40th Annual Advanced Family Law Seminar 2024

2024 Seminar
Written Materials

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ABOUT THE SPEAKERS

FACULTY

Hon. Dennis J. Smith (Ret.), The McCammon Group / *Fairfax*

Judge Dennis J. Smith (Ret.) was born in Brooklyn, N.Y. and graduated from Brooklyn College in 1975. He received his law degree from Washington College of Law of the American University in 1978, was admitted to the D.C. bar in 1978, and to the Virginia bar in 1979. He served as a member and chairperson of various committees of the Fairfax Bar Association, the Board of Governors of the Family Law Section of the Virginia State Bar as an attorney and then as the Circuit Court representative on the Board. He was a principal in the firm of Shoun, Smith & Bach, P.C., concentrating in family law matters. He was a Commissioner in Chancery for the 19th Judicial Circuit from 1987-1995 and was a Substitute Judge for the General District and Juvenile & Domestic Relations District Courts from 1990 until his appointment to the Circuit Court of Fairfax County in June 1995. He served as Chief Judge of that court from 2007 until his retirement in 2015 after which he served as Designated Judge until 2024. Since his retirement he has also been an independent contractor with the McCammon Group conducting mediations and arbitrations. He has lectured for many organizations including the Virginia State Bar, Virginia CLE, local Bar Associations, the National Business Institute, the National Judicial College and the Judicial Conference of Virginia. He taught Virginia Family Law as Adjunct Faculty for George Mason University School of Law from 1999 to 2016. He was a member and past president of the George Mason University Law School Inn of Court. He served as member of the Boyd-Graves Conference from 1994 to 2017. He was a member and Chairperson of the Judicial Education Committee of the Judicial Conference of Virginia. He was a Virginia representative to the 1999 National Symposium on the Future of Judicial Branch Education. He was a part of the Pro Se Litigation Planning Committee of the Supreme Court of Virginia. He served as Chairperson of the Committee for the Workshop on Handling Capital Cases offered by the Judicial Conference of Virginia and served as faculty for this annual course. He also chaired the Virginia Supreme Court's Advisory Committee on the Establishment of a Family Court in Virginia. He served on the Virginia Civil and Criminal Bench Book committee from 2012 to 2022. He has one daughter, a son-in-law, and 4 grandchildren. As a personal triumph in the face of years of professional experiences with marriage, he and his wife have been married for 50 years.

Nanda E. Davis, Davis Law Practice PLLC / *Roanoke*

Nanda Davis opened her law firm, Davis Law Practice, in Roanoke in 2014. She specializes in divorce, custody, and matters involving Child Protective Services. She received her training in mediation at the Harvard School of Law, Program on Negotiation, and offers mediation in family law matters. She is the former president of the Salem Roanoke County Bar Association and the former president of the Roanoke Chapter of the Virginia Women's Attorney's Association. Her articles have been published in Virginia Lawyers Weekly, the Family Law Quarterly and Above the Law. She is currently serving on the Board of Governors for the Family Law Section, and she received the Virginia Lawyers Weekly Influential Women of Law Award in 2020. She received her B.A. in philosophy from the University of Virginia in 2008, and her J.D. from George Mason

School of Law, *magna cum laude* in 2012.

Natalie Goldberg, **LCSW** / *Falls Church and Washington, DC*

Natalie Goldberg, LCSW is a licensed clinical social worker who has worked with children, adolescents, adults, and families for the past twenty plus years. Her work focuses on helping clients navigate the challenges of separation, divorce and other life transitions. She routinely serves as a Collaborative divorce coach, child specialist, parent coordinator, mediator, and divorce consultant. She regularly trains mental health professionals, attorneys and financial professionals in advanced collaborative and conflict resolution skills. Natalie was trained in the Collaborative process in 2013. She has served as President and Board member of the DC Academy of Collaborative Professionals and as a Board member of the Collaborative Professionals of Northern Virginia. She has held the position of co-chair of the Education Committee for both practice groups. She has served on the Equity & Inclusion Committee for the International Academy of Collaborative Professionals for the past three years and is a member of 2021-2022 IACP Leadership Academy. She has also served several years on the Board of the Collaborative Project of DC and the DCACP Public Outreach Committee for which she regularly co facilitates a free monthly workshop on divorce processes in DC called Third Thursday.

Daniel L. Gray, Cooper Ginsberg Gray PLLC / *Fairfax*

Daniel L. Gray is a founding member of Cooper Ginsberg Gray, PLLC in Fairfax, Virginia. Following his graduation from law school, he served as a judicial clerk in the Fairfax County, Virginia Circuit Court until 1997, when he began practicing family law. He is a past President of the Virginia Chapter of the American Academy of Matrimonial Lawyers and is the Virginia representative to AAML National, is the Chairman of the Virginia Family Law Coalition, is former Chairman of the Virginia State Bar Family Law Section, is former Chairman of the Fairfax County Bar Association Family Law Section, has published various articles on family law matters, and lectures extensively on family law and ethics matters in Virginia, Maryland, and the District. Mr. Gray is a member of the District of Columbia, Maryland, and Virginia Bars. He earned a J.D. from the George Mason University School of Law, and a B.A. from the University of Virginia.

Brian M. Hirsch, Hirsch & Ehlenberger / *Reston*

Brian has practiced Family Law in Northern Virginia since 1989, and is a partner in Hirsch & Ehlenberger, P.C. in Reston. He graduated The American University, Washington College of Law in 1985. Brian is the immediate-past editor of the *Virginia Family Law Quarterly,* a past Chair of the Board of Governors of the Family Law Section of the Virginia State Bar, a fellow of the American Academy of Matrimonial Lawyers, and a member of the VBA Family Law Coalition. He is also certified by the Virginia Supreme Court as a family mediator, and a frequent speaker on family law and family mediation. In 2015, he was appointed as a substitute judge for the Juvenile and Domestic Relations District Court, and authored the *Virginia Family Law Trial Handbook* in 2017.

Eric Rollinger, Stein Sperling Bennett De Jong Driscoll PC / *Rockville, MD*

Tax law attorney and Certified Public Accountant Eric Rollinger is a multifaceted member of Stein Sperling's nationally recognized tax litigation and controversy team. He takes great pride in having successfully settled hundreds of disputes with the IRS and state taxing authorities. Eric brings a wealth of knowledge and experience to his clients' cases. Detail-oriented and practical, Eric provides each client with an informed course of action structured around the unique aspects of the case. He recognizes that financial concerns often keep clients up at night and, maintaining open lines of communication at all times, he works hard to resolve their cases efficiently and optimally. As a Certified Valuation Analyst (CVA), Master Analyst in Financial Forensics (MAFF) and Master of Professional Accountancy (MPA), tax controversy and litigation support cases especially appeal to Eric, and he frequently provides relevant support in the areas of income analysis, tracing, tax consequences of marital awards, corporate structures, business valuation and financial forensics. Eric is actively involved in many professional organizations both on national and state levels, staying current with evolving tax laws and regulations. He has co-authored articles on maximizing deductible expenses and implications of tax incentive challenges in the Journal of State Taxation and *MACP Statement* magazines.

Bruce H. Russell, II., Bruce H. Russell, II, PC / *Lebanon*

Bruce has practiced law for over twenty years, mainly in the courts of his native Southwest Virginia. In that time, he has been a prosecutor, law professor, member of a small firm, and solo practitioner, and is proud of his service to his Commonwealth and community in each of these roles. In recognition of his extensive and continuing service to the bench, bar, and public, Bruce was named the 2023 Virginia State Bar Local Bar Leader of the Year. Rated AV Preeminent* by Martindale-Hubbell, Bruce has received the highest peer rating standard. For more than 130 years, Martindale-Hubbell (the premiere directory of attorneys) has been evaluating attorneys for their strong legal ability and high ethical standards through a Peer Review Rating system. The AV Preeminent rating is given to attorneys who are ranked at the highest level of professional excellence for their legal expertise, communication skills, and ethical standards by their peers. He has been selected as a Fellow of the Virginia Law Foundation. The Foundation supports projects throughout the Commonwealth that facilitate access to justice, promote an appreciation and understanding of the Rule of Law, and provide law-related education in support of these ideals. Fellows are recognized as leaders in the profession, not just in their practices but in their communities, and comprise a group of more than 600 of the best and brightest legal practitioners, committed to the highest ideals of the law and to the concept of the citizen lawyer. Nominees are put forth confidentially by their peers, and voted upon by a blue-ribbon panel of distinguished practitioners. Bruce is one of only a handful of Fellows from Southwest Virginia. He is honored to have been named a Leader In The Law by Virginia Lawyers Weekly, an award which recognizes the lawyers across the Commonwealth who are setting the standard for other Virginia lawyers. “Leaders” are recognized for changing the law, serving the community, changing practice or improving Virginia’s justice system, among other accomplishments. Bruce graduated from Richlands High School, The University of Virginia (where he served on the Honor Committee and its Executive Committee as Chairman of the Bad Check Committee), and the University of Richmond’s T.C. Williams School of Law. He began his legal career in Charlottesville at the turn of the century with the boutique firm of Thompson & Hagy, focusing on representing small high-

tech companies, primarily start-ups. He soon returned to the hills of his youth in Southwest Virginia, pursuing an opportunity to join the Buchanan County Commonwealth's Attorney's Office as that office's only full-time assistant. While there, he prosecuted everything from murder to the theft of fighting roosters. Shortly after arriving in Grundy, the Appalachian School of Law brought him onboard as an adjunct faculty member at the then-fledgling school. Returning to private practice in 2003, Bruce joined the law firm of Bolling & Hearl (eventually Bolling Hearl Russell), working out of Abingdon and Richlands, plus parts in-between. Bruce established his own firm in 2009, sharing space in Lebanon with the Hall-of-Fame attorney Steve Quillen. He continues to practice law throughout Southwest Virginia, including offices in Abingdon and Tazewell. Bruce logs thousands of miles each years traveling between the courthouses of the Western end of the state. He thinks of himself as the modern evolution of the "Virginia Country Lawyer," and his successful general practice encompasses criminal defense, traffic citations ranging from speeding tickets to DUI, domestic relations, plaintiff's litigation including personal injury, and whatever comes in through the door on any given day. He is the longest-serving President of the Russell County Bar Association, having held the presidency since 2013. Under Bruce's leadership, the Russell County Bar was awarded the Virginia State Bar's Award of Merit for outstanding projects and programs in 2021, 2022, and 2023. Currently President of the 28th District Criminal Defense Bar, Bruce also serves on the board of the Southwest Virginia Legal Aid Society. He was previously a board member of that group's predecessor organization, Client-Centered Legal Services. He is Past President of the Virginia Mountain/Valley Lawyers' Alliance, and is a member of the Boyd-Graves Conference**, for which he serves on the Steering Committee. He has been elected by his peers to represent the 28th Circuit on Bar Council (the Board of Governors of the Virginia State Bar), and is currently serves on the Bar's Executive Committee under President Chidi James. His other service to the State Bar includes the Special Committee on Bench-Bar Relations (currently Vice-Chair) and the Judicial Candidate Evaluation Committee. He is part of the 2024 VSB Strategic Planning Initiative, and is a faculty member of the Harry L. Carrico Professionalism Course. Bruce has also served as the President of the Watauga Elementary School P.T.O. Other board and committee memberships include the Cumberland Plateau Planning District Committee Advisory Board, the Regional Bench-Bar Conference Planning Committee, the Russell County Court Improvement Committee, Washington County Schools Superintendent's Parental Advisory Committee. He is President of the Virginia Alpha Delta Phi Alumni Chapter, and is on the board of the University of Virginia Southwest Virginia Alumni Association. For several years, Bruce coached as many as three teams at a time for the local youth soccer organization, Highlands Soccer Club, and served as the club's legal counsel. He has been happily married to Shannon, a public school special education teacher, since 2007. They live in Abingdon with their two sons, Clark (15) and Eamon (12), plus canine companions Huckleberry, Tiger Lily, Finn (long-haired miniature dachshunds), and Luna (a Goldendoodle). Bruce is a Kentucky Colonel, a Freemason, and a Shriner. Bruce has been privileged to represent thousands of clients from all walks of life in his twenty plus years in practice. Additionally, he has mentored several young attorneys as they have begun their journeys in the law. He is proud to have received the Martindale-Hubbell Platinum Client Champion Award based upon the experiences of his numerous highly satisfied clients, is ranked among the Top-Rated Lawyers In Virginia, was selected to Law Eagles of America, has been named a Lawyer of Distinction, and previously received the Martindale-Hubbell Client Distinction Award. He was listed on the 2022 Pro Bono Service Honor Roll, and was a Get To 30! Pro Bono honoree. Bruce currently lives in Abingdon, and practices out of offices in Lebanon, Abingdon, and Tazewell. He can be reached at 276.889.1750, or by email at bruce@bhr2law.com. *The highest rating possible.

This is given to attorneys who are ranked at the highest level of professional excellence for their legal expertise, communication skills, and ethical standards by their peers AND the judiciary. **An invitation-only group of lawyers, professors and judges representing a wide variety of practices throughout the Commonwealth, who meet and attempt to reach consensus about ways to improve the law.

Craig W. Sampson, Barnes & Diehl, PC / *Richmond*

Craig W. Sampson is President of Barnes & Diehl, P.C. in Richmond, Virginia. He handles complex divorce, custody, and support matters in courts throughout the Commonwealth. Before joining Barnes & Diehl, he was the principal of Sampson Law Firm, P.L.C., where he handled family law matters and criminal cases at all levels of the state and federal systems, including successful petitions for writ of certiorari to the United States Supreme Court. He is a past president of the Federal Bar Association (Richmond) and the Metro Richmond Family Law Bar Association. He lectures semi-annually on the Updates in the Law at the Advanced Family Law Seminar hosted by Virginia CLE, and he has presented on multiple occasions at the Bench Bar Conference in Richmond. Craig has published many articles over the years in the Virginia Family Law Quarterly. He was an adjunct professor of Family Law Ethics at the University of Richmond School of Law from 2016 to 2019, and he was a recipient of the 2017 Leader in the Law Award. He currently serves on the Board of Governors for the Family Law Section of the Virginia State Bar. He is also a co-author of the family law treatise known as "Virginia Practice: Family Law -Theory Practice and Forms" which is published annually by Thomson Reuters.

Lawrence P. Vance, Buchbauer & McGuire, PC / *Winchester*

Lawrence P. Vance graduated in 1987 with a B.S. in Economics from Virginia Tech and is a 1999 graduate of the George Mason University School of Law where he graduated *cum laude.* He is licensed in Virginia and Maryland. Mr. Vance became a Fellow in the American Academy of Matrimonial Lawyers in 2013. He joined the firm of Buchbauer & McGuire, P.C. in January 2007. Mr. Vance left a career of law enforcement in 1996 to study law. He interned in the Attorney General's Office of Virginia and was a summer clerk for the Honorable Justice Lawrence Koontz of the Virginia Supreme Court. Prior to joining Buchbauer & McGuire, P.C., Mr. Vance was a principal in the firm of Vance & Smalls, P.C. in Winchester and an associate in the Law Offices of Franklin R. Blatt, P.C. in Harrisonburg, Virginia. Mr. Vance maintains a practice focused on family law and has been a Substitute Judge in the 26th Judicial District since 2015. He is a past Chairman of the Board of Governors of the Family Law Section of the Virginia State Bar. He was a member of the Virginia Supreme Court's Workgroup on Guardian *ad litem* and part of the Workgroup on the Expansion of the Jurisdiction of the Court of Appeals. He served for three years as the Bench-Bar Committee Chairman of the Winchester-Frederick County Bar Association. He has written articles in the Virginia Lawyer and the Virginia State Bar Family Law Quarterly. Mr. Vance previously presented continuing legal education for Virginia CLE, the Virginia Chapter of the American Academy of Matrimonial Lawyers, and the Virginia State Bar.

Barry J. Waldman, Waldman & Associates PLLC / *Fredericksburg*

Barry is the Member-Owner of Waldman & Associates, PLLC, a Fredericksburg Area Law Firm

focused on Family Law and its related legal issues. He handles Contested Divorce Proceedings, Complex Custody and Support issues, and Premarital Agreements. Barry regularly appears before the Courts of the 15th Judicial Circuit and the Courts of Orange County, Virginia. Mr. Waldman holds an AV Rating from Martindale Hubbell and a perfect 10.0 Rating from AVVO. Mr. Waldman has been named both a Super Lawyer and a Rising Star by SuperLawyers.com (Thomson Reuters) in the area of Family Law. Mr. Waldman is a Member of the Board of Governors of the Family Law Section of the Virginia State Bar and has previously served as the Chairman of the Children and the Law Commission of the Young Lawyers Division of the Virginia State Bar. Barry was honored as a member of the Top Ten of the Next Generation of Business Leaders by the Fredericksburg Regional Chamber of Commerce. Barry is a graduate of the Leadership Fredericksburg Program and served as the Chairman of the Advisory Board for the program. He is a graduate of the University of Virginia, and the School of Law at the University of Richmond.

MODERATOR
Regina F. Amick, Wolcott Rivers Gates / *Virginia Beach*

Regina F. Amick was raised in Maryland and has been licensed to practice law in Maryland since 2003 and in the Commonwealth of Virginia since 2005. Ms. Amick has focused her practice solely on domestic relations matters including divorce, separation agreements, spousal support, division of property and retirements, child custody, child support. She has extensive experience handling complex business and property divisions, utilizing experts spousal support matters, business valuations and property valuations. She also has extensive experience in military divorces and related military retirement and VA disability issues. Ms. Amick has been with Wolcott Rivers Gates since 2008 and currently serves as one of the managing partners. Ms. Amick currently serves as Chair of the Virginia State Bar Board of Governors for Family Law, after having served as Vice-Chair and Secretary in years' past. She is also an active member of the Virginia Bar Association and holds the position of Vice Chair for the Domestic Relations Executive Council, after having served multiple years as the Continuing Legal Education Chair, coordinating, and teaching statewide lectures and seminars to her peers. She has served on the Virginia Bar Association's Commission on the Needs of Children, and volunteers with the C.L.A.S.S. Program of the Virginia Beach Bar to assist victims of domestic violence. She has served as co-chair to the Norfolk Portsmouth Bar Association Continuing Legal Education Committee, where she coordinated and/or moderated or served as faculty to numerous CLEs. Ms. Amick holds the position of Vice President in the I'Anson-Hoffman American Inn of Court, which strives to maintain civility and professionalism to the practice of Family Law. Ms. Amick has been recognized within the profession for the following achievements: Influential Women of Law, by Virginia Lawyers Weekly, 2020, Top Lawyers of Coastal Virginia in 2017 – 2022, Legal Elite 2018 – 2023, Best Lawyers U.S. News and World Report, Super Lawyer 2021, 2022, 2023. Ms. Amick has coordinated, moderated or served as faculty in numerous local and statewide CLEs. In June 2023, the article: *The Business of Marriage: The Non-Divorce Attorney's Impact on a Divorce*, by Regina F. Amick and Andrew T. Richmond was published in Virgina Lawyer, The Official Publication of the Virginia State Bar, Volume 72, Number 1. Ms. Amick serves on the Board of Directors for the Virginia Beach Neptune Festival and was honored to be named a Triton on the 2023 Royal Court.

UPDATE
ON
VIRGINIA
FAMILY LAW
(2023–24, *Part I*)

Compilation & Analysis of Cases
September 6, 2023 through March 12, 2024

Prepared and Presented
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TABLE OF CASES

I. INTRODUCTION

A. ABBREVIATIONS

Throughout this outline, the following abbreviations are used:

a. "GAL" refers to a guardian *ad litem*. "DSS" refers to the Department of Social Services. "DCSE" refers to the Division of Child Support Enforcement. "PSA" refers to a property settlement agreement. Where used, "COA" refers to the Court of Appeals.

b. Any Rules cited are the Rules of the Supreme Court of Virginia. "Code" refers to the Virginia Code as does any statute cited by a section number. "Guidelines" refers to the child support guidelines found in Virginia Code §§ 20-108.1 and -108.2.

c. The "trial court" refers to a circuit court. JDR refers to the Juvenile and Domestic Relations District Court. The "Court" refers to the Court of Appeals or the Supreme Court, depending on which issued the opinion. Unless labeled otherwise, the opinions are from the Court of Appeals.

d. The parties in cases dealing solely with child custody and/or child support are named as "Mother" and "Father." Otherwise, the parties are named as "Wife" and "Husband."

B. PUBLISHED AND UNPUBLISHED CASES

Published cases are in **Bold** in the outline. Pursuant to Code § 17.1-413, only Court of Appeals opinions having "precedential value" or "otherwise having significance for the law or legal system" are reported. The same is true for the Supreme Court of Virginia. However, we have included every relevant published and unpublished family law case decided by the Court of Appeals since **September 6, 2023,** through **April 18, 2024**. Although unpublished cases should not be cited as precedent, they may still provide valuable illustrative information.

II. PROCEDURAL ISSUES

A. JURISDICTION

Sultan v. Malik
October 30, 2023
Alexandria Division - Eastern District of Virginia
No. 1:23-cv-00457
Published

Husband claimed that during their divorce and custody proceedings, Wife, various Commonwealth judges, ex-wife's attorneys, and expert witness violated his Fourteenth Amendment rights. Additionally, Husband claimed perjury and alleged theory of respondeat superior.

The court found that the dismissal of the complaint was warranted under the Rooker-Feldman doctrine, as United States District Courts cannot directly review state court decisions. *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1996). In cases like this, the controlling question is "whether the party seeks the federal district court to review a state court decision and thus pass upon the merits of that state court decision." *Id.* The Rooker-Feldman doctrine applies if to grant relief, the federal court must determine that the state court ruling was erroneously entered. If a state court decision hurts the party, the party should appeal and then let the superior state courts decide if they have jurisdiction to hear the case.

The Court stated that it did not have subject matter jurisdiction to hear this case because the Husband sought to re-litigate his divorce and custody proceedings. "It amounts to nothing more than an attempt to seek review of the state court's decision[s] by a lower federal court." Declaratory relief is barred under the Rooker-Feldman doctrine when the party is functionally asking a federal court to review a state court judgment. Therefore, the case must be dismissed.

The Court noted that if the divorce and custody matters were pending and active, it would still not be able to hear the case under the *Younger* doctrine, as (1) federal courts must "abstain from interfering in state proceedings, even if there is federal subject matter jurisdiction, when there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding," (2) it implicates an important or vital state interest, and (3) it provides an adequate opportunity to raise constitutional issues. In this case, the action filed sought to attack state court domestic relations proceedings, the underlying cases implicated the state's substantial interest in domestic relations matters, and Husband had opportunities to raise constitutional challenges in state court.

B. NOTICE

Paxton v. Paxton
September 26, 2023
Bedford County
Record No. 1494-22-3
Unpublished
Affirmed

Husband and Wife married in 2008, separated in 2020, and Wife filed for divorce on November 30, 2021. On June 17, 2022, the circuit court ordered that the oral rulings be transcribed and incorporated into the final decree. Wife's counsel drafted a proposed final decree and emailed it to Husband's counsel for review. The court's judicial assistant and both parties' attorneys tried to set a date for the presentment hearing through email. During these communications, Husband's counsel noted that he was waiting to receive the transcript. Additionally, Husband's counsel indicated that he needed to set a date for a hearing on a motion to reconsider.

The judicial assistant sent out available dates for the hearing on the motion to reconsider on August 16, 2022. Wife's counsel agreed to the September 1 date; however, Husband's counsel did not respond. On August 22, Wife's counsel argued to the judicial assistant that Husband's counsel had enough time to respond and asked them to confirm the date. The assistant confirmed the hearing for September 1 and sent a confirmation email to both parties' counsel on August 22.

On August 25, Wife's counsel sent Husband an email with the notice of presentment and the proposed final decree. Husband nor his attorney attended the hearing on September 1. The circuit court dispensed the defendant's endorsement requirements under Rule 1:13.

On September 19, Husband's counsel received a copy of the final decree in the mail. Husband's counsel appeared before the circuit court on September 21, admitting to communicating with the assistant and opposing counsel, and admitting that his email address was correct. Also on September 21, Husband filed a "Motion to Suspend or Vacate Final Decree of Divorce" arguing that the decree was entered in violation of Rule 1:12 and Rule 1:13 with regard to service and notice. The circuit court denied Husband's motion and he appealed.

On appeal, Husband relied on Code § 20-99.1:1 to argue why the circuit court erred in the notice requirement, but COA found that he did not preserve arguments about Code § 20-99.1:1. Husband did not raise notice generally, as he only raised Rule 1:12 and Rule 1:13 specifically. COA notes that "making one specific argument on an issue does not preserve a separate legal point on the same issue for review." *Edwards v. Commonwealth*, 41 Va.

App. 752 (2003). Therefore, Rule 1:12 and Rule 1:13 did not preserve his arguments regarding Code § 20-99.1:1.

COA cited the Supreme Court of Virginia's ruling on when it is an abuse of discretion to modify or dispense the notice requirements of Rule 1:13. Examples included: entering an order when the attorneys disagreed over the contents of the draft order, *Rosillo v. Winters*, 253 Va. 268, when a cross claim was eliminated by an order entered into without notice to the cross claimant, *Iliff v. Richards*, 221 Va. 644, and child support was eliminated by order without notice, *Cofer v. Cofer*, 205 Va. 834. COA found that (1) Husband had actual notice of the presentment hearing through his counsel's communications with the judicial assistant and opposing counsel, (2) counsel acknowledged that his email was correct, and (3) that he received multiple emails notifying him of the date and time of the hearing. Counsel's argument that he did not see a new email pop up is not a sufficient reason for the sent emails to not qualify as actual notice.

Husband also argued that the circuit court erred in treating two bank accounts as "distinct marital assets for equitable distribution" since he was able to trace the funds from one account to the other before the evidentiary hearing. This argument was waived since he did not provide legal support for the position required by Rule 5A:20(e).

C. AUTHENTICATION

Morris v. Commonwealth of Virginia
October 3, 2023
Prince William County
Record No. 1075-22-4
Unpublished
Affirmed

On October 30, 2019, there was a physical altercation between A.J and Morris. Morris worked at a group home for individuals with developmental delays and A.J. was a 27-year-old woman who lived at the group home. A.J. was diagnosed with an intellectual disability, major depression, and adjustment disorder, which impacted her ability to communicate. The incident resulted with A.J. having several injuries, including a black eye, a hematoma near her eye, and an acute fracture of a bone in the eye socket.

Ducharme, the group home's Director of Investigation, found two recordings on the home's surveillance video that depicted parts of the incident. Ducharme recorded the surveillance videos on her phone, taking a "recording of a recording." Ducharme testified for the Commonwealth regarding the surveillance system and said (1) that the date and time stamp could not be altered, (2) it was not possible to edit or alter the videos while they were playing on the computer, (3) the system was functioning properly on the day of the incident, (4) and gave names of who had access to the system.

Additionally, Ducharme confirmed that the DVD played in court was indeed videos of the footage from her cell phone and that the videos "appear[ed] the same on th[e] DVD as [they] did on the server and . . . computer." However, Ducharme increased the playback speed of the surveillance videos, which caused the cell phone videos to be shorter in length than the original videos. Morris argued that the videos lacked sufficient authentication since there were still foundational questions, but the trial court ruled that Ducharme established herself as a "witness qualified to testify on authentication matters."

On appeal, Morris argued that since Ducharme did not create the original surveillance videos and the time stamp discrepancies rendered the surveillance videos "demonstrably unreliable," the Commonwealth did not lay a sufficient foundation to admit "the subject matter of the recordings."

"If the court determines that the information on the tape is relevant" and that the content's "probative value . . . outweighs any prejudicial effect, it should be admitted. Before asking the court to admit a videotape into evidence, however, the party offering it must authenticate it." *Brooks v. Commonwealth*, 15 Va. App. 407 (1992). "[T]he authentication inquiry is a narrow one and is only concerned with the genuineness of the offered evidence." *Snowden v. Commonwealth*, 62 Va. App. 482 (2013). "The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a preponderance of the evidence." *Campos v. Commonwealth*, 67 Va. App. 690 (2017).

COA found that although Ducharme was not the primary source of the surveillance video, she was the primary source that took a "recording of a recording" on her cell phone. Since she created these, she authenticated them. Even with the discrepancies in the playback speeds, the preponderance of the evidence supports that the videos on the cell phone were reliably genuine and what the Commonwealth represented them to be. Therefore, COA held that the authentication requirement of Rule 2:901 was satisfied.

III. EQUITABLE DISTRIBUTION

A. VALUATION OF PROPERTY

Scott v. Scott
October 10, 2023
Culpeper County
Record No. 1338-22-4
Unpublished
Affirmed

Parties married in February 2016. In May 2016, Husband received a gift of unimproved land in Culpeper and the deed only listed Husband's name. In October 2016, Husband signed a contract only in his name to build a house on the land. In 2017, Husband closed on the mortgage in the amount of $211,200 and refinanced the mortgage in his name only for the amount of $203,912.57 in 2019. Parties separated in March 2020. Husband refinanced the mortgage again, and it increased to $264,000.

During the marriage, Husband earned majority of household income ($90,000 a year), contributed the land which he constructed the marital home, and maintained the outside of the residence, as he remodeled, fixed the driveway, and built an at home salon for Wife. Wife maintained responsibility for the children, household tasks, and ran a salon out of the house ($30,000 a year).

Wife filed for divorce in May 2021. Parties agreed to the distribution of all the marital property except the Culpeper land. At trial, two experts gave a fair market value of the property. One concluded it was valued at $400,000 and the other concluded it was valued at $380,000. Considering the testimony, the circuit court concluded that the property was valued at $365,000, and it was classified as hybrid since the parties agreed the land was the husband's separate property. The circuit court ordered Husband to remit $47,500 to Wife for her marital share of the equity in the residence. Wife appeals.

Wife argued that the court erred in assigning the property value at $365,000, erred in calculating the parties shares in the property, and failed to quantify the values of the separate share and marital share of the property.

For equitable distribution, Code § 20-107.3 requires courts to classify the property, assign a value to the property, and distribute the property to the parties, taking into consideration the factors presented in Code § 20-107.3(E). The valuation is fact dependent. The court valued the property as of the date of the evidentiary hearing. The fact finder is not required to accept the testimony of an expert witness just because they are qualified as an expert. COA found that the circuit court was given a range of values by the experts' testimonies and the evidence supports the inference that the value of the property was within this range. Considering the deference that the circuit court has in determining credibility of witnesses and to make findings of fact of the property value, the COA found that the value of $365,000 was not a wrong value.

Regarding the calculation of shares to the property, Virginia law does not presume that there will be equal distribution of marital assets. Furthermore, the circuit courts discretion is limited in that it must consider all the factors in Code § 20-107.3; therefore, if it does this and bases its findings on credible evidence, the court "will not disturb its decision on appeal." The circuit court explicitly examined each factor and found that Husband earned

the majority of the household income and Husband's income greatly contributed to the acquisition and maintenance of the marital home more than Wife's. Therefore, COA found that circuit court did not abuse its discretion in its division of the equity.

B. DISTRIBUTION OF PROPERTY

Martin v. Al -Samman
September 26, 2023
Albemarle County
Record No. 1109-18-2
Unpublished
Affirmed

Husband and Wife married in 1996. On May 27, 2014, they executed a separation agreement which stated that Wife solely financed and purchased a piece of property. Wife was the uncontested sole owner.

In 2017, Wife filed for divorce and moved to incorporate the separation agreement into a final decree of divorce. Husband challenged the claim that the property was bought using only Wife's resources, arguing that marital resources were used. Wife testified that her parents gifted her $40,000 in cash for the down payment, and she put the cash in a separate bank account from Husband. She never transferred money into their marital accounts. The circuit court accepted Wife's argument and granted her request to incorporate the separation agreement into a final decree of divorce. Husband appealed.

As noted in *Galloway v. Galloway*, 47 Va. App. 83, "Marital property settlements entered into by competent parties upon valid consideration for lawful purposes are favored in the law and such will be enforced unless their illegality is clear and certain." Husband had the burden to provide evidence that would void the agreement. COA found that he failed to do so.

First, COA reasoned that Husband agreed in the separation agreement that Wife was the sole owner of the property, and solely financed and purchased the property. Second, COA reasoned that Wife made a clear effort to keep and treat the cash gifts as separate. Therefore, it ruled the separation agreement is valid.

Murphy v. Murphy
December 12, 2023
Henrico County
Record No. 1211-22-2
Unpublished
Affirmed

Wife and Husband divorce in 2021. The final decree valued the marital home at $405,000, and the marital equity in the home was $178,251. The decree awarded Wife 55% of the remaining $178,251 marital equity. Husband was awarded 45%. The decree stated the dollar value that each would receive, with Husband receiving $72,573 and Wife receiving $105,678. Wife sold the home on her own, as Husband's name was removed from the lien, mortgage, and debts.

Wife sold the home for $495,958.36. Parties filed a joint motion to determine the $57,872.79 of the excess marital equity from the sale. This amount is the final amount after expenses were deducted. Wife argued that she is entitled to the total amount since the decree stated the exact amount that she was to pay Husband. Additionally, Wife stated that if the home were sold at a price under the $405,000 value, she would have still had to pay Husband the exact amount in the decree. Husband argued that the decree did not allocate the excess equity; thus, the decree does not control the distribution of it. Circuit Court ruled that the final decree fully disposed of the marital home. The Circuit Court reasoned that Wife was entitled to the excess equity since she could have been faced with a deficit and the decree was "silent as to how any excess or deficiency would be addressed."

On appeal, the COA affirms the circuit court's ruling. COA notes that since "determining who has legal title . . . has little or no bearing upon how the value of an asset is to be equitably distributed . . . ," it does not matter if Wife and Husband owned the property as tenants in common. Property being separate or marital is based on statutory definitions, not legal title. COA ruled that the final decree was reasonable as the circuit court considered the value of the home, Wife's responsibility to sell the home, and the risk Wife had if the home sold for a different amount.

C. MILITARY RETIREMENT

Leo v. Leo
October 10, 2023
Loudoun County
Record No. 1402-22-4
Unpublished
Affirmed

The parties married on August 6, 2005, separated on December 16, 2018, and Wife filed for divorce on April 24, 2019. They agreed to divide Husband's military retired pay and their gross monthly incomes. However, they did not agree on the amount and duration of Wife's spousal support.

The circuit court considered each factor of Code 20-107.1(E) and determined that the husband had a "terrific capacity for earning income in comparison to the wife" and

Husband's financial resources "far outweighed" Wife's resources. Additionally, the court weighed the parties' high standard of living, the duration of their marriage, the impact on Wife's employment capacity due to being the sole custodian of a minor who needed extra attention, and Husband's part in "driving the expenses of litigation." The circuit court entered a divorce order which awarded Wife $3,100 in monthly spousal support for ten years. Additionally, it ordered the division of Husband's retired military pay by entering a retirement order which required Husband to indemnify Wife "for any Military Retired Pay waived as a result of disability election" and prohibited Husband from "making any elections . . . that in any way adversely affects the existence or amount of his Military Retired Pay. . . ." Husband appealed the divorce order and the retirement order in 2022.

In 2022, COA reversed and remanded both orders. COA held that the provisions in the retirement order related to indemnification violated the United States Supreme Court's holding in *Howell v. Howell*. COA vacated the retirement order. Because of that remand, COA also reversed and remanded the spousal support order. On remand, the circuit court recalculated the spousal support amount and awarded Wife $4,100 per month for ten years. Husband appealed.

Husband argued that the circuit court erred in determining the amount of spousal support because it failed to consider all of Wife's income and the amount should be limited to her actual need. He argued that the circuit court did not properly consider the first factor of Code 20-107.1(E).

Courts must consider thirteen factors when determining the amount and duration of spousal support. However, the judge does not have to explain how much weight was given to each factor and the weight given is within its discretion.

COA found that the circuit court did not err in considering the factors and that it did not abuse discretion when it incorporated these findings in the remand order to recalculate the amount of spousal support with the corrected military pay order. To correct the order, the circuit court struck the indemnification clause and the prohibition against Husband making any election that adversely affected his military retirement pay. The circuit court recognized that the "contingent nature" of the retirement benefit makes Wife significantly vulnerable. Due to the lack of certainty concerning the retirement, the circuit court found it "equitable and just" to increase the amount of spousal support to $4,100 per month for ten years.

Additionally, COA found that the circuit court did not abuse its discretion when it set the indemnity clause value at $120,000. The court did not set a specific value on the contingent nature of the retirement pay; it considered Wife's change of interest in the retirement pay while it also considered the factors that established the spousal support award.

Lott v. Lott
December 12, 2023
City of Newport News
Record No. 1322-22-1
Unpublished
Affirmed

Husband and Wife married in 1996 and separated in 2013 with the intent to divorce. Husband served in the Navy before and during the marriage. He was honorably discharged in 2014 due to a service-connected disability. In 2014, the parties entered into a property settlement agreement, where Wife was entitled to 41% of Husband's disposable military retirement pay. The agreement stated, "If the [h]usband is allowed to waive any portion of his retired pay in order to receive disability pay, then the [w]ife's portion of the [h]usband's disposable retired pay shall be computed based on the amount that the [h]usband was to receive before any such waiver was allowed or occurred. The [h]usband shall pay to the [w]ife directly any sums necessary in order that the [w]ife will not suffer any reduction in the amount due to her as a result of the [h]usband's waiver in order to receive disability pay."

