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COURSE SCHEDULE

FRIDAY

12:00 Registration

1:00 **Equitable Remedies in Real Estate Litigation Cases**

John C. Altmiller

2:00 Break

2:15 **Advanced Commercial Lease Negotiations**

Robert C. Goodman

3:15 Break

3:30 **Environmental Matters for Real Estate Attorneys**

Maxwell H. Wiegard

4:30 Break

4:45 **Zero Trust Architecture: An Ethical Imperative for Lawyers**

Michael C. Maschke

5:45 Closing remarks

6:00 Complimentary Cocktail Party—Come join us!

7:00 Optional Dinner at Waypoint Seafood and Grill with the Faculty

SATURDAY

7:00 Complimentary Continental Breakfast in the registration area

8:00 **Land Use and Zoning: What Every Transactional Lawyer Should Know**

Karen L. Cohen, J. Lori H. Schweller

9:00 Break

9:05 **Successful Strategies to Resolve Virginia Real Estate Title Defects**

James L. Windsor

10:05 Break

10:15 Cyber and Wire Fraud Strategies
Krista Christensen, Timothy D. Lynch

11:45 Break

12:00 The Ethics of Negotiation and Adversaries' Mistakes
Thomas E. Spahn

1:00 Closing remarks

1:15 Adjourn

ABOUT THE SPEAKERS

John C. Altmiller, Pesner Altmiller Melnick DeMers & Steele PLC / *Tysons*

John C. Altmiller is a shareholder in the firm Pesner Altmiller Melnick & DeMers since 2008. His practice is concentrated in real estate, real estate litigation, civil litigation, business law, landlord-tenant, collections, and contract law. He has tried cases in state, federal, and bankruptcy courts, and has numerous reported cases. He has been lead counsel in over sixty circuit court trials, and he has also represented parties in proceedings before regulatory boards and associations. Mr. Altmiller graduated Villanova University in 1988 and received his law degree from George Mason University in 1992. He is the former co-chairman of the Real Estate Section of the Fairfax County Bar Association. He has been a speaker at many continuing education seminars throughout Virginia in the areas of real estate and litigation.

Krista Christensen, Fidelity National Financial / *Omaha, NE*

Krista has worked in Fidelity National Financial's Legal Department for over 15 years and has held multiple roles within Claims and Risk Management before becoming the Manager of Fidelity National Financials' Cyber and Wire Fraud Department. In her current role, Krista is responsible for providing training on business email compromise and wire fraud to Company employees, independent title companies, real estate agents, brokers and attorneys in efforts to minimize the effects of this fraud scheme. She is a regular speaker at regional and national events discussing business email compromise and wire fraud in real estate transactions.

Prior to working with Fidelity National Financial, Krista completed her undergraduate work in Vocal Performance at the University of Nebraska before obtaining her Masters of Music in Vocal Performance from the University of Missouri- Kansas City. Krista then received her Juris Doctor from the University of Kansas.

Karen L. Cohen, Gentry Locke / *Richmond*

Karen Cohen is a Partner in Gentry Locke's Richmond office and is a member of the firm's Real Estate, Land Use & Zoning and Solar & Renewable Energy practice groups. Karen assists clients obtaining approvals for solar projects and advises developers on real estate transactions, the entitlement process, commercial leasing, environmental issues, construction, financing, and general corporate matters. Karen is the Immediate Past Chair of the Virginia State Bar Real Property Section Board of Governors and Co-Chair of the Land Use & Environmental Committee.

Karen received her B.S. degree in architecture from the University of Virginia, her M.S. in real estate development from George Mason University, and her J.D. magna cum laude from Georgetown University Law Center.

Robert C. Goodman, Kaufman & Canoles, PC / *Virginia Beach*

Rob is a Member at Kaufman & Canoles with over 50 years of extensive experience specializing in commercial transactions. His practice primarily focuses on business advice for mergers and acquisitions, sales of businesses, commercial and land leases, formation of business entities, major system procurements, and split-up of family businesses. In addition to his commercial

work, Rob works closely with families and family businesses in generational and estate tax planning, other tax issues, family dynamics, and charitable objectives. Renowned for his prowess in negotiation and crafting innovative solutions, Rob brings his enthusiastic expertise to every transaction.

Timothy D. Lynch, CR-11 — FBI Washington Field Office / *Manassas*

Tim Lynch became an FBI Special Agent in 2004 and was initially assigned to the Harrisburg Resident Agency, Philadelphia Field Office. SA Lynch investigated a variety of matters including international and domestic terrorism, interstate prostitution, crimes against children, interstate auto theft, and bank robbery before focusing primarily on white collar crime and public corruption.

From 2011 to 2013, newly promoted Supervisory Special Agent (SSA) Lynch served as a Defensive Tactics Instructor at the FBI Academy, leading multiple New Agent classes through training. When the 2013 government shutdown significantly limited Academy classes, SSA Lynch requested a return to criminal case work as a Special Agent.

From 2013 to 2020, SA Lynch was assigned to the Northern Virginia Resident Agency, Washington Field Office, where he investigated corporate fraud and white collar crime before again being promoted to SSA.

Since March 2020, SSA Lynch has supervised the Washington Field Office's Bank Fraud and Money Laundering squad. Prior to joining the FBI, SSA Lynch earned a bachelor's degree in English from James Madison University in 1999 and served as an infantry officer in the United States Marine Corps from 1999 to 2003. He is married and has three beautiful children who rarely listen to him.

Michael C. Maschke, Sensei Enterprises, Inc. / *Fairfax*

Michael Maschke is the Chief Executive Officer at Sensei Enterprises, Inc. Mr. Maschke holds a degree in Telecommunications from James Madison University. Mr. Maschke is an EnCase Certified Examiner (EnCE), a Certified Computer Examiner (CCE #744), a Certified Ethical Hacker (CEH) and an AccessData Certified Examiner (ACE). Mr. Maschke is also a Certified Information Systems Security Professional (CISSP).

Mr. Maschke has significant experience with network troubleshooting, design and implementation, security, systems integration, and computer engineering. He is also a member of the International Society of Forensic Computer Examiners (ISFCE).

Prior to his current role, he oversaw Sensei's digital forensics and information technology departments, which provided support to over 200 area law firms, legal entities and corporations. Mr. Maschke is a Microsoft Certified Systems Engineer, Microsoft Certified Systems Administrator and a Microsoft Certified Professional. He is an associate member of the American Bar Association and has spoken at the American Bar Association's TECHSHOW conference on the subject of cybersecurity. He is currently an active member of the ABA's Law Practice Division: Technology Core Group and is on the Fairfax Law Foundation Board of Directors. Mr. Maschke is a 2019 Fastcase 50 award recipient.

He is also a co-contributor of *Information Security for Lawyers and Law Firms*, a book published by the ABA in 2006 and *The 2008-2020 Solo and Small Firm Legal Technology Guides* (American Bar Association, 2008 – 2020).

J. Lori H. Schweller, Williams Mullen / Charlottesville

Lori H. Schweller is a Partner in the Charlottesville office of Williams Mullen. She assists developers, businesses, and private landowners with real property transactions, land use entitlement, and project development. Lori's experience spans industries including renewable energy, wireless communications, and commercial and residential development. Her real estate practice includes acquisitions, land use and zoning, site planning and subdivision, and establishment of common interest communities. She is listed in *The Best Lawyers in America*® for Real Estate Law (2015-present). Lori is 2016-2021 member and past Chair of the Virginia State Bar's Real Property Section Board of Governors, and she co-chairs its Land Use & Environmental Committee. Lori serves on the Real Estate Council of the Virginia Bar Association.

Thomas E. Spahn, McGuireWoods / Tysons

Thomas E. Spahn practices as a commercial litigator with McGuireWoods in Tysons, Virginia. He was selected as the 2013 and 2020 metro-Washington, DC "Lawyer of the Year" for "Bet the Company Litigation" by *The Best Lawyers in America* (Woodward/White, Inc.). He has served on the ABA Standing Committee on Ethics and Professional Responsibility and is a member of the American Law Institute and a Fellow of the American Bar Foundation. He is a Fellow of the Virginia Law Foundation. Mr. Spahn has written extensively on attorney-client privilege (including the Virginia CLE® publications *The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide* and *A Virginia-Specific Summary Guide: The Attorney-Client Privilege and the Work Product Doctrine*), ethics, and other topics, and has spoken at over 2,200 CLE programs throughout the U.S. and in several foreign countries. He graduated *magna cum laude* from Yale University and received his J.D. from Yale Law School.

Maxwell H. Wiegard, Miles & Stockbridge / Richmond

Max Wiegard assists clients with environmental regulatory issues, real estate transactions and development projects. He handles environmental, real estate, land use, zoning and business and commercial matters, as well as mergers and acquisitions.

He has experience with environmental litigation, administrative proceedings, environmental compliance and permitting matters, environmental enforcement actions, contaminated site transactions, brownfield redevelopment and adaptive land reuse matters, real estate transactions and litigation and zoning and land use proceedings.

Max is chair of the Environmental Law Section of the Virginia Bar Association and a member of the Virginia State Bar's Real Property Section's Land Use and Environmental Committee. He is past chair of the Environmental Section of the Virginia State Bar and the Real Estate Section of the Virginia Bar Association.

James L. Windsor, Kaufman & Canoles, PC / Virginia Beach

James L. Windsor is a member with Kaufman & Canoles, P.C. and is based in the firm's Virginia Beach office. He is the Chairman of the firm's Real Estate Claims & Title Insurance Solutions Group. Jim is rated an AV Preeminent lawyer with over 38 years of experience and expertise in counseling, mediation, and litigation involving real property, title insurance, construction, mechanic's liens, mortgage lending, and creditors' rights.

Jim has co-authored a published textbook, *Modern Real Estate Practice*, written a law review article and many other articles, and has given over 120 seminars on topics involving real estate and construction law. He has received many recognitions and honors including being listed in: *Best Lawyers in America*, Real Estate, 2018-2024, *Virginia Business Magazine*, *CoVaBiz* magazine, and Virginia Super Lawyers.

Jim also received the Distinguished Service Award from the Virginia Land Title Association.

MODERATOR

Toula Dreifuss, S & T Law Group / Falls Church

Toula is a partner with S&T Law Group, PLLC, which she co-founded with her law partner (and longtime law school friend), Sarah Louppe Petcher, in 2018. Toula's practice includes representing title company clients as outside counsel, representing transactional real estate clients, and trust and estate planning. Prior to forming her current firm, Toula worked in the settlement world for over 15 years, conducting residential and commercial real estate settlements for title companies while managing a solo practice.

Toula received her Bachelor of Arts from George Mason University and her JD from the George Mason University School of Law. Toula is a founding member and past chair of the NVAR Attorney Roundtable, and has served as a member and past chair of the NVAR Standard Forms Committee. Toula proudly serves on the Board of Directors for Capital Camps and Retreat Center.

Equitable Remedies in Real Estate Litigation Cases

John C. Altmiller

EQUITABLE REMEDIES IN REAL ESTATE CASES

A. Statute of Limitations and Doctrine of Laches

The selection and availability of remedies in real estate litigation can depend not only upon the specific goals of the plaintiff, but also upon whether a remedy is barred by a statute of limitations or the doctrine of laches. Because the applicability of these defenses can be crucial in selecting the proper relief, and because the law in this area is so misunderstood, it is appropriate to address this subject at the outset.

a. Inapplicability of the Statute of Limitations to Claims of Equitable Relief

Attorneys and judges have long considered statutes of limitation to be applicable to so-called “legal” claims (for example, trespass, nuisance, and breach of contract), regardless of the relief being sought, sometimes in reliance upon the principle that “equity follows the law” for the purposes of such application. *See, for example, Belcher v. Kirkwood*, 238 Va. 430, 433, 383 S.E.2d 729, 731 (1989). This assumption, however, is incorrect.

The analysis begins with Virginia Code § 8.01-230, which identifies when a statute of limitation begins to run:

In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, . . . except where the relief sought is solely equitable.

Therefore, as set forth in the statute, the limitation period does not accrue in cases where solely equitable relief is being sought. Axiomatically, a period that never begins to accrue cannot expire.¹

¹ This logical syllogism is well illustrated by the attorney Kobayashi when discussing the strength of the approach undertaken by his client, Keyser Soze: “One cannot be betrayed if one has no people.” *The Usual Suspects* (1995).

In a recent case involving injunctive relief being sought in a claim of trespass, the Virginia Court of Appeals confirmed that the statute means exactly what it says:

Here, the appellants pled that no sufficient remedy existed at law and were therefore seeking equitable remedies based on their claims of trespass and nuisance regarding the bamboo. Hence, by the plain terms of Code § 8.01-230, the right of action was not deemed to have accrued at the time the injury began and the five-year statute of limitations does not apply to their claims.

Willems v. Batcheller, 78 Va. App. 199, 221, 890 S.E.2d 659, 670 (2023). Although this result is dictated by the express statutory language, the Court appeared to recognize that further explanation was appropriate:

The appellees contend that the circuit court's interpretation violates the clear Virginia precedent that “equity follows the law.” *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 19, 822 S.E.2d 358 (2019) (quoting *Belcher v. Kirkwood*, 238 Va. 430, 433, 383 S.E.2d 729, 6 Va. Law Rep. 582 (1989)). First, we note that many of the cases cited by the appellees in support of this proposition predate the adoption of Code § 8.01-230, and clearly insofar as they are in conflict, the statute controls. As for citations after Code § 8.01-230's adoption, the appellees point to *May*. The appellees contend that in *May*, the Court recognized a “disguised breach of contract claim subject to the five-year statute of limitations” hidden in the plaintiff's equitable pleading. We disagree. In *May*, the plaintiff brought an action seeking declaratory and injunctive relief challenging certain corporate actions. *Id.* at 9. The defendant responded, in part, by arguing that plaintiff's action was precluded by the doctrine of laches and unclean hands. *Id.* The circuit court subsequently held that laches barred the plaintiff's claim. The Supreme Court reversed stating that “it is ‘well-established’ that ‘in respect to the statute of limitations equity follows the law.’” *Id.* at 19 (quoting *Belcher*, 238 Va. at 433); *see also Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 467, 587 S.E.2d 701 (2003). In *Kappa*, the Supreme Court “suggest[ed] that a declaratory judgment challenging corporate amendments is like a breach of written contract claim” and observed that “[t]he statute of limitations for written contracts is five years.” *May*, 297 Va. at 19. In *May* the plaintiff filed her complaint well within five years. Thus, the inference to be gleaned from *May* is that laches will not be found to bar a complaint that, were it brought at law, would be within the statute of limitations. It should not, as the appellees suggest, be taken to mean that the plain language of Code § 8.01-230 can be ignored.

Willems, 78 Va. App. at 221-22, 890 S.E.2d at 670-71. It is notable that the Court identifies an important principle regarding equitable relief, which is that although such claims are not subject

to statutes of limitation, it appears that the doctrine of laches cannot create, as a matter of policy, a time period shorter than what would be the applicable statute of limitations had the relief sought not been equitable. This is the best of both worlds: equitable claims are not limited by any statute of limitation, but they cannot be barred by the doctrine of laches if they are filed within a statute of limitation that would otherwise apply were it not equitable relief that was being sought.

The inapplicability of the statute of limitations to claims for solely equitable relief, although clearly justified by the express language in the statute, is surprising to many attorneys. In fact, the defendant in *Willems* asserted that the application of the plain statutory language would lead to “absurd” results. The Court disagreed, and articulated what it found to be a clear policy decision by the General Assembly:

The appellees further contend that applying the plain meaning of Code § 8.01-230 leads to absurd results. Although we agree that it is an established principle of statutory interpretation that “statutes are to be construed so as to avoid an absurd result,” *Eastlack v. Commonwealth*, 282 Va. 120, 126, 710 S.E.2d 723 (2011) (citing *Commonwealth v. Doe*, 278 Va. 223, 230, 682 S.E.2d 906 (2009)), the absurdity alleged by the appellees to flow from this interpretation of Code § 8.01-230 is that a party may wait many years longer than the statute of limitations would allow before bringing an action so long as they limit their prayer for relief to equitable remedies, requiring a defendant to bear the burden of asserting laches. We find no absurdity here. The General Assembly has made the policy decision that simply time alone will not bar a party from bringing a request seeking equitable relief. This does not limit the viability of the doctrine of laches. Instead, where prejudice accrues to a defendant occasioned by the plaintiff's failure to assert their rights, the laches doctrine ensures that the defendant will not be disadvantaged. Therefore, the circuit court correctly concluded that the statute of limitations did not preclude the appellants' claims.

Willems, 78 Va. App. at 222-23, 890 S.E.2d at 671.

It is difficult to overstate the effect of the proper application of Virginia Code § 8.01-230. Some obvious applications involve injunctive and declaratory relief in cases such as trespass or suits to quiet title. However, there are some less obvious applications that could significantly expand the viability of claims available to a plaintiff. One example would be a claim of fraud in

connection with a real estate transaction. The statute of limitations for fraud is two years, although that period of time can theoretically be extended by the so-called “discovery rule”² if a plaintiff can show that the fraud could not have been discovered through the exercise of due diligence. This can result in significant litigation over when a plaintiff should have discovered a false statement or concealment by a seller and can be even further complicated by the overlapping concept of *caveat emptor*. Even in cases where the facts may seem to justify the tolling statute under the discovery rule, a plaintiff may still be forced to litigate that issue, distracting from the underlying claim. If, however, the plaintiff seeks the remedy of rescission, the statute does not apply and the defendant will be forced to show actual prejudice, as discussed more fully below.

b. Doctrine of Laches

Because so many disputes involving real estate can only be resolved through injunctive or declaratory relief, and because those claims are governed solely by the doctrine of laches, it is important to understand the elements of that doctrine. Laches is the neglect or failure to assert a known right or claim for an unexplained period of time under circumstances prejudicial to the adverse party. *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 47, 353 S.E.2d 727, 735 (1987).

When the court considers the defense of laches, it does not apply an absolute rule, as is the case with a statute of limitations, but must determine each case in light of its particular circumstances. *Princess Anne Hills Civic League v. Susan Constant Real Estate Tr.*, 243 Va. 53, 58, 413 S.E.2d 599, 602 (1992). The burden of proving laches is upon the party who asserts it. *Morris v. Mosby*, 227 Va. 517, 521-22, 317 S.E.2d 493, 496 (1984). Even though a finding of

² Virginia Code §8.01-243(C)(2): “In cases in which fraud, concealment, or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered.”

laches rests primarily within the discretion of the trial court, the appellate court will not approve such finding if the party asserting this defense fails to prove prejudice. *Stewart v. Lady*, 251 Va. 106, 114, 465 S.E.2d 782, 786 (1996).

B. Injunctive Relief

One of the most common forms of relief sought in real estate litigation is injunctive relief. Such relief should always be considered in evaluating any real estate dispute, both because it is often the only real relief that a plaintiff can obtain and because the burdens normally facing a litigant seeking an injunction are often absent when the issue is real estate.

Normally, a plaintiff seeking an injunction will have to show irreparable harm and the related element of the lack of an adequate remedy at law. For many, if not most, real estate disputes, the courts have already established that irreparable harm is in the very nature of the claim, and the plaintiff will not have the burden of proving that additional element—or pleading specific facts to justify the conclusion, thus avoiding the risk of demurrer. The Virginia Supreme Court has repeatedly held that an injunction is the appropriate remedy for enforcement of a real property right. *See, e.g., Pizzarelle v. Dempsey*, 259 Va. 521, 532, 526 S.E.2d 260, 266 (2000); *Sonoma Development, Inc. v. Miller*, 258 Va. 163, 169-70, 515 S.E.2d 577, 580-81 (1999); *Boerner v. McCallister*, 197 Va. 169, 172, 89 S.E.2d 23, 25 (1955); *Norfolk S. Ry. Co. v. E. A. Breeden, Inc.*, 287 Va. 456, 464, 756 S.E.2d 420, 424 (2014). In fact, the Court has specifically distinguished an injunction related to personal property and an injunction related to the real property right:

When an injunction is sought to enforce a contract right concerning personal property, the plaintiff has a high burden of showing that the failure to enjoin the alleged improper action will result in irreparable harm for which the law will afford him no adequate remedy . . . By contrast, when the injunction is sought to enforce a real property right a continuing trespass may be enjoined even though each individual act of trespass is in itself trivial, or the damage is trifling, nominal or insubstantial, and despite the fact that no single trespass causes irreparable injury.

The injury is deemed irreparable and the owner protected in the enjoyment of his property whether such be sentimental or pecuniary.
Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 61-62, 662 S.E.2d 44, 53-54 (2008)
(citations omitted).

For example, in the case of repeated trespasses, even if each individual trespass is slight, and injunction will be appropriate:

As a general rule, where an injury committed by one against another is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, the legal remedy is inadequate and the trespass will be prevented in equity by an injunction, the prevention of a multiplicity of actions at law being one of the special grounds of equity jurisdiction.

Boerner v. McCallister, 197 Va. 169, 171-72, 89 S.E.2d 23, 25 (1955) (citations omitted). Note that the Court states that it is the "general rule" to grant an injunction in such a situation.

It is true that the decision to grant or deny an injunction is within the discretion of the trial court, and it will not be disturbed on appeal unless it is plainly wrong. *Blue Ridge Poultry & Egg Co. v. Clark*, 211 Va. 139, 144, 176 S.E.2d 323, 327 (1970). However, it should be noted that there are number of circumstances in which it is—or may be—plainly wrong for a trial court not to grant injunctive relief.

For example, in a case involving an encroachment of a fence over an easement, the Virginia Supreme Court found error in failing to grant injunctive relief:

Despite this express reservation of land for the Easement, Robinson, the owner of C&S Properties, acknowledged that the fence his company constructed prevented Snead from utilizing approximately two-thirds the width of the Easement. Even more so than in *Pizzarelle* where the encroachment constituted four to five feet of a 24-foot easement, C&S Properties' sizeable encroachment is "a material encroachment on the dominant owners' rights" because "a significant portion of the [E]asement would be rendered unusable for ingress and egress if injunctive relief were denied." Accordingly, we hold that the trial court was plainly wrong when it denied Snead's request for permanent injunctive relief.

Snead v. C&S Props. Holding Co., 279 Va. 607, 616, 692 S.E.2d 212, 216 (2010) (citations omitted). In the case cited by *Snead*, which involved a much slighter encroachment on a wide easement, the Court held that in a case where there is an encroachment upon an easement the plaintiff is effectively *entitled* to an injunction:

Thus, injunctive relief is available when an easement is being used for a purpose other than that originally granted. Otherwise, a new and different use of an express easement could be established by prescription, i.e., "a showing of adverse use under a claim of right, a use which is exclusive, continuous and uninterrupted and occurs with the knowledge of the land owner for at least twenty years."

To affirm the circuit court's denial of injunctive relief in this case would in effect allow the Dempseys to appropriate a portion of the easement and reduce a 24-foot easement to one of 19 to 20 feet in width. The Kolkers and the Pizzarelles acquired a 24-foot easement, and they are entitled to the free and continuous use and enjoyment of that 24 feet for the purpose of ingress and egress. The terms of the easement specifically guaranteed that right to them and further stated that no owner of a lot shall perform any act that interferes with that right.

Unlike some cases, the question here is not one of "reasonableness" or whether the easement is now "less useful or less convenient." The Dempseys portray the easement as not being "less useful" because vehicular traffic on the paved portion is not affected by the obstructions. However, the obstructions in the easement completely block all ingress and egress on the south side of the wooden fence.

Nor is this a case in which the equities should be balanced . . . In the present case, a significant portion of the easement would be rendered unusable for ingress and egress if injunctive relief were denied. Thus, we conclude that the circuit court's denial of injunctive relief, while a matter of discretion, was nevertheless plainly wrong in this case.

Pizzarelle v. Dempsey, 259 Va. 521, 530-31, 526 S.E.2d 260, 265-66 (2000). Note that in the case of an easement, the failure to grant injunctive relief would effectively allow the encroaching party to ascend to new and different rights. The Court found that this alone is sufficient to conclude that the failure to grant an injunction would be plainly wrong.

Nuisance is another claim in which an injunction is the only remedy that could offer any real relief to a plaintiff. Therefore, injunctive relief has widely been recognized as appropriate in

cases of continuing nuisances. “The jurisdiction of a court of equity to restrain by injunction the creation or continuance of a nuisance, which is likely to produce irreparable injury is well established and constantly exercised.” *Bragg v. Ives*, 149 Va. 482, 498, 140 S.E. 656 (1927). This is true even if the nuisance itself does not cause significant damage. Under traditional equitable principles, a court may enjoin a continuing trespass, even when each increment of trespass is trivial or the damage is trifling, in order to avoid a multiplicity of actions at law. *Fancher v. Fagella*, 274 Va. 549, 556, 650 S.E.2d 519 (2007). When the nuisance or trespass involves tree an encroaching tree, the Court has observed:

Not every case of nuisance or continuing trespass, however, may be enjoined. The decision whether to grant an injunction always rests in the sound discretion of the chancellor, and depends on the relative benefit an injunction would confer upon the plaintiff in contrast to the injury it would impose on the defendant. Any burden imposed on the public should also be weighed.

Fancher, 274 Va. at 556, 650 S.E.2d at 523.

C. Authority to Provide Complete Relief

Although the equity and law “sides of the court” were eliminated in 2006, the distinction between law and equity remains vital. This is particularly true when it comes to questions involving equitable relief. For example, as noted above, statutes of limitation do not apply to claims seeking solely equitable relief. Another example is in cases in which the primary relief is equitable, but there is a component of money damages impliedly being sought. This is sometimes addressed in the context of a trial court’s power to provide “complete relief”. The power of equity to award complete relief is also sometimes called the “clean-up doctrine.” *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 144, 795 S.E.2d 887 (2017). Indeed, “even where no prayer for general relief is included in the bill of complaint, a court in equity may properly grant appropriate relief not specifically requested.” *Johnson v. Buzzard Island Shooting Club, Inc.*, 232 Va. 32, 36, 348 S.E.2d

220, 3 Va. Law Rep. 476 (1986). This, in itself, is quite remarkable, since it appears to be an exception to the requirement that the court cannot grant relief that is not requested in the parties' pleadings. *See, for example, Allison v. Brown*, 293 Va. 617, 625-26, 801 S.E.2d 761, 766 (2017) (“Under well-settled Virginia law, [a] litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings,” and “[t]hus, a court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed.”)

Notably, this principle was invoked by the Virginia Court of Appeals in a case decided *after* the abolition of the two sides of the court:

Put another way, a claim for injunctive relief or specific performance necessarily implies a request for monetary relief as a lesser-included remedy, so much so that a plaintiff need not explicitly pray for money damages as a fallback position. *Winston v. Winston*, 144 Va. 848, 858, 130 S.E. 784 (1925). In *Winston*, for instance, the Court held that a complaint praying for specific performance alone is “in all respects the same” as a complaint seeking both specific performance and money damages, in the alternative. *Id.* at 859-60.

Worsham v. Worsham, 74 Va. App. 151, 175-76, 867 S.E.2d 63, 75 (2022). The Virginia Supreme Court has also cited prior law with approval on this point regarding a claim for attorney's fees:

Where some phase of the case alleged in a bill in chancery presents a good ground for equitable relief, and the court has acquired actual jurisdiction of all the parties, or of the res, necessary for the granting of some of the equitable relief to which the allegations of the bill entitle the complainant, a court of chancery may go on to a complete adjudication of the cause, even to the extent of establishing legal rights and administering legal remedies, which would otherwise be beyond the scope of its authority. In each such case the court is vested with a sound discretion to determine upon the facts and circumstances of the particular case, whether it is better to relegate the parties to a court of law for the establishment of their legal rights and the administration of legal remedies, or to go on and end the litigation by giving complete relief in the chancery cause.

Henderson v. Ayres & Hartnett, P.C., 285 Va. 556, 563, 740 S.E.2d 518, 521 (2013) (citing *Iron City Savings Bank v. Isaacsen*, 158 Va. 609, 625, 164 S.E. 520, 525 (1932)). This is a principal

that may have numerous applications. In addition to cases involving attorney's fees, such as *Henderson*, this principle may also be applicable in obtaining an abatement in a specific performance case or an additional money judgment any rescission case in which repairs or improvements were performed on the property being returned to the tortfeasor. For example, "where, on account of the act of the adverse party, complete restitution cannot be had, rescission will not be denied and the court will, so far as practicable, require the party profiting by the fraud to surrender the benefit he has received in the transaction." *Devine v. Buki*, 289 Va. 162, 177, 767 S.E.2d 459, 467 (2015).

D. The Right to a Jury in Equitable Claims

Although a jury cannot award equitable relief, the Virginia Code expressly permits matters of fact in equitable claims to be determined by a jury:

In any suit on an equitable claim, the court may, of its own motion or upon motion of any party, supported by such party's affidavit that the case will be rendered doubtful by conflicting evidence of another party, direct an issue to be tried before an advisory jury.

Virginia Code § 8.01-336(E). A jury can also be requested in the cases of defensive pleas made to equitable claims. Virginia Code § 8.01-336(D) provides that "[i]n any action in which a plea has been filed to an equitable claim, and the allegations of such plea are denied by the plaintiff, either party may have the issue tried by jury." These principles are incorporated into Rule 3:22(C):

(1) In an equitable claim where no right to a jury trial otherwise exists, where impaneling of an advisory jury pursuant to Code § 8.01-336(E) to hear an issue will be helpful to the court concerning disputed fact issues, such a jury may be seated. Decision on such claims and issues will be made by the judge.

(2) Where a jury trial on a defendant's plea in an equitable claim is authorized under Code § 8.01-336(D), trial of the issues presented by the plea will be by a jury whose verdict on those issues has the same effect as if trial by jury had been a matter of right.

This creates potential strategic decisions for litigants in which the doctrine of laches has been asserted. Either a plaintiff or a defendant could seek to have the question of prejudice determined by a jury. Although the author is not aware of any case in which the issue of prejudice in a defense based upon the doctrine of laches has been submitted to a jury, there does not appear to be any question that such a mechanism is available to either party as a matter of right.

E. Other Examples of Equitable Relief

a. Specific Performance

Specific performance is an important and powerful remedy. There are at least three circumstances in which specific performance is not only a potential remedy, it is the presumed remedy sought by plaintiff. The first circumstance is in the case of a purchaser seeking to enforce a contract for the sale of real estate against the seller. It is notable that, as with some circumstances in which injunctive relief is sought, it is not entirely accurate to describe specific performance and is purely discretionary, given the virtual presumption that a seller is entitled to such relief. “[Al]though the granting of specific performance is discretionary and not an absolute right, if the [real estate] contract sought to be enforced is proved and is in its nature and circumstances unobjectionable, a court of equity should decree specific performance as a matter of course.” *Allen v. Lindstrom*, 237 Va. 489, 497, 379 S.E.2d 450, 455 (1989).

This remedy is also available to a seller seeking to enforce the contract against the purchaser, based upon a doctrine of mutuality. In one case, the Virginia Supreme Court noted that in a prior case it has

required a real estate *purchaser* to perform his written contract of purchase for two reasons: first, to give the seller the complete relief of a vendor's lien which otherwise would not be recognized in a court of law; and, second, to comply with the principle of mutuality that compels courts of equity to give the real estate purchaser the same relief as that afforded the seller. We have also justified a

requirement of specific performance by both the seller and the purchaser of real estate because of the doctrine of equitable conversion.

Yamada v. McLeod, 243 Va. 426, 433, 416 S.E.2d 222, 226 (1992) (emphasis in original; citations omitted)

Finally, specific performance is also a presumed remedy in the case of the violation of restrictive covenants. The availability of this remedy has been summarized as follows by the

Virginia Supreme Court:

Once the plaintiff satisfies proof requirements, he or she is entitled to the remedy requested unless the defendant can establish one of several defenses or the court finds enforcement unusually difficult. *See Bond v. Crawford*, 193 Va. 437, 444, 69 S.E.2d 470, 475 (1952) (“Generally, where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance of it, as it is for a court of law to give damages for a breach of it.”); *Spilling v. Hutcheson*, 111 Va. 179, 183, 68 S.E. 250, 252 (1910) (“The injunction in this case is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial.”).

A defendant may avoid imposition of the remedy requested if such a remedy would create a hardship or injustice that is out of proportion to the relief sought, if performance by the defendant would be impossible, or if the enforcement of the decree would be unusually difficult for the court. 4 However, on the questions of hardship, injustice, or impossibility, the defendant bears the burden of proving the elements of the defense. *See Harper v. Virginian Ry.*, 76 W. Va. 788, 86 S.E. 919, 922 (W. Va. 1915) (“In suits to enforce specific performance of a contract like the one involved here it is for the defendant to show by way of defense that it is no longer able to perform the covenant consistently with its duty to the public in general, or that performance thereof will be burdensome and oppressive or otherwise inequitable.”).

Perel v. Brannan, 267 Va. 691, 700-01, 594 S.E.2d 899, 904-05 (2004)

b. Rescission

Claims of fraud in real estate transactions are frequently claimed, but often misunderstood. A complete discussion of such claims well exceeds the scope of these materials, but it is notable that one of the great difficulties in asserting a successful fraud claim is proving the correct measure

of damages. One way to avoid these difficulties, which can represent an existential threat to an otherwise viable fraud claim, is to seek rescission. Another crucial feature of rescission is that, in cases of fraud, it allows the potential for the recovery of attorney's fees, whereas a claim for money damages alone does not permit such recovery. *See St. John v. Thompson*, 299 Va. 431, 435, 854 S.E.2d 648, 651 (2021)(holding that "fees are proper if the trial court, exercising its discretion in a fraud case, awards equitable relief, and further determines that the circumstances surrounding the fraudulent acts and the nature of the relief granted compel an award of attorney's fees.").

A contract tainted with fraud is not void, but voidable. *Pretlow v. Pretlow*, 177 Va. 524, 549 (1941). This means that a plaintiff has a couple of options when deciding what remedy to pursue. A plaintiff pursuing a claim of fraudulent inducement may ask the court to rescind the fraudulently induced contract; to award monetary damages; or—occasionally—to do both. *See, e.g., Mears v. Accomac Banking Co.*, 160 Va. 311, 321, 168 S.E. 740, 743, 1933 Va. LEXIS 211, *18-19 (1933). Furthermore, fraud need not be intentional, but may be constructive:

The law is well settled that if one represents as true what is really false, in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on; and he to whom the representation is made, believing it to be true, acts on it, and in consequence thereof sustains damage, there is such fraud as will support an action for deceit at law, or a bill for rescission of the transaction in equity. Whether the representation is made innocently or knowingly, if acted on, the effect is the same. In the one case the fraud is constructive; in the other it is actual.

Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 833-34, 27 S.E.2d 198, 202 (1943).

Another important aspect of rescission is that it is not entirely dependent upon restoring the *status quo ante*:

Furthermore, we have recognized that, in awarding rescission, "[i]t is immaterial that the *status quo* cannot be literally restored." *Millboro Lumber Co. v. Augusta Wood Products Corp.*, 140 Va. 409, 421, 125 S.E. 306, 310 (1924). Rather, the trial court need only "be able *substantially* to restore the parties to the position they occupied before entering into the contract." *Id.* (emphasis added). Thus, when awarding rescission, "the aim of equity is to award complete, just and equitable

relief, with a view to restoring the parties to the status quo and *equitably adjusting their interests under the circumstances of the case.*"

Devine v. Buki, 289 Va. 162, 173, 767 S.E.2d 459, 465 (2015)(emphasis in original).

HOW TO ADD VALUE IN COMMERCIAL LEASE NEGOTIATIONS AND THE LEASE PROVISIONS

Robert C Goodman Jr.

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Value proposition

You can add value first by learning about the site and the players involved in the transaction and then by using your ingenuity and experience. Value can be both economic and problem solving /risk avoidance. Value can also just be getting a fair deal for both sides without spending unnecessary legal time and expense.

When I was asked in September of last year to do this presentation , I decided that the best way for me to share ideas with a group of attorneys as experienced and knowledgeable as each of you is to provide a lease form with some variations of some specific provisions and then a few exhibits to illustrate a few other examples of the value proposition. I welcome comments and questions as we go along.

I am going to start with some general points and then review a triple net land lease form which Rob Dewey and I jointly developed many years ago and use it as the outline (with comments) to cover provisions which I am focusing on for this presentation. This form will have variations for other clauses to illustrate specific issues which I will discuss.

I will finish with a few “war stories “ of some specific transactions which I hope will be of informative value.

General points that have stood me in good stead

1. Of course, before you start, be sure you have cleared conflicts and have an engagement letter.
2. Resolving the business points upfront in a Letter of Intent (LOI) makes the lease drafting much easier, especially if the LOI includes issues which are often “challenging “ in the lease draft negotiations. With respect to legal points that have business implications, I like to review them with my client and cover them in the LOI.

3. I tell my clients: “Put your dirty linen on the front steps and let the other side see it as they walk in.” In other words flag, upfront, issues that are going to show up in due diligence anyway
4. Where you can, visit the site in person to get a feel for the property. If that is not possible, take a Google Earth look at the site.
5. I also suggest that you and your client “go rogue” i.e. pretend you are the ‘devil’s advocate” working for the other side and think through what are the key concerns you would have and how would you handle them. That thought pattern will help you to negotiate and draft a fair LOI and later, the lease in many cases.
6. Understand what your client really wants and really needs. How strategic is the location? Are there any special problems such as access, environmental issues? Structural concerns? Competition? Financing?
7. What is the reasonable range for the rent (both locally and for national tenants, nationally)?
8. What do you know about the Landlord or Tenant? Is the deal a “flip” or a hold”?
9. In a negotiation you always need to be prepared to leave the table. Is your client prepared to do so?
10. And remember this fundamental for **all** agreements: **“You don’t have a right without a remedy”**. Practically what will you be able to do if the other side defaults.
11. At the same time, your remedies should be commercially reasonable. And you should give the other party written notice and a reasonable cure period before your remedies can be exercised.

12. Good clients make good agreements.

Have your client review carefully all provisions where there are business/factual/operational/management issues.

13. It is risky for Landlords to rely on the Tenant's credit.

In bankruptcy the Tenant can renounce a lease.

Remember, for example, K-Mart, Penn Central, WT Grant, Woolworths, JC Penney, Sports Authority, J Crew, Pier 1, Bed Bath & Gone, Toys "Were" Us, A&P Supermarkets and Brooks Brothers.

Take that risk into account when you structure your deal. You are better off with a tenant who has more "skin in the game" (i.e. is spending more for its improvements). For the Landlord's contribution it is usually best to have the landlord provide free or reduced rent which is also more tax efficient. Also for any real estate I like to say "location, location, location" to my clients. Think through how difficult may it be to replace a tenant.

14. When you represent the Landlord, advise your client to think of the Tenant as their partner or prospective partner.

I have been told by a very experienced real estate agent who is also a significant owner of retail shopping centers that many national tenants keep a record of which Landlords are best to deal with. This can be helpful when a lease comes up for renewal.

15. Document your advice and recommendations: one simple technique is a thank you type of email where you summarize key points without using language like "this is to confirm" but rather "I am glad we were able to work out etc." or if the result was a compromise, "I recognize that --- a concession was necessary, etc."

16. Be patient: do not have "All the patience of a fish on a hook".

17. Try to be a good listener to identify and understand the issues and potential solutions.

18. If you have a hint of an idea be sure you push it to the forefront of your mind and think it through. Do not think later “I thought of that, but did not pay attention to my instinct”.

Now we will turn to the Triple Net Lease Form Exhibit 1.

After we finish Exhibit 1, I will leave Exhibit 2 (a sample set of Marina Rules and regulations) for you to peruse on your own

Finally here are some short “war stories “ that I hope you will benefit from:

Billboard Lease

Past history of Client’s rental income from the traditional bill board: 1983 -2010 rent from \$150/mo. to \$550/mo.

I researched electronic billboards and, with my client’s consent, offered the billboard tenant the opportunity to install an electronic billboard in lieu of its conventional sign. I went on line and checked out pricing for digital billboards in similarly situated locations (i.e. those in similar markets and traffic volume) and computed estimated annual gross revenue based on various levels of usage.

Estimated initial gross revenue for the billboard company, assuming an 80% usage was in the \$120,000 range; so, I asked for a minimum rent of \$2000/month increasing 3% per year. I made the assumption that the billboard company’s gross revenues would be expected to rise by at least that much. In addition, I asked for a percentage rent of 1/3rd of the gross revenue in excess of the \$120,000 base (with the base adjusted upward by 3% each year since the base rent also increased by 3% each year). We settled on 25% of the excess.

Below is the definition of Gross Revenue. You can see in red how I tried to think through ways to keep the Gross revenue from being manipulated.

The term “Gross Revenue,” as used in this Lease, means all income or other remuneration received by **LESSEE**, for the use of space, announcements or bulletins on the Sign or any other use of the Sign, and all other revenue derived from Lessee’s operations with respect to the Sign, including, without limitation, forfeited deposits. In providing space on the Sign, *Lessee shall not manipulate prices for the Sign or treat the Sign differently from any other signs of LESSEE with respect to discounts or package prices provided as part of a package sale or otherwise and LESSEE must not structure posted or actual pricing for the Sign as part of any combination or package transaction in a manner calculated to lower the payments based on Gross Revenue. By way of clarification, and not limitation, the posted pricing for the Sign as a digital bulletin should be consistent with pricing for comparable signs and the discounted price for the Sign should be comparable with other signs within a customer package.*

By 2020 the percentage rent was in excess of \$30,000 in addition to the annual base rent which had increased from \$24,000 by the 3% annual adjustment. The end result was that the total rent had increased about 10 times from what we started with in 2010.

The lease drafting was simple, other than having to think through how the sign holder might try to lower the gross for this sign as part of a “bundle” (and then dealing with the language on that). What was important was the upfront research and negotiations.

With a cell phone tower I suggested we look out for an “additional client and my client fully concurred.

Here is the clause which pleased his family

Lessee shall maintain the Tower Facilities in a first class condition and in compliance with all laws and regulations and with best practices for the protection of wildlife, especially migratory and protected birds.

Solar panels

I am not going to discuss the details of a solar farm lease, but I would like to flag some points that are “less legal” but worth considering:

Can the solar panels be high enough off the ground to permit other activity below?

Will you see the panels from your farm house or other place where you care about your view?

If timber is being cut, does it have value for which you should be paid?

Is the project bonded so that you are not left with a disposal problem?

Elephant Trains

I was reviewing a shopping center lease drafted by a national owner and in the midst of all the tenant prohibitions was the statement: “There may be no elephant trains.” When I asked the landlord’s attorney what that meant, he explained that they like to know which prospective tenants took the trouble to review their lease.

And last: One of my favorite negotiations:

I was representing a start-up fitness center needing a fully built-out space in a new property being constructed by a well-known local contractor/developer. Many years earlier I had represented another contractor who had gone out of his way to help the current prospective landlord start his career/business. When we got together to discuss the lease, I deliberately spent a fair amount of time reminiscing about the landlord’s support from my now deceased client. When we switched over to the discussion of the lease and the build out, he turned to my clients and said “--- did this for me when I started and I am going to do the same for you. One day I hope you will pass on this tradition.” Needless to say the lease was an easy negotiation with very favorable (and fair) results.

**EXHIBIT 1
TO CLE PROGRAM
HOW TO ADD VALUE
IN COMMERCIAL LEASE NEGOTIATIONS AND THE LEASE PROVISIONS**

Robert C Goodman Jr.

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LEASE

For the purpose of this presentation we will only cover sections of the lease for which the titles are highlighted in red and some sections have been revised for the purpose of this presentation

by and between

LANDLORD INC., a Virginia Corporation

("Landlord")

and

("Tenant")

for real property at

**XXX Plaza Shopping Center
XXX County, Virginia**

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EXHIBITS

LEASE

*Except for some revisions for the purpose of raising other issues for this presentation,
this lease was a triple net unsubordinated ground lease.*

THIS LEASE is made and entered into as of the _____ of _____ 20--, by and between **LANDLORD INC., a Virginia Corporation** ("Landlord") and _____, a _____ ("Tenant").

WITNESSETH:

In consideration of the Rents reserved and the covenants and conditions set forth herein, Landlord and Tenant agree as follows:

I. FUNDAMENTAL LEASE TERMS. *These terms should reflect all the key business/potentially controversial legal terms as set out in a Letter of Intent or Deal Sheet.*

A. Parties.

Landlord: _____
Tenant: _____

B. Premises (Article 1).

--0-- acre (Outparcel 5) (to be surveyed by Tenant) out of approximately ---- acre parcel within a tract of land commonly known as XXX XXX County, Virginia upon which Tenant intends to construct a building containing approximately _____ square feet, as hereafter provided.

C. Term (Articles 3 and 4).

Twenty (20) Lease Years, with _____ () year renewal options.

Tenant to commence full rent payments upon the earlier to occur of: (i) date Tenant opens for business as a _____, (ii) six months after receipt of a building permit, or (iii) _____ (the "Rental Commencement Date").

D. Minimum Rent (Article 7).

<u>Lease Yr.</u>	<u>Annual</u>	<u>Monthly</u>
Lease Term	\$	\$
Years 1-5		

Note: Rent is based on ----- acres in Parcel -.

Alternative # 1 Fixed Increases:

Thereafter Minimum Rent shall increase 2%-3% per year or thereafter Minimum Rent shall increase 10%-15% for each five year renewal term

Alternative # 2 CPI Increases:

Thereafter, Minimum Rent shall increase each five years based on increases in Consumer Price Index during prior five (5) years.

Alternative #3 bracketed CPI increases:

Year 6 and thereafter during the Initial Term, Rent shall be increased at the beginning of each five year period during the Initial Term by a percentage based on increases in the Consumer Price Index ("CPI"), but increases of no less than 10% and no greater than 20%.

Option Periods

During each option period the then current rent shall increase based on increases in CPI using CPI for [the starting month of the lease] as the base.

Alternative #4 Fair Market Value Increases:

Annual Net Rental for the next 10 lease years commencing with Lease Year 11 shall be the greater of (i) the Minimum Annual Base Rental or (ii) 10% of the fair market value of the Demised Premises (exclusive of the Building constructed thereon by Tenant)

Alternative #5 Percentage rent:

Percentage Rent: one interesting version is set out below

E. Construction Rent.

\$_____ per month from the earlier to occur of: (i) commencement of construction or (ii) thirty (30) days after issuance of a building permit continuing until Rental Commencement Date (prorated for last month)

F. Due Diligence Period (Article 5.1) **90** days.

G. Permitting Period (Article 5.2) **240** days from lease execution.

H. Construction (Article 5.3).

Subject to due diligence, Tenant accepts the Premises "AS IS."

Tenant to be solely responsible for (a) all work and improvements on Premises, including, without limitation, parking lots, striping, lighting, drainage, landscaping and other improvements necessary for Tenant's operation; and (b) extending utilities to and on the Premises, utility connection fees and meters for service drive to premises and cost of transformer for Virginia Power service to Tenant's building, including any connection fees or meters).

I. Deposit.

Upon execution of the lease, Tenant shall deposit with Landlord an earnest money deposit in the amount of \$_____ (the "Deposit"). The Deposit shall be refundable if Tenant determines the site to be unsuitable and terminates the lease prior to the end of the "Due Diligence Period." Upon expiration of the 90 day "Due Diligence Period", unless the Lease is then terminated, the Deposit shall become non-refundable, but shall be applicable to Rent.

J. Extension of Due Diligence Period.

Should Tenant need an extension period, Tenant may have an additional sixty (60) days to obtain site plan approval, building and signage permits, and all other Governmental Approvals required construct Tenant's proposed building. Tenant shall pay an additional deposit of----- Thousand (\$--,000) that will be applied to the fixed rent but will be forfeited to Landlord in the event of termination of this lease.

K. Taxes, Insurance and Maintenance.

Tenant shall be responsible for the maintenance of the Premises, all insurance and real estate taxes on the Premises. **Note: Since this form is a triple net lease, there is no special language dealing with increases in taxes, insurance premiums and maintenance; however in most leases, the tenant is required to pay as "additional rent" for all increases above the base level at the outset of the lease and sometimes with a cap on increases in maintenance. Where there is a cap the tenant will want it to be annual and not cumulative and the Landlord will want it to be cumulative and adjustable to actual costs periodically and certainly at the time of each renewal. The disadvantage to both parties of an annual non-cumulative percentage cap is that the Landlord has an incentive to "max-out" expenses each year so as not to reduce its base.**

L. Brokerage.

Landlord shall pay all brokerage fees and commissions to the extent of, and only to the extent of, --- percent (--%) of "Minimum Rent" actually collected, with one-half (1/2) thereof being paid to ----. and one-half (1/2) thereof being paid to : _____. **NOTE Many agents now insist on being paid upfront in which event, a discount from the full commission to take into account the risk of the tenant failing is reasonable, but many brokers will insist on 3% upfront for each side's broker. In that event the upfront should only apply to the initial term and not to any renewals, extensions or additional leases in the same location with the same tenant. In addition, to mitigate the risk of a tenant default, you should seek to have a provision to recover the unamortized portion of any upfront commission. Of course if the mitigation payment is only by the tenant, the Landlord retains most of the risk.**

In any event no upfront commission payment should be made until rent commences.

M. Right of First Negotiation

N. Addresses (Article 34).

(i) If to Landlord:

Landlord Inc.
Attention

with a copy to:

Robert C. Goodman, Jr., Esq.
Kaufman & Canoles
2101 Parks Avenue suite 700
Virginia Beach, VA 3451
Phone: (757) 624-3238
rcgoodman@kaufcan.com)

(ii) If to Tenant:

Phone: _____
Fax: _____
Attn: _____

with a copy to:

Phone: _____
Fax: _____

RECITALS:

A. Landlord is in the process of developing a Shopping Center (herein so called) consisting of certain real property with buildings and improvements constructed or to be constructed thereon located ("County"), Commonwealth of Virginia ("State"). The legal description of the Shopping Center is set forth in that certain Easement with Covenants and Restrictions Affecting Land, recorded in the Clerk's Office of the Circuit Court of the County in----- (the "ECR")

B. Other Recitals not needed for the purpose of this illustrative form.

Note: Many Lease forms now have an extensive definition section which should be carefully reviewed since the definitions will have significant consequences in the impact and interpretation of the provisions. This Exhibit 1 places the definitions in the applicable clauses. In either event I still recommend putting all the Fundamental Lease terms upfront.

1. THE PREMISES.

Subject to the terms and conditions of this Lease, Landlord leases to Tenant and Tenant rents from Landlord the premises situated in the, County of XXX and State of Virginia, and known and described as follows:

The premises, together with the buildings and improvements and appurtenances to be constructed thereto (the "Premises") on a ---- acre parcel out of an approximately ----- acre tract of land (Parcel C) being a portion of the property commonly known as XXX Plaza Shopping Center (the "Shopping Center"). The legal description of the Shopping Center is attached hereto as Exhibit A and made a part hereof. The Shopping Center is shown as "TRACT 1 SHOPPING CENTER PARCEL" on the site plan attached hereto as Exhibit B and made a part hereof. The Premises are shown as Outparcel A on EXHIBIT B-1 attached hereto and made a part hereof. In the event of any conflict between Exhibit A and Exhibit B, Exhibit B shall control; provided, that a more definitive survey of the Premises (by Tenant) and of Landlord's Premises (by Landlord) may be attached during the Permitting Period and, if so attached, will replace Exhibits B and B-1 and become the definitive Exhibit B and in the event of any conflict between Exhibit A and Exhibit B, Exhibit B shall control;.

2. TITLE AND QUIET POSSESSION.

Landlord hereby represents, covenants and warrants to Tenant that it has full right and authority to enter into this Lease in accordance with the terms hereof and that it has good title in fee simple to the Premises free and clear of all liens and encumbrances except as stated in the current title commitment or policy issued from ----- Title Insurance Corporation attached hereto

as Exhibit C and made a part hereof (the "Permitted Exceptions"). Prior to execution of this Lease, Landlord has furnished Tenant with evidence of Landlord's title to the Premises in the form of a copy of a policy, or commitment for a policy, of title insurance issued by ---Title Insurance Corporation, which policy contained no exceptions to Landlord's interest in the Premises other than the Permitted Exceptions, the reciprocal easements set forth in this Lease and the ECR. Landlord shall indemnify, defend and hold Tenant harmless from all loss, damage, costs, expenses or claims arising or resulting from any breach of this representation or warranty.

3. LEASE TERM.

3.1 The Preliminary Term of this Lease shall be from the date of execution hereof until the earlier to occur of (a) the commencement of the Lease Term or (b) the termination of the Lease. The Preliminary Term shall consist of the Due Diligence Period (Section 5.1), the Permitting Period (Section 5.2) and the Construction Period (Section 5.3).

3.2 The term of this Lease (the "Term") shall be for a period of twenty (20) "Lease Years," as that term is hereinafter defined, and extensions hereunder. The Term shall commence on the date (the "Commencement Date") which is the earlier of (i) the "Rental Commencement Date," as that term is defined in Section IC, or (ii) the date Tenant opens for business to the public at the Premises; the Term shall expire on the last day of the twentieth (20th) consecutive Lease Year, unless sooner terminated or extended as provided herein.

3.3 The term "Lease Year" as used herein shall mean a period of twelve (12) consecutive full calendar months (except for the first Lease Year, which may be longer). The first Lease Year shall commence on the Commencement Date. The first Lease Year shall expire at midnight on the last day of the twelfth month following the Commencement Date. Succeeding Lease Years shall each commence on the first (1st) day following the end of the preceding Lease Year. After the Commencement Date and within ten (10) days after request from either party, the parties shall jointly execute a statement specifying the Commencement Date of this Lease.

4. OPTION TO EXTEND.

Provided Tenant has not been in default within the Lease Year immediately prior to the date Tenant exercises its option to extend and is not in default at the time it seeks to extend after written notice thereof and expiration of the applicable cure period, Tenant is hereby given the right to extend the Lease Term for _____ () additional period(s) of five (5) year(s) per period, upon the same terms and conditions as provided in the original term of this Lease. Tenant shall exercise the right granted in the foregoing sentence by notifying Landlord in writing of its intention to extend at least nine (9) months prior to the date of commencement of each such extension term, and thereupon this Lease shall be so extended without any further document or act. ***NOTE: Where feasible, it is very useful to the Landlord to receive from the Tenant an annual statement of Gross Sales at the Premises as reported for sales tax purposes. Properly drafted the statement providing such information does not violate SCC requirements for public companies.***

5. INSPECTION AND PERMITTING PERIOD; PERMITS; COMPLETION AND DELIVERY OF THE PREMISES AND SHOPPING CENTER; REIMBURSEMENT TO TENANT

5.1 Due Diligence. *Note: Since acceptance will be AS IS there should be fair and reasonable due diligence with no cover ups*

5.1.1 Tenant, its counsel, agents and other representatives, shall have full and continuing access to the Premises for any purpose whatsoever, including title review, inspecting, surveying, engineering, test boring, performance of environmental tests and such other work as Tenant shall consider appropriate and Tenant shall have the further right to make such inquiries of governmental agencies and utility companies, etc., and to make such feasibility studies and analyses as it considers appropriate (collectively the "Inspections"); provided, however, that Tenant shall, at Tenant's sole cost and expense, restore and/or repair the Premises to the same condition as prior to Tenant's Inspection.

5.1.2 Tenant may, at any time prior to the expiration of ninety (90) days after execution of this Lease (the "Due Diligence Period"), in its sole discretion, for any reason including, without limitation, not obtaining corporate approval, determine that the Premises are not acceptable to Tenant for any reason or no reason, and terminate this Lease by so advising Landlord in writing, in which event subject to the indemnity obligations of this Section 5.1 and the obligation to provide studies to Landlord set forth below, the parties shall be relieved from further liability, at law or in equity, provided Tenant shall indemnify and hold Landlord harmless against any and all liability, damages, claims, suits, causes of action or any proceeding, including reasonable attorney's fees arising out of Tenant's or its employees and agents, conducting Inspections on the Premises. Upon request by Landlord, Tenant shall, at no expense to Landlord, provide Landlord copies of all studies, tests, reports and the like prepared by or for Tenant with respect to the Premises.

5.1.3 After the end of the Due Diligence Period, the Deposit shall become non-refundable and Tenant shall not object to the title, environmental conditions or soil conditions of the Premises if Tenant has not notified Landlord of any such objections within the Due Diligence Period. Landlord agrees that after the end of the Due Diligence Period, and before the Rental Commencement Date, Landlord shall not adversely change the Premises or the title thereto; provided nothing herein shall prevent leasing adjacent property.

5.2 Permits. Tenant shall have an additional ----- (--0) days after the Due Diligence Period (the "Permitting Period") to obtain site plan approval, building permits, signage permits and all other governmental permits, consents and approvals (collectively the "Governmental Approvals") required or desired to construct Tenant's proposed building and other improvements and operate its business. In the event all Governmental Approval is not obtained, Tenant in its sole discretion, may terminate this Lease upon written notice to Landlord. Tenant shall at all times proceed in good faith and with due diligence to obtain all Governmental Approvals, including filing the engineered site plan and elevations within no more than thirty (30) days after the end of the Due Diligence Period and, upon reasonable request of Landlord, shall apprise Landlord of its progress and any problems encountered. During the Permitting Period, if Tenant determines that it will be unable to obtain the Governmental approvals, Tenant

shall terminate this Lease by giving written notice to Landlord setting forth therein the reasons for such termination. Landlord shall be furnished by Tenant with, and shall review, a copy of all engineering and other plans and revisions simultaneously with the submittal to XXX County and Landlord shall be notified of, and have the right for Landlord or its representative, to attend all such meetings. Landlord's approvals shall not be unreasonably withheld.

5.3 Construction of Building and Improvements.

5.3.1 Tenant's Work. On and after the end of the Permitting Period (if Tenant has not elected to terminate this Lease), Tenant shall construct on the Premises a building containing approximately ____ square feet of ground-floor area, for use as a _____ (the "Building"), together with on site loading areas, parking lots, drive aisles, sidewalks, trash dumpster, transformer pad (Tenant to be solely responsible for cost of bringing utilities to the Premises, utility connection fees and meters for service to the Premises and cost of transformer for Virginia Power service to the Building, including any connection fees or meters) and other such appurtenances and improvements (collectively, the "Other Improvements"), and related site work, all as more particularly set forth on Exhibit B and in the Construction Provisions in Exhibit D. The Building and Other Improvements are sometimes collectively referred to herein as the "Improvements." The Improvements shall be constructed (a) substantially in accordance with the "Plans and Specifications" to be prepared by Tenant and approved by Landlord, which approval shall not be unreasonably withheld, unreasonably conditioned or unduly delayed.

5.3.2 Development of Shopping Center by Landlord.

(a) Landlord covenants that as it develops the Shopping Center, it will do so in accordance with the ECR, all applicable laws, and the following additional conditions:

(i) Landlord shall construct or cause such improvements to be constructed in a good and workmanlike manner, lien-free in the same manner as required of Tenant under Article 26 in accordance with provisions applicable to Tenant as stated in Article 26 below; Landlord is not required to develop the Common Areas except in phases to accommodate new retailers;

(ii) Landlord shall not authorize construction traffic over the Premises;

(iii) After construction thereof, Landlord shall keep and maintain or cause the improvements, parking and the "Common Areas" (as defined in Article 27) within the Landlord's Premises (to the extent then improved) to be kept and maintained in accordance with the requirements of the ECR;

(iv) Landlord shall not operate, or permit to be operated, in the Landlord's Premises any activity which is in violation of the ECR; and

(b) Tenant consents to the future inclusion of the current Wetland's Mitigation Area in Landlord's Premises subject to the following: (i) the parking ratios of the ECR shall be maintained for Landlord's Premises and (ii) the building set back line of the Building Envelope on the parking areas shall not be moved forward.

5.4 Landlord's Work.

5.4.1 Tenant accepts the Premises AS IS, WHERE IS.

5.4.2 Landlord has provided offsite storm water management/BMP which Tenant may inspect during due diligence.

5.4.3 The Property shall be free and clear of all environmental, hazardous or toxic waste and materials and Tenant shall have right during the Contingency Period to determine whether such condition has been satisfied.

5.5 Force Majeure.

Except as otherwise specifically contemplated in this Lease or in the Construction Provisions, in the event that Landlord or Tenant shall be delayed or hindered in, or prevented from, the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure materials, delay by the other party, failure of power or unavailability of utilities, riots, insurrection, war or other reason of a like nature not the fault of such party or not within its control, then performance of such act shall be excused for the period of delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay; provided, however, that in connection with the construction of the Improvements, the consequences of delays by the other party shall be governed by the Construction Provisions. **No such delay or force majeure shall affect Tenant's obligations to pay Landlord all Rent and other monies as and when due.** Lack of funds shall not be a basis for avoidance or delay of any obligations under this Lease. **NOTE: a tenant will want to include language to deal with situations such as COVID and will want to delete the language in red above. Depending on the Landlord's financing, there may be room to delay or partially lower rent, without any obligation to excuse rent payments. In any event Landlord should be entitled to accurate current information, including sales reports for current and prior years, supporting any request for rent relief.**

6. EASEMENTS.

6.1 **Utility Easements.** Landlord and Tenant shall each cooperate in the granting of appropriate and proper easements for the installation, repair and replacement of storm sewer, all utilities and other proper services necessary for the orderly development and operation of the Shopping Center. To that end, during the Term, upon prior reasonable request of a party, the other party agrees to use reasonable efforts to obtain such underground public utility easements as the requesting party reasonably deems necessary, without unreasonably interfering with the use by the other party of its premises or causing the other party to incur expense, for the benefit of the requesting party or its premises. For the purpose of exercising the rights granted in this subparagraph 6.1, each party and/or the utility provider shall have the right to enter upon and use the Common Areas located on the Premises and Landlord's Premises to install the utility systems, to such extent and so long as reasonably necessary to accomplish such purpose, subject to restoration of such Common Areas following such installation and any other reasonable

conditions and requirements imposed by a party. For the purpose of this Lease, the Common Areas on the Premises shall mean landscaped, parking, drive aisle areas, sidewalks and other similar areas.

6.2 Common Area Easement. During the Term, Landlord grants to Tenant, for the benefit of the Premises, and Tenant grants to Landlord for the benefit of the Shopping Center, the nonexclusive right, privilege and easement (the "Common Area Easement") to use the Common Areas as and when constructed (i) in the case of the grant by Landlord to Tenant, the Common Areas located upon Landlord's Premises (including, without limitation, the "Access Aisle" and the "Lowe's Access," all as delineated on the Site Plan) and (ii) in the case of the grant by Tenant to Landlord, the Common Areas located on the Premises, for their intended purposes and to permit the respective party and its employees, agents, subtenants, assignees, licensees, suppliers, customers and invitees to use such Common Areas, in common with the other party, its successors, assigns, employees, agents, tenants, licensees, suppliers, customers and invitees and all other persons claiming by or through them, for the purposes (without limitation) of pedestrian service and vehicular access, ingress and egress to, from and between the Premises and the Landlord's Premises and the streets and highways abutting and adjacent to the Shopping Center, without payment of any fee or other charge therefor. Notwithstanding any other provisions of this Lease, Tenant shall at all times be required to maintain on the Premises sufficient parking (a) to be in full compliance with all zoning requirements without regard to said cross-easement and (b) not less than 12 spaces per 1,000 square feet of building Area. Landlord shall at all times be required to maintain on Landlord's Premises sufficient parking to be in compliance with zoning requirements for Landlord's Premises without regard to the cross-easement. Tenant shall designate the location of employee parking for its employees on the Premises and Landlord shall designate the location of employee parking for its tenants' employees on Landlord's Premises.

6.3 Non-Dedication. None of the easements granted by the parties to this Lease is intended, nor shall any of them be construed, as a dedication of any portion of the Shopping Center for public use, and the parties will refrain from taking any action which would cause such a dedication and will take whatever steps may be necessary to avoid any such dedication, except as may be agreed upon in writing by the parties hereto or their respective successors or assigns.

7. RENT. Examples of various alternatives are shown below

7.1 Tenant hereby covenants and agrees to pay Landlord as monthly fixed rent for the Premises, for the Lease Term, the sums set forth in Article I(D) hereof ("Minimum Rent").

7.2 Alternative for Fixed Increases. One Option is to refer back to Fundamental Provisions where the rent for the renewal terms is specified and set out for each period (usually 10%-15% each five years or 2%-3% annually) with more potential to use the higher percentage increases after the first ten years of renewals and to take a different approach for renewal options.

7.3 Alternative for CPI Rent Increases.

7.3.1 Beginning on the first day of (a) sixth (6th) Lease Year of the Lease Term, the Minimum Rent shall be increased by multiplying (a) the Minimum Rent for the immediately

preceding Lease Year by (b) a fraction, the numerator of which shall be the CPI for the third calendar month immediately preceding the Sixth Lease Year and the denominator of which shall be the CPI for third calendar month immediately preceding the first Lease Year.

7.3.2 Beginning on the first day of (a) eleventh (11th) Lease Year of the Lease Term, the Minimum Rent shall be increased by multiplying (a) the Minimum Rent for the immediately preceding Lease Year by (b) a fraction, the numerator of which shall be the CPI for the third calendar month immediately preceding the Eleventh (11th) Lease Year and the denominator of which shall be the CPI for third calendar month immediately preceding the sixth (6th) Lease Year.

7.3.3 Beginning on the first day of (a) sixteenth (16th) Lease Year of the Lease Term, the Minimum Rent shall be increased by multiplying (a) the Minimum Rent for the immediately preceding Lease Year by (b) a fraction, the numerator of which shall be the CPI for the third calendar month immediately preceding the Sixteenth (16th) Lease Year and the denominator of which shall be the CPI for third calendar month immediately preceding the Eleventh (11th) Lease Year.

7.3.4 Beginning with the first year of each option period and continuing for the balance of such option period the rent shall be increased by multiplying the Minimum Rent for the immediately preceding Lease Year by a fraction of the numerator of which shall be the CPI for the third calendar month immediately preceding such option period and the denominator of which shall be the CPI for the third calendar month preceding the sixteenth (16th) Lease Year. The rent for each additional option period shall be increased on the first day of such option period in the same manner as provided in the preceding sentence. In no event shall the rent in any option period be less than the rent for the Lease Year immediately preceding the option period.

