One, Inc. v. Anzine*,<sup>28</sup> the court granted summary judgment in favor of the former employee/defendant after concluding that a reasonable jury could not find that the defendant misappropriated the plaintiff’s trade secrets in violation of the act, because the plaintiff failed to label the supposedly trade secret information as confidential. The court held that even though the customer report at issue was not known to the public, and the plaintiff’s corporate policies prohibited employees from disclosing confidential information, the plaintiff’s written policies required employees to label all confidential information and trade secrets as such. Because the customer report was not labeled as such, the court found that the plaintiff had not taken sufficient reasonable measures to protect the secrecy of the asserted trade secrets.

**Practice Pointer:** Counsel should plead trade secret claims with as much specificity as possible, without destroying secrecy by

identifying each specific trade secret taken. Companies must take appropriate steps to ensure that their employees follow the requirements outlined in corporate policies, including the policies that govern access to, and dissemination of, confidential information and trade secrets. Companies must also ensure that access to trade secrets is immediately and automatically terminated for every departing employee.

### Injunctions

Injunctions under the DTSA may not be entered if they would “prevent a person from entering into an employment relationship.” Thus far, courts have taken different positions on the meaning of this clause. A Colorado district court enjoined the former employee/defendant from obtaining employment with the plaintiff’s competitor because, in part, there was other “employment for which Defendant appears qualified.”<sup>29</sup> A Louisiana district court vacated a temporary restraining order to the extent that it restricted the former employee/defendant from obtaining employment with a competitor, determining that an injunction under the Act cannot “effectively prevent him from competing as an employee” of the plaintiff’s competitor.<sup>30</sup> A South Carolina district court entered a preliminary injunction because it did not constitute a “blanket prohibition preventing Defendants from entering into any employment relationships,” but rather enjoined employment relationships only within a particular industry.<sup>31</sup>

The Act does not eliminate the requirement of pleading and proving irreparable injury when an injunction is sought. The Tenth Circuit has held that a federal court may not presume irreparable harm under the Act or its UTSA analogs.<sup>32</sup> Those statutes “merely authorize and do not mandate injunctive relief,” and “thus do not allow a presumption of irreparable harm.”<sup>33</sup> Some courts have required the plaintiff to show that the irreparable harm will occur “during the pendency of the litigation.”<sup>34</sup> However, some courts have presumed irreparable harm from trade secret misappropriation itself.<sup>35</sup> Some courts have also found that loss of market share and goodwill constitute irreparable injury.<sup>36</sup>

**Practitioners should provide a proposed order when they file for injunctive relief and the order should specifically describe the trade secrets to be protected and set forth**

**the precise relief sought, taking care not to prohibit employment and instead define the prohibited conduct and limit the scope and geographic areas.**

### Monetary Damages and Disgorgement

While monetary damages are at issue in every civil case, the DTSA provides an additional remedy known as disgorgement of profits arising from unjust enrichment. A plaintiff bringing a claim under the federal act can recover actual loss caused by the misappropriation, plus any unjust enrichment gained by the defendant to the extent this unjust enrichment is not included in computing actual loss. Disgorgement is an equitable remedy to prevent a defendant from being unjustly enriched from illegal actions.

In *Texas Advanced Optoelectronic Solutions Inc. v. Renesas Electronics America Inc., f/k/a Intersil Corporation U.S.*<sup>37</sup>, the Federal Circuit addressed the issue of apportionment relating to claims for damages in cases involving trade secrets. While the trade secret claims in that case were brought under Texas common law (along with patent claims under federal law), the issues regarding damages and apportionment are also applicable to damages claims brought under the DTSA.

The jury in the underlying case returned a verdict for the plaintiff on all claims and awarded \$48,783,007 in disgorgement of Intersil’s profits and \$10 million in exemplary damages for trade secret misappropriation, as well as additional damages for patent infringement and several other state law claims.

In an opinion written by Judge Richard Tarranto, the Federal Circuit reversed the finding of liability based on two out of three of the alleged trade secrets but affirmed the defendant’s liability for trade secret misappropriation. However, the plaintiff’s calculation of monetary relief did not distinguish among the three grounds for misappropriation. Moreover, the plaintiff’s damages expert did not explain which of the trade secrets contributed to what amount of the defendant’s profits that should be disgorged, and instead the expert assigned all profits to the misappropriation of all trade secrets. “On this record, we have no basis to conclude that the remaining ground for liability — the photodiode structure trade secret — supports the entire award.” The court therefore vacated

*DTSA continued on page 54*

# Beyond Trademark Registration: What Companies Need to Know About Protecting Their Trademark Rights

by Robin Cooke Vance



A Certificate of Registration issued by the United States Patent and Trademark Office often feels like a “golden ticket” that, once obtained, fully secures an owner’s rights in its trademark. However, obtaining a federal trademark registration is only the first step in protecting a trademark. Owners are still responsible for diligently monitoring, maintaining and enforcing rights in their trademark after registration in order to prevent constructive abandonment. Knowing how such abandonment might occur is therefore key to maintaining trademark rights.

## The Lifecycle of a Trademark

A trademark (a brand) is any “word, name, symbol, or device” that is used to identify the source of a particular good or service.<sup>1</sup> Trademarks thus provide consumers with helpful information — they can quickly locate products by identifying the trademark that distinguishes one sought-after product from

another.<sup>2</sup> In the U.S., trademark use, which must be bona fide and not made merely to reserve rights in a trademark, is required to gain rights in a trademark nationwide.<sup>3</sup> The senior user of a trademark generally enjoys rights in that trademark until it ceases use with no intent to resume use, at which time the mark is abandoned.<sup>4</sup>

Although U.S. trademark law recognizes a set rule on abandonment (i.e., a mark is abandoned when the mark owner ceases use with no intent to resume), there are several caveats. A trademark owner that reduces its use of a mark, even significantly, will not lose its rights provided that the new level of use is not *de minimis*. Furthermore, an owner may cease use all together without abandoning its rights so long as it intends to resume use within a reasonable period of time. Finally, a trademark owner that makes modifications to “update” a trademark may still retain its rights in the old version.

## Maintaining Rights in a Mark

It is axiomatic under U.S. trademark law that a company’s trademark rights hinge on a familiar concept: “use it or lose it.”<sup>5</sup> For a registered trademark, such use must satisfy the “use in commerce” requirement of the Lanham Act, which requires a “bona fide use”

where the trademark is placed on the goods, the product packaging, or a display associated therewith, and the goods are sold or transported in commerce.<sup>6</sup> For service marks, use in commerce is satisfied when the mark is “used or displayed in the sale or advertising of services” and the services are “rendered in commerce.”<sup>7</sup>

Use of the trademark must also meet a certain threshold, that is, use must be more than *de minimis*. Although there is no set level of what constitutes *de minimis* use, cases considering the question demonstrate that minimal use often qualifies, including by way of example: a single sale of a luggage set in a two year period,<sup>8</sup> two sales of goods bearing the mark in a period of two years,<sup>9</sup> and eighty-nine sales of perfume bottles over a twenty year period.<sup>10</sup> Thus, trademark owners typically retain rights in their trademarks given the low threshold on use.

Furthermore, trademark owners interested in maintaining rights without using the trademark directly can avoid abandonment through third-party trademark licensing as use of a trademark by a licensee inures to the benefit of the licensor.<sup>11</sup> Licensing could eliminate the financial output of producing a product or providing a service and still maintain rights in the brand. Licensors must be mindful, however, of the need to engage in quality control of licensed products and services — a lack of quality control may itself result in an abandonment of trademark rights through a process known as “naked licensing.”<sup>12</sup>

Finally, a trademark owner may cease use of a mark without abandoning its rights provided the owner intends to resume use within a reasonable period of time. The length of time, even if significant, may not result in abandonment if sufficient evidence exists of the owner’s intent to resume use. For example, in *Adolphe Lafont*, the Trademark Trial and Appeal Board held that evidence of the petitioner’s attempts to find an acceptable distributor for its products during seven years of non-use was sufficient to defeat a presumption of abandonment.<sup>13</sup> Indeed, even attempts by an owner to sell the trademark and its associated goodwill have been found sufficient to avoid abandonment.<sup>14</sup> However, it typically takes more than mere testimony on an owner’s intent to resume use to overcome a finding of abandonment.<sup>15</sup>

Maintaining adequate use of legacy brands can be quite important. There are multiple businesses in the United States today who search for evidence of “abandonment” of brands, and then claim ownership of the allegedly “zombie” brand and attempt to capitalize on the brand’s remaining goodwill.<sup>16</sup> While several courts have indicated that continuing goodwill in a legacy trademark should bar use by a third party<sup>17</sup>, that may not deter an opportunistic infringer from attempting to capitalize on a company’s hard-earned goodwill by arguing abandonment, thus forcing the mark owner to litigate to protect its brand.

### Tacking of Trademark Rights

Trademark owners frequently modify and update brands to reflect market trends and consumer preferences. One example is the KFC Colonel Sanders logo, which has undergone multiple iterations in the last century.<sup>18</sup> Another is the Starbucks “siren” logo, which the company has modified several times since its founding in 1971.<sup>19</sup> These modifications and updates do not automatically cause a loss of rights in the original trademarks, even when the original trademark is no longer in use. Instead, in determining whether or not such an update results in the loss of trademark rights in the older version, courts consider whether the newer version “retains its impact and symbolizes a continuing commer-

*There are multiple businesses in the United States today who search for evidence of “abandonment” of brands, and then claim ownership of the allegedly “zombie” brand and attempt to capitalize on the brand’s remaining goodwill.*

cial impression.”<sup>20</sup> If the newer version creates a “continuing commercial impression,” then the owner can “tack” its rights in the newer version to its rights in the older version to keep the rights uninterrupted.<sup>21</sup>

The issue of tacking often arises in infringement disputes whereby the defendant argues that the trademark owner has abandoned its rights, thereby allowing the defendant to take over the trademark. Consider the fact pattern in *Reynolds Consumer Products*

*Inc. v. Handi-Foil Corp.*<sup>22</sup> Reynolds is a well-known manufacturer of aluminum foil products found “in a strikingly large number of United States households.”<sup>23</sup> Reynolds uses a distinctive look for its product packaging, initially protecting such rights through federal trademark registrations in 1977. Reynolds has since then updated and revised its product packaging at least three times. Handi-Foil claimed that due to these various updates Reynolds abandoned its rights in the original product packaging elements protected by the 1977 registrations issued.<sup>24</sup> The district court, however, held the new packaging created a continuing commercial impression, and thus Reynolds had not abandoned its rights.<sup>25</sup>

Because tacking is a fact-intensive and subjective inquiry, rights owners must exercise caution when updating or rebranding. In many cases, the most appropriate strategy from a rights protection standpoint will involve overlapping use and overlapping trademark registrations for new and old versions of a brand. This type of strategy requires careful coordination between business units so that a company’s legal strategy matches its marketing and sales strategy. However, with careful planning companies can rebrand or update without risking existing brand equity, and without allowing any periods where their rights are vulnerable.

### Maintaining Rights through Brand Enforcement

Maintaining trademark rights also requires policing the marketplace for infringing use. Infringing use does not only mean use of an identical trademark for identical goods or services — instead, trademark owners should also consider use of even similar trademarks in the same or related commercial spaces.<sup>26</sup>

While there is no requirement for owners to enforce their rights against every potential infringer (owners have leeway to consider the needs of their business); they should not adopt a “lackadaisical and laissez-faire” attitude towards enforcement.<sup>27</sup> A failure to enforce rights can result in a weakened and potentially unenforceable brand.<sup>28</sup>

Trademark owners failing to enforce their rights can face severe repercussions, including significantly narrowed rights, or even an entire loss of rights. For example, the Fifth Circuit found that a plaintiff failed to adequately police the marketplace after the

defendant introduced evidence of more than seventy trademark registrations for marks identical or highly similar to the plaintiff’s trademark, many of which registered in connection with related goods.<sup>29</sup> As a result, the Fifth Circuit held that the plaintiff’s lack of enforcement significantly narrowed its rights in the trademark.<sup>30</sup> In another case, the Supreme Court held a trademark had become generic as the result of the trademark owner’s failure for twenty years to prevent use of the trademark as the dictionary term for the good identified.<sup>31</sup>

### Conclusion

Trademark registration alone is insufficient to preserve trademark rights. Instead, trademark owners must monitor, maintain and protect their rights and properly use their marks in commerce. Trademark owners must also actively enforce their rights against suspected trademark infringers. These efforts will help ensure trademark owners reap the long-term benefits of a commercially distinctive brand.



#### Endnotes:

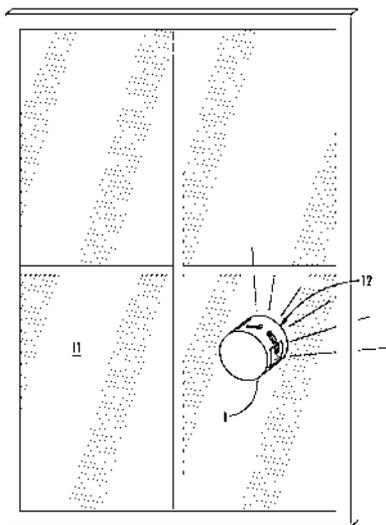
- 1 15 U.S.C. § 1127.
- 2 Jake Linford, *Valuing Residual Goodwill After Trademark Forfeiture*, 93:2 NOTRE DAME L. REV. 811, 819 (2017).
- 3 B. Gilpin, Note, *Trademarks in Cyberspace: Fulfilling the “Use” Requirement Through the Internet*, 78 J. PAT. & TRADEMARK OFF. SOC’Y 830, 831 (1996).
- 4 15 U.S.C. § 1127.
- 5 See Krystil McDowall, *A Critical Look at “Use”*



**Robin Vance** is a partner at McGuireWoods LLP, handling international intellectual property and technology development, protection, enforcement, licensing, and commercialization matters for clients in the entertainment, energy, biotechnology, life sciences, consumer products, and retail industries. She manages worldwide intellectual property portfolios for a variety of clients, including those having famous trademark rights, and regularly advises on IP transactional and insolvency matters. Robin has extensive experience with intellectual property licensing and development agreements and related transactions, domain name management and dispute resolution, e-commerce issues, data analytics, advertising law, trademark law, and copyright matters. Robin’s licensing experience includes both for-profit and non-profit parties as well as universities and other educational institutions covering a wide array of goods and services found in numerous industries.

- Under the Lanham Act*, 4:2 N.Y.U. J. OF INTELL. PROP. & ENT. LAW 226, 227 (2015) (citing *Menashe v. V. Secret Catalogue, Inc.*, No 05 Civ. 239 (HB), 2005 U.S. Dist. LEXIS 13324, at \*18 (S.D.N.Y. July 7, 2005) (“‘Use it or lose it’ is a fundamental precept of trademark law.”)).
- 6 15 U.S.C. § 1127. “Commerce” is defined as “all commerce which may lawfully be regulated by Congress.” What constitutes “use in commerce” for trademark purposes has broadened over time, as the scope of the commerce clause of the Constitution has broadened. See Thomas J. McCarthy, MCCARTHY ON TRADEMARKS, § 19:105 (5th ed. Nov. 2018 update).
- 7 15 U.S.C. § 1127.
- 8 *Momentum Luggage & Leisure Bags v. Jansport, Inc.*, No. 00 CIV. 7909 (DLC), 2001 U.S. Dist. LEXIS 10253 (S.D.N.Y. July 23, 2001).
- 9 *United Plywoods Corp. v. Congoleum-Nairn, Inc.*, 121 U.S.P.Q. 102 (T.T.A.B. 1959).
- 10 *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1272 (2d Cir. 1974).
- 11 15 U.S.C. § 1055; 15 U.S.C. § 1127.
- 12 See Linford, *supra* note 2, at 830.
- 13 *Adolphe Lafont, S.A. v. S.A.C.S.E. Societa Azioni Confezioni Sportive Ellera, S.p.A.*, 228 U.S.P.Q. 589, 1985 WL 71974 (T.T.A.B. 1985).
- 14 See, e.g., *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1044, 208 U.S.P.Q. 175 (2d Cir. 1980) (non-use for seven years, with the intent to sell the trademark and associated business and goodwill, found to be “completely inconsistent with an intent to abandon the mark”).
- 15 See, e.g., *Rivard v. Linville*, 133 F.3d 1446, 1449 (Fed. Cir. 1998) (finding that a trademark owner’s self-serving, after-the-fact “proclamations of his intent to resume or commence use in United States commerce during the period of nonuse are awarded little, if any, weight.”) (citing *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 1581, 14 U.S.P.Q.2d 1390 (Fed. Cir. 1990)).
- 16 Timothy J. Lockhart, *Did You Know... There are Zombie Brands?*, INTA Bulletin, Vol. 63, No. 14 (2008); Ken Bensinger, *Reviving Brands That Aren’t Quite Forgotten*, Los Angeles Times (Jan. 5, 2013).
- 17 McCarthy, *supra* note 6, at § 17:15.
- 18 KFC, Logopedia (last visited Jan. 27, 2019 10:42AM), <http://logos.wikia.com/wiki/KFC>.
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- 20 Thomas J. McCarthy, *supra* note 6, at § 17:26.
- 21 Berkley Technology Law Journal, *Survey of Additional IP and Technology Law Developments*, 31 Berkeley Tech. L.J. 1169, 1191 (2016).
- 22 *Reynolds Consumer Products, Inc. v. Handi-Foil Corp.*, No. 13-cv-214, 2014 WL 794277 (E.D. Va. Feb. 27, 2014).
- 23 *Id.* at \*1.
- 24 *Id.* at \*2.
- 25 *Id.* at \*4.
- 26 See 15 U.S.C. §§ 1114, 1125.
- 27 McCarthy, *supra* note 6, at § 11:91.
- 28 *Id.*
- 29 *Amstar Corporation v. Domino’s Pizza, Inc.*, 615 F.2d 252 (5th Cir. 1980).
- 30 *Id.*
- 31 *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 37, 21 S. Ct. 7 (1900).

Patents continued from page 18



#### Patent No. 10,125,969

Direct your holiday cheer only to the outside world. A woman in Lynchburg has invented a holiday window light that attaches to the inside surface of the glass. It seals against the window to prevent light leaks or reflected light into the room.

#### Patent No. D830,074

Out of Winchester comes this reconfigurable rocking chair patent, granted in October, that will swivel and rock whichever way its user decides.



Sources: uspto.gov and patents.google.com

# Always in Style: Intellectual Property in Clothing and Fashion Brands

by Joan Bellefield Davis



Two red purses, one authentic (left) and one counterfeit, show the difficulty in verifying that luxury goods are real.

Americans spend over \$250 billion a year on fashion in the United States.<sup>1</sup> The legal issues that constitute “fashion law” take many forms, particularly in an evolving economy where innovative start-ups are often replacing traditional fashion retailers.<sup>2</sup> Intellectual property law has played a huge role in fashion law over the past decade, allowing designers protection of their name, stylized logos, colors, and packaging. A fashion designer’s brand remains the most important piece of intellectual property they will ever own.

Trademarks, for one, protect the public from less than honorable merchants who put another company’s well-known brand name on counterfeit products as a way to increase profits. When consumers hear the brand name Chanel, or see the interlocked Cs, they immediately identify the products associated with Chanel as luxury products. When counterfeit

products are placed into commerce, both the consumer and brand owner suffer.