In 2015, Husband elected to waive a portion of his retirement pay to receive tax-exempt disability pay he was eligible for. Parties disagreed on the proper classification of the disability pay and whether distribution of the payments to Wife violate federal law. Husband claimed that he had been overpaying Wife through the sharing of his disability pay and due to this, he has paid off all of his spousal support and attorney's fees. Husband wanted to be credited $5,000. The trial court found that most of Husband's pay was "disposable retired pay" under 10 U.S.C. § 1408(a)(4); therefore it is subject to division.

On appeal, COA ruled that the indemnification in the Lotts' agreement should be enforced. *Yourko II* determined that "federal law does not bar courts from upholding [indemnification] agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties." COA mentions that neither the U.S. Supreme Court or Congress has placed limits on how a veteran can use it after it is received. Indemnification provisions in property agreements should be given the same treatment as contracts in general.

In *Howell*, the court was imposing an indemnification agreement upon the parties contrary to federal law, as a court cannot force a veteran to indemnify their ex-spouse for any reduction in the ex-spouse's portion of the veteran's retirement pay due to a waiver. Additionally, the Court never addressed if parties could independently agree to an indemnification provision. In the Lotts' case, the property settlement agreement was nothing more than a privately negotiated agreement which determines how the parties will distribute Husband's disability pay after it is received.

Since the provision caused Husband to make payments to ensure that Wife received full value owed to her under the agreement regardless of the classification of military benefits, the payments by Husband need to be paid directly to Wife, rather than through an agency. The grounds of the decision were not based on the income being divisible and distributable under 10 U.S.C. § 1408, which states that an agency can deliver the payment.

IV. SPOUSAL SUPPORT

Baker v. Baker
March 12, 2024
Record No. 1476-22-1
Gloucester County
Unpublished
Reversed and Remanded

The parties married in 1970 and separated in 2016. In 2018, the parties agreed that Husband would pay Wife $1,700 per month in spousal support, yet this amount and length of payment may change due to changes in material circumstances. Trial court incorporated this agreement into the final divorce decree.

Husband worked in energy management construction for 20 years. As project manager, his responsibilities included climbing, walking, and crawling. He decided to retire because, in his opinion, he was unable to walk around, squat, climb ladders, and bend over. Husband was 70 years old when he retired.

In 2022, Husband moved to reduce or terminate his spousal support because his retirement constituted a material change and his social security benefits was his only source of income. Trial court found that Husband's voluntary retirement was a material change in circumstances; therefore, it considered factors in Code §§ 20-109 and 20-107.1 to determine if the spousal support award should be amended. It decided that reduction or termination of spousal support was unjustified since (1) Husband voluntarily retired to take care of his disabled sister, even though she attended an adult day care five days a week, (2) other than Husband's opinion, there was no evidence that he could no longer perform the duties that his job required, and (3) Husband did not plan for retirement and left his job with no way to pay for his living expenses, spousal support, and his creditors. The trial court imputed to Husband's entire pre-retirement income. Husband appealed.

The standard of review for spousal support cases are fact specific and, in this case, there is no bright-line rule "requiring a payor spouse to forgo retirement in order to maintain support obligations at a pre-retirement level." *Stubblebine v. Stubblebine*, 22 Va. App. 703. However, spouses who are entitled to support "have the right to be maintained in the manner to which they were accustomed during the marriage, but their needs must be

balanced against the other spouse's financial ability to pay." *Id.* "A reduction in income resulting from a voluntary employment decision does not require a corresponding reduction in the payor spouse's support obligations, even if the decision was reasonable and made in good faith." *Id.*

The COA found that the trial court abused its discretion by imputing Husband's entire pre-retirement income, as it placed too much emphasis on the fact that (1) Husband's retirement was voluntary and (2) Husband did not have enough assets to support himself and his new wife post-retirement. First, COA noted that imputing Husband's entire salary of a job that he was increasingly unable to perform ignores the evidence of his changing earning capacity. Therefore, the evidence did not justify the trial court to impute his entire pre-retirement income, but the court could have imputed some of the pre-retirement income. Second, COA noted that the trial court placed all responsibility for retirement planning on Husband by imputing his entire income. Retirement planning is not the responsibility of one spouse. Even though Husband was the breadwinner for the family, Wife was also responsible for decisions within the forty-six-year marriage, including the decision to not adequately plan for retirement.

V. CHILD SUPPORT

Briscoe v. Briscoe
October 17, 2023
Loudoun County
Record No. 1496-22-4
Unpublished
Affirmed

Parties married in 2006 and had one child together. Husband filed for divorce in 2020. In November 2020, parties entered an "Agreed Pendente Lite Child Support Order" and agreed to equally split the child's private school tuition, tutor, and extracurricular activities. In December 2020, the final order of divorce was entered.

In 2021, circuit court entered an order incorporating the parties' custody, visitation and child support award, where the parties agreed to pay half of the child's private school tuition and education costs.

In March 2022, Father filed a motion to modify the custody, visitation and child support award. At the hearing in August 2022, Father testified that he and Mother agreed that the child should attend private school. The tuition was $41,700 per year. Mother contacted the school and told them that she would not pay for half of the tuition. Father could not afford tuition without Mother's contribution. Circuit court ordered Mother to pay half of the educational costs since the parties (1) previously agreed, (2) there is a demonstrated need

that the child attend private school, and (3) the parties have the means to pay. The written order of the change went into effect on September 1, 2022. Mother appealed.

Determination of child support is a discretionary decision by the circuit court. Educational expenses are included in the presumptive amount of child support; however, the court has discretion to deviate from the presumptive support guidelines based on factors in Code § 20-108.1(B) as they affect the obligation of each party, the ability of each part to pay child support, and the best interest of the child. Ordered education expenses is one factor where the court can deviate.

If there is a demonstrated need for the child to attend private school and the parent has the ability to pay, the court can order the parent to pay for it. Factors considered to determine if there is a demonstrated need include the "availability of satisfactory public schools, the child's attendance at private school prior to the separation or divorce, the child's special emotional or physical needs, religious training, and family tradition." *Joynes v. Payne*, 36 Va. App. 401 (2001).

COA found that there was sufficient evidence to deviate from the guidelines as there was testimony of the benefits the child received from the school, the child attended the school since pre-kindergarten, and both parents attended private school. Thus, there was no abuse of discretion in the circuit court's ruling.

Deel v. Schmidt, et al.
January 30, 2024
Record No. 0816-22-3
Buchanan County
Unpublished
Affirmed and Reversed in part

A separation agreement was entered into proactively by father, Deel, and mother, Schmidt, in case the unmarried couple decided to separate. The agreement addressed the distribution of their property and set out the responsibilities of each party regarding the custody, visitation, and child support of their one child. The agreement stated that Father would make child support payments to Mother "in an amount as would be required by Code § 20-108.2" and "until such time as that figure is actually calculated, the Father agrees to make voluntary payments to the Mother for which he will be entitled to a credit against any amount ultimately calculated to be due and owing pursuant to the referenced support guidelines." An acknowledgement that either party may bring the agreement before a court for "confirmation, ratification, or approval" and that the court can incorporate some or all of the agreement, "binding the parties to the fullest extent."

Seven years later, Father petitioned Buchanan County for JDR for custody and visitation. Mother petitioned for child support. Father was to pay $545.51 in prospective child support

and arrearages. The court did not have jurisdiction to resolve disputes regarding the agreement; thus, Mother appealed to the circuit court to have Father (1) pay the sum of his support obligations from the time the separation agreement was entered into in 2012 through 2018, and (2) pay for his portion of their child's uninsured medical expenses and her attorney's fees. Circuit court incorporated the agreement into a court order granting Mother the relief requested. Father was ordered to pay $49,206 in child support arrearages, $1,384.63 in medical expenses, and $18,728.66 in attorney fees.

Father appealed and argued that the circuit court erred by stating the agreement was valid and incorporating it into a court order, stating that: 1) "Code § 20-108.1(B) precludes the award of retroactive child support prior to an existing and pending case in a court of competent jurisdiction" and 2) the court erred in rejecting his res judicata, collateral estoppel, and statute of limitations defenses.

The majority held that the circuit court did not err when incorporating the order. A court is allowed to use its discretion when deciding to incorporate an agreement and in this case, Mother properly filed a motion requisition incorporation, a hearing was held, the agreement was in the best interest of the child, and Father's defenses were inapplicable to the case. However, the COA found that the circuit court could not award arrearages from the period before the Mother's initial filing in 2018. The language of Code § 20-108.1(B) states, "liability for support shall be determined retroactively for the period measured from the date that the proceeding was commenced by the filing of an action with any court . . . ."

Justice Beales dissents in part, disagreeing with the ruling that Mother cannot receive child support prior to the date that she filed suit. Justice Beales argues that although the majority correctly cited Code § 20-108.1(B), which prohibits awarding *statutory* child support retroactively, Mother could receive damages for failure to pay child support as a breach of contract violation. In her complaint, Mother specifically asked for monetary relief for the amounts owed "pursuant to the contract." Additionally, the circuit court's final order from May 4th, 2022 stated, Father "is found to have been in breach of the parties' Agreement."

Justice Causey dissents in part, disagreeing with the ruling that the incorporation of the agreement was valid. Justice Causey argues that Mother's right to bring a breach of contract claim had passed. Code § 59.1-508.5(a) states that a breach of contract claim must occur "within the later of four years after the right of action accrues or one year after the breach was or should have been discovered, but not later than five years after the right of action accrues." Contracts can be set by the parties' terms or statutory terms. In this case, the separation agreement did not specify a period of time that the contract would be valid; therefore, it is governed by the five-year statute of limitations. When Mother filed for enforcement of the agreement, seven years had passed, causing the agreement to be time barred. The circuit court was wrong to treat the agreement as a court order which dates to the original signing of the agreement and therefore, it was wrong to apply a twenty-year statute of limitation.

VI. CUSTODY AND VISITATION

A. GRANDPARENTS

Williams, et. al v. Panter
September 6, 2023
Smyth County
Case No. CJ18CHA62-00 through CJ18CHA73-00
Published
Affirmed

In 2017, Father committed suicide in the presence of Mother. After the incident, the paternal grandparents continued to visit, but Mother and paternal grandparents argued over communications and interactions that were occurring in front of the children. Mother fully stopped the grandparents' visitation with the children. Grandparents sought an award of visitation rights with the children.

Grandparents filed a *de novo* appeal from JDR to Circuit Court. Grandparents made a motion to appoint a guardian *ad litem* and asked for an independent psychological evaluation of the children. The Circuit Court denied the motions and found *inter alia* that there was no proof of harm to the children.

Grandparents renewed the motion for guardian *ad litem* and Mother motioned to dismiss the case based on a lack of jurisdiction. Both were denied and the Circuit Court ruled that it was an undisputed fact that the Mother was a fit parent. Grandparents conceded that they had no evidence to show that not having grandparent visitation would cause harm to the children. However, Grandparents relied on the plain reading of Code § 20-124.2(B2) and argued "such visitation may be awarded under a best interest of the child standard, without imposition of a predicate actual harm standard . . . ."

Grandparent visitation is allowed under Code § 20-124.2(B2) if (1) the court finds by a preponderance of evidence that the child's deceased or incapacitated parent, who is related to the petitioning grandparent, had consented to the child's visitation with the grandparent and (2) if the court finds that such visitation is in the best interest of the child. This subsection is limited to those who seek visitation with their minor grandchild and are parents of that child's deceased or incapacitated parent. The Circuit Court inferred that the legislature intended to exclude the actual harm standard for the subset of grandparents included in its scope; thus, only the best interest of the child standard would apply.

However, the Circuit Court held that applying Code §20-124.2(B2) to this case would be unconstitutional. It reasoned that subsection (B2) violates Mother's fundamental substantive due process rights by allowing visitation to grandparents when there is no

evidence presented indicating harm. After Father's death, Mother vested the liberty interest of a parent in raising her children. Father's presumed preference with whom the children would interact does not diminish Mother's liberty interest in raising the kids. Therefore, in this case, a predicate showing actual harm to the children due to denied grandparent visitation must be the applicable evidentiary standard. This Court did not rule on the constitutionality of Code §20-124.2(B2) on its face, as it can be applied to adjudications between grandparents and guardians of a child other than a fit of surviving parent.

Merlino v. City of Virginia Beach
October 3, 2023
Virginia Beach, Virginia
Record No. 1583-22-1
Unpublished
Affirmed

Father was married to Mother and they had a seven-year-old son together. On February 14, 2017, Father stabbed Mother with a syringe full of cyanide at their home. The maternal grandmother was at the home with the child when it occurred. The child "witnessed . . . mother jumping up and down after being injected with [c]yanide, heard . . . mother's cries for help and witnessed . . . mother suffering from the agonizing and horrific effects of poisoning while waiting for the ambulance." Mother later died in the hospital. Father was charged and convicted of first-degree murder, and received a life sentence with a three-year term of supervision. While he was awaiting trial, he sent encoded messages to people asking for their help to create an alibi and intimidate Mother's family.

The Virginia Beach Department of Human Services petitioned for a preliminary order against Father on the grounds of abuse and neglect. Virginia Beach JDR (1) entered an order stating that Father abused or neglected the child, (2) transferred custody of the child to the maternal grandparents, and (3) entered a permanent protective order on the child's behalf. Father appealed to the circuit court. The circuit court held that since there was evidence that Father attempted to get around supervision and restrictions law enforcement imposed on him to send encoded messages, there was reason to believe that Father would try to get around a restriction to contact his child. The circuit court entered orders identical to Virginia Beach JDR, including the protective order. Father appealed and argued that (1) the child was safe and loved, (2) incarceration of a parent does not render the child automatically abused or neglected, (3) and the child did not meet the definition of abused or neglected.

Code § 16.1-228(1) defines an abused or neglected child as one "[w]hose parents . . . create or inflict, threaten to create or inflict, or allow to be created or inflicted upon such child a physical or mental injury by other than accidental means, or create a substantial risk of death, disfigurement or impairment of bodily or mental functions." "[T]he statutory definitions of an abused or neglected child do not require proof of actual harm or

impairment having been experienced by the child." *Farrell v. Warren County. Department of Social Services,* 59 Va. App. 342 (2012). "[T]he Code contemplates intervention . . . where 'the child would be subjected to an imminent threat to life or health to the extent that severe or irreversible injury would be likely to result if the child were returned to or left in the custody of his parent . . . .'" *Jenkins v. Winchester Department of Social Services*, 12 Va. App. 1178 (1991). The standard for abuse and neglect cases is proof by a preponderance of the evidence.

COA held that the totality of the record shows that the circuit court did not err in finding that the child was abused or neglected. The circuit court did not come to its conclusion based on Father's incarceration, but based on his violent and threatening actions. The court emphasized that the murder of Mother and the attempted intimidation did not suggest that Father valued the child's well-being.

B. MATERIAL CHANGE OF CIRCUMSTANCES

Livingston v. Stark
December 18, 2023
Nineteenth Judicial Circuit of Virginia - Fairfax County
Case No. CL-2019-850
Opinion Letter - Judge Bernhard

Dispute involves Defendant's Motion to Modify the existing custodial schedule to equalize time between parties. The Court ruled that the reasons which the Defendant gave in favor of changing the custodial order were not material changes. The closest reason to a material change was the preference of the child; however, the statute says that child preference is a factor taken into consideration once it is determined that there is a material change and the Court thought it was inconsistent with the statute to use it as a basis for a finding of material change. Court denied the Motion to Modify, Defendant filed a motion to reconsider, and the Court suspended the order from October 26, 2023.

The original custodial schedule stated that the Plaintiff would have the children from 4:00 p.m. Sunday until after school Wednesday. Defendant had the children from after school Wednesday until after school Friday. The parties alternated having the children from after school Friday until Sunday at 4:00 p.m. The October 26th order changed the Sunday transition time to 6:00 p.m. The eldest children testified that they want to equalize time with their parents on Sundays. The reasoning included that it was inconvenient for the children to transfer household on Sunday evenings and that the arrangement was unfair to the Defendant.

The test to determine whether a custodial change should be made, the court must (1) determine if there has been a material change in circumstances stance the most recent custody award and (2) if the change would be in the best interest of the child. If there is no

material change, then custody will not be modified. Material change in circumstances can be "broad enough to include changes involving the children themselves" or "changes relating to the parents and their circumstances." Virginia courts tend to find material change when multiple changes have occurred since the most recent custody award, the change tends to destabilize the previous agreement, and the change is something more than a minor inconvenience.

The 19th Judicial Circuit of Virginia found that a child's preference to custody alone is not enough to constitute a material change in circumstances. There are multiple reasons that it aligns with Virginia Code. If the legislature intended to have a child's preference be a material change, it would not have listed child's preference as one factor in determining the child's best interest. Also, if preference was enough for the first prong, that factor would be enough to satisfy the second. Lastly, the ruling supports the role of the courts in protecting children's interests, as parents may pressure or manipulate children to tell the court that they want to live with a certain parent, and the child might change their mind without thinking about what is best for them. It would "unduly" bring courts into family disputes.

VII. CRIMINAL ISSUES

Creekmore v. Commonwealth
December 19, 2023
Henrico County
Record No. 1487-22-2
Unpublished
Affirmed

Creekmore was a licensed psychologist and started counseling sessions with R.P., a minor. R.P. was recommended to seek therapy after R.P had a panic attack at school. R.P started therapy on March 12, 2020, and during the second or third therapy session, R.P. reported her mother's sexual abuse to Creekmore. The abuse started when she was in elementary school. Creekmore recommended that R.P. defend herself by using her hands to block her mother and suggested that she read "Courage to Heal." R.P. followed the advice, yet the abuse continued. Creekmore then recommended group therapy with R.P.'s parents. Only her father attended the last two sessions and stated that having the mother attend would disrupt the home. R.P.'s father had witnessed the abuse and made it clear that he would not involve himself to help stop the abuse. R.P.'s last therapy session was on April 14, 2020.

A month after R.P.'s last therapy session, Child Protective Services (CPS) received an anonymous tip regarding the abuse R.P was enduring. That same day, an investigator went to R.P's home and removed her from the home. Creekmore was subpoenaed by CPS to be a witness in a protective order hearing. After outlining R.P.'s treatment plan to the

investigator, Creekmore was charged and convicted of violating Code § 18.2-371 for contributing to the delinquency of a minor. She appealed.

Code § 18.2-371 states that an adult who "willfully contributes to, encourages, or causes any act, omission, or condition that renders a child delinquent, in need of services, . . . or abused or neglected" is guilty of a Class 1 misdemeanor. Creekmore argued: 1) failing to report is not an overt act that "contributed, encouraged, or caused the child to be abused or neglected," 2) the word "omission" only refers to an omission by a third party, and 3) the mandatory reporting statute only subjected Creekmore to a fine; therefore, the legislature did not intend for this conduct to be criminalized.

Under Code § 16.1-228(4), an abused or neglected child is defined as one "[w]hose parent[] . . . commits or allows to be committed any act of sexual exploitation or any sexual act upon the child in violation of the law." COA stated that R.P. fits this definition since the abuse by her mother had occurred for years, the father was sometimes present during the abuse, and the father did not want to be involved in trying to stop the abuse.

Instead of reporting, Creekmore's advice to R.P. caused the child to remain in her home, where the abuse and neglect continued.

In regards to the term "omission," Creekmore's argument that the term only refers to third parties is not included in the statute. Black's Law Dictionary defined "omission" as a "neglect of duty." *Omission, Black's Law Dictionary* (11th ed. 2019); *Omission, Webster's Third New International Dictionary (2002).* COA noted that Creekmore did not dispute that she was required by statute to report suspected abuse or neglect, nor did she dispute that she neglected her duty to report when she failed to report the suspected abuse.

Lastly, regarding the issue of the legislature's intent to criminalize this conduct, the COA noted that the Supreme Court of the United States and the Supreme Court of Virginia "allows for conduct to be prosecuted when it violates more than one statute." *United States v. Batchelder,* 442 U.S. 114 (1979), stated, "when an act violated more than one criminal stature, the Government may prosecute[] under either so long as it does not discriminate against any class of defendants." The COA explains that Creekmore is facing prosecution due to her violation of statutory duty, her specific advice, and her conduct during treatment. Therefore, the COA affirmed the conviction.

Yellock v. Commonwealth of Virginia
January 30, 2024
Record No. 1936-22-3
City of Martinsville
Published
Reversed and Remanded

Appellant, Yellock, got into an altercation with his girlfriend. Thomas, while at a gas station, where he placed his hand on her head and jerked her head back. He was convicted of domestic assault and battery in violation of Code § 18.2-57.2. Yellock argues that the evidence failed to prove that the victim was a "family or household member," which is required to sustain a conviction under the Code section.

The COA must find whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Code § 18.2-57.2 states, "any person who commits assault and battery against a family or household member is guilty of a Class 1 misdemeanor." The statute's definition of "family or household member" includes: "any individual who cohabits or who, within the previous 12 months, cohabited with the person." The COA relied on *Rickman v. Commonwealth* to determine whether cohabitation was established. Factors include: (1) sharing of familial or financial responsibilities, which may include payment of utilities, shelter, food, or having commingled assets, (2) consortium, which may include conjugal relations, fidelity, affection, and cooperation, and (3) length and continuity of the relationship.

COA held that there is no evidence sufficient of cohabitation. First, there is no evidence on the record that established that Yellock and Thomas shared familial or financial resources. The Court cannot infer the sharing of familial or financial resources simply because Yellock and Thomas were in a relationship that involved touching on the date of the incident. Even at the time of the altercation, if the couple was sharing gas expenses, it does not meet the *Rickman* standard.

The COA also held that there was no evidence of consortium or a lengthy relationship. Beyond the facts that Yellock and Thomas were a couple and there was touching on the day of the incident, there is nothing to suggest that the relationship involved mutual respect, fidelity, or a very close partnership. Additionally, there was no testimony to explain the length of the relationship. An example of evidence that would meet the

Rickman standard would be the defendant giving the victim grocery money, desired to contribute to household expenses, had a sexual relationship with the victim, and lived with the victim for three months before the incident.

Therefore, the COA reversed Yellock's conviction for domestic assault and battery, and remanded the matter to the trial court to conduct a new trial on the lesser-included offense of simple assault and battery.

VIII. MISCELLANEOUS

A. In Vitro Fertilization (IVF)

LePage v. Mobile Infirmary Clinic
February 16, 2024
Supreme Court of Alabama

This Court has long held that unborn children are "children" for purposes of Alabama's Wrongful Death of a Minor Act, a statute that allows parents of a deceased child to recover punitive damages for their child's death. The Wrongful Death of a Minor Act applies to all unborn children, regardless of their location and including unborn children who are located outside of a biological uterus at the time they are killed.

Update on Virginia Family Law

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PROCEDURE

Sultan v. Malik

- Husband claimed that during their divorce and custody proceedings, Wife, various Commonwealth judges, ex-wife's attorneys, and expert witness violated his Fourteenth Amendment rights. Additionally, Husband claimed perjury and alleged theory of respondeat superior.

- The Court stated that it did not have subject matter jurisdiction to hear this case because the Husband sought to re-litigate his divorce and custody proceedings in federal court.

- Declaratory relief is barred under the Rooker-Feldman doctrine when the party is functionally asking a federal court to review a state court judgment.

Procedure - Jurisdiction

October 30, 2023

Eastern District of Virginia

No. 1:23-cv-00457

Published

Paxton v. Paxton

- Husband and his attorney missed the presentment hearing for the final divorce decree after many attempts to set a date for the hearing. The circuit court dispensed the defendant's endorsement requirements under Rule 1:13.

- Husband filed a "Motion to Suspend or Vacate Final Decree of Divorce" arguing that the decree was entered in violation of Rule 1:12 and Rule 1:13 with regard to service and notice. The circuit court denied Husband's motion and he appealed.

- COA found that (1) Husband had actual notice of the presentment hearing through his counsel's communications with the judicial assistant and opposing counsel, (2) counsel acknowledged that his email was correct, and (3) that he received multiple emails notifying him of the date and time of the hearing.

- Counsel's argument that he did not see a new email pop up is not a sufficient reason for the sent emails to not qualify as actual notice.

Procedure – Notice

September 26, 2023

Bedford County

Record No. 1494-22-3

Unpublished

Affirmed

Morris v. Commonwealth

- There was a physical altercation between patient and worker at a group home, which was caught on the surveillance camera.
- The director of the group home recorded the surveillance videos on her phone, taking a "recording of a recording."
- Morris argued that the videos lacked sufficient authentication since there were still foundational questions, but the trial court ruled that the director established herself as a "witness qualified to testify on authentication matters."
- On appeal, Morris argued that since Ducharme did not create the original surveillance videos and the time stamp discrepancies rendered the surveillance videos "demonstrably unreliable," the Commonwealth did not lay a sufficient foundation to admit "the subject matter of the recordings."
- COA found that although Ducharme was not the primary source of the surveillance video, she was the primary source that took a "recording of a recording" on her cell phone. Since she created these, she authenticated them.
- COA held that the authentication requirement of Rule 2:901 was satisfied.

Procedure – Authentication

October 3, 2023

Prince William County

Record No. 1075-22-4

Unpublished

Affirmed

EQUITABLE DISTRIBUTION

Scott v. Scott

- During divorce proceedings, parties disputed the distribution of the marital home
- After expert testimony, the circuit court concluded that the property was valued at $365,000 and ordered Husband to remit $47,500 to Wife for her marital share of the equity in the residence. Wife appealed.
- Wife argued that the court erred in assigning the property value at $365,000, erred in calculating the parties shares in the property, and failed to quantify the values of the separate share and marital share of the property.
- COA found that the circuit court was given a range of values by the experts' testimonies and the evidence supports the inference that the value of the property was within this range.
- Virginia law does not presume that there will be equal distribution of marital assets. The circuit court found that Husband earned the majority of the household income and Husband's income greatly contributed to the acquisition and maintenance of the marital home more than Wife's.
- COA found that circuit court did not abuse its discretion in its division of the equity.

Equitable Distribution:

Valuation of Property

October 10, 2023

Culpeper County

Record No. 1338-22-4

Unpublished

Affirmed

Martin v. Al-Samman

- Parties executed a separation agreement which stated that Wife solely financed and purchased a piece of property. Wife filed for divorce and moved to incorporate the separation agreement into a final decree of divorce.

- Husband challenged that the property was bought using only Wife's resources, arguing that marital resources were used. Wife testified that her parents gifted her $40,000 in cash gifts for the down payment and she put the cash in a separate bank account from Husband. She never transferred money into their marital accounts. The circuit court accepted Wife's account and granted her request to incorporate the separation agreement into a final decree of divorce. Husband appealed.

- "Marital property settlements entered into by competent parties upon valid consideration for lawful purposes are favored in the law and such will be enforced unless their illegality is clear and certain."

- COA ruled the separation agreement is valid.

Equitable Distribution:

Distribution of Property

September 26, 2023

Albemarle County

Record No. 1109-18-2

Unpublished

Affirmed

Murphy v. Murphy

- During the parties' divorce, Wife sold the home for a higher amount than the sale price.

- The final divorce decree stated the exact dollar amount wife and husband would receive if the house was sold at the original price.
- Parties filed a joint motion to determine the $57,872.79 of the excess marital equity from the sale.

- Circuit court ruled that the final decree fully disposed of the marital home and Wife was entitled to the excess equity since she could have been faced with a deficit and the decree was "silent as to how any excess or deficiency would be addressed."

- COA affirmed the circuit court's ruling and noted that since "determining who has legal title . . . has little or no bearing upon how the value of an asset is to be equitably distributed . . . ," it does not matter if Wife and Husband owned the property as tenants in common.

Equitable Distribution:

Distribution of Property

December 12, 2023

Henrico County

Record No. 1211-22-2

Unpublished

Affirmed

Leo v. Leo

- Husband appealed the divorce order and the retirement order, which required (1) Husband to indemnify Wife for waived retirement pay if he elected for disability and (2) prohibited Husband from "making any elections . . . that in any way adversely affects the existence or amount of his Military Retired Pay. . . ."

- COA held that the provisions in the retirement order violated the United States Supreme Court's holding in *Howell v. Howell*. On remand, the circuit court recalculated the spousal support amount and awarded Wife $4,100 per month for ten years. Husband appealed.

- Husband argued that the circuit court erred in determining the amount of spousal support because it failed to consider all of Wife's income and the amount should be limited to her actual need. He argued that the circuit court did not properly consider the first factor of Code 20-107.1(E).

- To correct the order, the circuit court struck the indemnification clause and the prohibition against Husband making any election that adversely affected his military retirement pay. The circuit court recognized that the "contingent nature" of the retirement benefit makes Wife significantly vulnerable. Husband appealed again.

- COA found that the circuit court did not err in considering the factors and that it did not abuse discretion when it recalculated the amount of spousal support with the corrected military pay order.

Equitable Distribution:

Military Retirement

October 10, 2023

Loudoun County

Record No. 1402-22-4

Unpublished

Affirmed

Lott v. Lott

- The parties entered into a property settlement agreement: "If the [h]usband is allowed to waive any portion of his retired pay in order to receive disability pay, then the [w]ife's portion of the [h]usband's disposable retired pay shall be computed based on the amount that the [h]usband was to receive before any such waiver was allowed or occurred . . . "
- Husband elected to waive a portion of his retirement pay to receive tax-exempt disability pay he was eligible for. Parties disagreed on the proper classification of the disability pay and whether distribution of the payments to Wife violate federal law.
- Husband claimed that he had been overpaying Wife through the sharing of his disability. The trial court found that most of Husband's pay was "disposable retired pay" under 10 U.S.C. § 1408(a)(4); therefore it was subject to division.
- *Yourko II* determined that "federal law does not bar courts from upholding [indemnification] agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties."
- COA mentions that neither the U.S. Supreme Court or Congress has placed limits on how a veteran can use it after it is received. The property settlement agreement was nothing more than a privately negotiated agreement which determined how the parties will distribute Husband's disability pay after it is received.

Equitable Distribution:

Military Retirement

December 12, 2023

Norfolk

Record No. 1322-22-1

Unpublished

Affirmed

SPOUSAL SUPPORT

Baker v. Baker

- During the separation process, parties agreed that Husband would pay Wife $1,700 per month in spousal support. Trial court incorporated this agreement into the final divorce decree.

- Husband moved to reduce or terminate his spousal support because his retirement constituted a material change and his social security benefits was his only source of income. Husband worked in energy management construction and as project manager, his responsibilities included climbing, walking, and crawling. He decided to retire at 70 years old because, in his opinion, he was unable to walk around, squat, climb ladders, and bend over.

- Trial court found that Husband's voluntary retirement was a material change in circumstances, but a reduction or termination of spousal support was unjustified since (1) Husband voluntarily retired to take care of his disabled sister, (2) there was no evidence that he could no longer perform the duties that his job required, and (3) Husband did not plan for expenses post-retirement. The trial court imputed to Husband's entire pre-retirement income. Husband appealed.

- COA found that the trial court abused its discretion, as there was no evidence that showed the need to impute his *entire* pre-retirement income and the trial court placed all of the retirement planning responsibility on Husband, when ex-Wife was also responsible for retirement planning and decisions.

Spousal Support

March 12, 2024

Record No. 1476-22-1

Gloucester County

Unpublished

Reversed and Remanded

CHILD SUPPORT

Briscoe v. Briscoe

- Parties were married and had one child together. Husband filed for divorce. Parties entered an "Agreed Pendente Lite Child Support Order" and agreed to equally split the child's private school tuition, tutor, and extracurricular activities.
- Circuit court entered an order incorporating the parties' custody, visitation and child support award.
- A year later, Mother contacted the school and told them that she would not pay for half of the tuition. Circuit court ordered Mother to pay half of the educational costs since the parties (1) previously agreed, (2) there is a demonstrated need that the child attend private school, and (3) the parties have the means to pay. Mother appealed.
- Ordered education expenses is one factor where the court can deviate from the presumptive support guidelines based on factors in Code § 20-108.1(B) as they affect the obligation of each party, the ability of each part to pay child support, and the best interest of the child.
- COA found that there was sufficient evidence to deviate from the guidelines as there was testimony of the benefits the child received from the school, the child attended the school since pre-kindergarten, and both parents attended private school.

Child Support

October 17, 2023

Loudoun County

Record No. 1496-22-4

Unpublished

Affirmed

Deel v. Schmidt, et al.

- In dispute over a separation agreement, Mother petitioned to have Father (1) pay the sum of his support obligations from the time the separation agreement was entered into in 2012 through 2018, and (2) pay for his portion of their child's uninsured medical expenses and her attorney's fees. Circuit court incorporated the agreement into a court order granting Mother the relief requested. Circuit Court incorporated the agreement.
- Father appealed and argued that "Code § 20-108.1(B) precludes the award of retroactive child support prior to an existing and pending case in a court of competent jurisdiction."
- COA found that the circuit court could not award arrearages from the period before the Mother's initial filing in 2018. The language of Code § 20-108.1(B) states, "liability for support shall be determined retroactively for the period measured from the date that the proceeding was commenced by the filing of an action with any court . . . ."
- Justice Beales argues that although the majority correctly cited Code § 20-108.1(B), which prohibits awarding *statutory* child support retroactively, Mother could receive damages for failure to pay child support as a breach of contract violation.
- Justice Causey dissents in part, disagreeing with the ruling that the incorporation of the agreement was valid.

Child Support

January 30, 2024

Record No. 0816-22-3

Buchanan County

Unpublished

Affirmed in part

Reversed and remanded in part

CUSTODY AND VISITATION

Williams, et al. v. Panter

- Father committed suicide. The paternal grandparents continued to visit, but Mother and paternal grandparents argued over communications and interactions that were occurring in front of the children. Mother fully stopped the grandparents' visitation with the children.

- Grandparents sought an award of visitation rights. JDR denied it, and grandparents appealed. They argued "such visitation may be awarded under a best interest of the child standard, without imposition of a predicate actual harm standard . . . ."

- Circuit Court held that applying Code §20-124.2(B2) to this case would be unconstitutional, as subsection (B2) violates Mother's fundamental substantive due process rights by allowing visitation to grandparents when there is no evidence presented indicating harm.

- In this case, a predicate showing actual harm to the children due to denied grandparent visitation must be the applicable evidentiary standard.

Custody & Visitation: Grandparents

September 6, 2023

Smyth County

Case No. CJ18CHA62-00 through

CJ18CHA73-00

Published

Affirmed

Merlino v. City of Virginia Beach

- Father stabbed mother with a syringe of cyanide. Mother died. Child witnessed Mother's agonizing suffering from the effects of the poison. Mother died. Father was charged and convicted of first-degree murder and received a life sentence. While imprisoned, he sent encoded messages to people asking for their help to create an alibi and intimidate Mother's family.

- JDR (1) entered an order stating that Father abused or neglected the child, (2) transferred custody of the child to the maternal grandparents, and (3) entered a permanent protective order on the child's behalf. Father appealed to the circuit court. Circuit Court affirmed.

- He appealed to the COA and argued that (1) the child was safe and loved, (2) incarceration of a parent does not render the child automatically abused or neglected, (3) and the child did not meet the definition of abused or neglected.

- Code § 16.1-228(1) defines an abused or neglected child as one "[w]hose parents . . . create or inflict, threaten to create or inflict, or allow to be created or inflicted upon such child a physical or mental injury by other than accidental means, or create a substantial risk of death, disfigurement or impairment of bodily or mental functions."

- COA held that the totality of the record shows that the circuit court did not err. The conclusion was not based on Father's incarceration but based on his violent and threatening actions, suggesting that Father did not value the child's well-being.

Custody & Visitation: Grandparents

October 3, 2023

Virginia Beach, Virginia

Record No. 1583-22-1

Unpublished

Affirmed

Livingston v. Stark

- Defendant wanted to change the custodial schedule. The eldest children testified that they want to equalize time with their parents on Sundays, reasoning that it was inconvenient for the children to transfer household on Sunday evenings and that the arrangement was unfair to the Defendant.

- The court must (1) determine if there has been a material change in circumstances stance the most recent custody award and (2) if the change would be in the best interest of the child. Material change in circumstances can be "broad enough to include changes involving the children themselves" or "changes relating to the parents and their circumstances."

- VA courts typically do not find "minor inconvenience" as a material change. It would "unduly" bring courts into family disputes.

- The 19th Judicial Circuit of Virginia found that a child's preference to custody alone is not enough to constitute a material change in circumstances. If the legislature intended to have a child's preference be a material change, it would not have listed child's preference as one factor in determining the child's best interest.