7.3.5 As used in this Lease, the term "Consumer Price Index" ("CPI") shall mean the index for "All Urban Consumers, U.S. City Average, All Items, 1982-1984 = 100", now published by the United States Department of Labor, Bureau of Labor Statistics, as part of the "Monthly Labor Review", calculated on the basis of 1982-1984 equals 100; provided however, that if said "Monthly Labor Review" or base is subsequently changed or revised, Landlord and Tenant shall make an appropriate conversion to such changed or revised labor review by the utilization of conversion factors, if any, published or otherwise made available by the Bureau of Labor Statistics. If such conversion factors are not published or otherwise made available, or if the "Monthly Labor Review" ceases to be published or otherwise becomes unavailable or unusable, Landlord and Tenant, in good faith, shall endeavor to agree upon a suitable substitute index; and, if Landlord and Tenant are unable to agree within ninety (90) days, the matter shall be submitted to the American Arbitration Association, whose determination shall be binding and conclusive.

7.4 Alternative for CPI Rent Increases with bracketed limits

7.4.1 Beginning on the first day of (a) sixth (6th) Lease Year of the Lease Term, the Minimum Rent shall be increased by multiplying (a) the Minimum Rent for the immediately preceding Lease Year by (b) a fraction, the numerator of which shall be the CPI for the third

calendar month immediately preceding the Sixth Lease Year and the denominator of which shall be the CPI for third calendar month immediately preceding the first Lease Year provided that the increase for such period shall be not less than ten percent (10%) or greater than twenty percent (20%) of the Minimum Rent for the preceding Period.

7.4.2 Beginning on the first day of (a) eleventh (11th) Lease Year of the Lease Term, the Minimum Rent shall be increased by multiplying (a) the Minimum Rent for the immediately preceding Lease Year by (b) a fraction, the numerator of which shall be the CPI for the third calendar month immediately preceding the Eleventh (11th) Lease Year and the denominator of which shall be the CPI for third calendar month immediately preceding the sixth (6th) Lease Year provided that the increase for such period shall be not less than ten percent (10%) or greater than twenty percent (20%) of the Minimum Rent for the preceding Period.

7.4.3 Beginning on the first day of (a) sixteenth (16th) Lease Year of the Lease Term, the Minimum Rent shall be increased by multiplying (a) the Minimum Rent for the immediately preceding Lease Year by (b) a fraction, the numerator of which shall be the CPI for the third calendar month immediately preceding the Sixteenth (16th) Lease Year and the denominator of which shall be the CPI for third calendar month immediately preceding the Eleventh (11th) Lease Year provided that the increase for such period shall be not less than ten percent (10%) or greater than twenty percent (20%) of the Minimum Rent for the preceding Period.

7.4.4 Beginning with the first year of the first option period and continuing for the balance of such option period the **rent shall be increased by multiplying the Minimum Rent for the immediately preceding Lease Year** by a fraction of the numerator of which shall be the CPI for the third calendar month immediately preceding such option period **and the denominator of which shall be the CPI for December 2001**. The rent for each additional option period shall be increased on the first day of such option period in the same manner as provided in the preceding sentence using the CPI for December 2001 as the base for the denominator. In no event shall the rent in any option period be less than the rent for the Lease Year immediately preceding the option period.

7.5 Alternative for rent increase based on fair market value of the leased land

As a side note, but worth mentioning, was how one such lease was negotiated. I was one of the Trustees of a trust which owned well located land, but the site was not big enough for the proposed new tenant without acquiring the adjacent vacant parcel. The developer wanted to buy our site but I wanted a triple net ground lease to provide long term income for the beneficiaries. I had the option to buy the adjacent parcel but I assigned it to the developer in exchange for the developer contributing it into the deal for a 1/3rd interest as landlord. With the developer economically on both sides of the lease, we got a solid triple net ground lease with the escalation you see below. There was also some regular escalation in the Minimum Annual Base Rent.

The Annual Net Rental for the next 10 lease years commencing with Lease Year 11 shall be the **greater of** (i) the Minimum Annual Base Rental or (ii) **10% of the fair market value of the Demised Premises (exclusive of the Building constructed thereon by Tenant) determined as provided below.**

Within thirty (30) days after the end of the 10th lease year, the Tenant shall present to the Landlord an appraisal, made by an independent, reputable qualified MAI Appraiser, which shall value the Demised Premises (exclusive of the Building constructed thereon by Tenant) as if it were free and clear of all leases (including this Lease), liens and encumbrances whatsoever and shall state the fair market value of the Demised Premises (exclusive of the Building constructed thereon by Tenant). Landlord shall have 150 days after receipt of said appraisal to accept Tenant's appraisal or to present to Tenant an appraisal by an independent, reputable, qualified MAI Appraiser which appraisal shall value the Demised Premises (exclusive of the Building constructed thereon by Tenant) as if it were free and clear of all leases (including this Lease), liens and encumbrances whatsoever and shall state the fair market value of the Demised Premises (exclusive of the Building constructed thereon by Tenant).

If the value of the low appraisal is at least 90% of the value of the higher appraisal, the values set forth in the two appraisals shall be added together and divided by 2 to determine an average, and that average shall be deemed to be the fair market value for the purposes provided herein; if not, the two appraisers shall appoint a third independent, reputable, qualified MAI Appraiser who shall, in accordance with the requirements of the Appraisal Institute, determine said fair market value; and provided that said value as determined by said third appraiser is not lower than the low appraisal (otherwise the value of the low appraisal shall be used), said value shall be deemed the value of the property for the purposes provided herein.

Each party shall be responsible for the cost of its own appraiser, and the parties shall divide equally the cost of the third appraiser unless there shall be a determination that the appraiser of a party failed to act in good faith, in which event the party whose appraiser failed to act in good faith shall be responsible for all costs of all appraisals. This same procedure shall be repeated for each ten (10) year period of this Lease (i.e. for the periods beginning with Lease Years 21, 31, 41 and 51) and shall always be at least the Minimum Annual Base Rent.

The logic for this approach is that the value of the location and consequently the fair rental value may not collate with the CPI, so the rent should be based on the value of the location.

7.6 Alternative with Percentage Rent [Note this example is from a brewery/restaurant lease where the tenant was provided with build ready site and some tenant allowance]

Example re Brewery/Restaurant Lease Percentage Sales Provision

The legal work/advice involved discussions and advice to the client with respect to the rent negotiations and then an analytic approach to a ‘fair “ workable definition of Gross Sales with the purpose of preventing circumvention of the Gross Sales and the reporting of Gross Sales.

Base Rent (Section --).

Base Rent also referred to as “Fixed Rent”) shall increase annually by three percent (3%) on the anniversary of the Commercial Operations Date and shall be as set forth below: *Rent numbers below are just examples. You should use excel to build and analyze your numbers.*

Lease Year	Monthly	3%	Annual
Initial Lease Term			
Year 1	\$ 20,000.00		\$200,000.00
Year 2	\$ 20,600.00		\$206,000.00
Year 3	\$ 21,218.00		\$212,180.00
Year 4	\$ 21,854.54		\$218,545.40
Year 5	\$ 22,510.18		\$225,101.76
Year 6	\$ 23,185.48		\$231,854.81
Year 7	\$ 23,881.05		\$238,810.46
Year 8	\$ 24,597.48		\$245,974.77
Year 9	\$ 25,335.40		\$253,354.02
Year 10	\$ 26,095.46		\$260,954.64
First Renewal Term			
Year 11	\$ 26,878.33		\$268,783.28
Year 12	\$ 27,684.68		\$276,846.77
Year 13	\$ 28,515.22		\$285,152.18
Year 14	\$ 29,370.67		\$293,706.74
Year 15	\$ 30,251.79		\$302,517.94
Second Renewal Term			
Year 16	\$ 30,251.79		\$302,517.94
Year 17	\$ 31,159.35		\$311,593.48
Year 18	\$ 32,094.13		\$320,941.29
Year 19	\$ 33,056.95		\$330,569.53
Year 20	\$ 33,056.95		\$330,569.53

F. **Percentage Rent** (Section ---).

An amount equal to ten percent (10%) of “Gross Sales” between Threshold 1 and Threshold 2 and 6.67% of Gross sales in excess of Threshold 2. The Percentage Rent Thresholds will increase annually by the same amount as the Base Rent increase namely, three percent (3%) and as set forth below. For the avoidance of doubt if the Gross Sales in the first Lease Year are \$5,000,000 the Percentage Rent would be \$266,700. *While my client would have liked a straight 10%, we compromised with the breakpoint after Threshold 1 was exceeded and the business deal will still work well. The rents used below are not the actual rents from the deal.*

Lease Year	Fixed Rent	Annual	Threshold 1	Threshold 2
			10% of all above	6.67% of all above
1	200,000	3.00%	2,000,000	4,000,000
2	206,000	3.00%	2,060,000	4,120,000
3	212,180	3.00%	2,121,800	4,243,600
4	218,545	3.00%	2,185,454	4,370,908
5	225,102	3.00%	2,251,018	4,502,035
6	231,855	3.00%	2,318,548	4,637,096
7	238,810	3.00%	2,388,105	4,776,209
8	245,975	3.00%	2,459,748	4,919,495
9	253,354	3.00%	2,533,540	5,067,080
10	260,955	3.00%	2,609,546	5,219,093
First Renewal Term				
11	268,783	3.00%	2,687,833	5,375,666
12	276,847	3.00%	2,768,468	5,536,935
13	285,152	3.00%	2,851,522	5,703,044
14	293,707	3.00%	2,937,067	5,874,135
15	302,518	3.00%	3,025,179	6,050,359
Second Renewal Term				
16	311,593	3.00%	3,115,935	6,231,870
17	320,941	3.00%	3,209,413	6,418,826
18	330,570	3.00%	3,305,695	6,611,391
19	340,487	3.00%	3,404,866	6,809,732
20	350,701	3.00%	3,507,012	7,014,024

G. Gross Sales (Section -----).

The challenge for the Landlord is to try to capture all sales and other proceeds originating from the operation and not to have offsite deliveries or pickups dilute the Gross Sales; and at the same time to permit the Tenant flexibility to hold parties, receptions, ticketed events, farmers markets and to ship large volume bulk sales to retail stores located in the region of the Premises, but where the goods are made at a location outside of the Premises market region.

The dollar aggregate of:

(a) the actual sales price of all goods and merchandise sold, leased or licensed and the charges for all services performed by Tenant or otherwise from all business conducted at or from the Premises, whether made for cash, check, credit, crypto currency or otherwise, without reserve or deduction for inability or failure to collect the same, including, without limitation, sales and services

(i) where the orders therefor originate at or are accepted at or from the Premises, whether delivery or performance thereof is made at or from the Premises, it being understood that all sales made and orders received at or from the Premises shall be deemed to have been made and completed therein;

(ii) pursuant to mail, telephone, internet, by means of other technology, or technologies hereafter developed;

(iii) by means of mechanical or other vending devices on the Premises;

(iv) or other remote means for delivery from, the Premises by any person or entity that are picked up at the Premises, whether by the customer or by proxy, including, without limitation, Door Dash or Uber Eats and the like (“Remote Orders”) and

(v) orders that are shipped from the Premises if the same were brewed or fermented on the Premises and

(b) all moneys or other things of value received by Tenant from its operations at the Premises (which are not excluded from Gross Sales as specified below)

including all finance charges, cost of gift or merchandise certificates and all deposits not refunded to customers.

By way of further clarification:

Gross Sales shall include, subleasing and licensing of space on the Premises to temporary third-party vendors and the hosting of private or ticketed events, including all sales at such events, except for such sales with respect to such events as are specifically excluded below.

Sales monitoring includes sales as provided by Tenant's and each other subtenant's, licensee's, concessionaire's and vendor's point of sale or other reporting system and further supported by monthly Virginia and City of ----- sales as summarized by the POS system monthly report, meals tax returns filed, proof of payment of sales tax and meals tax returns, any sales or meals tax audit results, profit and loss statement and general ledger with reasonable inspection rights for Landlord to periodically review and audit books and records.

"Gross Sales" shall not include: (i) cash refunds for merchandise returned to Tenant at the Premises, the selling price of which was previously included in Gross Sales (but in no event to exceed the amount of such cash refund), (ii) any sums received in settlement of claims for loss or damage to merchandise, (iii) the exchange of merchandise between stores of Tenant where such exchange is made solely for the convenient operation of Tenant's business, (iv) the amount of any federal, state, county, City or local sales tax, luxury tax excise tax or charge imposed on sales or (v) orders placed through the Guarantor's (*location was specified and was well out of the region where the Premises were located*) portal using its on-line POS system for product which has been brewed or manufactured in (*location was specified and was well out of the region where the Premises were located*) , but is being delivered in bulk to *the specific locality where the Premises are located* for shipment in bulk to customers to fulfill such orders.

Cash or credit refunds made upon transactions included within the Gross Sales, but not exceeding the selling price of merchandise returned by the purchaser and

accepted by Tenant, shall be deducted from the Gross Sales for the period when such refunds are made.

Each charge or sale upon installment or credit or layaway, so called, shall be treated as a sale for the full price in the month during which such charge or sale shall be made, irrespective of the time when Tenant shall receive payment from its customer.

Each lease or rental or license of merchandise to customers shall be treated as a sale in the month that the exchange is made.

In addition, in the event Tenant permits a farmer's market or beer festival to be held on the Premises, any on-site sales at such market or festival of non-alcoholic beverages made and sold by a vendor who is not affiliated, directly or indirectly, with Tenant shall be excluded from Gross Sales. For the purposes of this exclusion, affiliation shall include:

- (i) any party owned or controlled by Tenant or by any entity or individual having direct or indirect ownership of Tenant,
- (ii) any family members of such person;
- (iii) any person or entity with whom or which Tenant or its related or affiliated companies, has a reciprocal arrangement for similar events at the location or event of the other party; and
- (iv) any party compensating Tenant with respect to such sales.

Any ticket sales in connection with the farmer's market or beer festival shall be included in Gross Sales unless Tenant and Landlord enter into a written and mutually signed agreement before any such event. With the written consent of Landlord, Tenant may pay a fixed fee, the amount to be mutually agreed between the parties at the time of the arrangement, to Landlord in lieu of a Gross Sales payment for any ticket sales connected with Tenant's once-yearly anniversary party, or other similar annual event.

7.7 All Minimum Rent shall be payable in monthly installments of one-twelfth (1/12) the annual rate thereof then in effect, in advance, without notice or demand and without set off or abatement except as expressly set forth herein, upon the first day of each calendar month

included within the term of this Lease. All Minimum Rent and other payments to be made by Tenant to Landlord shall be made payable to Landlord and sent to Landlord at the place to which notices to Landlord are required to be sent (in Article I.L. hereof), unless Landlord shall direct otherwise by written notice to Tenant provided; however, until further written notice by Landlord to Tenant, Rent shall be paid to Landlord c/o ----- . Minimum Rent for any fraction of a month at the commencement or expiration of the Term, or in which the rate thereof changes pursuant hereto, shall be prorated on a per diem basis.

7.8 If Tenant fails to pay any installment of Rent, within ten (10) days after written notice, Tenant shall pay a late charge of three percent (3%) of the amount of such installment and in addition, Tenant shall pay interest to Landlord on any installment of Rent that remains unpaid for thirty (30) days after the due date therefor. Such interest shall accrue at the Default Rate (as defined in Paragraph 16 below) until Tenant pays such delinquent installment in full. Any interest owed by Tenant under this provision and not billed by Landlord within one (1) year after the due date of the applicable installment of Rent shall be deemed waived.

7.9 In addition to the payment of Minimum Rent as provided in this Article 7 Tenant shall pay to Landlord as "Additional Rent" all other sums of money and charges required to be paid by Tenant to Landlord under this Lease whether or not the same are designated Additional Rent, including but not limited to Taxes, Tenant's pro rata share or proportional share of all costs relating to the ECR and as defined in this Lease provided; however, in lieu of Tenant's being required to pay its pro rata or proportional share of all costs relating to the ECR ("ECR Costs"), Tenant shall pay Landlord as an agreed cost reimbursement for such ECR Costs, three hundred dollars (\$--00) per month (subject to an increase each five (5) years from the Rental Commencement Date in accordance with any increase in the Consumer Price Index (CPI-U). Minimum Rent and Additional Rent are collectively referred to herein as "Rent."

8. USES; CONFORMITY WITH LAW.

8.1 Tenant will use and occupy the Premises and appurtenances in a careful, safe and proper manner, for a ***Note The more specific the less flexibility the Tenant has to assign or sublease*** _____. Tenant will not permit the Premises to be used for any unlawful purpose or in violation of ECR. Landlord agrees and acknowledges that Tenant shall have no obligation to continually operate its business at the Premises, except as determined by Tenant in its sole and absolute discretion; however in the event Tenant shall cease to operate for six (6) continuous months (other than for remodeling or casualty, eminent domain or the like), then Landlord may terminate the Lease by giving written notice to Tenant after the end of the closed period by paying to Tenant the unamortized portion of the monies expended by Tenant in connection with the construction of the improvements on the Premises. Landlord's right to terminate shall remain in effect for ninety (90) days after the end of the six month period without Tenant having a right to sublet and thereafter Landlord shall have the right to terminate the lease upon written notice to Tenant, but Tenant shall have the right in good faith to notify Landlord that Tenant is engaged in bona fide negotiation to sublet the Premises and Landlord's rights to terminate shall be suspended for up to 90 days to permit Tenant to conclude a sublease and if such sublease has been concluded, Tenant shall have an additional 120 days for the subtenant to open for business. Nothing herein shall excuse Tenant from the payment of

Minimum Rent and other charges unless and until Landlord has terminated the Lease pursuant to this Section 8.1.

8.2 Tenant will not permit the Premises to be used for any unlawful purpose or in violation of ECR. Notwithstanding any other provision of this Lease, Tenant shall not use its premises for the purpose of (a) a gas station (b) a topless bar or the like, adult bookstore or other establishment selling or exhibiting pornographic materials or drug related paraphernalia or (c) the sale of *product specified by existing tenant* if the sales area of the premises devoted to the sale of *product specified by existing tenant* is in excess of ---- thousand (--,000) square feet of building floor area. Tenant understands [*other tenant in the Shopping Center*], its successors and assigns, may be a third party beneficiary of the foregoing restriction in clause (c) and have the right to enforce the same.

8.3 During the Term, Tenant shall comply with all lawful requirements of the local, county and state health boards, police and fire departments, municipal and state authorities and any other governmental authorities with jurisdiction, and of the board of fire underwriters, respecting the use, condition and occupancy of the Premises and Improvements. In the event that Tenant, within thirty (30) prior days' written notice (except in the case of an emergency, in which event only such notice as is reasonable under the circumstances shall be required) from Landlord or any such authority ordering performance of any such work which Tenant is required to perform in order to remain in, or come into, compliance with any such requirement, fails to perform or diligently commence and thereafter complete performance of same with reasonable diligence and promptness, Landlord may perform said work and collect the reasonable cost thereof plus interest at the Default Rate from Tenant with the next installment or installments of Minimum Rent. In the event that Landlord, within thirty (30) prior days' written notice (except in the case of an emergency, in which event only such notice as is reasonable under the circumstances shall be required) from Tenant or any such authority ordering performance of any such work which Landlord is required to perform in order to remain in, or come into, compliance with any such requirement with respect to the Common Areas on Landlord's Premises, fails to perform or diligently commence performance of same with reasonable promptness, Tenant may perform said work and, if Tenant is not reimbursed Landlord therefor, Tenant may deduct the reasonable cost thereof plus interest at the Default Rate from the next installment or installments of Minimum Rent.

9. UTILITIES.

Tenant shall make appropriate arrangements so that all utilities serving the Premises, including, without limitation, gas, water, sanitary sewer, storm water, trash removal, electricity, telephone, and other public or private utilities, used by Tenant in connection with the Premises, shall be separately metered and billed to Tenant, and Tenant shall be responsible to pay directly to the appropriate utility company or government agency or other party when due, all bills therefor. Landlord shall pay or cause to be paid when due all utility charges incurred in the operation of Landlord's Premises to the extent that non-payment would result in a lien on Landlord's Premises. Tenant shall also pay (1) all stormwater assessments imposed by the County or other governmental authority attributable to the Premises (to be prorated in an equitable manner if the Premises is not separately billed); and (2) its pro rata share of the drainage costs under the ECR based on the gross leasable area (defined as the ground floor

leasable area, excluding loading docks and outside sales areas ("GLA"), of the Building, divided by the GLA of all buildings existing in Landlord's Premises (or as illustrated on the Site Plan within Landlord's Premises until the Shopping Center construction is completed); (3) a share of the cost of security for the Common Areas (but not interior security for stores) as determined in a fair and equitable manner, and (4) its equitable share of other charges for shared services and shared facilities. Items 2, 3, and 4 are included within the \$----- per month fee in Paragraph 7.5.

10. REPAIR OF THE PREMISES.

There are often limitations requested by tenants to reduce financial exposure in the last several years of the lease term if it is not extended.

Tenant shall, at its sole cost and expense, repair and maintain the Premises in good order and repair and in a good, clean and safe condition, including making all repairs, alterations and replacements, interior and exterior, structural and non-structural to comply with these standards, that may be necessary for whatever reason. In the event of fire, casualty or eminent domain, Tenant's obligations shall be governed by the applicable provisions of Articles 19 and 21 below.

11. ACCESS BY LANDLORD.

Landlord shall have access to the Premises at all reasonable times upon 24 hours' written notice for reasonable purposes such as, without limitation, inspections to determine Tenant's compliance with its obligations under Lease and for reports to lenders and/or investors; provided such access shall not unreasonably affect Tenant's operations.

12. TENANT'S FIXTURES AND SIGNS.

12.1 No signs shall be located on the Common Areas of either the Premises or Landlord's premises except signs advertising businesses conducted thereon and signs for traffic control and direction and similar purposes. No sign shall be in violation of the ECR. Both Tenant and Landlord, or tenants acting through Landlord, may seek additional signage from the County beyond the amount expressly permitted under the zoning ordinance without variance or special exception; provided that any request for such additional signage shall contain an express statement that such additional signage should not be granted to the requesting party unless the grant will not adversely affect the remainder of the Shopping Center and the right of the owner(s) of the remainder of the Shopping Center to obtain additional signage.

12.2 Tenant shall be entitled, without Landlord's consent, but subject to governmental regulations and the ECR, to replace any or all of its signs with signage consistent with Tenant's then current prototypical signs. In the event of an assignment or subletting as a result of which Tenant is no longer occupying any portion of the Premises, Tenant's signs may be replaced at no expense to Landlord by signs identifying the appropriate assignee or subtenant; provided that the specific design of such signage shall be subject to Landlord's consent, which consent shall not be unreasonably withheld or unduly delayed. Tenant shall maintain all of its signs and sign panels in good condition and repair.

12.3 Landlord shall permit Tenant to place a temporary sign on the pylon sign at XXX, subject to the following: (a) Tenant must pay its pro rata share of the operating costs of the

overall sign, (b) Tenant will be responsible for all costs associated with the fabrication, installation and removal of their panels at their sole cost and expense; and (c) Landlord may provide Tenant notice at any time requesting the removal of the panels and within seven (7) days of receipt of such notice and if Tenant does not comply, Landlord may do so with Tenant being responsible for reimbursing Landlord for all costs associated with the same.

13. ALTERATIONS TO THE PREMISES.

During the Term, Tenant shall have the right, at its discretion and its sole cost, with Landlord's consent, not to be unreasonably withheld, (but subject to the ECR and the common easements granted herein), to make alterations or modifications to the Improvements constructed on the Premises; provided that if Tenant elects to make alterations or modifications to the Premises, (a) no change may be made to the curb cuts on the Premises, (b) no replacement shall exceed in height the maximum height for buildings on outparcels as provided under the ECR, (c) no structure shall be built so as to project on the XXX Road side beyond the initial building lines as shown on the plans for the Building as approved by Landlord (with no right to "in-fill" under any canopy or overhang), (d) all parking shall be at ground level, (e) no construction traffic shall unreasonably interfere with the operation of the Shopping Center, (f) Tenant shall do so in a manner consistent with preserving, repairing or replacing the Improvements, it being understood that the residual value of the Improvements is a material inducement to Landlord's entering into this Lease, and (g) without Landlord's consent, Tenant may not demolish the Building except to the extent provided for in Article 19. Landlord's consent to demolish the Building shall not be unreasonably withheld; however Landlord may require as a condition to such consent: (a) that the Building be replaced promptly after demolition with a comparable building of equal or better construction and value to the original building as legally modified pursuant to the Lease; (b) Landlord shall have a reasonable opportunity to review and approve the plans and specifications which shall not thereafter be modified without Landlord's consent, not to be unreasonably withheld; (c) Tenant shall provide appropriate assurances (including, without limitation, a bonded construction contract with conditional assignment to Landlord and evidence of all necessary permits and approvals) of its ability to reconstruct; and (d) Tenant shall reimburse Landlord for its reasonable expenses for review. Tenant shall cause all such alterations to be lien-free (in accordance with Article 26) and made and completed at Tenant's cost in a good and workmanlike manner and in compliance with all applicable laws. Without cost, expense or liability to Landlord, Landlord shall cooperate with Tenant in the obtaining of any and all licenses, building permits, certificates of occupancy or other governmental approvals which may be required in connection with any such modifications or alterations, and, without cost, expense or liability to Landlord, Landlord shall execute, acknowledge and deliver any documents reasonably required in furtherance of such purposes.

14. SURRENDER OF THE PREMISES.

14.1 Tenant will deliver and surrender possession of the Premises to Landlord upon the expiration of this Lease or its earlier termination, in good condition and repair, ordinary wear and tear and taking by eminent domain excepted and subject to the provisions of Article 19.

The language in red below when read in conjunction with the language in red in Section 21.2 avoids indirect subordination to a lender in the event of condemnation.

14.2 All repairs, alterations, replacements, other improvements or installations made to or upon the Premises which are so attached to the realty that the same shall be deemed by law to be a part of the realty shall (subject, however, to the provisions of Section 14.1 above and the provisions of the following sentence) be the property of Landlord and remain upon and be surrendered with the Premises as a part thereof upon the expiration of the term of this Lease. Notwithstanding the foregoing, all trade fixtures, decorative wall panels, and other items that make up Tenant's trade style, whether by law deemed to be a part of the realty or not, that have been installed at Tenant's expense at any time or times by Tenant or any person claiming under Tenant, shall remain the property of Tenant or persons claiming under Tenant and shall be removed by Tenant or any person claiming under Tenant at any time or times during the Term of this Lease or any occupancy by Tenant thereafter. HVAC, plumbing, heating, electrical and similar systems and equipment required for the operation of the Premises as real estate generally, as distinguished from Tenant's specific business, shall not be considered trade fixtures in any event and shall not be removed from the Premises. Tenant shall repair any damage to the Premises occasioned by the removal by Tenant or any person claiming under Tenant of any property from the Premises and leave the Premises in broom clean condition, including leaving all walls with smooth sheet rock ready for paint.

15. HOLDING OVER.

Statutory background: Hence the reason to include more specific language

§ 55.1-1413. Effect of failure of tenant in nonresidential rental property to vacate premises at expiration of term.

A tenant from year-to-year, month-to-month, or other definite term in a nonresidential rental property shall not, by his mere failure to vacate the premises upon the expiration of the lease, be held as tenant for another term when such failure is not due to his willfulness, negligence, or other avoidable cause, but such tenant shall be liable to the lessor for use and occupation of the premises and also for any loss or damage sustained by the lessor because of such failure to surrender possession at the time stipulated.

If Tenant continues its occupancy of the Premises after the expiration of the term of this Lease or any renewal or extension thereof (or any earlier termination provided or permitted by this Lease) either with or without the consent of Landlord, such tenancy shall be at sufferance only, and not month-to-month or year-to-year or based on any other interval of time. Such continued occupancy shall not defeat Landlord's right to possession of the Premises, and the tenancy provided for in this paragraph 15 may be canceled at any time upon not less than thirty (30) days' prior written notice from Landlord to Tenant. If following the termination of this Lease and the passing of thirty (30) days following a notice to "quit and vacate" the Premises, Tenant remains in possession of the Premises, in addition to Landlord's remedies under this Lease and in addition to the other charges due under the Lease, the Minimum Rent shall, thereafter, be twice that in effect at the time the Lease was terminated, and shall continue during the period Tenant remains in possession. Except for provisions relating to Lease Term, all covenants, provisions, obligations and conditions of this Lease shall remain in full force and effect during such tenancy.

16. REMEDIES UPON DEFAULT.

16.1 Events of Tenant's Default. Any of the following occurrences, conditions or acts by Tenant shall constitute an "Event of Default" under this Lease:

16.1.1 Failure to Pay Rent; Other Breach. (i) Tenant's failure to make any payment of Rent or other monies required by this Lease (including without limitation Rent, monies due under Section 16.2(a) or Real Estate Taxes) within ten (10) days after the receipt of written notice from Landlord to Tenant that same is overdue; or (ii) Tenant's failure to observe or perform any other provision of this Lease within thirty (30) days after receipt of written notice from Landlord to Tenant specifying such default in reasonable detail and demanding that the same be cured; provided that, if such default cannot with due diligence be wholly cured within such thirty (30) day period, Tenant shall have such longer period as is reasonably necessary acting in good faith to cure the default, so long as Tenant proceeds promptly to commence the cure of same within such thirty (30) day period and diligently prosecutes the cure to completion and provided further that in the case of a bona fide emergency, Landlord shall be required to give only such notice as is reasonable under the circumstances.

16.1.2 Bankruptcy. Tenant's adjudication as bankrupt or insolvent, or the appointment of a receiver, trustee in involuntary bankruptcy or other, similar officer to take charge of any substantial part of Tenant's property, which proceeding is not dismissed within one hundred twenty (120) days after it is begun.

16.2 Landlord's Remedies. After the occurrence of an Event of Default by Tenant, Landlord shall have the right to exercise the following remedies; however, prior to Landlord's exercising any right under subparagraph (b) below to re-enter or relet the Premises or under subparagraph (c) below to terminate the Lease, Landlord shall give Tenant an additional written notice of default (the "Second Default Notice") and Tenant shall have a ten (10) day grace period from receipt of the Second Default Notice to cure the default before Landlord shall exercise such rights or remedies:

16.2.1 Cure and Recover. In the event an Event of Default shall exist, Landlord shall have the right, at its option, and without any obligation to do so, and without terminating this Lease, to cure said Event of Default, and, in such event, all sums expended by Landlord in connection with the cure of such Event of Default shall be immediately due and payable by Tenant to Landlord upon receipt by Tenant from Landlord of an invoice therefor (together with receipts or other documentation reasonably satisfactory to Tenant), together with interest from the date of invoice at the Default Rate.

16.2.2 Continue Lease. Landlord may, at its option, continue this Lease in full force and effect, without terminating Tenant's right to possession of the Premises, in which event Landlord shall have the right to collect all Rent and other monies and charges when due—plus, after an Event of Default has occurred, interest at the Default Rate. In the alternative after the second Default Notice, Landlord shall have the right to peaceably re-enter the Premises without such re-entry being deemed a termination of this Lease or an acceptance by Landlord of a surrender thereof and in such event, subject to its obligations to mitigate damages in accordance with the provisions of this Section 16.2, to continue to be entitled to all Rent and other monies

and charges, and Tenant shall immediately surrender possession of the Premises in this circumstance. Landlord shall also have the right, at its option, from time to time, without terminating this Lease, to relet the Premises, or any part thereof, for a term or terms which may be equal or less than the Lease Term, with or without legal process upon such terms and conditions as Landlord may deem advisable, in which event the Rents received on such reletting shall be applied (i) first to the expenses of such reletting, including without limitation necessary renovation and alterations, repairs and improvements to the Premises, reasonable attorneys' fees and any real estate commissions actually paid, and (ii) thereafter toward payment of all sums due or to become due Landlord hereunder. If a sufficient amount to pay such expenses and sums shall not be realized or secured, in Landlord's exercise of good faith efforts to mitigate its damages (which Landlord hereby agrees to make), then Tenant shall pay Landlord any such deficiency monthly in advance on the first day of the month, and Landlord may bring an action therefor as such monthly deficiency shall arise. Any requirement for Landlord to mitigate damages under this Lease shall not require Landlord to make a lease with another tenant which would not, independent of the mitigation requirement, be in Landlord's good faith business interest. Landlord shall not, in any event, be required to pay Tenant any sums received by Landlord on a reletting of the Premises in excess of the Rent provided for in this Lease, but such excess shall reduce any accrued present or future obligations of Tenant hereunder. Landlord's re-entry and reletting of the Premises without termination of this Lease shall not preclude Landlord from subsequently terminating this Lease as set forth below.

16.2.3 Terminate Lease. Landlord may terminate this Lease by written notice to Tenant specifying a date therefor, which shall be no sooner than thirty (30) days following receipt of such notice by Tenant, and this Lease shall then terminate on the date so specified as if such date had been originally fixed as the expiration date of the Term. In the event of such termination, Landlord shall be entitled to recover from Tenant all unpaid obligations which have accrued prior to the date of termination, including such reasonable and actual expenses as Landlord may incur in recovering possession of the Premises, placing the same in good order and condition and repairing the same for reletting, and all other reasonable and actual expenses, commissions and charges incurred by Landlord in exercising any remedy provided herein or as a result of any Event of Default by Tenant hereunder (including without limitation reasonable attorneys' fees and insurance premiums) plus interest thereon at the Default Rate until paid, provided that in no event shall Tenant be obligated to compensate Landlord for any speculative damages caused by Tenant's failure to perform its obligations under this Lease.

In the event this Lease shall be terminated as provided above, by summary proceedings or otherwise, as provided herein Landlord, its agents, servants or representatives may immediately or at any time thereafter peaceably re-enter and assume possession of the Premises and remove all persons and property therefrom, in any lawful manner. In the event as a result of the occurrence of an Event of Default and the failure of Tenant to cure the same, Landlord shall give more than two (2) Second Default Notice in any consecutive twelve (12) month period, then Landlord shall be entitled to recover from Tenant (even if such default is cured within the grace period) Landlord's reasonable attorneys' fees in exercising its remedies hereunder.

16.2.4 Remedies Are Cumulative. The various rights and remedies reserved to Landlord herein, are cumulative.

16.2.5 Default Rate. As used in this Lease, the Default Rate shall mean the announced prime rate of _____, or any successor thereto, plus three (3) percentage points per annum.

THREE STIKES AND YOU ARE OUT CLAUSE *This clause has been widely accepted by all parties and proved useful in dealing with problem with tenants.*

Notwithstanding the foregoing, following two (2) substantially similar defaults under this Lease by Tenant within a twelve (12) month period, Landlord shall, upon the occurrence of any third (3rd) such default, have the right to exercise any or all remedies therefor under this Lease without, however, the obligation to provide notice thereof, or any opportunity to cure, to Tenant.

17. NONWAIVER OF DEFAULT.

No acquiescence by either party in any breach of covenant or default by the other party hereunder shall operate as a waiver of the acquiescing party's rights with respect to such breach or default or subsequently, to the same or any other breach or default.

18. QUIET ENJOYMENT.

Landlord agrees that upon Tenant's paying the Rent and performing and observing the agreements and conditions on its part to be performed and observed hereunder, Tenant shall and may peaceably and quietly have, hold and enjoy the Premises and all rights of Tenant hereunder during the Term of this Lease without any manner of hindrance or molestation from any person or entity claiming by, through or under Landlord, subject nevertheless to the provisions of this Lease.

19. DAMAGE BY FIRE OR CASUALTY.

19.1 In the event of a fire, earthquake or other casualty causing destruction or damage to the Improvements, and/or Common Areas, this Lease shall not terminate and Rent and other charges shall continue to be paid by Tenant. Within a reasonable time after such casualty, subject to force majeure (pursuant to Section 5.5), applicable building codes, the procurement of building permits and the receipt of insurance proceeds, Landlord shall commence and proceed with due diligence to complete reconstruction of the Common Areas (subject to changes permitted pursuant to this Lease) located on Landlord's Premises (excluding the Outparcels) to that condition existing immediately prior to such casualty, in the reconstructing party's reasonable discretion. Landlord agrees to give Tenant a good faith indication of Landlord's intent as soon as feasible under the circumstances; and in the event Landlord indicates a desire to rebuild within a time frame that would exceed the three (3) months deadline for completion, Landlord may provide Tenant with a projected completion date and Tenant shall, within ten (10) days after receipt of such notice, elect whether to accept the revised deadline for completion or to terminate the Lease. If Tenant elects to accept the revised deadline then the reference to three (3) months in the next sentence shall be deemed to be the revised deadline instead. In the event,

subject to force majeure, the Common Areas located on Landlord's Premises are not substantially repaired and reconstructed by Landlord, within three (3) months after such destruction or damage, and receipt of insurance proceeds or sooner if such repairs and reconstruction and reasonably be accomplished sooner and Tenant gives Landlord not less than thirty (30) days written notice requesting expedited action and such action is reasonably feasible, then Tenant, at its option, by giving written notice to Landlord and any Mortgagee(s), within thirty (30) days after the expiration of said period, may undertake completion of such reconstruction, in which event Landlord shall make available to Tenant all applicable insurance proceeds for such reconstruction (including any applicable deductible) or, if self-insured, the amount necessary. Additionally, Landlord shall assure (through parallel lease provisions or otherwise) that all areas of the Landlord's Premises (excluding Outparcels) leased to third party tenants are subject to substantially similar reconstruction obligations with respect to Common Areas.

19.2 In the event that, at any time during the Lease Term, the Building and related improvements (including Common Areas on the Premises) shall be damaged or destroyed (partially or totally) by fire or any other casualty insurable under a standard fire and extended coverage endorsement Tenant shall, at its expense, promptly and with due diligence either (a) repair, rebuild and restore the same as nearly as practicable to the condition existing just prior to such damage or destruction; or (b) repair, rebuild and restore the same for the same use and purposes but in accordance with such plans and specifications as are then generally in use by Tenant and subject to Landlord's approval, which approval shall be governed by the same standards as set forth in Article 13 relating to alterations; provided however, if during the last two (2) years of the Lease Term, the Building, Tenant's fixtures, equipment or other property affixed to the real estate shall be damaged or destroyed in an amount for replacement exceeding One Million Dollars (\$1,000,000.00) (increased by the CPI in the same manner as Minimum Rent) then Tenant may terminate this Lease as of the date of such damage or destruction by giving written notice to the Landlord within thirty (30) days thereafter and assigning to Landlord all insurance proceeds with respect to the Building including, without limitation, all alterations, improvements and equipment which become (or would become) property of Landlord pursuant to Section 14.2, and Tenant shall have an additional thirty (30) days, Rent free, within which to remove its property from the Premises. Notwithstanding any such termination of this Lease by Landlord as provided in this Article, Tenant shall have the right to exercise any option to extend the term hereof in accordance with the provisions of Article 4 within thirty (30) days after the date of the receipt of Landlord's notice of termination, and upon the exercise of any such option by Tenant, then this Lease shall continue in full force and effect despite such notice of termination by Landlord and Tenant shall repair, rebuild and restore the said permanent improvements as above provided.

19.3 Tenant shall clean up any rubble from destruction of its Premises within thirty (30) days after the occurrence of the same. Landlord in all leases with tenants entered into after this lease shall impose on such tenants a similar obligation.

20. WAIVER OF SUBROGATION.

Landlord and Tenant hereby waive all rights of subrogation which either has or which may arise hereafter against the other for any damage to the Premises or any other real or personal property or any business caused by perils covered by fire and extended coverage, building,

contents and business interruption insurance, or for which either party may be reimbursed as a result of insurance coverage affecting any loss suffered by it; provided, however, that the foregoing waivers do not invalidate any policy of insurance of the parties hereto now or hereafter issued, it being stipulated by the parties hereto that such waiver shall not apply in any case which would result in the invalidation of any such policy of insurance. Each party shall notify the other if such party's insurance would be so invalidated.

21. EMINENT DOMAIN.

21.1 Definition of Taking and Substantial Taking. For the purpose of this Lease, a "Taking" shall mean any condemnation or exercise of the power of eminent domain by any authority vested with such power or any other taking for public use, including a private purchase in lieu of condemnation by an authority vested with the power of eminent domain; the "Date of Taking" shall mean the earlier of the date upon which title to the Premises, Landlord's Premises or any portion thereof so taken is vested in the condemning authority or the date upon which possession of the Premises, Landlord's Premises, or any portion thereof is taken by the condemning authority; and "Substantially All of the Premises" shall mean (i) so much of the Premises as, when taken, leaves the untaken portion unsuitable, in Tenant's reasonable opinion, for the continued feasible and economic operation of the Premises by Tenant for the same purposes as immediately prior to such Taking or as contemplated herein, (ii) so many of the parking spaces within the Premises as reduces the parking ratio below the greater of (A) twelve (12) spaces per 1000 square feet of ground-floor gross leasable area or (B) that ratio which is required by the zoning ordinance applicable to the Premises, and Landlord does not provide replacement parking in the Additional Parking Area within ----- days after physical destruction, or prohibiting of the use, of the parking area or drive aisles as a result of the Taking, or (iii) so much of the Common Area Easement described in paragraph 6 above that access to the Premises is materially impeded.

The language in red below when read in conjunction with the language in red in Section 14.2 avoids indirect subordination to a lender in the event of condemnation.

21.2 Tenant's Rights Upon Taking or Substantial Taking. *In the event of a Taking of Substantially All of the Premises, Tenant, at its option upon thirty (30) days' written notice to Landlord, which shall be given no later than sixty (60) days following the Taking, shall have the right to terminate this Lease. Upon such termination, Landlord and Tenant shall divide the award in accordance with their respective interests as provided by law. The effect of the lease termination is that "All repairs, alterations, replacements, other improvements or installations made to or upon the Premises which are so attached to the realty that the same shall be deemed by law to be a part of the realty shall (subject, however, to the provisions of Section 14.1 above and the provisions of the following sentence) be the property of Landlord and remain upon and be surrendered with the Premises as a part thereof upon the expiration of the term of this Lease." The effect of this language is that the landlord has not subordinated its residual rights*

in the event of condemnation. But remember also to deal with this point in your SNDA clause and exhibit. All Rent and other sums payable by Tenant hereunder shall be apportioned and paid through and including the Date of Taking, and neither Landlord nor Tenant shall have any rights in any compensation or damages payable to the other as forth above in connection with such Taking.

21.3 Tenant's Rights Upon Less Than Substantial Taking. In the event of a Taking of less than Substantially All of the Premises, any award shall be allocated as set forth in paragraph 21(b), Rent and other charges shall be reduced fairly and equitably in accordance with the portion condemned or taken, effective as of the Date of Taking, and Tenant shall make all necessary repairs and restoration to the Improvements so that the portions of the Improvements not taken constitute a complete architectural unit. In the event of a Taking of less than Substantially All of the Premises which occurs within the last two (2) years of the Term or any renewal term, Tenant may terminate this Lease by giving not less than thirty (30) days' prior written notice to Landlord not later than 60 days following the taking, in which event of termination Landlord shall be entitled to retain the entire award that would otherwise be allocated between Landlord and Tenant under subparagraph (b) above.

21.4 Landlord's Obligations Upon Any Taking. In the event of any Taking following which the Lease continues in effect, Landlord shall make all necessary restorations to all portions of the Common Areas on Landlord's Premises (excluding Outparcels) such that they serve the function originally intended.

21.5 Rights Upon Temporary Taking. In the event of a Taking of the Premises, the Common Areas and/or any other area within the Landlord's Premises, or any portion thereof, for temporary use (specifically one not exceeding 120 days in duration), without the taking of the fee simple title thereto, this Lease shall remain in full force and effect. All awards, damages, compensation and proceeds payable by the condemnor by reason of such Taking relating to the Premises for periods prior to the expiration of the Lease shall be payable to Tenant. All such awards, damages, compensation and proceeds for periods after the expiration of the Lease shall be payable to Landlord. Anything contained herein to the contrary notwithstanding, a temporary Taking for any period in excess of one hundred twenty (120) days may, at Tenant's option, be deemed a permanent Taking and shall be governed by Section 21.2 or 21.3 above, as applicable.

21.6 Additional Claims Upon Condemnation. In the event of a Taking described in Section 21.2 or 21.3 above, both Landlord and Tenant shall be entitled to claim compensation from the condemning authority for relocation expenses and any other items to which either is entitled under applicable law that do not reduce the award payable under Section 21.2.

22. INSURANCE.

22.1 Casualty Insurance.

22.1.1 Tenant shall procure and maintain in effect fire insurance with extended coverage endorsement upon the Premises in an amount equal to one hundred percent (100%) of the replacement cost value of the Premises, including the Building. Policies of insurance procured pursuant to this section shall name Landlord and Landlord's mortgagee as additional

insureds and loss payees, as their interests may appear. Such policy shall bear an endorsement to the effect that Landlord shall be notified not less than thirty (30) days in advance of any modification or cancellation thereof and that the insured has waived any right of recovery against Landlord. Landlord and its mortgagee(s), if any, shall be furnished certificates from the insuring company showing the existence of such insurance. In the case of loss, provided there is no existing Event of Default hereunder, Tenant is authorized to adjust the loss and execute proof thereof in the name of all parties in interest.

22.1.2 Each party hereto has hereby remised, released and discharged the other party hereto and any officer, individual member or manager, agent, employee or representative of such party of and from any liability whatsoever hereafter arising from loss, damage or injury caused by fire or other casualty for which insurance (permitting waiver of liability and containing a waiver of subrogation) is carried by the party at the time of such loss, damage or injury to the extent of any recovery by the injured party under such insurance.

The language in red below voids indirect subordination to a lender in the event of casualty since all proceeds must be used for restoration rather than paid over to the lender to reduce the loan.

22.1.3 Application and disbursement of funds.

(a) Application of Funds. All insurance proceeds received on account of such damage or destruction, less the cost, if any, of such recovery, **shall be applied** pursuant to the terms of this Lease to the payment of the cost of such restoration, repair, replacement, rebuilding, or alteration (the "Work"), including expenditures made for temporary repairs or for the protection of property pending the completion of permanent restoration, repair, replacement, rebuilding, or alteration to the Building, and, if reasonably required by any Mortgagee, shall be held by such Mortgagee or a mutually agreeable third-party escrow agent (either of which is, for these purposes, the "Escrow Agent"), in an interest-bearing account in a federally insured financial institution, to be paid out, as provided below, from time to time (but no more often than once monthly), as the Work progresses, upon Tenant's written request, accompanied by a certificate of the architect or engineer in charge of the Work (the "Certificate"), dated not more than seven (7) days prior to such request, stating that the sum then requested either has been paid by Tenant or is justly due to the named contractors, subcontractors, materialmen, engineers, architects, or other persons (whose addresses shall also be stated) who have rendered services or furnished materials for certain portions of the Work. ***The effect of this language is that the landlord has not subordinated its residual rights in the event of property damage.*** The Certificate shall give a brief description of such services and materials, shall list the several amounts so paid or owing to each of such persons, shall state the cost of the Work at the date of the requisition, and shall state that no part of such expenditures has been or is being made the basis for any other request for payment. The Certificate shall state also that, except for the amounts listed therein, there is no outstanding indebtedness known to such architect or engineer, after due inquiry, for labor, wages, materials, supplies, or services in connection with the Work which, if unpaid, might become the basis of a vendor's, mechanic's, laborer's, materialman's, or similar lien upon the Work or upon the Premises or any part thereof. If change orders issued in connection with the Work increase the remaining cost to complete the Work by more than One

Hundred Thousand Dollars (\$100,000) in the aggregate in excess of then-current escrow funds, then Tenant shall deposit with the Escrow Agent the sum of all such change orders, to be distributed in accordance with this Section 22.1(c). Notwithstanding the foregoing, in the event the net worth of Tenant is greater than twenty five million dollars (\$25,000,000) (and Tenant, upon request of Landlord, provides reasonable evidence regarding same), then no escrow shall be required. Not less often than each five (5) years, the net worth requirement shall be increased to reflect any increase in the Consumer Price Index for the prior five (5) years.

(b) Disbursement. Upon compliance with the foregoing provisions of Section 22.1(c)(i), the Escrow Agent shall pay, out of the escrowed funds, to the persons named in the Certificate the respective amounts stated to be due to them or shall pay to Tenant the amount stated to have been paid by Tenant; provided, however, that such payments shall not exceed in amount the cost of the relevant Work as stated in the Certificate. If the insurance proceeds or reconstruction funds paid by Tenant to the Escrow Agent exceed the amount required to pay the total cost of the Work, Tenant, after payment of all costs of the Work, shall be entitled to receive or retain, as applicable, such excess.

22.2 Liability Insurance.

22.2.1 During the Term, Tenant shall keep in full force and effect at its own expense a policy of commercial general liability insurance with bodily injury and property damage coverage with respect to the Premises and business operated by Tenant, which shall list Landlord and Landlord's Mortgagee(s) as additional insureds as their respective interests may appear. The limits of such commercial general liability policy shall be not less than **\$2,000,000** combined single limit per occurrence for bodily injury and property damage, with a commercially reasonable self-insured retention limit and deductibles similar to that maintained by Tenant on other properties. **Not less often than each five (5) years, the policy limits shall be increased to reflect any increase in the coverage generally applicable to Tenant with respect to its restaurants, and in any event in an amount that shall be not less than the increase in the Consumer Price Index for the prior five (5) years.** As to events which may occur on the Premises and result in any claim hereunder, the Tenant's policy shall be primary.

22.2.2 Tenant will provide an "all Physical Loss" Builder's Risk insurance policy on all Tenant's Work to be performed in the Premises as it relates to the Building. The policy will include Tenant, its contractor and subcontractors and Landlord as named insureds, as their interests appear. The amount of insurance to be provided will be one hundred percent (100%) of the full replacement cost. In the event Tenant fails to furnish such certificates within ten (10) days after receipt of written notice from Landlord, Landlord may then obtain such insurance and the premiums on such insurance shall be deemed additional Rent to be paid by Tenant upon demand.

22.2.3 Landlord agrees to obtain, or require its own tenants to obtain, policies of general commercial liability insurance with bodily injury and property damage coverage with respect to Landlord's Premises. Such insurance shall at all times be in an amount of not less than Two Million Dollars (\$2,000,000.00) combined single limit for bodily injury and property damage per occurrence and may be covered by so-called "blanket" or "umbrella" policies. Such insurance shall be written with a company or companies authorized to engage in the business of

general liability insurance in the state where the Shopping Center is located, and there shall be delivered to Tenant customary insurance certificates evidencing such insurance prior to the Delivery Date and thereafter within ten (10) days prior to the expiration of each current policy. As to any claim which may occur off the Premises and result in any claim hereunder, the Landlord's or other tenant's policy, as the case may be, shall be primary.

22.3 Workers' Compensation Insurance. To the extent required by law, Landlord and Tenant shall maintain workers' compensation insurance covering their respective employees in statutory limits, or maintain such alternate coverages or arrangements as legally permissible.

22.4 Policy Provisions.

22.4.1 The following provisions shall otherwise apply: All policies of insurance enumerated above shall be provided by insurance carriers with a Best rating of not less than A- (or comparable rating from a similar rating company) licensed or otherwise permitted to do business in Virginia. Any insurance coverage enumerated above may be effected by a blanket policy or policies of insurance or under so-called "all risk" or "multi-peril" insurance policies, provided that the total amount of insurance available with respect to the Premises and Tenant's or Landlord's liability hereunder shall be at least the equivalent of separate policies in the amounts herein required, and provided further that in other respects any such policy or policies shall comply with the provisions of this Article 22. An increased coverage or "umbrella" policy may be provided and utilized by either party to increase the coverage provided by individual or blanket policies in lower amounts, and the aggregate coverage provided by all such policies with respect to the Premises and Tenant's or Landlord's liability hereunder shall be satisfactory provided that such policies otherwise comply with the provisions of this Article 22.

22.4.2 Provided Tenant's net worth is in excess of **\$100,000,000**, Tenant may with respect to both Casualty Insurance under Section 22.1 and Liability Insurance under Section 22.2 carry a commercially reasonable deductible acceptable to Landlord and its mortgagee. **Not less often than each five (5) years, the net worth requirement shall be increased to reflect any increase in the Consumer Price Index for the prior five (5) years.**

22.5 Indemnity. Except for the default or negligence of Landlord or its authorized agents or authorized employees or authorized representatives, Tenant hereby agrees to indemnify, defend and hold Landlord harmless from all claims, losses, costs, liability, damage or expense, including reasonable attorneys' fees, for any death, damage or injury to persons or property occurring on the Premises or resulting from Tenant's use or occupancy thereof.

23. SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT. *Note this provisions reflects the no subordination position of the lease.*

At the option of Landlord or any successor-in-interest to all or part of Landlord's interest, **this Lease shall be superior or subordinate** to the lien of any mortgage upon the Premises or any property of which the Premises form a part but only if the lienholder or mortgagee signs and delivers to Tenant a subordination, non-disturbance, and attornment agreement substantially in the form attached hereto as **Exhibit E**. The word "mortgage," as used herein, includes a mortgage, deed of trust or other similar instrument and any modification, extension, renewal or replacement

thereof. Subject to the foregoing, Tenant agrees to attorn to any such successor-in-interest and shall, upon the written request of Landlord, promptly execute a Subordination, Non-Disturbance and Attornment Agreement ("SNDA") in the form attached hereto as Exhibit E, or substantially similar form reasonably acceptable to Tenant and Landlord's lender in confirmation of the foregoing and such attornment. Tenant shall not be bound by the terms and provisions of said SNDA until Tenant has received a fully executed and recorded copy of said SNDA.

24. TRANSFER OF INTEREST.

24.1 (a) Landlord may at any time transfer its interest in this Lease and underlying fee, but no transfer or sale of Landlord's interest hereunder shall be binding upon Tenant until Tenant has received a true, correct and complete copy of the original instrument assigning Landlord's interest in this Lease or a certified and conformed copy of any deed conveying Landlord's fee interest in the Premises. Any such instrument shall evidence the fact that the assignee or transferee thereunder has assumed all of Landlord's obligations under this Lease and acquired sufficient title to the Premises to enable it to perform such obligations. After such assignment, Landlord shall be released from all obligations hereunder except that with respect to any of the Shopping Center which Landlord retains Landlord shall continue to have its obligations under this Lease unless and until Landlord disposes of such property in which event such obligations shall be a burden on the land so sold or otherwise transferred.

(b) If any person to whom Tenant shall not then be paying Rent under this Lease shall demand payment of Rent from Tenant, or any other amount payable by Tenant under this Lease, alleging his or its right to receive such Rent or other amount as a result of a transfer of Landlord's interest in this Lease or otherwise, Tenant shall not be obligated to honor such demand unless Tenant shall receive written instructions to do so from Landlord the person to whom Tenant shall then be paying Rent or shall otherwise receive written evidence from Landlord satisfactory to Tenant of the right of the person making the demand. The withholding of Rent, or any other amount payable by Tenant under this Lease, by Tenant pending the determination of the right of the party making the demand shall not be deemed to be a default on the part of Tenant.

24.2 Tenant shall have the right at any time to assign this Lease or sublet all or any part of the Premises, provided Tenant shall remain liable for the full performance of all terms, covenants and conditions of this Lease and the ECR.

25. REAL ESTATE TAXES.

25.1 If the Premises are separately assessed (or broken down by the tax assessor with separate valuations for purposes of the tax assessment), Tenant shall pay all real estate taxes and all installments of assessments (collectively, the "Taxes") payable with respect to the Premises during the Lease Term promptly as the same shall become due and before interest or penalty accrues thereon. Such payment shall be proportionately adjusted during the first and the last years of the term hereof. Tenant shall not be chargeable with nor be obligated to pay (a) any tax of any kind whatsoever which may be imposed on Landlord or the Rents payable hereunder (except as provided in Sections 25.6 and 25.7) (b) any interest or penalties payable as a result of Landlord's failure to pay any Taxes or assessments prior to delinquency, except the

Taxes mentioned in this Article 25 if they are separately billed to Tenant. Tenant shall provide Landlord with a copy of the paid tax bills within ten (10) business days after receipt thereof.

25.2 If the Premises are not already separately assessed, Landlord shall upon the execution of this Lease request that the Premises be separately assessed by the applicable taxing authorities. If Landlord is unable to cause the Premises to be separately assessed by the applicable taxing authorities, Tenant shall pay to Landlord Tenant's proportionate share of the Taxes payable with respect to the Shopping Center during the Lease Term. Tenant's proportionate share shall be based on the relative land values of outparcels compared to "in-line" land values and the relative value of the improvements thereon.

25.3 If the Premises are not already separately assessed, Landlord shall submit a bill to Tenant together with photostatic copies of all notices regarding the Taxes, including but not limited to any assessments, changes of assessments, tax rates, changes of taxes, and tax bills (the "Tax Bill"). The Tax Bill shall be submitted to Tenant at least fifteen (15) days before the last date when Tenant must make appeals or take other appropriate legal action in connection with such Taxes on the Premises. Tenant shall pay the Tax Bill to Landlord on or before the later of (i) fifteen (15) days prior to the due date of the Taxes and (ii) thirty (30) days after billing from Landlord. Tenant shall pay only its proportionate share of Taxes payable with respect to the Shopping Center land until such time as the improvements comprising the Premises are separately assessed, and Tenant shall not pay any Taxes against the buildings comprising the Shopping Center until such time. Tenant shall under no circumstances be liable for any Taxes assessed after the termination of this Lease. Landlord shall furnish Tenant with proof of payment of the Taxes within sixty (60) days of Tenant's payment. If Landlord fails to provide Tenant of such proof of payment of the Taxes, Tenant shall not be obligated to make further payments of the Taxes until such proof of payment of the Taxes is received by Tenant for Landlord.

25.4 Tenant shall have the right to contest, in good faith, the validity or the amount of any Taxes levied against the Premises, whether the Premises are separately assessed or not, by such appellate or other proceedings as may be appropriate in the jurisdiction and may defer payment of such obligations, pay same under protest or take such other steps as Tenant may deem appropriate. Landlord shall cooperate with the institution and in prosecution of any such proceedings and will execute and will provide any documents reasonably required therefor. The expense of such proceedings shall be borne by Tenant and any refunds or rebates secured shall belong to Tenant. In the event Landlord contests the validity or the amount of any Taxes levied against the Premises or the Shopping Center, Landlord shall pay for the cost thereof (or make arrangements for a contingent fee), and if any refunds or rebates are secured by Landlord as a result of such proceedings, Landlord shall proportionately pass-through to Tenant the amount of any such refunds or rebates. Further, if Landlord contracts with any outside consultants for such services for purposes of seeking any refunds or rebates of the Taxes, such contracts will be written on a contingency basis not to exceed, without Tenant's prior consent, one-third (1/3) of the savings.

25.5 Landlord or Tenant shall have the right to contest or seek a reduction in Taxes. In the event of any action to abate or reduce Rents, any rebates, refunds or abatements of Taxes, less reasonable out-of-pocket costs paid to independent third parties to obtain the same, shall be

refunded to Tenant on a pro-rata basis to the extent previously paid by Tenant within thirty (30) days of receipt by Landlord.

25.6 Tenant shall at all times be solely responsible for and shall pay before delinquency all municipal, county, state or federal taxes assessed or levied against any leasehold interest hereunder or any personal property of any kind owned, installed or used by Tenant. If at any time during the term of this Lease, a tax or excise on Rents or other tax, however described, is levied or assessed against Landlord on account of or measured by, in whole or in part, the Rent expressly reserved hereunder (excluding any income, corporate franchise, corporate, estate gift, inheritance, succession, capital stock, corporate loan, corporate bonus, transfer or profit tax of Landlord) as a substitute, in whole or in part, for taxes assessed or imposed on land and buildings, such tax or excise on Rents or other tax shall be included as a part of the real property taxes covered hereby, but only to the extent of the amount thereof which is lawfully assessed or imposed as a direct result of Landlord's ownership of this Lease or of the Rent accruing under this Lease. If any real property tax or assessment levied against the land, buildings or improvements covered hereby or the Rents reserved therefrom shall be evidenced by improvement or other bonds or in other form which may be paid in installments, Landlord shall, if permitted, elect such installment payment plan and only the amount paid in any Lease Year shall be included in the taxes for that Lease Year for purposes of this Article.

25.7 Tenant shall also reimburse Landlord for Tenant's pro rata share (based on acreage) for the real estate taxes on the ponds, drainage and related areas serving the Shopping Center and not part of any parcel leased or sold to another tenant.

26. MECHANICS LIENS.

26.1 Tenant covenants to promptly remove any lien filed against the Premises or Landlord's Premises as a result of Tenant's nonpayment for, or disputes with respect to, labor or materials furnished to the Premises or Landlord's Premises for or on behalf of Tenant or any party claiming by, through, or under Tenant nor shall Tenant permit any judgment, lien or attachment to lie, as applicable, against the Premises or Landlord's Premises as a result of its breach of the foregoing. If, after Tenant has received notice of the same, Tenant fails to discharge of record (by substitution of collateral, posting a bond therefor, court order or otherwise) any such lien within thirty (30) days (or such shorter period as Landlord may reasonably require in conjunction with any sale, financing or other transaction), then in addition to all other rights, Landlord may (but shall not be obligated to) discharge such lien in any appropriate manner, and all amounts so paid (including Landlord's out-of-pocket costs and attorney's fees) with interest at the Default Rate shall be immediately payable by Tenant.

26.2 Tenant may contest any mechanics' or other liens imposed against the Premises (provided Landlord agrees and acknowledges that Tenant shall have no responsibility with respect to liens arising from Landlord's Work or other construction, repair or maintenance required of Landlord under this Lease), provided Tenant believes in good faith that such liens are not proper, and further provided that Tenant bonds the liens so that such liens are released of record. Upon a final determination of the validity of such lien or claim, Tenant shall promptly pay any judgment or decree rendered against Tenant or Landlord, including without limitation all

proper costs and charges, and shall cause such lien to be released of record, all without cost to Landlord.

27. COMMON AREAS.

27.1 Tenant will at its own expense maintain good order, condition (comparable to other first-class shopping centers in the trade area) and repair all parking areas, landscaping, sidewalks, drive aisle and other similar areas of the Premises ("Common Areas"). Landlord grants to Tenant, its agents, employees and invitees, the nonexclusive right to use the Common Areas in common with other tenants of the Shopping Center.

27.2 With respect to maintenance of the Premises and the other Common Areas of the Shopping Center, each of the tenants shall comply with the ECR with respect to their respective properties. The parties also recognizing it may be advantageous to them in the future to enter into a joint maintenance agreement pursuant to which all maintenance for all portions of the Shopping Center or their respective portions, as the case may be, will be maintained under a single contract. In such event, the parties agree to endeavor in good faith and negotiate appropriate agreement for the maintenance of the Shopping Center, including the Premises, for the joint payment of expenses; provided, that, in any such agreement either party shall have the right upon reasonable notice as may be agreed to at the time, to terminate the agreement if such party is not satisfied with the quality or expense of such maintenance.

28. ALTERATIONS TO SHOPPING CENTER.

Landlord will not take any action with respect to the Shopping Center in violation of the ECR. Tenant shall be a third party beneficiary with respect to its rights to enforce in compliance under the ECR and Landlord shall affirmatively place an obligation to comply with the ECR on all other purchasers or tenants of any interest in the Shopping Center. Landlord will not amend the ECR during the term of this Lease without the consent of Tenant which consent shall not be unreasonably withheld.

29. HAZARDOUS MATERIALS.

29.1 Landlord represents to Tenant that Landlord has no knowledge of any Hazardous Materials which may have been used, released, generated, stored, treated, discharged or disposed of in or about or under the Premises in violation of any Environmental Law. However, Tenant acknowledges that Landlord is leasing the Premises to Tenant with no warranty or indemnification whatsoever with regard to the environmental condition of the Premises.

29.2 Any Hazardous Materials on the Premises and all containers therefor, shall be used, kept, stored, and disposed of in a manner that complies with all Environmental Laws applicable to Hazardous Materials.

29.3 Tenant agrees that, during the term of this Lease, including any renewals, it shall be fully liable for all loss, cost and expense related to the use, release, generation, storage, treatment, discharge or disposition of all Hazardous Materials placed or kept on the Premises by Tenant, its subtenants, assignees, contractors and subcontractors and that all such Hazardous Materials will only be used, released, generated, stored, treated, discharged or disposed of on or

about the Premises in compliance with all Environmental Laws. If Tenant shall fail to comply with the obligations set forth in the preceding sentence, or if Tenant or any licensee or subtenant of Tenant violates the Environmental Laws, Tenant shall thereafter remediate the alleged violation in accordance with the Environmental Laws, and except for any breach by Landlord of its representations and obligations under 29.1 above, Tenant shall defend, indemnify, and hold harmless Landlord and its agents, from and against any loss, damage, claims, demands, penalties, fines, liabilities, settlements, damages, costs, or expenses (including, without limitation, reasonable attorneys' and consultants' fees, court costs, and litigation expenses) of whatever kind or nature, known or unknown, contingent or otherwise, arising out of or in any way related to any breach of the foregoing obligations. The provisions of this subsection shall survive the termination or expiration of this Lease.

29.4 The term "Hazardous Materials" includes all materials, chemicals, substances, waste products, contaminants, pollutants or constituents thereof, that are regulated or controlled under the Environmental Laws as defined in Section 29.5 below.

29.5 "Environmental Laws" shall mean all Laws: (a) relating to the environment, human health, or natural resources; (b) regulating, controlling, or imposing liability or standards of conduct concerning any Hazardous Materials; (c) relating to Remedial Action; and (d) requiring notification or disclosure of releases of Hazardous Materials or of the existence of any environmental conditions on or at the Premises, as any of the foregoing may be amended, supplemented, or supplanted from time to time. Such laws shall include, without limitation, the Clean Air Act, Clean Water Act, Comprehensive Environmental Response, Compensation & Liability Act, Resource Conservation and Recovery Act ("RCRA"), Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Toxic Substances Control Act ("TSCA"), the Energy Policy Act (regulation of Underground Storage Tanks) the Emergency Planning and Community Right-To-Know Act of 1986, as amended from time to time, 42 USC Section 11001, et seq, and all other applicable federal, state and local laws, rules, regulations, codes and ordinances.

29.6 "Law" or "Laws" shall mean any present or future applicable law, statute, ordinance, regulation (including zoning regulations), code, building code, judgment, injunction, arbitration award, order, rule, directive, common law, codes and ordinances of any Governmental Authorities, easement, covenant, restriction, or other agreement of record affecting the Premises as of the date of this Lease or subsequent thereto.