Perhaps the most famous trademark case involving fashion law is *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*<sup>3</sup> Christian Louboutin, a designer of high-fashion women’s footwear and accessories, has, since 1992, painted the outsoles of his women’s high-heeled shoes with a high-gloss red lacquer. In 2008, he registered the red lacquered outsole as a trademark with the United States Patent and Trademark Office (USPTO). In 2011, Yves Saint Laurent (YSL), another high-end fashion designer, prepared to market a monochromatic red shoe. This meant that the entire shoe was red — including the insole, heel, upper, and outsole. Louboutin sued YSL alleging that YSL infringed upon Louboutin’s trademark by using red soles on the bottom of their red pumps. The district court denied Louboutin’s preliminary injunction holding that a single color can never serve as a trademark in the fashion industry.<sup>4</sup> Louboutin appealed.

The question before the appeals court was whether a single color could serve as a legally protected trademark in the fashion industry and, in particular, as the mark for a particular style of high-fashion women’s

footwear. The second circuit assessed the case by analyzing the doctrines of aesthetic functionality and acquired distinctiveness asking the following question: Does the red sole mark merit protection as a *distinctive* mark? After considering a number of factors, the court concluded that by placing the color red in a context that seems unusual, and deliberately tying that color to the product, Louboutin had created an identifying mark firmly associated with his brand and was therefore a distinctive symbol that qualified for trademark protection. The court further held, however, that the secondary meaning of the red sole mark extended only to the use of a lacquered red outsole that *contrasts* with the adjoining portion of the shoe. Therefore, though the red sole mark qualified for trademark protection, YSL's use of a red sole on a monochromatic red shoe did not constitute trademark infringement.

Copyright law also offers designers another form of protection. In the U.S., a fashion designer can register prints that are displayed on fabric used in their designs but in most circumstances will not be able to register the actual design of the garment. In 2017, the U.S. Supreme Court affirmed a Sixth Circuit decision that considered copyright protection involving graphics on a cheerleading uniform in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*<sup>5</sup>

The plaintiff, Varsity Brands, is a leading retailer of cheerleading uniforms and registered copyrights for multiple graphic designs that appear on their cheerleading uniforms. Defendant Star Athletica also sells cheerleading uniforms bearing graphic designs that, according to Varsity, are substantially similar to the designs for which Varsity held valid copyrights. Star argued that Varsity's copyrights were invalid because the designs at issue were unprotectable designs of useful articles. The district court agreed. Varsity appealed.

The question before the Sixth Circuit was whether the "pictorial, graphic, or sculptural features" that are incorporated into the design of a "useful article," a cheerleader uniform, can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. In order to prevail, Varsity had to demonstrate (1) that it owned a valid copyright in the designs, and (2) that Star copied the protectable elements of the work. In regard to the first question, the court found that Varsity had successfully

registered with the U.S. Copyright Office each of the five designs that Varsity alleged Star infringed. Registering with the Copyright Office gives the registrant a rebuttable presumption of validity, and the Sixth Circuit found that the district court had erred by failing to give greater deference to the Copyright Office's registration determinations. Thus, the court held that Varsity successfully demonstrated the first factor — that it owned a valid copyright in the designs.

Secondly, in order to prevail, Varsity had to demonstrate that Star copied the protectable elements of the uniform's designs. A cheerleader uniform is a useful article, possessing both useful functions and expressive features. When it comes to useful articles, only the expressive pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article can be protected. Star asserted that the pictorial, graphic, or sculptural features of Varsity's uniforms are inextricably intertwined with the utilitarian aspects of the cheerleading uniform because they serve a decorative function to the useful article. The court rejected this argument, reasoning that such a holding would render "all fabric designs, which serve no other function than to make a garment more attractive, ineligible for copyright protection." Because the court concluded that the graphic features of Varsity's designs could be identified separately from, and are capable of existing independently of, the utilitarian aspects of the cheerleading uniforms, it held that Varsity's uniform designs were copyrightable pictorial, graphic, or sculptural works. Star Athletica appealed to the U.S. Supreme court. In a vote of 6–2, the United States Supreme Court affirmed the Sixth Circuit's decision on March 22, 2017.

Another area of law often cited in fashion law disputes is trade and commercial secrets regarding confidentiality, non-compete and non-disclosure agreements signed by employees. In *Nike, Inc v Denis Dekovic, Marc Dolce, and Mark Miner*,<sup>6</sup> Nike sued three former employees, employed as shoe designers, for at least \$10 million in damages. Nike's complaint alleged that the designers misappropriated Nike's trade secrets and conspired with Adidas to start a new, competing business venture. In the complaint, Nike alleged that defendants knowingly violated several agreements signed with Nike at the outset of their employment.

All three defendants signed non-competition agreements pursuant to which they agreed to: (1) not to compete with Nike during and for a period of one year following their employment; (2) not to use or disclose any of Nike's confidential information and to return all copies of such information upon leaving Nike's employment; and (3) not to solicit other Nike employees away from Nike to a competitor.

In addition, the complaint alleges that defendants also signed employee invention and secrecy agreements, by which each of them "assign[ed] to Nike all...inventions...conceived" during his employment term with Nike relating "in any way" to Nike's "business...or products." Defendants further agreed to "disclose promptly and in writing to Nike all [such] inventions ... conceived or made by me during the term of my employment with Nike whether or not such inventions are assignable under this Agreement." Nike claims the three designers stole a "treasure trove of Nike products designs, research information and business plans" in an effort to market themselves to Adidas, and that Nike will suffer irreparable harm in the form of lost market share, lost sales, and lost goodwill due to the actions of its former employees. Ultimately, the parties came to a confidential settlement agreement. However, this case demonstrates the measures that fashion companies take when protecting against the exposure of confidential information considered valuable to the company's success.

Patent law, and in particular, design patents, is another area of intellectual property law that offer some protection to fashion designers. According to the USPTO, "a design consists of the visual ornamental characteristics embodied in, or applied to, an article of manufacture. Since a design is manifested in appearance, the subject matter of a design patent application may relate to the configuration or shape of an article, to the surface ornamentation applied to an article, or to the combination of configuration and surface ornamentation." In the last few years design patents have become more popular as a method of protecting fashion designs. In *Lululemon Athletica Canada v. Calvin Klein, Inc.*,<sup>7</sup> certain design patents were at issue, specifically patents protecting the elastic waistband around Lululemon's best selling yoga pant named the Astro Pant. Lululemon alleged Calvin Klein had copied its design patent. Patent case law

involving fashion designs is rare, so this case could have been a game changer in the fashion industry. We do not know how the courts would have ruled, because the parties reached a confidential out of court settlement.

The fashion industry also intersects with criminal law when it involves the prosecution of those buying and selling counterfeit goods. Counterfeit or "knock off" luxury goods cost the U.S. economy up to \$250 billion in lost revenue every year. Most illegal distributors are caught selling online. Online retailing giant Amazon now provides a brand registry which provides a streamlined process for brand owners to find and report IP rights violations.

A significant case involving the counterfeiting of fake purses is *United States v. Smatsorabudh*<sup>8</sup>, that was handled in the Alexandria Division of the Eastern District of Virginia. For two years, the defendant, Praepitcha Smatsorabudh, an Arlington resident, ran an elaborate scheme to defraud U.S. department stores in 12 or more states. Smatsorabudh would purchase authentic brand name luxury handbags from various department stores at their retail price, and then return to the stores later with counterfeit bags she had purchased from overseas.

After "returning" the counterfeit bag, Smatsorabudh would then sell the authentic bags online for thousands of dollars. The Department of Homeland Security suspected Smatsorabudh was importing counterfeit bags from Hong Kong and China after discovering that she received 32 inbound express shipments from Hong Kong between October 2014 and November 2015. DHS searched Smatsorabudh's email address pursuant to a warrant and found several emails between Smatsorabudh and individuals in China discussing the sale of counterfeit purses, and a search of Smatsorabudh's Arlington apartment produced multiple authentic and counterfeit designer handbags. A criminal complaint was filed in May 2016, alleging that Smatsorabudh violated 18 U.S.C. §1343 (Wire Fraud). The complaint alleged Smatsorabudh defrauded more than 60 department stores in 12 states out of a total of more than \$400,000, according to the U.S. Attorney's office. Further, Smatsorabudh flaunted the stolen purses on an Instagram account named RichGirlsCollection and sold goods on an

**Fashion IP** continued on page 53

# Todd Pilot: Java Jackets, Physics, and the Meat Department

by Deirdre Norman

Todd Pilot went into engineering because he was told that's where the jobs were. And he started out teaching physics and working for IBM before making the leap into the law, because, he says, "As corny as it may sound, I saw lawyers as the protectors of the people: The wrongly evicted, the falsely arrested, the consumer taken advantage of, the person injured at the hand of another, that guy cheated in a business deal, the inventor whose invention was stolen by some big company — the only one who could help them was the lawyer."

Pilot has now spent over 25 years working in the intellectual property arena, converting his childhood love of science and math into a flourishing legal career that began at NASA's Langley Research Center Patent Office, wound through clerkships in the District of Columbia Superior Court, passed through a stint at the United States Department of Commerce Patent and Trademark Office, that lead to a general counsel role for a satellite communications provider, and culminated in his boutique law firm in Old Town Alexandria called The Trademark Institute. Since 1997, his firm has handled a variety of litigation matters, with a specialty in patents, trademarks, counterfeit enforcement, music licensing, book licensing, and entertainment contracts of all kinds.

Says Pilot of his time at NASA, "Suffice it to say that drafting a patent application for a hydraulic stress monitor was not the most exciting work in the world." He began to represent athletes, then music artists in Virginia Beach, before expanding to representing entertainers all over the country.



How did a kid from Akron, Ohio, grow up to be a Virginia physicist and lawyer with a roster of clients that has included Missy Elliott, D'Angelo, writers and producers for artists such as Ludacris and Destiny's Child, and a wide range of actors, athletes and entertainers? The equation is simple: A lot of hard work, a little luck, and an enormous amount of support from friends and mentors. Pilot states that "all of his clients have been referrals or introduced to him by friends, attorneys or former clients."

Pilot is not only the first lawyer in his family, he is the first person to graduate from college. His family, which includes two sisters and a brother, moved to Virginia when he was in middle school after the well-paying jobs generated by the Ohio rubber industry dried up and went overseas. Pilot's stepfather died shortly after his family came to Virginia, and to help his mother out he went to work at a grocery store, stocking shelves all night and



Pilot, with his wife Dr. Sonia Pilot, a clinical psychologist and educator in the District of Columbia school system, who received her doctorate from the University of Virginia.

then often sleeping through class during the day — while still making As. “That grocery store should have been shut down for violating child labor laws,” Pilot laughs. “But I was happy to have that job. It seemed like everyone was trying to get a job there.”

His work ethic at the grocery store got him promoted to the meat department (“They saw a real future in me as a butcher,” he chuckles), where he no longer worked all night. But the job involved bagging chickens, cutting up beef loins, and cleaning the entire department long after the counter butchers had gone home at 5 p.m. Still, it was better than the all-night stocking job.

*It seemed crazy to throw away all of that technical training,” he says. “But patent law benefits from a degree in the sciences. I learned that many patent lawyers had master’s and PhDs in fields such as chemistry, physics, mathematics, and engineering.”*

Pilot’s math and science scores were good enough in high school for him to enter into a dual degree program in physics and engineering at Virginia Commonwealth University (VCU), run in conjunction with the University of Michigan. At VCU he also wrestled for the school in the 126-lb. weight class, and his uniform remains a source of endless amusement to his son.

Pilot went on to obtain his master’s in physics at Hampton University, teaching 200-level physics classes at Hampton and

VCU to science and math majors while he did so. But law school still loomed in the back of his mind.

“It seemed crazy to throw away all of that technical training,” he says. “But patent law benefits from a degree in the sciences. I learned that many patent lawyers had master’s and PhDs in fields such as chemistry, physics, mathematics, and engineering.”

In law school at William & Mary, Pilot wrote a 3L paper arguing for the patentability of software at a time when the copyright laws provided the primary protection for software. Today, a large number of his firm’s clients involve people looking to get an app patented. Despite the tech focus of his work, Pilot keeps a small, folded-up piece of cardboard in his office — the sort that comes on a hot takeout beverage. Sometimes called a “java jacket,” its sole purpose is to keep people who are holding hot beverages from burning their hands, and, of course, it is patented.

“We use that simple device to remind us that we are not the judge of marketability, only of patentability,” says Pilot. “We should assume that no idea is too simple or too silly to patent.”

Pilot has also found the time to serve on the Virginia State Bar’s Executive Committee and in leadership in a number of other bar associations, including the Alexandria Bar Association, the Old Dominion Bar Association, the American Bar Association, the Black Entertainment & Sports Law Association, and the Washington Area Lawyers for the Arts.

At his heart, Pilot remains a science geek and is quick with an answer when asked where physics and the law intersect. “Physics is very analytical. We conduct due diligence for clients considering the purchase of businesses with technology assets and patents. We are never intimidated by the technology. It also helps to understand technology when reviewing and drafting teaming and joint venture agreements for our government contractor clients. Of course, it can be pretty difficult trying to get through a patent application without the scientific and technical background.”

Whether it’s a hydraulic stress monitor or the world’s next java jacket, Pilot, like all good intellectual property attorneys, knows the science behind the law, and the law behind the science. *Todd Pilot may be reached at (703) 299-9500 or [tpilot@trademarkinstitute.net](mailto:tpilot@trademarkinstitute.net).* ☞

# The Watergate Scandal: What a Law Student Learned About the Rule of Law

by Frederick M. Bruner

Watergate has become synonymous with scandal. The 1972 break-in spawned one of the darkest periods in our country's history, but for me, when I think of Watergate, I recall how it enriched my law school experience and taught me the essential role lawyers must play to preserve our system of government.

Watergate was the backdrop during my years at the University of Virginia's School of Law from 1972 to 1975. The burglary and wiretapping of the Democratic National Committee headquarters at the Watergate Complex in Washington, D.C., took place on June 17, 1972, less than three months before my first year. Throughout that year, the front pages of *The Washington Post* regularly provided new information about the break-in and those arrested for the crime, but there was little or no discussion in my first-year classes about the unfolding scandal. President Nixon was re-elected by a landslide in November 1972, and the Watergate burglars were convicted of conspiracy, burglary, and wiretapping in January 1973. Then, in April 1973, White House Counsel John Dean began cooperating with federal prosecutors. By the end of that month, Dean had been fired by the White House, and the acting FBI Director, as well as the White House Chief of Staff and the Attorney General, had resigned. Before my first year of law school ended, the Senate Watergate Committee hearings were being televised and an independent special prosecutor, Archibald Cox, had been appointed to investigate whether there had been any presidential impropriety. During the summer of 1973, between my first and second years, Nixon's Oval Office tape recording system



John W. Dean III and wife Maureen Dean in the Senate Watergate Committee Hearing Room during Dean's second day of testimony. Photo credit Everett Collection Historical / Alamy Stock Photo

had been revealed through testimony before the Senate Watergate Committee. Cox and Congress issued subpoenas for those tapes, but Nixon resisted turning them over. On October 19, 1973, Nixon directed Cox to withdraw his subpoenas. In a televised news conference, Cox responded that he would continue to pursue the tapes.

These events set the stage for what became known as the Saturday Night Massacre, which occurred on Saturday, October 20, 1973. That evening, President Nixon ordered his new attorney general, Elliot Richardson, to fire Special Prosecutor Cox. Richardson refused to comply with the order and resigned. Nixon then ordered the deputy attorney general, William Ruckelshaus, to fire Cox. He, too, refused the order and resigned. Robert Bork, the solicitor general, then became the acting attorney general and he discharged Mr. Cox. That evening, Archibald Cox issued the following statement:

*Whether ours shall continue to be a government of laws and not of men is now for Congress and ultimately the American people [to decide.]*

My first class on Monday, October 22, 1973, was an ethics class taught by the law school's dean of admissions, Albert Turnbull, a soft-spoken Virginia gentleman who frequently kept our attention by sharing stories from his own legal experience related to the ethical issues being discussed in class. It was not uncommon to laugh a bit in his class, but on that day in October, Dean Turnbull's demeanor as he started class was very unusual. There was no smile on his face as he closed his textbook and in a stern voice, spoke about the firing of Cox. Finally, for the first time since I had been in law school, the events in

*None of the defendants appeared to be looking at Dean while he testified. It struck me that all these men had risen to great power in our government. It also struck me that nearly all of them had done so because of their successful legal careers.*

Washington were going to be the topic of the day. I will never forget the passion with which Dean Turnbull described what he referred to as a constitutional crisis. At that moment, I realized how fortunate I was to be in that classroom at that time. Dean Turnbull did not use the Socratic method that morning. Instead, he delivered a lecture which he obviously had prepared over the weekend about the events on Saturday night in Washington. The classroom was silent while he spoke. Everyone was leaning forward with eyes riveted on Dean Turnbull as he described in heroic terms the actions of Elliot Richardson, William Ruckelshaus, and Archibald Cox. Suddenly, for what probably was the first time, I felt a deep sense of pride for my chosen profession because of the principled actions of these attorneys. Their actions gave meaning to the words I read every morning as I entered the law school building. There, above the doorway, was the following inscription:

*That those alone may be servants of the law who labor with learning, courage and devotion to preserve liberty and promote justice.*

That lecture by Dean Turnbull has helped me to understand and remember that a lawyer's duty to stand up for the rule of law is essential for the preservation of liberty and justice.

Following the Saturday Night Massacre, Leon Jaworski was appointed to be the new independent prosecutor on November 1, 1973. Then, in March of 1974, seven men with direct ties to the White House were indicted. That group, known as the Watergate Seven, included former Attorney General John Mitchell, White House Chief of Staff H. R. Haldeman and John Ehrlichman. Impeachment hearings started in May and the Supreme Court ordered Nixon's tapes to be released on July 24, 1974. Nixon resigned on August 9, 1974.

I returned for my third year of law school in September 1974 and signed up for a criminal process seminar which was taught that fall by a practicing attorney from Washington, D.C., who traveled to Charlottesville to conduct weekend classes. Our professor was a friend of Judge John Sirica who was presiding over the trial of the Watergate Seven and, as a result, he was able to get us in to see the trial on an afternoon when John Dean was testifying for the prosecution. I was seated on the front row of this small courtroom. In the aisle next to me was the courtroom artist who was busy drawing John Dean as he faced the defendants, who were all within arms-reach of me. None of the defendants appeared to be looking at Dean while he testified. It struck me that all these men had risen to great power in our government. It also struck me that nearly all of them had done so because of their successful legal careers. I wondered how their lives had gone so wrong. Although I was disheartened by the notion that these successful lawyers had engaged in criminal conduct that could have undermined our democracy, it was inspiring to observe, from my front row seat, this critical moment in American history as our legal system brought these men to justice.

My law school class graduated on May 26, 1975. Our commencement speaker was

my first-year property law professor, Thomas Bergin, who used that opportunity to challenge us to take responsibility for making work what he called “our country’s new experiment in democracy.” To explain why he considered our Constitution to be a “new experiment,” he pointed out that his grandmother had been born in the same year that Thomas Jefferson and John Adams had died, a period which consisted, in his case, of just two long generations. Professor Bergin warned us that the roots for our democratic system did not run deep and could be destroyed if we neglected our duty and allowed to erode the constitutional guarantees of liberty, justice, and equality. He stressed the important part we should play as lawyers in determining the fate of our system of government.