Custody & Visitation:
Material Change of Circumstance

December 18, 2023

Fairfax County

Case No. CL-2019-850

Opinion Letter - Judge Bernhard

CRIMINAL

Creekmore v. Commonwealth

- Creekmore was a licensed psychologist and conducted counseling sessions with a minor. The sessions exposed ongoing sexual abuse to the minor by Mother. Creekmore never reported the abuse. After being subpoenaed by CPS, Creekmore was charged and convicted of violating Code § 18.2-371 for contributing to the delinquency of a minor.
- She appealed and argued that (1) failing to report is not an overt act that "contributed, encouraged, or caused the child to be abused or neglected," (2) the word "omission" only refers to an omission by a third party, and (3) the mandatory reporting statute only subjected Creekmore to a fine.
- The COA noted that Creekmore's advice caused the child to remain in her home, where the abuse and neglect continued. Also, the term "omission," Creekmore's argument that the term only refers to third parties is not included in the statute.
- COA noted that SCOTUS and the Supreme Court of Virginia "allows for conduct to be prosecuted when it violates more than one statute." Creekmore was facing prosecution due to her violation of statutory duty, her specific advice, and her conduct during treatment.
- COA affirmed the conviction.

Criminal: Reporting Abuse

December 19, 2023

Henrico County

Record No. 1487-22-2

Unpublished

Affirmed

Yellock v. Commonwealth

- Yellock got into an altercation with his girlfriend and the circuit court convicted him of domestic assault and battery in violation of Code § 18.2-57.2. On appeal, he argues that the evidence failed to prove that the victim was a "family or household member."
- Statute defines "family or household member" as "any individual who cohabits or who, within the previous 12 months, cohabited with the person."
- The COA relied on factors from *Rickman v. Commonwealth* to determine whether cohabitation was established, including (1) sharing of familial or financial responsibilities, which may include payment of utilities, shelter, food, or having commingled assets, (2) consortium, which may include conjugal relations, fidelity, affection, and cooperation, and (3) length and continuity of the relationship.
- COA stated that there was no evidence on record supporting cohabitation.
- COA reversed the conviction and remanded it to the circuit court conduct a new trial on the lesser-included offense of simple assault and battery.

Criminal: Domestic Assault & Battery

January 30, 2024

Record No. 1936-22-3

Martinsville

Published

Reversed and Remanded

MISCELLANEOUS

LePage v. Mobile Infirmary Clinic

- Alabama has a Wrongful Death of a Minor Act: a statute that allows parents of a deceased child to recover punitive damages for their child's death.
- The Supreme Court of Alabama has long held that unborn children are "children" for purposes of its Wrongful Death of a Minor Act.
- This Court ruled that the Wrongful Death of a Minor Act applies to all unborn children, regardless of their location, and it includes unborn children who are located outside of a biological uterus at the time they are killed.

Miscellaneous: In Vitro Fertilization

February 16, 2024

Supreme Court of Alabama

LEGISLATIVE UPDATE: 2024 GENERAL ASSEMBLY SESSION

By

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I. IN GENERAL

a. Summary List of 2024 Legislation.

i. Attached at **Appendix, Item 1** is a summary list of bills introduced into the House and Senate and tracked by the Virginia Family Law Coalition. Those bills which failed to advance at some point in the legislative process are noted, but are included for informational purposes. All enacted bills became effective July 1, 2024.

ii. No formal legislative history or formal legislative reports relevant to the bills covered herein were filed in this year's General Assembly session, with the exception of a report filed pursuant to 2023's SB895, discussed further below. The Report is attached at **Appendix, Item 2.**

iii. To obtain a complete history of the development of any bill contained herein, or to view the amendments made to the language of any such bills, refer to the searchable Virginia LIS database at Virginia's Legislative Information System

NOTICE: BILLS SHOWN IN THIS OUTLINE AS HAVING PASSED ARE SUBJECT TO SIGNING BY THE GOVERNOR OR POSSIBLE VETO BY APRIL 8, 2024.

b. General Overview of 2024 Session

i. Over 20 bills touching in some way on the practice of family law were introduced in this session. Certain bills passed both

chambers, only to be vetoed by the Governor, and several remain awaiting his enactment or veto.

ii. Many family-law related bills died at some point in the legislative process, and it is instructive to briefly review some of these, as they have a way of returning in future sessions. All but one of the bills noted below were also introduced in some form in the 2023 session and remain worth watching closely:

1. **HB 890:** As with last year's HB 1493, advocates of a shared parenting presumption in custody cases introduced another bill to create a shared parenting presumption without explicitly stating a presumption. The bill aimed to introduce the following language into the first sentence of Virginia Code 20-124.3: [T]he court shall, upon the request of either party, assure a minor child of frequent and continuing contact with both parents so as to maximize the amount of time the minor child spends with each parent, except in cases where there is abuse, neglect, or other pressing safety concern to the child or one of the parents."

   A plain reading of the proposed statute would result in a 50/50 presumption, as mathematically, that is the only way to maximize time with both parents. This bill returns every year, with additional support from both practitioners and mental health professionals.

   This past session, the bill was tabled with a request of the Family Law Coalition to work with the patron to see if any progress could be made on the issue.

2. **HB 1104:** As with last year's HB 1549, this bill would have permitted surviving parents to sue drunk drivers for child support when the drunk driver's behavior resulted in the wrongful death of a parent. In other words, if Parent A was killed by a drunk driver, the other parent, Parent B, could have sued the drunk driver for child support. The procedural hurdles involved were significant (where would such a suit be brought?) and the

application of the concept would have been extremely problematic. As an example, suppose Parent A, a millionaire executive, was killed by an unemployed drunk driver; whose income would be used for the purpose of running the guideline?

This year, new members of the House Civil Subcommittee relied more heavily on the fact that aggrieved persons could recover lost income with wrongful death actions in tabling the bill.

3. **HB 1311 and SB 519:** These bills would have eliminated the statutory one-year waiting period to file for a divorce on the basis of cruelty, reasonable apprehension of bodily hurt, or desertion. While the bill did not advance, the House Civil Subcommittee informally (at this writing) requested that the Family Law Coalition study the issue and make recommendations. The Senate version of the bill was continued to 2025.

4. **HB 833 and SB 115:** In past sessions, certain interest groups have sought legislation that would prevent a court from denying custodial time to a parent based only on a certain condition, usually physical, such as blindness. In a similar vein, these two bills sought to introduce the concept that no parent could be denied custodial time based on that parent's consumption of cannabis unless it was proven not to be in a child's best interests. HB 833 passed the House with a bipartisan vote and passed the Senate 38-1, only to be vetoed by the Governor on March 9. SB 115 likewise passed both chambers, but as of this writing awaits further action by the Governor. It remains to be seen whether the veto can be overridden.

II. MARRIAGE

a. <u>Minimum Age of Marriage.</u>

i. **HB 994** amended Virginia Code §§ 20-48 and 20-89.1 to remove "emancipated minor" eligibility to marry, and established the age of 18 as the minimum age to marry for all marriages occurring after July 1, 2024. The bill clarified that emancipated minors could still marry if the marriage occurred before July 1, 2024.

b. Marriage Lawful Regardless of Sex, Gender, or Race

i. **HB 174** added a new section to the Virginia Code, § 20-13.2, establishing that, "No person authorized by § 20-14 to issue a marriage license shall deny the issuance of such license to two parties contemplating a lawful marriage on the basis of the sex, gender, or race of such parties. Such lawful marriages shall be recognized in the Commonwealth regardless of the sex, gender, or race of the parties."

The new Code section adds a caveat that, "Religious organizations and members of the clergy acting in their religious capacity shall have the right to refuse to perform any marriage."

III. EQUITABLE DISTRIBUTION

a. None.

IV. DIVORCE

a. None.

V. CHILD SUPPORT

a. Calculation of Support Overages.

i. **HB 784** amends Virginia Code §§ 20-60.3 and 20-107.1 to require that – as with support arrearages – any overpayment of child or spousal support must be calculated and set forth in an order establishing or modifying support.

b. Termination of Temporary Support in Protective Order.

i. Pursuant to Virginia Code § 16.1-279.1, when issuing a protective order, the court is authorized to, among other relief, award temporary child support. **HB 294** amends § 16.1-279.1 to clarify that, "Such temporary child support order shall terminate upon the determination of support pursuant to § 20-108.1 or upon the termination of such protective order, whichever occurs first." This eliminates the need to amend the protective order support award upon an award of child support in a different proceeding.

VI. SPOUSAL SUPPORT

a. Calculation of Support Overages.

i. **HB 784** amends Virginia Code §§ 20-60.3 and 20-107.1 to require that – as with support arrearages – any overpayment of child or spousal support must be calculated and set forth in an order establishing or modifying support.

VII. CUSTODY/VISITATION

a. None.

VIII. ADOPTION/SURROGACY

a. **HB 783** makes various changes to statutes governing parental placement and agency adoptions. The bill makes Virginia Code § 63.2-1201.1 gender neutral, by removing references to "a man and a woman." It authorizes a hospital to release a child to prospective adoptive parents when the birth parent has executed a health care power of attorney. Previously, some hospitals would not release a child for adoption without a court order, which could sometimes take weeks. The bill now permits release with a health care power of attorney.

The bill decreases from 45 to 10 days the time for which a hearing is required to be held upon the filing of a petition for the approval of an entrustment agreement by a local board of social services or a child welfare agency.

IX. GUARDIANS AD LITEM

a. If not vetoed, **HB 893** requires the Judicial Council, in conjunction with the Virginia State Bar and the Virginia Bar Association, to adopt standards for the qualification and performance of attorneys appointed pursuant to § 16.1-266 to represent a parent or guardian of a child when such child is the subject of a "child dependency case." That term includes cases before the juvenile and domestic relations district courts, and the circuit courts on appeal, involving a child who is (a) alleged to have been abused or neglected pursuant to § 16.1-278.2; (b) alleged to be at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in his care pursuant to § 16.1-278.2; (c) the subject of a petition for approval of an entrustment agreement pursuant to § 16.1-277.01; (d) the subject of a petition for relief of custody pursuant to § 16.1-277.02; (e) placed in foster care and is the subject of a foster care or permanency plan filed pursuant to § 16.1-281, 16.1-282, 16.1-282.1, or 16.1-282.2; and (f) the subject of a petition for termination of residual parental rights pursuant to § 16.1-283.

It requires the Judicial Council to maintain a list of attorneys who are qualified to be appointed to represent indigent parents and guardians involved in a child dependency case and make such names available to the courts.

In terms of compensation, the bill states that when the court appoints counsel to represent a parent, guardian, or other adult in a child dependency case, such counsel shall be compensated for his services in an amount not to exceed $330, except that in matters arising under § 16.1-283, such counsel shall be compensated for his services in an amount not to exceed $680.

X. JURISDICTION AND PRACTICE

a. <u>Virginia Military Parents Equal Protection Act.</u>

i. **HB 194** amended sections 20-124.7 and 20-108 to add the Space Force to the listed branches of the U.S. Armed Forces covered by the Virginia Military Parents Equal Protection Act.

b. Appeals of *Pendente Lite* Orders to the Court of Appeals

i. Last year's SB 895, directed "That the Virginia Family Law Coalition (the Coalition) shall conduct a study on appeals of interlocutory decrees or orders involving domestic relations matters in the Commonwealth. The Coalition shall report the findings of such study to the Chairmen of the Senate Committee on the Judiciary and the House Committee for Courts of Justice by October 1, 2024."

The Coalition's study recommended that interlocutory appeals not be permitted as a matter of course in domestic relations cases, but suggested one amendment to Virginia Code § 17.1-405 – which already prohibited interlocutory orders in domestic relations matters under last year's SB 895. It recommended the statute be amended to clarify that the prohibition would not operate to negate Virginia Code § 8.01-675.5, which allows a circuit court to certify an order for interlocutory appeal. **SB 509** added that clarification to the statute.

XI. ATTORNEYS FEES

a. None.

APPENDIX 1

Bill No.	Summary	Status
HB110 (Sullivan - D)	**Surrogacy brokers; repeal of prohibition against.** Repeals the statute prohibiting any person, firm, corporation, partnership, or other entity from accepting compensation for recruiting or procuring surrogates or accepting compensation for otherwise arranging or inducing an intended parent and surrogate to enter into surrogacy contracts. Under current law, any violation of such prohibition is a Class 1 misdemeanor. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB110	**Passed House 50-48, 2/1/24** **Passed Senate 20-18, 2/19/24** **Vetoed by Governor 3/8**
HB 112 (Sullivan - D)	**Adoption; parental placement and agency adoption**. Makes various changes to statutes governing parental placement and agency adoptions. The bill authorizes a hospital to release a child to his adoptive parents when the birth parent has executed a health care power of attorney; provides that when a juvenile and domestic relations district court enters an order waiving the consent of one or both birth parents who have failed, without good cause, to appear at a hearing to execute consent for which they were given proper notice and transferring custody of a child who has been in the physical care and custody of prospective adoptive parents, such adoption shall be considered a parental placement adoption; also allows the juvenile and domestic relations court to find, even if a birth parent has been given proper notice and appears at a hearing to execute consent or withholds consent, that the consent of such birth parent is withheld contrary to the best interest of the child or is unobtainable; clarifies that the effect of an order of the juvenile and domestic relations district court accepting a birth parent's consent and finding that any applicable revocation period has expired is to terminate a consenting birth parent's residual parental rights. The bill provides that a juvenile and domestic relations court shall accept consent from an out-of-state birth parent. Under current law, a juvenile and domestic relations district court is required to request consent from an out-of-state court having jurisdiction over custody matters in the jurisdiction where a birth parent resides when such birth parent does not reside in the Commonwealth. The bill adds licensed child-placing agencies and prospective adoptive parents to those with the authority to consent to surgical and medical treatment of certain minors, subject to certain requirements. The bill decreases from 45 to 10 days the time for which a hearing is required to be held upon the filing of a petition for the approval of an entrustment agreement by a local board of social services or a child welfare agency. The bill also makes technical amendments. https://lis.virginia.gov/cgi-bin/legp604.exe?ses=241&typ=bil&val=HB112	Incorporated with HB783, and reported from House Courts with substitute 1/26
HB174 (Henson - D)	**Marriage lawful regardless of sex, gender, or race of parties; issuance of marriage license.** Provides that no person authorized to issue a marriage license shall deny the	**Passed House 54-40, 1/26/24** **Passed Senate 22-17, 2/19/24** **Approved by Gov. 3/8/24**

	issuance of such license to two parties contemplating a lawful marriage on the basis of the sex, gender, or race of the parties. The bill also requires that such lawful marriages be recognized in the Commonwealth regardless of the sex, gender, or race of the parties. The bill provides that religious organizations or members of the clergy acting in their religious capacity shall have the right to refuse to perform any marriage. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB174	
HB194 (Martinez – D)	**Virginia Military Parents Equal Protection Act; Space Force;** deployment. Adds members of the Space Force to the list of service members included in the definition of deploying parent or guardian for the purposes of the Virginia Military Parents Equal Protection Act. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB194	**Passed House 95-0, 1/26/24** **Passed Senate 39-0, 2/19/24** **Approved by Gov. 3/8/24**
HB244 (Martinez – D)	**Protective order in case of family abuse; parents; minors.** Prohibits the parent of a minor from filing a petition for a family abuse protective order against such minor, provided that the minor has not otherwise been emancipated pursuant to law. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB244	Stricken from docket 1/26
HB273 (Reid – D	**Divorce; cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment; divorce from bed and board.** Eliminates the one-year waiting period for being decreed a divorce on the grounds of cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment by either party. The bill also repeals the provision allowing for a divorce from bed and board on the grounds of cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment. The provisions of the bill apply to suits for divorce filed on or after July 1, 2024. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB273	**Continued to 2025 for Coalition study, 1/26/24**
HB294 (Ballard – D)	**Protective order in case of family abuse; termination of temporary order of child support.** Provides that when a court includes a temporary child support order with the issuance of a protective order in the case of family abuse, such temporary child support order shall terminate when a court determines child support in a subsequent proceeding or when the protective order expires, whichever occurs first. Current law requires that such temporary child support order terminate only after a court determines child support in a subsequent proceeding. This bill is a recommendation of the Judicial Council of Virginia and the Committee on District Courts https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB294	**Passed House 98-0, 1/25/24** **Passed Senate 39-0, 2/19/24** **Approved by Gov. 3/8/24**
HB295 (Martinez – D)	**Protective order in case of family abuse;** parents; minors. Prohibits the parent of a minor from filing a petition for a family abuse protective order against such minor, or from filing as next friend on behalf of his minor child against another of his minor children, provided that the minor has not otherwise been emancipated pursuant to law. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB295	Laid on table in House Courts 7-1 on 1/26/24

HB346 (Green – R)	**Premarital agreements; enforcement.** Provides that a premarital agreement executed on or after July 1, 2024, shall not be enforceable against a person who proves that the other party to the agreement was convicted of criminal sexual assault of the person against whom enforcement is sought or a child of the parties. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB346	Laid on the table in House Courts 8-0 on 1/17/24
HB765 (Delaney – D)	**Termination of parental rights; sexual abuse**; clear and convincing standard; petition filed by other parent. Allows a parent to file a petition to terminate the parental rights of the other parent if the circumstances giving rise to such a petition allege that such parent engaged in conduct prohibited by relevant law relating to sexual abuse, whether or not the parent has been charged with or convicted of the alleged violation, and the child was conceived of such conduct.	Tabled until 2025 – Coalition to work with patron on concerns.
HB766 (Delaney – D)	**Custody and visitation arrangements; best interests of the child; expert testimony; history of abuse.** Requires a court to consider any history of family abuse, sexual abuse, child abuse, or an act of violence, force, or threat in determining best interests of a child for purposes of determining custody or visitation arrangements. Under current law, only such history that occurred no earlier than 10 years prior to the filing of a custody or visitation petition is required to be considered. The bill also requires that any expert evidence from a court-appointed or outside professional relating to any alleged abuse of a child subject to such petition shall only be admitted if such professional possesses demonstrated expertise and clinical experience in working with victims of the type of such abuse alleged that is not solely of a forensic nature. The bill further directs the Office of the Executive Secretary of the Supreme Court of Virginia to provide mandatory judicial training on trauma-informed practices in proceedings involving domestic violence to magistrates and judges of the juvenile domestic relations district courts, general district courts, circuit courts, and the Court of Appeals of Virginia, the justices of the Supreme Court of Virginia, and court personnel.	Tabled until 2025 – Coalition to work with patron on concerns.
HB 783 (Herring – D)	**Adoption; parental placement and agency adoption; discharge of newborn infant.** Authorizes a hospital to release a child to his adoptive parents when the birth parent has executed a health care power of attorney. The bill contains technical amendments.	**Passed House 99-0, 2/1/24** **Passed Senate with Amend, 39-0, 2/19/24** **Passed House with Amend, 99-0** **Approved by Gov. 3/14/24**
HB784 (Herring – D)	**Entry or modification of child and spousal support orders;** determination of support overages. Specifies that all orders directing or modifying the payment of spousal support where there are minor children whom the parties have a mutual duty to support and all orders directing the payment of child support shall contain a statement as to whether support overages exist and certain details about such overages https://lis.virginia.gov/cgi-bin/legp604.exe?ses=241&typ=bil&val=hb784	**Passed House 99-9, 2/1/24** **Passed Senate 39-0, 2/19/24** **Approved by Gov. 3/8/24**
HB833 (Cousins – D)	**Child abuse and neglect; custody and visitation; possession or consumption of authorized substances.** Provides that a child shall not be considered an abused or neglected child, and no person shall be denied custody or visitation of a child,	**Passed House 56-43, 2/1/24** **Passed Senate 38-1, 2/19/24** **Vetoed by Gov. 3/8/24**

	based only on the fact that the child's parent or other person responsible for his care, or the person petitioning for custody or visitation of the child, possessed or consumed legally authorized substances. The bill directs the Board of Social Services to amend its regulations, guidance documents, and other instructional materials to ensure that such regulations, documents, and materials comply with, and that investigations and family assessments are conducted by local departments of social services in accordance with, the provisions of the bill. This bill is identical to SB 115.	
HB890 (Early – R)	**Best interests of the child; assuring frequent and continuing contact with both parents.** Provides that, in determining the best interests of a child for purposes of custody and parenting time arrangements, upon request of either party, the court shall assure a minor child of frequent and continuing contact with both parents so as to maximize the amount of time the minor child spends with each parent. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB890	Tabled until 2025 – Coalition to work with patron on concerns.
HB1104 (Walker – R)	**Wrongful death; death of parent or guardian of child resulting from driving under the influence; child support.** t Provides that in any action for death by wrongful act where the defendant, as a result of driving a motor vehicle or operating a watercraft under the influence, unintentionally caused the death of another person who was the parent or legal guardian of a child, the person who has custody of such child may petition the court to order that the defendant pay child support. https://lis.virginia.gov/cgi-bin/legp604.exe?ses=241&typ=bil&val=hb1104	Laid on table 6-2, 1/29/24
HB1129 (McQuinn – D)	**Grandparent; petition for visitation.** Provides that in any case or proceeding in which a grandparent has petitioned the court for visitation with a minor grandchild, the court may consider whether (i) the marriage of the parents of such child has been dissolved, (ii) a parent of the child has abandoned such child, (iii) the child was born while the parents were not married, or (iv) a parent of the child has prevented the grandparent from visitation at any hearing in such a case or proceeding held to determine the best interest of the child. https://lis.virginia.gov/cgi-bin/legp604.exe?ses=241&typ=bil&val=hb1129	Continued to 2025, 1/31/24
HB1144 (Cordoza – R)	**Children alleged to be abused or neglected; preliminary removal hearing; appointment of counsel for parent of such child.** Provides that at a preliminary removal hearing in cases in which a child is alleged to have been abused or neglected, the court shall appoint an attorney-at-law to represent such child's parent, guardian, or other adult standing in loco parentis if the court determines that such parent, guardian, or other adult standing in loco parentis is indigent, unless he has waived his right to representation or otherwise employed counsel. Under current law, any such appointment is made at an adjudicatory hearing on such removal after a preliminary removal order is issued. https://lis.virginia.gov/cgi-bin/legp604.exe?241+mbr+H337	Laid on table in House Courts 5-3, 1/31/24

HB1311 (Clark – D)	**Divorce; cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment**; divorce from bed and board. Eliminates the one-year waiting period for being decreed a divorce on the grounds of cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment by either party. The bill also repeals the provision allowing for a divorce from bed and board on the grounds of cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment. The provisions of the bill apply to suits for divorce filed on or after July 1, 2024. https://lis.virginia.gov/cgi-bin/legp604.exe?ses=241&typ=bil&val=hb1311	Continued to 2025 for Coalition study
HB1481 (Freitas – R)	**Visitation; petition of grandparent.** Removes the provision providing that, in any case or proceeding in which a grandparent has petitioned the court for visitation with a minor grandchild, and a natural or adoptive parent of the minor grandchild is deceased or incapacitated, the grandparent who is related to such deceased or incapacitated parent shall be permitted to introduce evidence of such parent's consent to visitation with the grandparent, in accordance with the rules of evidence and that, if the parent's consent is proven by a preponderance of the evidence, the court may then determine if grandparent visitation is in the best interest of the minor grandchild.	Continued to 2025 in House Courts
SB101 (Ebbin – D)	**Marriage lawful regardless of sex, gender, or race of parties; issuance of marriage license.** Provides that no person authorized to issue a marriage license shall deny the issuance of such license to two parties contemplating a lawful marriage on the basis of the sex, gender, or race of the parties. The bill also requires that such lawful marriages be recognized in the Commonwealth regardless of the sex, gender, or race of the parties. The bill provides that religious organizations or members of the clergy acting in their religious capacity shall have the right to refuse to perform any marriage. https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+SB101	**Passed Senate 22-18, 2/13/24** **Passed House 58-42, 2/21/24** **Gov. Action deadline 4/8/24**
SB115 (Lucas – D)	**Child abuse and neglect; custody and visitation; possession or consumption of authorized substances.** Provides that a child shall not be considered an abused or neglected child, and no person shall be denied custody or visitation of a child, based only on the fact that the child's parent or other person responsible for his care, or the person petitioning for custody or visitation of the child, possessed or consumed legally authorized substances. The bill directs the Board of Social Services to amend its regulations, guidance documents, and other instructional materials to ensure that such regulations, documents, and materials comply with, and that investigations and family assessments are conducted by local departments of social services in accordance with, the provisions of the bill.	**Passed Senate 40-0, 2/9/24** **Passed House 54-45, 2/21/24** **Gov. Action deadline 4/8/24**
SB 502 (Surovell – D)	**Petitions in juvenile and domestic relations district court; parents; minors.** Prohibits the parent of a minor from filing a petition for a family abuse protective order against such minor, provided that the minor has not otherwise been emancipated pursuant to law. The bill also authorizes the parent, guardian,	**Passed Senate 25-15, 2/13/24** **Passed House with substitute, 53-44, 2/23/24** **Fails to pass in Senate 3/9/24**

	or other person standing in loco parentis of a minor to file a petition for a child in need of services or in need of supervision with the clerk of the juvenile and domestic relations district court if an intake officer refuses to file such petition. Under current law, the decision by an intake officer to file such petition is final. https://lis.virginia.gov/cgi-bin/legp604.exe?ses=241&typ=bil&val=sb502	
SB 509 (Surovell – D)	**Court of Appeals; appeal of interlocutory orders.** Provides that certain interlocutory orders shall not be appealable to the Court of Appeals unless the circuit court grants a party's motion to certify such order for interlocutory appeal.	**Passed Senate 40-0, 1/30/24** **Passed House 100-0, 2/21/24** **Gov. Action Deadline 4/8/24**
SB519 (Graves – D)	**Grounds for divorce;** cruelty, abuse, desertion, or abandonment; waiting period. Eliminates the one-year waiting period for a divorce to be decreed on the grounds of cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment.	Continued to 2025

VIRGINIA FAMILY LAW COALITION

REPORT OF SB895 STUDY COMMITTEE ON APPEALS OF INTERLOCUTORY ORDERS IN DOMESTIC RELATIONS CASES

October 10, 2023

COMMITTEE MEMBERS: **Lawrence Diehl, Esq., Chair**
Kenneth Murov, Esq.
Julie Gerock, Esq.
Melanie Rice, Esq.

Consultants: **Megan Scanlon, Chief Deputy Clerk, Virginia Court of Appeals**
Senator Scott Surovell
Hon. Tanya Bullock, Judge, Virginia Beach Circuit Court
Hon. Penney Azcarate, Chief Judge, Fairfax Circuit Court

SB895:

This bill, enacted effective April 12, 2023, included a directive in paragraph (2) that the Virginia Family Law Coalition (the Coalition) conduct a study on appeals of interlocutory decrees or orders involving domestic relations matters in the Commonwealth. A committee of Coalition members was selected by Coalition Chairman Daniel L. Gray to perform the study, and the committee consulted with others that would have an interest on the issue. Thus, two circuit court judges, the Chief Deputy Clerk of the Virginia Court of Appeals, and the patron of SB895, were also consulted for their input. This study and report of the Coalition is being made pursuant to the directive of SB895.

GENERAL BACKGROUND AND HISTORY OF ISSUE:

Prior to January 1, 2022, **Va. Code Ann. §17.1-405** did not permit an appeal of interlocutory orders entered in most domestic relations cases, including orders relating to divorces, affirmance or annulments of marriages, custody of minor children, spousal and child support, control or disposition of a minor child, or any other matters arising out of Titles 16.1or 20. Parties, attorneys and courts in Virginia have long relied on this arrangement prior to January 1, 2022.

Effective January 1, 2022, the jurisdiction of the Court of Appeals was expanded to include most final orders in any civil matter. However, when the original legislation was passed, and through an oversight noted by the Boyd-Graves Conference, appeals of interlocutory orders relating to such issues as injunctions were omitted from the prior petitions for appeal that were permitted to the Virginia Supreme Court in the discretion of said Court. That omission was remedied by an amendment to §17.1-405 with an expedited effective date of April 27, 2022, which permitted the appeal of interlocutory orders as a matter of right to the Court of Appeals in matters involving an equitable claim in which the order (i) required money to be paid or the possession or title of property to be changed or (ii) adjudicated the principles of a cause. This amendment resulted in the arguable ability to appeal any interlocutory order in a domestic relations case, such as temporary orders of custody and support. Such interlocutory appeals would contradict the long-standing statute preventing such appeals. No other state had an unlimited ability to appeal, as a matter of right, interlocutory orders which would arguably apply to domestic relations orders, such as orders for spousal or child support, orders providing for the exclusive use of a marital residence, or orders relating to the use or ownership of property.

There arose a concern that an unlimited ability to appeal such temporary orders could result in a flood of appeals in divorce actions of temporary or *pendente lite* orders never seen in Virginia jurisprudence. There was a further concern that such appeals would be abused by angry or litigious spouses, which would effectively delay the conclusion of divorce actions; during the normal 9-12 month time period for such appeals a trial court loses jurisdiction over the case except for enforcement of its orders or other limited matters.

In order to remedy this oversight in prior legislation, SB895 was enacted with an emergency enactment date of April 12, 2023, effectively preventing appeals of interlocutory orders in domestic relations cases and reinstating the pre-January 1, 2022 law on the issue. The bill added to the list of nonappealable cases protective orders issued by a circuit court unless they are final.

Subsequent to the enactment of SB895, the Virginia Court of Appeals, in the case of Choi v, Choi, Record No. 0727-22-4, ___ Va. App. ___, (Va. Ct. App. 8/1/2023), citing other authorities, held that the amendments of SB895 were procedural in nature and applicable retroactively to the date of the 2022 amendments. Thus, the attempted appeal in Choi of an interlocutory spousal support order entered in a circuit court during a time period which arguably would have permitted such appeals, was dismissed for lack of jurisdiction, since SB895 prevented such appeals in domestic relations cases by its retroactive application.

However, the issue of whether Virginia should change its long-standing law and permit appeals of interlocutory orders, such as *pendente lite* custody orders, child or spousal support orders, use of a residence or other temporary orders in domestic relations cases, was the focus of SB895's request to the Coalition.

CURRENT VIRGINIA LAW ON THE ISSUE:

As stated above, based on the current status of **Va. Code §17.1-405(B)**, no appeal of interlocutory orders entered in the list of domestic relations issues set forth in the statute is now permitted.

As a result of the request of the patron of SB895, Sen. Scott Surovell, and his general concern that there do occur, on limited occasions, the entry of temporary orders that are either unreasonable or would cause irreparable damage to a party for which no other remedy exists, the study of this issue was agreed to by the Virginia Family Law Coalition.

It should be noted, consistent with many other states reviewed in this study, that **Va. Code Ann. §8.01-675.5** does permit the appeal of interlocutory orders in civil matters where, prior to the commencement of trial, a circuit court has entered an order not otherwise appealable. A party may request the circuit court to certify such order for interlocutory appeal. The motion must set forth a concise analysis of the rules, statutes or cases believed to be determinative of the issues, and request the trial judge to certify in writing that the order involves a question of law to which (i) there is substantial ground of difference of opinion, (ii) there is no clear, controlling precedent on point with decisions of the Supreme Court of Virginia or the Court of Appeals, (iii) determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) it is in the parties' best interests to seek an interlocutory appeal. If the request for certification is opposed, the issue can be briefed in accordance with Supreme Court Rules. If the Court of Appeals determines that the issue has "sufficient merit," it may in its discretion permit the appeal to be taken on the interlocutory order. Subsection (C) clarifies that no petition filed under this statute shall stay the trial court proceedings unless the circuit court or appellate court orders a stay upon finding that the petition for appeal could be dispositive of the entire case, or there exists good cause, other than the pending petition or appeal, to stay the proceedings.

As a further general comment on §8.01-675.5, Mr. Diehl- committee chair- as prior author of the treatise on Virginia Family Law for over 25 years, noted that no reported or unpublished case appears to have ever been

issued in Virginia arising out of this statute which is limited to issues of questions of law. The general types of temporary orders of child custody, support or other standard temporary orders entered in divorce cases are not subject to this statute.

However, the committee noted that there is a potential technical conflict between Va. Code Ann. §17.1-405(B) which now prevents any interlocutory appeals in domestic relations cases, and Va. Code Ann. §8.01-675.5 which permits interlocutory appeals relating to the resolution of legal issues. The committee recommended the continued potential application of §8.01-675.5 to domestic relation cases. **To avoid any potential issue of a conflict between the statutes, the committee recommends the enactment of a technical amendment to §17.1-405(B) as follows: "(B) Except as provided in Va. Code Ann. §8.01-675.5, … [and continuing the current language of §17.1-405(B)]."**

PROCEDURES IN PERFORMING STUDY AND MAKING RECOMMENDATIONS BY THE COMMITTEE AND COALITION:

To review the status of interlocutory orders in domestic relations cases in other states, Mr. Diehl performed an extensive research review of all other state statutes or rules on the issue. A summary of the statutes or rules applicable to interlocutory orders for all 50 states is attached to this report as "Exhibit A." This summary was furnished to all committee members for their review and comments. Initial memorandums summarizing and categorizing these statutes and the approaches taken by other states, along with comments on problematic issues in states approving some limited degree of appeals of interlocutory orders in domestic relations cases was also provided to the committee.

A Zoom call of all committee members and consultants was held on September 8, 2023. A detailed discussion of the pros and cons of permitting appeals of interlocutory orders in domestic relations cases was performed. As a result of this committee meeting, and for the more specific reasons set forth at the end of this study and report, **it was the unanimous recommendation that the Coalition report that there should be no appeals of interlocutory or *pendente lite* orders in domestic relations cases in Virginia and that Va. Code Ann. §17.1-405(B) should not be amended to permit such appeals, except to enact the technical amendment stated above to permit interlocutory appeals of legal issues pursuant to Va. Code Ann. §8.01-675.5.**

SUMMARY OF STATE STATUTES OR RULES ON INTERLOCUTORY ORDER APPEALS: GENERALLY

"Exhibit A", attached, is a summary of the rules or statutes of the 50 states relating to appeals of interlocutory orders. Most approaches or rules in other states, except as hereinafter noted, are not specific as to interlocutory orders entered in domestic relations cases. The approach taken was to review each state and provide a summary of the key parts of the rules or statutes that still could apply to domestic relations cases, even though the authority is applicable to civil cases generally. An attempt to review the most recent authorities of each state was made, although it is possible updates might have been enacted. For purposes of this study, however, the approaches noted should be reasonably accurate to provide the study committee with a review of how these issues are handled in other states. Since the actual timing of the notice of any appeal, the manner in which the appeal issue is considered, and the specific appellate rules and procedures vary from state to state, this summary merely focuses on the substantive issues permitted for such an appeal by other states.

Final Orders: It should be initially noted that all states permit appellate review of final orders entered in most civil cases. While the language or approach of such appeals varies, to the extent the state summaries do not specifically cite or refer to the general rule of finality for appeal purposes, it can be assumed such appeals are permitted. Of course, what is a final order for each state depends on each state's developed case law, but

since that is not the focus of this study, a further analysis of such law is unnecessary. In Virginia, even though in domestic relations cases a particular issue, such as custody, might be finalized as to that specific issue by a court order, the current law is clear that until there is a final order disposing of all issues, including attorney's fees, no appeal of what would otherwise be a final order on that issue is permitted. There must be a final order disposing of all issues. See, eg. Wells v. Wells, 29 Va. App. 82, 509 S.E.2d 549 (1999); Prizza v. Prizza, 45 Va. App. 280, 610 S.E.2d 326 (2005); Mina v. Mina, 45 Va. App. 215, 609 S.E.2d 622 (2005) (attorney's fees reserved in final decree- not final for appeal purposes until fee issue resolved).

This latter state of law is cited as being relevant to some approaches taken by other states that will be hereinafter cited in this summary where such final orders on some core issue are appealable even though not all other issues have been finalized.

Appeal of Interlocutory Orders Not Related or Applicable to Domestic Relations Orders: As shown by "Exhibit A," most states permit interlocutory appeals of certain specific orders, usually only with permission granted by the appellate court and not as an appeal as a matter of right. Generally as shown, but not relevant to the study issue, appeals by permission are provided for such temporary orders as the granting or denying of an injunction or the denial of the dissolution of an injunction or modification of an injunction; the granting of a new trial; motions related to the appointment or accounting of receivers; temporary orders in partition suits; orders granting summary judgments; temporary orders of certain administrative agencies; or other areas of the law not related to domestic relations. While the language of each state varies, as do the procedures for their appeals, such interlocutory order authority is widespread and the majority of states allow these appeals, but by the discretion of the appellate court in granting them. Since these types of appeals are not related to the issue before the study committee, many of these rules or statutes have been noted in the state summaries, but no further analysis is really needed since they do not apply to domestic relations temporary orders.

It should be noted that **Va. Code Ann. §17.1-405(A)(5)**, except for the domestic relations orders listed in 17.1-405(B), and consistent with some other states, allows an appeal of an interlocutory order involving an equitable claim in which order (i) requires money to be paid or the possession or title of property to be changed or (ii) adjudicates the principles of a cause. Further, **Va. Code Ann. §8.01-626** permits a petition for appeal to be filed with the Virginia Supreme Court where a circuit court grants a preliminary injunction, refuses an injunction or dissolves a granted injunction. The petition is reviewed by a 3-judge panel and its granting is within the discretion of the Supreme Court. Again, this is consistent with the cited statutes of other states dealing with injunctions.