30. ESTOPPEL CERTIFICATE.

Landlord and Tenant agree within fifteen (15) business days after request therefor by the other, subject to reimbursement for any reasonable legal expense in connection with the review thereof, to execute in recordable form and deliver a statement, in writing, certifying (a) that this Lease is in full force and effect, (b) the Commencement Date and the Rental Commencement Date of this Lease, (c) the last period for which Rent is paid currently, (d) the amount of Rent, if any, paid in advance, (e) that there are no known uncured defaults by the other party or stating those claimed, as the case may be, and (f) a certified copy of the lease, as modified, such other information as may be reasonably requested and reasonably agreed to be provided; provided that, in fact, such facts are accurate and reasonably ascertainable. Certificates with the amount of rent shall not be recorded.

31. ATTORNEY'S FEES.

In the event Tenant or Landlord defaults in the performance of any of the terms, covenants, agreements or conditions contained in this Lease and the other party places in the hands of an attorney the enforcement of all or any part of this Lease, the defaulting party agrees to pay on demand the other party's reasonable attorneys' fees for the services of the attorney, whether suit is actually filed or not. If Landlord fails to pay any such fees on demand, Tenant may deduct the amount of such fees from the Rent and other charges otherwise due hereunder. In addition, each party shall be entitled to reasonable attorneys fees incurred by such party in connection with documents requested by the other party during the Lease Term.

32. BROKERAGE.

Each party represents to the other that it has only dealt with ---- Company and _____ as agent and agrees to indemnify and save the other harmless from any breach by such party of the foregoing representation. Landlord shall pay all brokerage fees and commissions to the extent of, and only to the extent of the following: to ----- and _____ divided in equal shares, six percent (6%) of Minimum Rent, as provided for in paragraph 7.1, actually collected paid. No agent may file any lien or notice of lien unless Landlord has defaulted in the payment of any monies due such agent and the failure of Landlord to cure the same within thirty (30) days after receipt of written notice.

33. NOTICES.

Any notice or consent required to be given by or on behalf of either party to the other shall be in writing and given by mailing such notice or consent or sending by recognized overnight courier service, and shall be deemed given either (i) one (1) business day after sending by an overnight courier service, or (ii) two (2) business days after sending by registered or certified mail, return receipt requested, addressed to the other party as indicated in Article 1(G) hereof, or at such other address as may be specified from time to time in writing by either party. Any notice or consent given hereunder by either party shall be deemed effective when mailed as aforesaid, but the time period in which to respond to any notice or consent shall commence to run on the date on which such notice or consent is actually received by the addressee. Refusal to accept delivery shall be deemed receipt thereof.

34. MISCELLANEOUS.

34.1 Severability of Provisions. If any term or provision of this Lease, or the application thereof to any person or circumstance, shall to any extent be determined to be invalid or unenforceable by a court of competent jurisdiction, then the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby.

34.2 Memorandum of Lease. Neither party may record this Lease. However, upon the request of either party hereto, the other party shall join in the execution of a memorandum or so-called "short form" of this Lease for the purposes of recordation ("Memorandum of Lease") in the form of Exhibit F. Said Memorandum of Lease shall describe the parties, the Premises, the term of this Lease and any special provisions hereof, and shall incorporate this Lease by

reference. Any fees required to be paid in order to prepare or record such Memorandum of Lease shall be paid by the party recording the same. In the event of any conflict between the provisions of the Memorandum of Lease and the Lease, the Lease shall control. At the expiration or earlier termination of the Lease, the parties agree that should a Memorandum of Lease have been recorded, either party will, at the request of the other party, execute an instrument, in recordable form, acknowledging the expiration or earlier termination of the Lease, which instrument may be recorded by either party at the expense of the party recording the same; or in the alternative, in the event a party desires the execution of a Memorandum of Lease, either party may require the other also to execute a Memorandum of Lease Termination to be held in escrow by Landlord's counsel and filed upon the expiration or termination of the Lease in accordance with its terms.

34.3 Entire Agreement. This instrument shall merge all undertakings between the parties hereto with respect to the Premises and upon execution by both parties shall constitute the entire lease agreement, unless thereafter modified by both parties in writing. In the event Landlord shall execute this Lease prior to Tenant, Tenant shall have ten (10) days to accept the terms hereof and to execute this Lease, during which time Landlord's execution shall constitute an irrevocable offer.

34.4 Relationship of the Parties. Nothing contained in this Lease shall be deemed or construed by the parties hereto or by a third party to create the relationship of principal and agent or of partnership or of joint venture of any association whatsoever between Landlord and Tenant, it being expressly understood and agreed that neither the method or computation of Rent nor any other provision contained herein, nor any act or acts of the parties hereto, shall be deemed to create any relationship between Landlord and Tenant other than the relationship of lessor and tenant.

34.5 Importance of Each Covenant. Each covenant and agreement on the part of one party hereto is understood and agreed to constitute an essential part of the consideration for each covenant and agreement on the part of the other party.

34.6 Headings. The headings of the Articles of this Lease are for convenience of reference only and do not form a part hereof, and they shall not be interpreted or construed to modify, limit, or amplify the intent of such Articles.

34.7 Parties in Interest. Subject to the provisions of this Lease relating to assignment, subleasing and other transfers of the parties' interests, this Lease shall inure to the benefit of and be binding upon the successors in interest and assigns of the parties hereto.

34.8 Counterparts. This Lease may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

34.9 Number and Gender. Words in the singular, plural, masculine, feminine and neuter as used herein shall have the meanings and be construed as required by the context in which they are used herein.

34.10 Governing Law. This Lease shall be construed and governed by the laws of the State in which the Premises are located without regard to conflict of laws. Should any provisions be illegal or not enforceable under the laws of the said State, it or they shall be considered severable, and the Lease and its conditions shall remain in force and be binding upon the parties as though the said provisions had never been included.

34.11 Exculpation. The liability of Landlord under this Lease shall be limited to Landlord's equity interest in the Premises, and any judgments or claims against Landlord shall be satisfied solely out of proceeds of sale of such equity interest. No individual who is the Landlord (except to the extent of the individual's equity interest in the Premises) and no member or partner of any joint venture, tenancy in common, firm, partnership or other form of joint owner that is the Landlord, or their heirs, personal representatives, executors, successors and assigns, shall have any personal liability to Tenant under this Lease or to any person claiming through or under Tenant for any amount.

34.12 Time of the Essence. Time is of the essence under this Lease; however, any deadline (except the termination of this Lease and the date for payment of Rent) which is on a non-business day may be extended until the close of the first business day following such date.

35. RIGHT OF FIRST NEGOTIATION *This clause is reasonably fair to both parties and much better for Landlords because rights of first refusal can depress the value of properties and complicate sales and related transactions.* If Landlord desires to sell the Premises to an unrelated third party, Landlord grants Tenant a right of first negotiation with respect to the Premises.

35.2 In the event that the negotiations are not successful and Landlord does not sell the Premises within twelve (12) months after the conclusion of such negotiation and, if closing of another sale has not occurred, the right of first negotiation shall be reinstated. Landlord shall not during the twelve (12) months sell the property to a third party at a price equal to or less than the best offer received from Tenant in the negotiations without providing Tenant a reasonable opportunity to purchase for the same price.

35.3 Tenant's right of first negotiation hereunder shall be operative only with respect to sales or transfers of the Property by Landlord to entities or individuals unrelated to Landlord. Landlord shall be deemed to be related to any entity in which (i) it, or its owners, directly or indirectly, own at least fifty percent (50%) of the beneficial ownership interests or (ii) an entity owned or controlled by family members of the owners of Landlord. Tenant's rights hereunder shall survive any such transfer to a related entity or individual, unless Landlord has offered the Property to Tenant by giving Tenant a Notice and Tenant has made a Rejection of such Offer

36. RIGHTS OF LEASEHOLD MORTGAGEE

The provisions below have been widely accepted by lenders where there is a triple net ground lease and there will be only a Leasehold Mortgage.

In the event that Tenant shall mortgage or pledge its interest in this Lease (hereinafter called the "Leasehold Estate") as security for an indebtedness in any form whatsoever (such

mortgage or pledge is hereinafter referred to as a "Leasehold Mortgage"), and if the holder of such indebtedness secured by the Leasehold Estate (hereinafter called the "Mortgagee" notifies Landlord in writing of the execution of such Mortgage and the name and place and method for service of notices upon such mortgagee, then, from and after receipt of such notice and in such event, Landlord hereby agrees for the benefit of Tenant and such mortgagee as follows:

36.1 Landlord will give to any Mortgagee, simultaneously upon service thereof on Tenant, a duplicate of any and all notices or demands given by Landlord to Tenant and no such notice to Tenant shall be effective unless a copy is so served upon the Mortgagee;

36.2 In the event of any default by Tenant under this Lease, or under the terms of the Leasehold Mortgage, the Mortgagee shall have the privilege of performing any of Tenant's covenants or of curing any defaults by Tenant or of exercising any election, option or privilege conferred upon Tenant by the terms of this Lease, and Landlord shall accept performance by or at the instance of the Mortgagee as if the same had been by Tenant;

36.3 Landlord shall not terminate this Lease or Tenant's right to possession for any default of Tenant if, with respect to a monetary default, within a period of thirty (30) days after the expiration of the period of time within which Tenant might cure such default (provided Landlord has given notice to Mortgagee as otherwise provided hereunder) such default is cured or caused to be cured by the Mortgagee or with respect to non-monetary defaults if, within a period of thirty (30) days after the expiration of the period of time within which Tenant might commence to eliminate the cause of such default, the Mortgagee commences to eliminate the cause of such default and proceeds therewith diligently and with reasonable dispatch to cure the default; provided that for reoccurring defaults and any monetary defaults after the first such default, (i) Landlord in addition to its other rights hereunder, shall be entitled to a late fee of five percent (5%) of the payment then due plus any reasonable expenses incurred by Landlord in enforcing its rights hereunder, (ii) Mortgagee shall be obligated to pay all monetary amounts due before the expiration of the then applicable cure period; and (iii) Mortgagee agrees that any monies expended by Landlord to cure any nonmonetary obligation of Tenant (such as by way of example the cost of repairs) become monetary obligations after Tenant and Mortgagee being given a bill for the cost thereof.

36.4 If the Mortgagee cannot cure a default of Tenant unless the Mortgagee obtains possession of the Premises or acquires Tenant's Leasehold Estate under this Lease or if the default cannot be cured at all, then the following shall apply: Landlord shall not terminate this Lease or Tenant's right to possession for any default of Tenant if, as provided under subparagraph (c) above, provided the Mortgagee pays all Rent and other monies due and keeps all such payments current and takes prompt and continuously diligent steps to institute, prosecute and complete foreclosure proceedings or otherwise acquire Tenant's interest under this Lease and upon obtaining possession or acquiring Tenant's interest under this Lease, the Mortgagee shall promptly cure all still remaining defaults then reasonably susceptible of being cured by it provided, however, that the Mortgagee shall not be obligated to continue possession or to continue foreclosure proceedings after these defaults have been cured. Any default by Tenant that is not reasonably susceptible of being cured by Mortgagee shall be deemed to have been waived by Landlord upon completion of foreclosure proceedings or upon acquisition by the Mortgagee of Tenant's interest in the Lease, except that any events of default which are

reasonably susceptible of being cured shall then be cured with reasonable diligence after completion of foreclosure proceedings or acquisition by the Mortgagee of Tenant's interest in this Lease. It is understood and agreed that the Mortgagee or its designee or any purchaser in foreclosure proceedings may become the legal owner and holder of this Lease through any foreclosure proceedings or by assignment of this Lease in lieu of foreclosure;

36.5 No agreement between Landlord and Tenant modifying, canceling or surrendering this Lease shall be effective without the prior written consent of the Mortgagee;

36.6 No union of the interests of Landlord and Tenant herein shall result in a merger of this Lease in the fee interest; and

36.7 In the event of any termination of this Lease prior to the expiration of the term of this Lease, except by eminent domain, Landlord shall serve upon the Mortgagee, in the manner provided in Section 33 of this Lease, written notice of such termination and a statement of all other defaults, if any, under this Lease then known to Landlord. The Mortgagee upon payment to Landlord of all monies due with respect to this Lease and all Landlord's transactional costs including attorney's fees shall then have an option to obtain a new lease upon the same terms and conditions set forth in this Lease to the extent that the same are then applicable and with the same priority with respect to the Property. This option must be exercised by written notice to Landlord given within forty-five (45) days from the date the Mortgagee receives such notice and statement from Landlord. The new lease shall require the Mortgagee to cure all defaults of Tenant under this Lease which are reasonably susceptible of being cured by the Mortgagee.

36.8 If a Mortgagee takes possession of the Premises, the Mortgagee shall be liable for Tenant's obligation (prorated for the applicable periods) which such Mortgagee is in possession of the Premises so long as its bonafide Third party transfer assumes the obligations thereafter.

II. EXHIBITS.

Attached hereto and made a part of this Lease are Exhibits _____.

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the date first above written.

LANDLORD:

LANDLORD INC.

Date: _____, 20__

By: _____

Name:

Its: President

TENANT INC:

Date: _____, 20__

By: _____

Name: _____

Its: _____

**EXHIBIT 2
TO CLE PROGRAM
HOW TO ADD VALUE
IN COMMERCIAL LEASE NEGOTIATIONS AND THE LEASE PROVISIONS**
Robert C Goodman Jr.

Drafting the Rules and Regulations for a Marina was an exercise not just in talking with my client, but more importantly contacting existing marinas and thinking through what is appropriate for a first class facility.

**RULES AND REGULATIONS
OF
MARINA**

All use of property in the Marina and all conduct of persons in the Marina shall be in accordance with the provisions of these Rules and Regulations. These Rules and Regulations shall apply to each Tenant and the respective families and guests, employees, contractors, agents and invitees of any Tenant.

“*Marina*” shall mean and include all Common Areas of Marina including the Marina and shall also include the surrounding waters of _____ Creek.

“*Landlord*” shall include duly authorized representatives or agents of the designated Landlord, including the Property Director.

“*Tenant*” shall mean any person leasing a slip or other space in the Marina including tenants and subtenants of buildings and spaces therein.

“*Common Areas*” shall mean the parking lot, drive aisles, piers, docks, picnic areas, bulkheads, public dock space and walk ways within the Marina.

1. The rules of the road and the navigation laws of the United States shall apply to all vessels in the Marina.
2. No boat shall be operated so as to cause a wake in the Marina.

3. Neither Landlord nor any agent of Landlord shall be responsible for loss or damage to vessels in the Marina. Each owner of a vessel shall be responsible for damage to other boats in the Marina and for damage to any Common Areas or facilities (including, without limitation, docks, pilings, piers and bulkheads) of the Marina as a result of any actions by his vessel.

4. All vessels mooring in the Marina shall carry liability insurance against damage to persons or property with such limits as the Landlord may from time to time establish, and the owner thereof shall, upon request of Landlord, furnish appropriate evidence that such insurance is in full force and effect.

5. All vessels mooring in the Marina must be seaworthy, fully found, in insurable condition, in compliance with all local, state and federal safety regulations, and capable of getting underway within one hour after notice. It is the responsibility of the vessel owner to keep his vessel in such condition that it does not become unsightly or in the opinion of Landlord reflect unfavorably on the appearance of the Marina.

6. All vessel owners shall furnish Landlord, prior to mooring, with (a) information from current Documentation Certificate or Registration Card, and (b) the name and home and business address and telephone number of the owner of the vessel (and master of the vessel if different from owner).

7. In order to maintain proper security procedures for the Marina and to prevent unauthorized use of mooring slip, Tenant shall furnish Landlord with the name and registration number or document number of Tenant's vessel. Any vessel with respect to which Landlord has not been furnished such information may be refused access and/or granted moorage at current transient rates, either in the Tenant's slip or elsewhere as Landlord may determine.

8. Transfer of vessels between slips or from one slip to another is not permitted, except with the prior written approval of Landlord.

9. Tenant is responsible for mooring and maintaining the security of its vessel. All vessels shall be moored in berths or at moorings in a manner acceptable to Landlord, or shall be removed from the Marina. In the alternative, Landlord, after notice to the owner of a vessel, will moor vessels and assess a service fee. Only one vessel may be moored in a Slip. No vessel may overhang any mooring space without the prior approval of Landlord.

10. Fueling of a vessel in any slip or mooring area is ***STRICTLY PROHIBITED***. All fueling at the Marina must be done at the designated fuel dock.

11. Routine maintenance may be accomplished at mooring spaces but only with the express approval of Landlord. However, no major maintenance, such as shaft pulling, spray painting, engine removal or any action that might induce irreversible flooding or any major topside conversion work may be undertaken while the vessel is moored in the Marina, except to the extent expressly approved in advance in writing by Landlord. Any vessel which may sink in the Marina shall be immediately removed by the owner thereof.

12. All vessels shall be properly maintained and kept in a clean and orderly condition insofar as the exterior appearance thereof is concerned. No laundering or drying of laundry is permitted on any deck or rigging of any vessel or on the Common Areas.

13. All shore power connectors for any vessel shall be properly sized to be equal to or in excess of that required for service requested.

14. Only a Tenant and those expressly authorized by Landlord may use the water and electrical power service provided to Tenant.

15. Water conservation shall be practiced at all times. All water hoses shall have nozzles and shall be turned off when not in use.

16. Oil, gas, spirits, paints, inflammables and other substances which are deemed pollutant substances under the provisions of any state or federal law may not be discharged into the Marina waters or on the docks or Common Areas. No discharge of sanitation effluent is permitted on the Marina. Tenants are responsible for all spills of any petroleum, other pollutant or other prohibited discharge.

17. No explosive or other hazardous materials of any nature may be stored in the Marina or on any vessel except (a) for fuel within Coast Guard approved tanks in a vessel and (b) lubricants and normal cleaning materials used in the ordinary course of operation.

18. All Common Areas shall be kept clean at all times. Storage of loose gear on the Common Areas is not permitted. Hoses and electrical power lines shall not cross piers, docks or walkways. The finger pier between slips is for the use of the vessels on each side, and location of private gangways should be governed accordingly. In no case may a single gangway block access to another vessel.

19. All supplies, materials and accessories shall be stored in the dock box or locker available for each Slip, and nowhere else on the Common Areas, except as

may be permitted by Landlord. No paint and other flammable substances shall be stowed in any dock box or locker box.

20. All dock boxes must be purchased or rented from Landlord and installed by Landlord's personnel.

21. No structure may be erected on any of the Common Areas. Any additions or changes to any of the Common Areas is expressly prohibited.

22. No crab pots are permitted from any Common Areas or from boats in the Marina. Crabbing and fishing are permitted, unless permission is revoked by the Property Director.

23. Cleaning of fish, shell fish and game is prohibited in the Common Areas in the Marina, except where expressly designated.

24. Swimming from vessels, piers, docks or bulkhead is prohibited.

25. Open fires are expressly prohibited on any vessel moored in the Marina and on any common area in the Marina.

26. No refuse (including cigarette butts) shall be thrown overboard or in the Common Areas. All garbage shall be securely wrapped, tied in plastic trash bags and deposited in receptacles supplied for that purpose, and other debris placed where specified by Landlord.

27. All persons shall reduce noise levels between the hours of 9:00 p.m. and 7:00 a.m. Unnecessary noise shall be avoided at all times.

28. All persons shall conduct themselves courteously, in compliance with all laws and so as not to constitute a public nuisance.

29. No advertising or soliciting is permitted on any vessel or any of the Common Areas within the Marina.

30. No sign, advertisement or notice shall be exhibited, described, painted or affixed on any of the Common Areas. No sign, advertisement or notice shall be exhibited, described, painted or affixed on any vessel and any Slip or other mooring space of the Marina except for a sign reasonable in size approved by Landlord which may advertise the vessel for sale or charter.

31. Restrooms

All restroom usage shall be in accordance with the following provisions:

- (a) Only authorized users having card access may utilize the restrooms after hours.
- (b) Restrooms may only be used for their intended purpose.
- (c) No smoking, drinking or other activity other than that consistent with the normal use of a restroom may be conducted in said restrooms.
- (d) Each user of the restrooms is expected to comply with customary sanitary practices including flushing of commodes, clean up of unusual dirt, removing all personal items and utilizing trash disposal otherwise appropriate in a restroom. Other discardable items are to be deposited into dumpsters elsewhere in the common areas.
- (e) Only tenants and their personal guests are authorized to use the restrooms when they are unlocked.
- (f) Any violation of these premises or other improper use of the restrooms will result in revocation of rights of said tenant and tenant's invitees.

32. Pets

No pets will be permitted in any Slip or the Common Areas except subject to the following conditions:

- (a) Only domestic pets shall be permitted.
- (b) All pets shall be kept sufficiently under control at all times so that they will not become a nuisance to the owners or occupants of other slips.
- (c) All pets must be licensed as may be required by law.
- (d) No more than two domestic pets will be permitted for any Slip except with the approval of the Landlord.

- (e) All pet owners shall be responsible immediately to remove and clean up any mess created by their pet in any portion of the Common Areas.

33. Motorcycles and bicycles shall not be ridden on docks or piers and shall be parked in designated parking areas.

34. There shall be no boat trailers in the parking lot. Campers and recreational vehicles may only be parked in the parking lot with the permission of Landlord but only in specifically designated areas.

35. All persons in the Marina shall observe all speed limits, no parking and other designated signs with respect to vehicles and access by persons.

36. Landlord reserves the right to restrict use of parking available to Tenants of slips and/or mooring space in the Marina and to impose time and/or location limits on such use.

37. No employee of the Landlord shall perform any personal services, while on duty, for any individual Tenant, guest, employee, agent or Tenant, except to the extent that such services are approved by Landlord.

38. Landlord may at any time require the immediate removal from the Marina of any vessel in violation (or whose owner, owner's guests, agents, employees or invitees are in violation) of these Rules and Regulations and may have any such offending vessel (or vessel of any offending owner, or such owner's guests, agents, employees or invitees) removed at Tenant's expense.

39. Landlord may enforce such reasonable system of fines and/or cost reimbursement and/or lease termination for infractions of these Rules and Regulations as the Landlord may from time to time adopt subject to such procedures with respect to enforcement as the Landlord may from time to time adopt.

Risky Business: Strategies for Assessing & Managing Environmental Risk in Commercial Real Estate Transactions

by

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The objective of this presentation is to provide a framework for Virginia attorneys in Virginia to understand, assess, and manage environmental risk in the context of handling commercial real estate transactions. Following a brief summary of the development of federal environmental laws and state environmental regulatory programs, we will discuss of the types and categories of environmental risk at a conceptual level, and then discuss certain tools and strategies for assessing and managing environmental risk available to Virginia attorneys.

I. Development of Federal Environmental Programs and Relationship to State Programs

In 1969, the U.S. Congress commenced the modern phase of environmental policymaking when it enacted the National Environmental Policy Act (“NEPA”).¹ NEPA requires federal agencies to conduct environmental assessments of their regulatory actions. If such an assessment determines that significant effects on environmental quality are anticipated, NEPA requires preparation of an environmental impact statement.² In the wake of NEPA’s enactment, in 1970, the President established the U.S. Environmental Protection Agency for the purpose of consolidating environmental regulatory and enforcement responsibilities that had been spread throughout multiple federal agencies.

Since 1970, the U.S. Congress has enacted numerous statutes regulating environmental media and activities with potential to adversely affect human health and the environment, including the following statutes:

- Air

¹ NEPA § 101 *et seq.*, 42 U.S.C. § 4331 *et seq.*

² NEPA § 102; 42 U.S.C. § 4332.

- 1970 – Clean Air Act
 - Clean Air Act Amendments of 1977
 - Clean Air Act Amendments of 1990
- Surface Water and Ground Water
 - 1972 – Federal Water Pollution Control Act Amendments
 - Clean Water Act Amendments of 1977
 - Clean Water Act Amendments of 1987
- Drinking Water
 - 1974 – Safe Drinking Water Act
 - Safe Drinking Water Act Amendments of 1996
- Solid Waste and Hazardous Waste
 - 1976 – Resource Conservation and Recovery Act (“RCRA”)
 - 1984 – Hazardous and Solid Waste Amendments to RCRA
- Toxic Substances
 - 1976 – Toxic Substances Control Act (“TSCA”)
- Remediation of Properties Contaminated by “Hazardous Substances”
 - 1980 – Comprehensive Environmental Response, Cleanup and Liability Act (“CERCLA” or “Superfund”)
 - 1986 – Superfund Amendments and Reauthorization Act (“SARA”)
 - 1996 – Asset Conservation, Lender Liability, and Deposit Insurance Protection Act
 - 2002 – Small Business Liability Relief and Brownfields Revitalization Act

Each of the above-listed statutes implement a similar regulatory framework, which includes the setting of minimum standards at a national level and implementation of such standards through a national permit program. Following the enactment of complimentary state laws and regulations, states may obtain EPA approval of parallel state environmental regulatory programs. In the event a state elects not to adopt and run a parallel state regulatory program, the EPA will operate the permit program in such state.

State environmental regulatory programs derive their authority from state statutes and regulations alone. The enactment of such statutes and regulations by a state is a condition precedent to obtaining EPA approval of a particular stand-alone regulatory program, which may be stricter than the corresponding federal regulatory program, but not less strict, in accordance with the Supremacy Clause of the United States Constitution.

The Commonwealth of Virginia has obtained EPA approval to implement and operate the permit and enforcement programs contemplated in the above-listed federal statutes.

II. Evolution of Virginia Environmental Laws and Regulatory Programs

To regulate public water supplies, in 1916, the Board of Health was formed.³ A decade later, the Department of Conservation and Recreation, which has implemented the Chesapeake Bay Local Assistance programs and handled certain stormwater permitting responsibilities, was formed.⁴

To address concerns about water pollution, in 1946, the State Water Control Board (“SWB”) was established.⁵ Since 1972, the scope of the SWCB’s responsibilities has significantly expanded to include implementation of the Virginia Pollutant Discharge Elimination System (“VPDES”) permit program, regulation of surface water withdrawal from streams, and filling, dredging and disturbance of wetlands.

To address concerns about air pollution, in 1966, the State Air Pollution Control Board (“SAPCB”) was established to regulate air quality. This is the Board that is responsible for implementing provisions of the federal Clean Air Act in Virginia.

In the wake of the enactment of NEPA and the establishment of the EPA, in 1972, the Virginia Environmental Quality Act was enacted, and the Virginia Council on Environmental Quality was established to implement it. Under this Act, Commonwealth agencies are required to analyze the anticipated environmental impact of major projects.

Following the reorganization of the Commonwealth’s Executive Branch in 1976, and action by the General Assembly in 1986, supervision of Virginia environmental agencies was delegated to the Secretary of Natural Resources.⁶

To implement the Commonwealth’s solid waste and hazardous waste management programs, in 1986, the General Assembly also created the Department of Waste Management.

In 1992, the General Assembly created the Department of Environmental Quality, under which the programs governed by the State Water Control Board, the State Air Pollution Control Board and the Department of Waste Management were consolidated. Those boards, however, continue to exist and to

³ 1916 Va. Acts, c. 360.

⁴ 1926 Va. Acts, c.169.

⁵ 1946 Va. Acts, c. 399.

⁶ 1986 Va. Acts, c. 492.

exercise their statutory roles, although their functions have been refined to focus on rulemaking, policymaking and making formal case decisions.

III. Roles of Certain Parties in Virginia’s Environmental Regulatory System

The Secretary of Natural Resources is a member of the Governor’s cabinet, with authority derived from statutes and powers delegated by the Governor. The scope of the Secretary’s role includes: (a) supervising Virginia’s various environmental agencies; (b) developing strategic objectives and policies necessary to coordinate operation of such environmental agencies; and (c) overseeing administrative, fiscal and programmatic decisions made by agency directors.⁷

Citizen boards comprised of between seven and nine members appointed by the Governor oversee each Virginia environmental regulatory program. Such citizen boards include: (a) the State Water Control Board; (b) the State Air Pollution Control Board; (c) the Virginia Waste Management Board; and (d) the Virginia Board of Health. Meeting between four and six times each year and relying on the expertise and recommendations of Virginia Department of Environmental Policy Staff, citizen boards make policy by promulgating rules and making case decisions. The Secretary of Natural Resources lacks authority to reverse policy, regulatory, and case decisions made by citizen boards.

The Virginia Department of Environmental Quality (the “DEQ”) implements the directives of the various citizen boards, the Governor and the Secretary of Natural Resources. The DEQ is responsible for handling the day-to-day operations of Virginia’s environmental regulatory programs, and particular duties assigned to the DEQ by statute or regulation. The Director of the DEQ is appointed by the Governor for a term that runs concurrent with the Governor’s term. In addition to the many duties imposed on the Director by statute and the various citizen boards, the Director is expressly authorized to issue administrative compliance orders imposing civil penalties of up to \$10,000.⁸

IV. Identifying, Assessing, and Managing Environmental Risk at a Conceptual Level

Identifying and managing environmental risks is a necessary component of every transaction involving commercial real property. The consequences for neglecting to address environmental risks when handling a transaction include:

⁷ Va. Code § 2.1-51.7 *et seq.*

⁸ Va. Code § 10.1-1186 (10).

1. Strict joint and several liability for the cost of cleaning up contaminated property;
2. Civil penalties of up to \$32,500 per day;
3. Criminal penalties, extending to officers and directors;
4. Citizens' suits seeking injunctive relief brought by individual citizens or local governments;
5. Revocation of permits for non-compliance or enhancement of permit requirements, requiring capital expenditures and increasing operating costs; and
6. Toxic tort liability for property damage or personal injury under common law.

To avoid incurring the above-listed consequences, environmental risks must be identified, assessed, and managed during the contract drafting, diligence and transaction planning processes.

“Environmental risk” is a broad concept that includes: (a) potential liability for the cost of remediation of environmental conditions; (b) potential liability for damages resulting from adverse impacts on human health or the environment; and (c) potential future limitations on the use of real property or facilities located on such property. To effectively manage environmental risk Virginia real estate attorneys much have a working knowledge of environmental requirements and a take strategic approach to assessing potential risk factors associated with a particular parcel of real property.

When developing a strategy for assessing environmental risk, one should consider the forms of such risks, including (1) restrictions on the future use of the property; (2) liabilities related to the property's current use; and (3) liabilities related to the property's past use, each of which are discussed below.

A. Potential Future Limitations on Use or Operation of a Property or Facility

In cases where a commercial or industrial facility is operated on the parcel of real property that is the subject of a commercial real estate transaction, and the current or future operation of such facility is subject to regulation, the following questions arise:

1. Did the current owner or operator obtain necessary environmental permits?
2. Are the permits issued to the owner or operator transferable to a successor in interest?
 - a. Will a particular permit transfer as a matter of right, or does a regulator have authority to review and approve the requested transfer at its discretion?
 - b. What are the anticipated timing issues related to permit transfers, including applicable deadlines and anticipated duration of transfer process?
3. Have financial responsibility requirements applying to storage tanks, solid waste or hazardous waste been met?

- a. Can the documentation meeting applicable financial responsibility requirements be transferred to the new owner or operator?
4. Do the existing and proposed uses of the subject property comply with local land use regulations, including zoning regulations, special use permit conditions, flood plain regulations, and non-conforming use regulations?
5. Is the subject property subject to any administrative enforcement proceedings or orders, judicial consent decrees, pending citizen's suits seeking injunctive relief, or civil toxic tort litigation?
 - a. How will any pending, existing or anticipated enforcement proceedings, orders, decrees or litigation potentially affect the future use or operation of the subject property or result in potential liability to the new owner or operator?

Prospective purchasers of real property with industrial or commercial facilities located on them should obtain answers to each of these questions in connection with developing a strategy for assessing and managing environmental risks presented by the existing operation.

B. Potential Liabilities Arising from the Current Use of a Property or Facility

Two potential areas of concern related to the current use of a particular property and the operation of an existing facility located on the property. Those areas of concern relate to potential exceedances of discharge or emission limits and potential failure to meet monitoring and reporting obligations under permits issued to the property's current owner or operator.

Permittees whose operations exceed discharge or emissions limitations set forth in their permit may be subject to administrative enforcement actions or civil liability for such exceedances. Also, to ensure future compliance with such limitations, regulators may condition future operation of a facility on install and operation of supplemental pollution control devices, which may require capital expenditures and increase operating costs.

Most environmental regulatory programs obligate permittees to monitor regulated activities and submit reports to regulators on a regular basis. Permittees also are obligated to report unexpected events—such as spills, releases, or discharge exceedances—to regulators. Due to regulators' dependence on the submission of accurate monitoring-related information from permittees, and self-reporting of certain unexpected events, failure to submit required reports to regulators can result in liability for significant civil penalties.

C. Potential Liabilities Arising from Past Use of a Property or Facility

Due to the potentially retroactive liability for costs related to cleaning up contaminated real property under federal Superfund law, there is prospective environmental liability that arises from past activities on the subject property. Such prospective environmental liability may have little or nothing to do with the current use of a subject property and is not contingent upon an owner or operator's knowledge. For these reasons, this category of potential environmental risks can be more challenging to predict than others.

Potential Liabilities arising from past use of a subject property, or actions of a third-party, include responsibility for cleaning up a contaminated property and associated costs. In terms of the number of potentially responsible parties and scope of potential exposure, the acute source of potential risk is federal and state statutes that impose responsibility for cleaning up contaminated property on certain categories of persons. At the federal level, CERCLA establishes a broad scope of strict, joint, several, and retroactive liability that applies to numerous categories of potentially responsible parties, with few available defenses. For potentially responsible parties that falls within the scope of CERCLA's broad definitions of "owner" or "operator", 42 U.S.C. § 9607(b), enumerates three circumstances under which such party would not be liable for cleanup costs: if the release of the hazardous substance at issue was caused by (1) an "act of God"; (2) an "act of War", or (3) an act or omission by a third party who is not an agent or employee of the party and who was not acting "in connection with a contractual relationship" with the party, and the party can show that it exercised due care regarding the released hazardous substance and took precautions against foreseeable acts or omissions by third parties.

On account of the broad nature and scope of potential liability for cleanup-related costs described above, prospective purchasers of commercial real property should conduct an environmental site assessment meeting the EPA's "all appropriate inquiry" rule before acquiring property that may be contaminated with hazardous substances. Conducting an environmental site assessment in accordance with the EPA's "all appropriate inquiry" regulation will allow a prospective purchaser to qualify for an exception from potential liability for cleanup related costs available under CERCLA to "innocent purchasers" and "bona fide prospective purchasers." Also, a prospective purchaser can use the results of an environmental site assessment to negotiate a plan for addressing the contamination with the seller. Of course, a purchaser also could elect to terminate the transaction based on anticipated environmental risk identified through an environmental site assessment.

V. Assessing Environmental Risk Using Environmental Site Assessments

Prospective purchasers use environmental site assessments to both identify and assess potential environmental risks associated with real property that is the subject of a commercial real estate transaction.

Please note that environmental site assessments are distinguishable from environmental audits, which evaluate whether a facility's operations are in compliance with regulatory obligations and permit requirements.

A. All Appropriate Inquiry and CLERCLA Safe Harbors

Since it was enacted in 1980, CERCLA has been amended to establish certain exceptions to potential liability for the cleanup-related costs, known as “safe harbors,” which apply to property owners who qualify as an “innocent purchaser,” a “bona fide prospective purchaser” or a “contiguous property owner.”⁹ To enjoy the protections of these safe harbors, in connection with conducting its diligence, and prior to taking title, a prospective purchaser must conduct “all appropriate inquiry” into the environmental condition of the real property at issue.

1. Innocent Landowners

By statute, three categories of persons qualify for “innocent landowner” protection. The first category is owners of contaminated real property who acquire such property without knowledge of the contamination, after having conducted all appropriate inquiry into the property's environmental condition.¹⁰ The second category of “innocent landowners” is owners who inherit contaminated real property.¹¹ And the third category is governmental entities that acquire title to contaminated property through exercising their eminent domain powers.¹² The common bond between these three categories of “innocent landowners” is an element of timing; each of them discovered that real property they owned was contaminated after they took title to it. Qualification for “innocent landowner” status also imposes affirmative obligations on the landowner, including cooperating with cleanup efforts, complying with restrictions on the future use of the contaminated property, exercising due care regarding the contamination, to limit the potential for future harm to human health and the environment.¹³

2. Bona Fide Prospective Purchasers

To qualify for “bona fide prospective purchaser” status, a purchaser must meet the following statutory requirements: (a) establish the contamination at issue occurred prior to acquisition of the subject property; (b) making “all appropriate inquiry” into the historic uses of the subject property, which results in discovery of the contamination at issue; (c) submitting all required notices regarding the discovered

⁹ Small Business Liability Relief and Brownfields Revitalization Act, 107-118.

¹⁰ 42 U.S.C. § 9601(35)(A)(i)

¹¹ 42 U.S.C. § 9601(35)(A)(iii)

¹² 42 U.S.C. § 9601(35)(A)(ii)

¹³ 42 U.S.C. § 9601(35)(A)(i-iii) and 42 U.S.C. § 9607(b)(3)(a) and (b).

release of hazardous substances; (d) exercising due care related to the released hazardous substances by controlling the source of the release to prevent a continuing release and prevent future releases, and limiting the likelihood of exposure to released hazardous substances; (e) cooperating with efforts to remediate the discovered environmental condition; (f) comply with any restrictions on future land or institutional controls established in connection with the response to the discovered contamination; and (g) establish that it is not related to any party that is potentially liable for the discovered environmental condition through.¹⁴

3. Contiguous Property Owners

As the name implies, the category of persons who may qualify for protection as a “contiguous property owner” is limited to persons who own property adjacent to a source of a released hazardous substance that causes contamination affecting his property; provided, however, that he does not also own or operate the property on which the source of contamination is located. To qualify for this safe harbor, a contiguous property owner must: (a) submit required notices upon discovery of the release of the hazardous substances at issue; (b) exercise due care to stop a continuing release, prevent future releases and limit potential exposure to the released hazardous substances affecting his property; (c) cooperating with the remediation of the environmental condition at issue; (d) and comply with all restrictions on future use of his land and other institutional controls established in connection with the response to the discovered contamination. Like the first category of “innocent purchaser” discussed above, to qualify as a protected “contiguous property owner” the affected owner must establish that he conducted “all appropriate inquiry” at the time he acquired the affected property. However, in addition to the requirements enumerated above, a “contiguous property owner” must also establish that he did not actually know or have reason to know of the contamination at issue when he acquired the affected property.¹⁵

B. The Standard for Conducting an “All Appropriate Inquiry” Phase I Environmental Assessment

The applicable standard for conducting “all appropriate inquiry” has evolved over time. Since the 1990s, the standard for environmental site assessments established by the American Society for Testing and Materials (ASTM) have been used.¹⁶

In 1996, the EPA established a set of standards and practices for meeting the “all appropriate inquiry” requirement, in response to a statutory requirement.¹⁷ In response to EPA’s regulation, ASTM made

¹⁴ 42 U.S.C. § 9601(4).

¹⁵ 42 U.S.C. § 9607(q).

¹⁶ 42 U.S.C. § 9601(35)(B)(IV)(I).

¹⁷ 42 U.S.C. § 9601 (35)(B)(ii) and (iii).

certain modifications to its standard governing Phase I Environmental Site Assessments aimed at addressing certain enhanced requirements included in the EPA's regulation.¹⁸

Examples of contexts in which Phase I Environmental Site Assessments are commonly used include:

- Investigation by prospective purchasers or tenants of real property for evidence of potential contamination of environmental media or noncompliance with environmental regulations;
- Acquisition of industrial facilities by purchase, lease, or acquisition of controlling interest in property owner or operating entity;
- Establishment of a "baseline" environmental condition at the time of sale or lease commencement to protect a property owner from potential future claims related to environmental conditions for which the property owner is not responsible.
- Determining the condition and value of collateral in connection with financing and refinancing transactions.

In addition to this list, there are numerous other scenarios in which an environmental site assessment is a useful tool for identifying, assessing and managing environmental risk.

1. Elements of a Phase I Environmental Site Assessment

To meet the "all appropriate inquiry" rule and the current version of the ASTM standard governing Phase I Environmental Site Assessments, in general, assessments much include the following inquiries and actions:

- Interviews of current and past owners and operators of the subject property;
- Reviews of available sources of information related to the historic use of the subject property;
- Reviews of federal, state and local government records related to the historic use of the subject property;
- A site visit to the subject property to fort the purpose of conducting a visual inspection to determine if there is any evidence of potential recognized environmental conditions;
- Review of the prospective purchaser or operator's knowledge related to the historic use and condition of the subject property; and

¹⁸ 69 Fed. Reg. 52542 (Aug. 26, 2004); ASTM E1527-05.

- Comparison of the purchase price to the fair market value of the subject property, in an uncontaminated condition.

2. Review of Information Related to Past and Current Use of the Subject Property

The main focus of a Phase I Environmental Site Assessment is to access and review available records, documents and information regarding a subject property's current use and historic uses of the subject property. Attorneys can play a vital role in directing and facilitating this information gathering process. Issues frequently investigated in connection with performing Phase I Environmental Site Assessments include: (a) nature of current use of a subject property; (b) nature of past uses of the subject property; (c) categories and volumes of wastes generated on the subject property, if any; (d) protocols and policies for handling of hazardous materials and wastes on the subject property; (e) environmental permits issued in connection with the historic use of the subject property; (f) records of historic enforcement proceedings related to use of the subject property; (g) records of any historic spills, discharges or releases affecting the subject property; (h) types of materials used in improvements located on the subject property; (i) historic records related to analysis of samples of environmental media, such a soil or groundwater, collected from the subject property; and (j) insurance coverage records.

To investigate the historic use of a subject property qualified environmental consultants access numerous types of information sources, including:

- (a) State and federal environmental enforcement records;
- (b) Local government land use, zoning, planning, and building records related to permitting, occupancy, and changes in use;
- (c) Real estate tax assessment records;
- (d) Historical maps and aerial pictures of the subject property;
- (e) Title and real property records related to the subject property and adjacent properties;
- (f) Facility operations records;
- (g) Repair and maintenance records;
- (h) Facility permitting records and plans required under permits issued by permitting authorities;
- (i) Utilities records;
- (j) Wastewater discharge records; and
- (k) Local media records.

3. Site Visit by Environmental Consultant

In addition to reviewing records, documents and information related to the current and historic uses of a subject property, the applicable ASTM standard requires the environmental consultant conducting a Phase I Environmental Site Assessment to visit the subject property for the purpose of conducting a visual inspection of the current condition of such property, to determine if there is any evidence of the following conditions:

- (a) Underground storage tanks;
- (b) Aboveground storage tanks;
- (c) Wastewater treatment systems or wastewater discharges;
- (d) Transformers and related electrical equipment;
- (e) Solid waste accumulation;
- (f) Air emissions;
- (g) Staining consistent with potential spills, discharges or releases on the subject property;
- (h) Status of permit compliance;
- (i) The presence of endangered or threatened species, or resources of cultural or historic significance.

4. Supplemental Assessment Activities

In the event the environmental consultant conducting the Phase I Environmental Site Assessment identifies recognized environmental conditions that may present environmental risks, the next step is to conduct a Phase II Environmental Site Assessment focused on collecting additional information regarding the nature, scope and extent of the recognized environmental condition. Commercial real estate attorneys should work with the consulting engineer to craft an appropriate scope of work for the Phase II assessment project.

Unlike the elements of the Phase I Environmental Site Assessment inquiry discussed above, which focus on reviewing available records regarding the subject property's use, a Phase II Environmental Site Assessment involves collecting samples of environmental media, such as soil, ground water, or sub-slab air, and analyzing such samples for the presence of anticipated constituents of concern. Phase II Environmental Site Assessment also may include other potentially invasive activities, such as installing monitoring wells to facilitate determination of groundwater depths, flow directions, and rates of flow, boring into soil to determine the characteristics of soil on and the geology underlying the subject property, and digging test pits to evaluate the nature, scope and extent of historic on-site disposal of solid or hazardous wastes. In addition to these invasive activities, Phase II Environmental Site Assessment scopes may include identification and delineation of potential receptors of hazardous substances, to assist in efforts to assess

the nature, scope, and extent of environmental risks posed by a particular discovered environmental condition.

C. Confidentiality Issues Related to Environmental Site Assessments

As the information contained in an environmental site assessment can be extremely sensitive, parties to commercial real estate transactions frequently will desire to keep the information collected and generated in connection with performing an assessment confidential, to the extent possible. There are, however, potential hurdles to maintaining confidentiality of the results of environmental site assessments include:

- Federal and state regulations requiring reporting of releases, discharges, or other contamination incidents immediately upon learning or discovery of such condition;
- Federal and state statutes and regulations requiring anticipatory reporting to appropriate authorities when there is a “substantial threat” of a discharge or release; and
- Unless appropriate steps to shield information related to an environmental site assessment have been taken, such information would likely be discoverable in a litigation context.

In response to these hurdles, commercial real estate attorneys can take certain steps to exert control over environmental site assessment-related information and maximize the likelihood that such information protected under the attorney-client privilege and the attorney work product doctrine.

1. Statutory Environmental Assessment Privilege and Immunity for Voluntary Disclosure

Commercial real estate attorneys should be aware of Virginia laws establishing statutory protections of information generated in connection with performance of an environmental site assessment and individuals that voluntarily disclose information to a state or local regulatory body. Under Va. Code § 10.1-1198, a qualified privilege applies to any person involved in the preparation of a “voluntary environmental assessment” or in possession of such an assessment, which prohibits compelled production of documents produced in connection with conducting the assessment to a State or local regulator. Also, Va. Code § 10.1-1199, establishes a qualified immunity against State administrative action or civil penalties that applies to persons who voluntarily disclose information regarding violations of an environmental law, regulation, permit, or administrative order. But such qualified immunity does not apply if reporting of the disclosed information is required by statute or regulations, or under a permit or administrative order. Also, to be clear, the limited scope of this qualified immunity does not shield against enforcement actions brought by federal regulators or civil actions brought by third-parties.

2. Confidentiality Agreements with Transaction Parties

Agreements protecting the confidentiality of sensitive information relating to environmental conditions, limiting the nature and scope of its use, requiring its return in the event a transaction is terminated before consummation, and requiring consultation and consent before disclosure to a regulatory or any other third-party generally are in the interests of seller and purchasers. Early in the transaction process, Sellers frequently are concerned that disclosure of discovered regulatory violations, contaminated environmental media requiring remediation, and related potential liabilities for civil penalties or cleanup costs, could expose them to damages and potentially adversely affect the value of their real property asset. As the transaction process progresses, Buyers frequently seek confidentiality as they strategize about how to address discovered environmental conditions and comply with regulatory and permit requirements post-closing. Memorializing the terms of the parties' agreement to handle information related to environmental matters in confidence early in the transaction process will facilitate the exchange of information about a subject property over the course of a commercial real estate transaction.

3. Confidentiality Agreements with Consultants

All documents memorializing the nature and scope of environmental site assessment services to be provided by an environmental consultant should contain a provision obligating the consultant to hold all information related to the assessment in strict confidence and confirming that the results of the assessment are the property of the party contracting with the consultant. Please note that consulting firms' form scopes of work and services agreements frequently contain provisions disclaiming liability for consequential damages and authorizing disclosure under certain circumstances.

4. Utilizing Attorney Client-Privilege and Attorney Work Product Protections

To protect environmental assessment-related information from discovery in anticipated litigation related to environmental issues, parties may be able to invoke the protections of the attorney-client privilege and the attorney work product doctrine by engaging with environmental counsel early in the assessment process. The attorney-client privilege protects communications between an attorney and client from discovery in litigation. And the attorney work product doctrine provides limited protections against the discovery of the work product of attorneys prepared or generated in anticipation of litigation. The scope of protection under the attorney work product doctrine arguably extends to work performed by environmental consultants operating at the attorney's direction.

Before commencing an environmental site assessment, to maximize the likelihood that shields from discovery under the attorney-client privilege and the attorney work product doctrine will apply to the results of such assessment, a party should consider taking the following steps:

- Involve an attorney in the process of retaining the environmental consultant and document counsel's role in such process.
- Require environmental consultants to work at the attorney's direction and through the attorney.
- Limit the parties involved in the environmental assessment process to those who are essential.

VI. Strategies for Contractually Managing Risks in Commercial Real Estate Transactions

After identifying the nature and scope of environmental risks at issue in a particular commercial real estate transaction, parties to such transaction should attempt to allocate responsibility for such risks, to the extent possible, using appropriate contractual provisions. Certain categories of contractual provisions can be particularly useful tools to accomplish goals related to environmental risk allocation, in the commercial real estate transaction context.

For example, parties may be able accurately reflect their respective understandings regarding certain environmental issues in representations and warranties provisions. Issues to be memorialized in representations and warranties include the condition of the subject property at a particular point in time, the status of compliance with regulatory requirements and requirements under operating permits. The parties also can use the representations and warranties provisions to affirmatively identify which party is responsible for addressing issues or remediating environmental conditions under certain circumstances.

Parties to commercial real estate transactions also should consider including a separate provision articulating the terms of their agreement regarding the allocation of responsibility for any issues that may arise related to environmental compliance and both known and unknown environmental conditions in existence as of the closing date and take care to memorialize the nature and scope of any indemnity obligations contemplated by the parties.

Often, purchase and sale agreements will include compliance with all applicable environmental laws, regulations and permits as a condition precedent to purchaser's obligations to close. Such provisions typically further provide that the seller is responsible for bringing the subject property into compliance at its own cost.

In the event of known contamination, parties to commercial real estate transactions should consider expressly addressing their understanding related to responsibility for remediating such condition and related issues, in a stand-alone contractual provision. And, if the parties contemplate a prolonged remediation process for which a seller or lessor is responsible, buyers and lessees should consider requiring some form of financial assurance, including funds held in escrow, a letter of credit or a bond, to ensure that a source of funds necessary to complete the anticipated cleanup are available.

In many cases, parties may be able to effectively manage environmental risks by restructuring a commercial real estate transaction to remove contaminated real property or other environmentally compromised assets from the transaction.

For the reasons discussed in detail above, to ensure it has an opportunity to meet the EPA's "all appropriate inquiry" standard, a prospective purchaser of real property should condition its obligation to purchase such real property on completion of Phase I Environmental Site Assessment, and, if necessary, a Phase II Environmental Site Assessment, and expressly grant purchaser the right to terminate the purchase and sale agreement in the event contamination or other adverse environmental conditions are discovered in connection with performing the assessment. The prospective purchaser also should craft diligence and inspection provisions to provide its consultants sufficient time to complete a Phase I Environmental Site Assessment and, if necessary, a Phase II Environmental Site Assessment.

In the context of a leases, the parties should consider how they may be able to allocate and manage environmental risks by including limitations on permitted uses of the premises, establishing inspection rights, and related rights to review compliance records, as well as express remedies when an event of a release or noncompliance with environmental regulations is discovered.

1. Suggestions for Counsel for Purchasers and Lessees

While engaged in negotiations over the terms of a purchase and sale agreement or a lease agreement, prospective purchasers and lessees should pursue the following objectives:

- Increasing the likelihood of discovery, identification and assessment of environmental risks;
- Expressly allocating responsibility for handling required remediation, especially for known environmental conditions; and
- Minimizing the likelihood of interference with the proposed future use of the subject property.

In connection with pursuing such objectives, purchasers should propose the following provisions in purchase and sale agreements:

- a. Conditioning purchaser's obligations to close on conducting a Phase I Environmental Site Assessment and, if necessary, a Phase II Environmental Site Assessment;
- b. Conditioning purchaser's obligations to close on the environmental site assessment discovering no material adverse environmental conditions;
- c. Obligating seller to provide broad access to records and personnel with knowledge of the historic use of the subject property and environmental compliance matters;

- d. Permitting purchaser to conduct broad inspections related to the condition of the subject property and the status of compliance with environmental regulations and permit requirements;
- e. Representations that seller has not caused or permitted hazardous substances or hazardous wastes to be generated, treated, stored or disposed on the subject property;
- f. Representations that seller has not caused or permitted hazardous substances to be discharged or released on the subject property;
- g. Representations that seller has no actual or constructive knowledge of any release of hazardous substances affecting the subject property;
- h. Representations that seller is in compliance with all applicable laws and regulations governing hazardous substances;
- i. Representations that all permits necessary to use and operate the subject property have been obtained, remain in effect, and are being complied with;
- j. Representations that all permits necessary to use and operate the subject property are transferrable, will be transferred, and seller will cooperate with the transfer process;
- k. Obligating seller to indemnify purchaser for all liability arising out of environmental conditions existing as of the date of closing, whether they are known or unknown at that time;
- l. Obligating seller to disclose environmental litigation, enforcement proceedings and threats of litigation or anticipated enforcement proceedings;
- m. Obligating seller to produce records related to prior environmental assessments and all communications with certain environmental regulators; and
- n. Obligating seller to produce any notices it received of actual or potential environmental risks.

To the extent possible, prospective purchasers of commercial real property should reject provisions requiring them to take the property “as is.” And if a seller is unwilling to provide any representations or warranties related to environmental matters, a purchaser should insist on broad inspection, investigation and assessment rights, and sufficient time to complete a thorough assessment of the environmental condition of the subject property and the status of environmental compliance.

The goals and objectives of prospective lessees are similar to those of prospective purchasers enumerated above. Lessees should consider seeking lease provisions addressing the following issues:

- a. Requiring an environmental assessment of the premises at commencement of the lease term, in the event some degree of contamination is anticipated, or lessor proposes to use a

particularly pro-landlord form of lease, in order to establish a baseline environmental condition of the premises;

- b. Requiring an environmental assessment of the premises at the expiration of the lease term, in order to establish the environmental condition of the premises upon expiration of the lease;
- c. Representations and warranties by lessor related to historic uses and current condition of the premises;
- d. Express allocation of responsibility for remediation of releases of hazardous substances to lessor, unless a release is caused by lessee;
- e. Obligating lessor to indemnify lessee for contamination pre-existing commencement of the lease term, which obligation shall survive expiration or termination of the lease;
- f. Excluding remediation costs from definitions of operating costs and maintenance costs;
- g. Obligating lessor to provide lessee notice of any environmental hazards discovered during the term of the lease; and
- h. Granting lessee express termination rights in the event of discovery of environmental hazards or unknown environmental conditions during the lease term.

2. Suggestions for Counsel for Sellers and Landlords

While engaged in negotiations over the terms of a purchase and sale agreement or a lease agreement, prospective sellers and lessors should pursue the following objectives:

- Avoid agreeing to make representations or warranties that could facilitate assertion of post-transaction claims by the acquiror.
- Resist acknowledging environmental conditions that may give rise to post-transaction claims by the acquiror.
- Memorialize that it is the acquiror's responsibility to handle post-transaction compliance and remediation matters.

In connection with pursuing such objectives, and in an effort to pass environmental risk to the purchaser, upon disposing of and transferring title to a property, sellers should propose the following affirmative protections in purchase and sale agreements, in addition to negotiating against the purchaser's proposed representations, warranties and indemnity provisions that increase the likelihood of exposing seller to post-closing claims:

- a. Indemnification of seller by purchaser for any potential post-closing claims for environmental remediation or damages;

- b. Express acknowledgement of purchaser's acceptance of a subject property in its current condition, as of the closing date, following disclosure by seller of environmental risks and material conditions related to the subject property; and
- c. Express disclaimer of any representation by seller related to purchaser's future use of the subject property or purchaser's rights related thereto.

By including these proposed provisions in a purchase and sale agreement, the seller may be able to achieve its ultimate objective: to terminate its environmental risk upon transfer of title to the subject property to purchaser at closing.

The goals and objectives of prospective lessors are similar to those of prospective sellers in numerous respects. Similar to sellers, lessors seek to limit their potential liability for environmental claims, to the extent possible, upon transferring possession and control of the premises to the lessee and during the duration of the lease term. However, there is a significant difference between the positions of sellers and lessors relative to environmental risks: during the term of the lease seller retains ownership of the premises and possession and control of the premises will be transferred back to lessor upon expiration, or termination, of the lease. Thus, in an effort to protect the environmental condition of the premises during the lease term and protect the post-lease value of the real property asset, lessor should consider proposing the following protective provisions in a lease:

- a. Use restrictions limiting the permitted use of the premises to those that comply with applicable environmental requirements;
- b. Express requirements that use of any hazardous substances on the premises strictly comply with applicable legal and regulatory requirements;
- c. Express requirements that lessee comply with all reporting, monitoring and remediation obligations arising under environmental regulations applicable to and governing lessee's proposed use of the premises;
- d. Express requirements obligating lessee to notify lessor of its intended use of any hazardous substances, of any release or discharge of hazardous substances, and to submit copies of notices required under applicable environmental laws and regulations to lessor;
- e. Expressly obligate lessee to indemnify lessor for any environmental harm resulting from lessee's use and occupancy of the premises;
- f. Express acknowledgement by lessee of its acceptance of responsibility for, and its agreement to indemnify lessor for, cleanup costs, abatement costs, liability for potential third-party claims and other potential environmental obligations;

- g. Express restrictions related to lessee's rights to assign the lease, sublease the premises or otherwise delegate control of the premises to a third-party; and
- h. Expressly described circumstances related to environmental conditions or claims that constitute an event of default and provide lessor broad rights in such an event of default.

Ultimately, a lessor's main objective in negotiating environmental provisions in a draft lease should be to limit its potential responsibility for any environmental contamination or other environmental risk resulting from lessee's use or occupancy of the premises, for which lessor could be held liable, to the extent possible.

VII. Voluntary Remediation of Contaminated Property

To facilitate the remediation and redevelopment of contaminated commercial real estate properties in Virginia, the General Assembly authorized the establishment of the Virginia Voluntary Remediation Program (the "VRP") under the Brownfields Restoration and Land Renewal Act of 2002.¹⁹

The VRP presents a mechanism and process for property owners to voluntarily address contamination with support from the DEQ. The objective of VRP enrollment of a contaminated site is to ensure that the post-remediation condition and scope of anticipated future use of a contaminated property presents an acceptable level of risk to human health and the environment. As a risk-based program, the VRP presents property owners a certain degree of flexibility related to developing a strategy and plan for achieving an acceptable level of risk using active remediation, restrictions on future land use, and institutional controls.

After characterizing the nature and scope of contamination on a property, developing a corrective action plan, assessing the risk posed by the contaminated property in its current state and its anticipated post-remediation state, and completing the planned corrective action, the DEQ will issue a Certification of Satisfactory Completion of Remediation. This Certificate provides owners of the remediated property assurance that the DEQ will not take enforcement action against such property in the future, unless, of course, new environmental conditions are discovered on the property.

The VRP is not intended to serve as an alternative to mandatory remediation under state and federal environmental programs. Thus, property owners must apply for enrollment into the VRP. The DEQ reviews VRP enrollment applications to determine whether each application qualifies for the VRP process as a truly voluntary remediation project.

¹⁹ Va. Code §§ 10.1-1230—10.1-1237.

When used in appropriate circumstances, the VRP is an effective tool for managing environmental risk by obtaining certification that a property has been remediated to an acceptable level of risk to human health and the environment from the DEQ.

Another environmental risk mitigation tool available to prospective purchasers is issuance of Bona Fide Prospective Purchaser “Comfort Letters” by the DEQ. Such Comfort Letters reflect the DEQ’s concurrence, upon reviewing Phase I and Phase II Environmental Site Assessments submitted by the prospective purchaser, that the purchaser may qualify for defense against claims for cleaning up environmental conditions addressed in such assessment reports as a Bona Fide Prospective Purchaser.

Risky Business

Strategies for Identifying, Assessing, and Managing Environmental Risk in Commercial Real Estate Transactions

Maxwell H. Wiegard | 28th Annual Advanced Real Estate Seminar | March 1, 2024



1

Firm Overview



Miles & Stockbridge P.C. is a leading law firm with offices in the mid-Atlantic region, including offices in Baltimore and Washington, D.C. Its lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

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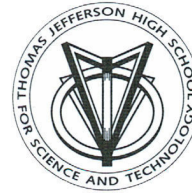
2

Environmental Risk, You Say?



I know what you are thinking...

- I understood there would be no math or science at this seminar.
- Nerds.
- More nerds.
- And even more nerds!
- I bet he drives a Subaru.
- Did he attend TJHSST for the sports?



3

Don't worry...



This presentation is not:

- A detailed discussion of environmental laws
- A technical discussion of environmental regulations
- A nuanced discussion of environmental policies
- A call to support an environmental cause
- A review of recent cases addressing environmental matters
- A review of recent environmental statutory and regulatory developments
- Full of science or math talk

4

Let's Talk Strategy...

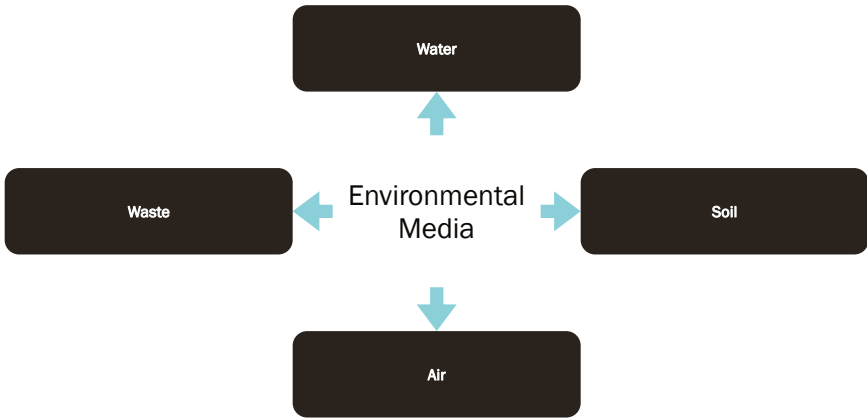


Instead, we will discuss certain practical strategies for handling environmental risk in the context of commercial real estate transactions:

- Such strategies will focus on:
 - ▶ Identifying potential environmental risks;
 - ▶ Assessing identified environmental risks; and
 - ▶ And managing known and unknown environmental risks.


5

Understanding Types of Regulated Environmental Media



6


Federal Environmental Law



Waste	<ul style="list-style-type: none"> Resource Conservation and Recovery Act ("RCRA") Hazardous and Solid Waste Amendments to RCRA
Air	<ul style="list-style-type: none"> Clean Air Act
Land	<ul style="list-style-type: none"> Comprehensive Environmental Response, Cleanup, and Liability Act ("CERCLA") Superfund Amendments and Reauthorization Act ("SARA") Small Business Liability Relief and Brownfields Revitalization Act
Water	<ul style="list-style-type: none"> Federal Water Pollution Control Act Clean Water Act Amendments Safe Drinking Water Act

7

What is Environmental Risk?




Potential manifestations of environmental risk:

- Liability for the cost of cleaning up environmental conditions
- Liability for damages related to adverse effects on real property resulting from releases or discharges of contaminants.
- Liability for failure to comply with regulatory requirements or limitations
- Inability to implement plans for future use or development of real property
 - ▶ Revocation of necessary permits
 - ▶ Implementation of use restrictions
- Increases in costs of development, redevelopment or operations
- Reduction in value of real property or other assets

8


Forms of Environmental Risk

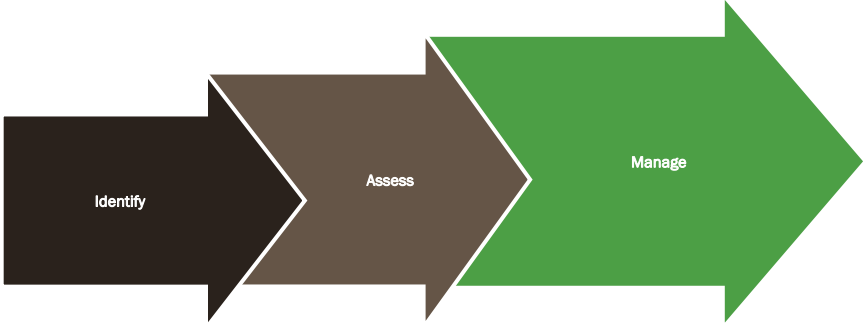


Past Use	<ul style="list-style-type: none"> • Any evidence of releases of hazardous substances? • Any evidence of generation, storage, or disposal of solid or hazardous wastes? • Any evidence of underground storage tanks or aboveground storage tanks? • Any evidence of discharges of wastewater?
Current Use	<ul style="list-style-type: none"> • Any instances of exceedances of discharge limits or emission limits? • Required supplemental pollution control devices? • Have record keeping obligations been met? • Have reporting obligations been met?
Future Use	<ul style="list-style-type: none"> • Have necessary permits been obtained and can they be transferred? • Applicable financial responsibility requirements? • In compliance with applicable zoning and land use regulations? • Restrictions on future use resulting from enforcement proceedings or remediation?

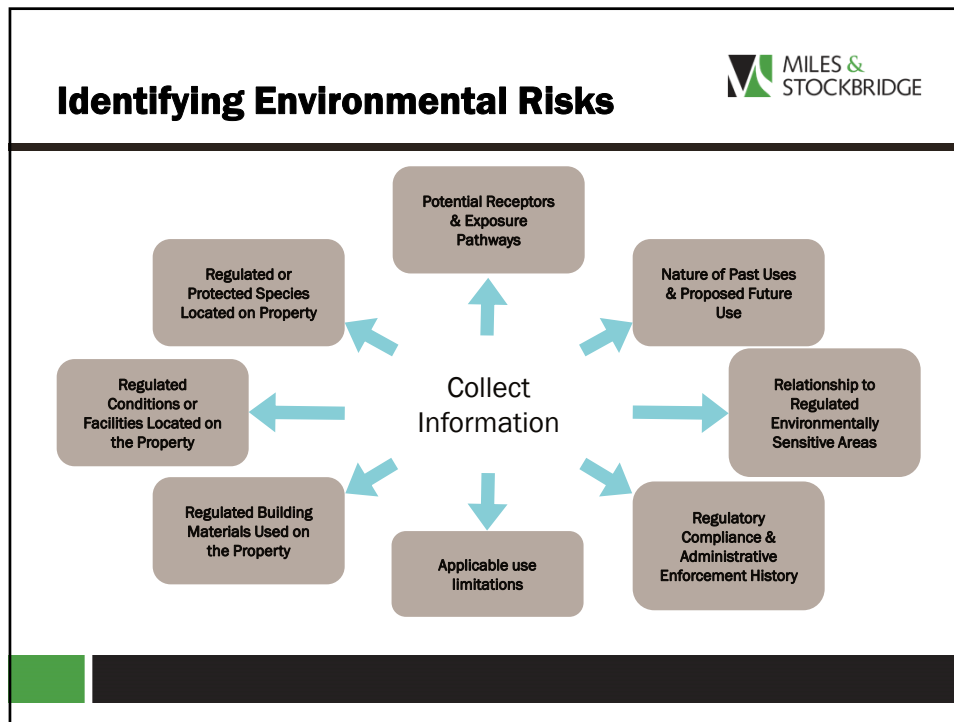
9

It's a process...