So now, when I think of Watergate, I think of Dean Turnbull’s passionate lecture about the heroism of the men who stood up for the rule of law. Although I am also reminded of the shame on the faces of the men who attempted to undermine our democracy, I am proud to have witnessed how our legal system dealt with their conduct. Most importantly, Watergate reminds me of Professor Bergin’s challenge to take responsibility for making this new experiment in democracy succeed. ♪



**Frederick M. Bruner** graduated from Hampden-Sydney College in 1972 and from the University of Virginia School of Law in 1975. After 20 years in private practice as a trial attorney in Norfolk and Richmond, he joined the Virginia Workers’ Compensation Commission as a Deputy Commissioner in the Alexandria office in 1995 and moved to the Richmond office in 1997. He presided over Workers’ Compensation hearings throughout the commonwealth until 2016. He now manages the commission’s Compromise Settlement Department.

Politics and lawyers have always been inextricably intertwined, a Venn diagram with much intersection. As early as 1875 when Ulysses S. Grant appointed John Henderson to investigate alcohol tax revenue corruption, numerous Presidents have appointed or been investigated by lawyers known as special counsel. In all, 29 men and women have filled that legal role, with President Clinton being the subject of the most investigations (12), and President Reagan coming in second with six, according to the *Saturday Evening Post*. The position is rarely a popular one, and Kenneth Starr, who investigated the Clintons, once referred to himself as a “skunk at a garden party” as he was being escorted from the White House.

## Join the Intellectual Property Law Section

Founded in 1970, the IP Section seeks to advance the quality of intellectual property law practice in the Commonwealth of Virginia. We strive to create opportunities for our members to get to know one another, to provide good CLEs to IP and non-IP attorneys, and to keep our members informed about developments in IP practice in the commonwealth.

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Learn more at <http://bit.ly/PBreporting>.

# Renters and Landlords Benefit from Virginia Reforms

by Helen Hardiman and Clarence Dunnaville



Helen Hardiman (right) and Clarence Dunnaville

There is no more effective way to reduce evictions than for a tenant to have a lawyer in court. While we applaud the Virginia legislature for passing reform bills that make the Virginia Residential Landlord Tenant Act (VRLTA) fairer to tenants, our call for lawyers to participate more fully in these cases remains clarion. Better laws enforced by competent counsel are a winning combination for Virginia renters and property managers. We hope our colleagues across the state will learn and enforce the letter of the new laws in order to help tenants avoid eviction and maintain stable housing.

Our last article in the February 2019 issue of *Virginia Lawyer* shared stories of two real-life evictions suffered by James and Carolyn.<sup>1</sup> You may remember that James was evicted after only a few months because his utility bills quickly mounted and forced him to choose between heat and rent. Carolyn was evicted after she withheld rent from her absentee landlord who refused to perform necessary maintenance. In both cases, families with minor children were rendered homeless. Such stories are too common in Virginia, where our landlord-tenant laws seem correlated with higher-than-average eviction court filings.<sup>2</sup> Fortunately, the VRLTA has undergone essential renovations this General Assembly session.

## **The Virginia Legislature Responds**

Our previous article detailed six proposed legislative solutions that were introduced in the 2019 Virginia General Assembly session. We are happy to report that most of the legislative

efforts to reduce evictions, including all six Housing Commission-endorsed bills, were successful this session, passing both chambers with extensive bipartisan support and signed into law by Governor Northam. As these statutory improvements become effective across the state, we hope to hear happier endings to eviction tales.

Del. Lashrecse Aird had this to say of the legislative package: “Too many of my constituents have faced eviction even after they’ve paid the landlord. I was proud to patron one of the six policy recommendations by the Virginia Housing Commission, a bill to help families remain in their homes, because safe, stable, and affordable housing is the foundation of success for all of us.”

Del. Betsy Carr echoed these sentiments: “Five cities in the Commonwealth of Virginia rank in the top ten of all cities in the nation in terms of eviction filings. Given the number of our cities experiencing high rates of eviction, we clearly have a systemic challenge rooted in state code. Accordingly, we have an obligation as the state legislature to address this situation. The City of Richmond, that I am proud to represent in the House of Delegates, unfortunately ranks second in the entire country. The reasons for our high rate of evictions are many and varied; we have a high rate of poverty and we have a substantial number of rental properties. Evictions take their toll — on the families experiencing eviction, the landlords who pay the price for vacancy and turnover, and the taxpayers who pay for all the residual costs associated with evictions.”

1. *Written Leases* – HB2054 sponsored by Del. Betsy Carr (D-Richmond); SB1676 sponsored by Sen. William M. Stanley Jr. (R-Franklin County)

Perhaps more than any other profession, lawyers appreciate a written contract and consistent rules that govern all contracts. As of July 1, 2019, the VRLTA will require written leases for residential tenancies. If no written lease is provided, seven default provisions will apply, including the explicit application of the VRLTA to oral leases. This improvement will clarify the rights and responsibilities of both landlords and tenants.

2. *One Case at a Time and Required Evidence* – HB1922 sponsored by Del. Jeff Bourne (D-Richmond); SB1627 sponsored by Sen. George Barker (D-Alexandria)

These companion bills attracted unanimous support. Requiring landlords to amend an existing unlawful detainer rather than filing a subsequent action streamlines the judicial process and protects tenants’ credit records. Moreover, this newly enacted language strengthens the evidentiary basis for unlawful detainers — the court must receive the landlord’s proper notice to a tenant of the impending lease termination before ordering possession to the landlord. Tenants need such information in order to mount possible defenses to the eviction action.

Del. Bourne said of his bill, “As a lawyer and landlord, I know that evidence and accuracy matter. When a tenant is late paying rent, the landlord should have to prove they gave proper notice to evict before proceeding to do so. And if additional rent becomes due after the landlord files for eviction, amendment of the existing lawsuit is the proper procedure, not another filing that can cost that tenant more fees and credit hits.”

3. *Pay and Stay* – SB1445 sponsored by Sen. Mamie Locke (D-Hampton); HB1898 sponsored by Del. Jennifer Carroll Foy (D-Prince William)

When this bill becomes law July 1, 2019, tenants will have significantly more time to repay all of their debt to a landlord to avoid eviction. If a tenant can pay rent, fees, and court costs at least two days before the scheduled eviction, they get to stay! For low- and moderate-income Virginians, an unforeseen expense can ruin a carefully balanced budget. With more time to come current, tenants can wait to receive another paycheck or secure a loan in order to save their housing. This “redemption” also assures landlords are made completely whole. Unfortunately, this right of redemption is only allowed once every 12 months,<sup>3</sup> but that one chance can make all the difference for a family living paycheck to paycheck.

4. *Use Writ or Lose Writ* – HB2007 sponsored by Del. Lashrecse Aird (D-Petersburg); SB1448 sponsored by Sen. Mamie Locke (D-Hampton)

An important parallel to the elongated “pay and stay” provision is the new requirement that a landlord either use their writ or lose their writ. Under this legislation, landlords have only 180 days, down from 12 months in the prior law, to transform the

court order granting them possession into a writ of eviction. So, if a tenant is able to catch up after an order of possession is entered against them, they can rest easier knowing that the order of possession against them will expire in half a year.

The bill also modifies what happens when landlords do use the order of possession to get a writ of eviction. As of July 1, 2019, if the landlord and tenant work out an arrangement and the landlord cancels the scheduled sheriff eviction, the writ of eviction “shall be vacated as a matter of law.” This automatic designation will work wonders on tenants’ credit reports, which will now show that the landlord and tenant resolved any past due rental payments. Housing providers should look more favorably on applicants whose

*This session, the Virginia General Assembly has taken a giant step forward in balancing the scales of power in these cases. Legislators in both chambers or both parties supported all six bills recommended by the Virginia Housing Commission.*

records — where the writ of eviction was vacated — demonstrate eventual and complete compliance. In these situations, tenants are not technically evicted and can represent as much to future landlords.

5. *Access to Appeal* – SB1626 sponsored by Sen. George Barker (D-Alexandria)

When this bill becomes law, tenants with meritorious defenses will have meaningful access to Circuit Court to appeal their eviction as ordered by the General District Court. Instead of paying up to a year’s rent in advance, now in order to perfect an appeal, the tenant must pay the amount of the judgment into the court as well as rent to the landlord as it becomes due.

6. *Pilot Eviction Diversion Program* – HB2655 sponsored by Del. Chris Collins (R-Winchester); SB1450 sponsored by Sen. Mamie Locke (D-Hampton)

Based on feedback from additional stakeholders, the eviction diversion pilot programs were substantially amended. As passed, the bills create eviction diversion pilot projects in the General District Courts of Danville, Hampton, Petersburg, and Richmond. Perhaps most importantly politically, the substitute bills are not expected to have a material fiscal impact on court system resources. The upshot of the pilot programs is that qualifying tenants enter into a court-ordered rent re-payment plan. If the payments are made on time, the court will dismiss the unlawful detainer. If not, the landlord will get a judgment for everything owed by the tenant (unless the tenant files an affidavit stating that the payment was in fact made). The stated purpose of these programs “shall be to reduce the number of evictions of low-income persons.”

Qualifying criteria for a tenant include:

- 1) appearing at the return date and asking to be referred to the program;
- 2) paying to the landlord 25 percent of the amount due at the return date;
- 3) demonstrating sufficient funds to make payments;
- 4) proffering a reason for being late;
- 5) having not consistently paid rent late (more than twice in six months or three times in the past 12 months);
- 6) having not exercised the right of redemption in the past six months; and
- 7) having not participated in the eviction diversion program in the last 12 months.

The list to qualify for the program may seem long, but tenants who are sidelined by an unexpected expense will benefit most, because the program gives them time to catch up — tenants pay the remaining balance in equal installments over the course of three months after the return date. As in the other legislation, protections exist to assure landlords are made whole. After the initial court date, if the tenant pays three equal monthly installments equal to 25 percent of the amount owed to the landlord, the case is dismissed.

These pilot programs will be in effect in the above-named jurisdictions from July 2020 through July 2023. The Office of the Executive Secretary, relevant General District Courts, and the Virginia Housing Commission will collaborate on data collection and analysis, culminating in a report to the General Assembly in July 2022 with suggestions for future legislation aimed at reducing evictions. The authors look forward to expanded eviction-diversion programs around the

commonwealth modeled on the successful components of the pilot projects.

### 7. Additional legislation

Though not part of the Virginia Housing Commission package, HB1923, sponsored by Del. Jeff Bourne (D-Richmond), passed unanimously. Once it takes effect, tenants who win certain cases against their landlord in court can be awarded reasonable attorney fees. Fees are available in cases where the tenant proves that the landlord failed to remedy in a reasonable time a fire hazard, a serious life/safety threat, or a condition that constitutes material noncompliance on the part of the landlord.

### How Can a Lawyer Help?

A lawyer can make all the difference in a landlord-tenant dispute. This session, the Virginia General Assembly has taken a giant step forward in balancing the scales of power in these cases. Legislators in both chambers or both parties supported all six bills recommended by the Virginia Housing Commission. Now we need lawyers like you to put the new laws into action. Here are six ways that you can provide meaningful representation to families attempting to save their homes.

1. Established in late 2018 by the Virginia Poverty Law Center (VPLC), the **Eviction Legal Helpline** provides free legal information, advice, and referrals to tenants in Virginia facing eviction or unwanted lease termination. Attorneys can volunteer in small increments as their schedules allow, accessing case records online and making calls from their office or home. Participating attorneys are covered by VPLC's malpractice insurance and receive training, robust reference materials, and on-call support from VPLC. Engagement with individual clients is limited to a single phone call and, under Rule 6.5 of the Virginia Rules of Professional Conduct, does not require a conflicts check. Contact: Phil Storey, phil@vplc.org or (415) 388-0396.

2. **Virginia Free Legal Answers** is part of an ABA initiative to provide online pro bono assistance to low-income citizens across the nation. To date more than 2,000 Virginians have been approved for assistance; 15 percent of the questions posted on the Virginia website are housing related, many of which come from tenants facing eviction. Licensed Virginia attorneys can provide anonymous online advice through the portal to help ten-

ants understand their rights, navigate disputes with landlords, and prepare for court. The engagement is limited in scope, no conflicts check is required to engage, and ABA/NLADA Malpractice insurance is provided by the ABA for the legal guidance that volunteer attorneys provide through website. To register visit [www.virginia.freelegalanswers.org](http://www.virginia.freelegalanswers.org) or contact Cris Gantz at [cgantz@vsb.org](mailto:cgantz@vsb.org) to get more information.

3. Contact your **local legal aid office** and sign up to take a housing case. Many have well-established pro bono partnerships and clinics to refer and assist in landlord-tenant matters. Find the nearest legal aid at [www.valegalaid.org/find-legal-help/directory](http://www.valegalaid.org/find-legal-help/directory) or call 1-866-LEGLAID (1-866-534-5243).

4. Add tenant representation to your **Virginia Lawyer Referral Service** practice areas. The category of "tenant" is in the "Real Estate" section of categories. VLRS can be reached at (804) 775-0591.

5. For **pro bono partners**, encourage new associates to represent tenants facing eviction — it's a great way to get court time!

6. Observe an **unlawful detainer docket** at your local General District Court. It's easy to check for unlawful actions online before planning your visit. It is not uncommon for dozens of cases to be set for a single hour, where lawyers for several housing providers are seeking judgments for money and possession. Seeing which tenants show up, hearing their stories, and understanding who is most impacted by eviction can be very powerful. ♪

#### Endnotes:

- 1 Names have been changed to protect privacy.
- 2 Matthew Desmond, Ashley Gromis, Lavar Edmonds, James Hendrickson, Katie Krywokulski, Lillian Leung, and Adam Porton. *Eviction Lab National Database: Version 1.0*. Princeton: Princeton University, 2018, [www.evictionlab.org](http://www.evictionlab.org).
- 3 Va Code § 55-248.34:1.

**Helen Hardiman** is a solo practitioner working to prevent and end housing discrimination in Virginia. She is humbled to have her name appear in this article alongside Mr. Dunnville's.

**Clarence M. Dunnville Jr.** is a well-known attorney, civil rights veteran, legal reformer, author, and activist for justice. He was the first black attorney at AT&T, and has fought segregation, discrimination, and social inequities in the justice system, labor, and housing his entire career.

## Highlights of the February 23, 2019, Virginia State Bar Council Meeting

At its meeting on February 23, 2019, in Richmond, the Virginia State Bar Council heard the following significant reports and took the following actions.

### Unauthorized Practice of Law Rules

Council approved by unanimous vote the proposed rewrite of the Unauthorized Practice of Law Rules. Prior to approval, Council unanimously approved amending the proposed amendments in two regards: (1) Paragraph 3.A. Exceptions, was amended by the addition at the end of the paragraph to include non-lawyers or paralegals employed by legal aid societies; and (2) Paragraph 5.D, Comments, was amended to correct the reference to Paragraph 3(Q) to Paragraph 3(R). The proposed rule changes

will be presented to the Supreme Court of Virginia for approval.

### Rule of Professional Conduct 4.4(b)

A motion was made and seconded to refer the proposed rule changes to Rule of Professional Conduct 4.4(b) to the Standing Committee on Legal Ethics for reconsideration, which motion was passed by affirmation.

### Rule of Professional Conduct 3.8

Council approved 47 to 13 the proposed revisions to Rule of Professional Conduct 3.8 with the addition of Comment [5]. Prior to approval, Council amended the proposed comment. The proposed comment will be presented to the Supreme Court of Virginia for approval.

### Appointment of Renu M. Brennan as Bar Counsel

Council approved by unanimous vote the appointment of Renu M. Brennan as Bar Counsel.

### Budget

Council unanimously approved a \$16 million proposed budget for the FY2020, which will be presented to the Supreme Court of Virginia for approval. This is an increase of \$1.9 million over the current operating budget, primarily due to a proposed salary increase, as well as anticipated technology costs.

### ALPS Agreement

Council approved the proposed amendment to the ALPS endorsement agreement.

## Annual Criminal Law Seminar Addresses Reforms and Issues

Over 350 defense lawyers, commonwealth's attorneys, and judges convened in Williamsburg for the annual Criminal Law Seminar. Twelve speakers covered topics ranging from new discovery rules to juvenile criminal law to the admissibility of witness memories on the witness stand. Popular topics included recent developments in criminal law and ethics updates during the full day seminar.

The Hon. M. Hannah Lauck, U.S. District Judge for the Eastern District of Virginia, received the Harry L. Carrico Professionalism Award, and the Hon. Rossie D. Alston Jr., Judge of the Court of Appeals of Virginia, gave the keynote luncheon address. In accepting her award, Judge Lauck fondly recalled her days as a clerk for former Supreme Court of Virginia Chief Justice Carrico, including the time he asked his clerks to go rollerblading with him, before zooming off and leaving them to flounder



Maria D. Jankowski, the Hon. M. Hannah Lauck, Nancy G. Parr, chair of the Criminal Law section, and the Hon. Rossie D. Alston Jr.

along behind his blistering pace.

Judge Alston spoke on issues in criminal law, including Fourth, Fifth, and Sixth Amendment cases, before turning to bipartisan federal criminal reform legislation — the First Step Act — recently signed by President Trump. The act may result in the release of anywhere from 53,000 to 181,000 non-vi-

olent federal inmates. Judge Alston concluded with a quote by Reverend Doctor Martin Luther King Jr.: “Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.”

## Vote in 2019 Bar Council Elections

Participate in the mini-democracy that is your Virginia State Bar by voting for the council member that will represent your circuit for the next three years, beginning July 1. Council is the bar's 81-person governing body and oversees all bar functions.

**Circuits 1, 13, 17 and 20 are open for voting.**

All active lawyers in good standing in those circuits should have received an email with the subject "Vote in the Virginia State Bar Council Election" on April 8. Follow the instructions in that email to vote — the process only takes a few minutes once you've decided who to vote for.

For links to candidate statements, what to do if you *didn't* receive your email, and to see who won in the uncontested circuits, go to <http://bit.ly/2019council>.



Help decide who gets to join this winsome crew of outgoing Bar Council members being honored at the 2017 Annual Meeting.

## Bar Welcomes Cameron Rountree as Deputy Executive Director

Cameron Rountree joined the Virginia State Bar as deputy executive director in March, bringing a variety of legal experience and knowledge from his career in private practice and government service.

Rountree comes to the bar from the Norfolk office of Williams Mullen, where he handled a broad range of civil matters and commercial litigation, as well as white collar and criminal defense. In particular, he represented clients in business ownership disputes, construction litigation, business tort and contract litigation, federal criminal defense and firearms industry practice.

Prior to private practice, Rountree worked as a special assistant U.S. attorney, a law clerk to the Honorable Tommy E. Miller, U.S. Magistrate Judge, and a military officer with the United States Navy.

Much of his substantial trial experience comes from his work in the U.S. Attorney's Office for the Eastern District of Virginia. He tried several jury trials in the federal courts of Hampton Roads and investigated cases with federal agencies like the FBI, the DEA, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. Rountree cites his experience as a prosecutor in informing his grasp of VSB's core mission of professional regulation and the similar procedures

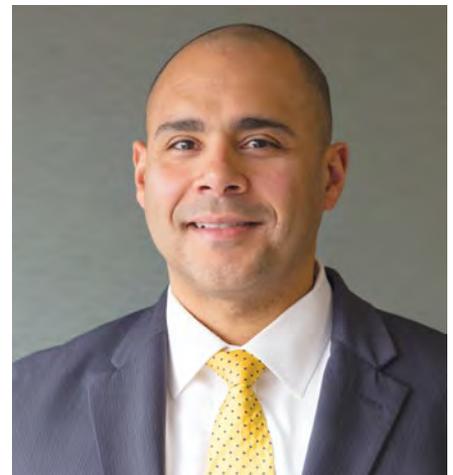
for lawyer misconduct in the bar.