SUMMARY OF STATE STATUTES OR RULES ON INTERLOCUTORY ORDER APPEALS: APPLICABLE TO DOMESTIC RELATIONS CASES.

There appear to be two types of rules or statutes that other states use that are or may be applicable to interlocutory orders entered in domestic relations cases. First, there are many states that have general statutes or rules applicable to any civil appeal, usually requiring the leave of the appellate court and in many cases limited to issues of issues of law or affecting the substantial rights of a party. Second, there are a limited number of states that have rules of interlocutory appeals that are specific to domestic relations cases, or specific types of temporary orders entered in cases, such as custody matters.

I. STATUTES OR RULES APPLYING *GENERALLY* TO CIVIL CASES, INCLUDING DOMESTIC RELATIONS CASES:

A. APPEALS OF INTERLOCUTORY ORDERS WHERE THERE IS A MATERIAL QUESTION OF LAW, WHICH COULD BE DISPOSITIVE OF THE CASE.

Approximately 19 states provide general authority, which would arguably apply to and include domestic relations cases, where the order appealed involves a controlling question of law where there is a substantial difference of opinion on the issue, and an immediate appeal would materially advance the ultimate determination of the litigation and avoid protracted and expensive litigation. While the specific language for such authority varies from state to state, most rules or statutes provide that the petition may be filed by a party, or by the trial court itself, or by a party with a required certification or joining of the trial court to the interlocutory order requesting such question for consideration by the appellate court. Generally, these statutes are not appeals as of right, but may be considered and accepted in the discretion of the appellate court.

Virginia has such a statute - **Va. Code Ann. §8.01-675.5** - but as noted above, this statute has apparently never been used as a method to resolve disputed questions of law in domestic relations cases. As stated above in this report, a technical amendment to Va. Code Ann. §17.1-405(B) should be enacted to avoid any potential conflict between this statute and the authorization of interlocutory appeals relating to the resolution of legal issues pursuant to §8.01-675.5.

States containing such authority include Alabama, Delaware (substantial issue of material importance), Hawaii, Idaho, Illinois, Indiana, Kansas, Mississippi, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Tennessee, Utah, Vermont (all parties must agree and trial court must sign the order), Virginia, Washington, Wisconsin and Wyoming.

B. APPEALS OF INTERLOCUTORY ORDERS THAT COULD SUBSTANTIALLY OR IRREPARABLY DAMAGE THE PETITIONER.

Some states provide generally, and not specific to domestic relations cases, for an appeal of an interlocutory order where the appellant will suffer "substantial" expense, injury or damage if the order is erroneous or the order affects a "substantial right" of a party.

Such states include Indiana, Iowa (order affecting the substantial rights affected by the order), New Hampshire (appeal of interlocutory order in order to protect a party from "substantial or irreparable injury"), North Carolina (trial court must certify the order for immediate appeal and the order affects the "substantial right of the appellant that would be lost without immediate review- award of attorney's fees was appealable as affecting the "substantial right" of a party), North Dakota, Oklahoma, Oregon, Tennessee (interlocutory appeal to prevent "irreparable injury or potential injury."), Wisconsin and Wyoming.

C. STATUTES OR RULES PERMITTING THE APPEAL, BY DISCRETIONARY DECISION OF THE APPELLATE COURT, OF ANY INTERLOCUTORY ORDER.

Iowa appears to permit the appeal of interlocutory orders with the discretion of the trial court. The filing of such a petition will not stay the order, but specifically says as to custody issues, the appellate court may stay the order pending based on listed factors.

Utah has a general statute providing for the discretionary appeal of interlocutory orders- it generally would require the appellate court to find why the issue would materially advance the termination of the litigation. As shown by the chart, this was applied to a petition filed by a Wife in a domestic relations case.

Vermont provides for a discretionary review of interlocutory orders if the court finds the order conclusively determines a disputed question and completely resolves an important issue separate from the merits of the case and would otherwise be an unreviewable order on appeal from a final judgment.

II. STATUTES OR RULES RELATING TO APPEALS OF INTERLOCUTORY ORDERS APPLYING *SPECIFICALLY* TO DOMESTIC RELATIONS CASES:

A. STATUTES OR RULES PREVENTING THE APPEAL OF AN INTERLOCUTORY ORDER.

Virginia Code Ann. §17.1-405(B) currently prevents the appeal of interlocutory orders in domestic relations cases. Texas also provides by statute that any temporary order entered by a family court "is not subject to an interlocutory appeal."

B. STATUTES OR RULES PERMITTING THE APPEAL OF INTERLOCUTORY ORDERS IN DOMESTIC RELATIONS CASES.

Colorado law provides for appeals of interlocutory orders prior to a final order of dissolution of a marriage. Temporary orders regarding the financial relationship between the parties such as alimony and child support and temporary attorney's fees orders are appealable. Interestingly however, temporary orders relating to child custody are not appealable unless the order is of such an extensive indefinite duration that it acts as a final order.

Florida provides for interlocutory orders in family law matters involving the right to immediate monetary relief, rights with regard to child custody or a time-sharing parenting plan, or whether a marital agreement is invalid in its entirety. The rules further provide that in the absence of a stay, the trial court can proceed on all matters not on appeal, including a trial and final hearing, but may not enter the final order disposing of all issues pending a ruling from the appellate court, absent leave of court.

Georgia provides for appeals as a matter of right for all final judgments, but also for any temporary order in custody and adoption matters. The custody order must be in an independent action and not part of a divorce action to be appealed as a matter of right. Discretionary appeals can be made by application for temporary orders in divorce cases, including equitable distribution, child support, alimony, the granting or refusal to grant a divorce or orders holding a party in contempt for nonpayment of alimony. The standard is set forth- it must be an order that either is dispositive of the case, appears to be erroneous and will probably cause substantial error at trial or adversely affect the rights of the appealing party.

Illinois permits an appeal of an interlocutory order as a matter of discretion by the appellate court, but only orders affecting the care and custody or the allocation of parental responsibilities of a minor or the relocation of the minor.

Maryland provides for an appeal of an interlocutory order which deprives a parent or grandparent or natural guardian of the care and custody of a child, or changes the terms of such order. The filing of the appeal does not stay the order of custody unless otherwise ordered, upon application and hearing, by an order of the appellate court.

Massachusetts provides for an appeal of interlocutory orders from various courts, including the "Probate and Family Court." Generally, a single appellate justice will hear the argument why the court should accept the appeal which is within the discretion of the appellate court. See the notation in the chart summary stating the policy of limiting such appeals to avoid a continual disruption of a case by a party repeatedly appealing such orders.

Michigan provides for interlocutory appeals by leave of the Court of Appeals for orders, among other listed types of proceedings, that are not final concerning custody, control and management of property, temporary alimony, support or custody of a minor child, or expenses and fees. Pending the filing of the petition, the orders are not stayed and are enforceable by the trial court except as otherwise ordered by the trial court or appellate court.

New York statutes appear to provide appeals as a matter of right from "any other order under the Family Court Act." This broad language is not specific as to interlocutory order but arguably includes them.

C. STATES WHICH DO NOT PROVIDE FOR INTERLOCUTORY ORDERS IN DOMESTIC RELATIONS CASES.

Except for the 8 states listed above in Section II(B) of this Memo, **no state** provides for the appeal of interlocutory orders specific to domestic relations cases, whether as a matter of right or a matter of discretionary permission by the appellate court. Only final orders relating to such issues are appealable. A review of various attorney articles reviewing this statute have stated that New York's law of interlocutory appeals is probably the most liberal of any state.

III. MISCELLANEOUS APPROACHES OF OTHER STATES APPLICABLE TO APPEALS OF DOMESTIC RELATIONS CASES.

A. Alaska limits appeals to final orders and not interlocutory orders, but Rule 218 provides for expedited appeals of final orders relating to custody, children in need, UCCJEA cases or adoption cases.

B. Maine also has a rule for the fast track of appeals of final orders relating to certain domestic relations cases, including the establishment of custody or changes in the contacts between a child and parent or grandparents pursuant to Maine's Grandparent Visitation Act.

C. Nevada provides for a fast track of appeals of final orders relating to appeals of custody or visitation issues. The criteria for staying the order pending the appeal are set forth in the rules.

D. New Jersey permits appeals as a matter of right of non-final orders determining final custody in bifurcated family actions or orders on preliminary matters in adoption cases. As noted above, Virginia does not permit appeals of final orders as to only some of the issues pending in a divorce matter even if the order is final as to that specific issue.

E. North Carolina, up until 2013, limited appeals to final orders only, similar to the law in Virginia. In 2013, their law was amended and now permits appeals of interlocutory orders prior to the entry of a final order disposing of all issues, which interlocutory order makes a final ruling of a specific issue. The ruling, in isolation, is technically a final order on that specific issue, but would not have been appealable since no final order disposing of all other related claims had been entered. This would be pre-final order or a temporary orders fully adjudicating claims for

such issues as a divorce, the validity of a premarital agreement, child custody, child support, alimony or equitable distribution orders. The order appealed must be final as to that sole issue.

F. Oregon provides for appeals of final orders in adoption or juvenile dependency cases, but the rules provide for an expedited review of the order.

G. Tennessee provides for an appeal of interlocutory orders in "extraordinary" circumstances where the lower court has departed so far from the accepted and usual course of judicial proceedings.

SUMMARY:

Many states have rules as to appeals of interlocutory orders where the order (a) relates to the issue of a substantial question of law for which there is a significant difference of opinion; or (b) where no case or statutory authority fully disposes of the issue, or (c) where an appeal may assist in the administration of a case by resolving such legal issue. While these statutes are general to all civil case and vary in their specific provisions, they seem to apply to domestic relations cases since those cases are not excluded. However, as noted above, Virginia already has a statute regarding this procedure.

As to appeals in other states relating to the impairment of "substantial rights" of a party, some of the state case law has applied this very broad term to limited domestic relations cases.

Listed in Section II(B) of this Memo are the states that do permit appeals of interlocutory orders specific to family law. Some focus on custody issues only, other focus on financial issues. Some are appeals of right, some are by the discretion of the court. The committee discussed its concerns, however, regarding the practical application of such appeals due to required use of the "abuse of discretion" standard of reviewwhere the record would be much more limited to enable a finding of such abuse, and other problems that are summarized below.

VIRGINIA FAMILY LAW COALITION RECOMMENDATIONS ON THE STUDY ISSUE:

1. **It is the recommendation of the Virginia Family Law Coalition that there be no appeals of domestic relations interlocutory or *pendente lite* orders to the Virginia Court of Appeals, except for the resolution of legal issues pursuant to the procedures set forth in Va. Code Ann. §8.01-675.5.** This recommendation is consistent with Virginia's long-standing law and statutes prohibiting such interlocutory appeals. This would include, but not be limited to, interlocutory orders relating to custody, visitation, child or spousal support, use of a marital home or other interim orders entered in domestic relations cases. The current statute prohibiting such appeals set forth in **Va. Code Ann. §17.1-405(B)** should therefore not be amended to permit such appeals.

2. To avoid a potential inconsistency with the provisions for interlocutory appeals relating to the resolution of legal issues, which the committee recommends be permitted in domestic relations cases, the Coalition further recommends enactment of the following technical amendment to Va. Code Ann. §17.1-405(B) as follows: **"Except as provided in Va. Code Ann. §8.01-675.5, …"** [continue remainder of statute].

The basis for such recommendations can be summarized as follows:

1. The Coalition is concerned that permitting interlocutory appeals of *pendente lite* orders in domestic relation cases could result in a flood of litigation as to such issues. There is a concern that such appeals would be used on occasion by a disgruntled or angry spouse as a vindictive tool to delay litigation, increase the costs of litigation, and adversely impact the docket of the appellate court.

2. The Coalition further is of the opinion that if such appeals were permitted, the "abuse of discretion" standard of review would most likely make the potential success of such an appeal virtually impossible. This problem was specifically noted in many of the articles reviewing interlocutory appeals in the other states that permitted such procedures. It was the general consensus that such appeals were not successful due to the standard of review, especially since such a review would be based on a more limited record. The broad discretion given to the trial court in Virginia on such issues as custody, visitation, support and other temporary issues, would make the standard more difficult to overcome since the record for *pendente lite* hearings would be much more limited. And the application of the "abuse of discretion" standard generally used to review even appeals of final orders relating to domestic relations issues, indicates a body of case law in Virginia with very few reversals of trial court's decisions on such issues.

3. As was further noted in comments during the study, there is a broad range of temporary hearing procedures used in various circuit courts around the state. - Some temporary hearings have very limited times allotted and some courts permit greater times for the hearing. This lack of uniformity results in an unfair and an unequal quality of a record for which an interlocutory appeal would be based. The prejudice to a party in those areas with more limited times and dockets for such hearings, and the lack of uniformity for such hearings, were noted as concerns.

4. There was further concern that even if interlocutory appeals were permitted, and assuming no order of a stay permitting the ability of a trial court to adjudicate the remaining issues before the trial court (as was generally the procedure in those other states permitted interlocutory appeals), a trial court might still be reluctant to make a final ruling on the remaining issues since the impact of an appellate decision could still affect those remaining issues. This would result in the potential of a long delay to finalize a divorce or domestic relations case pending the resolution of such an appeal (9-12 months potentially), to the detriment of the parties and the continued docketing of the case on the court docket.

5. There was a concern regarding the fee impact this would have on the parties if such appeals were permitted. This could prejudicially impact the party with lower resources to pursue or defend such an appeal. Based on the current standards of fee awards in the Court of Appeals, there would also be a likelihood that no fees relating to the appeal itself would be awarded. This would result in a double dip, so to speak, of attorney's fees incurred to pursue or defend an appeal of an interlocutory order, and then fees relating to appeals of a final order. And that is apart from the concern over the difficultyin reversing such a temporary order based on an "abuse of discretion" standard that would apply.

6. A further concern is the impact that permitting appeals of temporary orders in domestic relation cases would have on the Court of Appeals. A review of the data and reports leading to the increase of the judges of the Court of Appeals from 9 to 17 when the jurisdiction of the Court was expended to most civil cases, appeared to be based on appeals of final orders only. No resources or fiscal impact study was made, according to the review of the data reports, on any impact of increased docket due to interlocutory appeals. How many new appellate judges, clerks and staff would be needed to handle some unknown increase in the volume of potential interlocutory appeals would need an extensive study. There would also be a financial impact on the circuit court clerk's offices due to the additional time a record on the interlocutory appeal issue was needed to be prepared and provided to the parties and appellate court. The uncertainty of the extent of these fiscal impacts is a concern and further supports the recommendations of the Coalition set forth herein.

7. The Coalition notes that the general experience of family law practitioners is that we have good judges who do their best in providing orders that provide temporary relief or address temporary issues to the parties. While occasional aberrations might occur, they are generally limited in the experience of the Coalition and those serving on the study committee. To the extent a further and full opportunity to present evidence at trial might later show that the temporary orders were unfair or should be remedied, the recent decision in the Virginia Supreme Court decision in Everett v. Tawes, 833 S.E.2d 876 (Va. S. Ct., 2019) held that a trial court can retroactively modify a temporary order. This at least provides a potential remedy to such an order if the evidence supports such a modification.

8. Finally, there was some discussion on whether the jurisdiction of temporary orders pursuant to Va. Code Ann. §8.01-675.5, should be expanded to include appeals of such issues as the threshold jurisdiction of a court to hear an issue, or the limited, but critical, issue of the removal of a child internationally pending further litigation on the issues. The Coalition makes no recommendation on these issues since they were beyond the scope of its study directive, but leaves such considerations to the General Assembly.

Respectfully Submitted,

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2024 LEGISLATIVE UPDATE

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HB 994

§ 20-48. Minimum age of marriage.

The minimum age at which persons may marry shall be 18~~, unless a minor has been emancipated by court order. Upon application for a marriage license, an emancipated minor shall provide a certified copy of the order of emancipation~~.

§ 20-89.1. Suit to annul marriage.

A. When a marriage is alleged to be void or voidable for any of the causes mentioned in § 20-13, 20-38.1, or 20-45.1 or by virtue of fraud or duress, either party may institute a suit for annulling the same; and upon proof of the nullity of the marriage, it shall be decreed void by a decree of annulment.

***

D. ~~A~~ *For any marriage entered into prior to July 1, 2024, a* party who, at the time of such marriage as is mentioned in § 20-48, was capable of consenting with a party not so capable shall not be permitted to institute a suit for the purpose of annulling such marriage.

HB 174

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 20-13.2 as follows:

§ 20-13.2. Marriage lawful regardless of sex, gender, or race of parties.

No person authorized by § 20-14 to issue a marriage license shall deny the issuance of such license to two parties contemplating a lawful marriage on the basis of the sex, gender, or race of such parties. Such lawful marriages shall be recognized in the Commonwealth regardless of the sex, gender, or race of the parties.

Religious organizations and members of the clergy acting in their religious capacity shall have the right to refuse to perform any marriage.

HB 784

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-60.3 and 20-107.1 of the Code of Virginia are amended and reenacted as follows:

§ 20-60.3. Contents of support orders.

9. *a.* If support arrearages exist, (i) to whom an arrearage is owed and the amount of the arrearage, (ii) the period of time for which such arrearage is calculated, and (iii) a direction that all payments are to be credited to current support obligations first, with any payment in excess of the current obligation applied to arrearages; *and*

b. If support overages exist, (i) to whom an overage is owed and the amount of the overage, (ii) the period of time for which such overage is calculated, and (iii) how such overage is to be paid;

HB 294

Be it enacted by the General Assembly of Virginia:

1. That § 16.1-279.1 of the Code of Virginia is amended and reenacted as follows:

§ 16.1-279.1. Protective order in cases of family abuse.

10. Any other relief necessary for the protection of the petitioner and family or household members of the petitioner, including a provision for temporary custody or visitation of a minor child.

A1. If a protective order is issued pursuant to subsection A, the court may also issue a temporary child support order for the support of any children of the petitioner whom the respondent has a legal obligation to support. Such *temporary child support* order shall terminate upon the determination of support pursuant to § 20-108.1 *or upon the termination of such protective order, whichever occurs first.*

HB 783

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-166, 20-167, 63.2-1201.1, and 63.2-1230 of the Code of Virginia are amended and reenacted as follows:

§ 20-166. Power of attorney to delegate parental or legal custodial powers.

B. Any power of attorney properly executed pursuant to § 20-167 shall be signed by *(i)* all persons with authority to make decisions concerning the child pursuant to Chapter 6.1 (§ 20-124.1 et seq.)~~,~~ *and (ii)* the person to whom powers are delegated under the power of attorney, ~~and~~ *including prospective adoptive parents in a direct parental placement adoption pursuant to § 63.2-1230, or* a representative of a licensed child-placing agency that assists parents and legal guardians with the process of delegating parental and legal custodial powers of their children, including assistance with identifying appropriate placements for their children and providing services and resources to support children, parents and legal guardians, and persons to whom parental or legal custodial powers are delegated pursuant to this chapter. ~~That~~ *Such licensed child-placing* agency shall file notice of the arrangement authorized by the power of attorney with the local department of social services in the jurisdiction where the parents or legal guardian resides within seven days of its execution.

HB 783

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-166, 20-167, 63.2-1201.1, and 63.2-1230 of the Code of Virginia are amended and reenacted as follows:

§ 20-167. Statutory form for power of attorney to delegate parental or legal custodial powers.

A. A power of attorney to delegate parental or legal authority executed pursuant to this chapter shall be substantially as follows:

POWER OF ATTORNEY TO DELEGATE PARENTAL OR LEGAL CUSTODIAL POWERS

1. I/We certify that I/we am/are the parent or legal custodian of:

Full name of minor child: _____ Date of birth: _____

Full name of minor child: _____ Date of birth: _____

Full name of minor child: _____ Date of birth: _____

2. I/We designate _____ (insert full name, address, and phone number of designated attorney-in-fact) as the attorney-in-fact of each child listed above.

3. I/We delegate to the attorney-in-fact all of my/our power and authority regarding the care, custody, and property of each minor child named above, including *discharge of a newborn infant from the hospital of birth, the initial physical placement of a child with the prospective adoptive parent in accordance with the provisions of Title 63.2 of the Code of Virginia,* the right to enroll the child in school, the right to inspect and obtain copies of education records and other records concerning the child, the right to attend school activities and other functions concerning the child, and the right to give or withhold any consent or waiver with respect to school activities, medical and dental treatment, and

HB 783

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-166, 20-167, 63.2-1201.1, and 63.2-1230 of the Code of Virginia are amended and

§ 63.2-1230. Placement of children by parent or guardian.

The birth parent, legal guardian, or adoptive parent of a child may place his child for adoption directly with the *prospective* adoptive parents of his choice. *Such parent or legal guardian may execute a power of attorney to the prospective adoptive parent for discharge of a newborn infant from a hospital or for the initial physical placement of a child with a prospective adoptive parent pursuant to subsection B of § 20-166 and subsection A of § 54.1-2969.* Consent to the proposed adoption shall be executed upon compliance with the provisions of this chapter before a juvenile and domestic relations district court or, if the birth parent or legal guardian does not reside in Virginia, before a court having jurisdiction over child custody matters in the jurisdiction where the birth parent or legal guardian resides when requested by a juvenile and domestic relations district court of this Commonwealth, pursuant to § 20-146.11. Consent proceedings shall be advanced on the juvenile and domestic relations district court docket so as to be heard by the court within ~~ten~~ *10* days of filing of the petition, or as soon thereafter as practicable so as to provide the earliest possible disposition.

HB 893

C. ~~Counsel appointed for a parent or guardian pursuant to subsection D of § 16.1-266 shall be selected from the list of attorneys who are qualified to serve as guardians ad litem.~~ *On or before January 1, 2026, the Judicial Council, in conjunction with the Virginia State Bar and the Virginia Bar Association, shall adopt standards for the qualification and performance of attorneys appointed pursuant to § 16.1-266 to represent a parent or guardian of a child when such child is the subject of a child dependency case. The standards shall, to the extent practicable, take into consideration the following criteria: (i) license or permission to practice law in Virginia; (ii) current training in the roles, responsibilities, and duties of parent or guardian representation; (iii) familiarity with the court system and a general background in juvenile law; and (iv) demonstrated proficiency in this area of law. For purposes of this section, a "child dependency case" includes cases before the juvenile and domestic relations district courts, and the circuit courts on appeal, involving a child who is (a) alleged to have been abused or neglected pursuant to § 16.1-278.2; (b) alleged to be at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in his care pursuant to § 16.1-278.2; (c) the subject of a petition for approval of an entrustment agreement pursuant to § 16.1- 277.01; (d) the subject of a petition for relief of custody pursuant to § 16.1-277.02; (e) placed in foster care and is the subject of a foster care or permanency plan filed pursuant to § 16.1-281, 16.1-282, 16.1-282.1, or 16.1-282.2; and (f) the subject of a petition for termination of residual parental rights pursuant to § 16.1-283.*

D. Beginning July 1, 2026, the Judicial Council shall maintain a list of attorneys admitted to practice law in Virginia who are qualified to be appointed to represent indigent parents and guardians involved in a child dependency case based on the standards required by this section and shall make such names available to the courts.

E. Counsel appointed for a parent or guardian pursuant to subsection D of § 16.1-266 prior to July 1, 2026, shall be selected from the list of attorneys who are qualified to serve as guardians ad litem. On or after July 1, 2026, such counsel shall be selected from the list of attorneys who are qualified to be appointed to represent indigent parents and guardians established in accordance with subsection D. If no attorney who is on the list is reasonably available or appropriate considering the circumstances of the parent or case, a judge in his discretion may appoint any discreet and competent attorney who is admitted to practice law in Virginia.

HB 893

B. When the court appoints counsel to represent a parent, guardian, or other adult pursuant to § 16.1-266, such counsel shall be compensated for his services pursuant to § 19.2-163. *When the court appoints counsel to represent a parent, guardian, or other adult pursuant to § 16.1-266 in a child dependency case as defined in § 16.1-266.1, such counsel shall be compensated for his services in an amount not to exceed $330, except that in matters arising under § 16.1-283, such counsel shall be compensated for his services in an amount not to exceed $680. Notwithstanding the foregoing, no court may waive the limitation of fees as set forth therein.*

HB 194

§ 20-124.7. Definitions.

For purposes of this chapter:

"Deploying parent or guardian" means a parent of a child under the age of 18 whose parental rights have not been terminated by a court of competent jurisdiction or a guardian of a child under the age of 18 who is deployed or who has received written orders to deploy with the United States Army, Navy, Air Force, Marine Corps, Coast Guard, *Space Force,* National Guard, or any other reserve component thereof.

"Deployment" means compliance with military orders received by a member of the United States Army, Navy, Air Force, Marine Corps, Coast Guard, *Space Force,* National Guard, or any other reserve component thereof to report for combat operations or other active service for which the deploying parent or guardian is required to report unaccompanied by any family member.

HB 890 (not passed)

Be it enacted by the General Assembly of Virginia:

1. That § 20-124.3 of the Code of Virginia is amended and reenacted as follows:

§ 20-124.3. Best interests of the child; parenting time.

In determining best interests of a child for purposes of determining custody or ~~visitation~~ *parenting time* arrangements, including any pendente lite orders pursuant to § 20-103, the court shall, *upon the request of either party, assure a minor child of frequent and continuing contact with both parents so as to maximize the amount of time the minor child spends with each parent, except in cases where there is abuse, neglect, or other pressing safety concern to the child or one of the parents. The court shall* consider the following *factors when determining the particular custody or parenting time arrangements that will meet the best interests of the child*:

HB 1104 (not passed)

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-108.1 and 20-108.2 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 8.01-52.01 as follows:

§ 8.01-52.01. Death by wrongful act resulting from driving under the influence; death of parent or guardian of a child; child support.

In addition to the damages awarded pursuant to § 8.01-52, in an action for death by wrongful act where the defendant, as a result of driving under the influence in violation of clause (ii), (iii), or (iv) of § 18.2-266 or operating a watercraft or motorboat in violation of clause (ii), (iii), or (iv) of subsection B of § 29.1-738 or a similar local ordinance, unintentionally caused the death of another person who was the parent or legal guardian of a child, the person who has custody of such child may petition the court to order the defendant to pay child support. Upon such petition, the court shall determine such child support pursuant to the provisions of §§ 20-108.1 and 20-108.2.

HB 1311 (not passed)

§ 20-91. Grounds for divorce from bond of matrimony; contents of decree.

A. A divorce from the bond of matrimony may be decreed:

(1) For adultery; or for sodomy or buggery committed outside the marriage;

(2) [Repealed.]

(3) Where either of the parties subsequent to the marriage has been convicted of a felony, sentenced to confinement for more than one year and confined for such felony subsequent to such conviction, and cohabitation has not been resumed after knowledge of such confinement (in which case no pardon granted to the party so sentenced shall restore such party to his conjugal rights);

(4), (5) [Repealed.]

(6) Where either party has been guilty of cruelty, caused reasonable apprehension of bodily hurt, or willfully deserted or abandoned the other, such divorce may be decreed to the innocent party ~~after a period of one year from the date of such act~~; or

SB 115 (passed, but vetoed)

§ 20-124.2. Court-ordered custody and visitation arrangements.

B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall consider and may award joint legal, joint physical, or sole custody, and there shall be no presumption in favor of any form of custody. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. *A person's legal possession or consumption of substances authorized under Title 4.1 or Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1 alone shall not serve as a basis to restrict custody or visitation unless other facts establish that such possession or consumption is not in the best interest of the child.*

40th Annual Advanced Family Law Seminar 2024
Written Materials for CLE
Eric Rollinger Presentation from 10:45 AM – 11:45 AM on 4/18/24

Understanding Complex Deferred Compensation and Ambiguous Definitions of Income

1. Deferred Compensation: ISOs
    a. Incentive Stock Options (ISOs): tax favorable to the employee
        i. Do not pay ordinary income taxes on diff. between grant price and market price when exercise option; however, can trigger Alternative Minimum Tax (AMT)
        ii. Profits (diff. of sales price and grant price) taxed at capital gains rates if shares held for more than one year after exercise and two years after grant
        iii. ISOs cannot be owned by non-employee, and an inter-spousal transfer of ISOs converts the options to NQSOs

2. Deferred Compensation: NQSOs
    a. Non-Qualified Stock Options (NQSOs): non-tax favorable to the employee
        i. Pay ordinary income tax on difference between grant price and market price when exercise option
        ii. Appreciation is taxed at capital gains rate if holding period is met (i.e. one year after exercise)

3. Deferred Compensation: RSUs
    a. Restricted Stock Units (RSUs): treated the same as cash compensation at vesting
        i. Pay ordinary income tax on market price of stock at date of vesting
        ii. Appreciation is taxed at capital gains rate if holding period is met (i.e. one year after vesting)

4. Deferred Compensation: Inter-Spousal Transfers
    a. Stock option plans, like other nonqualified deferred compensation (NQDC) plans, may forbid inter-spousal transfers
        i. Review plan to see type of stock options and whether plan allows inter-spousal transfers
        ii. If inter-spousal transfer is not allowed by the plan, then other alternatives will need to be considered (i.e. equitably distribute other assets to spouse without NQDC; transfer if, as, and when; agree on when employee spouse will exercise/sell and split of the same)
    b. If the inter-spousal transfer of Stock Options is allowed, then:
        i. Transferee spouse steps into shoes of Transferor
        ii. Transferee is taxed at his/her ordinary income tax rates on his/her return when options are exercised

5. Deferred Compensation: Exercise of NQSOs and Cash Flow

a. Exercise of NQSOs in private companies may cause cash flow problems for Spouse exercising options, potentially without any market to sell the shares (as opposed to a public company where can easily sell shares on public market to pay for taxes on exercise)

6. Deferred Compensation – Marital Share
    a. VA Code Ann §: 20-107.3(G) states:
        i. "The court may direct payment of a percentage of the marital share of any pension, profit-sharing or deferred compensation plan, or retirement benefits, whether vested or nonvested, that constitutes marital property and whether payable in a lump sum or over a period of time."
        ii. "No such payment shall exceed 50 percent of the marital share of the cash benefits actually received by the party against whom such award is made."
        iii. "Marital share means that portion of the total interest, the right to which was earned during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent."

7. Deferred Compensation – Marital Share
    a. In *Dietz v. Dietz*, 17 Va. App. 203, the Virginia Court of Appeals reversed the decision of the trial court, because the maximum payment of a deferred compensation award cannot exceed 50% of the marital share of the cash benefit, and "The final [trial court] order required the husband to pay to the wife fifty-three percent "of the marital portion ... of the net proceeds" from the sale of any shares of stock acquired, if and when the husband exercised any of the stock options that were marital property.."
        i. "If" is not factually determined until the benefit is realizable (vested)
        ii. "When" only occurs if the option is exercised
        iii. "50% of Marital Share of Cash Benefit" assuming shares are exercised and sold at date of vesting is [Market Price at Vesting – (Grant Price + Costs to Exercise + Taxes)] * 50%

8. Deferred Compensation – Retirement Plans
    a. Perhaps the most common type of deferred compensation is retirement plans, of which some of the most common qualified deferred compensation plans are: 401(k), 403(b), and 457(b) plans
    b. In *Dietz v. Dietz*, 17 Va. App. 203, the Virginia Court of Appeals stated that:
        i. "the trial court treated the stock options in a manner similar to a pension that has not yet vested."
        ii. "By adding deferred compensation plans to those assets identified in Code §20-107.3(G) the legislature expressed its intention to treat uniformly all plans of compensation, whether payable upon retirement or not, if payment is deferred to the future but earned during the marriage. Consequently, a deferred compensation plan may now be treated as a pension or retirement benefit."

c. The Coverture fraction for determining the marital portion of retirement plans is similar to that used for Stock Options, and is basically: *Months of Marriage Till Last Separation ÷ Total Months of Employment to Earn Pension*

9. Deferred Compensation – Proposed MSA language
    a. If, as, and when W vests in RSUs and the shares are released to her, then, within 30 days of vesting she will convey, if the transfer of shares is allowed, to H 50% of the coverture fraction (defined below) net of her effective federal, state, and local taxes due thereon. At the time of transfer, W shall provide H with adequate documentation of the number of vested shares, the grant date of the shares, and the computation of her effective tax rate.
    b. The coverture fraction is equal to the quotient of the number of months after grant to W of the RSUs during the marriage before last separation (i.e. from the date of the grant to the date of separation) divided by the number of months after grant to W of RSUs until the vesting date (i.e. from the date of the grant to the date of vesting).

10. Deferred Compensation – Proposed MSA Calculation Language
    a. For point of elaboration, the calculation to determine the shares of stock due H per this agreement is the following: W's Total Tax (i.e. 2023 Form 1040, Line 24 + 2023 Virginia Form 760, Line 16) ÷ W's Total Income (2023 Form 1040, Line 9) = W's Effective Tax Rate. W's Effective Tax Rate × Taxable Income from Vesting of RSU = W's Effective Tax on RSUs. W's Total Income from RSUs – W's Effective Tax from RSUs = W's RSUs Net of Taxes. Share of Stock Due H Per This Agreement = W's RSUs Net of Taxes × Coverture Fraction, which is converted to shares by dividing by Market Price per share × 50%.

11. Deferred Compensation – Proposed MSA Example Language
    a. Example: 327 RSUs were granted on 12/31/20 and Vest on 12/31/23. Shares of Stock Due H Per This Agreement would be the following applying 2023 Form 1040 Individual Income Tax Return rates assuming all income and taxes were attributable to Wife. W's Total Tax of ($271,916 + $48,531) ÷ Total Income of $882,378 = W's Effective Tax Rate of 36.32%. W's Effective Tax Rate of 36.32% × Taxable Income from Vesting of RSUs of $70,305 assuming Stock Price Market Value of $215 per share as of 12/31/23 = W's Effective Tax on RSUs of $25,535. W's Total Income from RSUs of $70,305 – W's Effective Tax from RSUs of $25,535 = W's RSUs Net of Taxes of $44,770. Shares of Stock Due H Per This Agreement = W's RSUs Net of Taxes of $44,770 × Coverture Fraction of 83.33% assuming 6/30/23 date of final separation = $37,308.33, which is the equivalent of 173.53 shares assuming a $215 Market Price per share that when multiplied by ½ equals 86.76 Stock shares that should be transferred to H within 30 days of the earliest date that W is allowed by law and contract to transfer shares to him.

12. Ambiguous Definitions
    a. Often times MSAs seem to confuse Generally Accepted Accounting Principles (GAAP), Internal Revenue Code (IRC) definitions and tax return computations of "Gross Profit" and "Net Profit"

i. Gross Profit = Gross Receipts – Returns & Allowances – COGS
    1. Per IRS Forms (i.e. 1120 lines 1-3, 1120S lines 1-3, 1065 lines 1-3, and Sch. C lines 1-5)
ii. Net Profit = Gross Profit + Other Income – Total Business Expenses
    1. Per IRS Form 1040, Sch. C, Lines 1-31

13. Gross Income Definition: IRC
    a. "Gross Income" is defined by the IRC Sec. 61 as "all income from whatever source derived, including (but not limited to) the following items:
        i. Compensation for services, including fees, commissions, fringe benefits, and similar items;
        ii. Gross income derived from business;
        iii. Gains derived from dealings in property;
        iv. Interest;
        v. Rents;
        vi. Royalties;
        vii. Dividends;
        viii. Alimony and separate maintenance payments (Alimony and separate maintenance payments are eliminated from the definition effective 1/1/19 per P.L.115-97 Sec. 11051(c));
        ix. Annuities;
        x. Income from life insurance and endowment contracts;
        xi. Pensions;
        xii. Income from discharge of indebtedness;
        xiii. Distributive share of partnership gross income;
        xiv. Income in respect of a decedent; and
        xv. Income from an interest in an estate or trust."

14. Gross Income Definition: VA
    a. VA Code Ann § 20-108.2(C) states: "For purposes of this section, "gross income" means all income from all sources, and shall include, but not be limited to, income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits except as listed below, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans' benefits, spousal support, rental income except as listed below, gifts, prizes, or awards."
    b. VA Code Ann § 20-108.2(C) states that "Gross income shall be subject to deduction of reasonable business expenses for persons with income from self-employment, a partnership, or a closely held business. Gross rental income from any property owned individually, jointly, or by any entity shall be subject to deduction of reasonable expenses; however, the deduction shall not include the cost of acquisition, depreciation, or the principal portion of any mortgage payment. The party claiming any deduction for reasonable business expenses or reasonable expenses for rental property shall have the burden of proof to establish such expenses by a preponderance of the evidence."

15. Ambiguous Definitions of Income – Why This Becomes Important
    a. Example: H agrees to pay W in marital support 15% of H's income as defined by the MSA. "Income" for purposes of MSA is "all income, including wages, profits and dividends, from H's professional corporation … or any other entity for which H provides substantial medical services and any other wages, salary or other compensation for personal services" H has the following sources of income:
        i. a majority ownership interest in an S Corp. that issued him a K-1 with $400K of Ordinary Business Income and $250K of Distributions;
        ii. a minority ownership interest in a Partnership that issued him a K-1 with $1M of Ordinary Business Income, Guaranteed Payments of $350K, and Distributions of $120K; and
        iii. $15K of Form 1099 Other Income for serving on board of directors when he did not attend any meetings.
    b. End Result: Arguments can be made that H has "Income" as high as $2,135,000 or as low as $0 per ambiguous definition of "Income".