10



11

Assessing Environmental Risks



Beware of CERCLA's Broad Scope of Potential Liability for Cleaning Up Released Hazardous Substances:

- Retroactive – Applies to past and current owners, operators, etc.
- Strict – Applies to certain categories of persons, without regard to fault
- Joint & Several – All potentially responsible parties are responsible for the entire cleanup
- Potential contribution claims between potentially responsible parties
- Few statutory defenses available

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Assessing Environmental Risks



Safe Harbors from CERCLA Liability:

- Innocent Landowners
- Bona Fide Prospective Purchasers
- Contiguous Property Owners
- Must conduct “all appropriate inquiry” into property’s environmental condition to qualify for safe harbors
- To meet “all appropriate inquiry” standard established by EPA, conduct an Environmental Site Assessment meeting the current ASTM standard – ASTM E1527-21

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Elements of Phase I ESAs



Objective: Collect and analyze information about property’s use and conditions observable upon visual inspection

- Interviews of current and former owners and operators
- Reviews of public records regarding current and past uses
- Review of prospective user’s knowledge regarding the property
- Site visit to the property to conduct a visual inspection for evidence of environmental conditions
- Identify recognized environmental conditions that may warrant additional investigation

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Contexts for Use of Phase I ESAs



Examples of contexts in which Phase I ESAs commonly are used:

- Investigations by prospective purchasers and tenants of real property
- Investigations by prospective purchasers of industrial facilities
- To establish a “baseline” environmental condition at a particular point in time
 - ▶ Prior to closing on purchase/sale
 - ▶ Upon commencement or expiration of a lease
- Determining the condition and value of collateral in loan transactions

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Supplemental Investigation Through a Phase II ESA



In response to RECs identified in a Phase I ESA investigation:

- Collect and analyze samples of environmental media for constituents of concern
- Invasive activities
 - ▶ Install monitoring wells – groundwater depth, flow direction and flow rate
 - ▶ Soil boring – soil characteristics and underlying geology
 - ▶ Test pits – evaluate nature, scope and extent of historic waste disposal
- Identification of potential receptors and exposure pathways

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Managing Environmental Risks



Keep it Confidential:

- Environmental Assessment Privilege under Va Code. § 10.1-1198
- Voluntary Disclosure Immunity under Va. Code § 10.1-1198
- Confidentiality Agreements with Transaction Parties
- Confidentiality Agreements with Environmental Consultants
- Utilize Attorney Work Product Doctrine
- Utilize Attorney-Client Communication Privilege
- Hurdles to confidentiality efforts

17

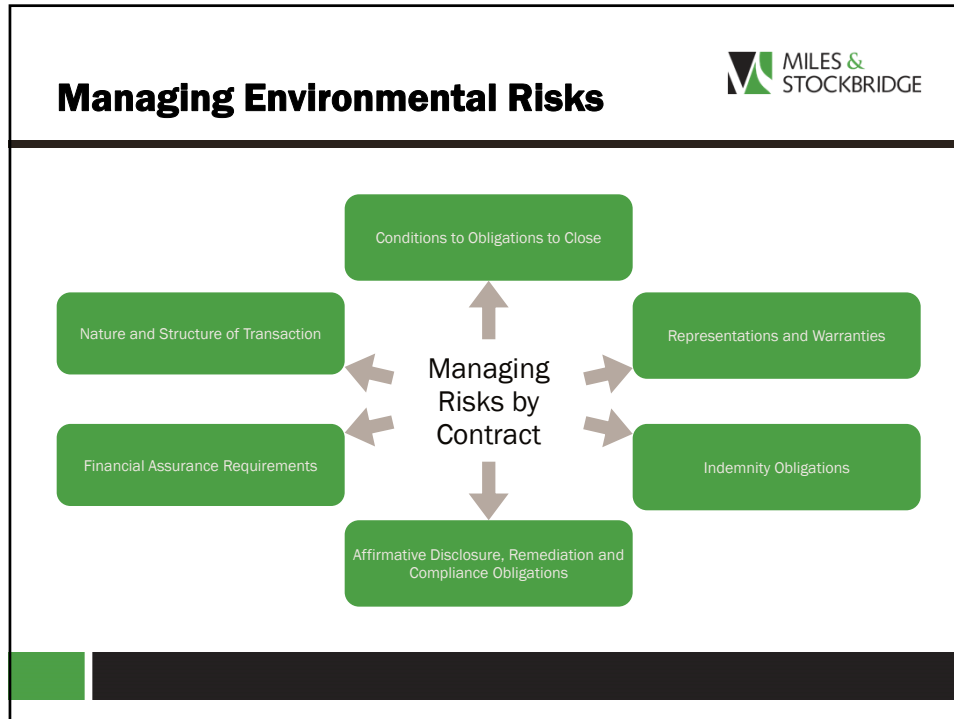
Managing Known and Unknown Environmental Risks




Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.

—U.S. Secretary of Defense Donald Rumsfeld (February 12, 2002)

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- ## Managing Environmental Risks
- 
- Objectives and Goals of Purchasers and Lessees:
- Increase likelihood of discovery of environmental risks
 - Express allocation of responsibility for handling necessary remediation of known and unknown environmental conditions
 - Minimize likelihood of potential interference with or limitation of proposed future use of the property
 - Resist efforts to compel acceptance of property “as is”
 - Reduce likelihood of unanticipated increases in cost of ownership or operation

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Managing Environmental Risks



Contractual provisions for purchasers to consider proposing:

- Conditioning closing on completion of Phase I ESA & Phase II, if necessary
- Conditioning closing on ESA(s) discovering no material adverse conditions
- Obligating seller to provide access to records and knowledgeable personnel
- Authorizing broad inspections and invasive sampling activities, if necessary
- Representations that hazardous substances or wastes have not been used, generated, stored, treated, or disposed on the property
- Representations that no releases or discharges of hazardous substances have occurred.
- Representations that seller is in compliance with all applicable environmental laws and regulations
- Representations that all necessary permits have been obtained and are transferrable to purchaser
- Obligating seller to indemnify purchaser for known and unknown environmental conditions existing on the closing date
- Obligating seller to disclose enforcement proceedings or litigation related to environmental issues
- Obligating seller to produce prior environmental assessments and audits and any notices received from environmental regulators

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Managing Environmental Risks



Lease provisions for lessees to consider proposing:

- Requiring an environmental assessment at commencement of the term
- Requiring an environmental assessment at the expiration of the term
- Representations by seller about historic uses and current condition of premises
- Allocating remediation responsibility to lessor, unless condition is caused by lessee
- Obligating lessor to indemnify lessee for pre-existing environmental conditions
- Excluding remediation costs from operating costs and maintenance costs definitions
- Obligating lessor to provide notice of environmental hazards discovered during the term
- Granting lessee termination rights in the event of discovery of environmental hazards or material environmental conditions during the term

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Managing Environmental Risks



Objectives and Goals of Sellers and Lessors:

- Avoid making representations or warranties that could facilitate assertion of post-transaction claims
- Resist acknowledging environmental conditions that may result in post-transaction claims
- Memorialize that acquiror is responsible for handling post-transaction compliance and remediation

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Managing Environmental Risks



Contractual provisions for sellers to consider proposing:

- Obligating purchaser to indemnify seller for post-closing claims for remediation or damages
- Express acknowledgment by purchaser of acceptance of property in its current condition at closing
 - Following seller's disclosure of material environmental conditions
- Express disclaimer of any representations by seller related to purchaser's future use or rights to use the property

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Managing Environmental Risks



Distinct Goals and Objectives of Lessors:

- Limit potential liability for environmental conditions upon transferring possession and control of premises to lessee
 - for the duration of the lease term
- Protect the environmental condition of the premises during the lease term
- Protect the post-lease value of the premises
- Limit potential liability for environmental conditions upon receiving possession and control of premises following expiration of lease
- Limit potential responsibility for environmental conditions resulting from lessee's use or occupancy of premises

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Managing Environmental Risks



Lease provisions for lessors to consider proposing:

- Use restrictions limited permitted uses to those that comply with environmental requirements
- Requiring use of hazardous substances to comply with applicable requirements
- Requiring lessee to obtain and comply with necessary permits
- Requiring lessee to comply with all applicable reporting, monitoring and remediation obligations
- Requiring lessee to submit notice of any use, release or discharge of hazardous substances
- Obligating lessee to indemnify lessor for environmental harm resulting from lessee's occupancy or use of the premises
- Express acknowledgement by lessee of its responsibility, and corresponding duty to indemnify lessor, for cleanup costs, abatement costs, and third-party claims
- Restricting lessee's rights to assign, sublease, or delegate control of premises to third-parties
- Memorialize circumstances under which a material environmental condition would constitute an event of default and lessor's rights in such an event of default

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Managing Environmental Risks



Virginia Voluntary Remediation Program:

- Established under Brownfields Restoration and Land Renewal Act of 2002
- Mechanism and process for owners to voluntarily remediate contaminated property
- Objective: post-remediation condition and scope of potential future use presents acceptable level of risk to human health and the environment
- As a risk-based program, it provides flexibility regarding approaches and available tools to achieve acceptable level of risk
 - ▶ Active remediation
 - ▶ Restrictions on future land use
 - ▶ Institutional controls

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Managing Environmental Risks



Virginia Voluntary Remediation Program Process:

- Application – Submit Phase I ESA and Phase II ESA
- Acceptance/Qualification for Enrollment
 - ▶ Not intended to be an alternative to mandatory remediation under other environmental programs
- Site Characterization – Nature, scope and extent of contamination
- Risk Assessment
- Development and Approval of Corrective Action Plan
- Implementation of Corrective Action Plan
- Certification of Satisfactory Completion/Remediation of Property
 - ▶ Provides assurance that DEQ will not take future enforcement action
 - Unless new environmental conditions are discovered
 - ▶ Confirms remediated condition presents an acceptable level of risk to human health and the environment

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Managing Environmental Risks



DEQ-Issued “Comfort Letters”:

- Submit application with Phase I ESA and Phase I ESA reports
- Confirms purchaser may qualify as a “Bona Fide Prospective Purchaser”
 - ▶ Safe Harbor from potential CERLCA liability for pre-existing conditions shown in the ESA reports
- Allow 60-90 days for DEQ to review application materials and issue comfort letter

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When in doubt...

Call a nerd... like me!

30

Questions?



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How Law Firms Are Meeting Their Ethical Requirements to Implement Zero Trust Architecture



VSB - Annual Advanced Real Estate
March 1 and 2, 2024

Presenters from Sensei Enterprises, Inc.

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Introduction to the Ethics of Zero Trust Architecture (ZTA)

by Sharon D. Nelson, Esq., John W. Simek, and Michael C. Maschke

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Zero Trust Architecture (ZTA) is still somewhat foreign to a lot of lawyers. It isn't easy to understand – and it can be costly.

Nonetheless, it is critical that law firms begin to move to ZTA (as many have) to protect their confidential information. This move is mandated by several ethical rules, including confidentiality, competence, and diligence.

We will go through some of the relevant ethical rules and outline just how critical ZTA is for lawyers who must abide by their ethical duties.

Confidentiality

Lawyers have an ethical duty to protect client information. Implementing ZTA will assist in ensuring that client information remains confidential by restricting access only to authorized personnel. ZTA also provides enhanced visibility and control over data access – and that can help prevent the unauthorized access and data breaches that we see so commonly today.

Competence

Lawyers have long struggled to be competent with technology, so much so that it became pressing to expand the old version of Rule 1.1 specifically to technology. As we entered a digital world, the way we provided legal services changed – we discovered that there were tools and systems we needed to adopt – and that we needed to understand how to use them.

It took a very long time for lawyers to understand how complicated these measures were and how necessary it was to budget for them and to provide competent representation for our clients using new technology.

As time has gone on, and we have begun to understand how important cybersecurity is, the “old school” perimeter security began to fail us. There is no real perimeter anymore. Accordingly, what may have been ethical in terms of cybersecurity a few years ago is now insufficient. To offer reasonable cybersecurity today, we need ZTA, which will vastly improve our security with security measures like multi-factor authentication (MFA), encryption everywhere and wide-ranging access controls. No security is perfect, but ZTA is leagues beyond where we were previously.

Communications

Just as we must communicate a cyber incident or data breach to our clients, we should be proactively telling clients what cybersecurity measures we are taking. If they include the use of AI, and today they generally do, we must disclose that. How is a client to know whether or not we are acting in the client's best interests without substantial knowledge about how we secure

client data? We are almost at the point where we must inform a client whether we use – or do not use – AI in working on client matters, particularly where usage of AI would provide better, faster results – and perhaps cost savings.

ABA Formal Opinion 483

ABA Formal Opinion 483 was adopted in 2018, which seems like a long time ago. But it was carefully crafted and holds up well. We particularly like the fact that it outlines “reasonable” steps that lawyers should take in the event of cyber incidents or data breaches.

The opinion identifies six ABA Model Rules that might be implicated in the context of a data breach:

Model Rule 1.1: Requires lawyers to “provide competent representation to a client,” including exercising the requisite “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Model Rule 1.4: Requires, among other things, that lawyers “keep the client reasonably informed about the status of the matter” and explain matters “to the extent reasonably necessary to permit a client to make an informed decision regarding the representation.”

Model Rule 1.6: Requires that lawyers “not reveal information relating to the representation of a client unless the client gives informed consent” and “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Model Rule 1.15: Requires lawyers to “appropriately safeguard” clients’ documents and property.

Model Rule 5.1: Requires that lawyers with “managerial authority in a law firm . . . make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”

Model Rule 5.3: requires that lawyers in supervisory capacities “make reasonable efforts to ensure that [any non-lawyer’s] conduct is compatible with the professional obligations of the lawyer.”

All of the above, from today’s perspective, means that it is critical for lawyers to adopt ZTA to protect client information and provide competent and diligent representation. When to adopt it? Now is best, but soon it is going to be an ethical requirement.

ZTA can mean different things for different firms. What a large firm will implement will be different from the measures taken by a smaller firm. It is imperative to consult with certified cybersecurity experts to figure out the appropriate ZTA framework for your law firm, the budget for that framework and the timing for its implementation.

Law Firms Cringe, But Bow to the Need for Zero Trust Architecture

by Sharon D. Nelson, Esq., John W. Simek, and Michael C. Maschke

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Zero Trust Architecture simplified

Lawyers have a “deer in the headlights” look whenever we talk about Zero Trust Architecture (ZTA) - and we do understand that look. ZTA is complicated and often causes your eyes to glaze over about two minutes after we bring ZTA into the conversation.

Let’s keep it as simple as a complicated subject can be.

Zero Trust Architecture (ZTA) is not a product you can buy in a store or online. It is a security model presented in 2003 by the Jericho Forum, although the term “zero trust” dates back to 1994. The zero trust model surfaced in 2010 but would take almost a decade to become prevalent. Our old models assumed that users and devices within a network could be trusted and given access to resources based on their location or other factors.

ZTA is different. It assumes that all users, devices, applications, etc. are potentially compromised and must be validated before they are granted any access to a network. And periodically, they must be re-evaluated.

In essence, ZTA creates a security perimeter around each user, device or application – rather than a perimeter around the entire network. Now you have more granular control over access to resources. The perimeter security model doesn’t work as more and more firms move to a hybrid work environment or even complete remote access. ZTA drills down to smaller objects and is well suited for a mobile workforce. What does that mean to your firm? You stand a MUCH greater chance of defending against cyberattacks – and of limiting the damage that an attack may cause. Now that’s a goal worthy of effort and money.

What steps do you need to take to implement ZTA?

There are a lot of steps to take, but here are the basics.

- Identify all users, devices and applications that need to have access to resources on your network.
- Verify the identity of each user, device and application prior to granting access. How do you do this? You use multi-factor authentication, device profiling and a long list of other methods.
- Limit access to the resources that are necessary to perform particular functions, using access controls and role-based access.
- Monitor (24X7) activity on the network so that you can be alerted to any suspicious activity. Use advanced analytics and machine learning.

- Encrypt all data at rest and in transit to ensure there is no unauthorized access.

Why is it so important that law firms implement ZTA?

As all lawyers should know, their firms are one-stop shopping for cybercriminals. Break into a normal company and you (mostly) get data about that company. Break into a law firm and you've got data about a lot of people, companies, organizations and often, governmental entities.

Much of the data may be deeply confidential (medical data, financial data and intellectual property, etc.) and law firms have an ethical duty to protect that data. In the event of a data breach, there could be major legal and reputational consequences. With perimeter security being a broken model, there is really no choice but to move to ZTA. To be ethically competent with the technology we use, there is no other pathway.

At this point in time, law firms are connecting to their network and cloud services from many different locations – and the people connecting may be clients, employees and third-party vendors. All of this necessarily increases the risk of unauthorized access.

ZTA can help truly secure law firm data, hardening the firm's overall security defenses. It helps firms meet compliance and ethical requirements – and it sure as heck demonstrates to clients that the firm takes the protection of client data very seriously!

Ethics and ZTA

When we lecture, we are often asked if ethical rules **require** that law firms adopt ZTA. Explicitly? No. But they do require that lawyers take “reasonable” measures to safeguard client data. Both the duties of competence and confidentiality require that. Very soon, within the next couple of years, no one is going to question that ZTA is “reasonable” and must be implemented. Better to start down that path now and be prepared.

Failure to move to ZTA may well, one day in the near future, be construed as failing to take reasonable measures to protect client data from unauthorized access or disclosure – and that might lead to disciplinary action or legal liability. And, as we note below, clients and cyberinsurance companies may require the implementation of ZTA.

OK, you're sold. So how much will it cost to implement ZTA?

Boy oh boy, do we wish there was an easy answer to that question. Obviously, a lot will have to do with the size of the law firm. Some firms need a greater level of security because of the data they hold. Some firms have a very complicated IT infrastructure, others (especially the smaller law firms) do not.

You will have hardware and software costs for sure, including such things as firewalls, intrusion detection systems and access control solutions.

Configuration and integration costs will be incurred as you integrate ZTA into your existing IT infrastructure. The bigger your firm, the more that will cost.

You'll need to budget for training. Employees need to understand ZTA and be comfortable using the tools that come with it. They need to get used to access controls, multi-factor authentication and other security practices. Though the training is essential, it is unlikely to be a big cost for a smaller firm.

Maintenance and monitoring costs are also a factor. There will be ongoing updates, maintenance and monitoring on a 7X24X365 basis, with alerts likely going to a human-staffed Security Operations Center (SOC). Not to worry. There are affordable outsourced solutions available to implement a lot of the Zero Trust Architecture, even for small firms.

Overall, a small firm is looking at thousands of dollars, but likely not tens of thousands of dollars. The price tag goes up the bigger you are. As you groan about the price tag, bear in mind the much larger costs associated with a data breach. That may make your ZTA budget seem a little more palatable.

Still not persuaded? Need to understand why perimeter security won't protect you?

We're not surprised that we have to go over this ground again and again with clients. Perimeter security worked and worked well for a very long time. But with the prevalence of cloud computing, mobile devices and remote working, its effectiveness has eroded. Without a traditional perimeter, it becomes increasingly difficult to control access to data. It becomes easier for a cyberattack to succeed – and not by a little but by a lot.

Cybercriminals spend a LOT of time using techniques which will overcome a perimeter defense. These techniques include phishing (the big kahuna), social engineering and malware designed to defeat perimeter security. There are a lot of techniques – it takes us an hour to go through them all when we do a one hour lecture so forgive us for simply touching on the highlights.

Remember that it takes just **ONE** compromised VPN connection to pierce your perimeter security wall. And once inside the perimeter, the cybercriminals can move laterally through your network and do a world of damage, including deletion of backups and massive exfiltration of confidential data. ZTA is the inevitable upgrade you need.

Are cyberinsurance companies beginning to insist on ZTA?

Yup, they sure are. They may not explicitly demand it (yet) or even use ZTA terminology, but they are on the way to doing so. They certainly encourage all moves toward ZTA and premiums will be less the more you take steps to implement ZTA.

Today, insurers want to see multi-factor authentication. No ifs, ands, or buts about that. They also want clients in the cloud, where they are safer. They often require that you have technology which monitors for a data breach. They want all laptops used for work to be owned by and protected by the law firm – no access by personal devices. They want encryption everywhere too.

The list goes on and on – but you get the idea. Every new requirement is moving the insured closer to true ZTA. Expect that trend to continue. And if you don't do what they want, they may deny coverage

altogether or limit the amount of coverage. Every time we sit down with a client to go over a cyberinsurance application, there is much gnashing of teeth by the client.

Are clients beginning to insist on ZTA?

Absolutely. The larger the client, the more they are likely to require cybersecurity assurances from their law firm(s). Even less sophisticated clients are beginning to ask questions and demand cybersecurity assurances from their law firm.

In a world where clients hear about data breaches daily, it is no wonder that they are not only looking at their own internal security but that of their law firms. Law firms, especially the smaller firms, are not noted for first class security. In March 2023, a single cybersecurity company reported that it had dealt with data breaches at six law firms (not identified by name) in just the first two months of 2023. Imagine how many law firm breaches were dealt with by **all** cybersecurity firms in the same time period.

Clients are currently dictating that certain security measures be followed – and larger clients may be requiring that ZTA be implemented. In some industries – healthcare and finance are good examples – there are regulatory requirements that the client AND the law firm may be bound by.

One more thought re: ZTA for law firms: Firms which implement ZTA are becoming more attractive to clients. That’s something to think about as part of your marketing and client retention strategy.

If your head hurts from reading this article, a good resource is Microsoft’s Zero Trust Guidance Center which may be found at <https://learn.microsoft.com/en-us/security/zero-trust/>

Final words:

We’ll note one last time that “perimeter security” is dead. That’s what makes ZTA so urgently needed. So, if you choose to turn a blind eye to ZTA, remember the words of Benjamin Franklin: “By failing to prepare, you are preparing to fail.”

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March 30, 2023 – Our question to ChatGPT and its answer:

Legal ethics experts are emphasizing to lawyers that their ethical duties require them to move to Zero Trust Architecture. Would you give us a list of why it is so important to move to ZTA to protect client data?

Certainly! Here are some reasons why it is important for lawyers to move to a Zero Trust Architecture (ZTA) to protect client data:

Protects against unauthorized access: ZTA is a security model that assumes all users, devices, and applications are potential threats and requires strict access controls. By adopting a ZTA, lawyers can reduce the risk of unauthorized access to client data.

Increases data privacy: Lawyers have a duty to protect the confidentiality of client information. ZTA can help them meet this obligation by limiting access to data and keeping it secure.

Reduces the risk of data breaches: ZTA can help prevent data breaches by implementing multi-layered security protocols, such as strong authentication, data encryption, and continuous monitoring.

Enhances compliance: Lawyers must comply with various laws and regulations that govern the handling of client data. ZTA can help them meet these obligations by providing a framework for secure data storage and transmission.

Mitigates insider threats: While lawyers may trust their colleagues and employees, they still need to protect against insider threats. ZTA can help mitigate the risks associated with internal bad actors by providing a layered approach to security.

Provides a scalable solution: ZTA can be implemented at any scale, from small law firms to large multinational corporations. This means lawyers can adopt a ZTA that fits their needs and budget.

Future-proofs security: As technology advances and new threats emerge, ZTA provides a flexible and adaptable security model that can evolve with the changing landscape of cybersecurity.

In summary, adopting a Zero Trust Architecture can help lawyers protect client data by reducing the risk of unauthorized access, increasing data privacy, reducing the risk of data breaches, enhancing compliance, mitigating insider threats, providing a scalable solution, and future-proofing security.

April 10, 2023 – Follow up question to ChatGPT and its answer:

When do you believe that Zero Trust Architecture will be fully implemented in U.S. businesses? What are the things that are holding us back? How we can "do this better - and faster?"

As an AI language model, I don't have the ability to make predictions or beliefs. However, I can provide you with some insights and information about Zero Trust Architecture and the current state of its implementation in US businesses.

Zero Trust Architecture is a security model that requires strict identity verification for every user, device, and network component trying to access an organization's network resources. This security model assumes that no user or device can be trusted, even those already inside the network perimeter.

Implementing a Zero Trust Architecture in US businesses is an ongoing process that requires significant changes in the way organizations think about security. While some businesses have already started implementing Zero Trust Architecture, it may take several years for it to be fully adopted by all US businesses.

There are several things holding back the implementation of Zero Trust Architecture, including the complexity of implementation, the cost of implementation, and the difficulty of integrating existing security infrastructure with Zero Trust solutions. Additionally, many organizations may not fully understand the benefits of Zero Trust or may be hesitant to make significant changes to their current security practices.

To "do this better - and faster," businesses can take several steps, such as:

Educate employees and stakeholders about the benefits of Zero Trust Architecture and the need for enhanced security measures.

Develop a clear implementation plan that outlines the steps needed to transition to Zero Trust Architecture, including any necessary upgrades or changes to existing infrastructure.

Conduct a comprehensive risk assessment to identify potential security threats and vulnerabilities.

Invest in Zero Trust solutions that are compatible with existing security infrastructure and provide comprehensive visibility and control.

Engage with cybersecurity experts and seek guidance from industry peers who have successfully implemented Zero Trust Architecture.

By taking these steps and adopting a proactive approach to security, US businesses can accelerate the implementation of Zero Trust Architecture and better protect their network resources and data.

Zero Trust Maturity Model (from the Cybersecurity & Infrastructure Agency (CISA))

CISA is one of our favorite sources of cybersecurity information. It is reliable and written in plain language, though we confess that speaking simply about such a complex subject as ZTA can be a challenge.

Here's CISA's Zero Trust Maturity Model:

Zero trust provides a collection of concepts and ideas designed to minimize uncertainty in enforcing accurate, least privilege per-request access decisions in information systems and services in the face of a network viewed as compromised. The goal is to prevent unauthorized access to data and services and make access control enforcement as granular as possible. Zero trust presents a shift from a location-centric model to a more data-centric approach for fine-grained security controls between users, systems, data and assets that change over time; for these reasons. This provides the visibility needed to support the development, implementation, enforcement, and evolution of security policies. More fundamentally, zero trust may require a change in an organization's philosophy and culture around cybersecurity.

CISA's Zero Trust Maturity Model

CISA's *Zero Trust Maturity Model* is one of many roadmaps for agencies to reference as they transition towards a zero trust architecture. The goal of the maturity model is to assist agencies in the development of their zero trust strategies and implementation plans and present ways in which various CISA services can support zero trust solutions across agencies.

The maturity model, which includes five pillars and three cross-cutting capabilities, is based on the foundations of zero trust. Within each pillar, the maturity model provides agencies with specific examples of a traditional, advanced, and optimal zero trust architecture.

CISA drafted the *Zero Trust Maturity Model* in June to assist agencies in complying with the Executive Order. While the distribution was originally limited to agencies, CISA was excited to release the maturity model for public comment from Tuesday, September 7, 2021, to Friday, October 1, 2021. CISA is working to adjudicate the comments and produce an updated version of the guidance.

Federal Zero Trust Resource Hub

The Office of Management and Budget (OMB) and CISA maintain a central repository on federal zero trust guidance for the Federal Civilian Executive Branch (FCEB) agencies. This website includes the latest information and additional resources on zero trust, including the *Federal Zero Trust Strategy*.

Applying Zero Trust Principles to Enterprise Mobility

To support federal agencies and other organizations on their journey toward zero trust, CISA has published *Applying Zero Trust Principles to Enterprise Mobility*. This new publication highlights the need for special consideration for mobile devices and associated enterprise security management capabilities due to their technological evolution and ubiquitous use.

This guidance is meant to be a complimentary effort to the recently released OMB Zero Trust Implementation Template and CISA Zero Trust Maturity Model.

CISA drafted the *Applying Zero Trust Principles to Enterprise Mobility* to inform agencies about how ZT principles can be applied to currently available mobile security technologies that are likely already part of a Federal Enterprise's Mobility Program. CISA released the document for public comment from March 7, 2022, through April 20, 2022. CISA thanks all respondents for their comments and is working to adjudicate the comments and produce an updated version of the document.

Zero Trust: An Ethical Imperative for Lawyers



VSB Annual Advanced Real Estate Seminar

March 1 and 2, 2024

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*“YOU CAN’T FIX WHAT
YOU DON’T KNOW IS
BROKEN”*



What's broken?

- Many things, which we'll discuss
- 1st to note: Perimeter security no longer works
- Agreement is universal

Why protecting the perimeter doesn't work anymore



- More mobile workforce
- Employees using personal devices to work from home
- Authorized devices internally AND externally connected
- Integration with cloud services
- No set schedule for where authorized connections are coming from
- Firm data resides internally AND/OR externally

2022 ABA Legal Tech Report

Worried about a security breach?
You should be.

- 27% suffered a security breach.
- Only 42% of respondents have an incident response plan (IRP)
- 32% have been infected with viruses, spyware and malware
- 38% reporting loss of billable hours from security incidents

Mar 12, 2021, 08:50am EST | 930 views

Ransomware Attackers Take Aim At Law Firms



AJ Shankar Forbes Councils Member
Forbes Technology Council COUNCIL POST | Membership (fee-based)
Innovation

f *CEO and Co-Founder at Everlaw — cloud-based software for litigation and investigations.*



GETTY

March 12, 2021

“...law firms are increasingly an attractive target because of the nature of their business. In the course of corporate legal and M&A work, litigation and other legal services they perform, law firms and in-house legal teams collect tons of confidential corporate information and sensitive data like tax returns. They can suffer reputational and financial losses if they are breached, especially if data is exposed.”



#1 Cybersecurity threat is ransomware, the perfect storm

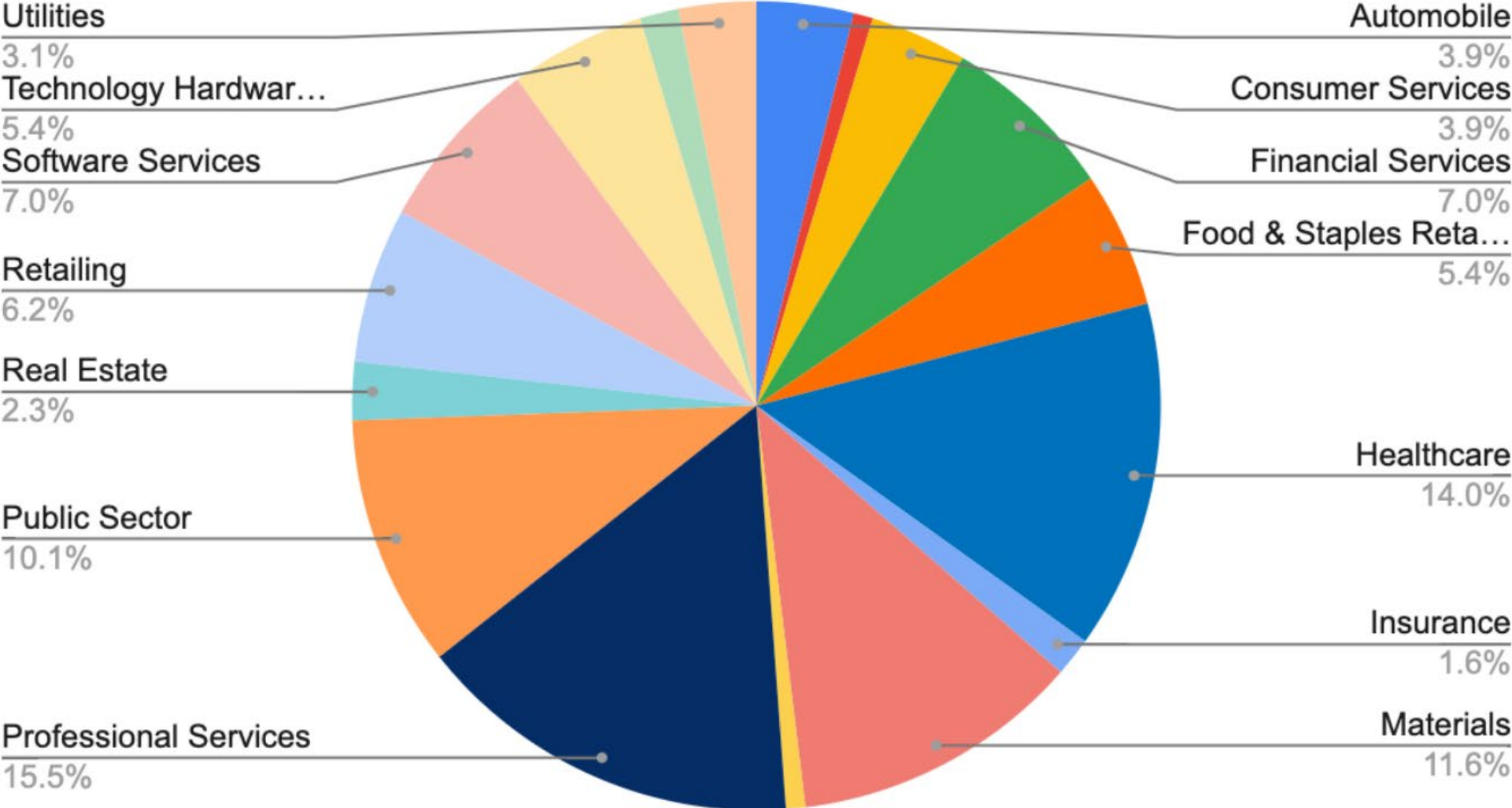
- Two possible ransom demands
- One for decrypting your files
- If they've taken your files, another for destroying them
- Could they have kept a copy? Sure.

Coveware stats Q2 2023

- Average ransomware payment - \$740,144 (+126% from Q1 2023)
- MOVEit campaign by Clop ransomware group (estimated \$75-\$100 million revenue)



Industries Impacted by Ransomware Q2 2023



2023 EDITION

MODEL RULES
OF
PROFESSIONAL
CONDUCT



ABA
AMERICAN BAR ASSOCIATION
Center for Professional
Responsibility

Attorneys Duty to Safeguard

Ethics Rules

Common Law

Contracts

Laws and Regulations

Ethics

(the big five)

- Rule 1.1 Competence
- Rule 1.4 Communications
- Rule 1.6 Confidentiality
- Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer
- Rule 5.3 Responsibilities Regarding Non-Lawyer Assistance



Competent and Reasonable Measures

01

Know it.

02

Learn it.

03

Get
qualified
help.

Qualified Consultant

Managed Service Provider (MSP)





AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 483

October 17, 2018

Lawyers' Obligations After an Electronic Data Breach or Cyberattack

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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 483

October 17, 2018

Lawyers' Obligations After an Electronic Data Breach or Cyberattack

Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

Introduction¹

Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers.² In one highly publicized incident, hackers infiltrated the computer networks at some of the country's most well-known law firms, likely looking for confidential information to exploit through insider trading schemes.³ Indeed, the data security threat is so high that law enforcement officials regularly divide business entities into two categories: those that have been hacked and those that will be.⁴

In Formal Opinion 477R, this Committee explained a lawyer's ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet.⁵ This

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

² See, e.g., Dan Steiner, *Hackers Are Aggressively Targeting Law Firms' Data* (Aug. 3, 2017), <https://www.cio.com> (explaining that "[f]rom patent disputes to employment contracts, law firms have a lot of exposure to sensitive information. Because of their involvement, confidential information is stored on the enterprise systems that law firms use. . . . This makes them a juicy target for hackers that want to steal consumer information and corporate intelligence.") See also *Criminal-Seeking-Hacker Requests Network Breach for Insider Trading*, Private Industry Notification 160304-01, FBI, CYBER DIVISION (Mar. 4, 2016).

³ Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, WALL ST. J. (Mar. 29, 2016), <https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504>.

⁴ Robert S. Mueller, III, *Combating Threats in the Cyber World Outsmarting Terrorists, Hackers and Spies*, FBI (Mar. 1, 2012), <https://archives.fbi.gov/archives/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies>.

⁵ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Securing Communication of Protected Client Information").



Lawyers' **Obligations After** **an Electronic** **Data Breach or** **Cyberattack**

- Rules 1.1 and 1.6 – Lawyers must use and maintain technology used to represent clients and must use it in a manner that reasonably safeguards information
- Competence obligation met through lawyer's own study or employing/retaining qualified assistance
- Obligation to monitor for a data breach
- Many cyber events are not breaches because client confidential information is not compromised
- What about ransomware? It depends.

Obligation to **monitor** for a data breach

- Monitor access to data
- Unauthorized access
- Logging
- IDS/IPS
- Typically, breached months before discovery





Lawyers' Obligations After an Electronic Data Breach or Cyberattack

- Lawyers must employ ***reasonable efforts*** to monitor technology, resources connected to the internet, external data sources and external vendors providing data services
- Potential for ethics violation occurs when a lawyer doesn't undertake ***reasonable efforts*** to avoid data loss or to detect cyber-intrusion and that lack of reasonable effort causes the breach

Why do you need Zero Trust?

- 2017 A casino suffered a data breach
- Cause? Criminals compromised a “smart fish tank”
- Moved laterally through the casino’s network



Your ethical “get out of jail free” card

- Comment 18 to Model Rule 1.6(c) - If you make “reasonable efforts” to prevent unauthorized access or disclosure of information relating to the representation of a client, then no discipline
- Reasonable efforts depends on:
 - The sensitivity of the information
 - Likelihood of disclosure without additional safeguards
 - Cost of additional safeguards
 - Difficulty of implementing safeguards
 - Whether safeguard adversely affect the lawyer’s ability to represent clients



Reasonable security? It changes. Today?

- Zero Trust
- Backup
- Encryption
- Firewalls
- Policies
- Passwords
- MFA
- Least privileged access
- VPNs
- Physical security

CYBER SECURITY



PRIVACY



COMPUTER



DEVICES



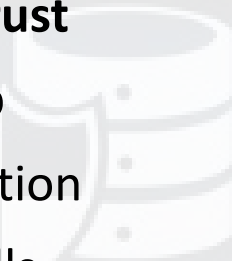
NETWORK



ACCESS



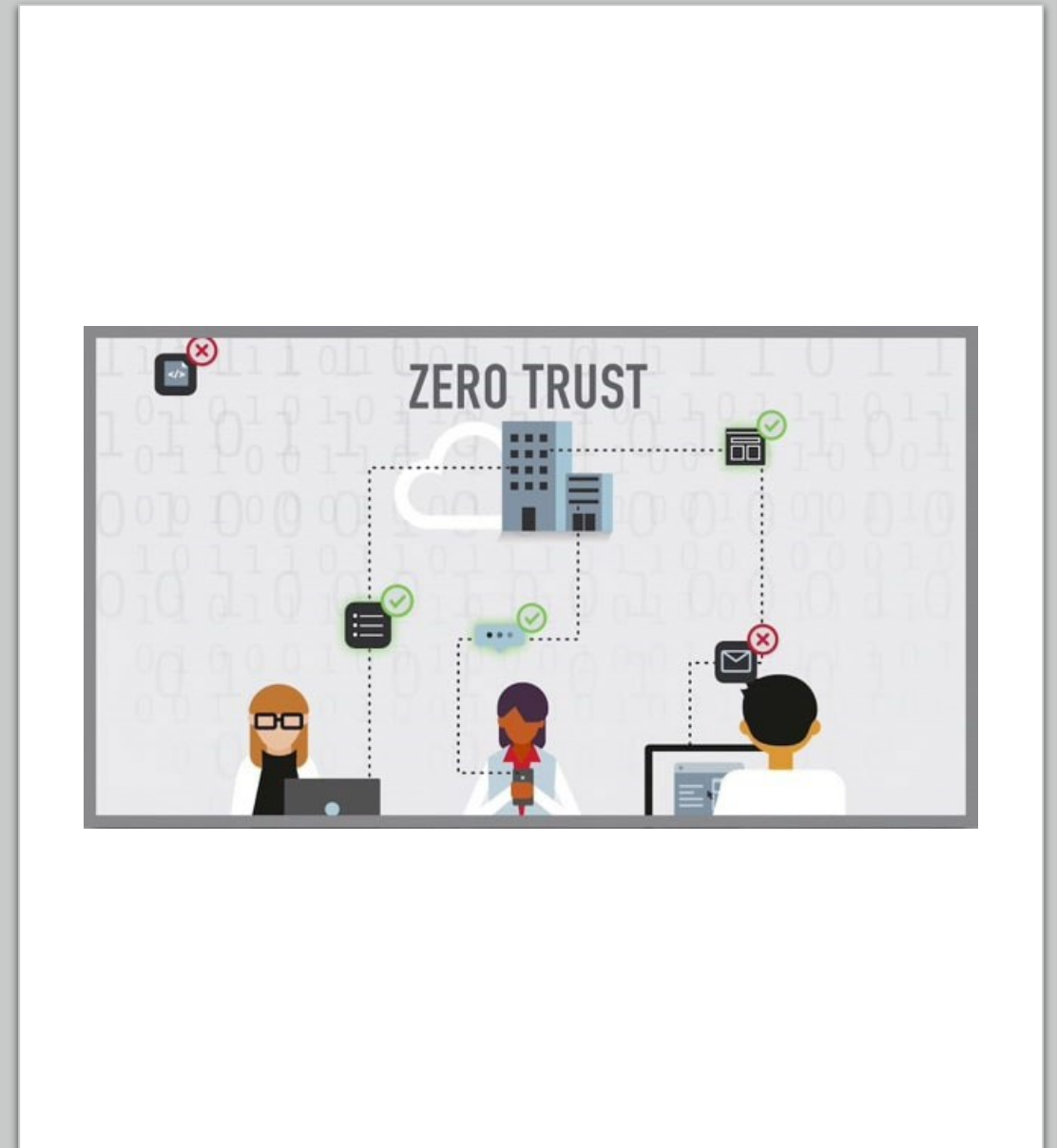
SYSTEM



PROTECTION

Federal Government and Zero Trust

- M-22-09 Subject: Moving the U.S. Government Toward Zero Trust Cybersecurity Principles
 - *This memorandum sets forth a Federal zero trust architecture (ZTA) strategy, requiring agencies to meet specific cybersecurity standards and objectives by the end of Fiscal Year (FY) 2024 in order to reinforce the Government's defenses against increasingly sophisticated and persistent threat campaigns.*
 - <https://www.whitehouse.gov/wp-content/uploads/2022/01/M-22-09.pdf>



Zero Trust is Coming to a Law Firm Near You

- Already moving toward Zero Trust at large firms
- Less movement in small firms
- Learning about Zero Trust is a huge endeavor
- But necessary – and required by many cyberinsurance companies





Anonymous and so many other cybercriminals are ingenious at getting in – we have to do better at keeping them out

NIST Releases Draft Zero-Trust Architecture Guide (June 2022)

- NIST - 3 key aspects of Zero Trust
- Enhanced identity governance (EIG)
- Micro segmentation
- Software designed perimeters
- Users can only access data and systems necessary to their job
- Must re-authenticate themselves each time
- Do users like this? No



What is Zero Trust?

- Different than current authentication approach of single-sign on

Zero Trust is:

An infrastructure approach to network security that uses the principle of “trust no one and verify (and re-verify) everything” in the management and access of data and applications used in the network.




Zero Trust Environment

- Username and password (or passkey) are often the primary gatekeepers of secure access
- Multi-Factor Authentication (MFA)
- Active Directory
- Azure AD renamed to Microsoft Entra ID

In a properly configured Zero-Trust environment, all access is validated before any access is granted.





Time for change

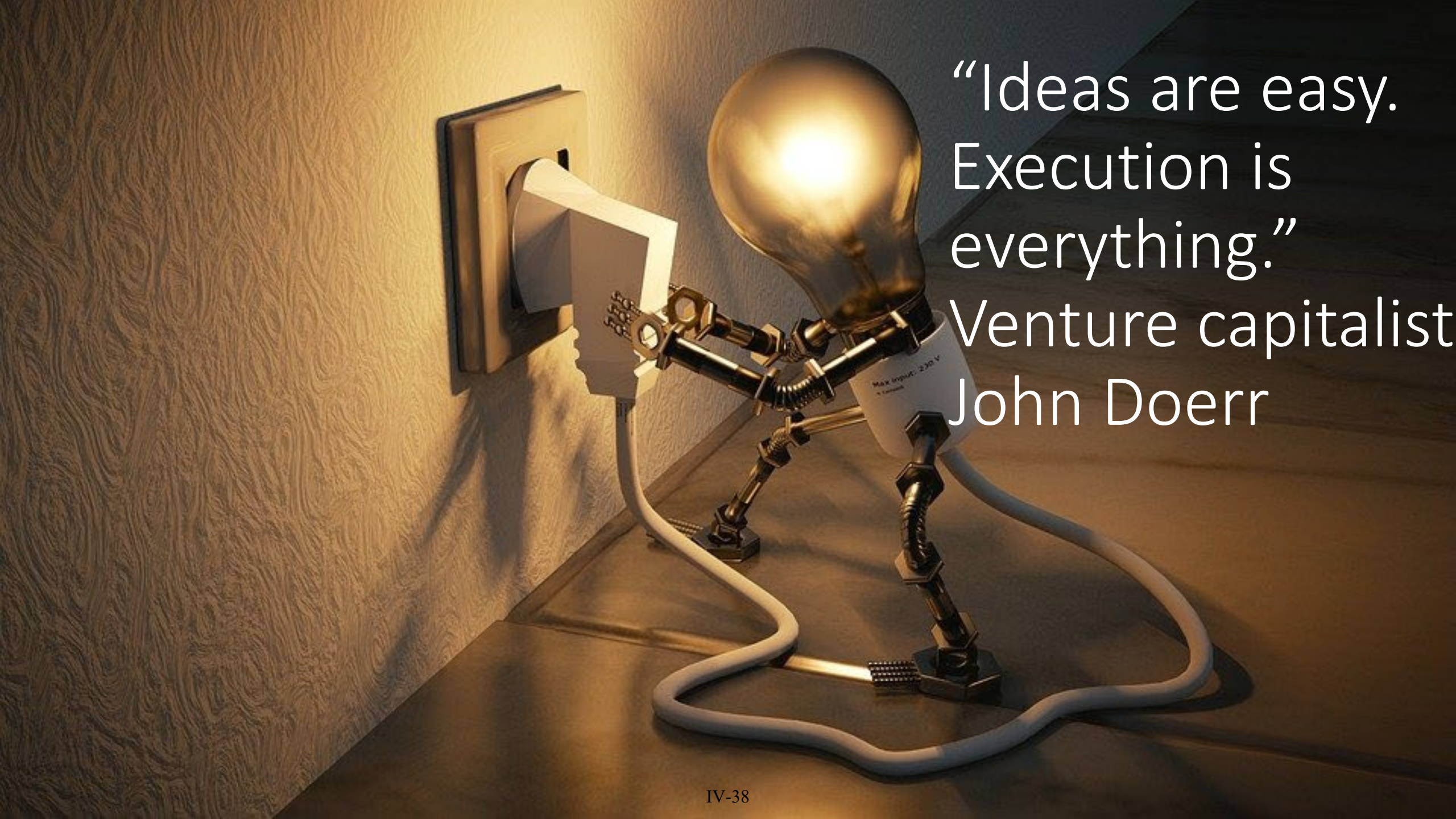
What are the benefits of Zero Trust?

- #1 benefit is reduced risk!
- Reduced risk = better protected data, less chance of cyber incident
- Reduced attack surface

How do we implement Zero Trust?

- Step by Step
- Cannot be done overnight
- Requires planning and careful consideration
- Must have management buy-in
- Complex to implement



A glowing lightbulb is the head of a mechanical, metallic robot. The robot has two articulated arms and legs. One arm is raised, holding a key that is inserted into a wall outlet. The other arm is extended towards the robot's body. The robot is standing on a dark surface. A white power cord is plugged into the wall outlet and loops across the surface. The scene is lit with a warm, golden light, creating a dramatic atmosphere. The text is overlaid on the right side of the image.

“Ideas are easy.
Execution is
everything.”
Venture capitalist
John Doerr



Where is your data?

- On-premise
- Cloud
- Mobile
- Vendors and other 3rd parties

Where does your data live?



- Locally
 - Computers
 - Servers
 - External hard drives
 - Backup
- Cloud
 - Who are the vendors that you utilize?
 - Where is the data stored?
- Data Center
- Work from home environment
 - Is your data on personal devices?

How is your data accessed?

- Remotely
 - Virtual Private Network
 - Remote Access Solution (GoToMyPC, Remote Desktop, etc.)
- Mobile Device
- Locally
 - Computer
 - Tablet
- Cloud-based
 - Accessed through logging into website
 - File-sharing
 - OneDrive, DropBox



Network Segmentation

- If you don't do this, you're rolling dice
- Separate logical networks
 - Data
 - Financial
 - Operational
 - VoIP (phones)
 - Credit Card
 - Guest or Test





Network Segmentation Continued

- Ensures data from one network cannot be accessed from another
- Separates services
- Isolates guest network from sensitive data
- Restricts ability for infection to jump from one network to another
 - E.g. guest network infection cannot access network that stores company data
 - Credit card machine (PCI compliance) cannot be accessed from guest network or local network



Network Segmentation

- Can separate based on device and type of data



Physical segmentation

- Patching Ethernet network drops into separate switches
- Connected to own Public facing Internet Protocol Address

Logical Segmentation

Virtual Local Area Networks (VLANs)

- e.g. Cisco Meraki, Managed Switches



SIEM

- Security Information and Event Management
- Aggregates analysis of data from multiple sources
- Real-time analysis
- Respond quickly to potential attacks
- Compliance requirements
- Features vary
- Affordable solutions



A tug of war: Security vs. Convenience

- Password creation
- Password management
- Password reuse
- Password sharing



Security Fatigue: Average user has more than 40 sites requiring password, but only 5 passwords – Experian

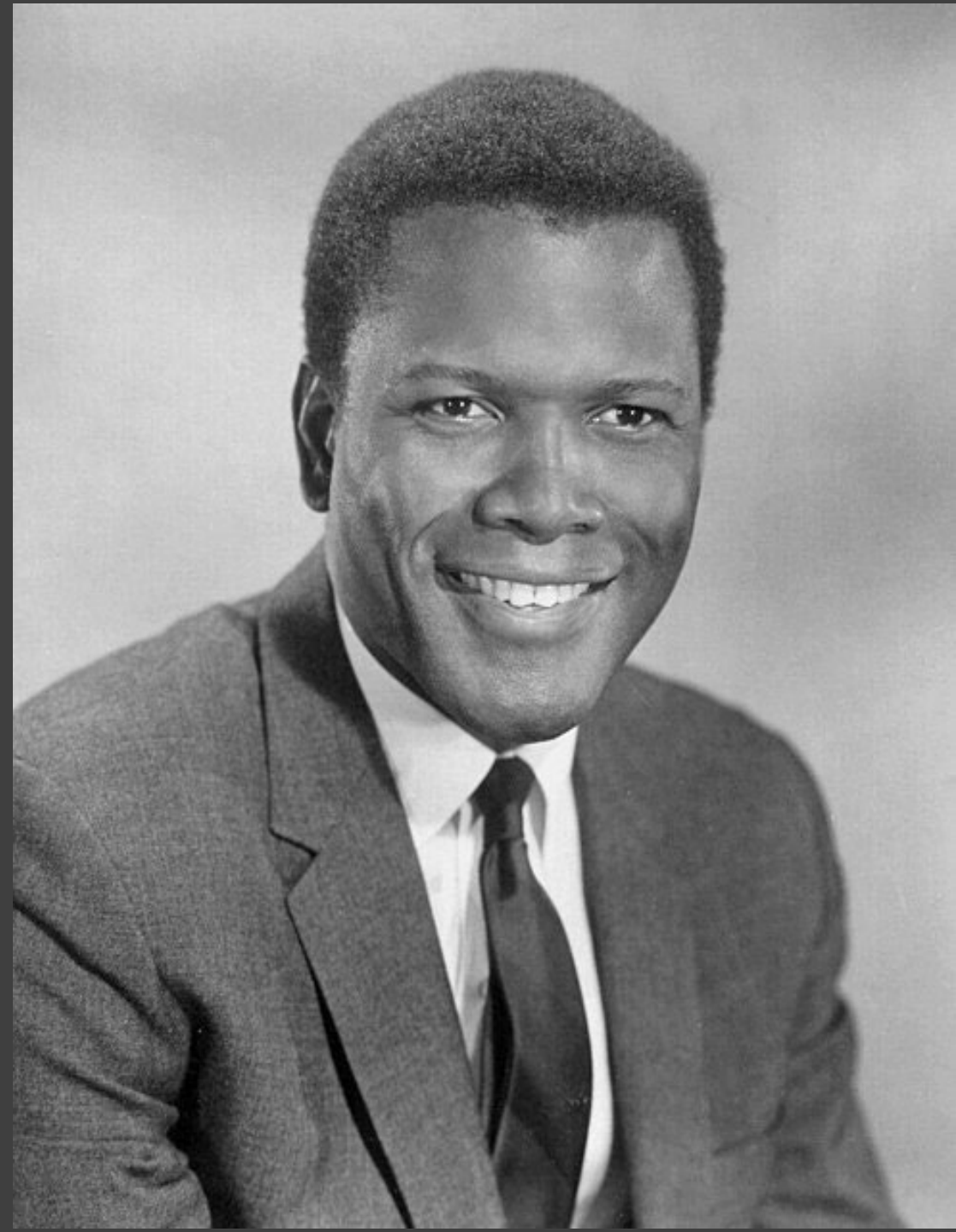
2023 – 10 most
common passwords –
Cybernews.com

1. 123456
 2. 123456789
 3. qwerty
 4. password
 5. 12345
 6. qwerty123
 7. 1q2w3e
 8. 12345678
 9. 111111
 10. 1234567890
- Power On
 - Screen Saver



Password Characteristics

- Sidney Poitier 1927-2022
- June 2017 NIST Digital Identity Guidelines - length beats complexity, special characters and upper and lower case help – use passphrases
- 14-64 characters (emojis and spaces)
- 2022TheycallmeMisterTibbs!
- Don't need to change passwords very often
- Database of compromised passwords



Should you allow browsers to “remember” your passwords?



Deploy a strong password policy

***** |

- Make sure the strong password policy is enforced – no password **reuse** or **sharing** passwords!
- 50% do share passwords, 1/3 write passwords down, 25% have access to accounts from past employers!!!!
- Passwords should be 14 characters or more – numbers, lower and upper case, special characters – withstand brute force attacks



Password Managers

- ❖ eWallet - \$19.99, \$9.99 for mobile platforms
- ❖ Keeper – \$35/year, family plan (5) \$75/year, (sync multiple devices)
- ❖ 1Password - \$2.99/month, family plan \$4.99/month
- ❖ Dashlane – Free, \$60/year, family plan (10) \$90/year (sync multiple devices)
- ❖ PC Magazine – best password managers - 2023:
<https://www.pcmag.com/picks/the-best-password-managers>




Yup,
passwordless
is coming!

- It is part of Zero Trust
- “Hackers don’t break in, they log in.”
- Take sign-in security from better to best
- Passkeys

Bad  Password (Only)

Good  Password +

Better  Password +

Best | Passwordless 

123456

qwerty

password

Iloveyou



SMS



Voice



Authenticator
(Push notifications)



Software Tokens OTP



Windows
Hello



Authenticator
(Phone Sign-in)

Passkeys

- **Passwordless** login
- Replaces traditional username and password
- Unique digital key
- Stored encrypted on device
- Very secure
- Support is still spotty



Password rules

- ❖ Troy Hunt
- ❖ <https://haveibeenpwned.com/>

The screenshot shows the homepage of the 'have i been pwned?' website. At the top, there is a dark navigation bar with a logo on the left and links for 'Home', 'Notify me', 'Domain search', 'Who's been pwned', 'Passwords', 'API', 'About', and 'Donate' on the right. The main content area has a blue background. A large white rounded rectangle contains the text 'have i been pwned?' in a white, lowercase, sans-serif font. Below this, the text 'Check if your email address is in a data breach' is centered. A white search bar with the placeholder text 'email address' is positioned above a dark button labeled 'pwned?'. Below the search bar, there is a link to the terms of use. At the bottom, there is a dark blue banner with a 1Password logo and the text 'Generate secure, unique passwords for every account' and a 'Learn more at 1Password.com' button. Below this banner, the text 'Why 1Password?' is centered. The footer is dark and contains four statistics: '700 pwned websites', '12,651,780,771 pwned accounts', '115,757 pastes', and '228,858,752 paste accounts'.

Home Notify me Domain search Who's been pwned Passwords API About Donate

have i been pwned?

Check if your email address is in a data breach

email address pwned?

Using Have I Been Pwned is subject to the [terms of use](#)

Generate secure, unique passwords for every account [Learn more at 1Password.com](#)

Why 1Password?

700 pwned websites 12,651,780,771 pwned accounts 115,757 pastes 228,858,752 paste accounts

Pwned Password Database

<https://haveibeenpwned.com/Passwords>

The screenshot shows the 'Passwords' page on the Have I Been Pwned website. The navigation bar at the top includes links for Home, Notify me, Domain search, Who's been pwned, Passwords (which is highlighted), API, About, and Donate. The main heading is 'Pwned Passwords', followed by a paragraph explaining that these are real-world passwords from data breaches, making them unsuitable for ongoing use. Below this is a search input field containing the word 'password' and a 'pwned?' button. A promotional banner for 1Password is visible, encouraging users to generate secure, unique passwords. The bottom section is titled 'Password reuse and credential stuffing' and discusses the risks of reusing passwords and the impact of credential stuffing attacks.

Home Notify me Domain search Who's been pwned **Passwords** API About Donate

Pwned Passwords

Pwned Passwords are hundreds of millions of real world passwords previously exposed in data breaches. This exposure makes them unsuitable for ongoing use as they're at much greater risk of being used to take over other accounts. They're searchable online below as well as being downloadable for use in other online systems. [Read more about how HIBP protects the privacy of searched passwords.](#)

 pwned?

Generate secure, unique passwords for every account

[Learn more at 1Password.com](#)

[Why 1Password?](#)

Password reuse and credential stuffing

Password reuse is normal. It's extremely risky, but it's so common because it's easy and people aren't aware of the potential impact. Attacks such as [credential stuffing](#) take advantage of reused credentials by automating login attempts against systems using known emails and password pairs.



Inactivity Timeout

After a period of inactivity, whether computer or application

- Force account logout
- Force computer lock
- Reconsider hibernation
- Require MFA to log back into computer upon locked system
- Screen saver password
- Not everyone will be happy!

Two factor authentication



**Something
you are**



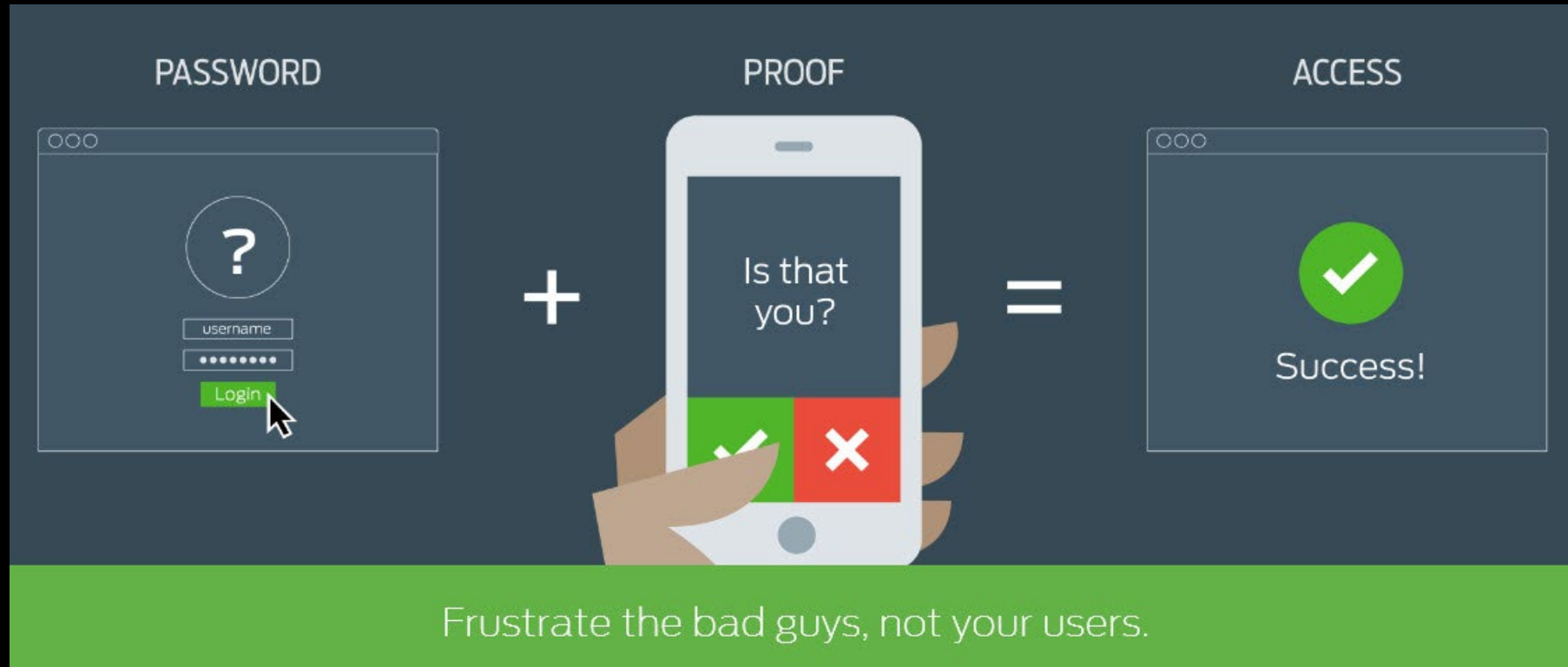
**Something
you have**



To avoid having your identity stolen

- ❖ Enable two-factor authentication
- ❖ EVERYWHERE!

Multifactor Authentication



Microsoft: Using multi-factor authentication blocks 99.9% of account hacks

Microsoft cloud services are seeing 300 million fraudulent sign-in attempts every day. MFA can help protect accounts against many types of account takeover attacks.



By Catalin Cimpanu for Zero Day | August 27, 2019 -- 04:30 GMT (21:30 PDT) | Topic: Security

Duo
Security

The most **secure** way to use 2FA?

- #4 Have code texted to phone, (can be intercepted using SIM swapping or tricking you into entering the code on a false logon screen) **LEAST SECURE** (but way better than nothing!)
- #3 Use an authentication app (generates a new code every 30 seconds)
- #2 Use push notifications, which you can simply accept
- #1 Use a hardware token **MOST SECURE**



Monitoring

- Monitor access to data
- Unauthorized access
- Logging
- IDS/IPS
- Security information and event management (SIEM)
 - Blumira, Perch



Service Account Authorization

- Service accounts are like user accounts
 - Often exist without being aware
 - Like user accounts, but are used by the operating system or software to perform tasks
 - Backups
 - Performing routine tasks
 - Running software
 - Often have Administrator level access, but may not be necessary
 - Understand what accounts are on your Domain and what they do
 - Disable or delete if not needed
 - Stale accounts with Administrator permissions can “hang” around
 - Review periodically

Now that Zero Trust is Implemented

- Regularly review Zero Trust Plan
- Update architecture and infrastructure as needed
- Train on the plan regularly!





Questions?

- Contact us:
- mmaschke@senseient.com
- <https://senseient.com/contact-us>
- 703.359.0700

28th Annual Advanced Real Estate Practice Seminar 2024
What Every Transactional Attorney Should Know About Land Use & Zoning

Karen L. Cohen and Lori H. Schweller
March 2, 2024

I. Basic Land Use Concepts

A. What Is “Land Use & Zoning” and How Does it Impact Real Estate Transactions?

a. Overview

Land use law is the body of state, local and federal laws and regulations governing the development and use of land (and buildings or structures on the land) and the planning of a community’s future land uses. Zoning is just one of the many tools in the “land use” toolkit – a local governing body (e.g., a board of supervisors or a city or town council) enacts zoning laws or a “zoning ordinance” to implement the locality’s planning goals.

Nearly every real estate transaction is impacted by, or is potentially impacted by, land use law issues. Whether it is a residential or commercial purchase or a lease transaction, every purchaser and every tenant cares about what they can and cannot do on the property they are about to buy. If, for example, a homebuyer has her heart set on buying a particular house because it has the perfect studio space for her home-business, then she needs to be sure that the home-business is in fact allowed. Otherwise, she may not want to buy the home – or, at the very least, this issue affects the value of the real estate and the price she is willing to pay for it. Similarly, a prospective commercial tenant would have little use for a lease in a building where his commercial use is prohibited by the local zoning laws. Even if the use is permitted, local zoning regulations may restrict the allowable number of parking spaces to a level that the business owner deems insufficient. Or, the laws may require more parking for his particular use than the site can accommodate.

Assume you have been asked to draft a contract for a buyer-client who comes to you and says, “I found this great property for a wedding venue. And, I’m so lucky! The county already approved it for a wedding venue before, but that person decided not to pursue it. I even have a copy of this thing the seller gave me . . . a ‘special use permit” and it says ‘wedding venue’ right here.” The client is excited to buy the land and start building the dream. Is that the end of the inquiry? *No!* Many follow-up questions need to be answered including: Is the special use permit still good or has it expired? Does it run with the land or was it issued specifically to the applicant who obtained it? Does your client have a complete copy of the permit, and are the conditions attached to it? Even if they are, are those the conditions that were actually approved by the governing body? Is there an approved final site plan? If so, is it still valid or has it expired? These are just a few of the issues – even if there is a valid *land use* approval for the desired use, that is *not* permission to construct anything. Before a shovel can even hit the dirt, further administrative approvals are needed for site development and building permits. These later approvals are separate from, and in addition to, the special use permit or other land use approval.

For the transactional attorney to protect her client in a real estate transaction, she must be aware of the potential land-use related risks and must understand the land use regulatory framework well enough to know how to mitigate those risks in the contract. While the

procedures governing land use vary by locality, there is a generally applicable framework in Virginia. This is because the locality's power to regulate land use derives from the state.

b. Authority of Local Governments to Regulate Land Use

Virginia is a "Dillon Rule" state, which means that "local governing bodies 'have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.'" *Sinclair v. New Cingular Wireless PCS*, 283 Va. 567, 576 (2012) (quoting *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417 (2010)); see 1 John Forrest Dillon, *Commentaries on the Law of Municipal Corporations*, 448-51 (5th ed. 1911). The planning and zoning power of Virginia localities is set forth in the enabling legislation contained in Title 15.2 of the Code of Virginia, entitled "Counties, Cities and Towns," and in Chapter 22 thereof, entitled "Planning, Subdivision of Land and Zoning." Within these sections of the Code, the state legislature has prescribed the authority (and limitations on such authority) of local governments to zone property, regulate uses within zoning districts, and comprehensively plan for future land uses.