"Cameron is a welcome addition to the bar's management team," said Executive Director Karen Gould. "He brings significant expertise from a variety of jobs that will lend itself to this position."

Before attending law school at William & Mary, Rountree was a surface warfare officer in the United States Navy, deploying from east and west coast-based ships. He remains an active member of the United States Navy Reserve. From March 2016 to March 2017, Rountree was called to serve as part of a joint task force based in Djibouti, where his command contributed to diplomatic security assistance in South Sudan, among other missions. His efforts earned him the Defense Meritorious Service Medal and the Joint Service Achievement Medal, among other unit and campaign awards.

"I'm excited to transition to public service," Rountree says. "I was looking for something that could help meld my legal experience and leadership experience, which I have trained for since I joined ROTC at 18. And this does that."

In addition to a master's degree from the United States Naval War College in national security and strategic studies, Rountree holds a bachelor's degree in government and Spanish from



the University of Virginia. He traces his initial interest in Spanish back to a sixth-grade crush on a classmate but says the degree and language skill has served him well through his career — and now again at the bar, providing public protection and education.

The deputy executive director position oversees legal services and communication work at the VSB, including the clerk's office, lawyer referral services, the Clients' Protection Fund, access to legal services, the bar's event planners, and bar publications.

Rountree relocated from Norfolk to Richmond with his wife, Susie, and their two children, aged 4 months and 16 months. They welcomed their third son earlier this month. Along with spending time with them, Rountree enjoys vegetable gardening, sailing, and brewing beer.

## The Bar's Special Committee on the Future of Law Practice Releases Final Report

Artificial intelligence. Blockchain. Cryptocurrencies. Globalization. Alternative legal service providers.

Virginia lawyers struggling to understand how these forces might shape their practice have a new resource. The Special Committee on the Future of Law Practice released its final 2019 report in March — a follow-up to its 2016 version.

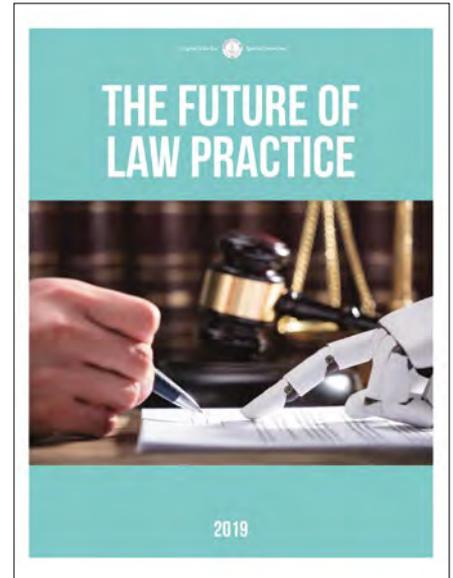
Via regular meetings where members compiled studies and reports from other bars, and with input from guests outside the legal profession, the committee presents a range and depth of information on external, technological energies changing the practice of law. That includes increasing competition from nonlawyer service providers, generational pressures that are likely to impact law firm business models, the future of billable hours, the insourcing and unbundling of legal services, the

accelerated globalization and multijurisdictional trends of legal services, and more.

“We feel the anxiety of lawyers facing a digital world that is often foreign to them — hence our emphasis on the need to educate lawyers and identify developments so they can find their place in that world, be competitive, and provide high quality legal advice and professional services,” it reads. “This report is meant to be easily read, enhance lawyers’ practices and advise them of probable changes they will see in the near and long term.”

The report concludes by offering a series of ten recommendations to the bar, its committees and boards, law schools, and all Virginia lawyers.

The bar encourages lawyers to read the committee’s report in full at <http://bit.ly/futurelawreport>.



## Conference of Local and Specialty Bar Associations

### Local and Specialty Bar Elections

**The Prince William County Bar Association, Inc.**

Kristina Keech Spittle, President  
Tracey Alma Lenox, President-elect  
Anna Brigman Bristle, Secretary  
Justin Michael Hargrove, Treasurer  
Kathleen Latham Farrell, Director  
Jessica Harbeson Foster, Director  
William Deckel Wides, Director

### Solo & Small-Firm Practitioner Forum

The Solo & Small-Firm Practitioner Forum focuses on issues that confront attorneys who practice alone or in small firms. Law office management and ethics are among several topics covered at these CLEs.

These CLEs are free, include lunch, and are available on a first-come, first-served basis. Registration and an agenda will be posted at <http://bit.ly/CLSBAcalendar>

**May 8, 2019**  
Fredericksburg Hospitality House  
& Conference Center

## In Memoriam

**Ralph L. Axselle Jr.**

Richmond

February 1943 – January 2019

**Michael J. Barrett Jr.**

Alexandria

January 1930 – January 2019

**Scott James Coonan**

Raleigh, North Carolina

June 1963 – January 2019

**George Fuller Cridlin**

Jonesville

March 1947 – December 2018

**William E. Cumberland**

Bethesda, Maryland

September 1938 – November 2018

**J.T. Cutler**

Newport News

July 1931 – October 2018

**Dale Warren Dover**

Alexandria

August 1949 – January 2019

**Susie S.C. Drake**

Lynchburg

June 1929 – February 2019

**Thomas Patrick Dulany**

Tysons Corner

October 1957 – January 2019

**Renay Melitta Fariss**

Chesterfield

November 1959 – November 2018

**Fred M. Haden**

Fairfax

October 1926 – June 2018

**Patrick John Link**

Long Grove, Illinois

July 1933 – December 2018

**Archibald Carter Magee**

Roanoke

October 1954 – February 2019

**Louis J. Marin**

Heathsville

October 1934 – November 2017

**Kevin Joseph McIntyre**

Arlington

December 1960 – January 2019

**Cecil G. Moore**

Saluda

April 1929 – January 2018

**John Rutledge**

Longboat Key, Florida

April 1925 – September 2018

**Hon. Kenneth N. Whitehurst Jr.**

Virginia Beach

June 1938 – November 2018

**Barbara Bracey Wiggs**

Alexandria

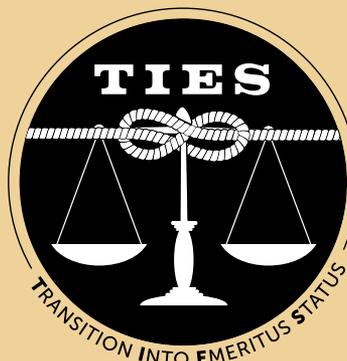
July 1941 – December 2018

**George Paul Williams**

Fredericksburg

April 1944 – February 2019

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# Researching Intellectual Property Law in Virginia with 2020 Vision

by Audrey Lynn

Virginia. Old Dominion. Land of Jefferson. Mother of Presidents. Headquarters of Amazon. Wait, what? Yes, it's true. Amazon has selected Virginia as the location of its second headquarters.<sup>1</sup> At the same time, Apple is expanding its presence in NoVA,<sup>2</sup> and Virginia Tech is set to build a million-square-foot, billion-dollar campus in Alexandria dedicated to technological innovation.<sup>3</sup> Four hundred years after the establishment of the first representative government in America at Jamestown marked the official success of that primitive colony, it looks as though Virginia will soon cement its status as a national leader in the high-tech industry, arguably second only to Silicon Valley, for the foreseeable future.

Virginia's legal community may be best known for the rich history and traditions that shape its ethos, but these have not prevented it from adapting to the commonwealth's changing economy. Meeting the demands of both existing and emerging industry, Virginia has more intellectual property lawyers than six of the eleven more populous states.<sup>4</sup> We can reasonably expect that number to increase in light of recent developments. Today, IP practitioners are well-served by the almost one-stop shopping Intellectual Property Law resources provided by Lexis and Thomson-Reuters, but of course, these are not available or appropriate in every situation. This article seeks to highlight a number of Virginia-based intellectual property law resources freely available on the internet. For example, the Virginia State Bar's Intellectual Property Section provides basic information about protecting intellectual property, and regularly publishes in the *Virginia Lawyer*. The

section also sponsors a Student Writing Competition, posting each year's winning article on its webpage. These articles, incentivized by a \$5,000 first-place prize (law professors and mentors take notice!), feature excellent research and analysis of open questions and emerging issues in IP law. Finally, the section hosts annual events in Alexandria, Williamsburg, and Virginia Beach to foster networking and keep members up to speed on developments in the field.<sup>5</sup>

Currently, both the Virginia State Bar and Thomson-Reuters' Westlaw Edge feature the University of Richmond's *Richmond Journal of Law & Technology* and the *Virginia Journal of Law and Technology* as Virginia's two leading journals on intellectual property law. The Richmond "JOLT" touts itself as the first exclusively online law review.<sup>6</sup> The journal, which publishes quarterly, also hosts symposia and has run a successful blog since 2012. Its University of Virginia counterpart, "VJoLT," publishes three issues per year in print and online, and recently started a blog.<sup>7</sup> These are outstanding publications, but they are far from the only Virginia journals that publish in the field. The law reviews of George Mason, Washington & Lee, and William & Mary as well as *Virginia Law Review Online* have published many articles concerning patents, copyrights, and trade secrets in the past decade. Even the smaller, mission-focused *Regent University Law Review* has highlighted issues in IP law, such during its 2017 Symposium, *The Expansion of Technology in the 21st Century*, where Judge Robert Humphreys' keynote speech included an effects-focused discussion of Intellectual Property Law and the Digital Millennium Copyright Act.<sup>8</sup>

Finally, resources published by law firms may be of interest to those seeking a practitioner's perspective. *Wilcox & Savage's Tech Law Letter* is published on the firm's website quarterly and frequently features contributions from the firm's leading IP lawyer and current VSB IP Section Chair Timothy Lockhart.<sup>9</sup> *Pender & Coward's* regular publications cover numerous practice areas, including patent, trademark, and intellectual property.<sup>10</sup>

Now more than ever, Virginia's IP attorneys can expect to confront head-on some of the main challenges facing their field. Staying up-to-date on the latest developments in not only the law, but in industry and resources, will be critical to successfully navigating the ever-shifting ground of modern IP law. Researchers and professionals looking to maintain familiarity with late-breaking developments should cast a wide net.

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# Metadata Mistakes: Not Inadvertant, But Incompetent

by Mark Bassingthwaighte

I have been writing and lecturing about metadata for years. (And in case you have forgotten, metadata is the “hidden” information about the electronic documents we create). I guess for some of late, I’ve run on with the topic long enough because a few have started to say “enough already.” Then this happened.

Earlier this year I was on the road visiting a dozen or so law firms and learned that several attorneys at two different firms were routinely emailing documents out to other attorneys without first removing the associated metadata. Making matters worse, in many instances the attorneys who were in receipt of these documents didn’t have to do anything to view the metadata. In other words, there was no metadata mining going on, no digging for it. All they had to do was open the document and they would find interesting and useful information staring them in the face. Think “tracked changes” as an example. Now here’s the kicker: No one was saying anything to anyone in order to keep the information coming. After all, this is a gift that keeps on giving. “Enough already?” I don’t think so.

Let’s talk ethics for a minute. There are basically two issues in play when it comes to metadata. The first is an attorney’s obligation to maintain client confidences, some of which can be metadata based. There is no exception in the confidentiality rule that says an attorney needn’t worry about maintaining client confidences if an electronic document is in use. This is why firms routinely require that all electronic documents be either scrubbed clean of metadata or converted to a pdf format prior to sending. Our professional conduct rules mandate this outcome. In fact, I can assure you that the two firms where the

above mentioned problem attorneys practice have such a rule in place.

The second issue concerns the viewing of metadata. If an attorney receives electronic documents with associated metadata intact, may the attorney view it? Suffice it to say that the issued ethics opinions on the subject run the gamut. Some opinions state it’s fine to take your advantages where you find them. At the other extreme you will find ones that say, “Nope, can’t do it.” But here’s where it gets interesting. If you read the opinions that come down on the side of saying an attorney should not view metadata, you often find an analysis that mirrors the analysis used with opinions issued over misdirected faxes back in the day with terms including “inadvertent disclosure” driving the analysis.

In the above example, the fact that no attorney was willing to do the right thing and speak up seems unfair. After all, the attorneys who sent the documents were simply unaware. Apparently they didn’t understand what metadata was all about, let alone what to do about it. Well I beg to differ. The attorneys receiving the useful information didn’t speak up because they understood there was nothing inadvertent about the actions of the attorneys who were sending out the documents.

Again, the Rules of Professional Conduct are in play. As attorneys, we are to maintain client confidences. And in today’s world, professional competency means having an understanding about what computers and applications like word processing programs do and don’t do. This isn’t optional. You see, I understand why the attorneys receiving the documents kept their mouths shut. I actually think they made the correct decision because the ongoing disclosures

were not inadvertent. A number of years ago, I might have called the disclosures innocent or naive, but not today. Today, I would label the attorneys who continue to routinely send out documents with the associated metadata intact incompetent. Yes, that may seem harsh, but it is true nonetheless.

If you aren’t already responsibly addressing the issues surrounding metadata on a daily basis, all I can say is: now is the time. There are firms that are using software tools that literally mine for metadata and sometimes they hit real pay dirt. Should opposing counsel ever do that to you, do you really want to try to argue that your routine delivery of the metadata was an unintentional act? I suspect that any impacted client would be less than impressed with that approach. In fact, I think they would call it what it is: incompetent. ☹



**Mark Bassingthwaighte**, ALPS risk manager, has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars, and written extensively on risk management and technology. Check out Mark’s recent seminars to assist you with your solo practice by visiting our on-demand CLE library at [alps.inreachce.com](http://alps.inreachce.com). Mark can be contacted at [mbass@alpsnet.com](mailto:mbass@alpsnet.com).

# Cut the Custodian: Using the Business Records Statute to Save Time and Money

by Brandon K. Fellers

Trial attorneys routinely rely on business records to substantiate their cases; however, the testimony of the custodians of record required to authenticate the record can be both time-consuming and financially burdensome. What if the proponent of the record knows it will be virtually impossible to get a live custodian to come to court?

In that case, the proponent could seek a certificate of authenticity from the business and follow the steps in Virginia Code § 8.01-390.3. Under that statute, the authentication and foundation necessary for the admission of a business record under the business records exception to the hearsay rule may be laid by (1) witness testimony; or (2) a certificate of authenticity of, and foundation for, the record made by the record's custodian or another qualified witness; or (3) a combination of testimony and a certification. The statute was first enacted in 2014 and only applied to civil cases. As of July 1, 2017, the statute was amended to include criminal cases.

While the statute is a step in the right direction in facilitating admission of records through an affidavit/certificate, the main pitfall is that the statute doesn't allow a judge to overrule the opposing counsel's objection. Perhaps in the future the General Assembly will follow the approach taken by Federal Rule of Evidence 902(11), where the certification can be used in lieu of live testimony unless the court, in its discretion, requires live testimony. In criminal practice in state courts, many defense attorneys will not object to the affidavit/certificate because if they do object and their client is found guilty, the commonwealth can assess the costs of travel for the custodian of record to the defendant pursuant to Virginia Code § 19.2-336 as

an expense incident to prosecution.

What if the proponent's records are from a small business that does not have a formal custodian of record? The statute allows for any "qualified witness" to authenticate the record, which could be anyone who has knowledge of how the business records are compiled, stored, and maintained.<sup>1</sup> A "qualified witness" could be an employee that one wouldn't think of as a formal custodian, such as a gas station clerk or a waitress at a restaurant. For example, the proponent wants to admit a 7-Eleven receipt into evidence and the store does not have form affidavits/certificates. The proponent should take advantage of this statute and draft a form certificate of authenticity to use in those situations using foundation language that tracks Virginia Supreme Court Rule 2:803(6). The statute allows for a declaration pursuant to Virginia Code § 8.01-4.3 instead of an affidavit. A notary is not required. Once the qualified witness signs the certificate, the proponent should send it to opposing counsel giving notice of intent to admit at the trial. If no objection is filed within 5 days of the notice, the receipt is admissible.

Before trial attorneys turn to the business record statute for authentication, they may face hurdles in retrieving the records, especially records from businesses associated with electronic communications, whether it is emails, telephone conversations, or data stored on computers. Civil litigators will face problems trying to subpoena content-based records for Facebook, Google, or Yahoo email due to certain provisions of the Stored Communications Act in 18 U.S.C. § 2701. Courts generally quash civil subpoenas issued to third-party ISPs that seek content. They are, however, able

to subpoena subscriber information. Facebook, for example, explains that their records can only be authenticated by the account owner or any person with knowledge of the contents of the account, but will not provide a live witness to come to court.<sup>2</sup>

In the criminal system, records are obtained by law enforcement through search warrants to search a defendant's electronic media or through government-issued subpoenas to third parties pursuant to the Stored Communications Act. State prosecutors use court orders pursuant to Virginia Code § 19.2-70.3 to get records from electronic communications providers, and the affidavit from the custodian alone is sufficient for admissibility under section H of that code section, without having to resort to the business record statute.

It is well-settled that properly authenticated business records are reliable evidence that serves as an exception to the hearsay rule. Trial attorneys can save an extra step, and save time and money, by routinely using the notice provision as set forth in Virginia Code § 8.01-390.3 in order to get these records admitted in their cases.

*Technology continued on page 57*



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- 25 *Intellectual Ventures I LLC v. Toshiba Corp.*, Civ. No. 13-453, Stipulation of Dismissal and Order (Aug. 28, 2017) (Dkt. 695).
- 26 *Parallel Networks Licensing, LLC v. Int'l Bus. Machs. Corp.*, Civil Action No. 13-2072 (Feb. 22, 2017).
- 27 *Id.* at \*26.
- 28 *Id.*
- 29 See 37 C.F.R. § 42.122(b).
- 30 *Parallel Networks* at \*26.
- 31 *Id.*
- 32 *Id.* at \*9-10.
- 33 *Parallel Networks Licensing, LLC v. Int'l Bus. Machs. Corp.*, No. 2017-2042 (Fed. Cir., May 11, 2018) (Rule 36 affirmance).
- 34 *Verinata Health v. Ariosa*, No. 12-cv-5501, Order on Plaintiff's Motion to Strike Portions of Defendants' Invalidation Contentions, at \*1-2 (N.D. Cal. Jan. 19, 2017) (Dkt. 319).
- 35 *Verinata Health* at \* 7 (declining to strike the combination of Quake and Craig), \*8-9 (declining to strike the combination of Fan and Lizardi and the combination of Straus, Rothberg, and Walt).
- 36 *Id.* at \*7-8.
- 37 *Id.*
- 38 *Id.* at \*9-10.
- 39 *Verinata Health v. Ariosa*, No. 12-cv-5501, Judgment (N.D. Cal. Jan. 28, 2018) (Dkt. 642).
- 40 See *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, No. 18-2198 (Fed. Cir.).
- 41 *Verinata Health v. Ariosa*, No. 12-cv-5501, Amended Notice of Appeal by Ariosa (N.D. Cal. Oct. 10, 2018) (Dkt. 723).
- 42 *Advanced Micro v. LG*, No. 14-CV-01012-SI, at \*9-10 (N.D. Cal. June 26, 2017).
- 43 *Id.* at \*10.
- 44 *Id.*
- 45 *Id.*
- 46 See *Advanced Micro v. LG*, No. 14-CV-01012 (Oct. 16, 2017) (Dkt. 246, 247).
- 47 See, e.g., *American Technical Ceramics Corp. et al v. Presidio Components, Inc.*, 2-14-cv-06544, Order (E.D. NY, Jan. 30, 2019); *Koninklijke Philips N.V. et al. v. Wang Alliance Corp.*, No. 14-12298, Memorandum and Order (D. Mass. Jan. 2, 2018) (Dkt. 226); *Network-1 Techs., Inc. v. Alcatel-Lucent USA, Inc.*, No. 6:11-CV-492 (E.D. Tex. Sept. 26, 2017) (Dkt. 978), Order Adopting Report and Recommendation, No. 6:11-CV-00492-RWS, 2017 WL 4856473 (E.D. Tex. Oct. 27, 2017) (Dkt. 1061); *Biscotti Inc. v. Microsoft Corp.*, No. 2-13-cv-01015 (E.D. Tex. May 11, 2017) (Dkt. 191); and *Douglas Dynamics, LLC v. Meyer Prods. LLC*, No. 14-cv-886-JPD (W.D. Wis. Apr. 18, 2017) (Dkt. 69).
- 48 *SAS Institute, Inc. v. Iancu*, 138 S.Ct. 1348 (2018).