16. Ambiguous Definitions of Income – Why This Becomes Important
    a. Example: In a 2021 Fairfax County Circuit Court Case of Hines v. Hines (Case No. CL2010-1369) the parties agreed in an addendum to their Marital Property Agreement that "the capital gains taxes associated with the sale and attributed to each parties' shares of the stocks sold shall be paid from the proceeds of the sale promptly prior to the net proceeds being distributed to the parties." The parties further agreed that "Under no circumstance will Shannon be liable to share or pay any other taxes resulting from the sale of marital stock other than the capital gains tax."
        i. H argued that "the capital gains tax" on sale of stock included Federal Capital Gains Tax, Federal Net Investment Income Tax, and Virginia Income Tax
        ii. W argued that the "the capital gains tax" on sale of stock only included the Federal Capital Gains Tax
    b. End Result: Judge ruled in favor of Wife and ordered that "the capital gains tax" on sale of stock only included the federal capital gains tax
        i. Note that the federal net investment income tax is not included on same line of Form 1040 as capital gains taxes., is not calculated or included on the Schedule D Tax Worksheet, nor the Qualified Dividends and Capital Gains Worksheet.
        ii. Note that a taxpayer is not liable for net investment income tax merely because they have capital gains, nor are all capital gains included in net investment income tax
        iii. Note that Virginia does not differentiate between capital gains and ordinary income in the computation of Virginia tax

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DEFERRED COMP AND AMBIGUOUS DEFINITIONS OF INCOME

40th Annual Advanced Family Law Seminar 2024
The Jefferson Hotel, Richmond, VA
Thursday, April 18, 2024

Deferred Compensation: ISOs

There are Two Types of Stock Option Plans:

ISOs and NQSOs

- Incentive Stock Options (ISOs): tax favorable to the employee
  - Do not pay ordinary income taxes on diff. between grant price and market price when exercise option; however, can trigger Alternative Minimum Tax (AMT)
  - Profits (diff. of sales price and grant price) taxed at capital gains rates if shares held for more than one year after exercise and two years after grant
  - ISOs cannot be owned by non-employee, and an inter-spousal transfer of ISOs converts the options to NQSOs

Deferred Compensation: NQSOs

There are Two Types of Stock Option Plans:

ISOs and NQSOs

- Non-Qualified Stock Options (NQSOs): non-tax favorable to the employee
  - Pay ordinary income tax on difference between grant price and market price when exercise option
  - Appreciation is taxed at capital gains rate if holding period is met (i.e. one year after exercise)

Deferred Compensation: RSUs

- Restricted Stock Units (RSUs): treated the same as cash compensation at vesting
  - Pay ordinary income tax on market price of stock at date of vesting
  - Appreciation is taxed at capital gains rate if holding period is met (i.e. one year after vesting)

Deferred Compensation: Inter-Spousal Transfers

- Stock option plans, like other nonqualified deferred compensation (NQDC) plans, may forbid inter-spousal transfers
  - Review plan to see type of stock options and whether plan allows inter-spousal transfers
  - If inter-spousal transfer is not allowed by the plan, then other alternatives will need to be considered (i.e. equitably distribute other assets to spouse without NQDC; transfer if, as, and when; agree on when employee spouse will exercise/sell and split of the same)

- If the inter-spousal transfer of Stock Options is allowed, then:
  - Transferee spouse steps into shoes of Transferor
  - Transferee is taxed at his/her ordinary income tax rates on his/her return when options are exercised

Deferred Compensation: Exercise of NQSOs and Cash Flow

- Exercise of NQSOs in private companies may cause cash flow problems for Spouse exercising options, potentially without any market to sell the shares (as opposed to a public company where can easily sell shares on public market to pay for taxes on exercise)

Deferred Compensation – Marital Share

- VA Code Ann §: 20-107.3(G) states:
  - "The court may direct payment of a percentage of the marital share of any pension, profit-sharing or deferred compensation plan, or retirement benefits, whether vested or nonvested, that constitutes marital property and whether payable in a lump sum or over a period of time."
  - "No such payment shall exceed 50 percent of the marital share of the cash benefits actually received by the party against whom such award is made."
  - "Marital share means that portion of the total interest, the right to which was earned during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent."

Deferred Compensation – Marital Share

- In *Dietz v. Dietz*, 17 Va. App. 203, the Virginia Court of Appeals reversed the decision of the trial court, because the maximum payment of a deferred compensation award cannot exceed 50% of the marital share of the cash benefit, and "The final [trial court] order required the husband to pay to the wife fifty-three percent "of the marital portion ... of the net proceeds" from the sale of any shares of stock acquired, if and when the husband exercised any of the stock options that were marital property.."
  - "If" is not factually determined until the benefit is realizable (vested)
  - "When" only occurs if the option is exercised
  - "50% of Marital Share of Cash Benefit" assuming shares are exercised and sold at date of vesting is [Market Price at Vesting – (Grant Price + Costs to Exercise + Taxes)] * 50%

Deferred Compensation – Retirement Plans

- Perhaps the most common type of deferred compensation is retirement plans, of which some of the most common qualified deferred compensation plans are: 401(k), 403(b), and 457(b) plans
- In *Dietz v. Dietz*, 17 Va. App. 203, the Virginia Court of Appeals stated that:
  - "the trial court treated the stock options in a manner similar to a pension that has not yet vested."
  - "By adding deferred compensation plans to those assets identified in Code §20-107.3(G) the legislature expressed its intention to treat uniformly all plans of compensation, whether payable upon retirement or not, if payment is deferred to the future but earned during the marriage. Consequently, a deferred compensation plan may now be treated as a pension or retirement benefit."
- The Coverture fraction for determining the marital portion of retirement plans is similar to that used for Stock Options, and is basically:

  Months of Marriage Till Last Separation ÷ Total Months of Employment to Earn Pension

Deferred Compensation – Proposed MSA language

For Stock Options and other Types of Deferred Compensation it is important to ensure that you include language in any agreement that verifies the percentage or amount that is being transferred (i.e. 50% of coverture fraction), an interspousal transfer is allowable, and acknowledges who will be responsible for the taxes

Proposed MSA Language for If, As, and When:

If, as, and when W vests in RSUs and the shares are released to her, then, within 30 days of vesting she will convey, if the transfer of shares is allowed, to H 50% of the coverture fraction (defined below) net of her effective federal, state, and local taxes due thereon. At the time of transfer, W shall provide H with adequate documentation of the number of vested shares, the grant date of the shares, and the computation of her effective tax rate.

The coverture fraction is equal to the quotient of the number of months after grant to W of the RSUs during the marriage before last separation (i.e. from the date of the grant to the date of separation) divided by the number of months after grant to W of RSUs until the vesting date (i.e. from the date of the grant to the date of vesting).

Deferred Compensation – Proposed MSA Calculation Language

Calculation

- For point of elaboration, the calculation to determine the shares of stock due H per this agreement is the following: W's Total Tax (i.e. 2023 Form 1040, Line 24 + 2023 Virginia Form 760, Line 16) ÷ W's Total Income (2023 Form 1040, Line 9) = W's Effective Tax Rate. W's Effective Tax Rate × Taxable Income from Vesting of RSU = W's Effective Tax on RSUs. W's Total Income from RSUs – W's Effective Tax from RSUs = W's RSUs Net of Taxes. Share of Stock Due H Per This Agreement = W's RSUs Net of Taxes × Coverture Fraction, which is converted to shares by dividing by Market Price per share × 50%.

Deferred Compensation – Proposed MSA Example Language

Ambiguous Definitions

- Often times MSAs seem to confuse Generally Accepted Accounting Principles (GAAP), Internal Revenue Code (IRC) definitions and tax return computations of "Gross Profit" and "Net Profit"

  - Gross Profit = Gross Receipts – Returns & Allowances – COGS
    - Per IRS Forms (i.e. 1120 lines 1-3, 1120S lines 1-3, 1065 lines 1-3, and Sch. C lines 1-5)

  - Net Profit = Gross Profit + Other Income – Total Business Expenses
    - Per IRS Form 1040, Sch. C, Lines 1-31

Gross Income Definition: IRC

"Gross Income" is defined by the IRC Sec. 61 as "all income from whatever source derived, including (but not limited to) the following items:

Alimony and separate maintenance payments are eliminated from the definition effective 1/1/19 per P.L.115-97 Sec. 11051(c).

Gross Income Definition: VA

Ambiguous Definitions of Income – Why This Becomes Important

- Watch for ambiguous definitions in Marital Settlement Agreements.

Example:

H agrees to pay W in marital support 15% of H's income as defined by the MSA. "Income" for purposes of MSA is "all income, including wages, profits and dividends, from H's professional corporation … or any other entity for which H provides substantial medical services and any other wages, salary or other compensation for personal services"

H has the following sources of income:

- a majority ownership interest in an S Corp. that issued him a K-1 with $400K of Ordinary Business Income and $250K of Distributions;
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- $15K of Form 1099 Other Income for serving on board of directors when he did not attend any meetings.

End result:

Arguments can be made that H has "Income" as high as $2,135,000 or as low as $0 per ambiguous definition of "Income".

Ambiguous Definitions of Income – Why This Becomes Important

- Watch for ambiguous definitions in Marital Property Agreements.

Example:

In a 2021 Fairfax County Circuit Court Case of Hines v. Hines (Case No. CL2010-1369) the parties agreed in an addendum to their Marital Property Agreement that "the capital gains taxes associated with the sale and attributed to each parties' shares of the stocks sold shall be paid from the proceeds of the sale promptly prior to the net proceeds being distributed to the parties." The parties further agreed that "Under no circumstance will Shannon be liable to share or pay any other taxes resulting from the sale of marital stock other than the capital gains tax."

H argued that "the capital gains tax" on sale of stock included Federal Capital Gains Tax, Federal Net Investment Income Tax, and Virginia Income Tax

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End result:

Judge ruled in favor of Wife and ordered that "the capital gains tax" on sale of stock only included the federal capital gains tax.

Note that the federal net investment income tax is not included on same line of Form 1040 as capital gains taxes., is not calculated or included on the Schedule D Tax Worksheet, nor the Qualified Dividends and Capital Gains Worksheet.

Note that a taxpayer is not liable for net investment income tax merely because they have capital gains, nor are all capital gains included in net investment income tax

Note that Virginia does not differentiate between capital gains and ordinary income in the computation of Virginia tax

FAMILY LAW MEDIATION: IMPROVING OUTCOMES

I. MEDIATION BASICS

1. Two main sources govern mediation.
    a. Standards of Ethics and Professional Responsibility for Certified Mediators ("Standards of Ethics") which was adopted by the Judicial Council of Virginia.
    b. Virginia Code
        i. Mediation (VA Code §§ 8.01-581.21 to 8.01-581.26)
        ii. Court-Referred Dispute Resolution Proceedings (VA Code §§ 8.01-576.4 to 8.01-576.12)

2. Definition of Mediation and Mediator

    a. "Mediation" means a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute. (emphasis added) (VA Code § 8.01-581.21)

    b. A "mediator" is "an impartial third party selected by agreement of the parties to a controversy to assist them in mediation." (VA Code § 8.01-581.21)

    c. Mediation is a confidential process.

        i. Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other. A mediator shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the mediation, unless the parties otherwise agree.

        However, where the dispute involves the support of minor children of the parties, the parties shall disclose to each other and to the mediator the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement by the parties. (VA Code § 8.01-581.24)

        ii. The mediator must disclose the following in writing to the parties:

            1. The mediator does not provide legal advice.
            2. Any mediated agreement may affect the legal rights of the parties.
            3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.

4. Each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement. (VA Code § 8.01-581.26)

Best practice is to include this statement in the Agreement to Mediate and the Mediated Marital Settlement Agreement.

3. Self-Determination

According to relevant portions of Section E of the Standards of Ethics (Self-Determination):

a. Mediation is based on the principle of self-determination by the parties. *Self-determination is the act of coming to a voluntary, uncoerced decision*. (emphasis added)

b. The mediator may provide information and raise issues. The mediator has no vested interest in the outcome of the mediation. Therefore, the mediator must encourage the parties to develop their own solution to the conflict. The mediator may suggest and explore options for the parties to consider, only if the suggestions do not interfere with the mediator's impartiality or the self-determination of the parties. The mediator may not recommend a particular solution to any of the issues in dispute between the parties or coerce the parties to reach an agreement on any or all of the issues being mediated.

    i. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process.

4. Professional Information

a. Section F (Professional Information) of the Standards of Ethics provides that:

    i. The mediator shall encourage the parties to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a party.

    ii. A mediator may give information only in those areas where qualified by training or experience and only if the mediator can do so consistent with these Standards.

    iii. When providing information, the mediator shall do so in a manner that does not interfere with the mediator's impartiality or the self-determination of the parties.

b. Subject Matter Expertise of the Mediator

i. Having a mediator with subject matter expertise can be critical to settling a family law case, both in terms of the value the mediator brings to the process, and the confidence counsel and the parties have in the mediator.

ii. The mediator should have knowledge of *substantive aspects of the law*, such as fault grounds, child custody, equitable distribution, spousal support, child support and attorney's fees.

iii. The mediator should have knowledge of *procedural aspects of litigation*, such as discovery, motions practice, evidence, burdens of proof at trial, and other aspects of the trial and appellate procedure.

II. FACILITATIVE VS. EVALUATIVE MEDIAITON

1. What is Facilitative Mediation?

A facilitative mediator guides the parties' conversation and discussion of issues that are important to them, without providing an opinion or judgement regarding the merits of the claims or the likely judicial outcome. The mediator will help the in creative outcomes, concerns for a continuing relationship, and the parties' overarching interests or feelings. The mediator will not tell the parties what to do or suggest a particular outcome.

2. What is Evaluative Mediation?

a. An evaluative mediator evaluates the merits of each party's case, looking at the law, the relative strengths and weaknesses of each party's facts, and the mediator's experience of the likely range of outcomes if the case were to go to trial. This can also include:

i. Length of time the trial and appellate process can take.
ii. Cost of litigation, including discovery, trial and an appeal.
iii. Involvement of third parties, such as family members, neighbors, romantic partners, and co-workers as witnesses.
iv. Stress to the client.
v. Stress to the parties' children.

b. Rule 2.11 of the Rules of the Supreme Court of Virginia states: "A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties." Mediator., Prof. Conduct Rule 2.11 (2000)

c. Barriers to Settlement to Address in Evaluative Mediation

i. *Parties' differing views of fairness.*
1. Distributional – A party not believing what they are receiving from the other party what is fair.
2. Procedural – A party not feeling as though they were treated fairly by the other party through negotiations or litigation leading up to mediation or in the mediation process.

ii. *Selective perception* – A party ignoring data that conflicts with their point of view, such as an expert opinion on the value of real estate, a mental health or custody evaluation conducted by a respected professional, vocational assessment, *etc.*, regardless of who hired the expert (*e.g.,* one party's expert or a joint expert).

iii. *Confirmation bias* – A party giving too much weight to data which supports their point of view, which can include how a friend, neighbor, relative or coworker says how they were treated in their divorce or other legal proceeding, or what they might have read on the internet (collective sigh).

iv. *Overoptimism* – Party being overly optimistic about predicting outcomes of litigation, and essentially overestimating their case and minimizing the opposing party's case.

v. *Attribution Bias* – Assuming the worst about the opposing party, often by never giving the benefit of the doubt to the other party, whether it is about why a party took a new job with less travel to be available to children, why a party may have made a reasonable financial offer, or otherwise.

vi. *Loss Aversion* - A party rejecting offers since settling the case would be perceived as "losing," especially if a party settles for less than their expectations prior to the negotiations. Often, this involves a party oversharing the details of their case with their friends, neighbors, relatives or coworkers, and especially if a party treats third parties as stakeholders.

3. When to Switch from Facilitative to Evaluative Mediation

a. Facilitative process has become unproductive or counterproductive.
i. First instinct should not be to switch to evaluative mediation when things get tense or heated.
ii. The mediator should show the parties that s/he can help them through some level of conflict before becoming evaluative. This demonstrates the mediator's skill dealing with conflict and helps preserve self-determination.
iii. The mediator might first propose a list of ideas so the parties have choices and maintain a feeling they are coming to their own decisions, rather than feeling that they are being told what to do.

b. If switching to evaluative mediation, ask parties for permission.

c. Almost always done in separate caucuses, discussed further below.

d. Once the evaluative opinion is given to a party and counsel, the mediator should ask whether s/he should stay in the party's room or allow the party and counsel to confer.

e. Once the impasse has been resolved, it is usually appropriate to switch back to facilitative mediation unless the situation indicates otherwise.

4. Pros and Cons of Evaluative Mediation

   a. Pros:
      i. Parties receive objective evaluation of their situation.
      ii. Helps to get beyond the impasse preventing settlement of a particular issue or a global settlement.
      iii. Preserves "cognitive integrity" by a party not being perceived as giving into the other party but just following the mediator's evaluative opinion.

   b. Cons:
      i. Can contradict the goal of self-determination.
      ii. The mediator may miss the "real issue" by jumping too quickly to outcomes.
      iii. The parties may feel less invested in the resolution since they did not really participate in the decision-making; they just agreed with or gave into the mediator's opinion.
      iv. The parties may walk away from mediation with lingering feelings of hurt and frustration because they did not feel heard.
      v. One party may feel the mediator is biased against him/her to the point of ending the mediation or the mediation being corrupted.

5. Parties Together vs. Shuttle Diplomacy when being Evaluative.
   a. Typically, together if it is a minor issue (*i.e.,* court cannot order a party to provide a child post-emancipation health insurance or a college education).
   b. Shuttle diplomacy for significant issues (*i.e.,* custody or spousal support) in order to preserve the parties' pride and privacy if they are upset by the mediator's evaluative opinion.
   c. Ask whose room the mediator should go into first if using shuttle diplomacy.

6. The Mediator's Proposal
   a. It is a proposal which the mediator believes may settle the case either by finding a compromise between the parties' current positions or a totally different settlement proposal than the parties previously considered.
   b. Must get the parties permission before making proposal.
   c. It is not based on a court outcome or evaluative opinion.
   d. Pros and cons of mediator's proposal:

i. Pros:
    1. Helps to get beyond the impasse preventing settlement of a particular issue or a global settlement.
    2. Like evaluative mediation, preserves "cognitive integrity" by a party not being perceived as giving into the other party but just following the mediator's evaluative opinion.

ii. Cons:
    1. May contradict self-determination.
    2. May inadvertently align the mediator with one party if one party accepts the proposal and the other party does not, which can corrupt the process.

III. HOW TO PREPARE YOUR CLIENT FOR MEDIATION

1. Explain the mediation process.
    a. What mediation is and how it differs from litigation.
        i. Litigation is a judge making decisions for your family.
        ii. Mediation allows you to participate in the decision-making process regardless if the mediator is a retired judge.
    b. Who the mediator is and his/her specific credentials.
        i. Judge (how the judge dealt with family law cases on the bench and his/her general reputation as a judge).
        ii. Lawyer (the litigation and settlement background of the lawyer and positions held with the Bar, and his/her reputation in the legal community).
    c. Where the mediation will be held.
        i. How sensitive is your client to being in the other lawyer's office?
        ii. Does the office have extra conference rooms to break out?
    d. How long a mediation session will last and the need to be patient.
        i. Does your client have a "hard stop" on the day of mediation? (If so, state that beforehand and not 15 minutes before your client has to leave).
        ii. Do you need one day or multiple days?
        iii. Has suit been filed?
        iv. Is there an upcoming trial date where you might need to go late or have a second day already scheduled?
        v. How long is your client good for before breaking for the day?
        vi. For the lawyer: Rule 1.14(a) (Client with Impairment) provides that "when the lawyer reasonably believes that the client has diminished capacity . . . and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action . . . ."
        vii. For the mediator: Section E of the Standards of Ethics provides that mediation "is based on the principle of self-determination by the parties. Self-determination is the act of coming to a *voluntary, uncoerced* decision. (emphasis added)

e. Adjusting your client's expectations.
    i. Client will need to understand (and potentially empathize with) the other party's interests and positions.
    ii. Separate positions from interests. "I want primary physical custody" is the position. "I'm worried my child will think I don't love her if I don't have more time than the other parent" is the interest.
    iii. Separate the person from the problem. "She is so controlling" refers to the person. "I am not sure how I am going to co-parent with her since she has such strong opinions about parenting" is the problem.
    iv. Brainstorming possible solutions, including solutions that are sometimes "outside the box."
    v. Know where your client will draw the line, and where he/she is willing to compromise.

2. Explain why you are recommending mediation.
    a. Client might not do well in litigation either in terms of the ruling, the cost, or the emotional toll.
    b. Get to a resolution faster.
    c. Litigation can be drawn out, expensive.
    d. Litigation makes it more difficult to co-parent.
    e. Litigation often begats more litigation (*i.e.,* getting back into court to "even the score.")

3. Understand what issues are most important to your client and why.
    a. Sort through interests and positions.
    b. What are your client's top two or three goals?
    c. What are the legitimate negotiable and non-negotiable topics?
    d. What are the "throw away" issues or issue that are agreed upon so time is not wasted on them?

4. Decide what the goals of the mediation are so you can determine if the mediation was successful afterward.
    a. Will there be a signed agreement or term sheet at the end?
    b. Will the client be able to consult experts and trusted family/friend/significant others prior to signing the agreement?
    c. Will the client need time to reflect on the mediation process after the mediation session so the client can "debrief" the situation, regardless if an agreement or term sheet is signed?

IV. HOW TO PREPARE YOURSELF TO REPRESENT YOUR CLIENT IN MEDIATION

1. Lawyer's role in mediation
    a. Getting into the right mindset
        i. Mediation is not court – chill out.

ii. In family mediation, the parties are not necessarily adversaries, and at one time presumably cared for one another and may still to some extent. They just may be hurting right now.
iii. The mediation process is not a win-lose proposition. In fact, should try to find a win-win option.
iv. Be pleasant to the opposing counsel.
1. Often parties regard the other attorney as the enemy in mediation.
2. This can be seen in:
a. avoidance of social pleasantries (*e.g.,* failing to greet opposing counsel, failing to introduce your client to opposing counsel, *etc.*),
b. demeaning or insulting opposing counsel and/or the opposing party while together,
c. expressing frustration that mediation would have been unnecessary if opposing counsel/party had been reasonable;
d. describing similar cases they have "won"; and
e. delivering a well-prepared trial opening statement and closing argument which treats the mediator as a judge.[1]

v. The issues do not need to be resolved strictly by the law and often are not (*e.g.,* awarding spousal support based on a formula of the parties' incomes, paying ex-spouse of a sale of a business or real estate which will occur in the future, agreement to share the cost of a college education or car insurance for an emancipated child, *etc.*).

b. How to get to the mediation mindset.
i. Listen to your client's goals.
ii. Be a problem solver more than an advocate.
iii. Treat your opposing counsel as a collaborator and not your adversary. The collective goal should be getting the parties out of conflict and to a signed agreement.

c. Depending on the mediator's style, don't be afraid of staying together in the same room so long as it is not counterproductive. However, some mediation models have an initial meeting followed by shuttle diplomacy.

2. Preparation for Mediation
a. Pre-mediation call with both counsel.
i. Be prepared for the call since the mediator is coming in cold.
ii. Know basic facts about the parties, their children, and the main issues to be resolved (*e.g.,* date of marriage, ages of the children, any special needs the

[1] Peter Robinson, Con*tending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50:4 BAYLOR L. REV. at 975-976.

children have, the parties' occupations and incomes, overview of the major assets, *etc.*).

b. Pre-mediation call with individual counsel if needed.
    i. Allows you to tell the mediator certain facts about the case you may not want the other party to know (*e.g.,* evidence of adultery, *etc.*)
    ii. Allows you to tell the mediator about your client's temperament (*e.g.,* anxious, self-centered, overly accommodating, conflict avoidant, *etc.*)

c. Help the mediator get up to speed.
    i. Provide the mediator with all relevant documents (*i.e.,* appraisals, tracing documents, interrogatory answers, *etc.*), offer letters, and proposed marital settlement agreement.
    ii. Mediator or one of the parties should set up a ShareFile or similar secure account for the parties to upload documents.

3. What are the issues and what is in dispute?
    a. Figure out the agreed-upon and disputed issues prior to meeting.
    b. For instance:
        i. For spousal or child support, are the incomes agreed to or in dispute?
        ii. For custody, is legal custody at issue or agreed to? Is the regular custodial schedule in dispute, and to what extent? Can the parties work out holidays? Can the parties agree to standard custody terms (*e.g.,* communication with children, non-disparagement, access to school and medical records and personnel, *etc.*)
        iii. For equitable distribution, do the parties agree on the value of property? Have the parties' done tracing for hybrid property?

4. Offer letters and draft agreements
    a. Have the parties exchanged offer letters?
    b. Is there a draft Marital Settlement Agreement that a party prepared and can be revised in mediation.

5. Be prepared for several "Last Issues."
    a. Clients or opposing party may have a new issue to discuss even though everyone had previously agreed that all issues were addressed.
    b. Be prepared for this and a few more "last issues" to crop up in finalizing a written agreement.
    c. Having a draft agreement prior to the mediation session helps avoid this.

V. THE ROLE OF THE CHILD SPECIALIST IN MEDIATION

1. The voice of the child often goes unheard in the parental divorce process. Should children's voices be included in the divorce process? Over the past few decades researchers and practitioners have increasingly acknowledged the voice of the child in parental separation and divorce. What does the research have to say?

2. Children want to be included:
    a. Children want to be heard and want to be active participants in decisions that affect their lives
    b. Children want to be kept informed and want to know their needs are being heard

4. Family relationships are positively impacted by child involvement:

    a. Significant differences in father/child interaction have been found in some studies where child inclusive mediation was used i.e., Fathers reported lower conflict with their co-parent after child-inclusive models; children reported feeling closer to their fathers after child-inclusive model; children reported more contentment with the parenting plan after the child-inclusive model.
    b. When parents focus intently on needs of children the intensity and duration of their conflict is reduced.
    c. Meaningful participation in the process has been seen as a protective factor for a child's adjustment over time.

5. Improved outcomes in mediation:
    a. Children's participation in an alternative dispute resolution (ADR) process correlates positively with ability to adjust to newly reconfigured family and ability to gain a sense of mastery over a confusing and helpless experience.

    b. Studies have also found that parents were more satisfied with their ADR process and exhibited more awareness about the impact of the changes on their children when the children's voices were heard in direct feedback.

6. Risks involved with including the voice of the child in mediation:
    a. If the mediator is the person interviewing the child, depending on the process and the information obtained from the interview, it can threaten a client's perception of the mediator's neutrality or impartiality.

    b. Without specialized skill, knowledge, and experience, children may be placed at greater risk when included in the process. However, when those skills are present, the mediation may well be the most ideally placed to bridge the gap between the family law processes, and the child and their concerns.

VI. Child Focused v. Child Inclusive Approaches in Mediation:
1. Child-focused mediation: Child-focused mediation keeps the focus of the discussions on the children and encourages parents to prioritize the needs of the child over those of the parents. In this form of mediation, the mediator:

    a. Centers conversations around the child's best interest

b. Speaks up for the child's best interests if discussions begin to stray away from the children.
c. Ensures parents look at how their positions in negotiation will affect the child if put in place.
d. Shares information from outside sources about what is best for the child (e.g., suggesting age-appropriate visitation schedules)
e. Child-focused mediation is a simple way to assert the child's voice without directly involving the child.

2. Child inclusive mediation: Child-inclusive mediation involves a Child Specialist who interviews the child to figure out how parents can meet the child's needs. We will be focusing on child inclusive mediation and the role of a Child Specialist in this process.

VII. The Role of the Child Specialist in Mediation:

1. A Child Specialist is a neutral mental health professional who specializes in separation and divorce and has specialized skill, knowledge, and experience in the areas of Child development, family systems, mediation, and often times collaborative divorce.
2. Their job is, very broadly, to bring the voice of the child into the process by informing the parents on child related issues in a way that prioritizes the needs and safety of children.
3. They provide information directly from the children, educate parents as needed/requested and provide resources to parents.
4. It is a limited role, which is focused on gathering information on the child and providing that information to the parents and mediator for the purposes of developing a parenting plan and promoting a co-parenting relationship that best meets the needs of the child.
5. Child Specialist is NOT a therapist or a custody evaluator.
   a. Unlike a therapist, the Child Specialist does not meet with the child in an on-going way, does not have a confidential relationship with the child, and is focused only on the divorce process.
   b. Unlike a custody evaluator, A Child Specialist does not make any recommendations regarding custody, does not evaluate for mental illness, and does not determine appropriateness of parents or develop the parenting plan.

VIII. Protocols of the Child Specialist Role: The Child Specialist.

a. Has a call with the referring mediator to gather preliminary information about the case, very high level.
b. Parent meetings - Meets with the parents together or separately to talk about the role and answer questions, get background information, understand concerns of each parent, listen to the questions each parent wants the process to focus on, and create a plan for when, where, and how the child interviews will take place. (e.g., an office, at home, in the community, at both parents' homes, etc.) The Child Specialist assess the parent's ability to receive feedback about the children. The

Child Specialist process is described to both parents, so they can prepare the children for the process. Parents are informed children will not be asked any questions that suggest that they must make any decisions related to their living circumstances. Children will be invited to attend but are not required or forced to attend. If the child already has another professional involved, the mediator will ensure that the invitation to attend is not a replication of another process.

c. Based on information from the parent meetings, the Child Specialist considers factors like parent conflict levels and the child(ren)'s ability to participate is assessed to help determine the structure of the meetings.
d. Meetings with the children – The Child Specialist meets with the children once or twice to gather the necessary information.
    i. Let child know the conversation is not confidential and will be shared with parents However if they say anything they do not want me to share I either won't share it or if it is super important that the information is shared, we will talk about how to do it in a way in which they are comfortable.
    ii. Start by asking is they know why they are meeting with me, and if not, I'll explain the reason. Then the child is asked a very open-ended question: Example: Is there anything you feel is important for me to know? Other questions might include:
        1. Can you tell me what it was like when your parents told you about their decision to get a divorce?
        2. Children can describe their experience by talking about it, drawing, writing, painting, using a sand tray or toys.
        3. Interview questions
            a. Examples of questions include the three wishes question, why do you think your parents live in two homes, do you ever feel caught in the middle, when do you see each parent and how is that working.
            b. Never ask a child which parent they like or love more, or which schedule a child prefers.
            c. Projective questions and drawings.
e. Discussions with collaterals – a Child Specialist may speak to third party professionals who are involved with the child—therapist, school counselor, teacher, etc.…
f. Compiles information and first shares the information with the mediator. Together they discuss the format for providing feedback to the parents.
g. Meets in a 4-way meeting with mediator and parents and delivers feedback so that the parents and the mediator can use the information the mediation process.
h. Child Specialist can be involved at different times of the process. Including returning at a later date to check in with children related to the divorce and the transition.

IX. Considerations When Deciding to Use Child Specialist in the mediation process?

1. Examples of cases that are a good fit for the Child Specialist role.
    a. Cases involving an impaired parent e.g., a parent with mental illness, addictions issues, high conflict dynamic, conflicting parenting styles.

b. Cases involving children with special needs e.g., significant anxiety, resist/refuse behavior (w. caution), regression in behavior during the divorce, etc.
c. To resolve impasses related to specific parenting decisions, e.g., disputes related to relocation or school placement.
d. To keep the focus of the process on the children. Often this is one of the only areas parents are aligned on.
e. Child Specialist as a co-mediator - co mediates custody issues and provides more support in the mediation process.

2. When to use caution recommending a Child Specialist in mediation.
    a. When parents are not ready to hear the feedback. The mental health, emotional functioning or personalities of a parent makes it impossible for them to hear the feedback about the children. The Child Specialist will assess this in the initial parent meetings.
    b. When there is fear of reprisal against the children by a parent
    c. When the children are too young to express themselves
    d. When children appear coached or manipulated by a parent (though the Child Specialist will assess that when they talk with children)
    e. Context is important, but it is the minority of families who do not benefit from a child-inclusive model.

FAMILY LAW MEDIATION

IMPROVING OUTCOMES

Psychologist Jill A.F. Gasper has concluded that ***"interparental conflict decreases children's well-being" so much that "the conflict is actually worse on children than the divorce process itself."***[i] The term "co-parenting" was "coined to describe what researchers hypothesized to be the ideal parenting relationship."[ii] Cooperative co-parents, she noted, "have minimal levels of conflict" and practice the healthiest co-parenting.[iii] In remarks presented to Virginia Juvenile and Domestic Relations District Court Judges, Dr. Gasper pointed out that current research indicates that ***it is conflict within divorces, rather than divorces in and of themselves, that has a direct correlation with children experiencing an increased risk of relationship problems, potential for substance abuse, decreased academic performance, and impaired intimate relationships***.[iv] (emphasis added)

[i] Gasper, J.A.F., Stolberg, A.L., Macie, K.M., & Williams, L.J. (2008). Co-parenting in Intact and Divorced Families: Its Impact on Young Adult Adjustment; *Journal of Divorce and Remarriage, 49,* 272-290.

[ii] *Id.*

[iii] *Id.*

[iv] Jill A.F. Gasper, PhD, Richmond, Virginia, Presentation to Judicial Conference of Virginia for District Courts, September 30, 2014.

MEDIATION BASICS

Two main sources govern mediation

a. Standards of Ethics and Professional Responsibility for Certified Mediators ("Standards of Ethics") which was adopted by the Judicial Council of Virginia.

b. Virginia Code
   i. Mediation (VA Code §§ 8.01-581.21 to 8.01-581.26)
   ii. Court-Referred Dispute Resolution Proceedings (VA Code §§ 8.01-576.4 to 8.01-576.12)

Definition of Mediation and Mediator

a. “Mediation" means a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute. (emphasis added) (VA Code § 8.01-581.21)

b. A “mediator” is “an impartial third party selected by agreement of the parties to a controversy to assist them in mediation.” (VA Code § 8.01-581.21)

Mediation is a confidential process

Unless expressly authorized by the disclosing party, the mediator may **not** disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other. A mediator shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the mediation, **unless the parties otherwise agree**.

However, where the dispute involves the support of minor children of the parties, the parties shall disclose to each other and to the mediator the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement by the parties. (VA Code § 8.01-581.24)

The mediator must disclose the following <u>in writing</u> to the parties:

1. The mediator does not provide legal advice.
2. Any mediated agreement may affect the legal rights of the parties.
3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
4. Each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement. (VA Code § 8.01-581.26)

Best practices: Include this statement in the Agreement to Mediate and the Mediated Marital Settlement Agreement.

Self-Determination

According to relevant portions of Section E of the Standards of Ethics (Self-Determination):

Mediation is based on the principle of self-determination by the parties. *Self-determination is the act of coming to a voluntary, uncoerced decision.* (emphasis added)

The mediator may provide information and raise issues. The mediator has no vested interest in the outcome of the mediation. Therefore, the mediator must encourage the parties to develop their own solution to the conflict. *The mediator may suggest and explore options for the parties to consider, only if the suggestions do not interfere with the mediator's impartiality or the self-determination of the parties.* The mediator may not recommend a particular solution to any of the issues in dispute between the parties or coerce the parties to reach an agreement on any or all of the issues being mediated. (emphasis added)

The primary role of the mediator is to facilitate a voluntary resolution of a dispute. *The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process.* (emphasis added)

Professional Information

Section F (Professional Information) of the Standards of Ethics provides that:

i. The mediator shall encourage the parties to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a party.

ii. *A mediator may give information only in those areas where qualified by training or experience* and only if the mediator can do so consistent with these Standards. (emphasis added)

iii. When providing information, the mediator shall do so in a manner that does not interfere with the mediator's impartiality or the self-determination of the parties.

Subject Matter Expertise of the Mediator

i. Having a mediator with subject matter expertise can be critical to settling a family law case, both in terms of the value the mediator brings to the process and the confidence counsel and the parties have in the mediator.

ii. In family law cases, the mediator should have knowledge of substantive aspects of the law, such as fault grounds, child custody, equitable distribution, spousal support, child support and attorney's fees.

iii. The mediator should have knowledge of procedural aspects of litigation, such as discovery, motions practice, evidence, burdens of proof at trial, and other aspects of the trial and appellate procedure.

FACILITATIVE *vs.* EVALUATION MEDIATION

What is Facilitative Mediation?

A facilitative mediator **guides the parties' conversation** and discussion of issues that are important to them, without providing an opinion or judgement regarding the merits of the claims or the likely judicial outcome. The mediator will help the in **creative outcomes**, **concerns for a continuing relationship**, and **the parties' overarching interests or feelings**. The mediator will not tell the parties what to do or suggest a particular outcome.

Separate positions from interests. "I want primary physical custody" is the position. "I'm worried my child will think I don't love her if I don't have more time than the other parent" is the interest.