While the Dillon Rule mandates that local governments have only the authority that is expressly given by the state, the scope of planning and zoning authority is broad, as evidenced by the legislature's declaration of the intent of Chapter 22:

This chapter is intended to encourage localities to improve the public health, safety, convenience, and welfare of their citizens and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the need for mineral resources and the needs of agriculture, industry, and business be recognized in future growth; that the concerns of military installations be recognized and taken into account in consideration of future development of areas immediately surrounding installations and that where practical, installation commanders shall be consulted on such matters by local officials; that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds.

Va. Code § 15.2-2200.

In prescribing the local government's specific authority to carry out these broad purposes, "the General Assembly of Virginia has undertaken to achieve in the enabling legislation a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights." *Bd. Of Sup'vrs of Fairfax Cnty. v. Snell Constr. Corp.*, 214 Va. 655, 657, 202 S.E.2d 889, 892 (1974).

Citizen engagement is a critical part of land use planning and approvals, and the enabling legislation recognizes this, requiring notice and a public hearing as prescribed, before the local planning commission may recommend or the governing body may adopt any plan, ordinance or amendment to a plan or ordinance. See Va. Code § 15.2-2204 ("The local planning commission shall not recommend nor the governing body adopt any plan, ordinance or amendment thereof until notice of intention to do so has been published once a week for

two successive weeks in some newspaper published or having general circulation in the locality; . . .”).

Thus, land use law is inherently political, too. For both ordinances and land use proposals that require legislative approvals – as opposed to “by right” uses which do not require legislative approval – the governing body typically has wide discretion in deciding whether to grant an approval. A court will uphold the governing body’s decision so long as it was “fairly debatable.”

The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The [C]ourt will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.

Schefer v. City Council of the City of Falls Church, 279 Va. 588, 691 S.E.2d 778 (2010) (quoting *Board of Supervisors of Fairfax County v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959) (emphasis added)). A fairly debatable question is presented “when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.” *City of Manassas v. Rosson*, 224 Va. 12, 17 (1982). Thus, the bar in Virginia is quite high for someone to challenge successfully a locality’s discretionary actions on land use matters.

B. Planning, Zoning, and Land Development

a. The Planning Commission

State law requires that “[e]very locality shall by resolution or ordinance create a local planning commission in order to promote the orderly development of the locality and its environs.” Va. Code § 15.2-2210. The local planning commissions shall serve primarily in an advisory capacity to the governing bodies. *Id.* Thus, land use applications are typically first reviewed by the local planning commission, which votes on a *recommendation* to the governing body of approval or denial; it is the governing body that makes the actual decision, and it may depart from the planning commission’s recommendation.

In addition, the planning commission is required by Va. Code § 15.2-2223 to “prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction,” and every governing body must adopt a comprehensive plan.

b. The Comprehensive Plan

State law requires that the comprehensive plan's purpose be to "guid[e] and accomplish[] a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities." Va. Code § 15.2-2223(A).

Pursuant to the enabling legislation, the comprehensive plan is a written document "with the accompanying maps, plats, charts, and descriptive matter," that "show[s] the locality's long-range recommendations for the general development of the territory covered by the plan." Va. Code § 15.2-2223(C). Some examples of the types of things that may be designated in the comprehensive plan include the designation of areas for various types of public and private development and use, such as different kinds of residential, including age-restricted, housing; business; industrial; agricultural; mineral resources; conservation; active and passive recreation; public service; flood plain and drainage; and other areas; the designation of a system of community service facilities such as parks, sports playing fields, forests, schools, playgrounds, public buildings and institutions, hospitals, nursing homes, assisted living facilities, community centers, waterworks, sewage disposal or waste disposal areas, and the like; the designation of historical areas and areas for urban renewal or other treatment; the designation of areas for the implementation of reasonable measures to provide for the continued availability, quality, and sustainability of groundwater and surface water; a capital improvements program, a subdivision ordinance, a zoning ordinance and zoning district maps, mineral resource district maps and agricultural and forestal district maps, where applicable; and the designation of corridors or routes for electric transmission lines of 150 kilovolts or more.

Comprehensive plans are supposed to reflect careful consideration of the community's transportation requirements, public services and facilities, and land use to plan for the future. See Va. Code § 15.2-2223. However, using a general plan for growth as the sole basis for denying a zoning application may be insufficient, depending on the facts of the case. For example, if a request for a land use approval involving increased density is denied on the basis that the comprehensive plan envisions development only where there are adequate public facilities, evidence is required that public facilities are inadequate for the proposed project. Three northern Virginia cases from 1975-1980 illustrate attempts to regulate growth and the increasing role of a locality's comprehensive plan in such efforts.

In *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434 (1975), Allman owned over 300 acres in western Fairfax County lying along Route 228, just south of its intersection with Route 7. He attempted to rezone the property from low-density residential to a higher density, which would have been consistent with the comprehensive plan. His request was denied by the Board of Supervisors in 1971 based on concerns about availability of public services and the County's unwritten policy to direct growth to the newly developing Reston. The comprehensive plan was silent as to whether public facilities needed to be in place prior to rezoning to a higher density. Further, the evidence showed that public facilities would not be unduly taxed by the proposed rezoning, and the Board approved another rezoning in the same area only a couple of months later. Following a long legal battle, the Supreme Court found the Board's decision unreasonable and directed the Board to reconsider its denial of the rezoning.

In *Board of Supervisors of Fairfax County v. Williams*, 216 Va. 49 (1975), the Board of Supervisors denied two requests for rezoning to a higher density for residential development on the basis that public facilities in the area were inadequate, relying exclusively on the comprehensive plan policies enacted to avoid higher density in the applicable portion of the county until public facilities were available or would be available in the near future. The trial court held the Board's denial to be unreasonable, finding from the evidence that the public facilities at issue were either available or were soon to be available. The Supreme Court agreed, noting that the trial court made four important factual findings: (1) public facilities were available, (2) similarly situated properties had already been rezoned for higher density, (3) the existing zoning of the subject property was unreasonable, and (4) denial of the rezoning was discriminatory. The Court agreed that the Board's decision was arbitrary and capricious and the reasonableness of the Board's denials was not fairly debatable.

However, in *Board of Sup'rs of Loudoun Co. v. Lerner*, 221 Va. 30 (1980), the Court upheld the denial by the Board of a request for rezoning based on specific provisions in the Comprehensive plan. The Comprehensive Plan established specific standards "as guidelines for new commercial development." "For a regional shopping center, the Plan provided a standard, among others, of a 'minimum population to support' of 100,000 to 200,000 within a radius of 5 to 15 miles for a center containing 400,000 to 1,000,000 square feet." Planning staff found that the application met all standards set out in the comprehensive plan except the population minimum described above, but staff cited other factors such as income levels as more significant and supportive of the regional shopping facility. The planning commission voted to recommend approval, but the board of supervisors denied the application. The Court held that denial on the basis of failure to meet the stated comprehensive plan population minimum was reasonable. The Court evaluated underlying facts, finding that Lerner and the Board had different interpretations of the meaning of the minimum population requirement. It held that Lerner failed to overcome the presumption of reasonableness with probative evidence of unreasonableness.

One clear distinction between *Williams* and *Lerner* is that the guidelines for controlling growth in the comprehensive plan relied on by the Board in *Williams* were very specific criteria. The standards in *Williams* were apparently too vague to be relied on as a grounds for denial.

The enabling legislation requires certain specific areas to be covered in a comprehensive plan. For example, the plan must designate areas for and address strategies for affordable housing, see Va. Code § 15.2-2223(D), and broadband infrastructure, see Va. Code § 15.2-2223(E). Prior to adoption of any comprehensive plan (or any amendment thereto), or in connection with a proposed rezoning, the locality must submit the plan or amendment to the Department of Transportation for review and comment if the plan or amendment will substantially affect transportation on state-controlled highways. Va. Code § 15.2-2222.1.

At least once every five years the comprehensive plan must be reviewed by the local planning commission to determine whether it is advisable to amend the plan. § 15.2-2230. Such amendments must be made with notice and a public hearing as provided in § 15.2-2204.

In connection with the comprehensive planning process, local planning commissions may, and at the direction of the governing body must, prepare and revise annually a capital improvement program based on the comprehensive plan. Va. Code § 15.2-2239. The capital improvement program is the basis of the capital budget for the locality, and will include the commission's recommendations, and estimates of cost of the facilities and life cycle costs, including any road improvement and any transportation improvement the locality chooses to

include, and the means of financing them, to be undertaken in the ensuing fiscal year and in a period not to exceed the next four years. *Id.*

Development of public facilities not already shown on the comprehensive plan or otherwise deemed in accord therewith must be evaluated by the planning commission and determined to be “substantially in accord with” the comprehensive plan. Va. Code § 15.2-2232.

In summary, the comprehensive plan is a required and necessary planning tool, but it is not part of the locality’s code of ordinances. Nevertheless, the plan may inform the governing body’s land use decisions. See *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30, 267 S.E.2d 100 (1980) (rezoning); *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986) (special use permit).

Practice Tips for the Transactional Lawyer:

- *If you represent the buyer or lessee in a transaction, make sure an analysis of the relevant jurisdiction’s comprehensive plan is part of due diligence.*
- *Talk to the planning director or someone in the planning department to find out whether all or any part of the comprehensive plan is under review or slated for a potential revision that might affect the property at issue. The property your client has his eye on might be on the verge of getting pulled into or out of a special planning district that could affect what he can or cannot do there. Such information would be relevant to a seller, too.*
- *Consider whether your client will need to obtain a comprehensive plan amendment (CPA) in addition to other land use entitlements such as a rezoning or special use permit.*
- *Check the ordinance about who may initiate a CPA and when – some jurisdictions only allow CPAs at a set time of year.*
- *If the contemplated use is considered a “public facility” under Va. Code 15.2-2232, or even if a public facility such as a public trail is part of the use, the locality may require a public facilities review (also known as a “2232 review” or “substantial accord” determination) by the planning commission.*

c. Enabling Authority for Zoning Ordinances

The legislature has granted to localities the express power to classify land into districts (zoning districts) and to regulate, restrict, permit, or prohibit certain uses in those districts. The division of land into zoning districts based on use classifications is known as “Euclidean” zoning:

Conventional zoning is called “Euclidean”, named after the Town of Euclid, Ohio, whose zoning ordinance was upheld by the U. S. Supreme Court in a landmark case in 1926. This conventional approach divides the land within the jurisdiction into discreet geographic districts based on the general use and intensity that is permitted for land and buildings. Typical zoning districts under this approach are residential, commercial and industrial. Many variations on this approach have been devised during the past nearly 90 years, and many of these are used in various localities in Virginia. One prominent variation of conventional zoning is called “Planned Unit Development” (PUD), in which some amount of flexibility is permitted for lot sizes and uses within the district, based upon a detailed conceptual development plan submitted by the applicant.

American Planning Association (APA) Virginia Chapter, Managing Growth and Development in Virginia (November 2017).

Localities also are expressly empowered to regulate, among other things, the size, bulk and height of buildings, and how much of a lot may be occupied by structures and how much open space must remain, Va. Code § 15.2-2280, subject to the requirement that such regulations must be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts. Va. Code § 15.2-2282.

Localities must design their zoning ordinances giving reasonable consideration, where applicable, to the purposes set forth in Va. Code § 15.2-2283, which address general health, safety and welfare concerns, as well as specific topics such as flood protection, historic areas, danger and congestion in travel and transportation, economic development, protection of the natural environment, airport and military air facilities, affordable housing, the ADA, and water quality, to name just a few.

The planning commission must hold at least one public hearing on any proposed ordinance or amendment thereto, after notice as required by § 15.2-2204, and when the commission completes its work, it presents the proposed ordinance or amendment to the governing body together with its recommendations and appropriate explanatory materials. Va. Code § 15.2-2285. The governing body also must hold at least one public hearing, after providing the requisite notice.

In the case of a proposed amendment to the zoning map (a “rezoning”), the public notice must state the general usage and density range of the proposed amendment and the general usage and density range, if any, set forth in the applicable part of the comprehensive plan. No land may be zoned to a more intensive use classification than was contained in the public notice without an additional public hearing after notice required by § 15.2-2204.

Va. Code § 15.2-2286 sets forth in detail the provisions a zoning ordinance may include. These provisions are too numerous to list here in detail; however, they include provisions for (1) variances or special exceptions, as defined in § 15.2-2201, to the general regulations in any district; (2) the temporary application of the ordinance to territory annexed to the jurisdiction; (3) the granting of special exceptions under suitable regulations and safeguards; and (4) the administration and enforcement of the ordinance including the appointment or designation of a zoning administrator to administer and enforce the zoning ordinance.

Practice Tips for the Transactional Lawyer:

- *Find the property on the locality's GIS mapping tool and use the "Layers" tool and the property card or property detail to identify the property's zoning. Trust, but verify – confirm this with the planning office.*
- *Thoroughly review the zoning ordinance to make sure the use is allowed on this property.*
- *Understand fully what it is your client really wants to do on the property. It is possible that the use they've described constitutes more than one use, or that, under the zoning ordinance, part of what they are doing constitutes a "primary use" and another part is a "secondary" or "accessory" use.*
- *Check the "Definitions" section of the ordinance and review it thoroughly – you may think you've identified the right use but there may be another defined use that is more specific and the zoning administrator would find applicable (e.g., "retail store" and "convenience store" and "grocery store" and other like terms all may be listed as defined terms and may have different permitting standards and may or may not be allowed in a given zoning district).*
- *Look at the list of uses allowed in the applicable zoning district and determine whether the use is allowed "by right" or whether legislative approval is needed.*
- *Some jurisdictions provide that the Board of Zoning Appeals (BZA), a quasi-judicial body, hears certain types of zoning cases, while the governing body (e.g., county board of supervisors, town or city council) hears other types of cases. Check the ordinance and confirm with the planning director.*

d. Powers and Duties of the Zoning Administrator

The zoning administrator is expressly authorized to (i) order in writing the remedying of any condition found in violation of the ordinance; (ii) insure (sic) compliance with the ordinance, bring legal action, including injunction, abatement, or other appropriate action or proceeding subject to appeal pursuant to § 15.2-2311; and (iii) in specific cases, make findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under § 15.2-2307 or subsection C of § 15.2-2311 (discussed in detail in the case law portion of these materials). Va. Code § 15.2-2286(A)(4).

Practice Tips for the Transactional Lawyer:

- *Get a zoning confirmation to confirm the property's zoning. Maybe what you found on the GIS is wrong. For example, the official map may indicate that the parcel is split-zoned, whereas the GIS tool labeled it with one zoning district.*
- *Confirm there are no uncured zoning violations.*
- *Find out whether there are any proffers or conditional use permit conditions affecting the property (the online tools for that info vary greatly among localities; again, even if you find it online, you must obtain an official verification).*
- *Determine whether all you need is a zoning confirmation/verification or whether you need a zoning determination (e.g., use classification, vested rights determination).*
- *A letter from the zoning administrator saying that a certain use type is permitted on that parcel under the zoning ordinance (e.g., daycare is permitted) is not a "determination" that your client is entitled to construct or operate her particular daycare project – it does not confer vested rights (see section k below).*

e. Zoning Amendments

Zoning amendments may occur by amendment to the zoning regulations (a "zoning text amendment") or by an amendment to the zoning map (a "rezoning" or "zoning map amendment"). Zoning amendments may be initiated (i) by resolution of the governing body; (ii) by motion of the local planning commission; or (iii) by petition of the owner, contract purchaser with the owner's written consent, or the owner's agent, of the property which is the subject of the proposed zoning map amendment. Va. Code § 15.2-2286(A)(7).

f. Conditional Zoning

Conditional zoning allows reasonable conditions, known as proffers, to be voluntarily offered by the applicant during a rezoning process as a way of mitigating the impacts of the proposed rezoning. See Virginia Code §§ 15.2-2296 through 15.2-2303.3.

In a commercial rezoning, an owner may proffer land, infrastructure improvements, or cash, or may voluntarily agree to other conditions, including restrictions on the use of the property or promising to use (or not use) certain building materials or architectural features. These proffers, if accepted by the governing body as part of the rezoning approval, become part of the zoning ordinance as it applies to that property. *Rowland v. Town Council of Warrenton*, 298 Va. 703, 842 S.E.2d 398 (2020).

Projects that might not otherwise be approved may be approved with conditions that adequately mitigate the impacts, and therefore, conditional zoning is a tool that has been thought to benefit both developers and communities. Proffers are subject to a “reasonableness” requirement, which is assessed under the well-established constitutional principles that the proffered condition must have an essential nexus with, and be roughly proportional to, the development’s impact. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) (essential nexus); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) (rough proportionality). Proffers for residential development are subject to additional requirements set forth in Va. Code § 15.2-2303.4.

g. Special Exceptions

Section 15.2-2286(A)(3) of the Virginia Code enables local governing bodies to grant special exceptions. Within a typical zoning ordinance, permitted and prohibited uses are listed for particular zoning districts. Some uses are said to be permitted “by right,” while others are allowed by “special exception,” and others are expressly prohibited. Some jurisdictions use the term “special use permit” or “conditional use permit” in place of the term “special exception.” Some use “special exception” and “special permit” to differentiate uses that are approved by the governing body versus those that the governing body has delegated to the Board of Zoning Appeals.

Special exception uses are permitted, but because it is thought that such uses produce greater impacts than by right uses on neighboring land (e.g., traffic, noise, light emissions), such permission is subject to a public hearing, where proponents and opponents may voice their opinions, and ultimately, the permit is issued only if the governing body votes to approve its issuance. Requiring such applications to go through the legislative process allows citizens to comment, and allows the locality to impose conditions on the use to mitigate the adverse impacts.

h. Variances

The state code defines a variance as:

[A] reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

Virginia Code § 15.2-2201. The Virginia Supreme Court explained the difference between a special exception and a variance in *Bell v. City Council of Charlottesville*, 224 Va. 490 (Va. 1982):

The state enabling legislation does distinguish between variances and special exceptions. A variance may be granted when the location or shape of the property or other special

circumstances would create a hardship if the zoning ordinance was strictly enforced. It allows a property owner to do what is otherwise not allowed under the ordinance. *Fairfax County v. Southland Corp.*, 224 Va. 514, 522, n. 2, 297 S.E.2d 718, 722 (1982). In contrast, a special exception does not allow a landowner to do something in violation of the ordinance. Instead, the property may be developed in a way consistent with the ordinance, but only with approval of the City after specified conditions are met. *Id.* at 521-22, 297 S.E.2d at 722. Nothing in the enabling act prevents the alteration of setback and height requirements as part of the issuance of a special exception.

Bell, 224 Va. at 496. Thus, a true variance is, by definition, something that should only be granted in unique (limited) circumstances; in practice, however, variances are often misunderstood and sometimes granted when the circumstances do not warrant a variance. Where the landowner's issue could be addressed by an amendment to the zoning ordinance of general application (e.g., changing the setbacks for that zoning district), a variance is not the appropriate mechanism – in that case, a zoning text amendment would be the appropriate action.

i. Land Development

Localities are required to adopt a subdivision ordinance “to assure the orderly subdivision of land and its development.” Va. Code § 15.2-2240. The subdivision ordinance contains requirements for subdivision plats, procedures for review and approval, and provisions for bonding public infrastructure improvements associated with the subdivision of land into parcels or lots of development. Landowners may not subdivide their land without making and recording a plat of the subdivision that fully complies with the subdivision ordinance. Va. Code § 15.2-2254. The subdivision plat may not be recorded unless and until it has been submitted to and approved by the local planning commission or by the governing body or its duly authorized agent, usually a locality's “land development” division or like agency.

Mandatory provisions of a subdivision ordinance are set forth in Va. Code § 15.2-2241, and are too extensive to list in full here; however, some of those provisions apply to or generally provide for plat details which must meet certain standards; for the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage; for adequate provisions related to drainage and flood control; for the extent to which and the manner in which streets shall be graded, graveled or otherwise improved and water and storm and sanitary sewer and other public utilities or other community facilities are to be installed; for the acceptance of dedication for public use of any right-of-way located within any subdivision, and for the provision of other site-related improvements required by local ordinances for vehicular ingress and egress; for storm water management facilities, financed or to be financed in whole or in part by private funds, appropriately bonded as provided in the statute; for conveyance of common or shared easements to franchised cable television operators and gas, telephone and electric service providers; and for reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner (“Family Land Subdivision”), among others.

Optional provisions for a local subdivision ordinance are set forth in Va. Code § 15.2-2242. Site plans or plans of development are subject to the same statutory requirements as subdivision plats. Va. Code § 15.2-2246. As with other land planning ordinances, the governing body may approve and adopt the subdivision ordinance only after notice has been published, and a public hearing held, in accordance with § 15.2-2204. Provisions for vacating easements and plats are set forth in § 15.2-2270 and -2271, respectively.

j. Permit Validity Period

Generally, site plans are valid for a period of five years:

An approved final subdivision plat which has been recorded or an approved final site plan, hereinafter referred to as "recorded plat or final site plan," shall be valid for a period of not less than five years from the date of approval thereof or for such longer period as the local planning commission or other agent may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development. A site plan shall be deemed final once it has been reviewed and approved by the locality if the only requirements remaining to be satisfied in order to obtain a building permit are the posting of any bonds and escrows or the submission of any other administrative documents, agreements, deposits, or fees required by the locality in order to obtain the permit.

However, in 2020, a subpart F was added, which provides:

An approved final subdivision plat that has been recorded, from which any part of the property subdivided has been conveyed to third parties (other than to the developer or local jurisdiction), or a recorded plat dedicating real property to the local jurisdiction or public body that has been accepted by such grantee, shall remain valid for an indefinite period of time unless and until any portion of the property is subject to a vacation action as set forth in §§ 15.2-2270 through 15.2-2278.

Virginia Code § 15.2-2261(F) (amended in response to the Virginia Supreme Court's decision in *Loch Levan Land Limited Partnership v. Board of Supervisors of Henrico County*, 297 Va. 674, 831 S.E.2d 690 (2019) (developer did not have vested right to construct road over dedicated right-of-way shown on recorded subdivision plat; plat was held to have been valid only for five years)).

In response to the COVID-19 pandemic, in 2020, the legislature also extended to July 1, 2025, the validity period for not just site plans, but other land use permits (special exceptions, conditional zoning) that contain time periods for performance that would otherwise expire. Va. Code § 15.2-2209.1:1 (titled "[e]xtension of approvals to address the COVID-19 pandemic"; subpart A for site plans and subdivision plats; subpart B for special exceptions, special use permits or conditional use permits; subpart C for conditional zoning (rezonings and proffers)). Note that the enactment clause to this legislation, which does not appear in the Code text, provides "[t]hat any extension of approvals outstanding as of

July 1, 2020, shall apply to any such approvals granted subsequent to July 1, 2020, that expire prior to July 1, 2025.”

Practice Tips for the Transactional Lawyer:

- *If your client or the seller’s broker tells you there’s an “approved site plan,” ask more questions: Is it a preliminary or final site plan? Is it valid and recorded? What is the validity period?*
- *Remember that having a valid final site plan **alone** does not confer vested rights. (See section k below on vested rights.)*
- *Make sure you understand the scope of easements – not just the written instrument, but the associated plat and the physical dimensions and layout of easements that may affect your client’s plans for the property.*
- *Remember that even if seller provides a copy of a special use permit or an approved rezoning, or other documentation of a legislative or BZA land use approval, the project cannot be built without land development and building permits.*
- *Do you want the purchase contract to be contingent on just obtaining legislative approvals? Or legislative approvals plus site plan? All the way through final site plan? What about building permits? All the way through obtaining a certificate of occupancy? It can be whatever the parties agree to, but you need to know what you’re asking for so that the contract can be made clear. (See Part II, infra, for how to draft various zoning contingency provisions.)*
- *If you want the purchase to be contingent on obtaining additional permits, you may need a longer study period in your contract to obtain additional land development approvals, to vacate or modify easements, etc.*
- *The contract needs to address who is responsible for obtaining which permits, and what “responsible” means. It may mean simply “cooperation”; it may mean something more.*
- *The contract needs to be clear about who pays for what in the approval process (application fees, engineering, environmental studies, legal, etc.)*
- *The contract needs to be clear about what happens if the approval is not obtained.*

k. Vested Rights

“Vested rights” is sometimes used as an umbrella term to describe generally a landowner’s right to conduct an activity that was once allowed but is prohibited under current zoning law.

However, “vested rights” has a particular meaning under Virginia law, and it is just one of several distinct sources of property rights.

This section contains excerpts from an article written by Karen Cohen in the December 2020 issue of *The Fee Simple*, available at the Real Property Section link at vsb.org. A copy of the full article also is attached to this outline.

Determining whether a landowner has vested rights under Virginia law is highly fact-dependent. Indeed, local boards of zoning appeals, circuit courts, and the state’s highest court often reach conflicting results in vested rights cases, as indicated by the outcomes of court decisions (discussed below).

It is helpful to begin by separately examining the sources and usage of three terms that are often conflated under the umbrella term, “vested rights” – so-called “grandfathering”; nonconforming; and vesting. Generally, in the land use context, “grandfathering” refers to when someone is permitted to follow old rules or laws that once allowed their activity instead of following newly implemented rules or laws that would presently apply to prohibit or limit that same activity. Those exempt from the new rule or law are sometimes said to have been “grandfathered in”; those who are not “grandfathered in” must abide by the new rules. Here is an example of such a clause, permitting subdivision applications filed before a certain date to be reviewed under pre-existing requirements (i.e., the rules that existed before the county adopted new rules):

Complete applications for final subdivision approval which have been filed before the close of business on October 9, 1996, which were in compliance with all substantive zoning and subdivision ordinance requirements in effect on that date shall be reviewed in accordance with those requirements.

Bertozzi v. Hanover County, 261 Va. 608, 610 (2001) (holding that, “under the grandfather clause,” subdivider was entitled to have his applications reviewed in accordance with the pre-existing ordinance requirements as the county had previously interpreted such requirements).

“Vested rights [] protect a landowner’s right to develop a specific project under existing zoning conditions and allow continuation of the non-conforming use when that zoning designation is amended or changed.” *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566 (2019) (quoting *Board of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 282 (2006)). Thus, vested rights “shall not be affected by a subsequent amendment to a zoning ordinance.” *Id.* (quoting Code § 15.2-2307(A)).

In addition to vesting of rights under common law principles, *see, e.g., Board of Supervisors of Fairfax County v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972), vested rights in Virginia are codified in Virginia Code §15.2-2307. Code §15.2-2307 sets forth more than one type of vesting. The first three subsections of the statute refer to two types of vesting, which can be referred to in shorthand as: (1) SAGA; and (2) lawful nonconformance. In “SAGA vesting,” landowners potentially can acquire vested rights because they are the beneficiary of a significant affirmative governmental action (SAGA), and the SAGA specifically allows the very thing that they are claiming they are entitled to do. If they also can show that they have relied in good faith on the SAGA and incurred extensive obligations or substantial expenses in diligent pursuit of a specific project in reliance on the SAGA, then they have a

vested right to do that project under Va. Code § 15.2-2307(A), even if there is a subsequent amendment to the zoning ordinance that would prohibit it.

Lawful nonconformance allows uses and structures that were once lawful to remain, subject to certain limitations, even though the current ordinance no longer allows them. The vesting statute also provides for vesting through the payment of taxes over a period of time in certain circumstances, and for remedial vesting where the zoning administrator or other official has approved a use or structure, the owner relies on that approval, and more than 60 days passes before an official attempts to reverse the approval. Each of these are discussed briefly below (and more extensively in the article referenced above).

SAGA Vesting

Va. Code § 15.2-2307(A) provides:

Nothing in this article shall be construed to authorize the impairment of any vested right. Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Code § 15.2-2307(B) lists examples of actions that may be considered significant affirmative governmental acts. Pursuant to Va. Code § 15.2-2307(B):

For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property; or (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.

For example, say a landowner applied for and received approval to rezone a parcel of land to build a 100-unit townhome project. The project is depicted in the generalized development plan (GDP) that was required with the application, and it has been approved by the governing body. If the owner has relied in good faith on that approval and incurred extensive obligations in diligent pursuit of the project, then the owner's right to do the particular 100-unit townhome project shown on the GDP is vested, because an approved rezoning for a specific use or density is one of the listed SAGAs. Note that the fact that the landowner has vested rights does not preclude the locality from rezoning that land. Let's assume the landowner had acquired a vested right to build the townhome project and then built it. The locality could subsequently enact a new ordinance rezoning that parcel, and at that point, the townhome project would be considered "lawfully nonconforming." See *Bragg Hill*, *supra*.

Lawful Nonconformance

This type of vesting – lawful nonconformance – also derives from Code § 15.2-2307, subpart C, which enables localities to enact zoning ordinances that provide for a landowner's right to continue or maintain lawfully nonconforming "land, buildings, structures, and the uses thereof," subject to certain conditions and limitations. Va. Code §15.2-2307(C) provides in part:

A zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever, with respect to the building or structure, the square footage of a building or structure is enlarged, or the building or structure is structurally altered as provided in the Uniform Statewide Building Code (§ 36-97 et seq.).

A nonconforming lot, nonconforming building, or nonconforming use, respectively, means "a lawful [lot, building or use] existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance." *Hardy v. Board of Zoning Appeals*, 257 Va. 232, 235 (citations and internal quotation marks omitted). While the law protects property rights in permitting the continuance of nonconformities, such nonconformance is disfavored, and therefore, subject to certain limitations. The purpose of the law is "to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy opposes the extension and favors the elimination of nonconforming uses. Nonconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan." *Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 43 (1997) (citing 8A Eugene McQuillin, *Municipal Corporations* § 25.184 (3d ed. 1994)). The legislature's approach to permitting nonconformities in certain circumstances – a type of "vesting" – reflects the tension between the desire to protect individual property rights and to not unduly hamper local governments' efforts to promote public health, safety and welfare through long-range land use planning. *Id.*

Unlike SAGA vesting, the enabling legislation for the nonconformity portion of the vesting statute permits localities to condition or limit, or even cause an owner to lose, vested rights. For example, an owner's discontinuance of a lawfully nonconforming use for more than two

years can cause the owner to lose the right to continue the use. See *Prince William County Board of Supervisors v. Archie*, 296 Va. 1 (2018) (“Code § 15.2-2307(C) provides for a locality to adopt a zoning ordinance that allows nonconforming uses to continue unless the use is discontinued[.]”). Additionally, the locality may provide that the owner is only allowed to continue such nonconforming uses or buildings if they do not intensify the use or do not enlarge the building. See Va. Code § 15.2-2307(C) (“[Lawfully nonconforming] land, buildings, structures, and the uses thereof . . . may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; . . .”). See *Archie, supra*, affirming circuit court’s judgment in favor of landowner that automobile graveyard was a lawfully nonconforming use.

Tax Payment Vesting

Va. Code § 15.2-2307(D) prohibits the government from requiring removal of a building or structure that was previously built in accordance with a building permit issued by the government, and upon completion, a certificate of occupancy or use permit was issued, or if the owner has paid taxes for that permitted building or structure for more than the previous 15 years. See *Board of Supervisors of Fairfax County v. Cohn, et al.*, 296 Va. 465, 473 (2018) (discussing this provision but finding that it only prevented removal of the structure, and where owners’ use of garage as a dwelling with kitchens and plumbing was unlawful, there was no vested right to such unlawful use, and the county could require the owner to remove the kitchens and plumbing that supported the unlawful use of the structure as a dwelling). In other words, the owners had paid taxes for the requisite period and had, therefore, acquired a vested right to have the structures remain – but only to remain for lawful uses: a garage and a garden house, not dwellings.

Remedial Vesting

In addition to the vested rights conferred by Va. Code § 15.2-2307, discussed above, a landowner may acquire a vested right “to use property in a manner that otherwise would not have been allowed,” *Board of Supervisors of Richmond County v. Rhoads*, 294 Va. 43, 52 (2017), pursuant to Va. Code § 15.2-2311(C), which provides:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud.

In *Rhoads*, the owners filed an application to build a 2-story garage, and the application was approved. The owners, in reliance on the approval, built the garage at a cost of approximately \$27,000. *Rhoads*, at 47. About a month after they built the garage, a new zoning administrator informed the owners that the previously approved 2-story garage was in violation of the city ordinance, which prohibited a garage from being taller than the primary structure (the house). The owners appealed the decision of the zoning administrator and the

BZA denied their appeal, affirming the zoning administrator's decision that the garage violated the ordinance. The owners then appealed to the circuit court. The circuit court reversed the BZA, finding that the owners were entitled to relief under Va. Code § 15.2-2311(C). The Board of Supervisors appealed, and the Supreme Court of Virginia affirmed the circuit court, finding in favor of the owners.

The Board had argued that Va. Code § 15.2-2311(C) did not apply because the first zoning official (the one who erroneously approved the 2-story garage), "lacked the authority to approve a plain violation of the Zoning Ordinance, and the Certificate he issued was therefore void ab initio." The Board also claimed that the "Certificate" approving the garage was not a "determination" within the meaning of the statute. Additionally, it asserted that the statute only applies to bar the subsequent actions of a zoning administrator or other administrative officer, and not those of any other body, such as the Board or a court. The court rejected all three arguments.

The court found that the plain terms of the statute clearly prescribe the prerequisites for when Va. Code § 15.2-2311(C) applies, namely: (1) a written order, requirement, decision or determination made by the zoning administrator; (2) the passage of at least 60 days from the zoning administrator's determination; and (3) a material change in position "in good faith reliance on the action of the zoning administrator." There was no question that more than 60 days elapsed between the zoning administrator's initial approval and his successor's later assertion of a zoning violation and it was undisputed that the Rhoadses materially changed their position in good faith reliance on the zoning administrator's approval of their specific plans, because they built the garage at a cost of nearly \$27,000.

With respect to the Board's argument that the initial grant of approval was erroneous and in violation of the zoning ordinance, and therefore void ab initio, the court noted that while "prior to 1995 administrative zoning decisions that violated the zoning laws were void and property owners bore the sole responsibility for the consequences of a government's zoning mistake (citations omitted), . . . [t]he plain language of Code § 15.2-2311(C) indicates that the statute is intended to eliminate the hardship property owners have suffered when they rely to their detriment upon erroneous or void zoning decisions." *Rhoads*, 294 Va. at 51. "The remedial purpose of Code § 15.2-2311(C) is to provide relief and protection to property owners who detrimentally rely in good faith upon erroneous zoning determinations and who would otherwise suffer loss because of their reliance upon the zoning administrator's error. Thus, Code § 15.2-2311(C) manifestly creates a legislatively-mandated limited exception to the judicially-created general principle that a building permit issued in violation of applicable zoning ordinances is void." *Id.*

The Board also claimed that even if the Certificate was not void ab initio, the signed Certificate was still not a "written order, requirement, decision or determination" by the zoning administrator. The Supreme Court rejected this argument, explaining that "[i]n issuing the Certificate, the zoning administrator necessarily made a determination that the building plans complied with the Zoning Ordinance in all respects. . . . The issuance of the Certificate clearly constitutes a decision or determination by the zoning administrator that the building plans complied with the Zoning Ordinance." *Id.* at 52.

Finally, the Board also claimed that Code § 15.2-2311(C) only binds a zoning administrator, but need not and should not be considered by any other body such as a board or a court in determining if there is an enforceable violation of a zoning ordinance. The court rejected this argument, finding "[b]y its terms, Code § 15.2-2311(C) and its vesting provisions must be

considered and enforced by a BZA, a board of supervisors, or a court in making a zoning determination or reviewing its correctness, if the prerequisites for the application of the statute are satisfied.” 294 Va. at 54. So long as the zoning administrator has made a “decision” or “determination” within the meaning of Code § 15.2–2311(C), the BZA and board are bound, otherwise, the statute “would afford scant, if any, protection to the property owner, and would not serve to ‘remedy the mischief at which [the statute] is directed.’” *Id.* at 55. “The remedial purpose of the statute requires the statute to be interpreted so as to provide relief and protection to property owners who rely in good faith upon erroneous zoning determinations . . . [o]nce the Rhoads’ rights vested, they were not subject to alteration by the zoning administrator, the BZA or the Board.” *Id.*

Zoning Letters and Determinations as Sources of “Vesting”

Whether or not a landowner acquires vested rights by virtue of a zoning official’s letter or determination also is highly fact-dependent. In *Rhoads*, the zoning administrator affirmatively approved the zoning for the garage project at issue, and in that case, the court found that the “Certificate of Compliance” constituted a “determination” by the zoning administrator. The court distinguished cases in which letters or other written communications from officials have been found to lack the definitive and specific approval needed to constitute a determination. See *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 354–56 (2013) (Code § 15.2–2311(C) did not apply to a “Cash Receipt” signed by a zoning administrator, because that document “was not a specific determination by the zoning administrator or any other City official that either of these businesses could use their respective premises in a manner not otherwise allowed under the zoning ordinances in effect at that time.”).

Other cases involving the issue of whether a zoning administrator’s letter constitutes a determination or decision upon which an owner may obtain vested rights have made clear that rights only vest to the extent of what is clearly approved in such letters. See e.g., *Board of Supervisors of Prince George County v. McQueen*, 287 Va. 122 (2014) (no vested rights accrued where zoning administrator did not “affirmatively approve” the project; rather, the “compliance letter” at issue “simply answered the question concerning the classification of [plaintiff’s] project” and stated in the letter that “the verification was subject to change.”); *James v. City of Falls Church*, 280 Va. 31, 44 (2010) (holding that a zoning administrator’s mere “interpretation” that the zoning ordinance permitted a consolidation with the caveat that actual approval of the requested consolidation was a planning commission function “lacked the finality of an ‘order, requirement, decision or determination’ under Code § 15.2–2311(C),” such that no vesting occurred); *Board of Supervisors of Stafford County v. Crucible*, 278 Va. 152, 160–61 (2009) (finding that Code § 15.2–2311(C) did not apply to a “zoning verification letter” because the letter did not affirmatively approve the project at issue and establish a vested right, but merely interpreted the definition of “school” under the then-current zoning laws).¹

No Property Interest in Mere Expectations for Project Not Yet Approved

Finally, it is worth noting that federal courts have invoked similar principles when evaluating whether a landowner has a constitutional property interest in anticipated development plans

¹ We recommend to the reader the article published in Fall 2018 of *The Fee Simple* entitled, “Bound and Determined: The Power of a Virginia Zoning Determination,” by Michelle A. Rosati and David I. Schneider. Through a series of vignettes, the authors explore the complex nuances of Va. Code §§15.2-2286, 15.2-2307, and 15.2-2311.

that are thwarted by regulatory action. The Fourth Circuit has reiterated that a landowner does not acquire vested rights to develop a “hoped for” or anticipated project that has yet to be approved by the governing body.

In *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685 (4th Cir. 2018), the Fourth Circuit concluded that Pulte failed to state viable constitutional claims, affirming the federal district court. After Pulte had invested more than twelve million dollars to purchase several hundred transferable development rights (TDRs) and recorded ownership of the TDRs, intending to build between 954 and 1,007 detached homes and townhomes on the land it had purchased in the TDR receiving area, the County amended its 1994 Master Plan, implementing a variety of regulatory changes that severely reduced the number of dwellings Pulte could build on its land, and placed additional costly burdens on Pulte, such as a requirement to dedicate parkland.

Pulte alleged that, as a result of the changes to the 1994 Master Plan on which it had relied when it made its purchase, it now could only develop 17% of its land. The court held that Pulte had no constitutional property interest to develop its land under the 1994 Master Plan. The court explained that “the 1994 Master Plan plainly apprised all who read it that it was intended to be revised . . . and the County could . . . take whatever land use actions it deemed necessary,” and that even after prerequisites listed in the plan were satisfied, local officials retained discretion to determine whether those criteria were met. The court reiterated its longstanding rule that any “significant discretion” left to “zoning authorities defeats the claim of a property interest.”

Here, it was clear that the zoning authorities retained significant discretion to make changes to the plan, and therefore, Pulte had “only a hope, not a legally cognizable expectancy” of being able to develop what it wanted. Indeed, the court noted that “[i]f Pulte expected to easily obtain approval to construct approximately one thousand homes there, that expectation was not reasonable in light of the text of the 1994 Master Plan.” See also *Loch Levan Limited Partnership, et al. v. Board of Supervisors of Henrico County, et al.*, 297 Va. 674 (Aug. 22, 2019) (vested rights doctrine “inapplicable where there is no underlying property right for the constitution to protect”).

Practice Tips for the Transactional Lawyer:

- *Help your client understand that just because she has a “permit” or “approval” or a zoning letter in hand, that alone does not mean she has “vested rights.”*
- *Depending on the level of detail of the approval and the type of approval obtained, your client may have vested rights.*
- *Determine whether it would be prudent to obtain a vested rights determination from the Zoning Administrator, with the concurrence of the attorney for the locality, which is expressly permitted by statute.*

II. Real Estate Transactions

A. Assisting the Purchaser with Land Use Evaluation

Seller's Representations. A seller in a real estate transaction typically will not provide representations regarding the property's zoning and land use entitlements. In fact, the seller may include a statement in the purchase and sale agreement that the seller makes no representation that the property is zoned or permitted in a way that would be necessary for the purchaser to carry on its intended purpose, and that it is purchaser's responsibility to perform all investigations necessary to make that determination for itself. On the other hand, a commercial seller that is very familiar with its land use entitlements, or perhaps has used them as a selling point for the property, may be willing to represent the zoning district and cite the existing land use approvals in the agreement. Further, a seller may be willing to make, if accurate, a representation such as "(t)here are no pending or [to the best of Seller's knowledge,] contemplated zoning changes, variances, special exceptions, or land use determinations affecting or potentially affecting the Property or any part thereof."

Purchaser's Due Diligence and Zoning Compliance Letters. When representing a purchaser in a real estate transaction, the attorney will advise the client about various topics of investigation or "due diligence" to be completed during the "feasibility" or "investigations" period prior to closing. The attorney will discuss the value of studying the property's title, perhaps obtaining a new or updated survey, ordering an environmental report, and, for improved property, perhaps ordering a property condition assessment. Finally, the attorney will review the existing zoning and land use restrictions affecting the property and may investigate whether existing improvements on the property conform to the current ordinance and any applicable land use approvals. The attorney for a commercial client may engage a third-party provider to prepare a zoning report. If the client intends to develop the property, the attorney will determine what approvals are required to achieve the client's goals. For an existing commercial use, the attorney will likely request a zoning compliance letter to confirm that the use is a permitted use in that zoning district, that the improvements comply with the various setback, height, and other regulations of the zoning district, and that there are no zoning violations affecting the property. For planned future improvements, an official zoning determination may be requested to ensure that the property may be used for the intended purpose or to confirm that a use is legally non-conforming and if and how it may be expanded.

Zoning Determinations. A contract purchaser's request for an official appealable zoning determination affects the property owner's rights, so it is prudent for a seller to include a provision in the purchase and sale agreement or lease agreement that the purchaser must allow the seller to review and approve any proposed request for zoning determination or, at a minimum, provide a copy to the seller. Va. Code § 15.2-2204(H) requires the locality to send written notice to the property owner when a party who is not the owner of the subject property applies for a zoning determination. Some localities require the applicant to provide such notice to the property owner and provide evidence to the locality that it has done so. However, if the applicant fails to do so or the notice does not reach the owner, a negative determination may be issued without the owner's knowledge of the request, at which time the 30-day appeal period begins to run. Fortunately, § 15.2-2311(A) provides some security to the property owner. For determinations issued after July 1, 1993, the appeal period does not begin to run until the zoning administrator's written determination is sent by registered mail or posted at the property owner's last known

address or “usual place of abode,” which is presumed, unless rebutted, to be the address in the real estate tax records or the address of the registered agent on file with the State Corporation Commission. However, the owner’s actual knowledge of a determination waives the right to challenge a decision based on lack of notice.

Appeals of Zoning Determinations. An appeal to the board of zoning appeals may be taken by any “person aggrieved . . . by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer” Virginia Code § 15.2-2311(A). “The appeal shall be taken within 30 days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof.” *Id.* Generally, the BZA appeal is considered an administrative remedy that must be exhausted before the aggrieved person can proceed in court: “A landowner may be precluded from making a direct judicial attack on a zoning decision if the landowner has failed to exhaust ‘adequate and available administrative remedies before proceeding with a court challenge.’” *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 23, 445 S.E.2d 97, 100 (1994), quoting *Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989). However, there are circumstances where it is permissible to raise the challenge in a court action. See e.g., *Dail v. York County*, 259 Va. 577, 582, 528 S.E.2d 447, 450 (2000) (validity of county ordinance may be challenged in court); *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 157-158, 677 S.E.2d 283, 286 (2009) (vested rights determination may be challenged in court because the authority for such determinations exists “concurrently” in the zoning administrator and the courts). However, if the landowner elects to pursue the administrative route for a vested rights determination, then administrative remedies must be exhausted, otherwise the matter becomes a “thing decided.” *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 583, 831 S.E.2d 483 (2019).

Thus, in the typical case, if the zoning administrator’s decision is not timely appealed to the BZA (30 days), the zoning administrator’s decision becomes “a thing decided,” so it is not subject to court challenge. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988) (zoning administrator’s determination that a landowner operated a junkyard on his property in violation of the zoning ordinance became a thing decided and not subject to attack because the landowner did not appeal the decision).

The Virginia Supreme Court has held in *Vulcan Materials* and, recently, in *Graydon Manor, LLC v. Board of Supervisors of Loudoun County*, 79 Va.App. 156 (2023), that, unless a party has a pending application with the jurisdiction, any information from the zoning administrator is advisory only and does not affect property rights, so the party cannot be aggrieved by a negative decision and, therefore, may not appeal it (and, as in *Vulcan*, was found *not obligated to appeal* under an exhaustion of administrative remedies analysis). By contrast, if a party has a pending application, even oral comments overheard at a meeting by the applicant, could be construed as an official determination that, if not appealed, are a thing decided.

How do *Vulcan Materials* and *Graydon Manor* decisions apply to a contract purchaser who has no land use application pending but needs a decision that he can rely on to conduct a particular use? A letter regarding by right uses cannot be relied upon because there is no vested right in the use except a legal nonconformity. If the property is subject to an approved special use permit or other entitlement, then such affirmative governmental act

can provide a basis for vesting (if the other requirements for vesting are met), and a letter citing its existence is merely confirmation. The cases seem to say that it is only when a party requests an official determination regarding a pending action that the determination is official and affects property rights. However, actual governmental practice may not reflect that difference between verifications / confirmations and determinations.

Even a simple residential purchase or unimproved land purchase without any future development goals warrants a zoning review not only of the property itself but also neighboring properties in case development is planned that could negatively impact the client's enjoyment of the property.

1. Existing Land Use Investigations

The investigation of the existing zoning and land use approvals typically takes place during the feasibility period. The attorney will review the following documents in relation to the property:

a. The locality's GIS system

The jurisdiction's GIS is a great starting point for zoning and land use due diligence. Depending on the jurisdiction, it can provide a wealth of data on zoning district, comprehensive plan land use designation, special development districts, various aesthetic and environmental overlay districts (e.g. airport, entrance corridor, water/sewer service), special tax districts and enterprise zones, conservation easements, agricultural-forestal districts, steep slopes, wetlands and flood plains, and even land use entitlements affecting the property such as special use permits and zoning proffers. Some GIS systems include historical maps, which help determine whether a use existed at the time of a zoning ordinance was adopted—critical in a non-conforming use analysis.

b. The Zoning Map

GIS is not the official record of zoning matters, as GIS websites disclaimers explain. The jurisdiction's zoning map is the official record of the zoning district for a parcel.

c. Zoning Ordinance

Once the attorney knows the zoning district in which the property is located, the attorney will consult the local code of ordinances, including the zoning ordinance, to analyze the following:

- Permitted (and not permitted) uses.
- Regulations governing the location of buildings and other improvements, yards and setbacks.
- Limits on the height, floor area ratio, setbacks of buildings and other improvements.
- Any applicable residential density limitations; square footage limitations.
- Applicable design and architectural standards.
- Permissible signage.

- Parking regulations.
- Water protection ordinance and other ordinances governing historic and environmentally sensitive areas.

If the current use of the property—or some aspect of the current use (e.g. outdoor display) is not permitted by the current zoning ordinance, it may be a (legally) nonconforming use. If the buyer intends to maintain that use, it would be prudent to request from the zoning administrator an official determination that the use is legally nonconforming. Remember that the owner’s ability to enlarge or change the use will be limited by the local zoning ordinance.

d. The Comprehensive Plan

If the client is planning new construction, development, or redevelopment, it is critical to review the locality’s comprehensive plan to understand current land use plans (and any amendments in progress) that may affect the property. The land use chapter and the Future Land Use Map (FLUM) will be particularly helpful. Examine the map to see how the property is designated for future land use (e.g. residential development), whether there are any road improvements or other public facilities planned in the area (or even on the property itself). Is the property in an area designated for development or for rural/agricultural use?

To illustrate the importance of comprehensive plan examination prior to purchase, a client who had contracted to purchase a commercial property found that the locality’s comprehensive plan designated part of the parcel’s prime frontage as a future site for a public park and ride facility. Learning such information during the feasibility period prior to purchase gives the client an opportunity to decide whether such project would interfere with its plans for development and whether potential modifications to the size and location of such planned facilities could be negotiated. Another example of the need for early investigations is in solar development where a great deal of work is done before the special use permit application is prepared and submitted. Learning at that late stage that a solar facility has been planned for an area designated as future residential or industrial park can be a very expensive omission. Localities are required to review their comprehensive plans every five years, and amendments occur continually. Even the most careful and prudent developer can get caught in an amendment that wreaks havoc on his project before he obtains the necessary entitlements to be vested.

It can be an insurmountable challenge to attempt to develop contrary to the land use designations in a locality’s comprehensive plan. As more fully discussed above, the Fourth Circuit explained in *Pulte Home Corp. v Montgomery Co., Md.*, 909 F.3d 685 (2018), there is no constitutional right to develop property other than rights, such as vested rights, derived from state and local law. In that case, Pulte complained that comprehensive plan amendments and the delay or denial of water and sewer service to its property violated equal protection and substantive and procedural due process. The court found no such violations, explaining that the county’s master plan “placed large discretion in the hands of the local authorities, as is to be expected when it comes to zoning, an ‘inescapably [] political function,’” quoting *Sylvia Dev’t Corp. v. Valvert Co., Md.*, 48 F.3d 810 (4th Cir. 1995).

Further, for certain types of development (e.g. solar and wind energy facilities, wireless communications, etc.), the county may have additional guidelines or policies embedded in the comprehensive plan that guide their land use decisions. If a locality has spent time and effort approving specific policies for a use, it will take them very seriously during zoning hearings, and such policy goals are sometimes treated as if they were part of the zoning ordinance even though the comprehensive plan is advisory only and does not have the status of a zoning ordinance.²

Though a comprehensive plan is a guide to local government officials making land use decisions,³ it may serve as a basis—even the sole basis—for the denial of a legislative action, such as a rezoning or special use permit.⁴ Consistency with the locality’s comprehensive plan is typically one of many factors in determining—and often the most important of these factors—whether to grant a special use permit. On the other hand, a zoning decision that does not follow the Comprehensive Plan is not, for that reason, automatically unreasonable.

e. Architectural / Historic District Regulations

It is important to determine whether the property lies within a designated historic district or architectural control district. If it does, it may be subject to additional review and approval for new structures and exterior modifications of existing structures. Check both the zoning ordinance and supplemental regulations. Review by an architectural review board may require an application, staff review, and public hearing, so it’s important to be aware of any such requirement and its timeline.

f. Applicable Overlay District Regulations (e.g. Entrance Corridor)

Similarly, the property may be within an overlay district that imposes regulations in addition to those of its underlying zoning district. One example is an entrance corridor overlay, which applies to parcels along important thoroughfares into and out of a locality. Other examples include critical slopes, water/sewer service areas, airport impact areas, and mountain preservation areas. These additional regulations may affect what uses are permitted, various lot and construction regulations, and the appearance of structures on the parcels.

g. Existing Land Use Approvals.

Finally, the client will want to research the locality’s records for all existing zoning and land use approvals for the property. These may be available through online databases. Existing approvals affecting the property may include rezonings with proffers, special exceptions with conditions, site plans, architectural review approvals, sign permits, and building permits. Since these approvals affect the property regardless of ownership (except special use permits in a few jurisdictions), then it is critical to review the dictates and limitations within these approvals. If the property is in a jurisdiction where special use permits are personal to the applicant, and the buyer wants to carry on the permitted use, review the special use permit and zoning ordinance to learn whether the permit may be assigned by the seller to the buyer (likely requiring the locality’s approval).

² *Board of Supervisors of Fairfax Co. v. Allman*, 215 Va. 434 (1975).

³ *Board of Supervisors v. Lerner*, 221 Va. 30 (1980).

⁴ *Lerner*, 221 Va. at 37.

If the attorney requests a letter of zoning compliance, the locality may provide information about and/or links to existing approvals, including site plans, within the response letter. However, unless an official determination regarding a particular planned use or non-conforming status is requested, such zoning verification may not be relied upon to vest rights. For example, the zoning confirmation letter may state that the property is currently compliant with the existing approved site plan. However, the property is not compliant with the site plan because a structure that should have been demolished to increase the percentage of pervious space on the parcel was never demolished by the seller. The buyer decides to use the structure as an office. The buyer is not protected in its use of the structure; if the locality discovered the discrepancy, it could require removal of the structure. Similarly, if the zoning compliance letter misstates the zoning district of the property, the buyer has no vested right in the misstated zoning. If he purchases the property with plans to develop in accordance with the district cited in the compliance letter, he has no recourse when the error is discovered other than to attempt a rezoning. As these examples show, careful research by the purchaser can avoid disappointing financial repercussions post-closing.

2. Future Land Use Entitlements

For clients planning to continue a property's existing use, the investigations outlined above will provide the necessary information to confirm that the use may continue. For clients planning to develop the property after purchase, the investigations outlined above will be the preface to obtaining new approvals. Therefore, it will be important to draft the purchase and sale agreement to give the purchaser time to obtain essential approvals. As with other types of property investigation, the seller would not want the purchaser's receipt of necessary land use approvals to be a condition to close, arguing that the purchaser can terminate if entitlements are not received during the designated time. By contrast, the purchaser would prefer to include entitlements as a condition to close, if possible. More likely, the agreement will include a period for pursuing desired approvals, during which period the purchaser may terminate the agreement if she cannot—or thinks she will not be able to—obtain the approvals. The purchaser will negotiate sufficient time to obtain necessary approvals—at a minimum, discretionary legislative approvals, such as rezoning and special use permit approval—possibly also ministerial approvals such as site plan approval and subdivision plats. A seller may agree to a zoning feasibility period for discretionary approvals, whose outcomes are hard to predict, but may prefer to close on the sale prior to final site plan and subdivision plat approval.

Zoning Approvals Period

A purchaser's attorney will want the purchase and sale agreement to provide sufficient time for the client to obtain final, unappealable land use approvals⁵. The land use attorney will estimate how much time will be needed to prepare applications, receive and respond to staff comments, filing revised materials, and present the application(s) at planning commission and city council or board of supervisors hearings. Several months may be needed just to draft and assemble the material prior to filing the application. The purchaser's attorney will coordinate with civil engineers, environmental consultants, and other client team members can prepare the necessary plans, reports, and narratives required to accompany an application. Longer lead time items include concept plans, a traffic impact analysis, and economic impact analysis. Certain investigations, such as environmental, historic,

⁵ An aggrieved party has thirty (30) days to appeal the approval of a rezoning or special exception.

archeological, and wildlife impact studies, which are required for certain types of development, may still be in progress at the time of filing the application.

The time needed for land use and zoning approvals can be difficult to predict because of the several factors outside the clients control: the level of community opposition, the number of resubmissions required, public meeting schedules, and decision deferrals. The buyer's attorney will determine what community, committee, planning commission, and governing body meetings will be required and when and how often the various commissions and boards meet. A single discretionary land use approval may require meetings of the community or community advisory committee, historic resources committee, architectural control board, agricultural forestal committee, planning commission, and governing body. Some localities require informational meetings of the planning commission and governing body for the sole purpose of hearing an introduction of the project and voting to schedule the hearing, which can add months to the process. In one jurisdiction, the period from application to approval could be as quick as four months. In another, the same type of project could take 18 months or longer.

The zoning approvals period often begins on the date the general feasibility period ends. It is common to structure the agreement so that an initial deposit is paid upon full execution of the agreement, and an additional deposit is paid if the buyer does not terminate by the conclusion of the feasibility period but, rather, moves forward to zoning. In that structure, the initial deposit likely becomes nonrefundable, while the additional deposit remains refundable during the zoning approvals period. The parties may structure the zoning approvals period to run concurrently with the feasibility period but last beyond it. Ideally, in either scenario, the agreement will give the purchaser the option to extend the zoning approvals period one or multiple times by notice and payment of additional smaller deposits. Unlike all or portions of the initial and additional deposit, the parties may agree that these extension payments will not be refundable if the purchaser terminates. These structures can become quite complex, especially as purchase and sale agreements are amended to extend the zoning approvals period further. The longer the buyer keeps the property off the market, the greater the proportion of various deposits the seller may want to keep if the buyer decides not to close. Of course, the contract will have an outside date for obtaining zoning approvals, after which the buyer must close or lose its deposit(s). Therefore, negotiating sufficient flexibility in the purchase agreement for zoning approvals may help your purchaser client avoid losing a significant investment in fees and costs of for studies, plans, and legal work when the due diligence period expires.

Seller Cooperation

Since the contract purchaser is attempting to obtain land use entitlements for property it does not own, it is essential to include in the purchase and sale agreement provisions requiring the seller to cooperate with purchaser's efforts. At a minimum, the seller should agree not to interfere with purchaser's efforts and to sign any applications that the locality requires to be signed by the property owners. Typically, the seller will sign an owner's authorization or limited power of attorney to give the purchaser the authority to file land use applications relating to the property. Often, the seller will require the purchaser to provide copies of applications and related materials to the seller for its review and approval within a specified period of time prior to filing. Purchasers will want to make that time period relatively short as the various parties responsible for preparing materials may be working up to the last minute before a filing deadline. The seller has an interest in following the purchaser's applications carefully. If, for some reason, the buyer obtains land use entitlements but fails to close, the seller—for good or ill—is stuck with the change in zoning and any special use permit and

associated conditions. Proffers associated with rezonings will be the seller's obligation to fulfill if it develops the property. For these reasons, sellers must examine proffers very carefully and understand their obligations, whether or not the transaction closes. The buyer will ask for a deemed-approved provision so that a non-responsive seller cannot hold up submissions. Not only is a seller's cooperation, as landowner, necessary to the buyer's rezoning efforts, but the timing of its cooperation may be critical. For example, a locality may have a strict timeframe for submission of draft proffers and submission of final, executed proffers prior to certain public hearings.

A recent case in Prince William County, GW Acquisition Co., LLC v. Pageland Ltd. Liab. Co., 2023 WL 6541851 (E.D. Va., Alexandria Division, Oct. 6, 2023), attached as Exhibit C, provides a primer for how the cooperative relationship between buyer and seller during the zoning approvals period should—or may not—work. In this case, a seller attempted to use the zoning approvals period as the basis of its termination of the purchase and sale agreement and withhold its approval of proffers necessary to the rezoning. Pageland Limited Liability Company ("Pageland") agreed to sell 175 acres to GW Acquisition Co., LLC ("GWA"). Pageland's acreage was only a portion of the land GWA contracted to purchase from various landowners for a future data center corridor, the Digital Gateway Project. GWA needed to rezone some of the parcels and commit to proffers. The purchase and sale agreement between Pageland and GWA contained the following provision regarding Pageland's required cooperation with the necessary rezoning:

*"Rezoning.... Seller hereby agrees, and all other Project Site Sellers have agreed, under their respective Project Site Purchase Agreements, to actively and fully support and cooperate with [GWA], using commercially reasonable, diligent and good faith efforts, in pursuing and obtaining the approval of the Data Center Rezoning, including promptly signing such documents as may be required in connection with obtaining such approval [of the Data Center Rezoning]."*⁶

Further, the purchase and sale agreement contained specific provisions regarding cooperation as to proffers associated with the rezoning and conditions associated with any necessary special use permits:

"Proffers or other Conditions. In the event the authorities of Prince William County require Purchaser or Seller, in order to obtain approval of the Data Center Rezoning, to agree to certain proffered conditions that may affect the Land, or if Purchaser desires to submit any proffers in connection with obtaining the Data Center Rezoning that may affect the Land ("Proffers"), Purchaser shall provide copies of such Proffers or proffered conditions to Seller for its review prior to Purchaser agreeing to any such proffered conditions. All Proffer(s) shall be subject to the prior written approval of Seller, which approval shall not be unreasonably withheld, conditioned or delayed. Seller agrees to promptly execute the Proffers when requested by Purchaser, subject to the foregoing right to approve."

The buyer's timeframe for rezoning was limited as follows:

"Outside Date for Rezoning. If a decision approving or disapproving the application for the Data Center Rezoning has not been made by the BOCS by August 15, 2023, either party may terminate this

⁶ *Id.* at *2.

Agreement by written notice to the other; provided, however, that if by August 15, 2023, a hearing to vote on the Data Center Rezoning is scheduled to occur on or before December 30, 2023, such termination date may be extended through the scheduled hearing date (together with additional time thereafter to obtain a final, non-appealable decision), upon request by either party.”

Pageland claimed that the hearing had not been properly scheduled by the deadline, and, therefore, the outside date for rezoning had been passed. Consequently, Pageland terminated the contract. Since they had terminated the contract, Pageland refused to approve the proffers that GWA needed to submit to the county in time for the public hearings. GWA argued that the hearing had been scheduled, so the seller had no right to terminate and had an obligation to review and approve the proffers for submission. We will not recount here the details of the county’s scheduling procedures, but the case illustrates how such details rise to importance when a seller or other party in opposition wants to thwart or overturn a land use matter.

The Court agreed with GWA that the hearing had been duly scheduled and described Pageland’s actions as evidence of “seller’s remorse.” In fact, the Court explains, Pageland had attempted to back out of the contract previously and had lost an earlier lawsuit to GWA for the same reason. One of the results of the first suit was that the court ordered Pageland to cooperate with the buyer during the land use entitlement process. This time as well the Court found that Pageland was obligated to cooperate, and its failure to do so would cause GWA irreparable harm. The Court ordered Pageland to comply with its obligations under the contract.

EXHIBITS:

- A. Purchase and Sale Agreement with Entitlements Period running concurrently (but twice as long) with inspections period; land use entitlements as a condition for buyer to close (buyer friendly)
- B. Purchase and Sale Agreement with Zoning Approvals period running consecutively with inspections period; land use entitlements not a condition to close (buyer friendly)
- C. *GW Acquisition Co., LLC v. Pageland Limited Liability Company, et al.*, United States District Court, E.D. Virginia, Alexandria Division 2023 WL 8081102 (October 6, 2023)

B. Some Considerations for Lease Transactions

1. **Permitted Use**

Every lease will define what use is permitted on the premises. Though a landlord is generally aware of land use entitlements affecting the premises, the tenant will need to conduct its own due diligence to ensure its intended use is allowed under existing zoning.

a. *Zoning Representations.* Landlords typically do not want to make any representations or warranties regarding the zoning of the property. Instead, they require the tenant to perform and rely on its own zoning-related due diligence. A typical landlord-friendly

lease will contain a provision such as the following, which means the tenant's attorney will need to check the current status of zoning and land use for the premises:

No Landlord Representations or Warranties. *Nothing in this Agreement shall be construed as a representation or warranty, whether express or implied, from Landlord that the Premises are fit or suitable for the Permitted Use. Landlord further makes no representation or warranty that any specific use of the Premises desired by Tenant is permitted pursuant to applicable Laws. Tenant hereby waives any Laws related to any implied warranties regarding the Premises or their fitness or suitability for the operation of Tenant's business or for Tenant's intended uses. Tenant shall rely solely and exclusively on its own due diligence and on the advice and counsel of Tenant's consultants and agents.*

b. *Tenant Due Diligence.* The tenant may want to order a third-party zoning report. The tenant will likely want to obtain a zoning confirmation letter from the locality in which the premises are located. Such letter typically identifies the zoning district in which the property is located, identifies land use approvals affecting the property, and will state whether there are any outstanding zoning violations. A zoning confirmation or verification letter is for information only and cannot be relied upon. The letter will not opine on whether the tenant's proposed operations comply with the zoning regulations or give the tenant any protection against subsequent zoning changes. If the tenant needs binding assurance that a use is permitted and that specific structures may be built, the tenant should obtain an official determination from the zoning administrator.

c. *Official Determinations of Nonconformity.* One example of when a tenant would be prudent to obtain an official determination is when a use on the property is no longer permitted under the current zoning ordinance but is allowed because it was ongoing when the ordinance was adopted so is legally nonconforming. The tenant will want to ensure that the use may be continued. For example, a car dealership may be located in a zoning district that permits the car dealership use by right but permits outdoor display of cars only by special use permit. The property has no special use permit associated with it because outdoor display of cars on the property has been ongoing since before the ordinance required a special use permit. In such case, the tenant should obtain an official determination that outdoor display of vehicles is a legally nonconforming use on the property and may be continued as long as the use is not enlarged beyond any parameters that may be set out in the zoning ordinance or discontinued beyond the time period the ordinance designates for losing nonconforming status.

As an example of how a lessee might inadvertently enter into a zoning violation, a parcel might be advertised as permitted for or suited for a car dealership because the property owner leased the property to a car dealership for fifteen years, during which time cars were displayed on portions of the property. During that fifteen years, the zoning ordinance was amended to require a special use permit for outdoor vehicle display. The dealership went out of business, and the property was used as a furniture store for three years. If the zoning ordinance requires the nonconforming use to be continuous and not cease for more than two years to retain its legally nonconforming status, then the potential new lessee will not be able to display cars outdoors without first obtaining a special use permit. If the outdoor vehicle display use was not discontinued for more than two years, the new lessee still needs to know where outdoor display is permitted and how much, if any, the area may be expanded. Typically, the zoning ordinance will permit only limited expansion of a nonconforming use, so it is very important to review the local ordinance and any existing approved site plans for the property, and, if binding assurance is required, obtain a zoning determination.