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patent licensing program.<sup>6</sup> Thus, each entity of the new industrial eco-system in Alexandria will need patent drafting and procuring services, advice regarding the scope and validity of patents, counseling on patent licensing and enforcement. The local IP law firms will be perfectly positioned to provide such services to these entities. ☞

Endnotes:

- 1 [www.washingtonpost.com/local/amazon-hq2-decision-amazon-splits-hq2-prize-between-crystal-city-and-new-york/2018/11/12/316d2a32-e2c9-11e8-8f5f-a55347f48762](http://www.washingtonpost.com/local/amazon-hq2-decision-amazon-splits-hq2-prize-between-crystal-city-and-new-york/2018/11/12/316d2a32-e2c9-11e8-8f5f-a55347f48762)
- 2 <https://vt.edu/innovationcampus/for-the-media/release.html>
- 3 <https://vtnews.vt.edu/articles/2019/01/univrel-deliveryteam.html>
- 4 [www.bisnow.com/washington-dc/news/economic-development/a-look-at-virginia-techs-planned-1b-potomac-yard-campus-94963](http://www.bisnow.com/washington-dc/news/economic-development/a-look-at-virginia-techs-planned-1b-potomac-yard-campus-94963)
- 5 [https://autm.net/AUTM/media/About-AUTM/Documents/AUTM\\_2017\\_US-Licensing\\_Survey\\_PR.pdf](https://autm.net/AUTM/media/About-AUTM/Documents/AUTM_2017_US-Licensing_Survey_PR.pdf)
- 6 <https://hbr.org/2018/01/why-companies-and-universities-should-forge-long-term-collaborations>

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eBay account named Loukpeach, which was registered to her. On August 3, 2016, Smatsorabudh entered into a plea agreement with the United States, pleading guilty to committing wire fraud. On December 21, 2016, a federal judge sentenced Smatsorabudh to 30 months in a prison, followed by three years of supervised release and \$403,250.81 in restitution.<sup>9</sup>

In conclusion, a lawyer representing a creator, designer, or fashion marketer must remember that one of the most valuable things that the client owns are the visual elements that define its brand — and protecting those elements can take many forms. ☞

Endnotes:

- 1 [www.statista.com/topics/965/apparel-market-in-the-us/](http://www.statista.com/topics/965/apparel-market-in-the-us/)
- 2 [www.businessoffashion.com/articles/intelligence/top-industry-trends-2018-10-startup-thinking](http://www.businessoffashion.com/articles/intelligence/top-industry-trends-2018-10-startup-thinking)
- 3 696 F.3d 206 (2d Cir. N.Y. 2012)
- 4 *Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.*, 778 F. Supp. 2d 445, 451, 457 (S.D.N.Y. 2011)
- 5 137 S. Ct. 1002 (2017)
- 6 *Nike, Inc v Denis Dekovic, Marc Dolce, and Mark Miner* Circuit Court of the State of Oregon for the County of Multnomah, No. 14-cv-18876
- 7 *Lululemon Athletica Canada Inc. v. Calvin Klein Inc.*, 12-01034, U.S. District Court, District of Delaware (Wilmington)
- 8 *United States v. Smatsorabudh*, 1:16cr168 (GBL)
- 9 *Ibid.* (Doc. No. 34, sentencing order) (Dec. 21, 2016)



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the damages award. Additionally, the court determined that Intersil was not entitled to a jury trial on the issue of the amount of disgorgement damages, because disgorgement is an equitable remedy for the district judge – not the jury. The court remanded the case back to the Eastern District of Texas and ordered that the damages be recalculated by the trial court, “with findings of fact and conclusions of law duly entered in accordance with Rule 52.”

**Practice Pointers: Counsel need to be very specific as to which damage amounts relate to which specific trade secrets, and ensure that admissible and specific expert testimony is adduced on those issues as well. Moreover, disgorgement awards are for the trial judge, not the jury, which presumably only finds liability for misappropriation in disgorgement cases, and not damages as well.**

#### **Ex Parte Civil Seizures**

The provisions regarding ex parte civil seizure orders were some of the most widely anticipated aspects of the Act. Thus far, however, courts have generally limited relief under the act to the remedies that were already available under the Federal Rules of Civil Procedure (Rule 65 injunctions). In *OOO Brunswick Rail Mgmt. v. Sultanov*,<sup>38</sup> the court declined to issue a requested seizure order against a former employee/defendant to seize the company-issued laptop and mobile phone in his possession, despite finding that the plaintiff had satisfied the requirements for a temporary restraining order, including a likelihood of success on the merits and irreparable harm. The court noted the Act’s requirement that seizure orders may only be permitted if a Rule 65 injunction would be inadequate. The court determined that the seizure order was unnecessary because the court was ordering the former employee to deliver the devices to the court at the time of the show cause hearing for a preliminary injunction, without accessing or modifying the devices in the interim.

In *Magnesita Refractories Co. v. Mishra*,<sup>39</sup> the court held that a seizure order was not necessary because the existing ex parte temporary restraining order authorized the seizure of the defendant’s personal laptop computer, which was adequate. Under the act, inadequacy exists where the party bound by the order “would evade, avoid, or otherwise not comply” with the order. The court noted, “Obviously, in this case, Rule 65 did the trick.”<sup>40</sup>

One federal court did grant a request for the seizure remedy, but only after the defendant first violated a temporary restraining order and falsely stated that he had deleted the data at issue.<sup>41</sup>

**Practice Pointer: The federal courts are very hesitant to pull the trigger on the Act’s ex parte seizure order provisions, almost invariably concluding that a Rule 65 injunction is adequate. Counsel are best advised not to lose credibility by demanding such relief, unless they are able to satisfy the specific circumstances identified in the legislative history, i.e., where “a defendant is seeking to flee the country or planning to disclose the trade secret to a third party immediately or is otherwise not amenable to the enforcement of the court’s orders.”<sup>42</sup>**

#### **Whistleblower Protection**

*Unum Group v. Loftus*<sup>43</sup> was one of the first cases to address the whistleblower protections embodied in the DTSA. Unum brought an action against the defendant, a former Unum employee, for trade secret misappropriation under both the act and Massachusetts state law, asserting that the defendant improperly removed numerous company documents from Unum’s facility. The defendant moved to dismiss the suit, asserting that he was immune from liability pursuant to the act’s whistleblower protections because he gave the documents to his attorney to “report and investigate a violation of law.” The court rejected that argument, finding that the defendant had not presented sufficient facts to support the whistleblower affirmative

defense. The court stated that it was not ascertainable whether the defendant had turned over all of Unum’s documents to his attorney, which documents he took and what information they contained, or whether he used, is using, or plans to use, those documents for any purpose other than investigating a potential violation of law.

Conversely, and apparently for the first time, a whistleblower was granted protection under the immunity provisions of the act in *Christian v. Lannett Co., Inc.*<sup>44</sup> There, the plaintiff sued her former employer for gender and disability discrimination. The defendant filed a counterclaim that included a claim under the Act based on the plaintiff’s retention of the defendant’s trade secrets, and disclosure of some of those secrets to her attorney, through a company laptop. The plaintiff moved to dismiss the counterclaim, based on the whistleblower protections of the Act. The court dismissed the counterclaim, finding that plaintiff’s disclosure of the documents, which was made pursuant to a court order, was consistent with the act’s immunity provisions, which permit a whistleblower to disclose trade secrets “in confidence... to an attorney ... solely for the purpose of reporting or investigating a suspected violation of law.”<sup>45</sup>

**Practice Pointer: When asserting the Act’s immunity provisions regarding former employees, counsel should ensure that the court is provided specific information as to the materials at issue, and how they were directly related to “reporting or investigating a suspected violation of law.”**

#### **Be Ready for the Unexpected: Lessons learned from *Waymo LLC v. Uber Technologies Inc.***

No article regarding the Defense of Trade Secrets Act would be complete without at least some discussion of *Waymo LLC v. Uber Technologies Inc.*<sup>46</sup>, so here is the executive summary.

Waymo (a spin-off from Google) was in the business of developing self-driving technology. Anthony

Levandowski was involved in that development. He then resigned and started Ottomotto, his own self-driving startup. Uber bought Ottomotto in February 2016.

In the summer of 2016, Waymo discovered that Levandowski had downloaded approximately 14,000 files shortly before he left Waymo. In February 2017, Waymo filed suit against Uber and Ottomotto, including claims under the act. Waymo only filed suit against Uber and Ottomotto because Levandowski's contract included an arbitration clause. Waymo initially alleged that Levandowski had taken 121 of Waymo's trade secrets to Uber, but by the time of trial, the claim was down to only eight trade secrets.

After only four days of testimony, the case settled. The public portions of the trial provided little evidence that Uber had actually used any of the information taken from Waymo, and the court (Judge William Alsup of the Northern District of California) appeared to question the value of the trade secrets. Moreover, it appeared that Waymo risked losing its trade secret



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protection.

Before trial, Waymo had sought \$1.85 billion in damages. During settlement talks in 2017, Waymo sought at least \$1 billion. During the trial, Uber's board of directors rejected a settlement agreement for \$500 million. The parties finally settled for Waymo acquiring a .34 percent stake in Uber, valued at \$245 million (plus Uber's promise not to use the materials that Levandowski took from Waymo). Waymo is still pursuing private arbitration against Levandowski and is reportedly working with the U.S.



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attorney's office to investigate criminal charges against him.

**Practice Pointer: Trade secret litigation can be complex, lengthy, high stakes, and full of twists and turns, including what are actually protectable trade secrets — and what are not.** ☞

#### Endnotes:

- 1 See 18 U.S.C. 1836(b).
- 2 Va. Code Sections 59.1 – 336 et. seq.
- 3 18 U.S.C. § 1839(3)(A) (2018)
- 4 18 U.S.C. § 1839(3)(B) (2018)
- 5 18 U.S.C. § 1839(5) (2018)
- 6 18 U.S.C. § 1836(b)
- 7 18 U.S.C. § 1836(b)(3)(A)(i)
- 8 18 U.S.C. § 1836 (b)(3)(A)(iii)
- 9 18 U.S.C. § 1836(b)(3)(A)(i)
- 10 18 U.S.C. § 1836(b)(3)(B)
- 11 S. Rep. No. 114-220 (2016)
- 12 18 U.S.C. § 1836(A)
- 13 18 U.S.C. § 1836(B)
- 14 18 U.S.C. § 1836(D)
- 15 18 U.S.C. § 1836(F)
- 16 18 U.S.C. § 1833(b)
- 17 18 U.S.C. § 1833(b)(3)
- 18 *Id.*
- 19 18 U.S.C. § 1833(b)(3)(C)
- 20 [http://pages.lexmachina.com/Email\\_Trade\\_Secret-Report-2018\\_LP-Banner.html](http://pages.lexmachina.com/Email_Trade_Secret-Report-2018_LP-Banner.html)
- 21 See *Revolution FMO, LLC v. Mitchell*, No. 4:17CV2220 HEA, 2018 WL 2163651, at \*5 (E.D. Mo. May 10, 2018), inferring interstate commerce from allegations that the California plaintiff licensed materials to the Missouri Defendant. But see *Search Partners, Inc. v. MyAlerts, Inc.*, No. 17-1034 (DSD/TNL), 2017 WO 2838126 at \*1-2 (D. Minn. June 30, 2017), where district court found no relationship to interstate commerce because the information was not embodied in a product or service.
- 22 See *Gov't Employees Ins. Co. v. Nealey*, 262 F. Supp. 3d 153, 172 (E.D. Pa. 2017), dismissed

- for lack of interstate commerce because the "requirement is jurisdictional."
- 23 E.g., *Progressive Sols., Inc. v. Stanley*, No. 16-CV-04805-SK, 2018 WL 2585374, at \*2 (N.D. Cal. Apr. 24, 2018)
- 24 See *Yager v. Vignieri*, No. 16CV9367 (DLC), 2017 WL 4574487, at \*2 (S.D.N.Y. Oct. 12, 2017), where the court rejected the assertion of no jurisdiction and noted that "Congress specifically crafted the commerce language in the DTSa to reach broadly in protecting against the theft of trade secrets."
- 25 See, e.g., Cal. Civ. Proc. Code § 2019.210 (2018): "In any action alleging the misappropriation of a trade secret..., before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders that may be appropriate under Section 3426.5 of the Civil Code."
- 26 See *Physicians Surrogacy, Inc. v. German*, 17CV0718-MMA (WVG), 2017 WL 3622329, at \*9 (S.D. Cal. Aug. 23, 2017), using plausibility as the standard instead of particularity.
- 27 898 F.3d 1279 (11th Cir. 2018)
- 28 Case No. 18 C 124 (June 6, 2018) 2018 WL 2735089 (N.D. Ill. June 7, 2018)
- 29 *Exec. Consulting Grp., LLC v. Baggot*, No. 118-CV-00231CMAMJW, 2018 WL 1942762, at \*8 (D. Colo. Apr. 25, 2018)
- 30 *JJ Plank Co., LLC v. Bowman*, No. CV 18-0798, 2018 WL 3579475, at \*4 (W.D. La. July 25, 2018)
- 31 *T&S Brass & Bronze Works, Inc. v. Slanina*,

- No. CV 6:16-03687-MGL, 2017 WL 1734362, at \*13 (D.S.C. May 4, 2017)
- 32 *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1143 (10th Cir. 2017)
- 33 *Id.*
- 34 *JJ Plank Co., LLC v. Bowman*, No. CV 18-0798, 2018 WL 4291751, at \*9 (W.D. La. Sept. 7, 2018)
- 35 See *G.W. Henssler & Assocs., Ltd. v. Marietta Wealth Mgmt., LLC*, No. 1:17-CV-2188-TCB, 2017 WL 6996372, at \*6 (N.D. Ga. Oct. 23, 2017): loss of confidential and proprietary information is per se irreparable harm.
- 36 *Id.* at 6.
- 37 895 F.3d 1304 (Fed. Cir. 2018)
- 38 No. 5:17-cv-00017, 2017 WL 67119, \*2-3 (N.D. Cal., Jan. 6, 2017)
- 39 No. 2:16-CV-524-PPS JEM, 2017 WL 365619 (N.D. Ind. Jan. 25, 2017)
- 40 *Id.* at \*2.
- 41 See *Mission Capital Advisors, LLC v. Romaka*, No. 16-cv-5878 (S.D.N.Y. July 29, 2016)
- 42 S. Rep. No. 114-220 (2016).
- 43 220 F. Supp. 3d 143 (D. Mass 2016)
- 44 No. CV 16-963, 2018 WL 1532849 (E.D. Pa. Mar. 29, 2018)
- 45 See 18 U.S.C. §1833(b).
- 46 3:17-CV-00939 (N.D. Cal.)

initiated—all situations discussed above—counsel must discuss a delayed appeal with the client.<sup>29</sup> While counsel’s first thought may be to file the delayed appeal, the duty to communicate requires counsel to advise the client about the current status of the appeal and ensure that the client still intends to pursue the appeal. If after consulting with counsel the client elects to pursue a delayed appeal, counsel must follow the procedure set forth in Virginia Code § 19.2-321.1 for the Court of Appeals, or § 19.2-321.2 for the Supreme Court of Virginia, including filing an affidavit certifying that the attorney, not the client, is responsible for the error.

The duty to communicate also includes advising a client that he may have a right to file a petition for writ of *habeas corpus*, the time limit to file a petition, and how and where to file the petition. This should occur if counsel missed the delayed appeal deadline.

Endnotes:

- 1 See Virginia Code § 19.2-159 (explaining that after finding an accused to be indigent, the court “shall appoint competent counsel to represent the accused in the proceeding against him, including an appeal, if any, until relieved or replaced by other counsel”). See also Standards of Practice for Indigent Defense Counsel (SOP) 10.2.1 (D), (E) and Comment.
- 2 See *Garza v. Idaho*, 586 U.S. \_\_\_, slip op. at 4 n.4 (2019) (While the Supreme Court “has never recognized a ‘constitutional right to an appeal,’ it has ‘held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent.’”). See also *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as whether to . . . take an appeal.”). The right to appeal in Virginia is by statute. See Virginia Code §§ 19.2-317 (when writ of error lies in criminal case for accused), 17.1-410 (review by the Court of Appeals of Virginia), 17.1-411 (review by the Supreme Court).
- 3 See *Garza*, slip op. at 1,4,14 (holding that, where an attorney’s deficient performance costs a defendant an appeal that he would have otherwise pursued, the presumption of prejudice in an ineffective assistance of counsel analysis applies even where the defendant has pleaded guilty and signed an “appeal waiver”). See also *Miles v. Sheriff of Va. Beach City Jail*, 266 Va. 110, 581 S.E.2d 191 (2003) (holding that trial counsel’s failure to file an appeal after having been instructed to do so by a client who pled guilty to charges constitutes deficient performance).

**Conclusion**

Both the VSB and the Virginia Indigent Defense Commission (VIDC) offer resources to court-appointed counsel. Counsel should contact the VSB Ethics Hotline, (804) 775-0564, or by email at [www.vsb.org/site/regulation/ethics](http://www.vsb.org/site/regulation/ethics) with questions relating to their ethical duties when representing indigent defendants on appeal. The VIDC will hold their annual Introduction to Indigent Defense Appeals for *felony certified court appointed attorneys* in Richmond on July 19, 2019. This full day beginner training addresses ethical considerations in appellate practice as well as preservation of appellate issues in the trial court, appellate pleadings, and oral advocacy. Eligible counsel will receive an email with a registration link in late May. Additionally, court appointed counsel may contact Catherine French Zagurskie at (804) 662-7249 or [cfrench@adm.idc.virginia.gov](mailto:cfrench@adm.idc.virginia.gov) with questions related to appeals or to request sample appellate pleadings. ☺

*Catherine French Zagurskie is chief appellate counsel for the Virginia Indigent Defense Commission. Prior to her current position at the VIDC, she was a supervising public defender at the Richmond Public Defender’s Office. She earned a J.D., summa cum laude, and M.S. in Social Administration from Case Western Reserve University.*

*Renu M. Brennan is bar counsel for the Virginia State Bar. She has prosecuted numerous cases throughout the state before district committees, the Virginia State Bar Disciplinary Board, and three-judge panels. In private practice, Brennan handled professional malpractice and commercial litigation. She is licensed in Virginia, the District of Columbia, and California.*

\* With assistance from Deputy Bar Counsel Kathryn R. Montgomery; Senior Assistant Bar Counsel Edward J. Dillon and M. Brent Saunders; and Intake Counsel James C. Bodie.