Separate the person from the problem. "She is so controlling" refers to the person. "I am not sure how I am going to co-parent with her since she has such strong opinions about parenting" is the problem.

What is Evaluative Mediation?

An evaluative mediator evaluates the merits of each party's case, looking at the law, the relative strengths and weaknesses of each party's facts, and the mediator's experience of the likely range of outcomes if the case were to go to trial. This can also include:

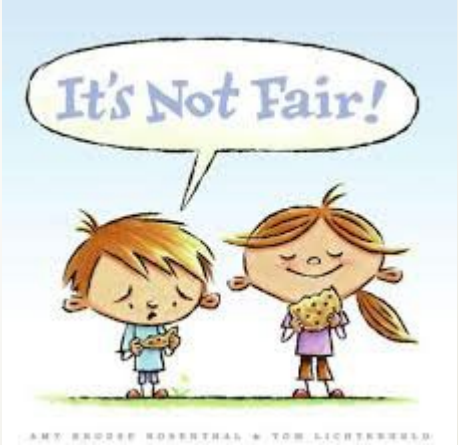
i. Length of time the trial and appellate process can take.
ii. Cost of litigation, including discovery, trial and an appeal.
iii. Involvement of third parties, such as family members, neighbors, romantic partners, and co-workers as witnesses.
iv. Stress to the client.
v. Stress to the parties' children.

"A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties." Mediator., Prof. Conduct Rule 2.11 (2000)

Barriers to Settlement to Address in Evaluative Mediation

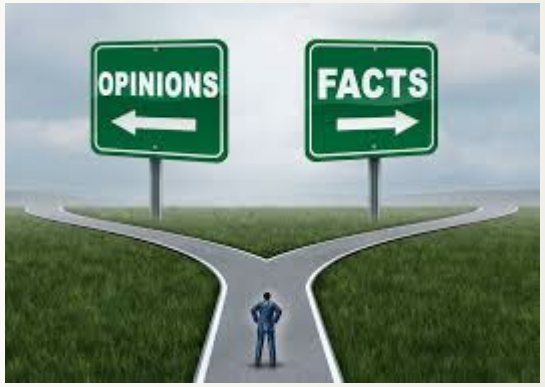
Parties' differing views of fairness.

1. Distributional – A party not believing what they are receiving from the other party what is fair.
2. Procedural – A party not feeling as though they were treated fairly by the other party through negotiations or litigation leading up to mediation or in the mediation process.

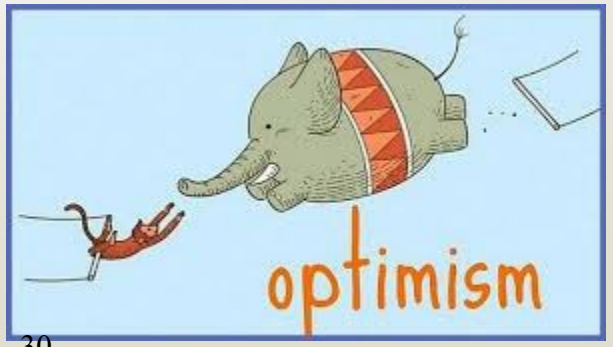


Selective perception – A party ignoring data that conflicts with their point of view, such as an expert opinion on the value of real estate, a mental health or custody evaluation conducted by a respected professional, vocational assessment, *etc.*, regardless of who hired the expert (*e.g.*, one party's expert or a joint expert).

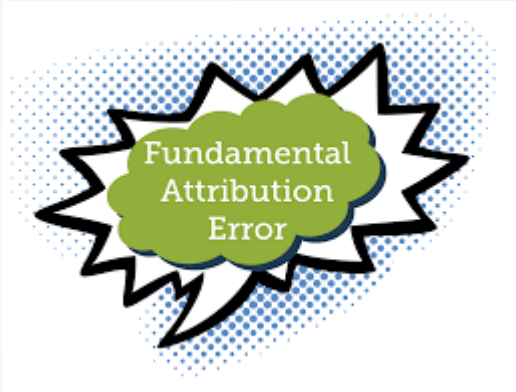
Confirmation bias – A party giving too much weight to data which supports their point of view, which can include how a friend, neighbor, relative or coworker says how they were treated in their divorce or other legal proceeding, or what they might have read on the internet (*collective sigh*).



Overoptimism – Party being overly optimistic about predicting outcomes of litigation, and essentially overestimating their case and minimizing the opposing party's case.



Attribution Bias – Assuming the worst about the opposing party, often by never giving the benefit of the doubt to the other party, whether it is about why a party took a new job with less travel to be available to children, why a party may have made a reasonable financial offer, or otherwise.



Loss Aversion - A party rejecting offers since settling the case would be perceived as "losing," especially if a party settles for less than their expectations prior to the negotiations. Often, this involves a party oversharing the details of their case with their friends, neighbors, relatives or coworkers, and especially if a party treats third parties as stakeholders.

When to Switch from Facilitative to Evaluative Mediation

Facilitative process has become unproductive or counterproductive.

i. First instinct should not be to switch to evaluative mediation when things get tense heated.
ii. The mediator should show the parties that s/he can help them through some level of conflict before becoming evaluative. This demonstrates the mediator's skill dealing with conflict and helps preserve self-determination.

- If switching to evaluative mediation, ask parties for permission.
- Almost always done in separate caucuses, discussed further below.
- Once the evaluative opinion is given to a party and counsel, the mediator should ask whether s/he should stay in the party's room or allow the party and counsel to confer.
- Once the impasse has been resolved, it is usually appropriate to switch back to facilitative mediation unless the situation indicates otherwise.

Pros and Cons of Evaluative Mediation

Pros:

i. Parties receive objective evaluation of their situation.

ii. Helps to get beyond the impasse preventing settlement of a particular issue or a global settlement.

iii. Preserves "cognitive integrity" by a party not being perceived as giving into the other party but just following the mediator's evaluative opinion.

Cons:

i. Can contradict the goal of self-determination.

ii. The mediator may miss the "real issue" by jumping too quickly to outcomes.

iii. The parties may feel less invested in the resolution since they did not really participate in the decision-making; they just agreed with or gave into the mediator's opinion.

iv. The parties may walk away from mediation with lingering feelings of hurt and frustration because they did not feel heard.

v. One party may feel the mediator is biased against him/her to the point of ending the mediation or the mediation being corrupted.

Parties Together vs. Shuttle Diplomacy when being Evaluative

a. Typically, together if it is a minor issue (*i.e.*, court cannot order a party to provide a child post-emancipation health insurance or a college education).

b. Shuttle diplomacy for significant issues (*i.e.*, custody or spousal support) in order to preserve the parties' pride and privacy if they are upset by the mediator's evaluative opinion.

c. Need to determine whose room the mediator should go into first if using shuttle diplomacy.

The Mediator's Proposal

a. It is a proposal which the mediator believes may settle the case either by finding a compromise between the parties' current positions or a totally different settlement proposal than the parties previously considered.

b. Must get the parties permission before making proposal.

c. It is not based on a court outcome or evaluative opinion.

Pros:

1. Helps to get beyond the impasse preventing settlement of a particular issue or a global settlement.

2. Like evaluative mediation, preserves "cognitive integrity" by a party not being perceived as giving into the other party but just following the mediator's evaluative opinion.

Cons:

1. May contradict self-determination.

2. May inadvertently align the mediator with one party if one party accepts the proposal and the other party does not, which can corrupt the process.

HOW TO PREPARE YOUR CLIENT FOR MEDIATION

Explain the mediation process to your client beforehand.

What mediation is and how it differs from litigation.

Who the mediator is and his/her specific credentials.

i. Judge-Mediator (how the judge dealt with family law cases on the bench and his/her general reputation as a judge).

ii. Lawyer-Mediator (the litigation and settlement background of the lawyer and positions held with the Bar, and his/her reputation in the legal community).

Where the mediation will be held.

How long a mediation session will last and the need to be patient.

Does your client have a "hard stop" on the day of mediation? (If so, state that beforehand and not 15 minutes before your client has to leave).

Do you need one day or multiple days?

How long is your client good for before breaking for the day?

For the lawyer: Rule 1.14(a) (Client with Impairment) provides that "when the lawyer reasonably believes that the client has diminished capacity . . . and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action . . . ."

For the mediator: Section E of the Standards of Ethics provides that mediation "is based on the principle of self-determination by the parties. Self-determination is the act of coming to a voluntary, uncoerced decision. (emphasis added)

Adjusting your client's expectations.

Client will need to understand (and potentially empathize with) the other party's interests and positions.

Brainstorming possible solutions, including solutions that are sometimes "outside the box."

Know where your client will draw the line, and where he/she is willing to compromise.

HOW TO PREPARE YOURSELF TO REPRESENT YOUR CLIENT IN MEDIATION

Lawyer's role in mediation

Getting into the right mindset

Mediation is not court – ***chill out***.

The parties are not necessarily adversaries, and at one time presumably cared for one another and may still to some extent. They just may be hurting right now.

Be pleasant to the opposing counsel. Be a role model for the parties

The issues do not need to be resolved strictly by the law and often are not.

How to get to the mediation mindset.

Listen to your client's goals.

Be a problem solver more than an advocate.

Treat your opposing counsel as a collaborator and not your adversary.

The collective goal should be getting the parties out of conflict and to a signed agreement.

Depending on the mediator's style, don't be afraid of staying together in the same room so long as it is not counterproductive.

However, some mediation models have an initial meeting followed by shuttle diplomacy.

There is no one right way.

Preparation for Mediation

Pre-mediation call with both counsel.

i. Be prepared for the call since the mediator is coming in cold.
ii. Know basic facts (*e.g.*, date of marriage, ages of the children, any special needs the children have, the parties' occupations and incomes, overview of the major assets, *etc.*).

Pre-mediation call with individual counsel if needed.

Provide the mediator with relevant documents (*i.e.*, appraisals, tracing documents, interrogatory answers, *etc.*), offer letters, and proposed marital settlement agreement.

What are the issues and what is in dispute?

Figure out the agreed-upon and disputed issues prior to meeting.

Offer Letters and Draft Agreements

i. Have the parties exchanged offer letters?
ii. Is there a draft Marital Settlement Agreement that a party prepared and can be revised in mediation.
iii. If everyone expects to end with a signed agreement, should have a document to work from that everyone has seen **prior to mediation**.

Be Prepared for Several "Last Issues"

Clients or opposing party may have a new issue to discuss even though everyone had previously agreed that all issues were addressed.

Be prepared for this and a few more "last issues" to crop up in finalizing a written agreement.

Having a draft agreement prior to the mediation session helps avoid this.

THE ROLE OF THE CHILD SPECIALIST IN MEDIATION

Should children's voices be included in the divorce process?

What does the research have to say?

- Children want to be included
  - Children want to be heard and want to be active participants in decisions that affect their lives
  - Children want to be kept informed and want to know their needs are being heard

- Family relationships are positively impacted by child involvement:
  - Fathers reported lower conflict with their co-parent after child-inclusive models
  - Children reported feeling closer to their fathers after child-inclusive model
  - Children reported more contentment with the parenting plan after the child-inclusive model).
  - Meaningful participation in the process has been seen as a protective factor for a child's adjustment over time.

- Improved outcomes in mediation:
  - Children's participation correlates positively with ability to adjust to new family structure
  - Studies have also found that parents were more satisfied with their ADR process and exhibited more awareness about the impact of the changes on their children when the children's voices were heard in direct feedback.

Considerations for including the voice of the child in mediation:

Does this create the perception of a conflict? If the mediator interviews the child, it can threaten a client's perception of the mediator's neutrality or impartiality.

If the interviewer does not possess specialized skill, knowledge, and experience, children may be placed at greater risk when included in the process.

CHILD FOCUSED
v.
CHILD INCLUSIVE APPROACHES

IN MEDIATION

Child-Focused Mediation: keeps the focus of the discussions on the children and encourages parents to prioritize the needs of the child over those of the parents.

<u>The mediator:</u>

- Centers conversations around the child's best interest
- Speaks up for the child's best interests if discussions begin to stray away from the children.
- Ensures parents look at how their positions in negotiation will affect the child if put in place.
- Shares information from outside sources about what is best for the child (*e.g.*, suggesting age-appropriate visitation schedules)

Child-focused mediation is a simple way to assert the child's voice without directly involving the child.

Child Inclusive Mediation:

A Child Specialist interviews the children to bring their voices into the process.

THE ROLE OF THE CHILD SPECIALIST IN MEDIATION

The Role of the Child Specialist in Mediation:

- A Child Specialist is a neutral mental health professional who specializes in separation and divorce and has specialized skill, knowledge, and experience in the areas of child development, family systems, mediation, and collaborative divorce.

- Their job, very broadly, is to bring the voice of the child into the process by informing the parents on child related issues in a way that prioritizes the needs and safety of children.

- They provide information directly from the children, educate parents as needed/requested, and provide resources to parents.

Child Specialist is NOT a therapist or a custody evaluator.

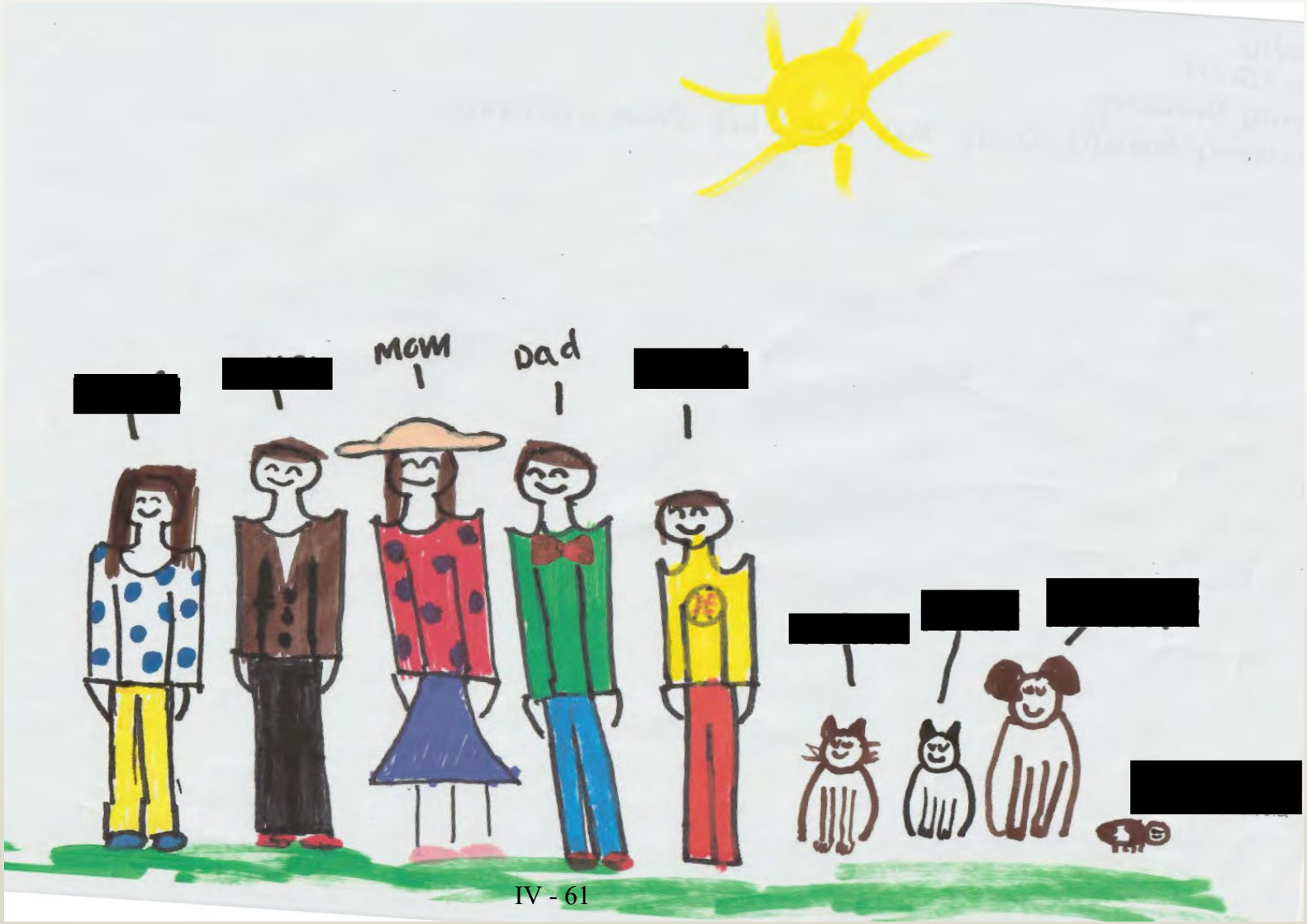
- Unlike a therapist, the Child Specialist does not meet with the child in an on-going way, does not have a confidential relationship with the child, and is focused only on the divorce process.

- Unlike a custody evaluator, a Child Specialist does not make any recommendations regarding custody, does not evaluate for mental illness, and does not determine appropriateness of parents or develop the parenting plan.

PROTOCOLS OF THE CHILD SPECIALIST ROLE

1. Has a call with the referring mediator to gather preliminary information about the case, very high level.
2. Parent meetings
3. Meetings with the children
4. Discussions with collaterals
5. Compiles information and first shares the information with the mediator..
6. Meets in a 4-way meeting with mediator and parents and delivers feedback so that the parents and the mediator can use the information the mediation process.

12 yr old girl- "My family before going out to dinner"



4 year-old girl – "Self in the rain" drawing

10 year-old boy - Picture of my family doing something

Considerations When Deciding to Use a Child Specialist in the Mediation Process

Examples of cases that are a good fit for the Child Specialist role:

- Cases involving an impaired parent.
- Cases involving children with special needs.
- To resolve impasses related to specific parenting decisions.
- To bring the focus of the process back on the children.
- Child Specialist as a co-mediator: co-mediates custody issues and provides more support in the mediation process.

When to use caution recommending a Child Specialist in mediation:

- When parents are not ready to hear the feedback.
- When there is fear of reprisal against the children by a parent.
- When the children are too young to express themselves.
- When children appear coached or manipulated by a parent (*e.g.*, cases in which parent alienation is suspected).

TIME FOR THE PANEL DISCUSSION!

Privilege CLE

Virginia State Bar, Family Law Section
Advanced Family Law CLE, Richmond, Virginia 2024

Lawrence P. Vance, Esq.
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Winchester, Virginia

1. Holder of the privilege is the party entitled to decide whether to assert the privilege.
2. Marital Privilege:
    a. Found at Virginia Code § 8.01-398 and Rules of Virginia Supreme Court Rule 2:504(a).

        Privileged marital communications:

        Husband and wife shall be competent witnesses to testify for or against each other in all civil actions.

        In any civil proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between his spouse and him during their marriage, regardless of whether he is married to that spouse at the time he objects to disclosure. This privilege may not be asserted in any proceeding in which the spouses are adverse parties, or in which either spouse is charged with a crime or tort against the person or property of the other or against the minor child of either spouse. For the purposes of this section, "confidential communication" means a communication made privately by a person to his spouse that is not intended for disclosure to any other person.

    b. Both spouses are holders.

    c. The privilege was significantly modified in 2005. Carpenter v. Commonwealth 51 Va. App. 84, 654 S.E.2d 345 (2007).

    d. This privilege is jointly held requiring both parties to waive privilege.

    e. “The purpose of the privilege is to preserve the "continued tranquility, integrity and confidence" of the marital relation, shielded and protected by the "inviolate veil of the marital sanctuary." *Menefee v. Commonwealth* 189 Va. 900, 912, 55 S.E.2d 9, 15 (1949), Thus, it does not shield any and every communication or act, regardless of its nature, but "only communications of a confidential nature," that

is, "of a secret nature between husband and wife." Id. at 907, 55 S.E.2d at 13 [20 Va.App. 475] quoting Thomas v. First National Bank of Danville, 166 Va. 497, 511, 186 S.E. 77, 78 (1936). Accord Stewart v. Commonwealth, 219 Va. 887, 893, 252 S.E.2d 329, 333 (1979) (noting that the predecessor to Code § 8.01-398 shields confidential communications). Thus, admissibility depends "upon the nature of the communication ... whether it was intended to be secret or confidential." Thomas, 166 Va. At 511, 186 S.E. at 83. Edwards v. Com., 20 Va. App. 470, ___, 457 S.E.2d 797, 800 (Va. App. 1995)"

f. "For the purposes of this section, "confidential communication" means a communication made privately by a person to his spouse that is not intended for disclosure to any other person."

    i. Husband's inculpatory statement to Wife over a cellphone was plainly a "communication privately made" between spouses, made directly by one to the other, over a closed communication system, unheard by anyone else, and under circumstances giving rise to no expectation that it would be overheard. *Braxton v. Commonwealth*, Record No. 0766-05-2, Virginia Court of Appeals, July 18, 2006, Page 4

g. "[A] person has a privilege to refuse to disclose, and to prevent anyone else from disclosing…" meaning that this privilege is mutual, and both parties must waive privilege for the testimony to be permitted.

    i. However, the privilege is limited to situations where a spouse is being examined in an action or is revealing a private communication through testimony. *Burns v. Commonwealth*, 261 Va. 307, ___, 541 S.E.2d 872, 890 (2001) (allowing the testimony about letters turned over to a non-spouse)

h. "Any confidential communication between his spouse and him…"

    i. Marital privilege applies to "all information or knowledge privately imparted and made known by one spouse to the other by virtue of and in consequence of the marital relation through conduct, acts, signs, and spoken or written words." *Menefee v. Commonwealth,* 189 Va. 900, 912, 55 S.E.2d 9, 15 (1949)

i. "[D]uring their marriage, regardless of whether he is married to that spouse at the time he objects to disclosure."

    i. In *Braxton,* the Husband and Wife were separated by a protective order but were married.

j. "This privilege may not be asserted in any proceeding in which the spouses are adverse parties, or in which either spouse is charged with a crime or tort against the person or property of the other or against the minor child of either spouse."

   i. Because the subject communication concerned acts as to which the Wife had a right of action against the Husband her testimony as to his statement was permitted. *Braxton v. Commonwealth*, Record No. 0766-05-2, Virginia Court of Appeals, July 18, 2006, Page 4-5

3. Religious Privilege:

   a. Found at Virginia Code § 8.01-400 and Rules of Virginia Supreme Court Rule 2:503.

> No regular minister, priest, rabbi, or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required to give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

   b. Religious official is holder.

   c. This privilege statute and rule do not have the same exceptions that others do for waiver upon consent of the declarant. Consequently, the language of the statute invests the religious official with the privilege and "leaves it to his conscience to decide when disclosure is appropriate". The declarant has no right of privilege. *Seidman v. Fishburne-Hudgins Educational Foundation, Inc.*, 724 F.2d 413 (4th Cir. 1984), *Nestle v. Commonwealth*, 470 S.E.2d 133, 22 Va. App. 336 (Va. App. 1996)

5. Medical Privilege:

   a. Found at Virginia Code § 8.01-399 and Rules of Virginia Supreme Court Rule 2:505.

> The scope and application of the privilege between a patient and a physician or practitioner of the healing arts in a civil case are as set forth in any specific statutory provisions, including Code § 8.01-399, as amended from time to time, which presently provides:
>
> (a) Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts is permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.
>
> (b) If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment may be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order may be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it must be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner may occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability is admissible at trial.
>
> (c) This section will not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act; (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug; or (iii)

prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.

(d) Neither a lawyer nor anyone acting on the lawyer's behalf may obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of Supreme Court as herein provided However, the prohibition of this subsection does not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:1 0 of the Rules of Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

(e) A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 is considered a

practitioner of a branch of the healing arts within the meaning of this section.

(f) Nothing herein prevents a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of a practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

b. Patient is the holder.

c. Testimony is not limited to the contents of the disclosed records when other facts are provided to the testifying medical provider. Holmes v. Levine, 639 S.E.2d 235, 273 Va. 150 (2007).

d. "Only diagnosis offered to a reasonable degree of medical probability is admissible at trial."

6. Mental Health Provider Privilege

a. Found at Virginia Code § 8.01-400.2 and Rules of Virginia Supreme Court Rule 2:506.

Except at the request of or with the consent of the client, no licensed professional counselor, as defined in Code§ 54.1-3500; licensed clinical social worker, as defined in Code§ 54.1-3700; licensed psychologist, as defined in Code § 54.1-3600; or licensed marriage and family therapist, as defined in Code§ 54.1-3500, may be required in giving testimony as a witness in any civil action to disclose any information communicated in a confidential manner, properly entrusted to such person in a professional capacity and necessary to enable discharge of professional or occupational services according to the usual course of his or her practice or discipline, wherein the person so communicating such information about himself or herself, or another, is seeking professional counseling or treatment and advice relating to and growing out of the information so imparted; provided, however, that when the physical or mental condition of the client is at issue in such action, or when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such counseling, treatment or advice will be privileged, and disclosure may be required. The privileges conferred

by this Rule do not extend to testimony in matters relating to child abuse and neglect nor serve to relieve any person from the reporting requirements set forth in § 63.2-1509.

b. Patient is the holder.

c. Psychologists are covered by both the Mental Health Provider Privilege and Medical Privilege.

7. Attorney Client Privilege.

a. Attorney Client Privilege is governed by common law. Rules of Virginia Supreme Court Rule 2:502.

> Except as may be provided by statute, the existence and application of the attorney-client privilege in Virginia, and the exceptions thereto, are governed by the principles of common law as interpreted by the courts of the Commonwealth in the light of reason and experience.

b. Privilege belongs to the client, client is the holder, not the attorney.

i. Attorney cannot assert the privilege except on behalf of the Client.

Commonwealth v. Edwards, 235 Va. 499, 370 S.E.2d 296 (1988)

c. Privilege requires an attorney-client relationship, and that the communication was made in confidence.

i. Seeking advice in legal capacity

ii. Expectation of confidentiality

d. Communication must relate to the matters where the advice is sought and for a proper purpose.

e. Waiver. §8.01-420.7.

> Attorney-client privilege and work product protection; limitations on waiver.
> A. When disclosure of a communication or information covered by the attorney-client privilege or work product protection made in a proceeding or to any public body as defined in §2.2-3701 operates as a waiver of the privilege or protection, the waiver extends to an undisclosed communication or information only if:
> 1. The waiver is intentional;
> 2. The disclosed and undisclosed communications or information concern the same subject matter; and
> 3. The disclosed and undisclosed communications or information sought in fairness be considered together.

B. Disclosure of a communication or information covered by the attorney-client privilege or work product protection made in a proceeding or to any public body as defined in § 2.2-3701 does not operate as a waiver of the privilege or protection if:

1. The disclosure is inadvertent;

2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and

3. The holder promptly took reasonable steps to rectify the error, including, if applicable, complying with the provisions of subdivision (b) (6) (ii) of Rule 4:1 of the Rules of the Supreme Court.

C. A court may order that the privilege or protection is not waived by the disclosure connected with the litigation pending before the court, in which case the disclosure does not operate as a waiver in any other proceeding.

D. An agreement on the effect of the disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

E. This section shall not limit any otherwise applicable waiver of attorney-client privilege or work product protection by an inmate who files an action challenging his conviction or sentence.

8. 5th Amendment Privilege.

   a. Statement could be the link that exposes the witness to criminal prosecution.

   b. Can only be invoked by the witness.

   c. Negative inference.

Asserting and Overcoming Privilege in Family Law Matters

Disclaimer

The information provided in this CLE does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available on this site are for educational purposes only. The views expressed at, or through, this site are those of the individual presenter in his individual capacity only and is not a predictor of any ruling in any court.

In other words, your actual mileage with any of these arguments may vary

Spousal Privilege

Found at Virginia Code § 8.01-398 and Rules of Virginia Supreme Court Rule 2:504(a).

Privileged marital communications:

Husband and wife shall be competent witnesses to testify for or against each other in all civil actions.

In any civil proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between his spouse and him during their marriage, regardless of whether he is married to that spouse at the time he objects to disclosure. This privilege may not be asserted in any proceeding in which the spouses are adverse parties, or in which either spouse is charged with a crime or tort against the person or property of the other or against the minor child of either spouse. For the purposes of this section, "confidential communication" means a communication made privately by a person to his spouse that is not intended for disclosure to any other person.

Spousal Privilege

"a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication"

Mutual privilege, it belongs to both spouses

Elements:

- This privilege was altered at the time of the adoption of the Rules of Evidence
- Married at the time of the communication
- Intent that the communication is intended for the spouse only

How could this ever come up in Family Law?

Subsequent domestic partner litigation

Mother calls Former Wife in custody and visitation case to testify about Father's, aka the Former Husband's statements about ------.

Payee calls Current Spouse in child support case to testify about Payor's statements about income, business expenses, etc.
(but see §20-88.59(H))

Clerical Privilege

Found at Virginia Code § 8.01-400 and Rules of Virginia Supreme Court Rule 2:503.

No regular minister, priest, rabbi, or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required to give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

Clerical Privilege

"give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him"

Elements:

- Privilege belongs to the minister, priest, rabbi, or accredited practitioner
- Information about the declarant, or another, when seeking spiritual counsel and advice relative to and growing out of the information so imparted

But does other privilege attach because of the nature of the communications?

- 54.1-3500 Definition of professional counseling

  "Appraisal activities" means the exercise of professional judgment based on observations and objective assessments of a client's behavior to evaluate current functioning, diagnose, and select appropriate treatment required to remediate identified problems or to make appropriate referrals.

  "Counseling" means the application of principles, standards, and methods of the counseling profession in (i) conducting assessments and diagnoses for the purpose of establishing treatment goals and objectives and (ii) planning, implementing, and evaluating treatment plans using treatment interventions to facilitate human development and to identify and remediate mental, emotional, or behavioral disorders and associated distresses that interfere with mental health.

- 54.1-3501(3) Exemption from requirements of licensure.

The activities, including marriage and family therapy, counseling, or substance abuse treatment, of rabbis, priests, ministers or clergymen of any religious denomination or sect when such activities are within the scope of the performance of their regular or specialized ministerial duties, and no separate charge is made or when such activities are performed, whether with or without charge, for or under auspices or sponsorship, individually or in conjunction with others, of an established and legally cognizable church, denomination or sect, and the person rendering service remains accountable to its established authority.

Also…

- 54.1-3701 Definitions

  "Social worker" means a person trained to provide service and action to effect changes in human behavior, emotional responses, and the social conditions by the application of the values, principles, methods, and procedures of the profession of social work.

- 54.1-3701(3) Exemption from requirements of licensure. The activities of rabbis, priests, ministers or clergymen of any religious denomination or sect when such activities are within the scope of the performance of their regular or specialized ministerial duties, and no separate charge is made or when such activities are performed, whether with or without charge, for or under auspices or sponsorship, individually or in conjunction with others, of an established and legally cognizable church, denomination or sect, and the person rendering service remains accountable to its established authority.

Medical Privilege

Found at Virginia Code § 8.01-399 and Rules of Virginia Supreme Court Rule 2:505.

(a) Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts is permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

(b) If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment may be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action.... Only diagnosis offered to a reasonable degree of medical probability is admissible at trial.

Healing Arts

54.1-2900 Definition

"Healing arts" means the arts and sciences dealing with the prevention, diagnosis, treatment and cure or alleviation of human physical or mental ailments, conditions, diseases, pain or infirmities.

Medical Privilege

Medical provider is NOT "permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity"

Privilege belongs to the patient

Except:

- "If the physical or mental condition of the patient is at issue in a civil action."
- As in §20-107.1(E)(4) ; §20-107.3(E)(4) ; §20-124.3(2); and, possibly §20-108(B)(11) and (15)

Extent of Medical Privilege Exclusion

What comes in:

"The diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner."

What stays privileged:

"Only diagnosis offered to a reasonable degree of medical probability is admissible at trial."

However, testimony is not limited to the contents of the disclosed records when other facts are provided to the testifying medical provider.

“Reasonable Degree of Medical Probability”

“Provisional”

“Provisional Diagnosis The specifier “provisional” can be used when there is a strong presumption that the full criteria will ultimately be met for a disorder but not enough information is available to make a firm diagnosis. The clinician can indicate the diagnostic uncertainty by recording “(provisional)” following the diagnosis.”

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH EDITION, page 23

“Rule Out”

- Not covered by the DSM-5
- Considered valid due to wide use

“The "rule out" diagnosis is more likely to be used when the clinician sees symptoms pointing towards a certain diagnosis, but there is a fair degree of doubt whether the diagnosis criteria will ultimately be met. When a clinician is seeing two competing diagnoses, the “rule out” diagnosis is the one that the clinician believes is the less likely alternative.”

https://www.yourceus.com/pages/dsm5577-section-iii-comprehensive-assessment-and-diagnosis?_pos=1&_sid=4259d06c3&_ss=r

Forced Releases

Can the Court direct that your client sign a release of to provide medical information?

"No order may be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it must be restricted to the medical records that relate to the physical or mental conditions at issue in the case."

Mental Health Provider Privilege

Found at Virginia Code § 8.01-400.2 and Rules of Virginia Supreme Court Rule 2:506.

Except at the request of or with the consent of the client, no licensed professional counselor, as defined in Code§ 54.1-3500; licensed clinical social worker, as defined in Code§ 54.1-3700; licensed psychologist, as defined in Code § 54.1-3600; or licensed marriage and family therapist, as defined in Code§ 54.1-3500, may be required in giving testimony as a witness in any civil action to disclose any information communicated in a confidential manner, properly entrusted to such person in a professional capacity and necessary to enable discharge of professional or occupational services according to the usual course of his or her practice or discipline, wherein the person so communicating such information about himself or herself, or another, is seeking professional counseling or treatment and advice relating to and growing out of the information so imparted; provided, however, that when the physical or mental condition of the client is at issue in such action, or when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such counseling, treatment or advice will be privileged, and disclosure may be required.

Mental Health Privilege

"Any information communicated in a confidential manner, properly entrusted to such person in a professional capacity and necessary to enable discharge of professional or occupational services according to the usual course of his or her practice or discipline, wherein the person so communicating such information about himself or herself, or another, is seeking professional counseling or treatment"

Privilege belongs to the patient

Except:

- If the physical or mental condition of the patient is at issue in such action.
- Once again in §20-107.1(E)(4) ; §20-107.3(E)(4) ; §20-124.3(2); and, possibly §20-108(B)(11) and (15)

Dual Psychologist Privilege

Virginia Code § 8.01-399 and Rules of Virginia Supreme Court Rule 2:505. ...
(e) A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 is considered a practitioner of a branch of the healing arts within the meaning of this section.

Medical Privilege

any information that he may have acquired in attending, examining or treating the patient in a professional capacity

Specifies also reliable diagnosis

Mental Health Privilege

any information communicated in a confidential manner by the patient

Diagnosis, third party communications, testing are not privileged

5th Amendment Self - Incrimination Privilege

1. Where is the line where the witness can invoke 5th Amendment privilege?

   Statement could be the link that exposes the witness to criminal prosecution.

2. Who can invoke 5th Amendment privilege?

   Can only be invoked by the witness.

The Negative Inference

§ 8.01-223.1 - In any civil action, the exercise by a party of any constitutional protection shall not be used against him, except that in any civil proceeding for spousal support, custody, or visitation under Title 16.1 or any civil action for divorce or separate maintenance under Title 20 filed on or after July 1, 2020, if a party or witness refuses to answer a question about conduct described in subdivision A (1) of § 20-91 or in § 18.2-365 on the ground that the testimony might be self-incriminating, the trier of fact may draw an adverse inference from such refusal.

§20-88.59(G) - If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

Attorney Client Privilege

Attorney Client Privilege is governed by common law. Rules of Virginia Supreme Court Rule 2:502.

Except as may be provided by statute, the existence and application of the attorney-client privilege in Virginia, and the exceptions thereto, are governed by the principles of common law as interpreted by the courts of the Commonwealth in the light of reason and experience.

Privilege belongs to the client. But the privilege can be invoked by the attorney on behalf of the client.

Waiver of Privilege

Waiver. §8.01-420.7 Attorney-client privilege and work product protection; limitations on waiver.

A. When disclosure of a communication or information covered by the attorney-client privilege or work product protection made in a proceeding or to any public body as defined in §2.2-3701 operates as a waiver of the privilege or protection, the waiver extends to an undisclosed communication or information only if:

1. The waiver is intentional;
2. The disclosed and undisclosed communications or information concern the same subject matter; and
3. The disclosed and undisclosed communications or information sought in fairness be considered together.

B. Disclosure of a communication or information covered by the attorney-client privilege or work product protection made in a proceeding or to any public body as defined in § 2.2-3701 does not operate as a waiver of the privilege or protection if:

1. The disclosure is inadvertent;
2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. The holder promptly took reasonable steps to rectify the error, including, if applicable, complying with the provisions of subdivision (b) (6) (ii) of Rule 4:1 of the Rules of the Supreme Court.

C. A court may order that the privilege or protection is not waived by the disclosure connected with the litigation pending before the court, in which case the disclosure does not operate as a waiver in any other proceeding.