Legal nonconformity also may pertain to a use in a portion, but not all, of a building. In the case of *Patton v. City of Galax*, 269 Va. 219 (2005), the Pattons acquired a two-story building in downtown Galax in Grayson County. Mr. Patton originally acquired the property in 1967. The downstairs fronting on South Main Street was used as a drugstore, and the upstairs was used as an apartment. After the Pattons obtained the property, the City adopted a comprehensive zoning ordinance, which designated the property as being in the Business General (B-2) zoning district. The zoning ordinance permitted apartments in the B-2 district only by special use permit, and they were not permitted even with a special use permit on the first floor of buildings fronting on “designated” streets. In the late ‘90s, the Pattons began renovating the ground floor for apartments and were stopped by the building official. There was no question that use of the second floor for apartments was a legal nonconforming use (without obtaining a special use permit) because it had been used as such continuously since before the ordinance was adopted. The issue was whether the Pattons could extend apartments to the first floor. The Supreme Court upheld the trial court, which upheld the Board of Zoning appeals in finding that they could not. The court explained that the locality has authority to govern if and how a nonconforming use may be increased or expanded, including within a building. Once the city met its burden of proving that a use violating the ordinance was undertaken, the Pattons had to prove that the first floor was “arranged or designed for such use at the time of adoption or amendment of” the zoning ordinance, which was the standard in the ordinance. They could not so prove since the downstairs had primarily been used as a drugstore among other uses over the years. Further, the court found that, though no streets had been specifically “designated,” it was a reasonable interpretation of the ordinance and zoning map to conclude that all streets in the B-2 district were designated as not allowing ground floor apartments.

d. *Landlord Warranties.* If you are drafting a lease on behalf of a tenant, you will want a warranty from the landlord that, as of the lease commencement date, the premises comply with all applicable laws, and the landlord must cure any violations of laws prior to lease commencement. Such violations could include zoning violations, such as violations of the zoning ordinance, existing special use permit conditions, proffers, or existing site plan. The tenant may also negotiate for an agreement from the landlord not to consent to any rezoning or variances that may render the tenant's permitted uses of the premises illegal. That is, rather than a “no reps and warranties” provision, a tenant will want the landlord to make certain representations and warranties about the premises with respect to the tenant’s intended use. An example of such provisions is the following:

Landlord's Representations and Warranties.

Landlord represents and warrants to Tenant that:

- (a) *The Premises and the Building comply with all Laws.*
- (b) *There are no defects in the title that prevent Tenant from using the Premises for the Permitted Use.*
- (c) *The Premises and the Building are in good condition, working order and repair.*
- (d) *The Premises comply with all local Laws relating to parking requirements for Tenant's Permitted Use.*
- (e) *There is no litigation, arbitration, or other legal or administrative suit, action, proceeding, or investigation pending or threatened against or involving Landlord or the ownership or operation of the Premises that would prevent Tenant from using the Premises for the Permitted Use, including, but not limited to, any condemnation action relating to the same.*

- (f) *Landlord has not received notice of any violation of any Laws noted or issued against the Premises, the Building or any portion thereof, that has not been cured, corrected, or waived as of the Commencement Date.*

The prospective tenant must review the land use approvals affecting the property to ensure that a use is permitted. For example, approved rezoning for a planned development such as a shopping center or mixed use planned development may designate on the zoning plan the uses that will be located in certain areas of the project. In such case, a different use would not be permitted in that location unless the plan were amended or otherwise approved by a zoning action.

Some leases, particularly ground leases and leases for space requiring tenant upfit, will commence before the tenant occupies the premises. As in a purchase and sale agreement, a tenant will negotiate for a due diligence period during which the tenant will investigate the land use approvals. Of course, for a long-term ground lease, the tenant may obtain land use approvals for its intended use. The tenant will need a termination provision to allow it to terminate the lease if it cannot obtain the necessary governmental approvals.

2. Parking

Sufficient and well-located parking may be critical to a tenant's business. It is important for the tenant to review the approved site plan to know how much parking is required, how much is provided, and where it should be located. The tenant's zoning verification letter should include, at the tenant's express request, confirmation that the property has been developed in accordance with the approved site plan and that there are no zoning violations. The lease terms must be consistent with the site plan and other land use approvals as to number and location of parking spaces available for tenant's use. If the property is part of a planned development or condominium, the documents establishing that regime will likely address parking in detail and should be reviewed to ensure that they and their implementation are consistent with site plan requirements.

3. Signage

Another point of negotiation between landlord and tenant will be the number, location, and design of tenant's permitted sign(s) on the subject property. Number, size, height, and design of freestanding signs and the number and size and placement of wall-mounted signage may be strictly regulated by the locality's zoning ordinance. If the tenant plans to add a tenant sign to an existing monument sign or add a wall sign or lettering to a building façade, it will be important to check the locality's zoning ordinance as well as site plans and other land use records for approved signage for the property. Existing monument signs may be old enough to be nonconforming, and an expansion might need to be limited in size to avoid unlawfully increasing the nonconformity. Either the landlord or—more likely--the tenant will need to obtain approvals for the tenant's desired signage before installation. The jurisdiction may have design guidelines for particular overlay or business districts and require an application and review by an architectural review board or committee as well as the zoning department.

AGREEMENT FOR PURCHASE AND SALE OF REAL ESTATE

THIS AGREEMENT FOR PURCHASE AND SALE OF REAL ESTATE (this “Agreement”) is made this _____ day of _____, 202__, by and between _____, a Virginia limited liability company (the “Seller”) and _____, a _____ limited liability company, or assigns, (the “Purchaser,” referred to collectively in this Agreement as the “parties,” each a “party”).

RECITALS

A. Seller is the sole legal owner of all those certain lots and parcels of land and improvements thereon, located in the City/County of _____, Virginia (the [“County”/the “City”]), containing approximately _____ acres of land in the aggregate, and identified on the current tax maps of the [County/City] as follows:

_____, all as more particularly shown and described on Exhibit A attached to this Agreement (collectively, the “Property”).

B. Purchaser desires to use the Property for the development of _____ (the “Project”).

C. Seller desires to sell the Property to Purchaser, and Purchaser desires to purchase the Property from Seller on the terms and conditions set forth herein.

D. The effective date of this Agreement shall be the date on which this Agreement is last executed by Seller or Purchaser, as the case may be, and delivered to the party not so executing this Agreement last, which date shall be filled in in the blank provided at the end of this Agreement (the “Effective Date”).

AGREEMENT

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties, the parties hereto agree as follows:

1. Sale of Property. Subject to the terms and conditions of this Agreement, Seller hereby agrees to sell to Purchaser and Purchaser hereby agrees to purchase from Seller, the Property.

2. Purchase Price. The purchase price for the Property shall be _____ and NO/100 Dollars (\$ _____) (the “Purchase Price”). This is a sale in gross, and not by the acre. The Purchase Price shall be payable as follows:

A. _____ Dollars (\$ _____) (the “Initial Deposit”), shall be paid by wire transfer within five (5) business days after the Effective Date to _____ (the “Escrow Agent”), to be held in accordance with this Agreement.

The Initial Deposit shall be refundable to Purchaser prior to the expiration of the Feasibility Period, as defined in Section 3A herein. If the Purchaser has not terminated this Agreement prior to the expiration of the Feasibility Period the Initial Deposit shall become nonrefundable to Purchaser, except upon a failure of a Condition to Purchaser’s Obligation to Close listed in Section 6A herein, or upon a default by Seller under the terms of this Agreement.

B. _____ (\$ _____) (the “Additional Deposit”) shall be paid by wire transfer to the Escrow Agent prior to expiration of the Feasibility Period, if this Agreement has not been terminated. The Additional Deposit shall be refundable to the Purchaser until the expiration of the Governmental Approval Period as

defined in Section 3B. If the Purchaser has not terminated this Agreement prior to the expiration of the Governmental Approval Period, the Additional Deposit shall become nonrefundable to Purchaser except upon a failure of a Condition to Purchaser's Obligation to Close listed in Section 6A herein, or upon a default by Seller under the terms of this Agreement.

C. Any applicable Extension Deposit, as defined in Section 3B. The Initial Deposit, the Additional Deposit, and any applicable Extension Deposit, together with any interest accrued thereon are hereinafter collectively referred to as the "Deposit."

D. The balance of the Purchase Price shall be paid at Closing, as hereinafter defined, by immediately available wire transfer.

E. The Escrow Agent shall promptly place the Deposit into an interest-bearing federally insured deposit account with a state or national bank whose accounts are federally insured. The Escrow Agent shall hold and dispose of the Deposit in accordance with the provisions of this Agreement. All interest accrued on the Deposit shall be applied towards the Purchase Price at Closing.

3. Feasibility Period and Governmental Approval Period.

A. Feasibility Period.

(i) For a period of ninety (90) days after the Effective Date (the "Feasibility Period"), Purchaser shall have the right to enter the Property, conduct any and all feasibility studies, soil borings and analysis, utility location availability studies, environmental reports, zoning and land use studies, and any other engineering or environmental studies, title searches, surveys, and other tests, studies or analyses (collectively, the "Tests and Studies"), provided that Purchaser shall obtain Seller's prior consent to any invasive testing. Seller shall, within five (5) days of the Effective Date, provide Purchaser with copies of any third party

reports or studies or other information in Seller's possession or readily available to Seller relating to the Property that Seller has not already provided to Purchaser, including, without limitation, geotechnical evaluations, environmental assessments, site engineering studies, site planning, utility plans, title searches, architectural plans and designs, traffic studies or reports, marketing materials, title policies or title commitments, surveys, zoning records or other zoning or land use documents from the [County/City], existing leases, and consolidated financial statements (the "Seller Materials"). The Feasibility Period shall be extended day for day for any delay in Seller's delivery to Purchaser of all or any portion of the Seller Materials. In the event that Purchaser terminates this Agreement, Purchaser shall return all Seller Materials to the Seller.

(ii). In the event Closing does not occur hereunder, Purchaser shall restore the Property to substantially the same condition it occupied prior to the Tests and Studies and Purchaser shall indemnify and hold Seller harmless from and against all loss, costs, damages, claims, liabilities and expenses (including reasonable attorneys' fees and court costs) arising from physical damage to the Property and injury to person or property asserted against or incurred by Seller as a result of the Tests and Studies or from the entry onto the Property of Purchaser, Purchaser's agents, contractors and employees, to conduct the Tests and Studies, excluding, however, any loss sustained by Seller as a result of what the Tests and Studies reveal. The provisions of this Section 3A(ii) shall survive Closing.

(iii). If the Purchaser determines, in its sole discretion, that the Property is not suitable for the Project, or if Purchaser is unsatisfied for any reason with the results of any Tests and Studies, Purchaser may, upon written notice to Seller delivered on or before the expiration of the Feasibility Period, terminate this Agreement, in which event the Escrow Agent shall return the Initial Deposit to Purchaser, together with any interest accrued thereon, but less

an amount equal to One Thousand and No/100 Dollars (\$1,000) (the “Early Termination Payment”), and the Escrow Agent shall disburse the Early Termination Payment to the Seller, and neither Seller nor Purchaser shall have any further obligation to the other under this Agreement, except Purchaser’s obligations under Section 3A(ii).

B. Governmental Approval Period.

(i). If the Purchaser has not terminated this Agreement prior to the expiration of the Feasibility Period, then upon such expiration the Purchaser shall prepare and submit zoning applications to the [County/City] as Purchaser determines in its sole discretion to be necessary for the Project, which may include, but not be limited to, applications for rezoning (including amendments to any previous rezoning or associated proffers affecting any portion of the Property), special use permit, special use permit amendment, comprehensive plan amendment, certificate of appropriateness, or special exception (the “Governmental Applications”).

(ii). Purchaser shall have a period of eighteen (18) months from the Effective Date (the “Initial Governmental Approval Period”) to secure the [County Board of Supervisors/City Council] approval of the Governmental Applications (the “Governmental Approvals”). Purchaser shall have the right in its discretion to extend the Initial Governmental Approval Period for six (6) one-month extensions (each, an “Extension Option,” and collectively the “Extension Options,” and the length of each Extension Option being the “Extension Period”) by providing written notice to Seller of such election prior to the expiration of the Initial Governmental Approval Period and by depositing with the Escrow Agent, as an additional deposit, the sum of _____ and No/100 Dollars (\$ _____) for each Extension Option that it elects to exercise (each an “Extension Deposit,” and

collectively, the “Extension Deposits”). The Purchaser shall provide written notice to Seller of any future Extension Options that it elects to exercise prior to the expiration of the then current Extension Period, and by depositing with the Escrow Agent an Extension Deposit. The Initial Governmental Approval Period and the Extension Period of any Extension Options that Purchaser elects in its discretion to exercise are collectively referred to herein as the “Governmental Approval Period,” and any applicable Extension Deposits shall held by the Escrow Agent pursuant to the terms of Section 2 herein.

(iii). The Additional Deposit shall be refundable to the Purchaser until the expiration of the Governmental Approval Period (less the Early Termination Payment) and shall be applied to the Purchase Price at Closing. Notwithstanding any other provision of this Agreement to the contrary, if the Purchaser elects to terminate this Agreement prior to the expiration of the Governmental Approval Period, any applicable Extension Deposit shall not be refundable to the Purchaser. Any applicable Extension Deposit and any accrued interest thereon shall be applied to the Purchase Price at Closing.

4. Title and Survey Objections. Within forty-five (45) days after the Effective Date, Purchaser shall obtain at its sole cost and expense a title insurance commitment (the “Title Commitment”) from Chicago Title Insurance Company (the “Title Insurer”) and an ALTA survey necessary to permit the Title Insurer to remove the general survey exception from the final title insurance policy of the Property (the “Survey”). Purchaser shall, not less than twenty (20) days prior to the expiration of the Feasibility Period, deliver copies of the Title Commitment and the Survey to the Seller and inform the Seller in writing (the “Title Objections Notice”) as to any survey or title defects or other objections regarding the Property disclosed by the Survey or by the Title Commitment that the Purchaser is unwilling to accept (the “Title Objections”). Any

such matters which Purchaser is willing to accept shall be referred to as “Permitted Exceptions.” Within ten (10) days after receiving the Title Objections Notice from Purchaser, Seller shall notify Purchaser of Seller’s election (a) to cure such Title Objections, in which event Seller shall cure such Title Objections promptly and at its expense, and in any event prior to the expiration of the Initial Governmental Approval Period, as applicable, or (b) not to cure such Title Objections. If the Seller is unable or unwilling to cure any Title Objection to Purchaser’s satisfaction prior to the expiration of the Initial Governmental Approval Period, then the Purchaser may, at its option, and as its sole remedy, (i) terminate this Agreement by giving the Seller written notice of such termination prior to the expiration of the Initial Governmental Approval Period, (ii) cure the Title Objections at its own expense and proceed to Closing with no reduction in the Purchase Price or (iii) waive the Title Objections and proceed to Closing with no reduction in the Purchase Price. If the Purchaser so elects to terminate this Agreement, the Deposit shall be refunded to the Purchaser, together with all interest earned thereon, less the Early Termination Payment, the Escrow Agent shall disburse the Early Termination Payment to the Seller, and the Seller and Purchaser shall have no further obligations or liabilities to one another hereunder. Notwithstanding the foregoing, Seller shall be unconditionally obligated, at its sole cost and expense, to satisfy at or prior to Closing all monetary encumbrances evidenced by deeds of trust, tax liens, judgments, mechanic’s liens or other liens or charges in a fixed sum or capable of computation as a fixed sum (“Liquidated Liens”), and Seller authorizes the use of the Purchase Price otherwise payable to Seller at Closing to pay and discharge any Liquidated Liens.

5. Closing.

A. Closing on the purchase of the Property (hereinafter referred to as

the “Closing”) shall take place thirty (30) days after Purchaser obtains approval from the County of a final subdivision plat (and, if required by the [County/City], a final site development plan) for the Project (the “Closing Date”).

B. At Closing, Seller shall convey to Purchaser, by [General Warranty Deed with English Covenants of Title/Special Warranty Deed], good and marketable fee simple title to the Property free and clear of any and all encumbrances except current taxes and Permitted Exceptions (the “Deed”). The Deed shall describe the Property according to the Survey. [*Or, the parties may agree that the deed will convey the property by the description of record, and Seller also will execute a quitclaim of the property with the description based on the Survey.*] In addition, Seller shall deliver to Purchaser an affidavit of mechanics’ lien and possession in the form required by the Title Insurer, a non-foreign affidavit, a Virginia form R-5 or R-5E, IRS Form 1099-S Information Reporting Form, a certificate reaffirming the Seller’s covenants and representations contained in Section 7 hereafter, and such other documents as may be reasonably required by Purchaser to acquire the Property and for Title Insurer to issue an ALTA-Form B title insurance policy.

6. Conditions of Closing.

A. Conditions to Purchaser’s Obligation to Close. Purchaser’s obligation to proceed to Closing under the terms of this Agreement is expressly conditioned upon satisfaction of the following conditions:

(i). This Agreement shall not have been previously terminated pursuant to any other provision hereof.

(ii). The Seller shall be prepared to deliver or cause to be delivered to the Purchaser all instruments and documents to be delivered to the Purchaser at Closing pursuant to this Agreement, or as otherwise reasonably required by the Title Insurer.

(iii). The Title Insurer shall have committed to issue an ALTA-Form B title insurance policy to Purchaser and Purchaser's lender, subject only to Permitted Exceptions, and including title to the use and enjoyment of the Deeded Access Easement.

(iv). There shall exist no pending or threatened actions, suits, arbitrations, claims, attachments, proceedings, assignments for the benefit of creditors, insolvency, bankruptcy, reorganization or other proceedings, against or involving Seller that would materially and adversely affect Seller's ability to perform its obligations under this Agreement, or which might prevent or adversely affect the Project or the construction and operation of improvements on any portion of the Property, or which questions the validity of any actions taken or to be taken by Seller or Purchaser hereunder.

(v). The Seller shall be in good standing and Seller and the Property shall be in full compliance with all building and zoning codes and the Property shall be free of all liens, with the exception of any lien secured by a deed of trust, which shall be paid from the proceeds at Closing.

(vi). There shall be no building, dwelling, sewer, water, school capacity, or other moratorium affecting the Property or the Project in effect, pending or proposed by the [County/City] or by any applicable authority.

(vii). Following the expiration of the Feasibility Period, there shall have been no change in the zoning of the Property other than the Governmental Approvals, no adverse change in title to the Property, no adverse change in environmental condition of the Property,

and no change with regard to school capacity issues that would in any way interfere with the Project.

(viii). The covenants and representations contained in Section 7 herein shall be true and correct. Notwithstanding that certain of Seller's covenants and representations may be limited to the extent of Seller's knowledge, the conditions precedent to Purchaser's obligation to consummate settlement set forth in this Section 6 shall not be so limited, and the satisfaction of such conditions shall depend upon the actual correctness on the Closing Date of the matters stated in all such representations and warranties.

The conditions set forth in this Section 6A, and elsewhere in this Agreement, are for the sole benefit of Purchaser. If any of the foregoing conditions are not met as of the Closing Date, or such earlier date as is set forth above with respect thereto, or Purchaser shall not have waived in writing the failure of any such condition, then Purchaser, at its sole option, may terminate its obligations under this Agreement, and receive a refund of the Deposit, together with all interest accrued thereon, and neither Seller nor Purchaser shall have any further obligations hereunder.

B. Conditions to Seller's Obligation to Close. Seller's obligation to proceed to Closing under the terms of this Agreement is expressly conditioned upon satisfaction of the following conditions:

(i). The Purchaser shall be prepared to pay to the Seller the Purchase Price and all other amounts to be paid to them at Closing pursuant to the provisions of this Agreement.

(ii). The Purchaser shall be prepared to deliver to the Seller all instruments and documents to be delivered to the Seller at the Closing pursuant this Agreement or as otherwise reasonably required by the Title Insurer.

(iii). This Agreement shall not have been previously terminated pursuant to any other provision hereof for reasons other than Seller's breach or default, Purchaser's termination during the Feasibility Period or the Governmental Approval Period, or by the mutual agreement of the parties.

7. Covenants and Representations. Seller represents and warrants to Purchaser the following, as of the date of this Agreement, and by appropriate certificate delivered at Closing, will represent as of the date of Closing:

- A. Seller has good and marketable fee simple title to the Property.
- B. There are no tenancies or parties with any rights of possession with respect to the Property.
- C. That to Seller's knowledge, there are no proceedings pending or threatened, against or relating to the Property including, without limitation, any proceedings relating to condemnation or the exercise of the rights of eminent domain as to any part of the Property or purchase in lieu thereof or for the limiting or denying of any right of access thereto.
- D. Seller has no knowledge of any special assessments against the Property or any planned public improvements which may result in a special assessment against Property or in any way interfere with the Project.
- E. This Agreement has been duly executed and delivered by Seller. The execution of this Agreement and the Closing hereunder will not violate or contravene any law, order, decree, rule, regulation, covenant or agreement to which Seller is subject.

F. Seller (a) has not filed a petition for relief as to Seller as debtor or bankrupt under the Bankruptcy Code of 1978 or like provision of law of any jurisdiction; (b) is not insolvent as finally determined by a court proceeding; and (c) has not filed a petition or application to accomplish the same or for the appointment of a receiver or a trustee for Seller or a substantial part of its assets. No proceedings relating to Seller have been commenced, either by Seller or by another, under any other reorganization, arrangement, insolvency, adjustment of debt or liquidation law of any jurisdiction. No attachment, execution, assignment for the benefit of creditors or voluntary or involuntary proceedings in bankruptcy against Seller or the Property has been contemplated, threatened or initiated.

G. Seller represents that neither Seller nor any of its members or managers is named on the Specially Designated Nationals and Blocked Persons list pursuant to the USA Patriot Act, and that neither Seller nor any of its members or managers is in violation of the USA Patriot Act, Executive Order 13224, or any other anti-terrorism laws or regulations.

H. Seller represents that to its knowledge, (i) no underground storage tanks, asbestos, items containing PCBs, tires, batteries, solid waste, or toxic or hazardous materials or substances, as defined in applicable state or federal law (collectively, "Hazardous Waste") are present upon or in the Property, (ii) there has been no release, discharge, storage, generation, treatment or disposal of any Hazardous Waste upon or in the Property, (iii) no property adjoining the Property has been used as landfill, nor has there been any release, discharge, storage, generation, treatment or disposal of any Hazardous Waste or petroleum product on any adjoining property, (iv) the Property and all improvements and operations presently thereon are in compliance with all applicable Federal, State and Local laws, regulations and rules, (v) the Property contains no remains or improvements of archeological or historic significance, or

graveyards. If Closing occurs hereunder, Seller hereby agrees to indemnify against and hold Purchaser and its successors and assigns harmless from any and all losses, liabilities, claims, demands, penalties, damages, costs and expenses, including without limitation, attorneys' fees that at any time may be incurred by Purchaser, its successors or assigns, whether before or after Closing, as a result of any breach by Seller of the foregoing representations and warranties in this Section 7.

The provisions of this Section 7 shall survive Closing and shall not be deemed merged into the Deed delivered at Closing. Except as otherwise warranted herein, Purchaser shall accept the Property in "AS IS" condition at Closing.

8. Zoning Status, Approvals, & Cooperation.

A. Seller hereby consents and agrees to join in, execute and timely support in good faith, as required, such applications as may be necessary or desirable to obtain the Governmental Approvals and in good faith will cooperate, support, and take all action reasonable or necessary to assist Purchaser in making and prosecuting the Governmental Applications. Accordingly, Seller shall execute and deliver upon request, a zoning or other customary special power of attorney or authorization in the form required by the [County/City] with respect to the Property.

B. The Property is listed on the [County/City] Zoning Map and in the [County's/City's] GIS system as being zoned _____.

C. From and after the Effective Date until Closing hereunder, or until this Agreement is permissibly terminated in accordance with the terms hereof by Purchaser or Seller, Seller shall not, other than in connection with the foregoing provisions of this Section 8, make any application to modify the zoning of the Property, or to otherwise modify in any way the legally permissible uses and/or development standards applicable to the Property.

9. Expenses, Taxes, and Closing Costs. All real estate taxes shall be prorated as of the date of Closing. Seller shall pay for any roll back taxes, the recording tax imposed upon grantors as to the Deed, the cost of preparation of the Deed, the brokerage commission due as set forth in Section 15 herein, and Seller's attorney's fees. Purchaser shall pay all other expenses and Closing costs, including, without limitation, costs relating to the Governmental Applications and Governmental Approvals, the cost of recordation of the Deed, any deed of trust, the cost of the Survey, the cost of the Title Commitment and owner's and lender's title insurance policies and fees, and expenses of its attorneys.

10. Risk of Loss. The risk of loss or damage to the Property by fire or other casualty prior to Closing shall be on the Seller. If such loss or damage, in the sole opinion of Purchaser, materially and adversely affects the Project or the Property as of Closing, Purchaser shall be entitled to terminate this Agreement and have the Deposit, together with any interest accrued thereon but less the Early Termination Payment refunded to the Purchaser, and the Escrow Agent shall disburse the Early Termination Payment to the Seller, and the parties hereto shall have no further obligations or liabilities to one another hereunder.

11. Condemnation. If, prior to Closing, any taking pursuant to the power of eminent domain is proposed or occurs, as to all or any portion of the Property intended to be acquired at Closing, or sale occurs in lieu thereof, the Purchaser shall be entitled to elect either to (i) terminate this Agreement or (ii) proceed to Closing, in which event, all proceeds, awards or other payments arising from any such taking or sale shall be paid to Purchaser, without any adjustment of the Purchase Price at Settlement. If the Purchaser elects to terminate this Agreement, the Deposit, together with any interest accrued thereon but less the Early Termination Payment, shall be refunded to the Purchaser, and the Escrow Agent shall disburse

the Early Termination Payment to the Seller and thereafter neither Seller nor Purchaser shall have any further obligations or liabilities to one another hereunder.

12. Default.

A. Seller's Default. If Seller defaults hereunder, Purchaser may terminate this Agreement by notice to Seller, in which event Purchaser shall be entitled to a full refund of the Deposit, but no such refund of the Deposit shall limit Purchaser's right to pursue all remedies available at law and in equity, including, without limitation, the right to the remedy of specific performance, or damages which may include, without limitation, the recovery of the expenses, including reasonable attorneys' fees and court costs, of Purchaser incurred in the prosecution of this Agreement and seeking redress for Seller's default. Notwithstanding the foregoing, Seller shall not be deemed in default hereunder unless Seller shall have been given written notice by Purchaser of such default and failed to cure such default within thirty (30) days after receipt of such notice, or, if such default is susceptible of cure but cannot reasonably be cured within thirty (30) days, an additional reasonable time period required to effect such cure so long as such cure has been commenced within such thirty (30) days and diligently pursued but in no event more than ninety (90) days from the date of Purchaser's notice to Seller.

B. Purchaser's Default. Seller and Purchaser agree that in the event of a default by Purchaser under this Agreement, the damages suffered by Seller will be difficult to ascertain, and that, in the event of a default by Purchaser, Seller's sole and exclusive remedy shall be to obtain from the Escrow Agent the Deposit, together with any interest accrued thereon, as liquidated damages, and Seller hereby specifically waives the right (i) to seek specific performance of this Agreement by Purchaser, and (ii) to sue Purchaser for monetary damages resulting from Purchaser's default under this Agreement. The Seller may not exercise the

remedy of liquidated damages if the Seller is in default in any material respect under this Agreement. Notwithstanding the foregoing, Purchaser shall not be deemed in default hereunder unless Purchaser shall have been given written notice by Seller of such default and failed to cure such default within thirty (30) days after receipt of such notice, or, if such default is susceptible of cure but cannot reasonably be cured within thirty (30) days, an additional reasonable time period required to effect such cure so long as such cure has been commenced within such thirty (30) days and diligently pursued but in no event more than ninety (90) days from the date of Seller's notice to Purchaser.

13. Governing Law. This Agreement shall be governed in all respects by the laws of the Commonwealth of Virginia.

14. Assignability. This Agreement shall inure to the benefit of and be binding upon the successors and permitted assigns of Seller and Purchaser. This Agreement may not be assigned by either party without the prior written consent of the other party; provided, however, that Purchaser may assign this Agreement to an affiliate entity owned or controlled by Purchaser without the Seller's consent, but such assignment shall not release the Purchaser from its obligations under this Agreement. Anything herein to the contrary notwithstanding, any party may assign the rights or obligations of such party hereunder to a qualified intermediary as part of a like-kind exchange under Internal Revenue Code Section 1031, but such assignment shall not relieve, release or absolve such party of its obligations to the other party hereunder.

15. Agents and Brokers. Seller and Purchaser each represent and warrant that it did not deal or consult with any broker or agent, real estate or otherwise, with regard to this Agreement or the transaction contemplated hereby, other than _____, who is the agent of the Seller (the "Seller's Broker"). Seller shall compensate Seller's Broker pursuant

to a separate agreement between Seller and Seller's Broker. Each party hereto agrees to indemnify and hold harmless the other party from all liability, expense, loss, cost or damage, including reasonable attorneys' fees and court costs, that may arise by reason of any claim, demand or suit of any agent or broker arising out of the facts constituting a breach of the foregoing representations and warranties.

16. Notices. Any notice required or permitted to be given under this Agreement shall be in writing and shall be deemed to be an adequate and sufficient notice if given in writing and delivery is made either by (i) personal delivery, in which case the notice shall be deemed received the date of such personal delivery or refusal of receipt, (ii) nationally recognized overnight air courier service, next day delivery, prepaid, in which case the notice shall be deemed to have been received one (1) business day following delivery to such nationally recognized overnight air courier service or refusal of receipt, or (iii) email, provided that delivery thereof is acknowledged by the receiving party, evidenced by the sender's receipt of a receipt evidencing delivery from its email program, or the sender of an email notice otherwise does not receive any indication that such email did not get delivered properly to the applicable recipient, and to the following addresses or email addresses, as applicable:

To Purchaser:

With a Copy to:

To Seller:

With a Copy to:

18. Entire Agreement; No Waiver. This Agreement, together with all exhibits attached hereto, constitutes the entire agreement between the parties and may not be modified or

changed except by written instrument executed by the parties. No waiver of any provision or condition of this Agreement by any party shall be valid unless in writing signed by such party. No such waiver shall be taken as a waiver of any other or similar provision or of any future event, act, or default.

19. Headings. Headings used in this Agreement are used for convenience only and shall not be considered when construing this Agreement.

20. Possession. Possession of the Property shall be delivered as of the date of Closing, free and clear of any tenancies.

21. Business Days. If any action is required under the provisions of this Agreement to occur by a date that is a Saturday, Sunday or legal holiday, such date shall be extended to the first day thereafter that is not a Saturday, Sunday or legal holiday.

22. Counterparts; Non-Paper Records. This Agreement may be signed or otherwise authenticated in any number of counterparts and by different parties to this Agreement on separate counterparts, each of which, when so authenticated, shall be deemed an original, but all such counterparts shall constitute one and the same Agreement. Any signature or other authentication delivered by facsimile or electronic transmission shall be deemed to be an original signature hereto. Each party who signs or otherwise authenticates this Agreement hereby: (1) agrees that the other party may create a duplicate of this Agreement by storing an image of it in an electronic or other medium (a "Non-Paper Record"); (2) agrees that, after creating the Non-Paper Record, such party may discard or destroy the original in reliance on this Section; (3) agrees that the Non-Paper Record shall be treated as the original for all purposes; and (4) expresses its present intent to adopt and accept the Non-Paper Record as an authenticated record of this Agreement. This Agreement, when signed or authenticated pursuant to this Section, shall

be evidence of the existence of this Agreement and may be received in all courts and public spaces as conclusive evidence of the existence of this Agreement and that this Agreement was duly executed by the parties to this Agreement.

23. Severability. If any term, covenant or condition of this Agreement, or the application thereof to any person or circumstance, shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term, covenant or condition to other persons or circumstances, shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

24. Confidentiality/Exclusivity. The: Parties and their respective representatives shall hold in strictest confidence all data and information obtained with respect to the Property and the terms and conditions of this Agreement, whether obtained before or after the execution and delivery hereof, and shall not use such data or information for purposes unrelated to this Agreement or disclose the same to others except as expressly permitted hereunder. The preceding sentence shall not be construed to prevent either party from disclosing to its prospective lenders or investors, or to its officers, directors, attorneys, accountants, architects, agents, title insurance company, engineers and consultants to perform their designated tasks in connection with the transaction contemplated by this Agreement. However, no party shall have this obligation concerning information which is published or becomes publicly available through no fault of either the Purchaser or the Seller, is rightfully received from a third party, or is required to be disclosed by law. Seller agree that, as of the Effective Date, Seller shall not, directly or indirectly, through any officer, director, agent, affiliate, representative or otherwise, market, solicit, initiate or encourage the making of any inquiries, engage in marketing,

negotiations or other substantial discussions, or accept or enter into any agreement with any other person, entity, or party other than Seller (including, without limitation any letter of intent or other commitment), with respect to the transaction contemplated under this Agreement or for the ground lease or other direct or indirect disposition of the Property; and shall discontinue any marketing, pending discussions or negotiations with any other third parties with respect to the transaction contemplated hereunder.

25. Severability. Except as may be otherwise expressly provided herein, every term and provision of this Agreement is intended to be severable, and if any term or provision of this Agreement is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of this Agreement. The preceding sentence shall be of no force or effect if the consequence of enforcing the remainder of this Agreement without such illegal or invalid term or provision would be to cause any party to lose the benefit of its economic bargain.

26. Other Miscellaneous Provisions:

A. Construction. This Agreement shall not be construed more strictly against the Purchaser merely by virtue of the fact that the same has been prepared by the Purchaser or its counsel, it being recognized both of the parties hereto have contributed substantially and materially to the preparation of this Agreement. All words herein which are expressed in the neuter gender shall be deemed to include the masculine, feminine and neuter genders and any word herein which is expressed in the singular or plural shall be deemed, whenever appropriate in the context, to include the plural and the singular.

B. Reporting Obligations. The Sellers and the Purchaser hereby designate the Title Insurer to act as and perform the duties and obligations of the “reporting person” with

respect to the transaction contemplated by this Agreement for purposes of 26 C.F.R. Section 1.6045 4(e)(5) relating to the requirements for information reporting on real estate transaction closed on or after January 1, 1991. If required, the Seller, the Purchaser and the Title Insurer shall execute at Closing a designation agreement designating the Title Insurer as the reporting person with respect to the transaction contemplated by this Agreement.

C. 1031 Exchange. Each of the Seller and the Purchaser may structure the sale of the Property as a like-kind exchange under Internal Revenue Code Section 1031 at such party's sole cost and expense. The other parties shall reasonably cooperate therein, provided that such other parties shall incur no material costs, expenses or liabilities in connection with such party's exchange and the other parties shall not be required to take title to or contract for purchase of any other property. If any party uses a qualified intermediary to effectuate the exchange, any assignment of the rights or obligations of such party hereunder shall not relieve, release or absolve such party of its obligations to the other parties hereunder.

27. Acceptance. This Agreement shall remain in effect until 5:00 pm on _____, 202____. If not signed by Seller and returned to Purchaser by that time, it shall be deemed null and void.

SIGNATURE PAGE IMMEDIATELY FOLLOWS

WITNESS the following signatures:

SELLER:

_____,
a [] []

Date: _____

By: _____ (SEAL)

Printed Name: _____

Title: _____

PURCHASER:

_____,
a [] []

Date: _____

By: _____ (SEAL)

Printed Name: _____

Title: _____

Receipt of funds representing the Initial Deposit from Purchaser is hereby acknowledged.

_____, as Escrow Agent

By: _____ DATE: _____

Printed Name: _____

Title: _____

EFFECTIVE DATE OF CONTRACT: _____, 202_____

Exhibit A
(Description of Property)

REAL ESTATE PURCHASE CONTRACT

THIS REAL ESTATE PURCHASE CONTRACT (this "Contract") is made this ____ day of _____, 202__, between _____, a _____ limited liability company and/or its assigns ("Buyer"), _____, a _____ corporation ("Seller"), and _____, as escrow agent ("Escrow Agent"). Buyer and Seller are sometimes collectively referred to herein as the "Parties" and individually as a "Party."

WITNESSETH:

WHEREAS, Seller desires to sell and Buyer desires to purchase certain property described hereafter; and

WHEREAS, the Parties desire to enter into a contract for the purchase and sale of such property on the terms and subject to the conditions set forth below.

NOW, THEREFORE, IN CONSIDERATION OF the mutual covenants, premises and conditions herein set forth, and other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:

1. **Sale of Property.** Seller agrees to sell and Buyer agrees to purchase, on the terms hereinafter stated, all of Seller's right, title and interest in and to the following described property:

____ (___) parcels of land including approximately _____ acres located in _____ [jurisdiction], identified as the following Tax Parcel ID numbers: _____, [with current address _____], together with all rights, privileges, interests, easements, improvements, hereditaments and appurtenances thereunto including, but not limited to all right, title, and interest in and to adjacent streets, alleys, rights-of-way, and any adjacent strips or gores of real estate (the "Property").

2. **Purchase Price.** Subject to the adjustments and prorations hereinafter described, the total purchase price to be paid by Buyer to Seller for the purchase of the Property is the sum of _____ **Dollars (\$ _____ .00)** (the "Purchase Price"). The Purchase Price shall be paid in the following manner:

(a) **Deposit.** The sum of _____ **Dollars (\$ _____ .00)** (the "Deposit") shall be deposited with the Escrow Agent, whose address is _____, within five (5) days after the Effective Date (as defined herein), to be held and disbursed in accordance with this Contract. The "Effective Date" shall be the last date that this Contract is executed by either Buyer or Seller as evidenced by the dates below their signatures on page 12 of this Contract. The Contract shall be effective on the Effective Date, regardless of whether the Escrow Agent has yet executed the same.

(b) **Cash at Closing.** At Closing (as defined herein), Buyer shall pay to Seller by wire transfer of immediately available funds the further sum of _____ **(\$ _____ .00)**, adjusted for any prorations, adjustments or credits as provided for in this Contract.

(c) The only duties of the Escrow Agent are to promptly place the Deposit and the Extension Payments (as defined herein) into a deposit account with a financial institution approved by Buyer and Seller, and to hold and disburse the Deposit and the Extension Payments to Seller at Closing, or otherwise in accordance with the terms of this Contract. The Escrow Agent shall have no duty to know or determine the performance or nonperformance of any term or condition of this Contract between the Parties. The Escrow Agent may resign its duties hereunder upon five (5) days written notice to each of the Parties, in which event Buyer and Seller shall mutually agree upon a substitute escrow agent who shall thereafter be the Escrow Agent. If a controversy shall arise between the Parties with any third person, the Escrow Agent may await the outcome of such controversy by final legal proceeding or otherwise as Escrow Agent may deem appropriate, or Escrow Agent may institute such interpleader or other proceeding as Escrow Agent may deem proper. The Escrow Agent is executing this Contract to evidence its consent to its role as the Escrow Agent in accordance with the terms and conditions hereof.

3. **Conveyance.** Seller shall convey the Property by [special warranty deed/general warranty deed with English covenants of title] (the “Deed”), free and clear of all liens and indebtedness of every kind, and free and clear of any encumbrance, condition or restriction, except for Permitted Exceptions (as hereinafter defined).

4. **Condition of Title.**
a. Title to the Property at Closing shall be marketable and insurable by an appropriate ALTA Owner's Title Policy (the “Title Policy”) issued by the Escrow Agent as agent for a national title insurance company selected by Buyer (the “Title Company”) at regular rates in the amount of the Purchase Price, without exception or limitation except as to (i) the lien of real property taxes on the Property for the current year not yet due and payable; and (ii) those matters affecting title and accepted by Buyer as set forth in Section 4.b. below (collectively, the “Permitted Exceptions”).

b. Buyer shall obtain a title commitment for the Property (the “Title Commitment”) setting forth all easements, exceptions, restrictions, encumbrances and liens (“Exceptions”), together with legible copies of the Exceptions and a current site plan and survey (if applicable) reflecting the location of all Exceptions. Buyer may also elect to have a new ALTA/ACSM survey of the Property completed, certified to Buyer, Buyer’s lender and the Title Company (the “Survey”). Buyer shall review the Exceptions and the Survey and determine whether any such Exceptions or Survey show defects which render title to the Property unacceptable. If Buyer disapproves any such Exceptions, then Buyer shall notify Seller in writing of each such Exception it disapproves (collectively, the “Disapproved Exceptions”) prior to the Inspection Completion Date (as hereinafter defined). Seller shall have seven (7) days following receipt of Buyer’s notice (the “Seller Response Period”) within which to notify Buyer in writing whether it shall remove the Disapproved Exceptions from title to the Property. If such notice states that Seller is willing to attempt to remove the Disapproved Exceptions, then Seller shall proceed to attempt to deliver title to the Property free and clear of the Disapproved Exceptions at Closing. If such notice states that Seller is not willing or is unable to attempt to remove the Disapproved Exceptions or Seller fails to notify Buyer of its intentions with respect to the Disapproved Exceptions within such seven (7) day period, then Buyer shall have the right to terminate this Contract by written notice to Seller delivered within ten (10) days after the Seller Response Period (or if Seller fails to respond, then ten (10) days after the date on which such response was due). Should Buyer terminate this Contract as provided in this Section, the Deposit shall be returned to Buyer and this Contract shall be null and void without liability or further obligations of any nature to any party. If Seller has attempted but has been unable to remove the

Disapproved Exceptions by Closing, Buyer shall have the right to terminate this Contract on or before Closing with the Deposit returned to Buyer or purchase the Property subject to any such matters as Seller shall have failed to remove.

c. Notwithstanding the foregoing, Seller shall be unconditionally obligated, at its sole cost and expense, to satisfy at or prior to Closing all monetary encumbrances evidenced by deeds of trust, tax liens, judgments, mechanic's liens or other liens or charges in a fixed sum or capable of computation as a fixed sum ("Liquidated Liens"), and Seller authorizes the use of the Purchase Price otherwise payable to Seller at Closing to pay and discharge any Liquidated Liens.

d. After the Inspection Completion Date, Buyer may, by delivery of written notice to Seller, object only to matters of title that (i) first arise, first appear of record, or are first created after the effective date of the Title Commitment, (ii) apply to the Property, (iii) were not created, caused or agreed to by Buyer, (iv) will prevent Buyer from utilizing the Property for Buyer's intended use, or (v) will have a materially adverse effect upon the economic feasibility of the Buyer's development ("Subsequent Objections"). If Buyer delivers any Subsequent Objections to Seller, then Seller must cure such title matter prior to Closing if it is a Liquidated Lien. If the Subsequent Objection is of such a nature that is not capable of being cured by Seller and the Subsequent Objection was outside of Seller's reasonable control (i.e. a taking by a public authority having the power of eminent domain), then Buyer shall have the option of (x) taking such title as Seller can convey without abatement of the Purchase Price, in which case all proceeds from such taking shall be paid over to Buyer at Closing, as provided herein, or (y) terminating this Contract upon written notice to Seller, in which case Seller shall not be in default under the terms of this Contract and shall not be responsible for any costs or expenses incurred by Buyer in connection therewith. If the Subsequent Objection is of such a nature that is not capable of being cured by Seller and the Subsequent Objection was caused by Seller or Seller's agents, Seller shall be in default under the terms of this Contract and Buyer shall have the option of (A) taking such title as Seller can convey without abatement of the Purchase Price, or (B) terminating this Contract upon written notice to Seller, and pursuing any remedies as provided in Section 15 of this Contract.

5. **Inspections.** Seller and Buyer hereby acknowledge that as of the date of the execution of this Contract, Buyer has not yet had an opportunity to complete its required due diligence and fully review and evaluate this transaction. Seller shall deliver to Buyer within five (5) days after the Effective Date the following: (i) any title insurance policies and reports and all exceptions to such policies and reports, (ii) any existing land survey of the Property, (iii) any existing environmental reports, soil reports, engineering or geotechnical studies, (iv) copies of the most recent tax bills for the Property, and (v) copies of any and all plans, reports, studies, surveys, documents, leases, service agreements, tests, and materials in Seller's possession or in the possession of its agents, attorneys, consultants, accountants and other representatives, concerning or otherwise affecting the Property (collectively, the "Due Diligence Data").

Buyer shall have until 5:00 p.m. local time on the date that is ninety (90) days after the Effective Date (the "Inspection Completion Date") to review and evaluate this transaction. If Buyer determines, in its sole and absolute discretion that Buyer does not desire to purchase the Property, then Buyer shall have the right to give written notice to Seller and Escrow Agent electing to terminate this Contract, provided such notice is delivered to Seller prior to 5:00 p.m. on the Inspection Completion Date. In the event such notice of termination is delivered on or before 5:00 p.m. on the Inspection Completion Date, then, Escrow Agent will deliver to Buyer the Deposit, and the parties shall be released from all further obligations each to the other under this Contract. In the event that the Buyer does not terminate this Contract as set forth in this

Paragraph 5, then the contingency set forth in Paragraph 5 shall be deemed satisfied or waived by Buyer. After the Inspection Completion Date, the Deposit shall be nonrefundable to Buyer (except as otherwise provided in this Contract) and applicable to the Purchase Price at Closing.

Buyer, its agents, employees and representatives shall have access to the Property at all reasonable times subsequent to the Effective Date and prior to the Closing or earlier termination of this Contract with full right to: (a) inspect the Property; and (b) to conduct reasonable tests thereon including, but not limited to, soil borings, geotechnical studies, Phase I Environmental Site Assessment (and Phase II environmental study if recommended by Buyer's consultant), topographical survey, and to make such other examinations with respect thereto as Buyer, its counsel, licensed engineers, surveyors or other representative may deem reasonably necessary. Any test, examinations or inspections of the Property by Buyer and all costs and expenses in connection with Buyer's inspection of the Property shall be at the sole cost of Buyer and shall be performed in a manner not to unreasonably interfere with the Seller's ownership of the Property. Upon completion of any such inspection, examination, or test, Buyer shall restore any damage to the Property caused by Buyer's inspection. Buyer hereby indemnifies and holds Seller harmless from all loss, cost or expense, including, but not limited to, reasonable attorneys' fees and court costs resulting from Buyer's inspections in connection with the Property. The provisions of this Section shall survive any termination of this Contract.

6. **Entitlements.** Buyer shall have until 5:00 p.m. on the date that is one hundred eighty (180) days after the Effective Date (the "Entitlement Period") to obtain the necessary entitlements in final, non-appealable form for the Property for use as [REDACTED], including but not limited to land use and zoning approvals, special or conditional use permits, site plan approval, and all other entitlements, permits, variances, licenses, and other governmental approvals necessary to develop the Property, in Buyer's sole and absolute discretion (collectively, the "Approvals"). Seller hereby agrees to fully cooperate with Buyer, at no out-of-pocket cost to Seller, in obtaining the Approvals within the Entitlement Period. Upon Buyer's request, Seller shall execute a limited power of attorney or land use authorization as required by the applicable jurisdiction, authorizing [REDACTED] or [REDACTED], either of whom may act on behalf of Buyer for such limited purpose, to execute all such documentation as may be reasonably required to obtain the Approvals. To the extent that Seller is required to execute any documents, agreements, or applications related to the Approvals or development of the Property, Seller hereby agrees to execute such required documents within ten (10) days after request from Buyer. Any delay in obtaining required signatures from Seller will serve to extend the Entitlement Period, day for day, until such signatures are obtained.

In the event Buyer is unable to obtain the Approvals prior to the expiration of the Entitlement Period, Buyer may elect to (i) terminate this Contract by delivering written notice to Seller prior to the expiration of the Entitlement Period or (ii) Buyer may extend the Entitlement Period for one (1) additional period of ninety (90) days by providing notice in writing to Seller and Escrow Agent with a payment of _____ Dollars (\$_____.00) (the "Extension Payment"). The Extension Payment shall apply to the Purchase Price at Closing, or in the event that Buyer does not obtain the Approvals within the Entitlement Period, as extended, Buyer may elect to terminate this Contract by delivering written notice to Seller and Escrow Agent, and the Extension Payment shall be returned to Buyer along with the Deposit only if Buyer is unable to obtain the Approvals despite its diligent efforts. In the event that the Buyer does not terminate this Contract as set forth in this Section 6, then the contingency set forth in Section 6 shall be deemed satisfied or waived by Buyer.

7. **Representations and Warranties.** (a) Seller hereby makes the following

representations and warranties to Buyer, which are a condition of Buyer's obligation to close, which are true and correct as of the Effective Date of this Contract (unless otherwise indicated hereafter), and which shall be true and correct as of the Closing Date, as though such representations and warranties were again made at such time, and which shall be certified as correct by the Seller as of the Closing Date by execution and delivery to Buyer of an appropriate certificate (or identifying any such representations and warranties which are no longer true and correct in any material respect):

- (i) Seller owns good and marketable fee simple title to the Property.
- (ii) To the knowledge of Seller, there are no pending, threatened or contemplated condemnation or legal actions involving all or any portion of the Property, and Seller has received no notice of any such action.
- (iii) Seller has the legal power, right and authority to enter into this Contract.
- (iv) This Contract and all documents required hereby to be executed by Seller are and shall be valid, legally binding obligations of and enforceable against Seller in accordance with their terms, subject only to applicable bankruptcy, insolvency, reorganization, moratorium laws or similar laws or equitable principles affecting or limiting the rights of contracting parties generally.
- (v) Seller is not a "foreign person" which would subject Buyer to the withholding tax provisions of Section 1445 of the Internal Revenue Code. Prior to Closing, Seller shall execute and deliver to Buyer an affidavit in the usual and customary form as required by law, certifying among other things that Seller is not a "foreign person" for the purposes of Section 1445 of the Internal Revenue Code.
- (vi) Seller has not entered into any contract, agreements, commitments, letter of intent or other agreements of any kind with any party other than Buyer, relating to the sale of all or any portion of the Property which is still in effect.
- (vii) The Property is vacant and free and clear of all tenancies, leases, subleases and rights of occupants.
- (viii) Seller has no knowledge of and has not received actual written notice of any violations of any environmental laws or any other laws or municipal ordinances, orders or requirements noted or issued by any governmental department or authority affecting the Property.
- (ix) During the period from the Effective Date until the Closing Date, Seller shall not enter into any leases, licenses, easements or occupancy agreements which may affect the Property without Buyer's prior written consent, which shall not be unreasonably withheld, provided such agreements do not materially interfere with Buyer's ability to obtain the Approvals or use the Property for the intended use. In addition, Seller shall not cause any physical damage or waste on the Property, specifically including any placement, release, discharge, storage, generation, treatment or disposal of any Hazardous Waste upon or in the Property. For purposes of this subsection, "Hazardous Waste" shall include underground storage tanks, asbestos, items containing PCBs, tires, batteries, solid waste, or toxic or hazardous materials or substances, as defined in applicable state or federal law.

(b) Buyer hereby makes the following representations and warranties to Seller, which are a condition of Seller's obligation to close, which are true and correct as of the Effective Date of this Contract (unless otherwise indicated hereafter), and which shall be true and correct as of the Closing Date, as though such representations and warranties were again made at such time, and which shall be certified as correct by the Buyer as of the Closing Date by execution and delivery to Seller of an appropriate certificate (or identifying any such representations and warranties which are no longer true and correct in any material respect):

(i) Buyer has the legal power, right and authority to enter into this Contract.

(ii) The individual executing this Contract and the instruments referenced herein on behalf of Buyer has the legal power, right and actual authority to bind Buyer to the terms and conditions hereof and thereof.

(iii) This Contract and all documents required hereby to be executed by Buyer are and shall be valid, legally binding obligations of and enforceable against Buyer in accordance with their terms, subject only to applicable bankruptcy, insolvency, reorganization, moratorium laws or similar laws or equitable principles affecting or limiting the rights of contracting parties generally.

(c) Seller and Buyer shall promptly advise the other party in writing if it determines at any time prior to the Closing Date that any of its representations and warranties in this Section 7 are no longer true and correct in any material respect. The representations and warranties of Seller and Buyer in this Section 7 shall survive Closing for twelve (12) months and shall thereafter be deemed to have merged into the Deed executed and delivered by Seller to Buyer at Closing hereunder.

8. **Closing.** Buyer and Seller agree that the purchase shall be consummated as follows:

(a) **Title Transfer.** Seller agrees to convey good and marketable fee simple title to the Property to Buyer by the Deed on the Closing Date, as set forth above in Section 3. Effective on the recordation of the Deed by Seller to Buyer, beneficial and legal ownership, and the risk of loss of the Property shall pass from Seller to Buyer (the "Closing").

(b) **Settlement.** Provided that this Contract has not been earlier terminated, and subject to the conditions to Closing set forth herein, this transaction shall close within thirty (30) days after the earlier of (i) Buyer's receipt of all Approvals or (ii) the end of the Entitlement Period, or any extension thereof, if Buyer does not elect to terminate this Contract as provided in Section 6 (the "Closing Date"). Closing shall occur on the Closing Date and shall be conducted by mail or overnight courier by the Title Company, or at such other time and place as may be agreed to in writing by Seller and Buyer.

(c) **Seller's Instruments.** At Closing, unless otherwise set forth below, Seller shall deliver or cause to be delivered to Buyer the following items (all documents shall be duly executed and acknowledged where required):

(i) **Special Warranty Deed.** The Deed executed by Seller conveying to Buyer marketable fee simple title to all of Seller's right, title and interest in and to all of the Property, free and clear of all liens and encumbrances except for

Permitted Exceptions. At Buyer's election, the Deed shall describe the Property in accordance with the Title Commitment and/or the Survey.

(ii) **Lien Affidavit.** An affidavit in form acceptable to the Title Company certifying that the Property is free from claims for mechanic's, materialmen's, and laborer's liens, possessory rights of third parties, and sufficient to cause the Title Company to issue owner's and lender's title insurance policies without exception for mechanics' liens or possessory rights of third parties.

(iii) **FIRPTA.** An affidavit, in form and substance satisfactory to Buyer, stating Seller's United States taxpayer identification number, that Seller and all persons holding beneficial interest in the Property are "United States Persons" as defined by Section 1445(f)(3) and Section 7701(g) of the Internal Revenue Code of 1986, as amended (the "Code") and that the Buyer is not subject to the withholding requirements of Code Section 1445(a).

(iv) **Federal and State Tax Documentation.** An IRS 1099 reporting form and any Florida reporting form as may be required.

(v) **Settlement Statement.** A settlement statement setting forth in reasonable detail the financial transaction contemplated by this Contract (the "Settlement Statement").

(vi) **Authority Documentation.** Reasonable documentation evidencing Seller's existence and authority to convey the Property as may be reasonably required by Title Company.

(vii) **Additional Documentation.** Any additional documents reasonably requested by Buyer or the Title Company in order to convey insurable title to the Property, including documents to be executed by Seller in satisfaction of any requirements set forth on Schedule B-1 of the Title Commitment.

9. **Buyer's Instruments.** At Closing, Buyer shall deliver or cause to be delivered to Seller the Purchase Price required by Section 2, the Settlement Statement, and such additional documents as might be reasonably required by Seller to consummate the sale of the Property to Buyer.

10. **Conditions Precedent to Obligation of Buyer.** The obligation of Buyer to consummate the transaction hereunder shall be subject to the fulfillment on or before the Closing Date of all the following conditions, any or all of which may be waived by Buyer in its sole discretion. Other than as otherwise provided for in this Contract, if any of the conditions are not fulfilled as of the Closing Date, Buyer may terminate this Contract and the Escrow Agent shall immediately return the Deposit to Buyer and Buyer shall have no further rights or remedies available to it under this Contract, except if the failure to satisfy any condition is due to the default of Seller, in which case Buyer shall have the remedies available to it pursuant to Section 15 herein.

(a) Seller shall have delivered to Buyer, or, as applicable, the Escrow Agent, all of the items required to be delivered to Buyer pursuant to the terms of this Contract, including those provided for in Section 8(c).

- (b) All of the representations and warranties of Seller contained in this Contract shall be true and correct in all material respects as of the Closing Date.
- (c) Seller shall have performed and observed, in all material respects, all covenants and agreements of this Contract to be performed and observed by Seller as of the Closing Date.
- (d) There has been no material and adverse change to the condition of the Property since the Inspection Completion Date, normal wear and tear excepted.
- (e) The Escrow Agent shall be unconditionally and irrevocably committed to issue to Buyer the Title Policy, based on the Title Commitment, with the standard permitted exceptions deleted and containing such endorsements as Buyer or its attorneys reasonably request, provided that Buyer provides the Escrow Agent with all diligence items which may be required to issue Buyer's desired endorsements.
- (f) Buyer shall have obtained the Approvals as set forth in Section 6.

11. **Costs.** Seller shall pay the following costs: Seller's attorney's fees associated with the sale, Seller's fees and costs associated with preparation and recordation of the Deed including any transfer tax, Seller's portion of any ad valorem tax prorations, all costs to repay, satisfy and/or release any Liquidated Liens or other liens, and fifty percent (50%) of any escrow fees charged by the Escrow Agent. Buyer shall pay the following costs: Buyer's attorney's fees, Survey costs, Buyer's portion of any ad valorem tax prorations, customary Buyer's fees and costs associated with recordation of the Deed, all title examination costs and costs of obtaining an owner's policy of title insurance, and fifty percent (50%) of any escrow fees charged by the Escrow Agent. Any other costs or charges of closing this transaction not specifically mentioned in this Contract shall be paid and adjusted in accordance with local custom in the area in which the Property is located.

12. **Property Tax Prorations.** All real and personal property ad valorem taxes and installments of special assessments, if any, for the calendar years prior to the current calendar year shall be paid by Seller. All real and personal property ad valorem taxes and special assessments, if any, whether payable in installments or not, for the current calendar year shall be prorated to the Closing Date on a calendar year basis, based on the latest available tax rate and assessed valuation, to be paid by Seller through the Closing Date and by Buyer from the Closing Date through the end of the calendar year.

13. **Possession.** Possession of the Property shall be delivered to Buyer on the Closing Date free from any parties claiming rights to possession of the Property.

14. **Damage, Destruction and Condemnation.**

(a) **Casualty.** Except as provided herein, Seller assumes all risk of loss or damage to the Property by fire or other casualty until the Closing Date. If such loss or damage materially and adversely affects Buyer's intended use and enjoyment of the Property as of the Closing Date, Buyer shall have the option, in its sole discretion, either to (i) terminate this Contract by giving Seller written notice in which event the Deposit and the Extension Payment, if any, shall be returned to Buyer and the parties hereto shall have no further obligations or liabilities to one another hereunder except as expressly provided for hereunder; or (ii) proceed to Closing and accept from Seller an assignment of all insurance payable as a result of such damage or casualty

and Seller shall credit against the Purchase Price the amount of any deductible. If at any time on or prior to the Closing Date any portion of the Property is destroyed or damaged as a result of fire or any other cause whatsoever, Seller shall promptly give written notice thereof to Buyer.

(b) **Condemnation.** In the event, at any time on or prior to Closing Date, any action or proceeding is filed, under which the Property, or any portion thereof, may be taken pursuant to any law, ordinance or regulation or by condemnation or the right of eminent domain, Seller shall promptly give written notice thereof (which notice shall describe the type of action being taken against the Property, and which portions of the Property will be affected thereby) to Buyer. Buyer shall have the right to terminate this Contract by written notice to Seller within thirty (30) days following the date upon which Buyer receives Seller's written notice of such action or proceeding, in which event the Deposit and the Extension Payment, if any, shall be returned to Buyer and the parties hereto shall have no further obligations or liabilities to one another hereunder except as expressly provided for hereunder. If Buyer does not elect to so terminate this Contract within said thirty (30) day period, this Contract shall remain in full force and effect and the parties shall proceed to Closing and all condemnation proceeds will be assigned to Buyer.

15. **Default; Remedy.**

(a) In the event that either Party fails to perform such Party's obligations hereunder (except as excused by the other's default), the Party claiming default may make written demand for performance.

(b) In the event of a default by Seller, if Seller fails to comply with any such written demand within ten (10) days after receipt thereof, Buyer shall have the option to (i) terminate this Contract and on such termination, the Deposit and Extension Payment shall be returned by Escrow Agent to Buyer, or (ii) pursue its right to the remedy of specific performance against Seller. If the remedy of specific performance is not available to Buyer, due to the willful misconduct or failure of Seller to perform its obligations under this Contract, then Buyer may file an action seeking to recover all expenses actually incurred by Buyer in obtaining the Approvals. Seller shall be responsible for attorneys' fees actually incurred by Buyer in filing suit for specific performance or any action to recover expenses.

(c) In the event of a default by Buyer, if Buyer fails to comply with any such written demand within ten (10) days after receipt thereof, Seller shall have the right to terminate this Contract and, on such termination, the Deposit and Extension Payment, if any, shall be forfeited by Buyer and delivered by Escrow Agent to Seller. Seller and Buyer agree that in the event of a default by Buyer under this Contract, the damages suffered by Seller will be difficult to ascertain, and as such Seller's sole and exclusive remedy shall be to obtain from the Escrow Agent the Deposit and Extension Payment, if any, as liquidated damages, and Seller hereby specifically waives the right (i) to seek specific performance of this Contract by Buyer, and (ii) to sue Buyer for monetary damages resulting from Buyer's default under this Contract.

16. **Brokerage.** Each party hereto represents and warrants to the other that it has dealt with no brokers or finders in connection with this transaction. Seller and Buyer each hereby indemnify, protect and defend and hold the other harmless from and against all losses, resulting from the claims of any broker, finder, or other such party, claiming by, through or under the acts or agreements of the indemnifying party. The obligations of the parties pursuant to this Section 16 shall survive the Closing or any earlier termination of this Contract.

17. **Miscellaneous.** It is further agreed as follows:

(a) **Governing Law.** This Contract and all documents and instruments referred to herein shall be governed by, and shall be construed according to, the laws of the Commonwealth of Virginia.

(b) **Notice.** All notices necessary or proper herein shall be made by: (i) overnight delivery; (ii) a reputable courier or delivery service; or (iii) via e-mail with a copy delivered via method (i) or (ii), addressed as follows:

If to Seller:

Attn: _____

Email: _____

With a copy to:

Attn: _____

Email: _____

If to Buyer:

Attn: _____

Email: _____

With a copy to:

Attn: _____

Email: _____

If to Escrow Agent:

Attn: _____

Email: _____

The addresses of the parties may be changed by giving notice thereof in writing in the manner set forth in this Section for the giving of notice. Any notice shall be deemed to have been given: one (1) day after it is delivered to an overnight delivery service for delivery; or on the same day, if delivered via a courier, delivery service, or via e-mail. Notices from either party (to the other) may be given and received by its attorneys as identified herein

(c) **Entire Agreement.** This Contract constitutes the entire agreement between Buyer and Seller and there are no agreements, understandings, warranties, or representations between Buyer and Seller except as set forth herein. This Contract cannot be amended except in writing executed by Buyer and Seller.

(d) **Binding Effect.** This Contract shall inure to the benefit of and bind the respective successors and assigns of the Parties hereto.

(e) **Assignment.** Buyer shall have the right to assign its rights and interest under this Contract to an entity which is an affiliate of Buyer and, upon receipt of notice from Buyer that Buyer has assigned this Contract, Seller shall recognize such assignee as the Buyer hereunder.

(f) **Counterparts.** To facilitate execution, this Contract may be executed in as many counterparts as may be required. It shall not be necessary that the signature of, or on behalf of, each Party, or that the signatures of all persons required to bind any party, appear on each counterpart. It shall be sufficient that the signature of, or on behalf of, each Party, or that the signatures of the persons required to bind each party, appear on one or more such counterparts. All counterparts shall collectively constitute a single agreement. It is the intent and agreement of each party hereto that if any signature hereon is not an original, but is a digital, mechanical, or electronic reproduction (such as, without limitation, a photocopy, fax, email, PDF, Adobe image, Adobe Sign, DocVerify, DocuSign, jpeg, telegram, telex, or telecopy), then such signature shall be as enforceable, valid and binding as, and the legal equivalent to, an authentic and traditional ink-on-paper original wet signature penned manually by its signatory and each party may rely upon such instrument as an original for all purposes.

(g) **Severability.** If any term, covenant or condition of this Contract, or the application thereof to any person or circumstance, shall to any extent be invalid or unenforceable, the remainder of this Contract, or the application of such term, covenant or condition to other persons or circumstances, shall not be affected thereby, and each term, covenant or condition of this Contract shall be valid and enforceable to the fullest extent permitted by law.

(h) **Business Days.** If any action is required under the provisions of this Contract to occur by a date that is a Saturday, Sunday or legal holiday, such date shall be extended to the first day thereafter that is not a Saturday, Sunday or legal holiday.

(i) **Confidentiality.** The terms and conditions which are contained in this Contract shall be kept in strict confidence by Buyer and Seller and shall not be disclosed to any individual or entity other than to those authorized representatives of Buyer and Seller and their agents for the purpose of assisting in the transaction contemplated by this Contract. All Due Diligence Data which is not published as public knowledge or which is not generally available in the public domain, or which is known by Buyer prior to disclosure hereunder or becomes available to Buyer on a non-confidential basis from a source other than Seller, shall be kept in strict confidence by Buyer and shall not be disclosed to any individual or entity other than to those authorized representatives of Buyer and their agents for the purpose of assisting Buyer in

evaluating the Property for Buyer's potential acquisition thereof until Closing; provided however, that Buyer shall have the right to disclose any such information to its employees, officers, shareholders, financial advisors, consultants, partners, affiliates, lenders and attorneys in connection with the acquisition, financing, ownership, operation and sale of the Property or if required by applicable law or as may be necessary in connection with any court action or proceeding with respect to this Contract.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, this Contract has been duly executed by the Parties on the dates set out below and by the Escrow Agent.

SELLER:

a [state of organization] [entity type]

By: _____ (SEAL)
Name: _____
Title: _____

Date Executed: _____

BUYER:

a [state of organization] [entity type]

By: _____ (SEAL)
Name: _____
Title: _____

Date Executed: _____

ESCROW AGENT:

By: _____
Name: _____
Title: _____

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THE LANGUAGE OF VESTED RIGHTS – IRONING OUT THE CONFUSION

By Karen L. Cohen



Karen L. Cohen is Chair of the Real Estate & Land Use practice at Protorae Law, PLLC in Tysons, VA. Ms. Cohen currently serves as Secretary of the Virginia State Bar Real Property Section and co-chair of the section's Land Use & Environmental Committee. Ms. Cohen is chair of the Prince William Government Relations Subcommittee of NAIOP Northern Virginia, a member of the Northern Virginia Building Industry Association (NVBIA), and American Institute of Architects Northern Virginia (AIANV). In addition to her law degree, Ms. Cohen holds an architecture degree and a master's in real estate development. Ms. Cohen is a member of the

Board of Directors of Legal Services of Northern Virginia (LSNV) and serves on LSNV's Racial Justice Committee.