- 4 RULE 1.1. Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- 5 RULE 1.4 Communication (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- 6 Slip op. at 4.
- 7 See *Peyton v. King*, 210 Va. 194, 196-197, 169 S.E.2d 569, 571 (1969). Although *Peyton* was decided before a statutory right to an appeal existed in Virginia, *In re Watford*, 295 Va. 114, 126, 809 S.E.2d 651, 658 (2018), while noting that a guilty plea is only one factor to consider in a writ of actual innocence analysis and is not dispositive, cites to *Peyton* for the recognition “that a guilty plea is a ‘self-supplied conviction’ that acts as a waiver of all defenses other than those jurisdictional.” See also *Brown v. Commonwealth*, 68 Va. App. 58, 69-70, 802 S.E.2d 197, 202-203 (2017).
- 8 See *Class*, 138 S. Ct. at 804-805. It is worth noting that the Supreme Court made clear that *Class*’s claims did not “fall within any of the categories of claims that [his] plea agreement forbids him to raise on direct appeal.” *Id.*
- 9 *Jones v. Commonwealth*, Rec. No. 0279-18-3, slip op. at 10 n.5 (Court of Appeals, January 29, 2019) (unpublished) refers to *Class* in a footnote when it explains that appellant’s appeal following a guilty plea does not assert that “the statute of conviction violates the Constitution.”
- 10 LEO 1880
- 11 *Garza*, slip op. at 8. *Garza* explicitly does

- not address “what constitutes a defendant’s breach of an appeal waiver or any responsibility counsel may have to discuss the potential consequences of such a breach.” *Id.*
- 12 RULE 2.1 Advisor In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.
- 13 See *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (citing *Rodriguez v. U.S.*, 395 U.S. 327 (1969) (“A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”)).
- 14 RULE 3.1 Meritorious Claims and Contentions A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
- 15 *Anders v. California*, 386 U.S. 738, 744 (1967). See also *Akbar v. Commonwealth*, 376 S.E.2d 545,546 (1989) and *Brown v. Warden of Virginia State Penitentiary*, 238 Va. 551, 554-555, 385 S.E.2d 587, 588-589 (1989).
- 16 *Anders*, 386 U.S. at 744.
- 17 *Anders*, 386 U.S. at 744 (emphasis added). Virginia follows the holding of *Anders*. From the trial court to the Court of Appeals:

Akbar, 376 S.E.2d at 546 and Rule 5A:12(h). From the Court of Appeals to the Supreme Court: *Brown*, 238 Va. at 555-556, 385 S.E. at 589-590 and Rule 5:17(h). See also LEO 1880.

18 See SOP 10.3.3 (“When counsel reasonably believes that no potentially meritorious issues exist in a case, he shall so advise the client, and shall inform the client of the costs associated with proceeding with the appeal. Counsel should advise the client that it may be in the client’s best interests to withdraw the appeal.” If the client desires to still appeal, counsel should “proceed to litigate the case to the best of his or her ability under the circumstances” or, alternatively, pursue an *Anders* appeal.)

19 See Rules 5:17(h) and 5A:12(h). See also LEO 1880 (finding that a court appointed attorney must petition for an appeal when requested by the client, even if the attorney believes such appeal to be frivolous, and counsel must follow Rules 5:17(h) and 5A:12(h) when he deems an appeal to be non-meritorious).

20 *Id.*

21 *Id.*

22 65 Va. App. 506, 779 S.E.2d 199 (2015).

23 Slip op. at 5.

24 See, e.g., *Ghameshlouy v. Commonwealth*, 279 Va. 379, 390, 689 S.E.2d 698, 703-704 (2010) (notice of appeal) and *Amin v. County of Henrico*, 286 Va. 231, 236, 749 S.E.2d 169, 171 (2013) (petition for appeal).

25 *Smith v. Commonwealth*, 56 Va. App. 351, 363, 693 S.E.2d 765, 771 (2010).

26 RULE 1.3 Diligence (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

27 In the Court of Appeals, see Rule 5A:3 and Virginia Code § 17.2-408. In the Supreme Court, see Rule 5:5.

28 In the Court of Appeals, see Rules 5A:6(a) (notice of appeal), 5A:8(a) (transcripts), and 5A:12(a) petition for appeal. In the Supreme Court of Virginia, see Rule 5:5 (a), (d). It is also worth noting that Virginia Code § 8.01-428(C) provides an additional narrow exception to the notice of appeal deadline governed by Rule 5A:6(a) when an appellant is “not notified by any means of the entry of a final order,” and the trial court finds that the lack of notice does not result from appellant’s “failure to exercise due diligence.” *Reston Hospital Center, LLC v. Remley*, 63 Va. App. 755, 763 S.E.2d 238 (2014). The exception must be applied within 60 days of the entry of the final order and vests the discretion to grant the party leave to appeal in the trial court.

29 There are other available grounds for a delayed appeal not discussed in this article. See Code §§ 19.2-321.1-2. Note that Code § 19.2-321.1 recognizes that the default may be “in whole or in part” of the appeal.

## Research continued from page 50

### Endnotes:

- 1 Cailin Crowe, Amazon’s New Headquarters Is Coming to Northern Virginia. Here’s How Local Colleges Helped Make That Happen, *Chron. of Higher Educ.*, <https://www.chronicle.com/article/Amazon-s-New-Headquarters-Is/245083> (Nov. 13, 2018).
- 2 Jon Banister, Apple Leases New D.C. Office Space Across from New Carnegie Library Flagship, *Bisnow*, <https://www.bisnow.com/washington-dc/news/office/apple-leases-office-space-across-from-new-carnegie-library-flagship-93376> (Sept. 28, 2018).
- 3 Virginia Tech, Virginia Tech Innovation Campus in Alexandria Helps Attract Amazon to Washington D.C. Region; News Conference at 3:30 p.m. Today, <https://vt.edu/innovationcampus/for-the-media/release.html>
- 4 Based on the author’s comparison of state-specific practice-area information available on Martindale for the 12 most populous states. See Martindale, Find Intellectual Property Attorneys, <https://www.martindale.com/areas-of-law/intellectual-property-lawyers/> (last visited Feb. 8, 2019); World Population Review, US States – Ranked by Population 2019, <http://www.worldpopulationreview.com/states> (last visited Feb. 8, 2019).
- 5 See generally Virginia State Bar, Intellectual Property Law, <http://www.vsb.org/site/sections/intellectualproperty> (last visited Feb. 20, 2019).
- 6 Richmond Journal of Law and Tech., About JOLT, <https://jolt.richmond.edu/about-2/> (last visited Feb. 8, 2019).
- 7 See generally Va. Journal of Law and Tech., <http://vjolt.org/> (last visited Feb. 20, 2019).
- 8 Robert Humphreys, How the Changes in Technology Are Shaping the Law and the Legal Profession in America, 30 Regent U.L. Rev. 371 (2018); see also Regent University Law Review, Fall 2017 Symposium, <https://www.regentuniversitylawreview.com/fall-2017-symposium/> (last visited Feb. 8, 2019).
- 9 Wilcox Savage, Tech Law Letter, <https://www.willcox savage.com/news-publications/publications/category/tech-law-letter> (last visited Feb. 8, 2019).
- 10 Pender & Coward, Publications and Legal Resources, <https://www.pendercoward.com/resources/publications-legal-resources/> (last visited Feb. 8, 2019).

## Technology continued from page 52

### Endnotes:

- 1 *Lee v. Commonwealth*, 28 Va. App. 571 (1998). Fraud investigator for company was “qualified” witness because he had access to the records and had knowledge of how the records were compiled and maintained.
- 2 *Law Enforcement and Third-Party Matters*, <https://www.facebook.com/help/473784375984502>.

## FASTCASE WEBINARS

Fastcase is free to all VSB members, a \$995 annual value. Fastcase provides tools to make legal research easier and more intuitive. Lawyers across the country use Fastcase to provide them with an award-winning legal research platform. Learn how to use

Fastcase optimally here:

[www.fastcase.com/webinars/](http://www.fastcase.com/webinars/)

### Introduction to Boolean

Thursday, May 16, 2019

1:00 PM – 2:00 PM ET

Thursday, June 20, 2019

1:00 PM – 2:00 PM ET

Thursday, June 20, 2019

1:00 PM – 2:00 PM ET

### Ethics and Legal Research

Thursday, April 25, 2019

1:00 PM – 2:00 PM ET

Thursday, May 23, 2019

1:00 PM – 2:00 PM ET

### Ethics and Legal Research

Thursday, June 27, 2019

1:00 PM – 2:00 PM ET

Thursday, June 27, 2019

1:00 PM – 2:00 PM ET

### Introduction to Legal Research on Fastcase

Thursday, May 2, 2019

1:00 PM – 2:00 PM ET

Thursday, June 6, 2019

1:00 PM – 2:00 PM ET

### Data Analytics: Fastcase and Docket Alarm

Thursday, May 9, 2019

1:00 PM – 2:00 PM ET

Thursday, June 13, 2019

1:00 PM – 2:00 PM ET

**Dates and registration information for Virginia Criminal Sentencing Commission CLEs may be found at [www.vcsc.virginia.gov/training.html](http://www.vcsc.virginia.gov/training.html)**

**Introduction to Sentencing Guidelines .**  
(6 Hours — Approved for 6 CLE & VIDC Re-certification) The introduction seminar is designed for the attorney or criminal justice professional who is new to Virginia's Sentencing Guidelines.

**Advanced Sentencing Guidelines & Ethics**  
(5 Hours — Approved 5 CLE, 1 Ethics & VIDC Re-certification) The evaluation course is designed for the experienced user of Virginia's Sentencing Guidelines.

## **Understanding Rap Sheets, Automation and SWIFT!**

(3 Hours — Approved for 3 CLE & VIDC Re-certification) The understanding rap sheets and automation seminar is designed for the attorney or criminal justice professional who prepares or uses Virginia's Sentencing Guidelines.

*Virginia Lawyer publishes at no charge notices of continuing legal education programs sponsored by nonprofit bar associations and government agencies. The next issue will cover July 5 through August 22. Send information by June 7 to [norman@vsb.org](mailto:norman@vsb.org). For other CLE opportunities, see Virginia CLE calendar and "Current Virginia Approved Courses" at [www.vsb.org/site/members/mcle-courses/](http://www.vsb.org/site/members/mcle-courses/) or the websites of commercial providers.*

## **Virginia State Bar Harry L. Carrico Professionalism Course**

May 2, 2019, Norfolk

July 16, 2019, Roanoke

See the most current dates and registration information at [www.vsb.org/site/members/new](http://www.vsb.org/site/members/new).

## **Virginia CLE Calendar**

Virginia CLE will sponsor the following continuing legal education courses. For details, see [www.vacle.org/seminars.htm](http://www.vacle.org/seminars.htm).

April 23  
**The Articulate Attorney®: Public Speaking for Lawyers**  
Live — Fairfax  
9 AM–12:15 PM

April 24  
**The Articulate Attorney®: Public Speaking for Lawyers**  
Live — Richmond  
9 AM–12:15 PM

**Special Education Law in Virginia: An Overview**  
Live — Charlottesville/Webcast/Telephone  
10 AM–1:15 PM

April 25  
**CLE and Kris Kristofferson for Charity: An Advocate's Secret Weapon**  
Live — Alexandria  
SEMINAR: 4–5 PM; DINNER: 5:15 PM; CON-CERT: 7:30 PM

April 29  
**49th Annual Criminal Law Seminar 2019**  
Video — Fredericksburg  
8:15 AM–4:45 PM

**Vicarious Trauma and Wellness—Know the Warning Signs Before It Is Too Late**  
Webcast/Telephone  
NOON–2 PM

April 30  
**49th Annual Criminal Law Seminar 2019**  
Video — Abingdon, Norfolk, Richmond, Roanoke, Tysons  
8:15 AM–4:45 PM (RICHMOND VIDEO BEGINS AT 9 AM)

**Controlling the Deposition**  
Webcast/Telephone  
NOON–2 PM

May 1  
**"The Designated Hitter"—Deposing a Corporation's Designated Witness Under Federal Rule 30(b)(6) or Virginia Rule 4:5(b)(6)**  
Live — Charlottesville/Webcast/Telephone  
NOON–2 PM

**Essentials of Child Support, Custody, and Visitation**  
Live — Charlottesville/Webcast/Telephone  
3–5 PM

May 2  
**Ethics Update for Virginia Lawyers 2019**  
Live — Charlottesville/Webcast/Telephone  
NOON–2 PM

May 3  
**Gang Law and Trends in Virginia**  
Webcast/Telephone  
NOON–2 PM

May 3–5  
**The Conner-Zaritsky 40th Annual Advanced Estate Planning and Administration Seminar**  
Live — Williamsburg  
FRIDAY: 12:55–5:35 PM; SATURDAY: 8:30 AM–1 PM; SUNDAY: 8:30 AM–12:35 PM

May 7  
**28th Annual Employment Law Update Seminar 2019**  
Live — Richmond  
8 AM–4:45 PM

May 8  
**37th Annual Real Estate Practice Seminar 2019**  
Live — Roanoke  
9 AM–4:10 PM

May 9  
**28th Annual Employment Law Update Seminar 2019**  
Live — Fairfax  
8 AM–4:45 PM

**Criminal Speedy Trial Litigation in Virginia—Keeping Your Case "Up to Speed"**  
Live — Charlottesville/Webcast/Telephone  
NOON–2 PM

May 10  
**Special Education Law in Virginia: An Overview**  
Webcast/Telephone  
1–4:15 PM

May 14  
**23 Mistakes Experienced Drafters USUALLY Make**  
Live — Fairfax  
8:30 AM–4 PM

**Disaster Recovery: Ethics and Practical Steps**  
Webcast/Telephone  
NOON–2 PM

May 15  
**23 Mistakes Experienced Drafters USUALLY Make**  
Live — Richmond  
8:30 AM–4 PM

**Consumer Law Basics: The Lemon Law and Breach of Warranty**  
Live — Charlottesville/Webcast/Telephone  
NOON–2 PM

May 16  
**Essentials of Child Support, Custody, and Visitation**  
Webcast/Telephone  
11 AM–1 PM

**CLE at Topgolf Loudoun for Charity: The New World of Spousal Support**  
Live — Ashburn  
SEMINAR: NOON–1 PM; LUNCH: 1–1:30 PM;  
GOLF: 1:30–3 PM

May 17  
**Annual Military Law Symposium 2019: Serving Those Who Serve**  
Live — Quantico  
8:30 AM–4 PM

**4th Annual Legal Writing Workshop**  
Live — Quantico  
8:30 AM–5:15 PM

May 21  
**37th Annual Real Estate Practice Seminar 2019**  
Live — Fairfax  
9 AM–4:10 PM

May 22  
**35th Annual Advanced Family Law Seminar 2019**  
Video — Abingdon, Alexandria, Charlottesville, Dulles, Fredericksburg, Norfolk, Richmond, Roanoke  
9 AM–4:45 PM

**Ethics Update for Virginia Lawyers 2019**  
Webcast/Telephone  
NOON–2 PM

May 23  
**37th Annual Real Estate Practice Seminar 2019**  
Live — Williamsburg  
9 AM–4:10 PM

**35th Annual Advanced Family Law Seminar 2019**  
Video — Harrisonburg, Tysons, Warrenton, Winchester  
9 AM–4:45 PM

May 28  
**Consumer Law Basics: The Lemon Law and Breach of Warranty**  
Webcast/Telephone  
NOON–2 PM

May 29  
**“The Designated Hitter”—Deposing a Corporation’s Designated Witness Under Federal Rule 30(b)(6) or Virginia Rule 4:5(b)(6)**  
Webcast/Telephone  
NOON–2 PM

May 30  
**Criminal Speedy Trial Litigation in Virginia—Keeping Your Case “Up to Speed”**  
Webcast/Telephone  
NOON–2 PM

June 5  
**Essentials of Federal Criminal Sentencing**  
Live — Charlottesville/Webcast/Telephone  
NOON–2 PM

June 6–7  
**71st Annual VIRGINIA Conference on Federal Taxation 2019**  
Live — Charlottesville  
THURSDAY: 8:50–5:15 PM; FRIDAY: 8:45 AM–4:30 PM

June 11  
**Obtaining and Using Medical Records: The Key to Success in Your Personal Injury Suit**  
Live — Charlottesville/Webcast/Telephone  
NOON–2 PM

June 12  
**Representation of Children as a Guardian ad Litem — 2018 Qualifying Course**  
Video — Abingdon, Alexandria, Charlottesville, Norfolk, Richmond, Roanoke  
8:30 AM–5:15 PM (RICHMOND VIDEO BEGINS AT 9 AM)

June 13  
**Representation of Children as a Guardian ad Litem — 2018 Qualifying Course**  
Video — Tysons  
8:30 AM–5:15 PM

**45th Annual Recent Developments in the Law 2019: News from the Courts and General Assembly**  
Live — Virginia Beach  
8:45 AM–4:10 PM

June 18  
**28th Annual Employment Law Update Seminar 2019**  
Video — Abingdon, Alexandria, Norfolk, Richmond, Roanoke  
8 AM–4:45 PM (RICHMOND VIDEO BEGINS AT 9 AM)

**What Every Real Estate Attorney Needs to Know About PACE**  
Live — Charlottesville/Webcast/Telephone  
NOON–2 PM

**CLE and Washington Nationals for Charity**  
Live — Washington, DC  
SEMINAR: 6–7 PM; GAME: 7:05 PM

June 19  
**28th Annual Employment Law Update Seminar 2019**  
Video — Charlottesville, Tysons  
8 AM–4:45 PM

June 20  
**Obtaining and Using Medical Records: The Key to Success in Your Personal Injury Suit**  
Webcast/Telephone  
NOON–2 PM

June 25  
**37th Annual Real Estate Practice Seminar 2019**  
Video — Tysons  
9 AM–4:10 PM

**Representation of Incapacitated Persons as a Guardian ad Litem — 2018 Qualifying Course**  
Video — Abingdon, Alexandria, Charlottesville, Norfolk, Richmond, Roanoke  
9 AM–4:05 PM

June 26  
**37th Annual Real Estate Practice Seminar 2019**  
Video — Ashburn, Charlottesville  
9 AM–4:10 PM

**Representation of Incapacitated Persons as a Guardian ad Litem — 2018 Qualifying Course**  
Video — Tysons  
9 AM–4:05 PM

June 27  
**37th Annual Real Estate Practice Seminar 2019**  
Video — Abingdon, Alexandria, Fredericksburg, Harrisonburg, Norfolk, Richmond, Roanoke  
9 AM–4:10 PM

**Essentials of Probate**  
Live — Charlottesville/Webcast/Telephone  
TBD

**Zoning and Land Use**  
Live — Charlottesville/Webcast/Telephone  
TBD

July 2  
**Controlling the Deposition**  
Webcast/Telephone  
NOON–2 PM

## DISCIPLINARY SUMMARIES

The following are summaries of disciplinary actions for violations of the Virginia Rules of Professional Conduct (RPC) (Rules of the Virginia Supreme Court Part 6, ¶ II, eff. Jan. 1, 2000) or another of the Supreme Court Rules.

Copies of disciplinary orders are available at the link provided with each summary or by contacting the Virginia State Bar Clerk's Office at (804) 775-0539 or [clerk@vsb.org](mailto:clerk@vsb.org). VSB docket numbers are provided.