D. An agreement on the effect of the disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

E. This section shall not limit any otherwise applicable waiver of attorney-client privilege or work product protection by an inmate who files an action challenging his conviction or sentence.

"I'm probably not what you've signed up for anyhow and I have a terrible feeling that the only way resolve will come to these issues is with spilled blood. I am tired of [opposing attorney's] games and I am fully prepared to end all of this in a most finite fashion. He doesn't know me, and I can guarantee if I'm pushed into a corner I will strike swiftly and thoroughly."

Can you break privilege?

"YOU'RE FIRED!"

Ethical Considerations in Attorney-Client Relationship Terminations

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Our primary responsibilities as lawyers are to our clients. That said, sometimes those relationships deteriorate, and representation terminates prior to conclusion of the matter we, as attorneys, were hired to undertake. Sometimes our obligations to third parties dictate a change, sometimes the attorney needs to make the decision to "fire" a client, and sometimes the client, dissatisfied for reasons (real or imagined) wishes to end the relationship. Here we explore both scenarios, client requested termination and attorney requested termination, and ask, "What are we obligated to do, ethically?"

(all references to "Rule ____" are to the Virginia Rules of Professional Conduct – March 12, 2022 - found at: https://www.vsb.org/Site/about/rules-regulations/rpc-part6-sec2.aspx)

When the Client says: "You're Fired!"

First Consideration: Is there anything pending before a Court or Regulatory Agency?

If the answer is no - Basic Considerations – NO COURT INVOLVED:

1. Confirm with client that they are terminating representation for all purposes or only asking that you reasonably reduce the scope of representation.
    a. Remember you cannot refuse to step aside, unless permission is required from a third party – i.e. The Court – See Rule 1.2(a)
    b. Similarly, the client could limit the scope of the representation, if appropriate after consultation. See Rule 1:2(b)
2. If terminating all services, make sure you document their request.
    a. My Fee Agreement with Clients includes a provision that requests for termination must be in writing (e-mail from their e-mail address on file is normally acceptable).
    b. If they refuse to provide a written confirmation, do so yourself, a written confirmation on letterhead.

c. As Family Law Attorneys we don't normally have issues relating to Corporate Authority to make determinations of hiring and firing lawyers, but you should reference Rule 1.13.

3. Once termination is confirmed, the "best practice" is to provide a written statement to client providing a basic description of the additional steps you believe are necessary to finish the matter and a recommendation that they seek the advice of an attorney to assist them. Rule 1.4 may actually require this: (From Rule 1.4(b)) - "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." See also Rule 1.16 (d) – "... a lawyer shall take steps to the extent reasonably practicable to protect the client's interests..."

4. Prepare a copy of the Client file. Rule 1.16(e) sets out this process, which is applicable for ending attorney-client relationships in all scenarios (with one exception!).

    a. You RETURN THE ORIGINALS of any client furnished documents that are themselves originals and not copies or printouts from the internet.
    b. You RETURN THE ORIGINALS of any legal instruments or official documents (PSAs signed? Original Corporate Minutes? Wills? Vehicle Titles? Wet signature Contracts?).
    c. Who pays for the copies of these two types of Documents???? – YOU THE LAWYER if you want copies.
    d. When do you turn over these Originals? – "within a reasonable time" "upon request".
    e. Better Practice – Don't Wait for the Request – offer to let them pick up or offer to deliver to their new lawyer.

5. COPY OF CLIENT FILE CONTINUED - Ok - But what about everything else in the file?

    a. You can provide a copy.
    b. "Upon Request"
    c. "Within a Reasonable Time"
    d. CAN I BILL THEM FOR THIS?????
        i. Yes!
        ii. But must provide even if they don't have money to pay and refuse to pay.
    e. Does it all have to be a paper copy?
        i. NO!!!! (yay!)
        ii. If the client agrees – you can send in electronic format – We have firm branded USB Drives for this purpose.
        iii. Practice Pointer - Keep a copy of their consent to receive in electronic format

6. COPY OF CLIENT FILE #3 – What can I keep from Sending???

    a. NOT MUCH
    b. Draft Billing – i.e. the drafts reviewed before being finalized and sent to client – but client can have an additional copy of their bills if they want them
    c. Internal memos about attorney-client conflict
    d. Review of any conflict of interest concerns (though these should probably have been discussed with client and documented long before this point)
    e. Staffing decisions for client file and tasks
    f. What else? Maybe internal memos on strengths and weaknesses of witnesses? Disclosure would be contrary to law or Court Order (see Rule 1.16 Comment 11). Be very careful and generally if there is a question, provide it.

7. WHAT ABOUT THE MONEY???

    a. Let's start with the easy one – If you didn't earn it, you can't keep it.
    b. Even if you did earn it but you can't document that you earned it, you can't keep it.
    c. BUT, BUT, Mr. WALDMAN!!! I was going to document it… I did work…
    d. Rule 1.16(d) tell us (in part) that "…refunding any advance payment of fee that has not been earned…" is our obligation.
    e. Rule 1.5 says that we must only keep as fees:
        i. That are reasonable - 1.5(a)
        ii. That were earned – Rule 1.5 – Comment 4
        iii. That were adequately explained to client – 1.5(b)
        iv. Not on a contingency basis - 1.5(d) – there are exceptions – See Rule 1.5 – Comment 6 if you want to go down this slippery slope.
        v. Practice Pointer – Your Fee Agreement should explain what happens with fees if representation is terminated.
    f. When do I return the Funds? Within a Reasonable period of time, but I suggest as soon as you are able to deliver the file copy and have prepared a final billing in the case.

8. WHAT ELSE ?? - Representation that does not include Court proceedings

    a. Notify Other Parties to the Matter – Once you have told client you are doing so – Don't let client stop you from doing this!
    b. Consider having a conversation with client about why they are closing out representation before conclusion.
    c. Be a good colleague – get client's permission to talk to their next lawyer.
        i. Do not disparage the client in this conversation while being honest
        ii. You do not need to criticize yourself.
        iii. Make sure their new Lawyer knows how to contact other parties to the matter.

iv. You need permission! – Rule 1.6!!!! – Confidentiality extends to Former Clients Too!! – Comment 18

WHAT ABOUT IF THERE IS A COURT OR REGULATORY AGENCY INVOLVED?

ALL OF THE ABOVE APPLY PLUS:

9. Usually you are required to seek permission form the Adjudicatory Authority (Fancy form for saying… JUDGE).

    a. You are attorney of record until the Judge Approves and an Order is entered.
    b. This should be explained to the Client in clear and certain terms
        i. Practice Pointer 1 - You should consider language in your fee agreement of what happens if there is active litigation – firing is not automatic.
        ii. Practice Pointer 2 - Letter to client reminding them of this fact.
    c. Until Court approves - You are actually allowed to keep accruing a fee
        i. BUT – It must be reasonable
        ii. UNLESS CLIENT allows – It must be the minimum charges relating to required duties.
        iii. You are still ethically obligated to not allow the client's case to suffer.
        iv. You are still ethically obligated to the Court.
        v. You must still maintain client confidences.
        vi. You must still avoid missing deadlines – or get extensions
        vii. YOU SHOULD SUGGEST THAT YOUR CLIENT FIND NEW COUNSEL.
    d. Practice Pointer – be direct with client:
        i. "It's ok that you are hiring a new lawyer" – Don't get mad – just find a better case once this one is done.
        ii. "Instead of me withdrawing, why don't we have your lawyer substitute in so it is seamless for the Court and other others who could make your life more difficult"
        iii. If they still want you gone first before new lawyer – DOCUMENT THAT DECISION BY LETTER TO CLIENT NOTING IT IS AGAINST YOUR ADVICE.
    e. Practice Pointer – Orders to Withdraw/Orders to Substitute
        i. If it is a substitution:
            1. If client didn't tell you, ask for client confirmation
            2. Client message confirming; or
            3. Client signature on Order
            4. I know – we should be able to trust our colleagues but…
            5. Make sure the Order of Substitution has the new lawyer's contact information
            6. MAKE SURE THE ORDER IS ENTERED

ii. If a withdrawal with no new lawyer
    1. Client's signature on Order.
    2. Client's contact information on the Order
        a. They are now Counsel of Record, the Court and other Lawyers need to have a means to contact them.
        b. The client doesn't want to miss important information from the Court
        c. What about Protective Order? – Good question – See below - file notice with the Court of the Contact information asking that the Court place this information under seal, providing a copy of the Protective Order if not already on file – Confidential addendum????
    3. MAKE SURE THE ORDER IS ENTERED!!

BUT WAIT! THERE'S MORE!

Unique Circumstances in Client Representation Termination:

10. "Family Abuse" PROTECTIVE ORDERS:

a. Where client is the protected party:
    i. Make sure you explain that they will be representing themselves if there is no other lawyer.
    ii. Make sure they know that even if it is related to a criminal charge, the Office of the Commonwealth's Attorney is not "Their Lawyer" and generally won't argue the Protective Order or Legal Requirements for the Order if not already required for the criminal prosecution.
    iii. Make sure they know that the Court and Maybe the opposing attorney will still need their contact information.
        1. How???? – If in Circuit Court (Divorce), the Confidential Addendum "Addendum for Protected Identifying Information – Confidential" with letter explaining the circumstances when filing - https://www.courts.state.va.us/forms/circuit/cc1426.pdf
        2. If in JDR:
            a. Non-Disclosure Addendum - https://www.courts.state.va.us/forms/district/dc621.pdf
            b. Request For Confidentiality – Civil (for other issues) https://www.courts.state.va.us/forms/district/dc618.pdf
    iv. Make sure they know that there may be a delay in response because anything filed by the other side often will not be mailed direct to them, but will have to go through the Court, and then be "Served" or "Mailed" by the Court.

b. Where Client is the Party Who is the "Respondent"
    i. Inform them that all communications will have to go through the other side's lawyer or the Court.
        1. REMIND THEM THAT THEY STILL CANNOT CONTACT THE PROTECTED PARTY EVEN IF THEY ARE ACTING IN THE ROLE OF LAWYER – unless they really like Jail…
        2. That they CANNOT use third parties to communicate with the Protected Party Except the other side's lawyer about legal issues that are pending.
    ii. That they still need to keep the Court up to date on their address.
    iii. That Their Criminal Defense Lawyer (particularly if Court Appointed) is generally not responsible for dealing with the Protective Order Issue!

11. FEE DISPUTES – Money, Money, Money

a. If you have documented your efforts, had a clear engagement letter or fee agreement, and billed correctly, you generally have little to be worried about. – Again, Rule 1.5 is a good starting point for review
b. Your Fee Arrangement, however, is generally considered a contract, and thus may have a Statute of Limitations for civil suits that is the same as written contract/Open Account.
c. Statute of Limitations on Malpractice….
d. Ethics Complaints – Again, well documented accounting done with regularity, pursuant to a written fee explanation, with proper Trust Accounting in General, you generally have little to be worried about.
e. But – Fee disputes are almost inevitable.
f. Have provisions to explain how, when and what happens with billing, and "refunds" incorporated into your engagement letter or Fee Agreement.
g. Be Prompt in doing your final billing to a client file that has closed. NO LESS THAN MONTHLY!
h. If there is still a dispute – offer up the Fee Dispute Resolution Program
    i. This is not mandatory for either party
    ii. It has a very minimal expense - $20.00
    iii. It is Mediation or Arbitration service provided through VSB
    iv. For More Information - https://www.vsb.org/Site/Site/legal-help/fee-dispute.aspx?hkey=b453f83f-0814-43e2-8729-d3ec1e67abb7

12. Discovery Protective Orders: A Conundrum

a. Where a Court has already entered an Order limiting Access to Certain information produced in Discovery or Via Subpoena Duces Tecum – See Rules of the Supreme Court of Virginia, Rule 4:1(c) or 4:9A(c)(3) (for Subpoena Duces Tecum, for example)
b. Usually will limit who has access to or the scope of an inquiry.

c. Concern is here is most likely involving that one party or general public will have access to confidential or potentially embarrassing information.
d. Now your "Soon to Be" Former Client is either "Counsel of Record", is entitled to a Copy of Your File or will be prejudiced in their pro se self-representation.
e. WHAT DO I DO?
    i. Advise Client that the Court HAS TO be notified of the issue.
    ii. Advise Client that until the Court deals with the issue you may be required to withhold that part of the file if the Court's Discovery Protective Order Could be interpreted to require withholding the documents.
    iii. Advise the Client that it may require a hearing before you can finalize the withdrawal and deliver documents subject to the Discovery Protective Order.
    iv. Notify Opposing Counsel and the Court of the issue as part of the Motion to Withdraw.
    v. Contact the VSB Ethics Hotline if you remain concerned. Confirm to Client response received.
    vi. Is this Required by Rule 3:3(a)(2):
        A. A lawyer shall not knowingly:
            2. fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

What About Rule 3.4(d)?

"A lawyer shall not: (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling".

PART TWO – What if it is time for the Attorney to End the Relationship?

10 Clients you should consider firing/letting go/sending to the next guy (and hope you aren't the next guy)

1. "Let's go get that bitch/bastard/insert expletive or derogatory term of choice…"

*For this client, there's no "winning" short of absolute annihilation.
*Domestic relations cases can bring out the absolute worst in people, as those of us in attendance know.
*Remember the line from Danny DeVito's character in The War of the Roses (which is the best divorce movie of all time): "In a divorce, there's no winning; there's only degrees of losing." Truer words were never spoken!
*Remember: you are not the earthly instrument of your client's wrath, nor should your client expect this of you (or anyone else).

2. The client who CAN'T pay…

*Some clients just don't have the means to afford your services
*That is sad, and life is hard sometimes.
*Pro bono/low bono
*Depending on the situation, and if your home/office have been recently visited by the milkman of human kindness, you may decide to represent certain clients on a free or reduced rate basis.
*Virginia attorneys have an aspirational duty to provide pro bono legal services.
*See Virginia Rule 6.1 (2% Rule)

3. The client who WON'T pay…

*People can be stingy
*Some clients are willing to pay anything. Most clients don't want to pay any more than they think they absolutely have to, and more than you'd think have an unrealistic expectation regarding the cost of legal services. A few 1. want what they want, 2. want it now, and 3. think it ought to be free (or virtually free).
*It is extremely important to get a retainer in these cases, and this retainer should be sufficient to allow you the attorney to effectively and as completely as possible address the legal issue at hand without going into the hole.
*The fee must be reasonable (See Rule of Professional Conduct 1.5)

4. "Tell me what my witness should say. They'll say what I tell them to say…"

*Words to this effect are a major warning sign on the road to fraud/perjury.
*In law as in life: "Truth is the first duty."
*This is not stated thusly in the rules. I borrowed this phrasing from the Starfleet Academy Code of Conduct…
*"The first duty of every Starfleet officer is to the truth, whether it's scientific truth, or historical truth, or personal truth! It is the guiding principle on which Starfleet is based, and if you can't find it within yourself to stand up and tell the truth about what happened, you don't deserve to wear that uniform!" -Captain Jean-Luc Picard
*See 7 below.
*See Virginia Rule of Professional Conduct 1.2 - Scope of Representation
…
(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent…
(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

5. My boyfriend says you should be saying "X"…

*The boyfriend/girlfriend is almost certainly not a lawyer, and is most definitely not your client's lawyer. The client who persists in this line of direction towards you appears not to trust your professional judgment. Ask the client whom he or she wants representing them: you or the guy who drove them to your office in his Camaro on his break from the Smoke Shack…

*See Virginia Rule of Professional Conduct The Virginia Rules of Professional Conduct address the issue of client autonomy and the direction of the course of representation, particularly in situations where someone other than the client pays for the attorney's services. The relevant rule that directly addresses this issue is Rule 1.8(f), which discusses the conditions under which a lawyer may accept compensation for representing a client from someone other than the client.

Rule 1.8(f): Third-Party Payments

Rule 1.8(f) states that a lawyer shall not accept compensation for representing a client from one who is not the client unless:

- The client gives informed consent;
- There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- Information relating to representation of a client is protected as required by Rule 1.6.

Commentary on Client Direction of Representation

The commentary on Rule 1.8(f) and related rules emphasize the principle that it is the client who directs the course of representation. Even when a third party is paying the lawyer's fees, the lawyer's duty of loyalty remains to the client, and the client retains ultimate authority over the representation. This is consistent with Rule 1.2(a), which stipulates that a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

Rule 1.2(a): Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.2(a) further clarifies that while a lawyer may provide advice and guidance to the client regarding the means to achieve the client's objectives, the final decisions regarding those objectives and the general direction of the case rest with the client. This includes decisions such as whether to settle a litigation matter, plead guilty in a criminal case, or waive the right to appeal.

5a. My fiancé wants to meet with us when we talk…

*A deeper wade into the quagmire of number 5 above, except now, “Loverboy” (or “Lovergirl”) wants to take their show on the road, and the venue chosen is the sanctity of your office.
*Perhaps this the best time to say a word about fees. Sometimes, a client’s family member or significant other thinks they have a role in the representation due to having paid all or a portion (small or large) of the fee.
*While the source of your fee may be someone other than the client, it must be made clear that ONLY the client has an active role in steering the course of their case.

6. The drugs don’t mean I’m a bad parent…

*It’s very important to explain the reality of how certain habits may be viewed by the tribunal. It is even more important to be honest and candid with the client.
*Some clients have a certain, shall we say, dissociation with objective truth/reality, and will refuse to accept what we tell them about the impact certain habits may have upon their case.

*See LEO 1885
*See Virginia Rules of Professional Conduct Rule 1.4 - Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.
…
Comment [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party.

7. I'm willing to say he beat me up or raped me…

*See 4 above.

If what the client and/or witness is going to say is false, then this could also lead to criminal sanctions for the client, the witness, you, or even all of the above!
See § 18.2-436. Inducing another to give false testimony; sufficiency of evidence.
If any person procure or induce another to commit perjury or to give false testimony under oath in violation of any provision of this article, he shall be punished as prescribed in § 18.2-434.
In any prosecution under this section, it shall be sufficient to prove that the person alleged to have given false testimony shall have been procured, induced, counselled or advised to give such testimony by the party charged.

Code 1950, § 18.1-277; 1960, c. 358; 1975, cc. 14, 15.

8. "If you don't call my kids as witnesses, I will fire you."

*It is the client's place to dictate the ENDS of the representation, but it is the attorney's role to determine the MEANS by which those ends are reached (or, rather, ATTEMPTED to be reached). This is subject to the attorney's obligation to ***consult*** with the client as to those means (emphasis added).
*HOW TO RESOLVE: Discuss with the client (or prospective client) what is important (in the client's eyes/mind) about the testimony of said little bundles of joy, determine how else the information might be presented to the tribunal, and counsel the client about the risk/reward calculus involved.
*The client *might* just want to use junior's testimony as an emotional cudgel against the other party (shocking!).
*See Rule 1.2 - Scope of Representation
(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a

criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

9. “Don’t do any work until I approve what you are doing. And the cost…”

*This one is kind of tricky
*Remember, you don’t HAVE to take on any client who wants to hire you, just because that client expresses an interest in hiring you.
*If you feel you cannot effectively pursue the representation of the client under the terms of the representation the client is willing to agree to, you should not undertake the representation, nor should you continue to pursue the representation.
*Consider: The Virginia Rules of Professional Responsibility do not contain a rule that explicitly requires attorneys to get approval before performing work in the general sense of conducting legal tasks or representation. However, several rules address the importance of obtaining informed consent from a client regarding the scope of representation, fees, and certain actions that may require explicit client approval. Here are a few relevant rules that highlight the importance of communication and consent in the attorney-client relationship:

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer
***Rule 1.2** addresses the attorney's duty to consult with the client about the means by which the client's objectives are to be pursued. It implies that the lawyer should seek the client's informed consent regarding the representation's scope and the strategies to be employed.

Rule 1.4: Communication

- •**Rule 1.4** requires attorneys to communicate effectively with clients, keeping them informed about the status of their matter, promptly comply with reasonable requests for information, and explain matters to the extent reasonably necessary to allow the client to make informed decisions regarding the representation.
- Rule 1.5: Fees
- •**Rule 1.5** deals with fees and states that lawyers should not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors determining the reasonableness of a fee include whether the fee is fixed or contingent, the terms of the fee agreement, and whether the client has given informed consent to the fee.

Rule 1.6: Confidentiality of Information

- •**Rule 1.6** requires a lawyer to obtain informed consent from a client before revealing information relating to the representation, except for specific exceptions. While this rule is more about confidentiality, it emphasizes the importance of client consent in certain actions the lawyer might take.

In the context of starting or conducting work that has significant implications for the client or the direction of a case, such as incurring substantial fees, entering settlements, or undertaking a significant change in strategy, obtaining informed consent from the client is crucial. This ensures that the client is fully aware of and agrees to the proposed course of

action, aligning with the principles of autonomy and informed decision-making in the attorney-client relationship.

For specific guidance on obtaining approval before performing certain types of legal work or making decisions that significantly affect the client's interests, attorneys are advised to refer to the detailed provisions of the Virginia Rules of Professional Responsibility and consider the ethical implications and requirements for informed consent in their practice.

10. I am going to call the Bar on you if you don't win.

*Obviously, there is no way to prevent a client from filing a Bar Complaint against you.
*That doesn't mean said complaint will be founded and/or in any way meritorious, just that the client has a right to seek this form of redress.
*In fact, domestic relations and criminal law are the most common practices areas that receive bar complaints, just due to the nature of the cases….
*Keep good records to protect yourself in the event of a bar complaint
*You, the attorney, must ask yourself: if the client is already in the mindset of making his or her case about YOU, is this a headache you need?
*See also the new rule 8.4f, making it professional misconduct for a lawyer to (f) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before a lawyer regulatory or disciplinary authority.
https://www.vacourts.gov/courts/scv/amendments/rule_8_4_f.pdf
*See also LEO 189 concerning Contingency Fees in Domestic Relations cases.
https://www.vacle.org/opinions/189.htm

Part III: Firing the client…

There is a great deal of overlap between the section on when a client fires the attorney, and when we as attorneys must part ways with the client. What follows is a brief summary of when this is necessary/when it is permissible, and a short list of the major steps and considerations when crossing this particular Rubicon:

The key provision is:
Virginia Rules of Professional Conduct Rule 1.16
(a) Mandatory Withdrawal:
An attorney **MUST** withdraw from representing a client if:

- The representation will result in a violation of the Rules of Professional Conduct or law. This mandate is directly supported by Rule 1.16(a)(1), which states that a lawyer shall not represent a client or, where representation has commenced, must withdraw from the representation of a client if: the representation will result in violation of the rules of professional conduct or other law.
- The attorney's physical or mental condition materially impairs their ability to represent the client. This condition for withdrawal is specified in Rule 1.16(a)(2), which requires withdrawal when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

- The attorney is discharged by the client. **See Part I of the outline above.** This requirement is outlined in Rule 1.16(a)(3), indicating that a lawyer must terminate representation upon being discharged by the client, which respects the client's autonomy over their legal representation.
- The attorney is discharged by the client.

(b) Permissive Withdrawal:
An attorney *may* withdraw from representing a client if:

- Withdrawal can be accomplished without material adverse effect on the client.
- The client persists in a course of action involving the attorney's services that the attorney reasonably believes is criminal or fraudulent. Rule 1.16(b)(3)
- The client has used the attorney's services to perpetrate a crime or fraud. Rule 1.16(b)(4)
- The client insists upon pursuing an objective that the attorney considers repugnant or imprudent. Rule 1.16(b)(4)
- The client fails substantially to fulfill an obligation to the attorney regarding the attorney's services, and the attorney has given reasonable warning that the attorney will withdraw unless the obligation is fulfilled. Rule 1.16(b)(5
- The representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client. Rule 1.16(b)(6)
- Rule Rule 1.16(b)(7): Other reasons that do not harm the client's interest.

(c) Court Approval:
*When required by the rules of a tribunal, an attorney shall not withdraw from representation of a client without its permission. See Part I above for how to make this happen
*

(d) Duties Upon Withdrawal:
*See Part I above for what must be done, but the bottom line is that upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred.

(e) Timing Of Withdrawal
*The timing of withdrawal should also consider the client's dependence on the attorney's expertise, especially in such a specialized area of law as divorce/child custody, where finding a replacement might be challenging. Withdrawal should ideally be timed to ensure that the client has the best possible opportunity to find a competent replacement.
*In my experience, Courts will usually grant the withdrawal, but are less likely to do so the later you are in the process, e.g., a week before a two day hearing, etc.
*Don't put the Judge (and consequently, yourself) in a bad spot in this regard.

Summary of the Five Major Considerations When "Firing" A Client:

- **Communication:**
  - **Provide clear and prompt communication** to the client regarding the decision to terminate the representation. Explain the reasons for withdrawal in a professional and respectful manner, adhering to the standards of communication outlined in Rule 1.4 (Communication).
- **Protecting Client Interests:**

    - **Take appropriate steps to avoid prejudice** to the client's case or interests when withdrawing. According to Rule 1.16(d), attorneys must minimize potential harm to the clients. This obligation includes providing timely notice to the client, allowing time for the hiring of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.
    - If necessary, assist the client in finding alternative representation, reflecting the commitment to act in the best interests of the client, as emphasized across various rules but particularly relevant here.
- **Confidentiality:**
    - **Continue to uphold the duty of confidentiality** even after the termination of the attorney-client relationship, as mandated by Rule 1.6 (Confidentiality of Information). This duty remains crucial irrespective of the reasons for or the manner of termination.
- **Refund of Fees:**
    - **If there are unearned fees or expenses,** refund them promptly to the client, in accordance with Rule 1.16(d). This rule explicitly requires the prompt return of any unearned fees upon termination of the attorney-client relationship.
- **Court Approval:**
    - **If court approval is required for withdrawal,** follow the appropriate procedures and seek permission from the court, as outlined in Rule 1.16(c). This rule stipulates that an attorney must comply with the applicable law requiring notice to or permission from a tribunal when terminating representation. The attorney must continue representation until such notice is granted, ensuring that the withdrawal does not negatively impact the legal proceeding or the client's interests.

These considerations underscore the importance of ethical conduct and responsibility towards the client, even in the context of terminating the attorney-client relationship. The Virginia Rules of Professional Responsibility provide a framework to ensure that the process of "firing" a client is handled with professionalism, integrity, and respect for the client's rights and interests.

Remember: It's important for attorneys to be familiar with the specific language of the Virginia Rules of Professional Conduct and to seek guidance from the Virginia State Bar or legal ethics counsel if there are any uncertainties or unique circumstances.

Appendices:

A. Rules of Professional Conduct – 1.2, 1.4, 1.5, 1.6, 1.13, 1.16, 3.3 and 3.4.
B. Sample Fee Agreement Provisions:
    1. Termination of Representation by the Attorney
    2. Termination of Representation by Client
    3. **Refunds to Client of Funds Remaining on Deposit:**
    4. **Client File Copy & Original Document Return**
C. Confidentiality Forms - Confidential Address information:
    1. From CC-1426
    2. Form DC-621
    3. Form DC-618
D. Sample Letter to Client Who Terminated Services
E. VSB Fee Dispute Resolution Program Brochure

APPENDIX

A

RULES OF PROFESSIONAL CONDUCT

1.2, 1.4, 1.5, 1.6, 1.13, 1.16, 3.3, AND 3.4

In addition, the Committee added the second sentence under Maintaining Competence Comment section to note Virginia's Mandatory Continuing Legal Education requirements.

The amendments effective March 1, 2016, added the language "in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology."

The amendments effective October 31, 2018, added Comment [7].

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

(1) discuss the legal consequences of any proposed course of conduct with a client;

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law; and

(3) counsel or assist a client regarding conduct expressly permitted by state or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to

be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

[2-3] *ABA Model Rule* Comments not adopted.

[4] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by

appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

[8] *ABA Model Rule* Comment not adopted.

Criminal, Fraudulent and Prohibited Transactions

[9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. *See* Rule 1.16.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does

not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. Paragraph (c)(2) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. *See* also Rule 3.4(d).

[13] Paragraph (c)(3) addresses the dilemma facing a lawyer whose client wishes to engage in conduct that is permitted by applicable state or other law but is prohibited by federal law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by state law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (c)(3) applies, but is not limited in its application, to any conflict between state and federal marijuana laws.

VIRGINIA CODE COMPARISON

Paragraph (a) has no direct counterpart in the Disciplinary Rules of the *Virginia Code*. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client...." EC 7-8 stated that "[I]n the final analysis, however, the ... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately

for the client.... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provided that a lawyer "shall not intentionally ... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law.... A lawyer does not violate this Disciplinary Rule, however, by ... avoiding offensive tactics...."

With regard to paragraph (b), DR 7-101(B)(1) provided that a lawyer may, "with the express or implied authority of his client, exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or position of his client."

With regard to paragraph (c), DR 7-102(A)(7) provided that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-105(A) provided that a lawyer shall not "advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal ... but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 stated that a lawyer "should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

Paragraph (d) had no counterpart in the *Virginia Code*.

With regard to paragraph (e), DR 2-108(A)(1) provided that a lawyer shall withdraw from representation if "continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules." DR 9-101(C) provided that "[a] lawyer shall not state or imply that he is able to influence improperly ... any tribunal, legislative body or public official."

COMMITTEE COMMENTARY

The Committee adopted this Rule as a more succinct and useful statement regarding the scope of the relationship between a lawyer and the client. However, the Committee moved the language of paragraph (b) of the *ABA Model Rule* to the Comment section styled "Independence from Client's Views or Activities" since it appears more appropriate as a Comment than a Rule. Subsequent paragraphs were redesignated accordingly.

The Committee added the fourth sentence in Comment [1] requiring lawyers to advise clients of dispute resolution processes that might be "appropriate."

In Comment [7], the Committee used the verb "shall" to match the mandatory standard of the *Virginia Code* and these Rules.

The amendments effective January 1, 2004, added present paragraph (d) and redesignated former paragraph (d) as present paragraph (e).

The amendment effective March 12, 2022, adopted January 11, 2022. Separated paragraph (c) into paragraphs (1) and (2) and added new paragraph (3); for Comment [12], added "Paragraph (c)(2)" after "...to a lawful enterprise."; removed the following phrase: "The last clause of paragraph (c)", and added a new Comment [13].

RULE 1.3 Diligence

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

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and

"give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."

Paragraphs (b) and (c) adopt the language of DR 7-101(A)(2) and DR 7-101(A)(3) of the *Virginia Code.*

COMMITTEE COMMENTARY

The Committee added DR 7-101(A)(2) and DR 7-101(A)(3) from the *Virginia Code* as paragraphs (b) and (c) of this Rule in order to make it a more complete statement about fulfilling one's obligations to a client. Additionally, the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy.

The amendments effective February 28, 2006, added Comment [5].

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

COMMENT

[1] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.

[2- 4] *ABA Model Rule* Comments not adopted.

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the

client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of

limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

VIRGINIA CODE COMPARISON

Rule 1.4(a) is substantially similar to DR 6-101(C) of the *Virginia Code* which stated: "A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered."

Paragraph (b) has no direct counterpart in the *Virginia Code*. EC 7-8 stated that a lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

Paragraph (c) is identical to DR 6-101(D) of the *Virginia Code*.

COMMITTEE COMMENTARY

The *Virginia Code* had already substituted the essential notion of paragraph (a) as DR 6-101(C), thus specifically addressing a responsibility omitted from the *ABA Model Code*. The Committee believed that paragraph (b) specifically addressed a responsibility only implied in the *Virginia Code* and that adding DR 6-101(D) as paragraph (c) made the Rule a more complete statement regarding a lawyer's obligation to communicate with a client. Additionally, the Committee added a new second paragraph to the Comment to remind lawyers of their continuing duty to help clients choose the most appropriate settlement process.

RULE 1.5 Fees

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

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

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

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

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

stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

(1) in a domestic relations matter, except in rare instances; or

(2) for representing a defendant in a criminal case.

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

(1) the client is advised of and consents to the participation of all the lawyers involved;

(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;

(3) the total fee is reasonable; and

(4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

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

COMMENT

be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When considering whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. In any event, a fee should not be imposed upon a client, but should be the result of an informed decision concerning reasonable alternatives.

Contingent Fees in Domestic Relations Cases

[6] An arrangement for a contingent fee in a domestic relations matter has been previously considered appropriate only in those rare instances where:

(a) the contingent fee is for the collection of, and is to be paid out of (i) accumulated arrearages in child or spousal support; (ii) an asset not previously viewed or contemplated as a marital asset by the parties or the court; (iii) a monetary award pursuant to equitable distribution or under a property settlement agreement;

(b) the parties are divorced and reconciliation is not a realistic prospect;

(c) the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent;

(d) the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis; and

(e) the fee arrangement is fair and reasonable under the circumstances.

Division of Fee

[7] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

[8] *ABA Model Rule* Comment not adopted.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 2-105(A) required that a "lawyer's fees . . . be reasonable and adequately explained to the client." The factors involved in assessing the reasonableness of a fee listed in Rule 1.5(a) are substantially similar to those listed in EC 2-20.

Paragraph (b) emphasizes the lawyer's duty to adequately explain fees (which appears in DR 2-105(A)) but stresses the lawyer's duty to disclose fee information to the client rather than merely responding to a client's request for information (as in DR 2-105(B)).

Paragraph (c) is substantially the same as DR 2-105(C). EC 2-22 provided that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the

United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee...."

With regard to paragraph (d), DR 2-105(C) prohibited a contingent fee in a criminal case. EC 2-22 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-105(D) permitted division of fees only if: "(1) The client consents to employment of additional counsel; (2) Both attorneys expressly assume responsibility to the client; and (3) The terms of the division of the fee are disclosed to the client and the client consents thereto."

There was no counterpart to paragraph (f) in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee believes that DR 2-105 placed greater emphasis than the *ABA Model Rule* on the Full Disclosure of Fees and Fee Arrangements to Clients and therefore added language from DR 2-105(A) to paragraph (a) and from DR 2-105(D)(3) to paragraph (e). The Comment to paragraph (d)(1) reflects the Committee's conclusion that the public policy concerns which preclude contingent fee arrangements in certain domestic relations cases do not apply when property division, support matters or attorney's fee awards have been previously determined. Paragraph (e) eliminates the requirement in the *Virginia Code* that each lawyer involved in a fee-splitting arrangement

assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the *Virginia Code* was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

The amendments effective January 1, 2004, added paragraph (f).

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office

management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

(2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information

necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

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

COMMENT

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and

correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[5] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[5a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly

hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

[5b] Compliance with Rule 1.6(a) might include fulfilling duties under Rule 1.14, regarding a client with an impairment.

[5c] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

[6] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6a] Lawyers involved in insurance defense work that includes submission of detailed information regarding the client's case to an auditing firm must be extremely careful to gain consent from the client after full and adequate disclosure. Client consent to provision of information to the insurance carrier does not equate with consent to provide the information to an outside auditor. The lawyer must obtain specific consent to disclose the information to that auditor. Pursuant to the lawyer's duty of loyalty to the client, the lawyer should not recommend that the client provide such consent if the

disclosure to the auditor would in some way prejudice the client. *Legal Ethics Opinion #1723, approved by the Supreme Court of Virginia, September 29, 1999.*

Disclosure Adverse to Client

[6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[7] Several situations must be distinguished.

[7a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. *See* Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

[7b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[7c] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph (c)(1), the lawyer is obligated to reveal such information if the

crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another. Caution is warranted as it is very difficult for a lawyer to "know" when proposed criminal conduct will actually be carried out, for the client may have a change of mind. If the client's intended crime is perjury, the lawyer must look to Rule 3.3(a)(4) rather than paragraph (c)(1).

[8] When considering disclosure under paragraph (b), the lawyer should weigh such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the nature of the client's intended conduct, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

[8a] Paragraph (b)(7) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

Withdrawal

[9] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await

the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[10a] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the

lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[11] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[12] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct

[13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(2) requires an attorney who has information indicating that another

attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[14] Although paragraph (c)(2) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

[15 - 17] *ABA Model Rule* Comments not adopted.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Acting Reasonably to Preserve Confidentiality

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's

supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

[19a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated

data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. *See* Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;

(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;

(c) Procedures addressing security measures for access of third parties to stored information;

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

VIRGINIA CODE COMPARISON

Rule 1.6 retains the two-part definition of information subject to the lawyer's ethical duty of confidentiality. EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." However, the definition of "client information" as set forth in the *ABA Model Rules*, which includes all information "relating to" the

representation, was rejected as too broad.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

Paragraph (b)(1) is substantially the same as DR 4-101(C)(2).

Paragraph (b)(2) is substantially similar to DR 4-101(C)(4) which authorized disclosure by a lawyer of "[c]onfidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Paragraph (b)(3) is substantially the same as DR 4-101(C)(3).

Paragraph (b)(4) had no counterpart in the *Virginia Code*.

Paragraphs (c)(1) and (c)(2) are substantially the same as DR 4-101(D).

Paragraph (c)(3) had no counterpart in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added language to this Rule from DR 4-101 to make the disclosure provisions more consistent with current Virginia policy. The Committee specifically concluded that the provisions of DR 4-101(D) of the *Virginia Code*, which required broader disclosure than the *ABA Model Rule* even permitted, should be added as

paragraph (c). Additionally, to promote the integrity of the legal profession, the Committee adopted new language as paragraph (c)(3) setting forth the circumstances under which a lawyer must report the misconduct of another lawyer when such a report may require disclosure of privileged information.