Whether or not land use law is your main practice area, no doubt you have heard someone, somewhere, talk about a parcel of land, or a building, or the use of the land or building, in terms such as this: “Oh, yes, that junkyard is there only because the city *grandfathered* it in” or, “Current zoning wouldn't allow it, but the owner's rights had vested.” Or perhaps you have heard a zoning official refer to a certain lot or building that seems to violate the current zoning as being allowed to be there because it is “lawfully nonconforming.” Sometimes, this vocabulary is used without sufficient precision. While these are related concepts, casually conflating the terminology can lead to misunderstandings about precisely what rights are associated with the property in question. This article provides a basic overview of the terminology and discusses some relevant case law that sheds light on the subject.

Property owners are often surprised (and disappointed) to learn that they are not allowed to use their property or build upon it in the manner they expected. That disappointment is even greater when owners feel they have made a proper inquiry and believe they were given the “green light” to do what they want to do with their land. When they find they cannot, owners and their counsel may claim the landowner's rights are “vested” because the government approved the very thing the landowner wants to do. Or there may be an argument that the owners' use (or their building, or the land) is “lawfully nonconforming” and therefore, permitted to continue even if no longer allowed by current zoning laws. However, local governments are entitled to put limitations and conditions on lawfully nonconforming uses, lots and buildings, such that, depending on the circumstances, “vested” rights acquired in that manner can be limited or lost altogether.

Determining whether a landowner has vested rights under Virginia law is highly fact-dependent. Indeed, local boards of zoning appeals, circuit courts, and the state's highest court often reach conflicting results in vested rights cases, as indicated by the outcomes of court decisions (discussed below).

It is helpful to begin by separately examining the sources and usage of these three terms – so-called “grandfathering”; nonconforming; and vesting. Generally, in the land use context, “grandfathering” refers to when someone is permitted to follow old rules or laws that once allowed their activity instead of following newly implemented rules or laws that would presently apply to prohibit or limit that same activity. Those exempt from the new rule or law are sometimes said to have been “grandfathered in”; those who are not “grandfathered in” must abide by the new rules. Here is an example of such a clause, permitting subdivision applications filed before a certain date to be reviewed under pre-existing requirements (*i.e.*, the rules that existed before the county adopted new rules):

Complete applications for final subdivision approval which have been filed before the close of business on October 9, 1996, which were in compliance with all substantive zoning and subdivision ordinance requirements in effect on that date shall be reviewed in accordance with those requirements.

Bertozzi v. Hanover County, 261 Va. 608, 610 (2001) (holding that, “under the grandfather clause,” subdivider was entitled to have his applications reviewed in accordance with the pre-existing ordinance requirements as the county had previously interpreted such requirements).

In a recent zoning case in Massachusetts, the court specifically declined to use the term “grandfathering,” acknowledging its racist origins.¹ Virginia’s enabling laws do not necessitate using that term to describe the legal concept it embodies in the context of land use and zoning.² However, Virginia’s enabling laws specifically provide for: (1) how and when a landowner acquires “vested rights”;³ and (2) how localities may allow the continuance of “land, buildings, and structures and the uses thereof which *do not conform* to the zoning prescribed for the district in which they are situated[.]”⁴ Thus, when referring to “vested rights,” or to land, buildings, or uses that do not conform to current zoning (*i.e.*, “nonconformities”), those terms should be used in a manner consistent with the meaning given to them by state law.

VESTED RIGHTS: SAGA VESTING AND NONCONFORMITIES

“Vested rights [] protect a landowner’s right to develop a specific project under existing zoning conditions and allow continuation of the non-conforming use when that zoning designation is amended or changed.” *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566 (2019) (quoting *Board of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 282 (2006)). Thus, vested rights “shall not be affected by a subsequent amendment to a zoning ordinance.” *Id.* (quoting Code § 15.2-2307(A)).

Code §15.2-2307 sets forth more than one type of vesting. The first three subsections of the statute refer to two types of vesting, which can be referred to in shorthand as: (1) SAGA; and (2) lawful nonconformance. In “SAGA vesting,” landowners can acquire vested rights because they are the beneficiary of a significant affirmative governmental action (SAGA), and the SAGA specifically allows the very thing that they are claiming they are entitled to do. If they can show that they have relied in good faith on the SAGA and incurred extensive obligations or substantial expenses in diligent pursuit of a *specific* project in reliance on the SAGA, then they have a vested right to do *that* project under Va. Code § 15.2-2307(A), even if there is a subsequent amendment to the zoning ordinance that

¹ Referring to the protection given to structures that predated the zoning restrictions at issue in *Comstock v. Zoning Bd. of Appeals of Gloucester, et al.*, No. 19-P-1163 (Aug. 3, 2020), the Massachusetts Appeals Court said:

Providing such protection commonly is known – in the case law and otherwise – as “grandfathering.” We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase “grandfather clause” originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867. See Webster’s Third New International Dictionary 987 (2002) (definition of “grandfather clause”); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 Colum. L. Rev. 835 (1982).

² The term “grandfathering” is nowhere to be found in the state enabling legislation for local regulation of *land use*, except for a reference to the “grandfathering” provisions of the Virginia stormwater regulations in the State Water Control Law, see Va. Code § 62.1-44.15:52(A). The only other places in the entire Code that the term is used appear to be references to “grandfathered [health insurance] plans” in the insurance title of the Code and a reference to a “grandfathering period” in the Virginia Electric Utility Regulation Act.

³ Va. Code § 15.2-2307(A).

⁴ Va. Code § 15.2-2307(C) (emphasis added).

would prohibit it.⁵ Code § 15.2-2307(B) lists examples of actions that may be considered significant affirmative governmental acts.⁶

For example, say a landowner applied for and received approval to rezone a parcel of land to build a 100-unit townhome project. The project is depicted in the generalized development plan (GDP) that was required with the application, and it has been approved by the governing body. If the owner has relied in good faith on that approval and incurred extensive obligations in diligent pursuit of the project, then the owner's right to do the particular 100-unit townhome project shown on the GDP is vested, because an approved rezoning for a specific use or density is one of the listed SAGAs. Note that the fact that the landowner has vested rights does not preclude the locality from rezoning that land. Let's assume the landowner had acquired a vested right to build the townhome project and then built it. The locality could subsequently enact a new ordinance rezoning that parcel, and at that point, the townhome project would be considered "lawfully nonconforming." See *Bragg Hill, supra*.

This type of vesting – lawful nonconformance – also derives from Code § 15.2-2307, subpart C, which enables localities to enact zoning ordinances that provide for a landowner's right to continue or maintain *lawfully nonconforming* "land, buildings, structures, and the uses thereof," subject to certain conditions and limitations.⁷ A nonconforming lot, nonconforming building, or nonconforming

⁵ Va. Code § 15.2-2307(A) provides:

Nothing in this article shall be construed to authorize the impairment of any vested right. Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

⁶ Pursuant to Va. Code § 15.2-2307(B):

For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property; or (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.

⁷ Va. Code §15.2-2307(C) provides in part:

A zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations

use, respectively, means “a *lawful* [lot, building or use] existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance.” *Hardy v. Board of Zoning Appeals*, 257 Va. 232, 235 (citations and internal quotation marks omitted). While the law protects property rights in permitting the continuance of nonconformities, such nonconformance is disfavored, and therefore, subject to certain limitations. The purpose of the law is “to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy opposes the extension and favors the elimination of nonconforming uses. Nonconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan.”⁸

Unlike SAGA vesting, the enabling legislation for the nonconformity portion of the vesting statute permits localities to condition or limit, or even cause an owner to lose, vested rights. For example, an owner’s discontinuance of a lawfully nonconforming use for more than two years can cause the owner to lose the right to continue the use. See *Prince William County Board of Supervisors v. Archie*, 296 Va. 1 (2018) (“Code § 15.2-2307(C) provides for a locality to adopt a zoning ordinance that allows nonconforming uses to continue unless the use is discontinued[.]”). Additionally, the locality may provide that the owner is only allowed to continue such nonconforming uses or buildings if they do not intensify the use or do not enlarge the building. See Va. Code § 15.2-2307(C) (“[Lawfully nonconforming] land, buildings, structures, and the uses thereof . . . may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; . . .”).

THE ARCHIE CASE – NONCONFORMING USE NEVER DISCONTINUED

In *Archie*, *supra*, the Supreme Court of Virginia held that the circuit court did not commit error when it held that an automobile graveyard was a lawfully nonconforming use, even though the property had been sold and owned by another person for a number of years and even though the automobiles were kept on the property without that owner’s permission. The landowner had come before the Prince William County Board of Zoning Appeals (BZA) to contest the Zoning Administrator’s determination that a certain parcel of his land could no longer be used as an automobile graveyard. In 1954, the landowner’s family had established an automobile salvage business on property that was later subdivided into Parcels 20, 20A, and 20B. Parcels 20 and 20B had been used continuously as an automobile graveyard, which the County Code defined as “any lot . . . upon which five or more inoperative motor vehicles of any kind are found.” In 1958, the County adopted a zoning ordinance, which precluded such land from being used as an automobile graveyard; however, lawful uses pre-dating the enactment of this ordinance could continue as lawful nonconforming uses.

Parcel 20A was sold to a commercial purchaser in 1987, but the landowner repurchased it in 1992. In 1990, the commercial purchaser obtained a court order requiring the landowner to remove all cars from the land, but there was uncontested evidence that this order was never obeyed, and that over one hundred vehicles remained on the property the entire time. The BZA upheld the Administrator’s determination; however, on appeal, the circuit court reversed, finding that the nonconforming use of Parcel 20A as an automobile graveyard had never been abandoned or discontinued. The County appealed.

whenever, with respect to the building or structure, the square footage of a building or structure is enlarged, or the building or structure is structurally altered as provided in the Uniform Statewide Building Code (§ 36-97 et seq.).

⁸ *Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 43 (1997) (citing 8A Eugene McQuillin, Municipal Corporations § 25.184 (3d ed. 1994)). The legislature’s approach to permitting nonconformities in certain circumstances – a type of “vesting” – reflects the tension between the desire to protect individual property rights and to not unduly hamper local governments’ efforts to promote public health, safety and welfare through long-range land use planning.

The Virginia Supreme Court held that the circuit court did not commit error. The County Code provides that a nonconforming use terminates when such use is intentionally abandoned or discontinued for a period of two years. The County argued that the parcel's use as an automobile graveyard had ceased for two independent reasons: (1) the landowner did not own Parcel 20A from 1987 to 1992 and (2) during that time, the commercial owner never placed junk vehicles on the lot. However, the County Code states that the nonconforming status adheres solely to the land, irrespective of its owner. Therefore, it was immaterial that the landowner did not hold title to the parcel from 1987 to 1992, or that the commercial purchaser did not deposit any junk vehicles there. Because Parcel 20A housed five or more inoperative motor vehicles for an uninterrupted period of time prior to the enactment of the 1958 zoning ordinance, the lawful nonconforming use of the land as an automobile graveyard never terminated. The court therefore affirmed the circuit court's judgment in favor of the landowner.

THE COHN CASE – PAID TAXES DID NOT “VEST” AN UNLAWFUL USE

In *Board of Supervisors of Fairfax County v. Cohn, et al.*, 296 Va. 465, 473 (2018), the Supreme Court of Virginia considered a different subsection of the vested rights statute; however, the court's examination of the statute as a whole helps to clarify the statutory framework for vested rights. In *Cohn*, the court held that the Circuit Court of Fairfax County erred when it reversed the decision of the BZA, which had upheld the zoning administrator's decision to require the Cohns to cease using two of the three structures on their lot as dwellings in a residential district where only one dwelling per lot is allowed. The two illegal structures (a detached garage and a garden house) were constructed before the Cohns acquired the parcel in 1998. No zoning violations had been issued since their construction. However, in 2016, an inspection revealed that the garage and garden house had been converted to dwellings (before the Cohns purchased the property). The zoning administrator issued a notice of violation (NOV), instructing the Cohns to remedy the violation by removing the kitchens and other appliances used for cooking and removing all gas, plumbing and electrical connections, thereby restoring the structures to their original *permitted* use, which the evidence showed was use as a garage and a garden house, respectively, and not as dwellings. The building permits issued for the garage and the garden house expressly stated that “there are no kitchens or bathrooms approved” and therefore it was clear that use of these structures for dwellings was illegal.

The Cohns admitted that neither the garage nor the garden house “conform to the original building permits,” and that it was likely the use of the garage and the garden house as dwellings “was established unlawfully.” *Id.* at 471. However, the Cohns argued that because they had paid taxes on the property for more than 15 years, Code § 15.2-2307(D) created a vested right to continue the use of the structures as dwellings. The board of zoning appeals determined that Virginia Code § 15.2-2307(D)(ii) did *not* protect the unlawful use of the structures as dwelling units. The trial court held otherwise, concluding that Virginia Code § 15.2-2307(D)(ii) created vested rights for both the illegal structures *and their uses*. The Supreme Court of Virginia reversed, holding that only the structures themselves were protected by Va. Code § 15.2-2307(D)(ii), and that § 15.2-2307(D)(ii) “does not provide protection for the uses of those structures.” *Cohn*, 296 Va. at 477.

In outlining the statutory scheme for vested rights, the court first observed that “[t]he General Assembly enacted Code § 15.2-2307 to prevent the impairment of vested rights in a landowner's use of their property.” *Id.* at 473. The first subsection of Code § 15.2-2307 concerns the vesting of the right to use of land. It provides that a significant affirmative governmental action allowing the use of land *in a particular way* may result in the beneficiary receiving a vested right to use the land *in that manner*. See *Cohn*, 296 Va. at 473. Code § 15.2-2307(C) concerns a landowner's vested right to maintain nonconforming “land, buildings, and structures, and the uses thereof.” A nonconforming use of a building or structure is, generally, “a *lawful* use [of a building or structure] existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance.” *Hardy v. Board of Zoning Appeals*, 257 Va. 232, 235 (1999) [citations and internal quotation marks omitted]. Landowners are entitled to maintain lawfully nonconforming buildings, structures, and uses. *Hale v. Board of Zoning Appeals for Town of Blacksburg*, 277 Va. 250, 271

(2009) (“It is well established in the law that as to an existing use, absent condemnation and payment of just compensation, the landowner has the right to continue that use even after a change in the applicable zoning classification causes the use to become nonconforming.”) (citing *Board of Supervisors of Fairfax County v. Board of Zoning Appeals*, 271 Va. 336, 348 (2006)). However, “[a] nonconforming use may not be established through a use of land which was commenced or maintained in violation of a zoning ordinance.” *Hardy*, 257 Va. at 235. And while Code § 15.2-2307(C) acknowledges the vesting of the right to maintain a nonconforming building, structure, or use, it also provides that if the structural condition of the building is altered, the vested right to the nonconforming use is lost. *Cohn* at 474-75.

Because the kitchens and bathrooms installed in the garage and garden house were unlawful, the Cohns could not (and did not) claim that their dwelling use was *lawfully nonconforming*. Rather, they sought relief under Va. Code § 15.2-2307(D) on the basis that they had paid taxes on the structures for more than 15 years. Va. Code § 15.2-2307(D) prohibits the government from requiring removal of a building or structure that was previously built in accordance with a building permit issued by the government, and upon completion, a certificate of occupancy or use permit was issued, or if the owner has paid taxes for that *permitted* building or structure for more than the previous 15 years.

However, with no vested right to *use* the structures as *dwellings*, the court found against the Cohns, holding that subsection (D) of the vested rights statute only protects the *structures* from removal, and further, that this did not prevent the County from requiring the Cohns to take out the kitchens, plumbing, etc. that support the illegal use of the structures as dwellings. *Cohn*, 296 Va. at 477-78 (holding “that Code § 15.2-2307(D)’s references to ‘building’ and ‘structure’ concern the edifices themselves, not their uses, and only protects the building or structure itself from removal.”). In other words, through the “paid taxes vesting” provision, the Cohns had acquired a vested right to have the structures remain – but only to remain for what these structures were permitted: a garage and a garden house, not dwellings.

REMEDIAL VESTING – CODE § 15.2-2311 (THE RHOADS CASE)

In addition to the vested rights conferred by Va. Code § 15.2-2307, discussed above, a landowner may acquire a vested right “to use property in a manner that otherwise would not have been allowed,” *Board of Supervisors of Richmond County v. Rhoads*, 294 Va. 43, 52 (2017), pursuant to Va. Code § 15.2-2311(C), which provides:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud.

In *Rhoads*, the owners filed an application to build a 2-story garage, and the application was approved. The owners, in reliance on the approval, built the garage at a cost of approximately \$27,000. *Rhoads, id., at 47*. About a month after they built the garage, a new zoning administrator informed the owners that the previously approved 2-story garage was in violation of the city ordinance, which prohibited a garage from being taller than the primary structure (the house). The owners appealed the decision of the zoning administrator and the BZA denied their appeal, affirming the zoning administrator’s decision that the garage violated the ordinance. The owners then appealed to the circuit court. The circuit court reversed the BZA, finding that the owners

were entitled to relief under Va. Code § 15.2-2311(C). The Board of Supervisors appealed, and the Supreme Court of Virginia affirmed the circuit court, finding in favor of the owners.

The Board had argued that Va. Code § 15.2-2311(C) did not apply because the first zoning official (the one who erroneously approved the 2-story garage), “lacked the authority to approve a plain violation of the Zoning Ordinance, and the Certificate he issued was therefore void *ab initio*.” The Board also claimed that the “Certificate” approving the garage was not a “determination” within the meaning of the statute. Additionally, it asserted that the statute only applies to bar the subsequent actions of a zoning administrator or other administrative officer, and not those of any other body, such as the Board or a court. The court rejected all three arguments.

The court found that the plain terms of the statute clearly prescribe the prerequisites for when Va. Code § 15.2-2311(C) applies, namely: (1) a written order, requirement, decision or determination made by the zoning administrator; (2) the passage of at least 60 days from the zoning administrator’s determination; and (3) a material change in position “in good faith reliance on the action of the zoning administrator.” There was no question that more than 60 days elapsed between the zoning administrator’s initial approval and his successor’s later assertion of a zoning violation and it was undisputed that the Rhoadses materially changed their position in good faith reliance on the zoning administrator’s approval of their specific plans, because they built the garage at a cost of nearly \$27,000.

With respect to the Board’s argument that the initial grant of approval was erroneous and in violation of the zoning ordinance, and therefore void *ab initio*, the court noted that while “prior to 1995 administrative zoning decisions that violated the zoning laws were void and property owners bore the sole responsibility for the consequences of a government’s zoning mistake (citations omitted), . . . [t]he plain language of Code § 15.2-2311(C) indicates that the statute is intended to eliminate the hardship property owners have suffered when they rely to their detriment upon erroneous or void zoning decisions.” *Rhoads*, 294 Va. at 51. “The remedial purpose of Code § 15.2-2311(C) is to provide relief and protection to property owners who detrimentally rely in good faith upon erroneous zoning determinations and who would otherwise suffer loss because of their reliance upon the zoning administrator’s error. Thus, Code § 15.2-2311(C) manifestly creates a legislatively-mandated limited exception to the judicially-created general principle that a building permit issued in violation of applicable zoning ordinances is void.” *Id.*

The Board also claimed that even if the Certificate was not void *ab initio*, the signed Certificate was still not a “written order, requirement, decision or determination” by the zoning administrator. The Supreme Court rejected this argument, explaining that “[i]n issuing the Certificate, the zoning administrator necessarily made a determination that the building plans complied with the Zoning Ordinance in all respects. . . . The issuance of the Certificate clearly constitutes a decision or determination by the zoning administrator that the building plans complied with the Zoning Ordinance.” *Id.* at 52.

Finally, the Board also claimed that Code § 15.2-2311(C) only binds a zoning administrator, but need not and should not be considered by any other body such as a board or a court in determining if there is an enforceable violation of a zoning ordinance. The court rejected this argument, finding that “[b]y its terms, Code § 15.2-2311(C) and its vesting provisions must be considered and enforced by a BZA, a board of supervisors, or a court in making a zoning determination or reviewing its correctness, if the prerequisites for the application of the statute are satisfied.” 294 Va. at 54. So long as the zoning administrator has made a “decision” or “determination” within the meaning of Code § 15.2-2311(C), the BZA and board are bound, otherwise, the statute “would afford scant, if any, protection to the property owner, and would not serve to ‘remedy the mischief at which [the statute] is directed.’” *Id.* at 55. “The remedial purpose of the statute requires the statute to be interpreted so as to provide relief and protection to property owners who rely in good faith upon erroneous zoning determinations . . . [o]nce the Rhoads’ rights vested, they were not subject to alteration by the zoning administrator, the BZA or the Board.” *Id.*

ZONING LETTERS AND DETERMINATIONS AS SOURCES OF “VESTING”

Whether or not a landowner acquires vested rights by virtue of a zoning official’s letter or determination also is highly fact-dependent. In *Rhoads*, the zoning administrator affirmatively approved the zoning for the garage project at issue, and in that case, the court found that the “Certificate of Compliance” constituted a “determination” by the zoning administrator. The court distinguished cases in which letters or other written communications from officials have been found to lack the definitive and specific approval needed to constitute a determination. See *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 354–56 (2013) (Code § 15.2–2311(C) did not apply to a “Cash Receipt” signed by a zoning administrator, because that document “was not a specific determination by the zoning administrator or any other City official that either of these businesses could use their respective premises in a manner not otherwise allowed under the zoning ordinances in effect at that time.”).

Other cases involving the issue of whether a zoning administrator’s letter constitutes a determination or decision upon which an owner may obtain vested rights have made clear that rights only vest to the extent of what is clearly *approved* in such letters. See e.g., *Board of Supervisors of Prince George County v. McQueen*, 287 Va. 122 (2014) (no vested rights accrued where zoning administrator did not “affirmatively approve” the project; rather, the “compliance letter” at issue “simply answered the question concerning the classification of [plaintiff’s] project” and stated in the letter that “the verification was subject to change.”); *James v. City of Falls Church*, 280 Va. 31, 44 (2010) (holding that a zoning administrator’s mere “interpretation” that the zoning ordinance permitted a consolidation with the caveat that actual approval of the requested consolidation was a planning commission function “lacked the finality of an ‘order, requirement, decision or determination’ under Code § 15.2–2311(C),” such that no vesting occurred); *Board of Supervisors of Stafford County v. Crucible*, 278 Va. 152, 160–61 (2009) (finding that Code § 15.2–2311(C) did not apply to a “zoning verification letter” because the letter did not affirmatively approve the project at issue and establish a vested right, but merely interpreted the definition of “school” under the then-current zoning laws).

NO PROPERTY INTEREST IN MERE EXPECTATIONS FOR PROJECT NOT YET APPROVED

Finally, it is worth noting that federal courts have invoked similar principles when evaluating whether a landowner has a constitutional property interest in anticipated development plans that are thwarted by regulatory action. The Fourth Circuit reiterated that a landowner does not acquire vested rights to develop a “hoped for” or anticipated project that has yet to be approved by the governing body. In *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685 (4th Cir. 2018), the Fourth Circuit concluded that Pulte failed to state viable constitutional claims, affirming the federal district court. After Pulte had invested more than twelve million dollars to purchase several hundred transferable development rights (TDRs) and recorded ownership of the TDRs, intending to build between 954 and 1,007 detached homes and townhomes on the land it had purchased in the TDR receiving area, the County amended its 1994 Master Plan, implementing a variety of regulatory changes that severely reduced the number of dwellings Pulte could build on its land, and placed additional costly burdens on Pulte, such as a requirement to dedicate parkland.

Pulte alleged that as a result of the changes to the 1994 Master Plan on which it had relied when it made its purchase, it now could only develop 17% of its land. The court held that Pulte had no constitutional property interest to develop its land under the 1994 Master Plan. The court explained that “the 1994 Master Plan plainly apprised all who read it that it was intended to be revised . . . and the County could . . . take whatever land use actions it deemed necessary,” and that even after prerequisites listed in the plan were satisfied, local officials retained discretion to determine whether those criteria were met. The court reiterated its longstanding rule that any “significant discretion” left to “zoning authorities defeats the claim of a property interest.” Here, it was clear that the zoning authorities retained significant discretion to make changes to the plan, and therefore, Pulte had “only a hope, not a legally cognizable expectancy” of being able to develop what it wanted. Indeed, the

court noted that “[i]f Pulte expected to easily obtain approval to construct approximately one thousand homes there, that expectation was not reasonable in light of the text of the 1994 Master Plan.” See also *Loch Levan Limited. Partnership, et al. v. Board. of Supervisors. of Henrico County, et al.*, 297 Va. 674 (Aug. 22, 2019) (vested rights doctrine “inapplicable where there is no underlying property right for the constitution to protect”).

CONCLUSION

Zoning attorneys are frequently asked to evaluate the impact of zoning changes on property rights. “Vested rights” is sometimes used as an umbrella term to describe generally a landowner’s right to conduct an activity that was once allowed but is prohibited under current zoning law. However, “vested rights” has a particular meaning under Virginia law, and it is just one of several distinct sources of property rights. For example, property rights may derive from protection offered by a clause in an ordinance, or from a significant affirmative governmental act (SAGA) approving a specific project, or from an ordinance permitting the continuance of a nonconforming structure so long as it is not expanded beyond a stated limit. Practitioners should be careful to ascertain the particular source of the property rights at issue. Doing so will lead to using the most precise language to describe those rights, leading to better communication with clients, local governments, concerned citizens, and colleagues.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GW ACQUISITION CO., LLC,)	
)	
Plaintiff,)	
)	
v.)	1:23-cv-1207 (LMB/WEF)
)	
PAGELAND LIMITED LIABILITY)	
COMPANY, et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION

Before the Court is plaintiff GW Acquisition Co., LLC’s Motion for Temporary Restraining Order [Dkt. No. 2] and Motion for Preliminary Injunction [Dkt. No. 11] to require defendants Pageland Limited Liability Company and Kimberly and David Mitchell to approve Proffers in accordance with the express terms of a valid and enforceable land sale contract. For the reasons that follow, GWA’s Motion for Preliminary Injunction will be granted [Dkt. No. 11], and its Motion for Temporary Restraining Order will be denied as moot [Dkt. No. 2].

I. BACKGROUND

A. Factual Background

This civil action concerns a dispute arising out of the Prince William County Digital Gateway Project (“Digital Gateway Project” or “Project”), a controversial redevelopment project which proposes to convert 2,100 acres of rural land in Prince William County into a data center corridor. Plaintiff GW Acquisition Co., LLC (“plaintiff,” “GWA,” or “Buyer”), a developer involved in the Project, initiated this civil action against defendants Pageland Limited Liability Company (“Pageland”) and Kimberly S. Mitchell and David C. Mitchell, Trustees of the Kimberly and David Mitchell 2021 Irrevocable Trust, (the “Mitchells”) (collectively,

“defendants” or “Sellers”) to force them to comply with the terms of their Purchase and Sale Agreements (“PSA”) to sell parcels of land to GWA.

This is not the first time that GWA and Pageland have found themselves on opposing sides in federal court. Pageland has previously attempted to breach the PSA to obtain a higher purchase price for its property. See GW Acquisition Co., LLC v. Pageland Ltd. Liab. Co., No. 1:22-cv-255, 2023 WL 125018 (E.D. Va. Jan. 6, 2023) (“Pageland I”). In that civil action, Pageland was ordered to “support and cooperate with plaintiff GW Acquisition Co., LLC in pursuing and obtaining approval of the Data Center Rezoning application.” See id. [Dkt. No. 179] at 2. As this Court found in Pageland I, this civil action “boil[s] down to a case of sellers’ remorse,” GW Acquisition Co., LLC v. Pageland Ltd. Liab. Co., No. 1:22-cv-255, 2023 WL 3294123 (E.D. Va. May 5, 2023) (Brinkema, J.), wherein Pageland, and now the Mitchells, have refused to abide by the terms of their signed agreements which require them to cooperate fully in the pursuit of the County’s approval of the Project.¹

Contractual Relationship Between the Parties

On October 27, 2021, GWA entered into PSAs with Pageland and the Mitchells pursuant to which both agreed to sell certain real property comprising approximately 175 acres. [Dkt. No. 1] at Exs. A, B. The 175 acres are part of a larger redevelopment effort by GWA in the Digital Gateway Project. The GWA assemblage includes over 812 acres of land, currently owned by Pageland, the Mitchells, and other landowners, all of which are subject to PSAs with GWA.²

¹ In Pageland I, this Court ordered Pageland to pay more than \$735,000 of GWA’s legal expenses and related costs incurred. Pageland has noticed an appeal of that decision.

² GWA is not the sole developer involved in the Digital Gateway Project. During the hearing on the Motion for Preliminary Injunction, GWA informed the Court that Compass Data Centers is also purchasing and developing land and is subject to the County’s regulation and approval process. [Dkt. No. 39].

In November 2022, Prince William County approved a Comprehensive Plan Amendment which redesignated the Digital Gateway corridor from agricultural and rural uses to allow for technology and data center development. [Dkt. No. 3] Ex. 2 at ¶ 3. GWA is now in the process of securing site-specific rezonings, which require certain Proffers³ to ensure the property has the necessary infrastructure to support the data center development. Id. Virginia law requires written acknowledgement by the landowners of any proffered condition “prior to a public hearing before the governing body.” See Va. Code. § 15.2-2298; see also PWC Ord. § 32-700.30.

Purchase and Sale Agreements

GWA alleges that to ensure compliance with all conditions and timelines established by Prince William County, meticulous coordination is required between GWA and each seller of land. “Each parcel of land is integral to this coordinated and complementary effort required to successfully complete each step of the rezoning process.” [Dkt. No. 12] at 7. The PSAs employed by GWA contain provisions designed to ensure that each landowner cooperates in a timely and meaningful manner in the Data Center Rezoning process, by requiring landowners to support and cooperate with GWA’s rezoning efforts. Specifically, § 7.2 of the Sellers’ PSAs provides in part:

Rezoning. . . . Seller hereby agrees, and all other Project Site Sellers have agreed, under their respective Project Site Purchase Agreements, to actively and fully support and cooperate with [GWA], using commercially reasonable, diligent and good faith efforts, in pursuing and obtaining the approval of the Data Center Rezoning, including promptly signing such documents as may be

³ A Proffer or Proffered Condition is a voluntary commitment from a landowner or developer to reduce or eliminate the impact of new development on neighboring properties and the county. Once Proffers are accepted, they become a part of the zoning regulations applicable to the property.

required in connection with obtaining such approval [of the Data Center Rezoning].

See [Dkt. No. 1] Ex. A, § 7.2; Ex. B, § 7.2. Further, the Sellers' required cooperation extends to the approval and execution of proffered conditions that may be required by Prince William County throughout the rezoning process. Section 7.2.2 of the Sellers' PSAs provides:

Proffers or other Conditions. In the event the authorities of Prince William County require Purchaser or Seller, in order to obtain approval of the Data Center Rezoning, to agree to certain proffered conditions that may affect the Land, or if Purchaser desires to submit any proffers in connection with obtaining the Data Center Rezoning that may affect the Land ("Proffers"), Purchaser shall provide copies of such Proffers or proffered conditions to Seller for its review prior to Purchaser agreeing to any such proffered conditions. All Proffer(s) shall be subject to the prior written approval of Seller, which approval shall not be unreasonably withheld, conditioned or delayed. Seller agrees to promptly execute the Proffers when requested by Purchaser, subject to the foregoing right to approve.

See id. Under § 7.2.2 there is a "two-step process," whereby the proposed Proffers must first be reviewed and approved by the Sellers who must communicate that approval to GWA. The second step requires the Sellers to sign the Proffers within one week of the Proffers being submitted to the Board of County Supervisors for its approval of the rezoning application. [Dkt. No. 39] at 16-17.

On August 28, 2023, GWA provided copies of Proffers via e-mail to all landowners, including Pageland and the Mitchells. [Dkt. No. 12] Ex. 1 at 1-5.⁴ The next day, Pageland and the Mitchells were provided a second copy of the Proffers via e-mail and by letter. Id. Exs. 3, 4. Each communication requested review and approval of the Proffers by September 6, 2023, id.,

⁴ GWA asked for approval of two Proffers—the North Proffer and the South Proffer—which established a set of conditions to which Sellers would affirm that the land being sold shall be in substantial conformance with a set of detailed requirements. See generally [Dkt. No. 12] Ex. 1 at 7-139.

because GWA alleges that prompt review and approval was necessary to abide by the schedule promulgated by Prince William County for timely rezoning, which includes review and public hearings before the Prince William County Planning Commission (the “Planning Commission”) and Board of County Supervisors (the “Board” or “BOCS”). [Dkt. No. 12] Ex. 2 ¶ 5. Although the Sellers do not yet have to sign the Proffers, GWA alleges that without all the Sellers advising GWA that they approve the Proffers, GWA’s rezoning application cannot move forward in the Planning Commission or Board processes. [Dkt. No. 12] Ex. 2 ¶ 7.

Hearings Before the Planning Commission and Board of County Supervisors

Final County approval for the Data Center Rezoning will involve two hearings: one before the Planning Commission and one before the Board. *Id.* ¶ 5. After the Planning Commission hearing, the date of which is yet to be finalized, the Planning Commission will issue a recommendation to the Board as to the rezoning of the Project site. The Board will make the final decision as to whether the proposed Project may go forward.

On July 30, 2023, the Chair of the Board, Ann Wheeler, sent an email to Prince William County Executive Christopher Shorter, in which she stated, “I am scheduling these two QTS⁵ rezoning cases noted below to be heard by the Board of County Supervisors at our November 21, 2023 meeting and they are now on that agenda.” [Dkt. No. 12] Ex. 5.⁶ Moreover, Wheeler wrote, “I would appreciate your assistance in working with all relevant agencies and our planning staff to conclude our staff evaluation / recommendations and schedule a Planning Commission hearing in a timely manner so that we stay on track to hear these cases as now

⁵ QTS Data Centers is a subsidiary company of plaintiff GW Acquisition Co. LLC. [Dkt. No. 1-1] at 26; [Dkt. No. 1-5] at 2.

⁶ The e-mail provides that the two cases placed on the agenda were REZ 2022-0032 (Digital Gateway North) and REZ 2022-0033 (Digital Gateway South). [Dkt. No. 12] Ex. 5.

scheduled for the Board of County Supervisors on November 21, 2023.” Id. As alleged by GWA, Wheeler sent this communication pursuant to Virginia Code § 15.2-2286.A.7 and Prince William County Ordinance § 32-700.43, which require the Board to vote on rezoning applications within one year of the application being filed.

On September 19, 2023, the Board voted to amend its meeting calendar, moved the November 21, 2023 meeting to November 28, 2023, and consolidated three land use applications for public hearings and votes on December 12, 2023, two of which being Digital Gateway North and Digital Gateway South. The amendment to the Board’s meeting calendar required a formal vote by the Board per its Rules of Procedure, which provide in part:

The Board may change the date, time, or place of any regular meeting to another date, time, or place, when such meeting conflicts with any holiday or any such change is otherwise deemed necessary by the Board, or it may establish additional regular meetings in any month. Such change to, or addition of a regular meeting may be accomplished by adoption of a resolution changing, or adding a regular meeting date, done at a regular or special meeting, which is provided for in this section.

See BOCS Rules of Procedure A(1)(b). The Rules do not require that a vote be taken to change the substantive agendas or hearings scheduled for particular dates.

Termination Clause in the Purchase and Sale Agreements

The PSAs include language that allows for the parties to terminate the entire agreement if the rezoning applications are not voted on by the Board within a defined period. Section 7.2.3 provides in part:

Outside Date for Rezoning. If a decision approving or disapproving the application for the Data Center Rezoning has not been made by the BOCS by August 15, 2023, either party may terminate this Agreement by written notice to the other; provided, however, that if by August 15, 2023, a hearing to vote on the Data Center Rezoning is scheduled to occur on or before December 30, 2023, such termination date may be extended through the scheduled hearing

date (together with additional time thereafter to obtain a final, non-appealable decision), upon request by either party.

[Dkt. No. 1] Exs. A, B. In effect, § 7.2.3 provides the parties the contractual option to extend the termination date if two conditions are met: 1) that a Board hearing to vote on the rezoning application is scheduled by August 15, 2023, and 2) the scheduled hearing is to take place before December 30, 2023. GWA notified Pageland and the Mitchells of its decision to exercise its authority under § 7.2.3 in writing on August 9, 2023. [Dkt. No. 12] Exs. 6, 7.

Alleged Breach

On August 30, 2023, Pageland provided written notice to GWA that it was terminating its PSA pursuant to § 7.2.3 claiming that the method by which Wheeler scheduled the public hearing on GWA's rezoning applications falls outside "accepted standard BOCS practice" because the agenda for the November 21, 2023 meeting was not finalized by August 15, 2023. [Dkt. No. 12] Ex. 8. Similarly, the Mitchells communicated their intent to terminate the PSA on the same basis as Pageland. Given their view that they have terminated their PSAs, Pageland and the Mitchells have refused to approve the Proffers in the proposal GWA has submitted to the Planning Commission. They are the only landowners who have refused to approve the Proffers at issue in this civil action. [Dkt. No. 12] at 12. GWA argues that it will sustain irreparable harm caused by Pageland's and the Mitchells' breach of §§ 7.2.2 and 7.2.3 of the Sellers' PSAs, which "puts the entire, years-long redevelopment effort at risk." [Dkt. No. 12] at 10.

B. Procedural History

On September 8, 2023, GWA filed a six-count complaint against Pageland and the Mitchells, [Dkt. No. 1], seeking declaratory judgments against Pageland and the Mitchells stating that each defendant is required to approve the Proffers necessary for GWA to obtain approval of the rezoning (Count I and Count II, respectively); specific performance of § 7.2 against Pageland

and the Mitchells as to the Proffers (Count III and Count IV, respectively); and breach of contract against Pageland and the Mitchells, seeking \$75,000 or more in damages (Count V and Count VI, respectively). *Id.* ¶¶ 25-14. Simultaneously, GWA filed the pending motions for injunctive relief. [Dkt. Nos. 2, 11].

On September 25, 2023, the Court held a preliminary injunction hearing at which the parties presented argument on the issues pertinent to both motions. The Court will analyze the issues in accordance with the preliminary injunction standard and deny the temporary restraining order motion as moot.

II. DISCUSSION

A. Standard of Review

A plaintiff seeking a temporary restraining order or preliminary injunction must be able to show “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).⁷ No single factor is determinative.

B. Analysis

1. Likelihood of Success on the Merits

“A party seeking a preliminary injunction must establish that he is likely to succeed on the merits of at least one claim.” Roe v. Shanahan, 359 F. Supp. 3d 382, 409 (E.D. Va. 2019). To meet this burden, the party must show more than merely “a grave or serious question for

⁷ Although a temporary restraining order may be issued *ex parte*, Fed. R. Civ. P. 65(a)(1) prohibits the issuance of a preliminary injunction “without notice to the adverse party.” There is no specific amount of time required for this notice, but defendants must be “given a fair opportunity to oppose the application.” Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Loc. No. 70, 415 U.S. 423, 433 n.7 (1974).

litigation,” Sarsour v. Trump, 245 F. Supp. 3d 719, 729 (E.D. Va. 2017) (emphasis and citation omitted), but need not show “a certainty of success,” League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (citation omitted). Here, the parties do not dispute that GWA has executed enforceable contracts with Pageland and the Mitchells. For example, neither Pageland nor the Mitchells dispute that they are required “to actively and fully support and cooperate with [GWA], using commercially reasonable, diligent and good faith efforts, in pursuing and obtaining the approval of the Data Center Rezoning, including promptly signing such documents as may be required in connection with obtaining such approval [of the Data Center Rezoning],” to promptly review any Proffers GWA submits, and to approve them absent the Proffers being unreasonable. [Dkt. No. 1] Ex. A § 7.2.2; Ex. B § 7.2.2. Importantly, Sellers do not argue that the underlying Proffers are unenforceable, i.e., that the Proffers are defective or unreasonable in violation of § 7.2.3. The Sellers also do not dispute that on August 28, 2023, GWA provided them with sets of Proffers and asked each to approve them on or before September 6, 2023. [Dkt. No. 12] Ex. 1. It is uncontested that both Pageland and the Mitchells failed to approve the Proffers by September 6, 2023, as requested.

The core issue in this litigation is Sellers’ claim that they are entitled to terminate their PSAs. Pageland indicated that it was terminating the PSA pursuant to § 7.2.3, while counsel for the Mitchells reiterated his clients’ unwillingness to timely approve the Proffers and “reaffirm[ed]” that the Mitchells’ may ultimately attempt to terminate their PSA. [Dkt. No. 12] Ex. 10.⁸

⁸ GWA has submitted supplemental briefing demonstrating that the Mitchells purport to have terminated the PSA pursuant to § 7.2.3 on October 2, 2023. [Dkt. No. 46] Ex. A (“I am writing to provide you with formal notice that the Seller hereby exercises its option under Section 7.2.3 of the PSA to terminate the Agreement. As you know from my correspondence dated September

As an initial matter, Pageland’s refusal to approve the Proffers defies a previous Order by this Court, in addition to a sworn commitment by its corporate representative. In Pageland I, this Court issued declaratory relief as to GWA, requiring Pageland to “cooperate with the Buyer on executing the Data Center Rezoning application . . . and avoid the risk of future litigation.” See 2023 WL 125018, at *17 (E.D. Va. Jan. 6, 2023) (Brinkema, J.). Additionally, during a deposition in the previous litigation, Pageland’s corporate representative swore under oath that Pageland intended to sign all Proffers in compliance with the PSAs and cooperate fully in the rezoning application process. See [Dkt. No. 12] Ex. 9 at 19-20. Given those predicates, Pageland’s current refusal to comply with the PSAs and approve the proffers demonstrates yet another attempt to flout this Court’s commands and the requirements of its signed contract with GWA.

Sellers’ invocation of their termination rights under § 7.2.3 is unsupported by any authority, and instead relies on a strained reading of the bylaws, standard practices, and scheduling decisions of the Board. Pursuant to § 7.2.3, the termination right inures to Sellers if, and only if: 1) a decision approving the application for the rezoning has not been made by the Board by August 15, 2023; and 2) a hearing to vote on the rezoning is not scheduled by August 15, 2023 to take place on or before December 30, 2023. [Dkt. No. 1] Exs. A, B. The parties agree that a decision approving the rezoning application did not occur before August 15, 2023; but, despite Sellers’ argument to the contrary, it is evident from the record that on July 30, 2023, Wheeler scheduled a vote to occur on the rezoning applications to take place on November 21, 2023, satisfying the conditions outlined in § 7.2.3 of the PSAs.

6, we believe that the August 15, 2023 deadlines for voting on rezoning or scheduling a hearing to vote on the rezoning application set forth in Section 7.2.3 of the PSA have not been met.”).

Pageland and the Mitchells argue that Wheeler’s e-mail to the County Supervisor did not properly “schedule” the November 21, 2023 hearing on the rezoning application because the process was not “formal,” [Dkt. No. 26] at 1, “official,” *id.* at 4, nor was an agenda for that meeting “finalized,” [Dkt. No. 12] Exs. 8, 11; however, neither the PSAs nor the Board Rules of Procedure support Sellers’ argument. First, neither document defines “schedule;” and second, neither sets out procedures for how a hearing or vote may be scheduled. Under generally accepted rules of contract construction and interpretation, the word “schedule” must be given its natural and ordinary meaning in context. PMA Cap. Ins. Co. v. U.S. Airways, Inc., 626 S.E. 2d 369, 372 (Va. 2006) (“Words that the parties used are normally given their usual, ordinary, and popular meaning.”). Here, scheduling connotes the “plan[ning] or appoint[ing] for a certain time or date.” See Am. Heritage Coll. Dictionary (3d ed.). Wheeler did just that with respect to the rezoning applications. In her e-mail to the County Executive, Wheeler plainly stated that the Digital Gateway Project applications were being scheduled for a hearing before the Board on November 21, 2023, pursuant to Virginia Code § 15.2-2286.A.7 and Prince William County Ordinance § 32-700.43. In doing so, she set the wheels in motion for the appropriate County staff to prepare for the hearings to occur on November 21, 2023, requesting that the County Executive “work[] with all relevant agencies and [] planning staff” and affirming that the Digital Gateway Project hearings “are now on that [November 21, 2023] agenda.” [Dkt. No. 12] Ex. 5.

In addition to attacking how the meeting was scheduled, Sellers also claim that a public agenda had not yet been finalized at the time of Wheeler’s July 30, 2023 e-mail. To support their argument, Sellers point to Rule F(2) of the Board Rules of Procedure, which requires that “[t]he

Chair, with the County Executive, shall prepare an agenda for each meeting.”⁹ They claim that “[t]his language indicates that collaboration and consent are necessary to place any issue on the agenda,” underscoring their position that more formality and procedure is required to notice a matter for a particular public hearing. [Dkt. No. 25] at 5. But Sellers misread Rule F(2), which does not contain a requirement that a public agenda must be created either alongside or before the act of scheduling the underlying vote for a particular meeting. The ministerial act of preparing and disseminating an agenda before the precise time and place of the meeting—which is governed by applicable regulation—cannot somehow be transformed into a requirement that the scheduling of a vote for that meeting must also follow the formal procedures governed by the Board Rules. Such a reading would run counter to other provisions in the Rules, such as Rule F(2)(a), which provides that the agenda and its supporting materials be dispatched to the public “in preparation for the meeting,” not prior to or concurrent with its scheduling or internal Board members’ decisions to consider certain matters.

State law does not help defendants. Virginia Code § 15.2-1813 requires only that the public receive notice of hearings “at least seven days prior to the date set for the hearing.” *Id.* Virginia law does not require that a Board of Supervisors must publicly disseminate its agenda months in advance of the scheduled meeting. In this case, the Board has publicized its hearing dates well in advance of their occurrence, and its meeting agendas are routinely finalized days before the meeting date. For example, the meeting agenda for the Board’s September 12, 2023 meeting was finalized and made publicly available approximately one week before the meeting

⁹ See Prince William County Board of County Supervisors Rules of Procedure, https://www.pwcva.gov/assets/documents/bcs/BOCS_Rules.pdf.

occurred. [Dkt. No. 12] at 19 & n.5. As this exhibit clearly shows, there is no merit to Sellers' argument that a public agenda must be issued at the same time as a meeting or vote is scheduled.

Pageland, but not the Mitchells, also argues that Wheeler was not authorized to schedule the rezoning applications for a vote during the November 21, 2023 hearing, claiming that Prince William County zoning ordinances limit the Chair's ability to schedule a vote until the Planning Commission's review is complete. See, e.g., [Dkt. No. 26] at 8-10; [Dkt. No. 25] at 8-10; [Dkt. No.12] Ex. 8. Pageland's citation to PWC Ord. § 32-700.41 is inapposite because that ordinance requires the Planning Commission to take certain actions as it relates to its own hearings and recommendations; it does not require the Board to take specific actions before scheduling hearings or votes of its own. In fact, having a hearing date set by the Board often allows the Planning Commission to work backward in preparing materials, holding hearings, and making recommendations so as to enable the Board to vote on a zoning issue.

The Board Rules provide that the Chair "shall prepare an agenda for each meeting" with the help of the County Executive. [Dkt. No. 12] Ex. 12 §§ A(1)(a), F(2). Here, Wheeler notified the Prince William County Executive on July 30, 2023 that GWA's rezoning cases were scheduled for the November 21, 2023 meeting. Wheeler wrote, "I am scheduling these two QTS rezoning cases noted below to be heard by the Board of County Supervisors at our November 21,

2023 meeting and they are now on that agenda.” [Dkt. No. 12] Ex. 3.¹⁰ Section 7.2.3 only requires that a hearing be scheduled before the Board, and one has been timely scheduled.¹¹

Sellers next argue that the Board’s vote on September 19, 2023 to move the November 21, 2023 meeting to November 28, 2023, and setting certain land use hearings and votes for the December 12, 2023 meeting, indicate that formal Board action is required to schedule votes. This argument is unsupported by the Board Rules. Specifically, Rule A(1)(b) requires the Board to vote to change the “date, time, or place of any regular meeting to another date, time, or place,” id., but it does not say anything about the formality required to amend the substantive discussions and reschedule votes to be held during those meetings. In effect, Rule A(1)(b) is immaterial to the question before the Court, which is whether before August 15, 2023 a meeting was scheduled to take place to vote on the rezoning applications and that the meeting is set to occur before December 30, 2023. Clearly, this has happened.¹²

¹⁰ Sellers argue that Wheeler’s e-mail demonstrates the tentative nature of the scheduling: “Please note that I may slightly amend this date at a future time depending upon the vacation schedule of my colleagues and other issues that may arise.” [Dkt. No. 12] Ex. 5. Nothing in this language supports the argument that Wheeler’s scheduling action was “premature [or] contrary to procedural norms.” [Dkt. No. 25] at 6. As is common in multi-member bodies, the restrictions imposed by others’ shifting calendars can impact items that are otherwise properly scheduled.

¹¹ Wheeler publicly stated “[t]he decision to schedule the hearing was prompted by an email from the applicant, which was sent after the one-year time limit set both by Virginia law and county ordinance expired. Contrary to certain assertions by a supervisor, the application had always been posed for consideration by year-end.” Ann Wheeler, Why I Scheduled a November 21 Hearing on the Digital Gateway, PRINCE WILLIAM TIMES (Aug. 26, 2023), https://www.princewilliamtimes.com/opinion/guest-opinion-why-i-scheduled-a-nov-21-hearing-on-the-digital-gateway/article_2c3454ca-4410-11ee-a9bf-db53b8df003a.html.

¹² Sellers also claim that a vote was not properly scheduled pursuant to § 7.2.3 because the Board did not satisfy prerequisites for being placed on the “consolidated land use public hearing agenda.” [Dkt. No. 12] Ex. 8. But consolidated land use public hearings are used by the Board to streamline the hearing process for straightforward or low-profile land use matters, allowing staff to dedicate time to higher profile disputes, such as the Digital Gateway Project. Zoning

Sellers raise one final issue as to the merits of GWA’s claim: GWA failed to comply with the 30-day notice-and-cure provision in the PSAs before filing its civil action and moving for injunctive relief. [Dkt. No. 26] at 12. Section 17.6 of the PSAs provides:

Notice and Cure Right. Prior to declaring a default and exercising the remedies described herein the non-defaulting party shall issue written notice of default to the defaulting party describing the event or condition of default in sufficient detail to enable a reasonable person to determine the action necessary to cure the default. The defaulting party shall have thirty 30 days from delivery of the notice in which to cure the default except for a failure to proceed to Closing as and when required pursuant to the terms of this Agreement or a failure by Purchaser to deliver the Purchase Price on the Closing Date as to which no cure period shall apply. If the default has not been cured within the applicable cure period the non-defaulting party may exercise the remedies described above.

[Dkt. No. 1] Ex. 1 at 25. According to Pageland, GWA never responded to its August 30, 2023 termination notice, [Dkt. No. 26] at 12; instead, GWA filed this civil action on September 8, 2023. GWA argues that Pageland’s purported termination of its PSA, and the Mitchells’ stated intention to do the same, render the cure provision in § 17.6 “a futile act,” [Dkt. No. 33] at 11, because Sellers’ repudiation excuses compliance with the contractual notice-and-cure provision.

Sellers’ argument is unpersuasive. Both Pageland and the Mitchells have demonstrated clear intentions “neither to . . . cure any alleged default of [their] obligations” under the PSAs, “nor to continue” with their agreements. See Hippocratic Growth Maryland Processing LLC v. Pesce, 2022 WL 5245752, at *7 (D. Md. Oct. 6, 2022) (citing Recreonics Corp. v. Aqua Pools, Inc., 638 F. Supp. 754, 758 (D.S.C. 1986) (holding that, where a defendant terminates a contract and announces its intention not to perform, the defendant preempts the fulfillment of the

cases on the standard public hearing agenda, as here, are not subject to the requirements laid out in Board Rule of Procedure F(9)(c).

condition precedent)). Neither Pageland nor the Mitchells have indicated in their pre-litigation or post-litigation postures any intent to cure their failure to approve the Proffers submitted by GWA. No amount of time would have resulted in any cured breach or avoided the need for the instant litigation.¹³

Ultimately, “when a contract has been made, and either party refuses to perform the agreement, equity enforces the performance of the contract specifically, by compelling the refractory party to fulfill his engagement according to its terms.” Griffin v. Griffin, 753 S.E.2d 574, 582 (Va. App. 2014); see also Stolz v. Fed. Commc’ns Comm’n, 882 F.3d 234, 240 (D.C. Cir. 2018). Because the PSAs are enforceable contracts which clearly outline the processes by which Proffers must be reviewed and approved as part of GWA’s rezoning applications with Prince William County, GWA is likely to succeed on the merits of its claim.

2. Irreparable Harm

GWA has adequately demonstrated that it will suffer irreparable harm if an injunction is not issued because Sellers’ refusal to approve the Proffers endangers GWA’s ability to have the Planning Commission and the Board fully assess its rezoning application, thereby putting the entire Project at risk. Each day that Sellers continue to refuse to comply with their contractual obligations under § 7.2.2, or alternatively seek to terminate and withdraw from the PSAs under § 7.2.3, the rezoning applications—and the entire Digital Gateway Project—become jeopardized.

¹³ This finding conforms with the previous litigation, in which Pageland made obvious its desire to terminate the agreement and seek a higher price for the land it previously agreed to sell to GWA. See GW Acquisition Co., LLC v. Pageland Limited Liability Co., 2023 WL 125018, at *1, 16 (E.D. Va. Jan. 6, 2023) (Brinkema, J.) (“[T]he uncontested record reflects that these disputes boil down to a case of sellers’ remorse,” and further noting defendant’s “history of failing to comply with the Purchase and Sale Agreement” and “obvious dissatisfaction with the GWA agreement” provided a reasonable basis for GWA to be concerned about his future cooperation).

GWA has presented evidence showing that Pageland's and the Mitchells' properties constitute necessary pieces in a complex, sizable land redevelopment project. By intent, design, and necessity, every parcel of land subject to a PSA in the Project is dependent on the inclusion of all others. GWA concretely articulated this fact at the preliminary injunction hearing when it explained the relative importance of Pageland's and the Mitchell's properties. Specifically, GWA explained that substations required for electrical generation, transmission, and distribution for the data centers are to be built on portions of the land Pageland and the Mitchells agreed to sell to GWA. "If those substations have to be moved, this entire project is gone. It's done. We're over. . . . The plan does not work without those two properties, period." [Dkt. No. 39] at 18-19. As the Fourth Circuit has previously explained, a developer undertaking a "complex project that can only progress in phases" suffers irreparable harm if a necessary parcel of land is withdrawn from the development plans at the eleventh hour. See E. Tenn. Nat. Gas. Co. v. Sage, 361 F.3d 808, 829 (4th Cir. 2004).

Certain portions of the project have to be completed before construction can begin on other portions. Therefore, as the district court recognized, "any single parcel has the potential of holding up the entire project." Continuing, the court said, "[t]o require [the company] to build up to a parcel of land [it] do[es] not possess, skip that parcel, and then continue on the other side would prove wasteful and inefficient." Furthermore, [the company] is under an order from FERC to complete construction and have the pipeline in operation by January 1, 2005. It would not be possible to meet FERC's deadline without a preliminary injunction.

Id. (cleaned up).

Moreover, delay could unravel the Project. If Pageland and the Mitchells withhold their approval of the Proffers, resulting in the inability of either the Planning Commission or the Board to approve the rezoning applications before December 30, 2023, the PSAs for all landowners in the Project would become terminable. See [Dkt. No. 12] at 14; see also [Dkt. No.

1] Exs. A, B; [Dkt. No. 12] Ex. 2 ¶ 8. It is undisputed that GWA stands to lose substantial profits if the land is not rezoned. These lost profits are difficult to quantify, making injunctive relief more appropriate. See HCI Techs., Inc. v. Avaya, Inc., 446 F. Supp. 2d 518, 521 (E.D. Va. 2006) (“[A] finding of irreparable harm is most appropriate where the plaintiff’s damages are difficult to calculate.”), aff’d, 241 F. App’x 115 (4th Cir. 2007); see also Update, Inc. v. Samilow, 311 F. Supp. 3d 784, 795 (E.D. Va. 2018). Further, the Sellers’ refusal to affirm the Proffers is certainly increasing GWA’s litigation costs and the cost of the transaction as a whole. For example, GWA points to the vulnerability of all the PSAs given Sellers’ breach, arguing that the delay increases the likelihood of breaches or invalidations of other covenants. A failure to meet deadlines, the likelihood of lost profits, and increased construction costs in a multi-phase project all tilt in favor of irreparable harm being inflicted on GWA by Sellers.¹⁴

Pageland and the Mitchells are unlikely to be harmed by being required to approve the Proffers under § 7.2.2 of the PSAs. It is not a burdensome task, nor is it one with which they are unfamiliar; and to the extent Sellers argue that there is some financial loss to them, this loss is a result of their negotiating choices and signing the contracts, not a result of approving the Proffers. In fact, Pageland and the Mitchells would likely engender more financial hardship by terminating the PSAs in two respects. First, neither Pageland nor the Mitchells are guaranteed to find alternative buyers for their parcels at prices at or exceeding GWA’s multi-million dollar contract prices. Sellers’ insistence on peering around the corner for a higher bidder may result in

¹⁴ See Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, & Maintain a Nat. Gas Pipeline Over Tracts of Land in Giles Cnty., Craig Cnty., Montgomery Cnty., Roanoke Cnty., Franklin Cnty., & Pittsylvania Cnty., Virginia, 2018 WL 648376, at *16 (W.D. Va. Jan. 31, 2018), objections sustained in part and overruled in part, 2018 WL 1193021 (W.D. Va. Mar. 7, 2018), aff’d sub nom., Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell, 915 F.3d 197 (4th Cir. 2019).

no sale at all. Second, and perhaps more worrisome, Pageland and the Mitchells risk exposing themselves to litigation by other developers and landowners involved the Project should their refusal to comply with their PSAs result in the Project not receiving zoning approval.

3. Balance of the Equities and Public Interest


The balance of the equities and public interest also favor GWA. The enforcement of valid contractual obligations is consistent with public policy, and there is no public interest weighing against such enforcement. Although the Digital Gateway Project is controversial and has spurred heated debate among its supporters and critics, that controversy is not relevant to the Court's analysis.

III. CONCLUSION

At bottom, the parties have entered into valid land sale contracts which require Pageland and the Mitchells to approve the Proffers that are integral to GWA's rezoning applications. Further, GWA has sufficiently demonstrated that without approval of the Proffers, there is a strong likelihood of the entire Digital Gateway Project not being approved, which would result in millions of dollars of losses for GWA and other landowners and developers. Moreover, defendants have not presented sound arguments that they are entitled to terminate their contracts. For these reasons, plaintiff's Motion for Preliminary Injunction [Dkt. No. 11] will be granted, and its Motion for a Temporary Restraining Order [Dkt. No. 2] will be denied as moot, by an Order to be issued with this Memorandum Opinion which will require the defendants to comply with their contractual obligations.

Entered this 6th day of October, 2023.

Alexandria, Virginia

lsl 

Leonie M. Brinkema
United States District Judge

Land Use & Zoning

What Every Transactional Lawyer Should Know



Karen L. Cohen



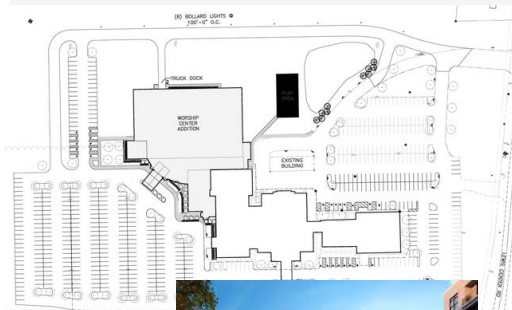
Lori H. Schweller



- I. Land Use Basics/Sources of the Law
- II. Practical Considerations & Drafting Tips for Transactional Lawyers

1

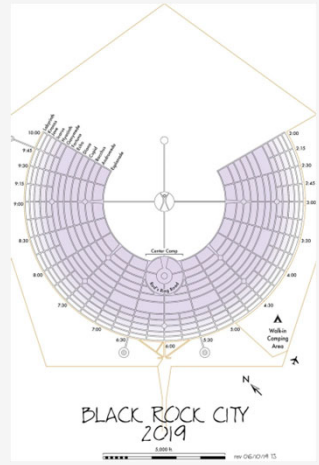
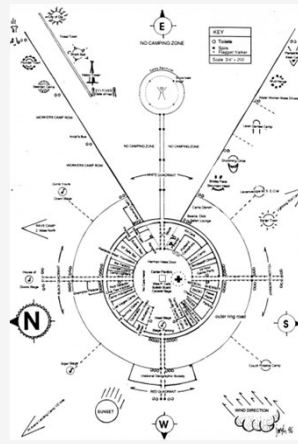
What Is Land Use Law?



2

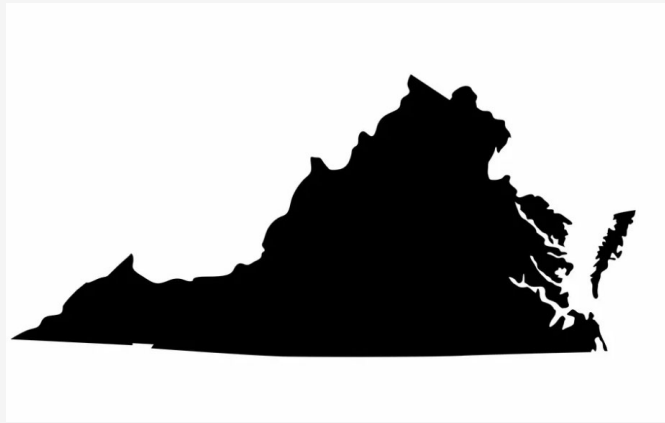
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Interdisciplinary



3

Land Use Law in the Commonwealth of Virginia



4

Virginia – The Dillon Rule

Dillon's Rule is derived from written decision by Judge [John F. Dillon](#) of Iowa in 1868. It is a cornerstone of American municipal law. It **maintains that a political subdivision of a state is connected to the state as a child is connected to a parent.**

<https://www.williamsburgva.gov> › Dillon-Rule

Nebraska is considered a Dillon Rule state, which means that cities, villages, and other political subdivisions only have those powers expressly granted to them by the Legislature.

The Dillon Rule can be a revelation to those who are relatively new to local government. Most members of the general public have NO knowledge of it or lack a grasp of how it limits the powers of local government.
Art Mead, Weldon Cooper Center for Public Service, UVA

<http://www.virginiaplaces.org> › government › dillon

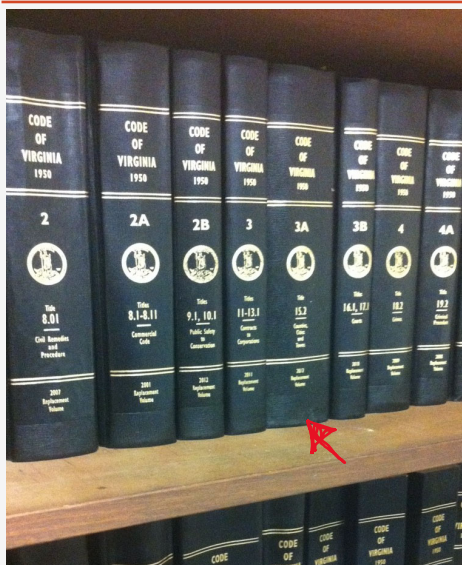
Local Government Autonomy and the Dillon Rule in Virginia

The Dillon Rule give the state legislature the capacity to meddle in small-scale decisions made by local jurisdictions. Municipal (town, county and city) ...

5

5

Enabling Law / Form of Government



Title 15.2. Counties, Cities and Towns

Subtitle I. General Provisions; Charters; Other Forms and Organization of Counties

- Chapter 1 General Provisions (§§ 15.2-100 through 15.2-110)
- Chapter 2 Local Government Charters (§§ 15.2-200 through 15.2-209)
- Chapter 3 Optional Forms of County Government; General Provisions (§§ 15.2-300 through 15.2-307)
- Chapter 4 County Board Form of Government (§§ 15.2-400 through 15.2-418)
- Chapter 5 County Executive Form of Government (§§ 15.2-500 through 15.2-542)
- Chapter 6 County Manager Form of Government (§§ 15.2-600 through 15.2-642)
- Chapter 7 County Manager Plan of Government (§§ 15.2-700 through 15.2-750)
- Chapter 8 Urban County Executive Form of Government (§§ 15.2-800 through 15.2-858)

Subtitle II. Powers of Local Government

- Chapter 9 General Powers of Local Governments (§§ 15.2-900 through 15.2-985)
- Chapter 11 Powers of Cities and Towns (§§ 15.2-1100 through 15.2-1133)
- Chapter 12 General Powers and Procedures of Counties (§§ 15.2-1200 through 15.2-1249)
- Chapter 13 Joint Actions by Localities (§§ 15.2-1300 through 15.2-1310)
- Chapter 14 Governing Bodies of Localities (§§ 15.2-1400 through 15.2-1433)
- Chapter 15 Local Government Personnel, Qualification for Office, Bonds, Dual Office Holding and Certain Local Government Officers (§§ 15.2-1500 through 15.2-1549)
- Chapter 16 Local Constitutional Officers, Courthouses and Supplies (§§ 15.2-1600 through 15.2-1656)
- Chapter 17 Police and Public Order (§§ 15.2-1700 through 15.2-1753)
- Chapter 18 Buildings, Monuments and Lands Generally (§§ 15.2-1800 through 15.2-1814)
- Chapter 18.1 Local Government Facilities Private Capital Lending (§§ 15.2-1815 through 15.2-1817)
- Chapter 19 Condemnation (§§ 15.2-1900 through 15.2-1907.1)
- Chapter 19.1 Acquisition of Waterworks Systems (§§ 15.2-1908 through 15.2-1916)
- Chapter 20 Streets and Alleys (§§ 15.2-2000 through 15.2-2030)
- Chapter 21 Franchises; Sale and Lease of Certain Municipal Public Property; Public Utilities (§§ 15.2-2100 through 15.2-2160)
- Chapter 22 Planning, Subdivision of Land and Zoning (§§ 15.2-2200 through 15.2-2329)

6

6

Sources of Legal Authority

A collage of images representing legal authority in Virginia. It includes the Bill of Rights, the Constitution of Virginia, the LIS (Virginia Law) logo, the County of Fairfax logo, the Environmental Law logo, and a screenshot of the municode website. The municode website shows a search bar and a list of categories including Code of Virginia, Administrative Code, Constitution of Virginia, Charters, Authorities, Compacts, and Uncodified Acts. The 'Charters' category is highlighted with a red circle, and a list of counties and cities is visible below it.