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## CIRCUIT COURT

### Robert Richard Kaplan Jr.

Richmond, VA

17-033-107835

Circuit Court Case No. CL2018-4882-8

Effective December 11, 2018, the Circuit Court of the City of Richmond affirmed the decision of the Third Disciplinary District Committee, section III, to issue a public admonition to Robert Richard Kaplan Jr. for violating professional rules that govern fees. RPC 1.5 (a)

[www.vsb.org/docs/Kaplan-021919.pdf](http://www.vsb.org/docs/Kaplan-021919.pdf)

## DISCIPLINARY BOARD

### Michael Leon Avery

Fairfax, VA

19-000-113963

On February 15, 2019, the Virginia State Bar Disciplinary Board suspended Michael Leon Avery's license to practice law in the Commonwealth of Virginia for sixty days, with thirty days stayed pursuant to conduct during one year of probation. The suspension and probation periods began on January 25, 2019. This was an imposition of reciprocal discipline, based on disciplinary action by the District of Columbia Court of Appeals. Rules of Court, Part 6, Section IV, Paragraph 13-24

[www.vsb.org/docs/Avery-022619.pdf](http://www.vsb.org/docs/Avery-022619.pdf)

### Sammy Edward Ayer

Yorktown, VA

17-010-108850, 17-010-108870, 17-010-109322, 18-010-110422

Effective February 15, 2019, the Virginia State Bar Disciplinary Board revoked Sammy Edward Ayer's license to practice law in the Commonwealth of Virginia based on violations of the rules of professional conduct governing competence, diligence, communication, safekeeping property, bar admission and disciplinary matters, and misconduct. RPC 1.1; 1.3 (a); 1.4 (a); 1.15 (a)(1-2); 8.1 (a); 8.4 (c)

[www.vsb.org/docs/Ayer-022119.pdf](http://www.vsb.org/docs/Ayer-022119.pdf)

### Rhetta Moore Daniel

Richmond, VA

18-032-110445, 18-032-111046, 18-032-111733

Effective February 22, 2019, the Virginia State Bar Disciplinary Board revoked Rhetta Moore Daniel's license to practice law in the Commonwealth of Virginia based on violations of the rules of professional conduct governing competence, meritorious claims and contentions, candor toward the tribunal, fairness to opposing party and counsel, impartiality and decorum of the tribunal,

judicial officials, and misconduct. RPC 1.1; 3.1; 3.3 (a)(1); 3.4 (g), (j); 3.5 (f); 8.2; 8.4 (b), (c)

[www.vsb.org/docs/Daniel-022619.pdf](http://www.vsb.org/docs/Daniel-022619.pdf)

### Sean Hanover

Fairfax, VA

19-000-114282, 19-000-113945

Effective February 12, 2019, the Virginia State Bar Disciplinary Board revoked Sean Hanover's license to practice law based on his affidavit consenting to the revocation. By tendering his consent to revocation at a time when allegations of misconduct are pending, Hanover acknowledges that the material facts upon which the allegations of misconduct pending are true. Rules of Court, Part 6, Section IV, Paragraph 13-28

[www.vsb.org/docs/Hanover-021319.pdf](http://www.vsb.org/docs/Hanover-021319.pdf)

### Timothy George Hayes

Tazewell, VA

18-000-107910

Effective February 11, 2019, the Virginia State Bar Disciplinary Board revoked Timothy George Hayes's license to practice law based on his affidavit consenting to the revocation. By tendering his consent to revocation at a time when allegations of misconduct are pending, Hayes acknowledges that the material facts upon which the allegations of misconduct pending are true. Rules of Court, Part 6, Section IV, Paragraph 13-28

[www.vsb.org/docs/Hayes-021119.pdf](http://www.vsb.org/docs/Hayes-021119.pdf)

### Brian Austin Revercomb

King George, VA

18-060-111408

Effective January 25, 2019, the Virginia State Bar Disciplinary Board suspended Brian Austin Revercomb's license to practice law in the Commonwealth of Virginia for 6 months with terms for violating professional rules that govern competence, diligence, communication, declining or terminating representation, and bar admission and disciplinary matters. RPC 1.1; 1.3 (a), (b); 1.4 (a), (b); 1.16 (d); 8.1 (c), (d)

[www.vsb.org/docs/Revercomb-021519.pdf](http://www.vsb.org/docs/Revercomb-021519.pdf)

### Cherie Anne Washburn

Lynchburg, VA

19-090-113267

Effective March 19, 2019, the Virginia State Bar Disciplinary Board revoked Cherie Anne Washburn's license to practice law based on her affidavit consenting to the revocation. By tendering her consent to revocation at a time when allegations of misconduct are pending, Washburn acknowledges that the material facts upon which the allegations of misconduct are pending are true. Rules of Court, Part 6, Section IV, Paragraph 13-28

[www.vsb.org/docs/Washburn-031919.pdf](http://www.vsb.org/docs/Washburn-031919.pdf)

## DISTRICT COMMITTEES

### Jason Alexander Atkins

Gloucester, VA

18-060-112575

On March 25, 2019, a Virginia State Bar Sixth District Subcommittee issued a public reprimand without terms to Jason Alexander Atkins for violating professional rules that govern competence, diligence, and communication. This was an agreed disposition of misconduct charges. RPC 1.1; 1.3 (a) (b); 1.4 (a) (b)

[www.vsb.org/docs/Atkins-032619.pdf](http://www.vsb.org/docs/Atkins-032619.pdf)

**DISTRICT COMMITTEES****Ashton Harris Pully Jr.**

Virginia Beach, VA  
18-022-112880

Effective February 5, 2019, a Virginia State Bar Second District Subcommittee issued a public reprimand with terms to Ashton Harris Pully Jr. for violating professional rules that govern safe-keeping property. This was an agreed disposition of misconduct charges. RPC 1.15 (a)(3), (c), (d)(3-4)  
[www.vsb.org/docs/Pully-020619.pdf](http://www.vsb.org/docs/Pully-020619.pdf)

**Anthony George Spencer**

Ladysmith, VA  
16-060-103733

On March 12, 2019, a Virginia State Bar Sixth District Subcommittee issued a public reprimand without terms to Anthony George Spencer for violating professional rules that govern fairness to opposing party and counsel. This was an agreed disposition of misconduct charges. RPC 3.4 (g)  
[www.vsb.org/docs/Spencer-031319.pdf](http://www.vsb.org/docs/Spencer-031319.pdf)

**DISCIPLINARY PROCEEDINGS****Suspension – Failure to Pay Disciplinary Costs**

John Patrick Bond	Fairfax, VA	Effective Date	Lifted
James Daniel Griffith	Reston, VA	March 27, 2019	
		March 6, 2019	

**Suspension – Failure to Comply with Subpoena**

Andrew Ira Becker	Virginia Beach, VA	March 6, 2019	
John James Good, Jr.	Stafford, VA	March 13, 2019	
Edward Emad Moawad	McLean, VA	March 22, 2019	
Kathryn Suzanne Pennington	Virginia Beach, VA	February 26, 2019	

**NOTICES TO MEMBERS****SUPREME COURT OF VIRGINIA SEEKS COMMENT ON PROPOSED CHANGE TO RULE 3.8**

The Supreme Court of Virginia requests public comment by May 21, 2019 on a proposal to modify Rule 3.8 (“Additional Responsibilities of a Prosecutor”) of the Rules of Professional Conduct by adding a Comment 5. [www.vsb.org/site/news/item/SCOVA\\_RPC\\_comment](http://www.vsb.org/site/news/item/SCOVA_RPC_comment)

**SUPREME COURT OF VIRGINIA AMENDS RULES ON FILE FORMATS FOR DOCUMENTS**

On February 15, 2019, the Supreme Court of Virginia amended the Rules by adding Rule 1:26 that states all materials made part of any court record are public records unless sealed by court order, or otherwise provided by law, and thus must be submitted either unencrypted or with software that makes them capable of unencryption. The new rule takes effect on May 1, 2019.  
[www.vsb.org/site/news/item/SCOVA\\_file\\_formats](http://www.vsb.org/site/news/item/SCOVA_file_formats)

**MCLE BOARD SEEKS COMMENTS ON AMENDMENTS TO MCLE REGULATIONS**

The Virginia State Bar Mandatory Continuing Legal Education (MCLE) Board seeks comments on proposed amendments to the MCLE regulations that will permit teaching and attendance credits for MCLE courses that pertain to professional health initiative courses, as well as amendments to clarify the language regarding “lawyer well-being.” Written comments must include the name and address of the commenter. To be considered, comments must be received by May 1, 2019.  
[www.vsb.org/site/news/item/mcle\\_board\\_seeks\\_comments](http://www.vsb.org/site/news/item/mcle_board_seeks_comments)

**THE BAR’S SPECIAL COMMITTEE ON THE FUTURE OF LAW PRACTICE RELEASES FINAL REPORT**

The Special Committee on the Future of Law Practice released its final 2019 report. In the report, the committee presents a range and depth of information on external, technological energies changing the practice of law. The report concludes by offering a series of ten recommendations to the bar, its committees and boards, law schools, and all Virginia lawyers.  
[www.vsb.org/site/news/item/scfpl\\_releases\\_report](http://www.vsb.org/site/news/item/scfpl_releases_report)

**VSB DISCIPLINARY BOARD TO HEAR ANN BRIDGEFORTH TRIBBEY’S REINSTATEMENT PETITION ON JUNE 28, 2019**

The Virginia State Bar Disciplinary Board hearing on Ann Bridgforth Tribbey’s reinstatement was continued until June 28, 2019, at 9:00 a.m. at the State Corporation Commission, Courtroom A, 1300 E. Main Street, Richmond, VA 23219. [www.vsb.org/site/news/item/vsb\\_tribbey\\_reinstatement](http://www.vsb.org/site/news/item/vsb_tribbey_reinstatement)

**PETER W. BUCHBAUER RECEIVES FAMILY LAW SECTION’S 2019 LIFETIME ACHIEVEMENT AWARD**

The Virginia State Bar Family Law Section has awarded its highest honor, the Betty A. Thompson Lifetime Achievement Award, to Peter W. Buchbauer of Buchbauer & McGuire, P.C. in Winchester.  
[www.vsb.org/site/news/item/peter\\_w\\_buchbauer](http://www.vsb.org/site/news/item/peter_w_buchbauer)

**ANNUAL MEETING**

Online registration is now open for the 81st Annual Meeting, June 12–15, 2019, in Virginia Beach. [www.vsb.org/annualmeeting](http://www.vsb.org/annualmeeting)

**INDIGENT CRIMINAL DEFENSE SEMINAR**

Register now for a seat at one of the webcast locations for the Leroy Rountree Hassell Sr. Indigent Criminal Defense Seminar on May 3. [www.vsb.org/special-events/indigent-defense](http://www.vsb.org/special-events/indigent-defense)

## CLIENTS' PROTECTION FUND BOARD PAYS \$51,123 TO PETITIONERS

At its most recent meeting on January 11, 2019, in Charlottesville, the Virginia State Bar Clients' Protection Fund Board approved payments totaling \$51,123.

The board approved new claims in the amount of \$47,173 regarding five Virginia lawyers. In the largest award of the meeting, one petitioner, a former client of Michael Anthony Lormand of Glen Allen, was awarded \$17,500 as reimbursement for funds that the attorney collected for her spousal arrearages but failed to remit to her. The bar revoked Lormand's license to practice in June of 2018 for misconduct related to the petitioner's case.

Another petitioner recovered \$16,875 for fees paid to Christopher DeCoy Parrott of Manassas. Parrott's license was initially suspended in November of 2016, and, failing to comply with the terms of the suspension, his license was revoked in October of 2017. Parrott, facing discipline, signed an agreement in 2017 to pay the petitioner back, but that never occurred.

The board approved a \$2,000 payment to a petitioner's estate to reimburse for work in a divorce case in which Shelly Renee Collette did not do significant work. The petitioner died after he filed the petition, but before the Board considered the claim. Collette's license was revoked in March of 2018.

A former client of Charles Gregory Phillips of Salem was awarded \$2,914 – reimbursement for a fee given to Phillips for work on a divorce proceeding that wasn't carried out. Phillips attempted to present investigators with an itemized bill that showed work occurring before the petitioner retained him and after the petitioner terminated the representation. The bill was deemed fraudulent, and the petitioner's complaint to the bar was one of the cases that led to Phillips' ten-month suspension last year.

A petitioner, the mother of a decedent in a wrongful death action, received \$7,884 as reimbursement for funds that the attorney, Michael Alan Bishop, received before his death but failed to pay to the wrongful death beneficiaries. The attorney did not maintain the funds for disbursement to the beneficiaries.

At the meeting, the board also affirmed its prior decisions in September 2018 to approve three claims from former clients

of Phillips and Brent Lavelle Barbour, totaling \$3,950. In Phillips' case, the petitioner appealed the awarded amount of \$1,250, asking for the full requested amount of \$2,500. The board decided, however, that some work had been performed in her divorce and custody case, and they affirmed their award of \$1,250.

Barbour, whose license was revoked in February 2018, requested reconsideration of two awards given to his former clients in September. The board affirmed an award of \$1,200 as reimbursement for unearned fees in one criminal case. And, in another, the board increased its award from \$750 to the full amount requested by the petitioner, \$1,500. In both cases, Barbour had not done any significant work for the clients.

At the January meeting, the board also read a letter of gratitude from Jason Blye, a claimant awarded \$4,360 in September. "After the outcome of my case, I had become so discouraged and felt that all hope was lost," he wrote. "I had never felt so cheated in my life . . . It is because of you and your board that I will have the financial ability to get back into court and get the outcome that we deserve. This program is a true blessing and I hope that you and your board realize that your efforts are greatly appreciated."

The Clients' Protection Fund was created by the Supreme Court of Virginia in 1976 to reimburse persons who suffer a quantifiable financial loss because of dishonest conduct by a Virginia lawyer whose law license has been suspended or revoked for disciplinary reasons, or who has died and did not properly maintain client funds. The fund is supported by Virginia lawyers who pay an annual fee of up to \$25. The Supreme Court of Virginia has set the current annual fee at \$10 per Virginia lawyer with an active license status.

Payments from the Clients' Protection Fund are discretionary and are not a matter of right. If you have any questions, you may contact Vivian R. Byrd, administrator to Clients' Protection Fund at [cpf@vsb.org](mailto:cpf@vsb.org) or (804) 775-0572. While the VSB does not name petitioners in news summaries, recipients of Clients' Protection Fund disbursement are a matter of public record. Contact the CPF administrator for more information.

A full chart of the amounts paid as a result of January's meeting follows.

### New Petitions

Docket Number	Lawyer's Name	City of Record	Amount Paid	Type of Case
18-555-003162	Christopher DeCoy Parrott	Manassas, VA	\$16,875	Unearned fees/Civil Law - State
18-555-003168	Shelly Renee Collette	Winchester, VA	\$2,000	Unearned fees/Family Law
18-555-003174	Michael Anthony Lormand	Glen Allen, VA	\$17,500	Unearned fees/Family Law
19-555-003181	Charles Gregory Phillips	Salem, VA	\$2,914	Unearned fees/Family Law
19-555-003193	Michael Alan Bishop <i>deceased</i>	Meadowview, VA	\$7,884	Unearned fees/Personal Injury/ Property Damage

### Reconsidered Petitions

18-555-003176	Brent Lavelle Barbour	Lynchburg, VA	\$1,500	Unearned fees/Criminal Law
19-555-003180	Brent Lavelle Barbour	Lynchburg, VA	\$1,200	Unearned fees/Criminal Law
18-555-003167	Charles Gregory Phillips	Salem, VA	\$1,250	Unearned fees/Family Law



Join us for the 2019 Annual Meeting as **Marni E. Byrum of Alexandria** is sworn in as the 81st president of the Virginia State Bar.

The Annual Meeting offers an opportunity to stay abreast of current legal and professional issues, spend leisure time with your family, and socialize with your colleagues, all in the relaxed and informal setting of Virginia Beach.

Complete Annual Meeting information, including online registration, forms, and hotel information and links, is available on the Virginia State Bar website. If you have not received a brochure and/or need more specific information, please contact the Virginia State Bar, Bar Services Department at (804) 775-0514 or [annualmeeting@vsb.org](mailto:annualmeeting@vsb.org). All information on the following pages is tentative and subject to change. Please refer to [www.vsb.org/annualmeeting](http://www.vsb.org/annualmeeting) for updates.

## Schedule of Events

### WEDNESDAY, JUNE 12

#### NOON

Executive Committee Holiday Inn North Beach

4:00 P.M. Lawyers Helping Lawyers Board of Directors Meeting Holiday Inn North Beach

### THURSDAY, JUNE 13

#### 8:45 A.M. – 4:30 P.M.

45th Recent Developments Seminar Sheraton Oceanfront  
*(separate registration with VaCLE)*

9:00 A.M. Council Meeting Holiday Inn North Beach

12:00 P.M. VADA Board Meeting The Cavalier

4:30 P.M. Diversity Conference Welcome Reception Sheraton Oceanfront  
*Open to all attendees*

5:00 P.M. Friends of Bill W. Meeting Holiday Inn North Beach

6:30 P.M. Opening Reception for All Attendees Sheraton Oceanfront  
*Sponsor: VSB Members Insurance Center*

### FRIDAY, JUNE 14

7:00 A.M. Yoga by the Sea Beachfront Sheraton

7:30 A.M. Run in the Sun – 5K Run Boardwalk  
*Sponsor: YLC; Virginia Lawyers Weekly*

7:30 A.M. Conference of Local and Specialty Bar Associations Sheraton Oceanfront  
*Annual Meeting & Awards Breakfast*

8:30 A.M. VADA Board Meeting The Cavalier

#### 8:30 A.M. – 10:00 A.M. CLEs

Finding Civility in Discovery Hilton Oceanfront

Why Go to Europe When Europe Comes to You? U.S. Data Protection in a GDPR World Sheraton Oceanfront

The Future of Law Practice: Confronting The Shifting Landscape Sheraton Oceanfront

9:00 A.M. Virginia Law Foundation Meeting Princess Anne Country Club

#### 10:10 A.M. – 11:40 A.M. CLEs

Immigration: Contradictory or Complementary to the Rule of Law? Hilton Oceanfront

Preaching What We Practice: Taking Your Experience Back to the Classroom Sheraton Oceanfront

Proactive Wellness: How to Identify, Understand, and Mitigate Lawyers' Occupational Risks Sheraton Oceanfront

11:45 A.M. Dunnaville Diversity Achievement Award Hilton Oceanfront

11:45 A.M. Section & Conference Joint Lunch (ticketed event) Hilton Oceanfront

11:45 A.M. Virginia Legal Aid & Oliver Hill Pro Bono Awards Luncheon Sheraton Oceanfront  
*Sponsor: Virginia Law Foundation*

11:45 A.M. YLC Members & Fellows Lunch & Annual Meeting (ticketed event) Sheraton Oceanfront

#### 1:30 P.M. – 3:00 P.M. CLEs

So the Officer was Wearing a Body Worn Camera. Now What? Hilton Oceanfront

Caveat Emptor: What You Need to Know About International M&A in the Trump Era Sheraton Oceanfront

True Collegiality: A Study of How Young Family Lawyers Can Reverse the Trend of Hostility and Return to the True Calling of Service Sheraton Oceanfront

3:00 P.M. – 4:00 P.M. Family Bingo Sheraton Oceanfront  
*Sponsor: Walker Jones, PC*

#### 3:15 P.M. – 4:45 P.M. CLEs

The Grim Reaper: Death, Taxes and Real Estate Sheraton Oceanfront

Hot Topics in Ethics Sheraton Oceanfront

4:30 P.M. Rakes Leadership in Education Award (by invitation) Sponsor: Gentry Locke Hilton Oceanfront

# 81st Annual Meeting

## FRIDAY, JUNE 14

- 5:00 P.M.** YLC Membership Reception Hilton Oceanfront  
*Sponsor: Virginia CLE*
- 5:00 P.M.** Friend of Bill W. Meeting Holiday Inn North Beach
- 6:00 P.M.** President's Reception Hilton Oceanfront
- 7:00 P.M.** Banquet & Installation of President Hilton Oceanfront  
*(ticketed event)*  
*Sponsor: The McCammon Group*
- 9:00 P.M.** Dance with Rare Mixx live band Hilton Oceanfront

## SATURDAY, JUNE 15

- 7:00 A.M.** Yoga by the Sea Beachfront Sheraton
- 8:00 A.M.** Law School Alumni Breakfasts Sheraton Oceanfront  
*(ticketed event)*
- 9:00 A.M.** General Session & Awards Sheraton Oceanfront  
Continental Breakfast Buffet

9:45 A.M. – 11:45 A.M.