The amendments effective January 1, 2004, added present paragraph (b)(4) and redesignated former paragraphs (b)(4) and (5) as present (b)(5) and (6); in paragraph (c)(3), at end of first sentence, deleted "but only if the client consents after consultation," added the present second sentence, and deleted the former last sentence which read, "Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney."; added Comment [5b] and [6a]; rewrote Comment [13].

The amendments effective March 1, 2016, added paragraph 1.6 (d); added "*Acting Reasonably to Preserve Confidentiality*" before adding Comments [19], [19a], [20] and [21] paragraphs "a" through "f".

The amendments effective December 1, 2016, added paragraph (7); in paragraph (c)(1) added the language "*reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another*", and

rewrote the last sentence of the paragraph; deleted former paragraph (2) and redesignated former paragraph (3) as present paragraph (2); added the language to comment [7c] "*if the crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another*", substituted the language "*Caution*" is "*warranted*" in place of "Some discretion is involved", and added the last sentence; in Comment [8] deleted the language "The lawyer's exercise of discretion requires consideration of" and replaced it with "*When considering disclosure under paragraph (b), the lawyer should weigh*", and added the language "*and with those who might be injured by the client*"; and added Comment [8a]; and in Comments [13] and [14] substituted the language "(c)(3)" with *"(c)(2)"*.

RULE 1.7 Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the

organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly

authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] The decisions of constituents of the organization ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Substantial justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance

RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon

termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising

from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

COMMENT

[1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. *See* also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the

lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed *pro se*.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. *See* Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Retention of Client Papers or File When Client Fails or Refuses to Pay Fees/Expenses Owed to Lawyer

[10] Paragraph (e) eschews a "prejudice" standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files.

[11] The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially the same as DR 2-108(A).

Paragraph (b) is substantially similar to DR 2-108(B) which provided that a lawyer "may withdraw from representing a client if: (1) Withdrawal can be effected without material prejudice to the client; or (2) The client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; or (3) The client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."

Paragraph (c) is identical to DR 2-108(C).

Paragraph (d) is based on DR 2-108(D), but does not address documents in the lawyer's files (which are handled under paragraph (e).

Paragraph (e) is new.

COMMITTEE COMMENTARY

The provisions of DR 2-108 of the *Virginia Code* derived more from *ABA Model Rule* 1.16 than from its counterpart in the *ABA Model Code*, DR 2-110. Accordingly, the Committee generally adopted the *ABA Model Rule*, but substituted the "illegal or unjust" language from DR 2-108(B)(2) for the "criminal or fraudulent" language of the *ABA Model Rule*. Additionally, the Committee substituted the language of DR 2-108(C) for that of paragraph (c) of the *ABA Model Rule* to make it clear that a lawyer, in circumstances involving court proceedings, has an affirmative duty to request leave of court to withdraw. The Committee recommended paragraph (e) instead of a "prejudice" standard as being more easily understood and applied by lawyers.

The amendments effective January 1, 2004, in paragraph (e), first sentence, inserted "therefore, upon termination of the representation, those items" between "client and" and "shall," inserted "within a reasonable time" between "returned" and "to the client," and inserted "or the client's new counsel" between "the client" and "upon request; in paragraph (e), third sentence, substituted "Also upon termination," for "Upon request," inserted "upon request" between "the client" and "must also," inserted "within a reasonable time" between "provided" and "copies," inserted "transcripts" before the present word "pleadings," and inserted "or collected" between "prepared" and "for the client; in paragraph (e), added the last sentence; and added Comment [11].

RULE 1.17 Sale Of Law Practice

A lawyer or a law firm may sell or purchase a law practice, partially or in its entirety, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted, except the lawyer may practice law while on staff of a public agency or legal services entity which provides legal services to the poor, or as in-house counsel to a business.

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

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

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

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

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

COMMENT

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

[2] *ABA Model Rule* Comment not adopted.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, Section 8.01-271.1 of the *Code of Virginia* states that a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court,

may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), *see* the Comment to that Rule. *See also* the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

False Evidence

[5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[7] *ABA Model Rule* Comment not adopted.

[8] The prohibition against offering false evidence only applies if the lawyer knows the evidence is false. A lawyer's reasonable belief or suspicion that evidence is false does not preclude its presentation to the trier of fact. A lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, but the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(4) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's

effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness, offers testimony during that proceeding that the lawyer knows to be false. In such situation or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal

information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[12] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however,

either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[13] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[13a] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[13b] The ultimate resolution of the dilemma, however, is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance

of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. *See* Rule 1.2(c).

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. For purposes of this Rule, *ex parte* proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear. However, a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding. If so, the lawyer must comply with a disclosure demand by the tribunal or challenge the action by available legal means. The

failure to disclose information as part of a legal challenge to a demand for disclosure will not constitute a violation of this Rule.

Duration of Obligation

[15] The obligation to rectify false evidence or false statements of law and fact should have a practical time limit. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

VIRGINIA CODE COMPARISON

Paragraph (a)(1) is substantially similar to DR 7-102(A)(5), which provided that "[i]n his representation of a client, a lawyer shall not knowingly make a false statement of law or fact."

With regard to paragraph (a)(2), DR 7-102(A)(3) provided that "[i]n his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal."

Paragraph (a)(3) has no direct counterpart in the *Virginia Code*. EC 7-20 stated: "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his

adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part."

With regard to paragraph (a)(4), the first sentence of this paragraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use perjured testimony or false evidence." DR 4-101(D)(2), adopted here as Rule 1.6(c)(2), made it clear that the "remedial measures" referred to in the second sentence of paragraph (a)(4) could include disclosure of the fraud to the tribunal.

Paragraph (b) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the *Virginia Code* to paragraph (c).

Paragraph (d) is identical to DR 7-102(B).

COMMITTEE COMMENTARY

The Committee generally adopted the *ABA Model Rule*, but it deleted the word "material" from paragraph (a)(1) to make it identical to DR 7-102(A)(5) and from paragraph (a)(2) because it appeared to be redundant. Additionally, the word "directly," preceding "adverse" was deleted from paragraph (a)(3).

With respect to paragraph (a)(3), the Committee believed it advisable to adopt a provision requiring the disclosure of controlling adverse legal authority. While there was no corresponding provision within the Disciplinary Rules of the *Virginia Code*, there is a corresponding provision within the *ABA Model Code*, DR 7-106(B)(1). However, the Committee deleted the word "directly" from the paragraph in the belief that the limiting effect of that term could seriously dilute the paragraph's meaning.

The Committee determined to retain the obligation to report a non-client's fraud on the tribunal, and therefore repeated the provisions of DR 7-102(B) in paragraph (d).

The amendments effective December 1, 2016, deleted "…, subject to Rule 1.6" at the end of paragraph (a)(2); rewrote the second half of paragraph (d) to read "…upon *the* tribunal *in a proceeding in which the lawyer is representing a client* shall promptly reveal the fraud to the tribunal."; added paragraph (e); deleted the phrase from Comment [6] "Upon ascertaining that material evidence is false" and replaced it with "*If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false*"; deleted Comments "[7 – 9] *ABA Model Rule* Comments not adopted."; added Comments [7], [8], and [9]; removed the language "*ABA Model Rule* Comments not adopted" from Comment [10] and added the remainder of the comment; changed

"cooperate" to "cooperates" in Comment [11]; and added "*Duration of Obligation*" before adding new Comment [15].

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be

foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. *See* also Rule 1.2(c).

[4] Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2.

[5] Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

[6] Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

[7] In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this

Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

[8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 7-108(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."

Paragraph (b) is identical to DR 7-108(B).

Paragraph (c) is substantially similar to DR 7-108(C) which provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness

contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness." EC 7-25 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (d) is substantially the same as DR 7-105(A).

Paragraph (e) is new.

Paragraph (f) is substantially similar to DR 7-105(C)(1), (2), (3) and (4) which stated:

> In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness. (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil

litigant, or as to the guilt or innocence of an accused, but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Paragraph (g) is identical to DR 7-105 (C)(5).

Paragraph (h) is new.

Paragraph (i) is similar to DR 7-104, although a lawyer is no longer prohibited from "participat[ing] in presenting" criminal charges and therefore may freely offer advice to the client about the client's rights under the criminal law.

Paragraph (j) is identical to DR 7-102(A)(1).

COMMITTEE COMMENTARY

The Committee attempted to join the best of both the *Virginia Code* and *ABA Model Rule* 3.4 in this Rule. For example, paragraph (a) was adopted because it appears to place a broader obligation on lawyers than DR 7-108(A), but DR 7-108(B) was added to the Rule as paragraph (b) because it states explicitly what is only implicit in paragraph (a).

Language from DR 7-108(C) was added to paragraph (c) to make it clear that certain witness compensation is permitted—something not clear from the language of the *ABA Model Rule*, although it is stated in the *ABA Model Rule's* Comment.

The language of DR 7-105(A) was adopted as paragraph (d) in lieu of the *ABA Model Rule* language because it states more clearly what is apparently intended by the Rule. However, the Committee deleted as unnecessary the word "appropriate" preceding "steps."

With respect to paragraph (e), the Committee saw no reason to limit the discovery request provisions to the pretrial period, as is explicitly the case in the *ABA Model Rule*.

Paragraph (f) parallels similar provisions in DR 7-105(C) and paragraph (h) covers a subject not addressed in the *Virginia Code*.

Paragraph (i) is similar to DR 7-104, although the Committee voted to delete the reference to "participate in presenting." This deletion allows a lawyer to offer advice to the client about the client's rights under the criminal law without violating this Rule.

The Committee determined that the existing language of DR 7-102(A)(1) should appear as paragraph (j), although the *ABA Model Rules* do not contain this section.

The amendments effective January 1, 2004, added present paragraph (g) and redesignated former paragraphs (g) through (i) as present paragraphs (h) through (j).

RULE 3.5 Impartiality And Decorum Of The Tribunal

(a) A lawyer shall not:

APPENDIX

B

SAMPLE FEE AGREEMENT PROVISIONS:

TERMINATION OF REPRESENTATION BY CLIENT

TERMINATION OF REPRESENTATION BY ATTORNEY

REFUNDS TO CLIENT OF FUNDS REMAINING ON DEPOSIT

CLIENT FILE COPY & ORIGINAL DOCUMENT RETURN

SAMPLE FEE AGREEMENT LANGUAGE:

Termination of Representation by the Attorney:

Attorney's Right to Withdraw from Matter: Attorney reserves the right to withdraw as attorney or counsel of record and terminate the Attorney-Client relationship described herein, for reasons permitted under Virginia law, including but not limited to: (1) failure to pay fees as set out in this Agreement, (2) failure to provide additional advance fee payment(s) as requested by Attorney, (3) Client presents a check which is dishonored due to insufficient funds, (4) Client fails to pay all Costs as defined herein, (5) failure to provide information requested by Attorney, (6) failure to follow the advice of the Attorney, (7) Attorney determines that after additional investigation that in his professional judgment Client's case or request is not feasible, is without merit, or otherwise may be in conflict with the attorney's ethical duties and responsibilities. (8) Client's requested course of action is contrary to the Attorney's Ethical Duties, is illegal or immoral. Termination of the attorney-client relationship by either party **must be in writing**. Any funds that remain within Client's trust account will be refunded **after** the entry of an order by all courts where the Attorney is representing Client. Client understands and acknowledges that he/she will be responsible and billed for any and all costs and attorney time incident to Attorney withdrawing from Client's matter and all reasonably necessary efforts until the Attorney is withdrawn (and/or granted permission to Withdraw by the appropriate Court/Authority) from all matters for which has been retained or made an appearance before a Court or Tribunal.

Termination of Representation by the Client:

Client's Termination of Attorney-Client Relationship: In the event that Client wishes to terminate Attorney's services, **client must provide such request, in writing**, to Attorney's office, and if any matters have been filed with a court, client must sign an order permitting Attorney to withdraw from representation. Any funds that remain within Client's trust account will be refunded **after** the entry of an order by all courts where Attorney is representing Client. Client understands and acknowledges that he/she will be responsible and billed for any and all costs and attorney time incident to Attorney withdrawing from Client's matter and all reasonably necessary efforts until the Attorney is withdrawn (and/or granted permission to Withdraw by the appropriate Court/Authority) from all matters for which has been retained or made an appearance before a Court or Tribunal. Client acknowledges that there are circumstances where a Court may not permit Attorney to discontinue services to the Client, even where Client and/or Attorney desire the same. In the event that the Court refuses to allow the Attorney to withdraw as counsel of record, Client will continue to be responsible for the financial obligations created hereunder and that the Attorney will retain those funds that may remain on deposit. If there is no pending proceeding before a Court or Other Tribunal, the attorney will discontinue services as soon as practicable and after notifying other persons or entities that the representation has terminated.

Refunds to Client of funds remaining on Deposit:

Refund of Funds: Except as set forth herein, Client understands that any refunds of client funds will be provided to Client either with the regular monthly procedures or within fifteen (15) business days of the termination of the attorney-client relationship, payable to the client at the last known address. Amounts to be refunded in excess of $1000.00 may trigger a request that the Client appear in person to collect the refund check and Client acknowledges that he/she may be required to sign for receipt of the same. Again, return of remaining funds on deposit must await completion of the case, or an Order releasing the attorney from further duties, if a Court proceeding is not concluded, or minimal notification to other parties of ending representation if the matter has not been brought to conclusion but there is no pending Court proceeding. Client will be provided the final billing statement for the last month of services at or before the time that the refund is issued.

Client File Copy & Original Document Return

Return of Original Documents Provided by Client and Copy of Client File: Attorney will return all original documents of Client that are in Attorney's possession within 21 days of the conclusion of the representation and Client's request for their return. Originals include, original Wills, Vehicle Titles, Contracts or Agreements with original ink signatures by all necessary parties, legally significant documents that are not copies or print-outs, original corporate minutes or original financial instruments that are not copies or computer generated. The client may also request a copy of the remaining documents in their file, which the attorney will provide within a reasonable period of time, but for which the client is responsible for copying costs related thereto. Currently, attorney's staff will charge a cost of $.25 per page for making a paper copy of the file (not including the originals described above). Client may also opt to receive a digital copy (in PDF format) of their file on USB Drive for a flat fee of $25.00, with no per page charge. After the client file has been closed for more than 60 days, the Attorney reserves the right to charge an additional $25.00 fee for retrieval of the client file to provide any copies requested.

APPENDIX

C

CONFIDENTIALITY FORMS:

CONFIDENTIAL ADDRESS INFORMATION

FORMS CC-1426, DC-621, DC-618

ADDENDUM FOR PROTECTED IDENTIFYING INFORMATION—CONFIDENTIAL

Case No. .....

Commonwealth of Virginia

In the Circuit Court of the [ ] City [ ] County of .....

..... v. .....

This addendum is filed with and incorporated by reference in the document(s) indicated below, from which the protected identifying information contained herein has been removed by the attorney or party whose signature appears below. This addendum shall be used to distribute such information only as required by law, and may be made available only to the parties, to their attorneys, and to other person(s) as the court may allow.

[ ] Complaint [ ] Petition [ ] Motion [ ] Order [ ] Decree [ ] Other Pleading: .....

[ ] Agreement(s) of the Parties [ ] Transcripts [ ] Other: .....

.....
PARTY NAME (LAST, FIRST, MIDDLE)

.....
ADDRESS

.....

.....
SOCIAL SECURITY NUMBER

.....
DATE OF BIRTH

.....
PARTY NAME (LAST, FIRST, MIDDLE)

.....
ADDRESS

.....

.....
SOCIAL SECURITY NUMBER

.....
DATE OF BIRTH

NAME OF ASSET, LIABILITY, ACCOUNT, CREDIT CARD	IDENTIFYING ACCOUNT NO.

NAME OF ASSET, LIABILITY, ACCOUNT, CREDIT CARD	IDENTIFYING ACCOUNT NO.

.....
CHILD NAME (LAST, FIRST, MIDDLE)

.....
SOCIAL SECURITY NUMBER

.....
DATE OF BIRTH

.....
CHILD NAME (LAST, FIRST, MIDDLE)

.....
SOCIAL SECURITY NUMBER

.....
DATE OF BIRTH

Attach additional sheet(s) for other information, as needed.

.....
DATE

_____
[ ] PARTY [ ] ATTORNEY

.....
PRINT NAME

ADDRESS /TELEPHONE NUMBER OF SUBSCRIBER

FORM CC-1426 MASTER 5/08
VA. CODE § 20-121.03

THIS IS CONFIDENTIAL INFORMATION

NON-DISCLOSURE ADDENDUM

Case No. .....

Commonwealth of Virginia

[ ] **PROTECTIVE ORDER**

IN PROTECTIVE ORDER CASES, THIS INFORMATION SHALL NOT BE RELEASED EXCEPT BY COURT ORDER OR WHEN NECESSARY FOR USE BY LAW ENFORCEMENT.

[ ] **UCCJEA AFFIDAVIT**

IN CASES IN WHICH A UCCJEA AFFIDAVIT IS REQUIRED AND A PERSON REQUESTS THAT INFORMATION BE KEPT CONFIDENTIAL, THIS INFORMATION SHALL NOT BE RELEASED EXCEPT BY ORDER OF THE COURT.

[ ] **PETITION FOR SUPPORT** [ ] **MOTION TO AMEND** [ ] **MOTION FOR SHOW CAUSE**

IN SUPPORT CASES WHERE A PERSON REQUESTS THAT INFORMATION BE KEPT CONFIDENTIAL, THE INFORMATION SHOULD NOT BE RELEASED EXCEPT BY ORDER OF THE COURT.

SHERIFF/PROCESS SERVER: THE INFORMATION CONTAINED IN THIS DOCUMENT IS CONFIDENTIAL AND MAY NOT BE DISCLOSED TO THE PARTIES OR TO THE PUBLIC.

In re: .....
CHILD

..... v. .....

.....
NAME AND ADDRESS OF PERSON WHOSE INFORMATION IS TO BE PROTECTED

.....

....
HOME TELEPHONE NUMBER WORK TELEPHONE NUMBER

PROTECTIVE ORDER CASES ONLY Information for each protected person or each person requested to be protected.

NAME (LAST, FIRST, MIDDLE)	D.O.B.	RACE	SEX

SUPPORT CASES ONLY Va. Code § 20-60.3 Include this information for the person whose information is to be protected.

DCSE ID No. ..... Driver's License No. and State: .....

Social Security No. ..... Date of Birth: .....

UCCJEA AFFIDAVIT USE ONLY Va. Code § 20-146.20E

In addition to above, complete only the information that has been omitted from the DC-620, AFFIDAVIT form:

1. The child presently resides at: .....
ADDRESS

The child commenced residing there on ..... and has resided there continuously to this date.
DATE

2. The other places where and persons with whom this child has lived during the last five (5) years include:

.....

3. I know of a person who is not already named as a party in this proceeding who has physical custody of this child or who claims to have custody or visitation rights with respect to the child. The name and address of that person is:

.....

4. Anything else from the affidavit not contained above:

.....

REQUEST FOR CONFIDENTIALITY — CIVIL
Commonwealth of Virginia Va. Code §§ 20-60.3; 20-146.20E

Case No. .....

TO: .....

[ ] Circuit Court

[ ] Juvenile and Domestic Relations District Court

..... v. .....

In re: .....

[ ] **Custody Proceeding**: I request that the above-named court(s) not disclose, release or allow to be examined any identifying information about me because my health, safety or liberty would be jeopardized by the disclosure of such information.

[ ] **Support Proceeding**: I request that the above-named court(s) not disclose, release or allow to be examined any information about me because [ ] a protective order has been issued [ ] I am at risk of physical or emotional harm from the other party.

SHERIFF/PROCESS SERVER: THE INFORMATION CONTAINED IN THIS DOCUMENT IS CONFIDENTIAL AND MAY NOT BE DISCLOSED TO THE PARTIES OR TO THE PUBLIC.

.....
NAME

.....
ADDRESS

....
DATE OF BIRTH SOCIAL SECURITY NUMBER

.....
EMPLOYER NAME AND ADDRESS

.....
HOME TELEPHONE NUMBER WORK TELEPHONE NUMBER VIRGINIA DRIVER'S LICENSE NUMBER

NOTICE: When a party to a custody proceeding requests that information be kept confidential, this information shall not be released except by order of the court. In support cases where a person requests that information be kept confidential, the information should not be released except by order of the court.

..... _____
DATE OF REQUEST SIGNATURE OF PARTY MAKING REQUEST

Received on: ..... by _____
DATE AND TIME [ ] CLERK/DEPUTY CLERK [ ] MAGISTRATE [ ] INTAKE OFFICER

TO THE CLERK: PLACE IN A SEALED ENVELOPE

APPENDIX

D

SAMPLE LETTER TO CLIENT WHO TERMINATED SERVICES

Waldman & Associates, PLLC
Rising to Meet Your Challenges
1300 THORNTON STREET, SUITE 200, FREDERICKSBURG, VIRGINIA 22401

December 5, 2023

Bob The Client
007 Bond Avenue
Somewhere, VA 23456

VIA ELECTRONIC & US MAIL
Bobsemail@sendhere.com

Re: The Client Family Law Matter
Closure of File - Order

Dear Mr. The Client:

I received your message of Sunday, December 2, 2023, asking that we close your file. A few small administrative issues need to be resolved to do so:

1. You ask for a copy of your file. We will provide a copy. If you prefer we can provide a USB drive with all documents. We will review your file to confirm that we do not have any original documents that we are required to return. Generally, we are required to return things like original land deeds, original car titles, original wills or original contracts. Anything else you would normally receive a hard copy or electronic copy. Making an electronic copy will be quicker, but a paper copy can be provided. The electronic copy via USB would be a flat fee of $25.00, a paper copy will be dependent on the number of pages and will require additional time (7 days from the day the file closes), and a charge of $.25 per page. USB can be provided within 2 to 3 business days.

2. There is active litigation in the Circuit Court of Stafford County, Case Number CL23-777777. There is also now also 2nd case filed by your wife (though I have not received a copy of the new filing). Because this is the case, I am obligated to do one of three things:

a. File an Order dismissing the CL23-777777 – this would be without typically without prejudice, allowing for refiling in the future, but does not impact the filing made by your wife's lawyer – you will likely receive a copy in the near future; or
b. Have you sign an Order releasing me as your attorney, and technically listing you as your own representative before the Court, for case number CL23-777777 (but again, not the newest one filed by your wife's attorney) i.e. you would be treated as if you were your own lawyer, including any duties that would necessarily come with that role, including the duty to comply with all of the Pre-Trial Order requirements in advance of your trial May 1, 2024. This includes supplementing Discovery, having a pre-trial settlement conference at least 30 days before trial, identifying any of your expert witnesses 90 days

before trial, preparing what is known as an equitable distribution worksheet, and providing lists of your witnesses and the documents you will present at trial at least 15 days before the trial. I refer you to the Pre-Trial Scheduling Order we sent you on October 8, 2023; or

c. If you have hired a new lawyer, that lawyer can prepare an order where they are substituted in my place, and I will sign it upon receipt.

In any event, one of those three orders has to be signed by the judge before I can actually close your file – See page 3 of your Fee Agreement, "Client's Termination of Attorney-Client Relationship" which is included as it represents the minimum ethical requirements expected by the Court. I remain your lawyer until one of those orders is signed by the judge, and although I will do only the absolute bare minimum to keep your case from suffering harm, any efforts required are still billable to your account.

Upon entry of the Order we will do a final accounting, and deliver the copy of your file, if it has not been delivered before then. In the interim, if you have hired a new lawyer, I will facilitate the transfer to the new lawyer, and try to keep your expense to a minimum. It may be helpful to the new lawyer if you give me specific permission to talk to the new lawyer about the status of your case. If you have not hired a new lawyer, I need to know whether you want to dismiss the filing we did earlier this year, or if you want it left open with me being relieved of any responsibilities in that case (you would become your own lawyer as indicated above in 2b).

Please let me know your preference, so we can either prepare the appropriate and necessary order or be in contact with your new lawyer to facilitate transition.

Thank you for your timely response.

Very truly yours,

Barry J. Waldman

BJW/

Telephone: (540) 891-1414 Facsimile: (800) 616-5579 www.waldman-law.com

APPENDIX

E

VSB FEE DISPUTE RESOLUTION PROGRAM BROCHURE

Virginia State Bar
Informational Brochures

FEE DISPUTE RESOLUTION PROGRAM

A public service of the Virginia State Bar and local bar associations.

I. Introduction

What is the Fee Dispute Resolution Program?
The Fee Dispute Resolution Program was created as a voluntary program to help attorneys and clients resolve disputes over fees and costs paid, charged, or claimed for legal services provided by a Virginia lawyer. The program achieves this goal by providing two options—mediation and binding arbitration—through local circuit commmittees. Parties who choose the mediation process but who do not reach a satisfactory conclusion may still utilize the binding arbitration process. However, you may not move from binding arbitration to mediation.

What is mediation?
Mediation is a voluntary, confidential process in which a neutral third party facilitates communication between the parties to help them understand and resolve their dispute. Mediators do not decide the issues in the dispute or impose solutions. If the parties choose to resolve their dispute with a written agreement, that agreement is enforceable in the same manner as any other written contract.

What is binding arbitration?
When you agree to arbitration, you are consenting to submit your case to a neutral third party who will hear all sides of your dispute and then issue a binding award. Unlike a court hearing, arbitration is informal and is conducted without strict observance of rules of civil procedure or evidence. The award of the arbitrators is enforceable by the circuit court and cannot be revised or revoked except under certain circumstances, such as the fraud, corruption, or evident partiality of an arbitrator.

II. General Program Information

How do I participate in the program?
The first step is to call the Virginia State Bar's fee dispute hotline at (804) 775-9423. You will need to leave your name, address, phone number, locality where the dispute took place, and the name of the person(s) with whom you have a dispute. If you wish to receive the information via email, please leave your email address as well. The VSB coordinator will provide you with the Agreement To Participate that you must fill out and sign to get your case started, as well as the program rules and guidelines. If you choose to mediate, this form becomes the Agreement To Mediate. If you choose to arbitrate, this form becomes the Agreement To Arbitrate. Please note that the VSB cannot advise you as to whether you have a valid fee dispute.

How much does it cost to participate in the program?
The Petitioner — the party who contacts the program first — pays a one-time non-refundable fee of $20. This is the only administrative fee charged, whether you choose to mediate your case, arbitrate your case, or mediate first, then arbitrate. Both parties are expected to cover their own costs, including copies of documents and correspondence, legal representation, or stenography.

What if a lawyer has already filed a lawsuit to collect the fee?
The Fee Dispute Resolution Program cannot handle a fee dispute that has already been decided by a court. Also, the program cannot handle a dispute that is pending before a court. However, if both parties sign an agreement to participate in the program, either by mediation or arbitration, and nonsuit the case or ask the court for a stay in the proceedings, the program can handle your case. You should continue to prepare for the court case unless and until there is a mutual understanding to participate in the program in writing.

Do I have to hire a lawyer to represent me in a fee dispute resolution proceeding?
No. You do not need to hire a lawyer to participate in mediation or arbitration, but you have the right to bring a lawyer with you, should you decide to do so.

What if my client/lawyer refuses to participate?
This is a voluntary program. If there is no mutual agreement to mediate or arbitrate through the program, it cannot resolve the dispute. A circuit committee chair of the program will usually give each party about two weeks to decide. The Virginia State Bar strongly encourages all lawyers and clients involved in a fee dispute to consider using the program instead of resorting to court.

What if I think my lawyer has been unethical in representing me?
The program committees are not part of the disciplinary system of the Virginia State Bar. Therefore, allegations of unethical conduct by a Virginia lawyer must first be reported to the Virginia State Bar through the complaint process. Visit www.vsb.org for information about filing a complaint. If the Virginia State Bar determines that no disciplinary rule has been violated, the matter may be referred back to the Fee Dispute Resolution Program. In general, the Virginia State Bar disciplinary process does not address complaints about a lawyer's fee.

III. Information about the Mediation Process

Who are the mediators?

Cases are mediated by volunteer lawyers and nonlawyers who are certified by the Supreme Court of Virginia and have participated in a training program for resolving fee disputes.

How do I start the mediation process?

If you wish to mediate your dispute you must sign an Agreement To Mediate. On that form you will briefly state the amount of the fee in controversy and provide a brief summary of your views about the dispute. Once the other party has agreed to participate and signed the Agreement to Mediate, the committee chair will help you identify the mediators, who will schedule the mediation session. The Agreement to Mediate form may be obtained from the Virginia State Bar or a circuit committee chair.

When will a mediation session be scheduled?

Once the Agreement To Mediate has been signed by all parties to the dispute, the mediator will then work with the parties to schedule the mediation at a mutually agreeable time, within thirty days of the mediator's appointment.

Do I have to attend the mediation hearing in person?

The process is most likely to be successful when the parties meet face to face. If, however, both parties cannot physically be present, they may be able to arrange to mediate by telephone.

IV. Information about the Arbitration Process

Who are the arbitrators?

The arbitrators are lawyers and nonlawyers who volunteer their time to hear and decide these disputes. All volunteers have participated in a training program focused on resolving fee disputes.

How do I start the arbitration process?

If you want to arbitrate your fee dispute, you must sign an Agreement To Arbitrate. On that form you will state the amount of the fee in controversy and give a brief explanation of your position in the dispute. The Agreement To Arbitrate form may be obtained from the Virginia State Bar or a circuit committee chair.

When will an arbitration hearing be scheduled?

Once the Agreement To Arbitrate has been signed by all parties to the dispute, the committee chair will assign the case to one arbitrator, or to an arbitration panel. The arbitrators will then schedule a hearing within forty-five days of their appointment.

How many arbitrators will handle my case?

In arbitration, if the amount in controversy is $25,000 or less, the case is usually assigned to a single arbitrator who is usually a lawyer-arbitrator. You may request a panel of three arbitrators, but that decision is within the discretion of the committee chair. For matters in excess of $25,000, the committee chair will assemble a three-arbitrator panel consisting of at least one lawyer and at least one nonlawyer.

Can I object to the appointment of a certain arbitrator?

Yes, if you question the arbitrator's impartiality. However, once a hearing begins, such objections are waived. Removal of an arbitrator, for good cause shown, is within the discretion of the committee chair.

Do I have to attend the arbitration hearing in person?

If you are unable to attend the arbitration hearing in person, the hearing may be held by teleconference, or you may waive the evidentiary hearing. If you do not appear at the hearing, and do not give a reasonable explanation for your absence, the arbitration will proceed without you. Once a hearing date has been agreed upon, it is unlikely that the hearing will be rescheduled unless there are extraordinary circumstances.

What if I decide not to arbitrate after I've signed the Agreement to Arbitrate?

Once you sign the Agreement To Arbitrate form, your consent to arbitration is irrevocable, and the arbitration award may be enforced against you in court.

How do the arbitrators decide?

All arbitrators have been trained and sworn to conduct the arbitration hearing in an impartial and neutral manner. When resolving a fee dispute, the arbitrators may consider all pertinent factors, including the intention and understanding of the parties at the time the representation was undertaken. Expert testimony supporting the reasonableness or unreasonableness of the fee is not necessary but is permitted. The factors to be considered are:

- The time and labor required, the novelty, complexity and difficulty of the questions involved, and the skill required for proper legal representation;
- The likelihood that the acceptance of the engagement would preclude other employment by the lawyer;
- The customary fee or rate charged in the community;
- The monetary or other stakes involved in the matter;
- The time constraints of the representation;
- The nature and length of the professional relationship with the client;
- The experience, reputation, diligence, and ability of the lawyer, as well as the skill, expertise, or efficiency of effort reflected in the actual services rendered;
- Whether the fee agreement was fixed or contingent;
- Whether the lawyer provided an adequate explanation to the client of the fee arrangement at the outset of the representation;
- Whether the fee arrangement was in writing;
- The promptness of the billing;
- The experience of the client in obtaining legal services;
- Whether an estimate of the total fee was given and, if so, how close to the final bill was that estimate;

- The extent to which the lawyer and others in the lawyer's office have documented their time spent on the matter; and
- The results obtained by the lawyer.

When will I know the decision?
Arbitrators will deliberate in private after the formal closing of the arbitration hearing. They will issue an award within ten days after the hearing.

How do I decide whether to use mediation or arbitration?
Mediation is often appropriate when parties hope to continue a business relationship or to end that relationship without hard feelings. Mediators help the parties work together to reach a resolution that both find acceptable. If the parties do not resolve their case in mediation, they can still pursue resolution through arbitration.

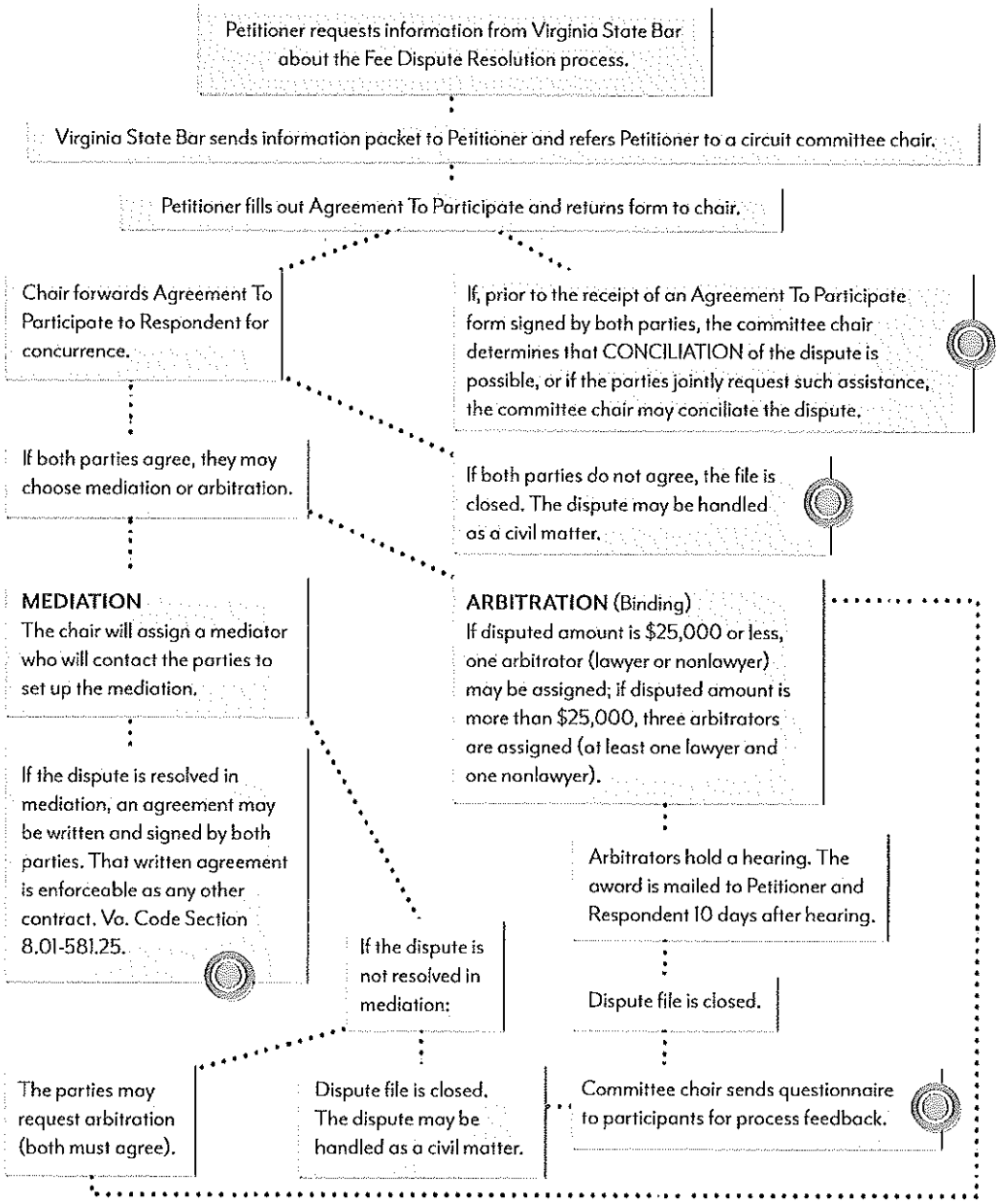
Arbitration is appropriate when the parties are willing to accept the decision of a neutral third party, the arbitrator. This means that even if one of the parties objects to the decision, they are still required to implement its terms. However, arbitration does guarantee a final decision.

Public Information Brochures

The Virginia State Bar, an administrative agency of the Supreme Court of Virginia, publishes brochures on law-related issues as part of its mission to advance the availability and quality of legal services provided to the people of Virginia. These brochures are not offered as and do not constitute legal advice or legal opinions and do not create an attorney-client relationship. Brochures may be downloaded at vsb.org/site/publications/publications-home

updated 2/2020

Fee Dispute Resolution Process



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