### SPECIAL CLE

Judicial Squares Sheraton Oceanfront

10:00 A.M.

Brunch for 50-Year Award Recipients Sheraton Oceanfront  
*Sponsor: Senior Lawyers Conference*

**NOON** Raffles & Closing Reception Sheraton Oceanfront  
*Cash Bar*

**1:00 P.M.** Tennis Tournament Princess Anne Country Club  
*Sponsor: MichieHamlett*

**1:00 P.M.** David T. Stitt Memorial Beachfront Sheraton  
Volleyball Tournament  
*Sponsor: Harris Matthews & Crowder PC*

## Special Events

### Dance the Night Away!

Friday, June 14, 9:00 P.M. – Join the fun with the Rare Mixx Band – one of the hottest party bands on the east coast. Bring your dancing shoes!

### Bingo – A Family Favorite!

Take a break from the beach and bring your family to the Sheraton Oceanfront Hotel on Friday afternoon for lots of fun and prizes! – Sponsor: Walker Jones, PC

### Boardwalk Art Show & Festival

This year our meeting coincides with the 62nd Annual Boardwalk Art Show! For more information, visit [www.virginiamoca.org/](http://www.virginiamoca.org/).

### Athletic Events

**38th Annual Run in the Sun** – Friday, June 14, 7:30 A.M. on the Virginia Beach Boardwalk – Sponsors: Virginia Lawyers Weekly and Young Lawyers Conference

**17th Annual Tennis Tournament** – Saturday, June 15, 1:00 P.M. at Princess Anne Country Club – Sponsor: MichieHamlett

### 35th Annual David T. Stitt Memorial Volleyball Tournament

Saturday, June 15, 1:00 P.M. Sheraton Beachfront – Sponsors: Young Lawyers Conference and Harris Matthews & Crowder PC

### Early Morning Yoga by the Sea

Friday and Saturday mornings at 7:00 A.M.



## Showcase CLE Programs

**TOTAL AVAILABLE MCLE CREDIT: 8.0 Hours, including 4.0 Ethics (pending)**

Your Annual Meeting registration fee includes these programs sponsored by VSB sections and conferences in collaboration with statewide bars and other legal organizations. You must be registered for the Annual Meeting to receive CLE credit for any program on Friday or Saturday.

8:30 A.M. – 10:00 A.M.

### Finding Civility in Discovery

Hilton Oceanfront (1.5 CLE hours; 1.0 ethics pending)

Sponsors: Litigation Section, Construction & Public Contracts Section, and Senior Lawyers Conference

### Why Go to Europe When Europe Comes to You?

#### U.S. Data Protection in a GDPR World

Henry Ballroom (1.5 CLE hours pending)

Sponsors: Corporate Counsel, Intellectual Property, and Business Law Sections

### The Future of Law Practice: Confronting the

#### Shifting Landscape

Sheraton Oceanfront (1.5 CLE hours; .5 ethics pending)

Sponsors: General Practice Section, Health Law Section, Military Law Section, and Senior Lawyers Conference

10:10 A.M. – 11:40 A.M.

### Immigration: Contradictory or Complementary to the Rule of Law?

Hilton Oceanfront (1.5 CLE hours pending)

Sponsors: Diversity Conference, YLC, Hispanic Bar Association of Virginia, VWAA, and APABAVA

### Preaching What We Practice: Taking Your Experience Back to the Classroom

Sheraton Oceanfront (1.5 CLE hours pending)

Sponsors: Education of Lawyers and Health Law Sections

### Proactive Wellness: How to Identify, Understand, and Mitigate Lawyers' Occupational Risks

Sheraton Oceanfront (1.5 CLE hours pending)

Sponsor: ALPS

JUNE 12–15 2019 • VIRGINIA BEACH, VIRGINIA

## Showcase CLE Programs

1:30 P.M. – 3:00 P.M.

### So the Officer was Wearing a Body Worn Camera. Now what?

Hilton Oceanfront (1.5 CLE hours; .5 ethics pending)

Sponsors: Criminal Law and General Practice Sections

### Caveat Emptor: What You Need to Know About International M&A in the Trump Era

Sheraton Oceanfront (1.5 CLE hours; 1.0 ethics pending)

Sponsors: Antitrust, Business Law, Corporate Counsel, Intellectual Property, and International Practice Sections

### True Collegiality: A Study of How Young Family Lawyers Can Reverse the Trend of Hostility and Return to the True Calling of Service

Sheraton Oceanfront (1.5 CLE hours; .5 ethics pending)

Sponsors: Family Law Section and Young Lawyers Conference



Register now at  
<http://bit.ly/AM2019reg>

3:15 P.M. – 4:45 P.M.

### The Grim Reaper: Death, Taxes and Real Estate

Sheraton Oceanfront (1.5 CLE hours pending)

Sponsors: Real Property, Tax Law, and Trusts and Estates Section

### Hot Topics in Ethics

Sheraton Oceanfront (1.5 CLE hours; 1.5 ethics pending)

## Special CLE Program

SATURDAY, JUNE 15, 9:45 A.M. – 11:45 A.M.

### Judicial Squares CLE

Sheraton Oceanfront (2.0 Hours; .5 Ethics pending)

Sponsor: Young Lawyers Conference

Fasten your seatbelts for Judicial Squares, the ultimate CLE game show! This year, get ready to “go for the win” with some of your favorite Virginia judges, as we dive into civil and criminal procedure concerns. Contestants will hear from judges who will seek to challenge them by providing answers to various questions, while committee members decide whether that answer is true or false. Don’t fall into a trap of “X gets the square” when you’re an O by taking these judges at face value! The winning team will then go head-to-head in a twisted lightning round against the judicial panel, determining who will be the ultimate winner... the attorneys or the judges!

## Annual Meeting Sponsors

APABA

Access to Legal Services Committee

ALPS

The City of Virginia Beach

CLSBA

Diversity Conference

Gentry Locke

Harris Matthews & Crowder PC

Hispanic Bar Association of Virginia

Martingayle Bischoff P.C

The McCammon Group

MichieHamlett

Senior Lawyers Conference

Sensei Enterprises, Inc.

Sheraton Oceanfront Hotel

Virginia CLE

Virginia Lawyers Weekly

VSBA Members' Insurance Center

VWAA

Walker Jones PC

Young Lawyers Conference

*We gratefully acknowledge these sponsors of the 2019 Annual Meeting for their contributions in hosting a variety of activities and special events for our members and their guests.*

## Raffles and Prizes

There will be plenty of raffles and prizes for both adults and children at this year’s meeting. The raffle collection will be donated by our prize sponsors. Look for the raffle display listing the prizes and sponsors in the registration area of the Sheraton Oceanfront Hotel. Raffle entry forms will be distributed in your Annual Meeting registration badge packet. Drawings for all raffles and sponsored prizes will be announced at the **Closing Reception** on Saturday, June 15, at Noon, in the Grand Ocean Foyer of the Sheraton Hotel. You must be present to win!

## Don’t Miss Any of the Fun!

Visit the Annual Meeting website  
[www.vsb.org/annualmeeting](http://www.vsb.org/annualmeeting)

Download Now — Annual Meeting mobile app!  
 (visit the iTunes store or Google play and look for “VSBA Events”)





*Thank you* to the lawyers across the commonwealth who joined the Virginia Lawyer Referral Service and supported its mission of assisting the public in finding an attorney. [www.vlrs.net](http://www.vlrs.net)

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Howard Barry Ackerman  
Christina Janel Aguirre  
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Jamie Leigh Allgood  
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Jeremiah Asias Asercion  
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Todd Douglas Bunn  
Thomas Coleman Bunting  
Geoffrey Stewart Burke  
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Brandon Thomas Bybee  
Brittany Stansberry Carper  
Meghan Michele Casey  
Cynthia Lynne Chaing  
Joan Walda Champagne  
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Timothy Lawrence Coffield  
Sarah Catherine Collins  
Martin Carroll Conway  
Anthony Roelof Coppola  
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Jonathan Seth Gelber  
Christin Lucille Georgelas  
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Joseph Francis Grove  
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Barbara Timmeney Hanna  
Gregory Owen Harbison  
Helen O'Beirne Hardiman  
Andrea Clair Harris  
Brett Charles Herbert  
Veronica Beatriz Hernandez  
Harry Hamilton Heyson III  
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Scott Samuel Ives  
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Soo Kang Keithley  
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Richard J. Knapp II  
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Karen Marie Lado Loftin  
Kenneth Matthew Long  
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Rachel Elizabeth Madden  
Mark Joseph Madigan  
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Besianne Tavss Maiden  
James Chandler Martin  
Thomas Charles Mason III  
Michelle Nicole Mathis  
Earl Neville Mayfield III  
John David Mayoras  
Michael Allen Mays  
Katherine Cordova McCollam  
Ronald Clark McCormack  
Amy Estes McCullough  
Franklin D McFadden Jr.  
Jonathan Lee McGrady  
Dennis James McLoughlin Jr.  
Neil Edward McNally  
Mark Bruce Michelsen  
Shawn Michael Mihill  
Abigail Ann Miller

Robert Kenneth Miller Jr.  
Douglas Edward Milman  
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**Steven W. Lippman** and **Robert D. Michaux** have joined **Christian & Barton, L.L.P.**



Lippman



Michaux

Lippman is a member of the business law and health care practice groups. He received his law degree from the University of Richmond School of Law and his undergraduate degree from James Madison University.

Michaux is a member of the firm's intellectual property and litigation practice areas. He received his law degree from the University of Richmond School of Law and his undergraduate degree from Virginia Commonwealth University.

**Michael A. Inman** of **Inman & Strickler PLC** in Virginia Beach has been appointed to the executive committee of the Hampton Roads Association of Commercial Real Estate, and to the Board of Trustees for the REACH Foundation which provides educational opportunities. He also serves on the Virginia Beach Planning Commission.



Inman

**Caryn R. West** has joined **Parks Zeigler PLLC** in Virginia Beach as a partner. She currently serves as the president of the Norfolk & Portsmouth Bar Association, treasurer of the Norfolk & Portsmouth Bar Association Foundation, and secretary of the Hampton Roads Estate Planning Council. West has worked for well over a decade as a trusts & estates and corporate services attorney.



West

**KPM Law**, with offices across Virginia, as well as Washington, DC, North Carolina, West



Montgomery



Hoyle

Virginia, and Maryland, announced that **W. Barry Montgomery** has become

a shareholder in the Richmond office and **James "Lee" Hoyle** has been promoted to partner in Richmond.

**Michael C. Litman** and **Soroush "Surge" Moghaddassi** have joined **Harman Claytor Corrigan & Wellman's** Richmond office as associates. Litman focuses his practice on the defense of lawsuits involving local governments and public entities, premises and products liability, motor vehicle liability, and commercial disputes. Moghaddassi primarily defends cases involving motor vehicle liability, premises and products liability, and commercial litigation.



Litman



Moghaddassi

The Thomas Jefferson Foundation has announced that **David C. Landin**, special counsel at **Hunton Andrews Kurth LLP**, has joined the Monticello Board of Trustees. Landin will contribute to the foundation's mission of education and preservation of Monticello, the home of Thomas Jefferson and a National Historic Landmark.



Landin

**David S. Houston** has joined **Bean, Kinney & Korman P.C.** as a shareholder, practicing in the areas of zoning and land use and commercial leasing. Houston has counseled and represented clients throughout Virginia, leveraging his expertise in complex developments and zoning approvals for both large and small businesses. Prior to joining Bean Kinney, Houston was at Blank Rome LLP.



Houston

**Paley Rothman** has opened a Northern Virginia office and added **Eva Juncker** and **Lynette Kleiza** to the Family Law practice as principals.



Juncker

Juncker was a founding partner at Zavos Juncker Law Group,

PLLC and head of the litigation team. Her practice focuses on all areas of family law, including divorce, juvenile law, custody, support, equitable distribution, post-divorce modification, partition actions, transgender issues, pre- and post-nuptial agreements, marital settlement agreements, and property settlement agreements.

Kleiza was formerly a partner at Zavos Juncker Law Group where she represented clients in domestic relations law, including marital agreements, adoption, complex equitable distribution, LGBTQ matters, custody and visitation, relocation, child support, and spousal support.



Kleiza

**Anthony M. Russell** of **Gentry Locke** has been selected as a Fellow of the Litigation Counsel of America. Russell recently won a unanimous \$625,000 jury verdict in a medical malpractice case involving an injured minor with the assistance of Gentry Locke associate **Mary Kathryn Atkinson**.



Russell

**Michele Satterlund**, a partner at **McGuireWoods** has received a legal writing award through a national nonprofit program run in association with the Library of Congress that recognizes only 30 articles from the nation's 1,000 largest law firms. Satterlund was recognized for *Sidewalks: The Next Mobility Frontier*, that explains how cities are adopting policies to accommodate technologies such as delivery robots and shared stand-up scooters that change how sidewalks are used to move goods and people. Satterlund's clients include national and international companies in the technology, pharmaceutical, transportation, healthcare and manufacturing industries.



Satterlund

# Professional Notices

**Gentry Locke** is pleased to announce that **Ashley W. Winsky** has joined the firm's Richmond office as a partner in the Transportation, Insurance, Plaintiff Personal Injury, and Civil Litigation practices. Winsky brings nearly a decade of experience in defending motor carriers, railroads, amusement parks, bus companies, product manufacturers, and business owners against a wide array of personal injury claims. She has also represented individuals in wrongful death and catastrophic injury claims. She is an active member of the Transportation Lawyers Association and the American Trucking Association.



Winsky

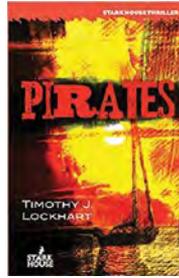
**Willie Azael Mejia** has joined **Priale & Racine PLLC** as an associate attorney. He represents clients (both English and Spanish-speaking) in criminal, traffic, and immigration matters in northern Virginia. He graduated from George Mason University with a B.S. in Criminology, and William & Mary Law School in May 2018.



Mejia

## Books by Virginia Lawyers:

Intellectual property lawyer **Timothy J. Lockhart** of Willcox & Savage, PC has published his second novel, *Pirates* (Stark House Press), the story of the adventures of an ex-SEAL who starts a boat charter business in Costa Rica after serving in a desert war and finds the experience less peaceful than he may have imagined.



**Kirk Schroder** of **Schroder Brooks PLC** in Richmond has published *The Essential Guide to Entertainment Law: Dealmaking*, a leading resource book on legal issues in the entertainment industry that includes forms, contracts, and negotiating tactics in law ranging from book publishing to motion pictures and television.



## Professional Notices

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## Positions Available

### ESTATE PLANNING ATTORNEY (BETHESDA)

Paley Rothman, a nationally recognized suburban law firm conveniently located in downtown Bethesda, one block from the metro, is seeking an attorney with 2 to 4 years of experience in estate planning and estate administration. LLM in taxation is a plus. Admitted to practice in Virginia is a plus. We are looking for a talented, organized and creative individual who will prepare estate planning documents, help determine estate planning strategies, and meet with clients. The job is fast paced but affords a great work-life balance and the ability to grow your own practice. Paley Rothman offers a sophisticated legal practice, collegial work atmosphere, superior training and growth potential. Please submit cover letter and resume to [careers@paleyrothman.com](mailto:careers@paleyrothman.com).

### REAL ESTATE LITIGATION ATTORNEY (VIRGINIA BEACH)

Kaufman & Canoles seeks a Real Estate Litigation lawyer to join our Real Estate Claims and Title Insurance Solutions team at our Virginia Beach office. The ideal candidate will have 3–10 years of litigation experience with a working knowledge of real estate and title issues. Candidate should possess writing, analytical and communication skills and will share our firm's core values of producing high-quality work and providing excellent client service. Please apply online <https://www.kaufcan.com/careers/> or submit your resume to [hr@kaufcan.com](mailto:hr@kaufcan.com).

### ASSOCIATE ATTORNEYS (RICHMOND & ARLINGTON)

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### FAMILY LAW ATTORNEY (NOVA)

Maddox & Gerock, PC, a pre-eminent family law firm located in Merrifield/Falls Church, is seeking an experienced and motivated family law attorney. Minimum of three (3) years of family law and trial experience required. Ideal candidates will possess the ability to efficiently and independently manage a high volume of cases. This is not an entry level position. Excellent benefits with competitive compensation and a chance to work in a friendly environment. Please submit your resume to [jgerock@maddoxandgerock.com](mailto:jgerock@maddoxandgerock.com) and [kmaddox@maddoxandgerock.com](mailto:kmaddox@maddoxandgerock.com), along with two (2) recent references and summary of trial experience.

### ASSISTANT COMMONWEALTH'S ATTORNEY (WINCHESTER)

The City of Winchester and the Commonwealth's Attorney's Office invites you to come join our team! Successful applicants must be a licensed attorney in Virginia with knowledge of the Virginia Court system; at least one-year prosecution experience

is preferred. Successful applicants must also have a good knowledge of the rules of evidence in Virginia. The applicant for this position will be expected to prosecute both misdemeanors and felonies in the Winchester District Courts and Circuit Court. The prosecutor shall work for the Commonwealth Attorney. Job duties will include, but are not limited to, preparing for weekly trials, prosecuting misdemeanors and felonies, prepare plea agreements, prepare sentencing guidelines, and advise police officers on matters of criminal law. To apply for this position, please visit the City of Winchester's website at [www.winchesterva.gov](http://www.winchesterva.gov).

### TRIAL ATTORNEY (NOVA)

Allstate Insurance Company is looking for a Trial Attorney for our staff counsel office in Northern, VA. Must perform end to end trial litigation, have J.D. degree and Virginia license. 1–5 year's Insurance Defense/Personal Injury experience preferred. Must travel, handle a heavy case load and work in a diverse, fast-paced and organized environment. Apply [www.allstate.jobs/title-primary\\_city-primary\\_state-allstate/9186975/trial-attorney-fairfax-va-fairfax-va/](http://www.allstate.jobs/title-primary_city-primary_state-allstate/9186975/trial-attorney-fairfax-va-fairfax-va/).

### SENIOR TRIAL ATTORNEY (NOVA)

Allstate Insurance Company is looking for a Senior Trial Attor-

ney for our staff counsel office in Northern, VA. Must perform end to end trial litigation, have J.D. degree and Virginia license. 7+ year's Insurance Defense/Personal Injury experience preferred. Must travel, handle a heavy case load and work in a diverse, fast-paced and organized environment. Apply [https://www.allstate.jobs/title-primary\\_city-primary\\_state-allstate/9228446/senior-trial-attorney-fairfax-va-chantilly-va/](https://www.allstate.jobs/title-primary_city-primary_state-allstate/9228446/senior-trial-attorney-fairfax-va-chantilly-va/).

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