Planning: The Comprehensive Plan

§ 481505631Scdq wr
eh uhylnz hg dwdhdw
rqfn hyhu| ilyh |hdwv

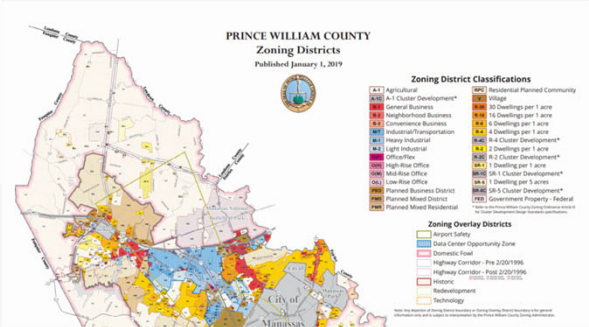
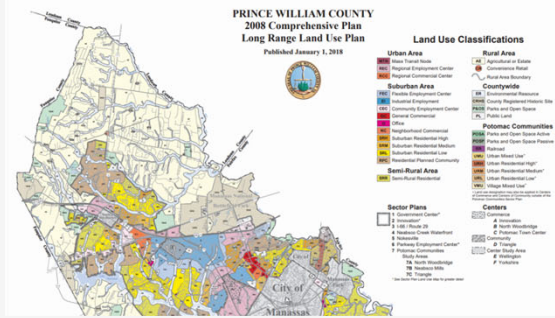
At least once every five years the comprehensive plan shall be reviewed by the local planning commission to determine whether it is advisable to amend the plan.

A collage of images related to the comprehensive plan for Chesterfield County. It features the title 'MOVING FORWARD THE COMPREHENSIVE PLAN FOR CHESTERFIELD COUNTY' and several photos showing people in various settings, including a meeting, a building, and a river scene. The text at the bottom reads: 'Adopted by the Chesterfield County Board of Supervisors on May 22, 2019'.

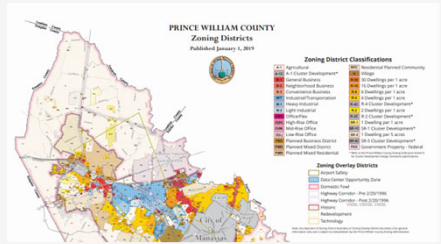
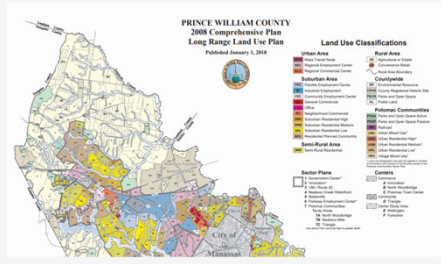
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Existing Land Use Map	after page 18
Zoning Classifications Map	after page 18
Planning Areas Map	after page 18
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Planning vs. Zoning



Zoning Implements the Comprehensive Plan



COMPATIBILITY MATRIX
ZONING AND COMPREHENSIVE PLAN DESIGNATIONS
NON-RESIDENTIAL

		COMPREHENSIVE PLAN DESIGNATIONS											
		CEC	REC	RCC	MTN	O	FEC	EI	GC	NC	CR	UMU	VMU
U O N I N G	B-1			•					•			•	
	B-2									•			
	B-3										•		
	O(L)	•										•	
	O(M)	•											•
	O(H)	•											•
	O(F)	•											•
	M-1												
	M-2												
	MT												
	PBD	•											•
	PMD ¹	•											•
V												•	

¹ Only as part of a PBD/limited use zoning development. Proffers would be requested to limit O(F) uses in these designations to office and office-like/office-compatible uses.
² Only as transition area and transition uses within E1 planned area.
³ Town centers may only be established in Centers of Commerce or Centers of Community unless specifically identified in a sector plan.
⁴ B-1 only if other required components are included.

Permitted Uses (By Right v. SE)

6/26/23, 9:12 PM
DIVISION 1 - AGRICULTURAL DISTRICT A-1
 Botetourt County, VA Code of Ordinances

Sec. 25-71. - Purpose.
 The Agricultural District A-1 is intended to preserve and enhance the rural character and natural resources of those portions of the county where agriculture, forest, rural residential and open space uses predominate, and to accommodate additional limited amounts of low density residential development that is not served by public water or wastewater systems.

This district is generally intended to apply to land within the current A-1 district on the date of adoption of this chapter and land designated in the comprehensive plan as being planned for agricultural, rural residential or private forest. Land in this district is generally not intended to be served with public water or wastewater.

Sec. 25-72. - Permitted uses.
 The following uses are permitted by right, subject to compliance with all other requirements of this chapter, and all other applicable regulations:

- (1) Agriculture.
- (2) Agriculture, intensive, subject to standards of subsection 25-79(c).
- (3) Cemetery.
- (4) Church.
- (5) Dwelling, single-family.
- (6) Dwelling, accessory.
- (7) Group home.
- (8) Home occupation, subject to standards of section 25-434.
- (9) Mobile (manufactured) home, Class A or B, subject to standards of section 25-437.
- (10) Natural area.
- (11) Park, unlighted.
- (12) Playground, unlighted.
- (13) Sawmill, temporary.
- (14) Sawmill, small scale.
- (15) School, public.
- (16) Telecommunications tower, attached, subject to standards of section 25-441.
- (17) Temporary family health care structure.
- (18) Temporary meteorological tower (MET), subject to standards of section 25-446(d).
- (19) Cabin or cottage, subject to standards of section 25-434.
- (20) Homestay, subject to standards of section 25-434.
- (21) Stable, commercial.

Sec. 25-73. - Uses permissible by special exception.

The following uses may be permitted by the board of supervisors as special exception uses, subject to the requirements of this chapter and all other applicable regulations:

- (1) Airport, private.
- (2) Animal hospital.
- (3) Antique shop.
- (4) Assisted living facility.
- (5) Boardinghouse, subject to standards of section 25-434.
- (6) Bed and breakfast, subject to standards of section 25-434.
- (7) Campground.
- (8) Cabin or cottage, resort, subject to standards of section 25-434.
- (9) Civic club.
- (10) Community center.
- (11) Correctional facility, adult.
- (12) Correctional facility, juvenile.
- (13) Country club.
- (14) Crematorium and/or funeral home.
- (15) Day care center.
- (16) Fire, police and rescue stations.
- (17) General store.
- (18) Golf course.
- (19) Grain mill, feed mill.
- (20) Helpport.
- (21) Home business, subject to standards of section 25-435.
- (22) Home business, rural, subject to standards of section 25-4.
- (23) Hunting lodge, game preserve.
- (24) Junkyard, automobile graveyard.
- (25) Kennel, commercial.
- (26) Kennel, private.
- (27) Landfill.
- (28) Livestock market.
- (29) Medical care facility.
- (30) Nursery, production.
- (31) Park and ride lot.
- (32) Park, lighted.
- (33) Pet farm.
- (34) Playground, lighted.
- (35) Public recycling collection points.
- (36) Public utility trunk lines, other (gas, electric, communications).
- (37) Public utility trunk lines, water or sewer.
- (38) Public utility plants, other (gas, electric, communications).
- (39) Public utility plants, water or sewer.
- (40) Public utility maintenance facility or storage yard.
- (41) Public utility substations (gas, electric, communications).
- (42) Recreational vehicle park, subject to standards of section 25-434.
- (43) Roadside stand.
- (44) Rural resort, subject to standards of section 25-434.
- (45) Rural retreat, subject to standards of section 25-434.
- (46) Sawmill.
- (47) School, private.
- (48) Shooting range.
- (49) Slaughterhouse, includes custom meat cutting, processing and sales.
- (50) Special events facility.
- (51) Reserved.
- (52) Storage yard.
- (53) Structures, non-residential, totalling in excess of twenty thousand (20,000) square feet.

11

Application

Application Requirements



Consultation with the County Planning staff to review the feasibility of the proposal and to obtain recommended procedures and technical assistance. Applicant is encouraged to contact adjoining property owners to inform them of the proposal.

Application must be legible and signed by property owner, contract purchaser, or owner's agent.

Justification stating in general terms the change in use of the property, the effect of the changes on the surrounding area, the reasons for the request, the consistency of the request with the Community Plan, and the consistency of the request with the general purposes of the Zoning Ordinance and the purpose stated at the beginning of the applicable district regulations.

Concept Plan of the proposed project and the concept plan checklist must be submitted with the application. Plan must be 8.5" x 11".

Meters and bounds description must accompany rezoning application.

Water and sewer application and planimetric maps must accompany rezoning and special use permit application, if applicable.

List of adjoining property owners including owner's names, addresses (mailing address including zip code) and tax map numbers of all adjoining proprietors and those directly across any public right-of-way must accompany application, including those in adjacent jurisdictions. Refer to tax records in the County Assessor's office.

Application fees must accompany application and are as follows:

Rezoning - Agri/Single-Two	\$415 + \$20/acre or portion thereof
Rezoning - Multi-family	\$860 + \$25/acre or portion thereof
Rezoning - Industrial	\$840 + \$30/acre or portion thereof
Rezoning - Commercial	\$945 + \$32/acre or portion thereof
Land Use Plan Amendment	\$710
Special Use B Landfill	\$1,875
Special Use B Other	\$150
Variance	\$190
Waiver	\$190
Administrative Appeal	\$275
Technology Fee	7% fee on all permit issuing fees

In addition, the applicant must pay legal advertisement fees. Staff will prepare ad for the applicant and deliver ad to The Roanoke Times. The applicant will be billed by The Roanoke Times for the ad. Please include retail and phone number.

Public Hearing Notices must be posted at clearly visible locations along the street frontage or property lines of the subject property. Notices will be issued by Planning & Zoning following receipt of the completed application.

For further information or assistance, please contact:

Department of Planning
 5204 Bernard Drive, SW P.O. Box 29800
 Roanoke, VA 24018-0798
 Phone: (540) 772-2068 - Fax: (540) 776-7155
 E-Mail: planning@roanokecountygov.com

All required items must be submitted before the application deadline.



County of Roanoke
 Community Development
 Planning & Zoning
 5204 Bernard Drive
 P O Box 29800
 Roanoke, VA 24018
 (540) 772-2068 FAX (540) 776-7155

For Staff Use Only

Date received:	Received by:
Application fee:	PC/BZA date:
Platmaps issued:	BOS date:
Case Number:	

ALL APPLICANTS

Check type of application filed (check all that apply)
 Rezoning Special Use Variance Waiver Administrative Appeal Comp Plan (18-2-232) Review

Applicants name/address w/zip _____ Phone: _____
 Cell #: _____
 Email: _____
 Contact for Legal Ads _____

Owner's name/address w/zip _____ Phone #: _____
 Cell #: _____
 Email: _____

Property Location _____ Magistral District: _____
 Community Planning area: _____

Tax Map No: _____ Existing Zoning: _____

Size of parcel(s): Acres: _____ Existing Land Use: _____

REZONING, SPECIAL USE PERMIT, WAIVER AND COMP PLAN (18-2-232) REVIEW APPLICANTS (R/S/W/CP)

Proposed Zoning: _____
 Proposed Land Use: _____

Does the parcel meet the minimum lot area, width, and frontage requirements of the requested district?
 Yes: No: IF NO, A VARIANCE IS REQUIRED FIRST (Revealing)

Does the parcel meet the minimum criteria for the requested Use Type in Article IV (Special Use Permit)? Yes No

IF NO, A VARIANCE IS REQUIRED FIRST
 If rezoning request, are conditions being proffered with this request? Yes No

VARIANCE, WAIVER AND ADMINISTRATIVE APPEAL APPLICANTS (V/W/A/A)

Variance/Waiver of Section(s) _____ of the Roanoke County Zoning Ordinance in order to: _____

Appeal of Zoning Administrator's decision to _____ of the Roanoke County Zoning Ordinance
 Appeal of Interpretation of Section(s): _____
 Appeal of Interpretation of Zoning Map to _____

In the application complete? Please check if enclosed. APPLICATION WILL NOT BE ACCEPTED IF ANY OF THESE ITEMS ARE MISSING OR INCOMPLETE.

R/S/W/CP V/A/A	Consultation	R/S/W/CP V/A/A	8 1/2" x 11" concept plan	R/S/W/CP V/A/A	Application fee
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

I hereby certify that I am either the owner of the property or the owner's agent or contract purchaser and am acting with the knowledge and consent of the owner.

Owner's Signature _____

12

Citizen Engagement



Home » Government » About Loudoun County » Communities & Homeowners Associations

Communities & Homeowners Associations

Residential Communities Interactive Map

The [Residential Communities of Loudoun County Map](#) provides the public with information about the existing and planned subdivisions of Loudoun County.

Selected Local Communities & Homeowners Associations

Some developments have a homeowners association (HOA). An HOA is an affiliation of homeowners in a development that oversees the enforcement of private covenants - deed restrictions that apply to a group of homes or lots.

13

13

Data center backlash fuels Prince William board chair's election loss

On Tuesday, Wheeler lost her party's primary election to a relatively unknown challenger — Deshundra Jefferson — a surprise outcome fueled by anger over [data center development](#) in the county that stands to affect the county board's direction.

The Washington Post
Democracy Dies in Darkness

14

Notice - Posting



17

17

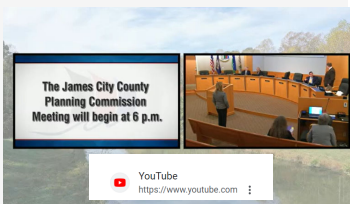
The Planning Commission



Prince William County Planning Office
Development Services Building
4 County Complex Court
Prince William, Virginia 22192

PLANNING COMMISSION 2019

William J. Milne, Chairman	Occoquan Magisterial District
Rene M. Fry, Vice Chairman	Potomac Magisterial District
Don Taylor	At-Large
Richard R. Berry	Gainesville Magisterial District
Austin B. Haynes, Jr.	Coles Magisterial District
Edgar Bruce Holley	Neabsco Magisterial District
Patti McKay	Brentsville Magisterial District
Cynthia Moses-Nedd	Woodbridge Magisterial District



UPCOMING PUBLIC HEARINGS, WORK SESSIONS & EVENTS

SEPTEMBER 11, 2019

6:00 P.M. - 8:30 P.M. Work Sessions only:
Parks, Recreation & Tourism Plan
TLC Mixed-Use Zoning District
Board Chambers, James J. McCoart Administration Building
1 County Complex Court, Prince William, VA 22192

SEPTEMBER 18, 2019

7:00 P.M. Public Hearing
Board Chambers, James J. McCoart Administration Building
1 County Complex Court, Prince William, VA 22192

AGENDA

SEPTEMBER 24, 2019

5:30 P.M. Work Session: Rural Area Preservation
Hylton Performing Arts Center - Gregory Family Theatre
10960 George Mason Circle, Manassas, VA

OCTOBER 2, 2019

7:00 P.M. Public Hearing
Board Chambers, James J. McCoart Administration Building
1 County Complex Court, Prince William, VA 22192

18

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Governing Body

For questions or information, please contact info@cumberlandcounty.virginia.gov or call 804-493-3800.



**CUMBERLAND COUNTY
BOARD OF SUPERVISORS**
Regular Monthly Meeting
Circuit Courtroom, Cumberland Courthouse
17 Courthouse Circle, Cumberland, VA

January 10, 2023
7:00 p.m.

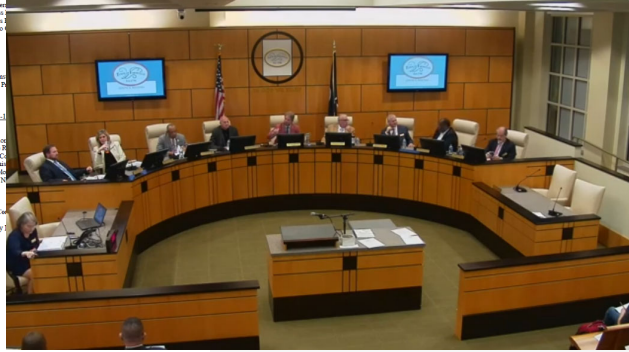
7:00 p.m. -

1. Call to Order
2. Roll Call of Members
3. Welcome and Pledge of Allegiance
4. Election of Chairman Motion
5. County Administrator Comments Motion
6. Approval of Agenda Motion
7. Organizational & Administrative Matters
 - a. Review and approve By-laws (pp. 1-20) Motion
 - b. Review and approve Code of Ethics and Standards of Conduct (pp. 38-42) Motion
 - c. Review Committee Appointments (pp. 52-61) Motion
 - d. Approval of 2023 Proposed Meeting Schedule (pp. 46) Motion
8. State & Local Department/Agencies/Community Service Provider Reports
 - a. Cumberland County Public Schools Information
 - b. Cumberland County Public Library Information
 - c. Cumberland Fire and EMS Information
 - d. CDPH Information
 - e. Medicare's Home Update Information
 - f. Finance Report Information
 - g. Monthly Budget Report (pp. 43-52) Information
 - h. Planning and Zoning Report Information
 - i. Financial Project Updates (pp. 58-61) Information
 - k. County Attorney's Report Information

Page 1 of 2

For questions or information, please contact info@cumberlandcounty.virginia.gov or call 804-493-3800.

10. Current Agenda Motion
 - a. Approval of Bills
 - b. Approval of Minutes (December 15, 2022) (pp. 62-74)
 - c. Report to the Public Hearing
 - i. CA 23-03 Short Term
 - ii. CA 23-05 Budget
 - iii. CUP 23-03 Anna's
 - iv. CUP 23-12 Dennis
11. Old Business
12. New Business
 - a. MOU Agreement with County
 - b. Annual Report Goals and P
13. Public Hearings
14. Additional Information - (pp. 23)
 - a. Director's Report
 - b. DRAV Report
 - c. Monthly Business Inspection
 - d. Monthly Business License P
 - e. Commonwealth Regional C
 - f. Approved Planning Commis
 - g. Approved Economic Develop
 - h. Approved RZA minutes - N
15. Public Comment
16. Chairman and Board Member Co
17. Adjourn - Regular Monthly



Page 2 of 2

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Final Resolution

AYES: 5

NAYS: 0

COMMONWEALTH OF VIRGINIA
COUNTY OF CHARLES CITY



BOARD OF SUPERVISORS
GILBERT A. SMITH, CHAIRMAN
WILLIAM G. COADA, VICE-CHAIRMAN
BYRON ADKINS, SR., MEMBER
COUNTY ADMINISTRATOR
MS. MICHELLE JOHNSON
ASSISTANT COUNTY ADMINISTRATOR/
COMMUNITY DEVELOPMENT DIRECTOR
MS. RHONDA L. RUSSELL, AICP

January 13, 2023

The AES Corporation
4100 Inatlike Drive
Suite 302
Glenn Allen, VA 23060

Ben Saunders, Senior Director, Solar Development - AES Clean Energy

Re: Special Use Permit (SUP-05-2022) Approval

Dear Mr. Ben Saunders,

At the January 11, meeting of the Board of Supervisors, the Board of Supervisors unanimously approved the Special Use Permit (SUP-05-2022) application for the operation of a solar energy generating facility and siting agreement. The parcels which are part of this SUP application include: 8-8 partial, 8-24 partial, 13-79, 13-79A, 13-1, 13-76, 13-38 partial, 14-2 partial, 14-15 partial, 14-19, 24-58, 24-61, 23-10, 25-67, 25-100 partial, and 26-10. The conditions are attached for your reference.

If you have further questions, please feel free to contact my office (804) 651-4701.

Sincerely,

Michelle Johnson
County Administrator

CC: File
Attachments

ORDINANCE O-2022-21

O-2022

AN ORDINANCE GRANTING A CONDITIONAL USE PERMIT (CASE #21-09-CUP) TO BELDALE LLC FOR A SOLAR ENERGY FARM ON TAX MAP PARCEL #13 LOCATED NEAR THE INTERSECTION OF STATE ROUTE 684 (CARTERSVILLE ROAD) AND STATE ROUTE 715 (DUKE ROAD).

WHEREAS, Beldale, LLC requests a conditional use permit (CUP) to permit a solar energy farm within the Agricultural - 10 (A-10) zoning district per Sec. 83-162 of the Zoning Ordinance of the County of Powhatan; and

WHEREAS, §15.2-1427 and §15.2-1433 of the Code of Virginia, 1950, as may be amended from time to time, enable a local governing body to adopt, amend, and codify ordinances or portions thereof; and

WHEREAS, §15.2-2280, §15.2-2285 and §15.2-2286 of the Code of Virginia, 1950, amended, enables a local governing body to adopt and amend zoning ordinances; and

WHEREAS, on May 9, 2022, the Powhatan County Planning Commission held a public hearing on this matter and all of those who spoke on this topic were heard; and

WHEREAS, on May 9, 2022, the Powhatan County Planning Commission voted recommended to the Board of Supervisors approval of the request to grant the Conditional Use Permit (CUP); and

WHEREAS, the Powhatan County Board of Supervisors caused to be published a notice of public hearing on this matter in the Powhatan Today on May 11th and 18th, 2022; and

WHEREAS, the full application was available for public inspection in the Powhatan County Administrator's Office, County Administration Building, 3834 Old Buckingham Road Powhatan, Virginia 23139; and

WHEREAS, on April 25, 2022, the Powhatan County Board of Supervisors found the application as presented to be in substantial accord with the 2021 Powhatan County Comprehensive Plan

NOW, THEREFORE, BE IT ORDAINED by the Powhatan County Board of Supervisors, in accordance with §83-123(0)(4) of the Code of the County of Powhatan, public necessity,

20

20

Permit Validity

Code of Virginia
 Title 15.2, Counties, Cities and Towns
 Subtitle II, Powers of Local Government
 Chapter 22, Planning, Subdivision of Land and Zoning
 Article 1, General Provisions

§ 15.2-2209.1. Extension of approvals to address housing crisis

A. Notwithstanding the time limits for validity set out in § 15.2-2206 or 15.2-2261, or the provisions of subsection F of § 15.2-2206, any subdivision plan valid under § 15.2-2206 and outstanding as of January 1, 2020, and any recorded plat or final site plan valid under § 15.2-2261 and outstanding as of January 1, 2020, shall remain valid until July 1, 2025, or such later date as may be provided for by the terms of the locality's approval, local ordinance, resolution, or regulation. Any other plan or permit associated with such plat or site plan extended by this subsection is similarly extended for the same time period.

B. Notwithstanding any other provision of this chapter, for any valid special exception, special use permit, or conditional use permit, or any modifications thereto, outstanding as of July 1, 2020, any deadline in the exception permit, or in the local zoning ordinance that requires the landowner or developer to commence the project or incur significant expenses related to improvements for the project within a certain time, is extended until July 1, 2025, or such longer period as may be agreed to by the locality.

C. Notwithstanding any other provision of this chapter, for any recorded approved pursuant to § 15.2-2297, 15.2-2298, or 15.2-2301 and valid and outstanding as of July 1, 2020, any professed condition that requires the landowner or developer to incur significant expenses upon the occurrence of an event related to a stage or level of development is extended until July 1, 2025, or longer as may be agreed to by the locality. However, the extensions in this subsection do not apply (i) to professed dedications of land or rights of way pursuant to § 15.2-2297, 15.2-2298, or 15.2-2301 or (ii) when completion of the event related to the stage or level of development has already occurred.

D. The extension of validity provided in subsection A and the extension of deadlines as provided in subsection B will be effective only if any unrevoked performance bonds and agreements or other financial guarantees of completion of public improvements in or associated with the proposed development are continued in force. However, if the locality has enacted a bonding moratorium or deferral program, the performance bonds and agreements or other financial guarantees of completion may be waived or modified by the locality, in which case the provisions of subsections A and B apply. The landowner or developer must comply with the terms of any bonding moratorium or deferral agreement with the locality in order for the extensions referred to in this subsection to be effective.

Code of Virginia
 Title 15.2, Counties, Cities and Towns
 Subtitle II, Powers of Local Government
 Chapter 22, Planning, Subdivision of Land and Zoning
 Article 1, General Provisions

§ 15.2-2209.1:1. Extension of approvals to address the COVID-19 pandemic

A. Notwithstanding any time limits for validity set out in § 15.2-2206 or 15.2-2261, any subdivision plan valid under § 15.2-2206 and outstanding as of July 1, 2020, and any recorded plat or final site plan valid under § 15.2-2261 and outstanding as of July 1, 2020, shall remain valid until July 1, 2025, or such later date as may be provided for by the terms of the locality's approval, local ordinance, resolution, or regulation. Any other plan or permit associated with such plat or site plan extended by this subsection is similarly extended for the same time period.

B. Notwithstanding any other provision of this chapter, for any valid special exception, special use permit, or conditional use permit, or any modifications thereto, outstanding as of July 1, 2020, any deadline in the exception permit, or in the local zoning ordinance that requires the landowner or developer to commence the project or incur significant expenses related to improvements for the project within a certain time, is extended until July 1, 2025, or such longer period as may be agreed to by the locality.

C. Notwithstanding any other provision of this chapter, for any recorded approved pursuant to § 15.2-2297, 15.2-2298, or 15.2-2301 and valid and outstanding as of July 1, 2020, any professed condition that requires the landowner or developer to incur significant expenses upon the occurrence of an event related to a stage or level of development is extended until July 1, 2025, or longer as may be agreed to by the locality. However, the extensions in this subsection do not apply (i) to professed dedications of land or rights of way pursuant to § 15.2-2297, 15.2-2298, or 15.2-2301 or (ii) when completion of the event related to the stage or level of development has already occurred.

D. The extension of validity provided in subsection A and the extension of deadlines as provided in subsection B will be effective only if any unrevoked performance bonds and agreements or other financial guarantees of completion of public improvements in or associated with the proposed development are continued in force. However, if the locality has enacted a bonding moratorium or deferral program, the performance bonds and agreements or other financial guarantees of completion may be waived or modified by the locality, in which case the provisions of subsections A and B apply. The landowner or developer must comply with the terms of any bonding moratorium or deferral agreement with the locality in order for the extensions referred to in this subsection to be effective.

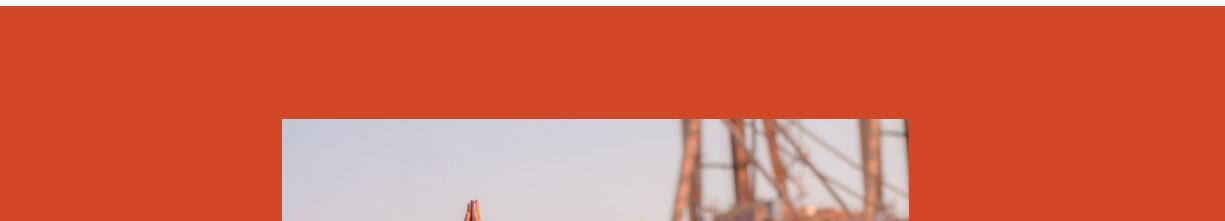
2020, Sp. Sess. I, c. 40:2022, cc. 178, 179.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.



Takes effect July 1, 2023.

All local land use permits valid and outstanding as of July 1, 2020 will be extended to July 1, 2025.



Land Development – Subdivision & Site Plans

LAND DEVELOPMENT DIVISION

Home / Your Government / Departments & Agencies / Development Services / Land Development Division

- LDD Home
- About LDD
- Documents, Codes & Policies
- Site/Subdivision/Plans/Plats
- Bonds, Escrows & Permits
- Zoning Approval & Administration
- Online & Automated Services
- Fees
- Affiliated Agencies

SUBDIVISION ORDINANCE

The subdivision of land in the County according to a reasonable set of requirements and guidelines confers benefits upon the individual landowner and upon the community. When a landowner seeks to acquire the advantages of lot subdivision, he or she must comply with the reasonable conditions laid down by the Board of County Supervisors for design, dedication, improvement, and restrictive use of land to conform to the adopted comprehensive plan for the physical and economic development of the County and for the safety and general welfare of the future lot owners in the subdivision and of the community at large.

The Board of County Supervisors pursuant to the recommendation of the Planning Commission and a public hearing held in accordance with § 15.2-2204 of the Code of Virginia does, by the adoption of the subdivision ordinance, exercise the police power given by §§ 15.2-2240 through 15.2-2276 of the Code of Virginia to assure the orderly subdivision of land and the police power conferred by § 15.2-2224 of the Code of Virginia to implement the comprehensive plan of the County and the general police power as given by § 15.2-1200 of the Code of Virginia.

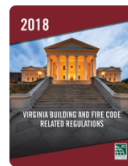
Whenever any subdivision of land is proposed, the subdivider shall apply for and secure approval of such proposed subdivision in accordance with the procedures set forth in the subdivision ordinance in the Design and Construction Standards Manual and in the Administrative Procedures Manual. In most cases, a final subdivision plan is required.

The Subdivision Ordinance has been amended by the Board of County Supervisors. The amendments became effective on Aug. 5, 2006. [View the Amended Subdivision Ordinance.](#)

23

23

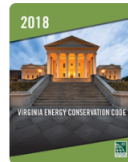
Building Code



2018 Virginia Building and Fire Code Related Regulations



2018 Virginia Construction Code



2018 Virginia Energy Conservation Code



2018 Virginia Existing Building Code

24

24

Occupancy Approvals

"Non-RUP"



"COO"

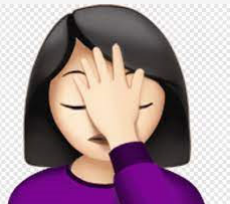


Zoning Administration



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THE LANGUAGE OF VESTED RIGHTS – IRONING OUT THE CONFUSION

By Karen L. Cohen



FAUQUIER COUNTY
Department of Community Development
Division of Zoning, Permitting and Inspections
29 Ashby Street, Suite 310
Warrenton, VA 20186

FAX: (540) 422-8231

TELEPHONE: (540) 422-8220

OFFICIAL NOTICE OF ZONING VIOLATION AND CORRECTIVE ORDER

Notice Date: May 29, 2013

Property: PN 6044-67-6620, 10082 Gazabo Lane, Blackstone Inn

Zoning: RA/Rural Agriculture & RCR/Rural Conservation

Property Owner: StoneCreek Group LLC
5306 Inverchapel Road
Springfield VA, 22151

Registered Agent: David Maurice Strong
6106 Greenlawn Court
Springfield VA 22152

DESCRIPTION OF VIOLATION

You are hereby notified that Fauquier County staff has inspected and researched the above referenced property and found a violation of the following provisions of the Fauquier County Zoning Ordinance:

Code Section	Description of Violation
3-309.9, 12-201	Operation of resort without required Special Exception approval (expired)
3-307, 12-201	Operation and expansion of restaurant without Special Exception approval (expired) and site plan
3-309, 14-16, 12-201	Events without Special Exception and site plan approval
13-501	Building structures without a Zoning Permit

CORRECTIVE ACTION REQUIRED

Please be advised that you have thirty (30) days to remedy the above violations by applying for all required special exceptions (resort, adaptive reuse for restaurant and events) and thereafter diligently pursuing the special exceptions and site plan approvals and then the required zoning and building permits. To proceed with the application for the special exception, please contact Holly Meade of the Planning Staff at 422-8210, she will assist you through the process.

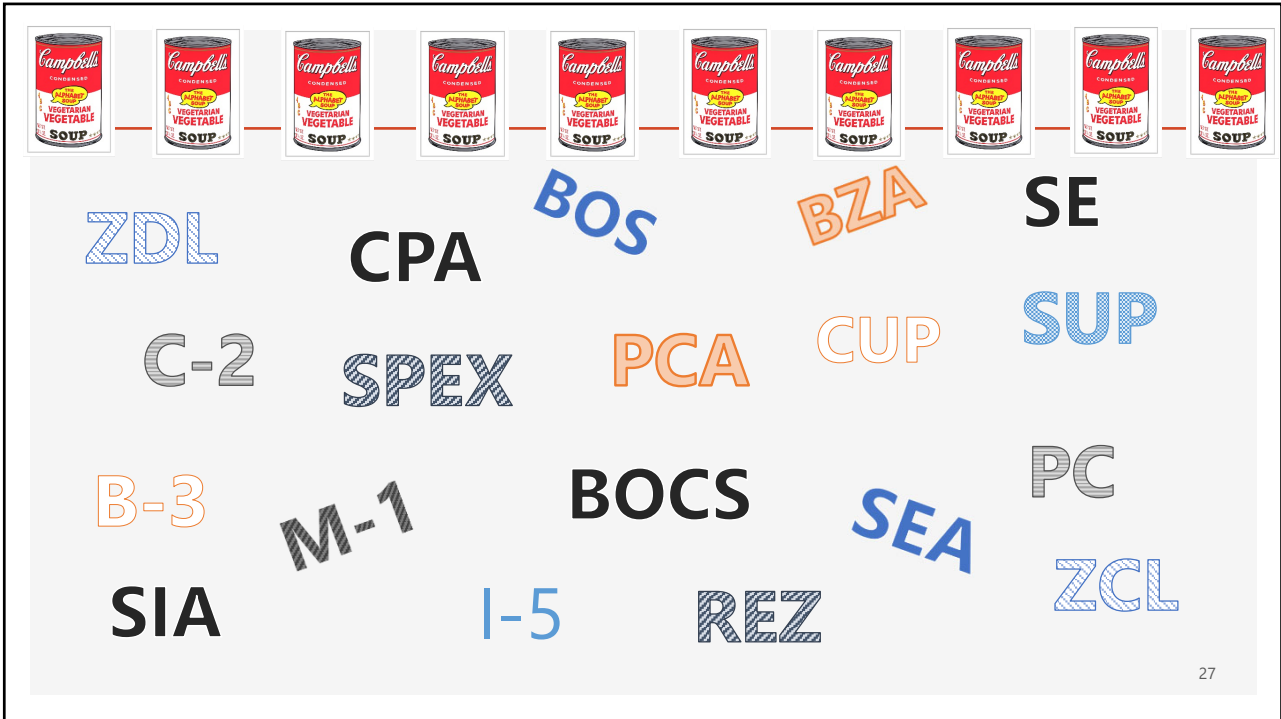
If you do not comply within 30 days of the date of this letter, these violations will either be forwarded to the County Attorney's Office for appropriate legal action, or the County may begin imposing civil fines, with a maximum fine of up to \$5,000.00 per violation authorized pursuant to Section 13-603.2 of the Fauquier County Zoning Ordinance.

The determination by the Zoning Administrator that you are in violation of the Zoning Ordinance is a final decision. If you wish to contest this final decision, you must file an appeal with the Board of Zoning Appeals by submitting a land development application, a filing fee of \$500.00, and the basis for your appeal within thirty (30) days of the date on this notice to the Department of Community Development. Failure to appeal within thirty (30) days will result in your loss of the right to appeal in this matter.

If you have questions about the violation or the required corrective action, please contact our office at (540) 422-8220. Thank you for your prompt attention to this matter.

Noted By:
Kimberley Johnson, Zoning Administrator

cc: Peter Schwartz, Marshal District Supervisor
Marlene Primeau, Assistant County Attorney
Holly Meade, Assistant Chief of Planning



Part II Transaction Tips



Purchase and Sale Agreement

- TYPICALLY, SELLER WILL NOT PROVIDE REPRESENTATIONS AS TO ZONING MATTERS
- SELLER MAY STATE EXPLICITLY THAT IT PROVIDES *NO REPRESENTATIONS* THAT THE PROPERTY IS SUITABLE FOR PURCHASER'S USE
- IF SELLER WAS RESPONSIBLE FOR RECENT ZONING OR VERY KNOWLEDGEABLE ABOUT LAND USE HISTORY, SELLER MAY LIST APPLICABLE LAND USE APPROVALS TO GIVE BUYER A HEAD START ON DUE DILIGENCE

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PURCHASER DUE DILIGENCE:

- INVESTIGATES EXISTING ZONING AND LAND USE ENTITLEMENTS
- OBTAINS ZONING COMPLIANCE LETTERS AND OFFICIAL DETERMINATION(S)
- IF PLANNING TO DEVELOP OR REDEVELOP, INCLUDES TIME PERIOD IN THE PSA TO OBTAIN LAND USE APPROVALS

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Zoning Status Investigation

GIS system

- Zoning District Designation
- Other “overlays” that affect land use planning:
 - steep slopes
 - entrance corridors
 - historic districts
 - water/sewer service areas
 - Comprehensive Plan designations
 - Agricultural/forestal districts
 - Conservation easements
 - Land use approvals such as special use permits and zoning amendments with proffers
 - Historic overlay maps to determine timing of nonconforming uses

NB: GIS is not the official record of zoning district. The Zoning Map provides the official zoning determination.

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Zoning Status Investigation, cont'd

Zoning Ordinance

- Permitted (and not permitted) uses.
- Regulations governing the location of buildings and other improvements, yards and setbacks.
- Limits on the height, floor area ratio, setbacks of buildings and other improvements.
- Any applicable residential density limitations; square footage limitations.
- Applicable design and architectural standards.
- Permissible signage.
- Parking regulations.
- Water protection ordinance and other ordinances governing historic and environmentally sensitive areas.

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Zoning Status Investigation, cont'd

Comprehensive Plan – Land Use Chapter and Future Land Use Map (FLUM)

- Status of the Plan? Under review for amendment?
- Property intended for future residential, commercial, industrial, or mixed-use development? Designated for rural preservation or agriculture?
- Location of future public facilities, such as roads, pedestrian and bicycle trails
- Specific policies for certain types of development (e.g. solar energy facilities; wireless communications facilities)
- **Remember, there are no vested rights in existing Comprehensive Plan land use designation or zoning district**
- **It is in the discretion of the governing body whether and how stringently to follow the locality's comprehensive plan when making land use decisions about private development.**

Therefore, early discussions with planning staff and supervisors or councilors can help the client understand how a project that is not consistent with the Plan will be viewed and whether a Plan amendment should be considered.

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Zoning Status Investigation, cont'd



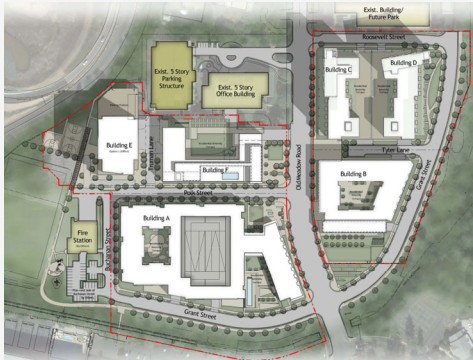
Historic and Architectural Control Districts

Location in these areas can affect what your client may build and how it will look.

Discretionary approvals may be required (check meeting schedules).

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Zoning Status Investigation, cont'd



Existing Land Use Approvals

- Research the locality's records for prior
- Zoning map amendments / Rezonings
- Special use permits / Special Exceptions
- Preliminary and Final Site Plans
- Water protection ordinance and environmental approvals and permits

Obtain copies of approval documents, including resolutions, minutes, proffers, zoning plans and site plans

Check the validity period of special use permits and site plans

Beware of seller's marketing claim that it has "approved permits"! (What permits exactly? Still valid?)

35

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Drafting the PSA for Land Use Entitlements

- Seller representations
- Whether condition to close
- Period needed for zoning approvals
- Deposits / Extension fees
- Buyer's termination rights
- Seller cooperation

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Seller's Representations and Warranties

The Property is listed on the [County/City] Zoning Map and in the [County's/City's] GIS system as being zoned _____.

The Property and its current use, and the location of the Improvements on the Property are in compliance with all Laws.



NO WARRANTIES. PURCHASER HEREBY ACKNOWLEDGES THAT, EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, NEITHER SELLER, NOR ANY PERSON ACTING ON BEHALF OF SELLER, NOR ANY PERSON OR ENTITY WHICH PREPARED OR PROVIDED ANY OF THE MATERIALS REVIEWED BY PURCHASER IN CONDUCTING ITS DUE DILIGENCE, NOR ANY DIRECT OR INDIRECT OFFICER, DIRECTOR, PARTNER, MEMBER, SHAREHOLDER, EMPLOYEE, AGENT, REPRESENTATIVE, ACCOUNTANT, ADVISOR, ATTORNEY, PRINCIPAL, AFFILIATE, CONSULTANT, CONTRACTOR, SUCCESSOR, OR ASSIGN OF ANY OF THE FOREGOING PARTIES (SELLER, SELLER RELATED PARTIES, AND ALL THE OTHER PARTIES DESCRIBED IN THE PRECEDING PORTIONS OF THIS SENTENCE (OTHER THAN PURCHASER) SHALL BE REFERRED TO HEREIN COLLECTIVELY AS THE "EXCULPATED PARTIES") HAS MADE OR SHALL BE DEEMED TO HAVE MADE ANY ORAL OR WRITTEN REPRESENTATIONS OR WARRANTIES, WHETHER EXPRESSED OR IMPLIED, BY OPERATION OF LAW OR OTHERWISE (INCLUDING WITHOUT LIMITATION WARRANTIES OF HABITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE), WITH RESPECT TO THE PROPERTY, **THE PERMITTED USE OF THE PROPERTY OR THE ZONING AND OTHER LAWS, REGULATIONS AND RULES APPLICABLE THERETO OR THE COMPLIANCE BY THE PROPERTY THEREWITH**

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Zoning Approvals as a Condition to Close

Zoning Approvals NOT a condition to close:

Purchaser may terminate prior to close of the Zoning Approvals Period if cannot obtain certain approvals.

“Following the expiration of the Feasibility Period, there shall have been no change in the zoning of the Property other than the Governmental Approvals, no adverse change in title to the Property, no adverse change in environmental condition of the Property, and no change with regard to school capacity issues that would in any way interfere with the Project.”

Zoning Approvals ARE a Condition for Buyer to Close:

“Buyer shall have obtained the Approvals as set forth in Section x.”

[Section x is “entitlements.”]

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What Approvals and Permits does Purchaser need by Closing?



Legislative actions: Comprehensive Plan Amendment, Zoning Ordinance Amendment, Zoning Map Amendment



Site Development approvals: site plan approval, subdivision plat approval, erosion & sediment control, stormwater



(Building Permit, Certificate of Occupancy)

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Zoning Approvals Period

Purchaser estimates time needed to prepare application materials, receive planning staff comments and resubmit, present the application at committees, planning commission, governing body (180 days? 18 months?)

May start at the Effective Date or at the conclusion of the feasibility/inspections period if Buyer doesn't terminate

Typically, will include an initial period with one or more extensions (90 days? 6 months?);

Purchaser may terminate if has not obtained required approvals by end of Zoning Approval Period + any extension periods



See exhibits for sample PSAs with zoning provisions

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Deposits and Purchaser's Right to Terminate



If Zoning Approvals Period begins after Feasibility Period, Purchaser may pay an Additional Deposit if does not terminate at the end of the Feasibility Period.



One or multiple Extensions with additional deposit paid for each one.



Purchaser may terminate if unable to obtain (defined) Approvals.

"The Additional Deposit shall be refundable to the Purchaser until the expiration of the Governmental Approval Period and shall be applied to the Purchase Price at Closing. Notwithstanding any other provision of this Agreement to the contrary, if the Purchaser elects to terminate this Agreement prior to the expiration of the Governmental Approval Period, any applicable Extension Deposit shall not be refundable to the Purchaser. Any applicable Extension Deposit and any accrued interest thereon shall be applied to the Purchase Price at Closing."

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Seller Cooperation

Seller hereby consents and agrees to join in, execute and timely support in good faith, as required, such applications as may be necessary or desirable to obtain the Governmental Approvals and in good faith will cooperate, support, and take all action reasonable or necessary to assist Purchaser in making and prosecuting the Governmental Applications. Accordingly, Seller shall execute and deliver upon request, a zoning or other customary special power of attorney or authorization in the form required by the [County/City] with respect to the Property.

From and after the Effective Date until Closing hereunder, or until this Agreement is permissibly terminated in accordance with the terms hereof by Purchaser or Seller, Seller shall not, other than in connection with the foregoing provisions of this Section 8, make any application to modify the zoning of the Property, or to otherwise modify in any way the legally permissible uses and/or development standards applicable to the Property.



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GW Acquisition Co., LLC v. Pageland Ltd. Liab. Co., et al. (10/6/2023)

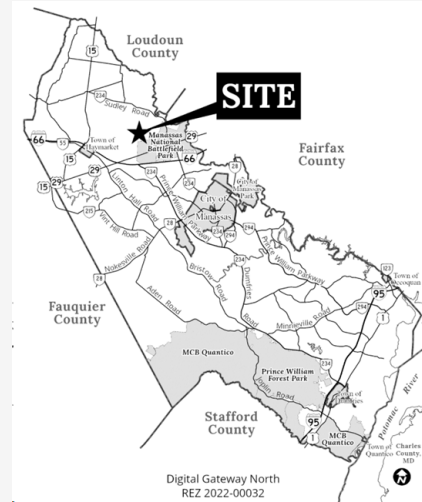
On October 27, 2021, Pageland agreed to sell 175 acres in Prince William County to GWA, a portion of the 876 acres GWA contracted to purchase from various landowners to construct the Digital Gateway Project.

Following a Comprehensive Plan amendment (November 2022), GWA needed to rezone and commit to **proffers**.

Proffer: a voluntary commitment from a landowner or developer to reduce or eliminate the impact of new development on neighboring properties and the county. Once Proffers are accepted, they become part of the zoning regulations applicable to the property. (Footnote No. 3)

Va. Code § 15.2-2298 "requires written acknowledgement by the landowner of any proffered condition 'prior to a hearing before the governing body.'"

2023 WL 6541851, at *2 (E.D. Va. Oct. 6, 2023)

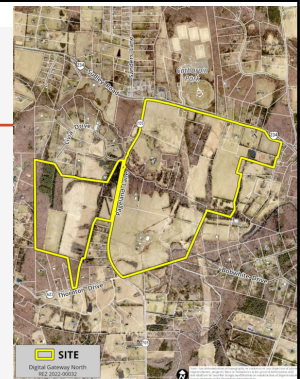
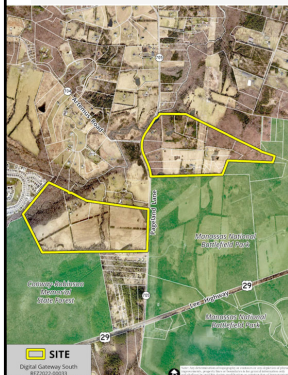


43

43

Seller Cooperation Provisions

"Rezoning.... Seller hereby agrees, and all other Project Site Sellers have agreed, under their respective Project Site Purchase Agreements, to actively and fully support and cooperate with [GWA], using commercially reasonable, diligent and good faith efforts, in pursuing and obtaining the approval of the Data Center Rezoning, including promptly signing such documents as may be required in connection with obtaining such approval [of the Data Center Rezoning]."



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Specific Provision regarding Proffers and Conditions

“Proffers or other Conditions. In the event the authorities of Prince William County require Purchaser or Seller, in order to obtain approval of the Data Center Rezoning, to agree to certain proffered conditions that may affect the Land, or if Purchaser desires to submit any proffers in connection with obtaining the Data Center Rezoning that may affect the Land (“Proffers”), Purchaser shall provide copies of such Proffers or proffered conditions to Seller for its review prior to Purchaser agreeing to any such proffered conditions. All Proffer(s) shall be subject to the prior written approval of Seller, which approval shall not be unreasonably withheld, conditioned or delayed. Seller agrees to promptly execute the Proffers when requested by Purchaser, subject to the foregoing right to approve....”

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Buyer’s Timeframe for Rezoning

“Outside Date for Rezoning. If a decision approving or disapproving the application for the Data Center Rezoning has not been made by the BOCS by August 15, 2023, either party may terminate this Agreement by written notice to the other; provided, however, that if by August 15, 2023, a hearing to vote on the Data Center Rezoning is scheduled to occur on or before December 30, 2023, such termination date may be extended through the scheduled hearing date (together with additional time thereafter to obtain a final, non-appealable decision), upon request by either party.”

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Board Hearing Scheduled ... Defendants Terminate Contract

July 30, 2023: Chair of the Board of Supervisors emailed County Executive, "I am scheduling these two QTS rezoning cases ... to be heard by the Board of Supervisors at our November 21, 2023 meeting and they are now on the agenda."

August 30, 2023: Pageland provides notice of termination pursuant to the provision for the outside date for rezoning and refused to sign the proffers arguing:

*Email does not properly schedule a hearing because not formal.

*The Board's agenda must be finalized at the time of scheduling.

*Board's shifting hearing to November 28th indicates its participation is required to schedule.

*Notice and opportunity to cure are required.

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Court granted Plaintiff's Motion for Preliminary Injunction

The Court agreed with GWA that the hearing had been duly scheduled and described Pageland's actions as evidence of "seller's remorse."

In fact, Pageland had attempted to back out of the contract previously and had lost an earlier lawsuit to GWA for the same reason, resulting in a *court order for Pageland to cooperate* with the buyer during the land use entitlement process.

The Court found that Pageland's failure to cooperate would cause GWA irreparable harm.

The Court ordered Pageland to comply with its obligations under the contract.

In addition to providing a primer on how to draft a buyer's contract with zoning approval conditions, the case illustrates how the details of the zoning process and contract provisions rise to importance when a seller or other party in opposition wants to thwart a sale or land use approval.

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Coda

PRINCE WILLIAM DIGITAL GATEWAY

On December 12, 2023, the Board of Supervisors approved the rezoning applications for Digital Gateway South and Digital Gateway North were both approved 4 (yea)-3 (nay)-1 (abstain) over staff's recommendation for denial and the Planning Commission's November 8th recommendation of denial. The proffer statement for each project was 60 pages long.

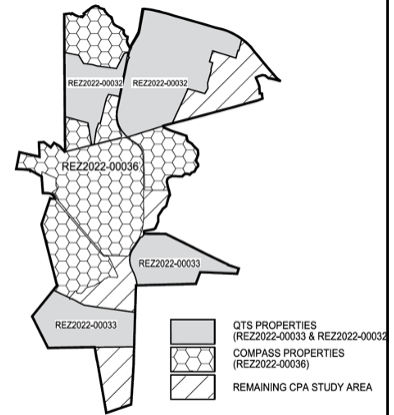


Figure 1: PW Digital Gateway Rezoning Locations within the CPA Study Area

Thank you
QUESTIONS?

Lease Considerations

Permitted Use – No Warranties from Lessor

- Be careful about legally nonconforming uses and partial nonconformity
- Car dealership example
- *Patton v. City of Galax*, 269 Va. 219 (2005)

Parking

- Site plan
- Property Owners Association / Condominium Association

Signage

- Existing approvals
- Zoning Ordinance
- Architectural Review Regulations

**SUCCESSFUL STRATEGIES TO
RESOLVE VIRGINIA REAL ESTATE
TITLE DEFECTS:
THE TOOLS IN THE TOOLBOX
AND
A-Z: 26 “TITLE TIPS”**

For:

**VIRGINIA STATE BAR
REAL PROPERTY SECTION
ADVANCED REAL ESTATE SEMINAR**

March 1-2, 2024

Presented By:

**JAMES L. WINDSOR, ESQ., CHAIRMAN
REAL ESTATE CLAIMS & TITLE INSURANCE SOLUTIONS GROUP
KAUFMAN & CANOLES, P.C.
2101 Parks Avenue, Suite 700
Virginia Beach, VA 23451
Phone: (757) 873-6308
E-mail: jlwindsor@kaufcan.com**

I. REFORMATION

A. What is Reformation?

1. “An equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties, *usually to correct fraud or mutual mistake*, such as an incomplete property description in a deed [T]he actual intended agreement must usually be established by clear and convincing evidence.” Black’s Law Dictionary, 11th Ed.;
2. “Equity has undoubted jurisdiction to reform an instrument if it does not express the intent of the parties.” Gibbs v. Price, 207 Va. 448, 449 (1966). “Equity should give effect to the true intent of the parties, despite a contrary intent reflected by a writing the parties mistakenly believed to monument their bargain.” Id. at 449–50. “The authorities all agree that equity has jurisdiction to reform written instruments . . . [w]here there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake” Larchmont Properties v. Cooperman, 195 Va. 784, 793 (1954) (citations omitted). “In short, reformation for mutual mistake allows a court to change the written document to reflect the *actual* agreement by the parties” Lewis v. Lewis, No. 1042-15-1, 2016 WL 2864378, at *5 (Va. Ct. App. May 17, 2016) (emphasis in original);
3. A court may find that a mutual mistake was made even when the parties testify that they intended different things and the parties do not jointly ask for reformation. See Holland v. Vaughan, 120 Va. 324 (1917). Parol evidence may be used to establish the circumstances entitling one to reformation. Id. at 327.

B. Examples of Cases Applying the Reformation Doctrine to “Missing Parties” are as Follows:

1. In Pleasants v. Pleasants, 221 Va. 1017 (1981), a husband and wife attempted to purchase a piece of real property. Inexplicably, the husband was listed as the sole grantee in the deed. The husband and wife thought they owned the property jointly and immediately took out a mortgage as joint owners. In an action to reform the deed, The Court stated that “[e]quity has undoubted jurisdiction to reform an instrument if it does not express the intent of the parties. Equity should give effect to the true intent of the parties, despite a contrary intent reflected by a writing the parties mistakenly believed to monument their bargain.” Id. at 1020 (citation omitted). *The Court went on to rule that reformation of the deed to add the wife as a grantee was proper.*

2. In Ocwen Financial Services, Inc. v. Gilmore (In re Gilmore), 284 B.R. 801 (Bankr. E. D. Va. 2002), a lender provided financing to the debtors with the express understanding that the property would be held jointly. Prior to settlement, all parties were clear that the property would pass in tenancy by the entirety. There was no doubt that the debtors intended to grant a security interest to the lender. The lender negligently failed to obtain the signature of the debtor's spouse at settlement. *The lender's negligence in failing to obtain the signature did not defeat its claim of a mutual mistake. The bankruptcy court entered an order reforming the deed of trust to add the debtor wife as a grantor, retroactive to the settlement date.* Id. at 805.
3. In Source One Mortgage Services Corporation v. First Equity Bank, 39 Va. Cir. 452 (*Fairfax Cnty.* 1996), a husband and wife purchased a parcel of real estate. The husband borrowed the purchase money and executed a first deed of trust, which he and his wife endorsed. However, in the deed of trust, the wife only conveyed her dower rights, which, as a tenant by the entirety, she did not have. Thus, the conveyance of her interest to the trustees in the first deed of trust was defective. The husband and wife also executed a second deed of trust, and then defaulted on both payment obligations. In the subsequent litigation between the lien holders, the Court ruled that on those facts:

[t]he disparity between the manner in which the property was titled and the manner in which the First Deed of Trust was executed was either inadvertent or fraudulent. In other words, *the [Defendant] intended either to give a valid security interest or to defraud the lender by a deliberate defect. If the former, the Court should reform the First Deed of Trust to reflect the parties' intent. If the latter, the Court will not permit fraud and the Deed should be reformed.*

Id. at 452-53 (emphasis added) (footnote omitted). The Court also noted that the lender on the second deed of trust advanced money to the husband and wife expecting to be in a second position, and that refusing to reform the first deed of trust would give the second lender a windfall, while reformation would put the second lender in the position it anticipated. *The Court ordered reformation of the first deed of trust.* Id. at 453.

4. Bryant v. Uzzle, Chancery No. CH-32331 (*Chesapeake Cir. Ct.* Oct. 19, 1994) also demonstrates that Courts will reform a deed of trust to reflect the intentions of the parties and to correct a mistake. In that case, George W. Estes ("Estes") purchased a parcel of real estate with a loan to have been secured by a first deed of trust. The deed of trust was executed by Estes. However, through a clerical error, Lena Uzzle ("Uzzle"), Estes' girlfriend,

was inadvertently inserted as a co-grantee on the deed conveying the property to Estes. Accordingly, due to a mistake, Estes and Uzzle were grantees in the deed acquiring the property and only Estes signed the deed of trust. The Honorable Izaak D. Glasser, Commissioner in Chancery, in his report, noted that the intent of the parties was clearly to give the mortgagee a complete lien against the entire property. Accordingly, the Commissioner reported that the mortgagee was entitled to reformation of the deed to eliminate Uzzle's name. *The Honorable E. Preston Grissom, Judge of the Chesapeake Circuit Court, in his order dated October 19, 1994, agreed and reformed the deed to eliminate Uzzle's name as a grantee.*

5. Other cases:

- a) Embrace Home Loans, Inc. v. Muscara, Case No. CL22002715-00 (*Loudoun Cty. Cir. Ct.* Aug. 19, 2022) (Deed reformed to remove one of two grantees);
- b) Am. Home Mortg. Corp. v. Allotey, No. CL08-1251, 2008 Va. Cir. LEXIS 2516 (*Prince William Cty.* Aug. 11, 2008) (The court issued a consent order correcting a scrivener's error and confirming the validity and priority of a deed of trust on the property.);
- c) Washington Mut. Bank v. Prado, No. 78933, 2008 Va. Cir. LEXIS 1877 (*Prince William Cty.* Oct. 3, 2008) (Final Decree quieting title to property finding a minor scrivener's error did affect the validity of a deed, and reforming and correcting the deed to convey the property.);
- d) Union Bank & Trust v. Hodge, No. CL16001022-00, 2016 Va. Cir. LEXIS 408 (*Montgomery Cty.* Jul. 20, 2016) (Motion for default judgment granted. Finding a mistake on a credit line deed of trust where the grantors' names were omitted from the first page, the court ordered the credit line deed of trust reformed by adding the grantors' names to the first page of the credit line deed of trust.);
- e) U.S. Bank, N.A. v. Beaver, CL20000354-00 (*Isle of Wight Cty. Cir. Ct.* Nov. 6, 2020) (Judge Lawson Wayne Farmer) (The Court declared that the refinance deed of trust, which was signed by only one of two borrowers/spouses, represented a valid and fully enforceable first-priority lien.);
- f) JPMorgan Chase Bank, N.A. v. Coleman, CL20180001508 (*Fairfax Cty. Cir. Ct.* April 20, 2018) (Judge Bruce White) (The Court declared i) a deed which was not signed by the grantors but notarized and recorded in the land records void, ii) title remained

vested in the defendants/grantors, and iii) the interest of the defendants was encumbered by a deed of trust.);

- g) PNC Bank v. Crabb, CL18004704-00 (*Norfolk Cir. Ct.* Sept. 27, 2018) (Judge David W. Lannetti) (The Court reformed the legal description of a deed and added two missing grantors, such that the full title was conveyed, and reformed the legal description to a deed of trust and declared the deed of trust a valid and enforceable lien.);
- h) HSBC Bank USA, N.A. v. Mayzick Partnership, CL18000113-00 (*Portsmouth Cir. Ct.* March 23, 2018) (Judge Johnny E. Morrison) (The subject property was owned by a partnership. A deed of trust encumbering the subject property was signed/granted by the partner in an individual capacity. The Court reformed the deed of trust and a subsequent modification agreement by replacing the grantor who signed in an individual capacity with the partner of partnership, and reforming an incorrect legal description in three instruments in the chain of title.);
- i) Wells Fargo Bank, N.A. v. Williams, CL15002462-00 (*Henrico Cnty. Cir. Ct.* Feb. 12, 2016) (Judge Lee A. Harris Jr.) (The Court reformed the legal description contained in a deed of trust and decreed that it is a valid and enforceable lien.);
- j) Caliber Home Loans, Inc. v. Bautista, CL2017-0013609 (*Fairfax Cnty. Cir. Ct.* Dec. 8, 2017) (Judge Alfred D. Swersky) (The Court declared that a deed of trust, signed by both the husband and wife but did not list the wife as a grantor, conveyed the interest of both the husband and wife, and it constituted a valid and enforceable lien.);
- k) Nationstar Mort. LLC v. Daraja, CL17001955-00 (*Hampton Cir. Ct.* Sept. 17, 2018) (Judge Bonnie L. Jones) (The Court reformed a deed of gift so that it conveyed the entire fee simple interest, not just a life estate, in the property, so that reverse mortgage deeds of trust were valid and enforceable liens, and the Court declared a quitclaim deed a nullity.);
- l) Virginia Credit Union, Inc. v. JPMorgan Chase Bank, N.A., CL18003366-00 (*Chesterfield Cnty. Cir. Ct.* Dec. 3, 2018) (Judge Steven C. McCallum) (The Court decreed that three corrective deeds confirming title in three grantees were to be recorded, and the deeds of trust encumbering the three properties were valid and enforceable liens.);

- m) Swaffar v. Kitchin, CL19-4916 (*Portsmouth Cir. Ct.* March 6, 2020) (Judge William S. Moore, Jr.) (The Court declared that a deed executed by an attorney-in-fact was a valid conveyance of real property.);
- n) Champion Mort. Co. v. Professional Foreclosure Corp. of Va., CL 13-25 (*Middlesex Cnty. Cir. Ct.* July 17, 2013) (Judge R. Bruce Long) (The Court entered a consent order reforming a deed of trust to add a missing grantor and declared that the deed of trust was a valid first lien against the entire property.);
- o) SunTrust Bank v. Huizar, CL18002515-00 (*Hampton Cir. Ct.* Jan. 8, 2019) (Judge Christopher W. Hutton) (The Court 1) reformed a deed of trust to add a spouse as a grantor to the deed of trust who was not listed as a grantor but signed the deed of trust and whose signature was not notarized, and 2) declared that the deed of trust conveyed the full interest of the property and was a valid and enforceable lien.);
- p) Planet Home Lending, LLC v. Garrison, CL23001956-00 (*Hampton Cir. Ct.* Dec. 6, 2023) (Judge Tonya Henderson-Stith) (The Court entered a consent order declaring that a deed of trust, which was recorded without the signature of one of the two grantors, conveyed the interest of both grantors, and reforming the deed of trust to add the signature of the missing grantor.);
- q) In New Century Mortgage, et al. v. Joyner, et al., CL07-1492 (*Hampton Cir. Ct.*, 2007) (Judge William C. Andrews, III) (The Court reformed, *nunc pro tunc*, a deed of trust that had omitted a grantor's signature.);
- r) In GMFS, LLC, et al. v. Foresman, et al., CL06-1381 (*Norfolk Cir. Ct.*, 2006) (Judge Norman A. Thomas) (The Court reformed a deed to remove a grantee and then reformed, *nunc pro tunc*, the refinance deed of trust to change the parcel identification number.);
- s) In Hill v. U.S. Escrow Financial Services, LLC, et al., CL06-00261, (*Hampton Cir. Ct.*, 2006) (Judge Wilford Taylor, Jr.) (The Court reformed, *nunc pro tunc*, a deed to correctly state the grantee.)

C. Examples of Cases Applying the Reformation Doctrine to Erroneous or Defective Legal Descriptions are as Follows:

1. In Holland v. Vaughan, 120 Va. 324 (1917) the grantors conveyed land to the grantees. The grantees alleged that by mutual mistake of the parties the deed contained an imperfect description of the property the grantors

intended to convey. Specifically, the deed omitted a ten acre tract of land. The grantees asked that the court reform the deed to include the ten acre tract. The grantors testified that they did not intend to include the ten acre tract, but the testimony of other witnesses contradicted this assertion. The trial court denied the relief, and entered judgment for the grantors. On appeal, the Supreme Court reversed. ***The Supreme Court concluded that there was no doubt of a mutual mistake, and that the grantees were entitled to reformation of the deed to include the ten acre tract.***

2. In Boone v. Scott, 166 Va. 644 (1936), Scott's father, the owner of a two and a half acre tract conveyed part of the tract to one son, part to another son, and the rest to Scott. Scott sold her tract to Boone. By the mistake of the drafter of the deed, the deed conveyed the entire two and one half acres to Boone, including the two parcels that had been conveyed to the sons. Scott sued for reformation, and the trial court reformed the deed to exclude the two parcels that had been conveyed to the sons from its legal description. Boone appealed, but ***the Supreme Court affirmed the reformation, stating that when a mutual mistake "has been proved by clear, cogent and satisfactory evidence, equity should, and will reform the instrument to make it conform to the real intent of the parties at the time it was executed."*** Id. at 653; *the use of the incorrect description by the grantor, when the grantee has constructive knowledge regarding the property's legal description, constitutes mutual mistake.*
3. The Supreme Court of Virginia affirmed the ruling of ***Orange County Circuit Court***, Judge F. Ward Harkrader, Jr., who reformed a plat in Knewstep v. Jackson, 259 Va. 263 (2000). The deed conveyed an easement, described its location, and referred to a plat. Id. at 266. The plat showed an easement in a different location from the description in the deed. Id. The Circuit Court reformed the plat to conform to the deed. Id. at 267. ***The Supreme Court affirmed the reformation, concluding that there was a mutual mistake of fact about the location of the easement, and that the inconsistency between the deed and the plat was evidence of that mistake.*** Id. at 269.
4. In Bank of Lancaster v. Bur, Case No. CL13000096-00 (***Westmoreland Cnty. Cir. Ct.*** Dec. 5, 2013), the legal description of a deed of trust included only one of two adjacent lots. The house built on the property straddled the two lots. The bank had already sold the property at foreclosure based on the deed of trust with the defective legal description and delivered a trustee's deed to a third-party buyer at foreclosure. The bank filed a lawsuit seeking alternative forms of equitable relief, including reformation. The Court entered an Order reforming the deed of trust and the trustee's deed, effective as of the dates of their respective executions, to include the missing lot. As to the trustee's deed, the Court stated, ***"The Trustee's Deed (as defined in***

the Complaint) is REFORMED nunc pro tunc as of April 15, 2013, such that its legal description specifically includes both Lot No. 188 and Lot No. 189, as in the Correct Legal Description (as defined in the Complaint). It is DECLARED that both the Deed of Trust and the Trustee's Deed were and are valid and enforceable conveyances of the entire Property, as defined by the Correct Legal Description to include both Lot No. 188 and Lot No. 189."

5. In Pennymac Mortgage Investment Trust Holdings I, LLC v. Rollins, Case No. CL13003648-00 (*Richmond Cir. Ct.* Jan. 9, 2014), the deed to the borrower and a refinance deed of trust executed by the borrower both contained an incorrect lot number, although they contained a correct street address and tax map number for the property. The lender filed a lawsuit seeking equitable relief, including reformation. *The Court entered an order reforming the deed and the deed of trust. Interestingly, the Court declined to reform these instruments nunc pro tunc, striking through the nunc pro tunc language in the order.*
6. Circuit courts throughout the Commonwealth have consistently reformed legal descriptions, as of the date of the execution or recordation thereof, in various deeds, in deeds of trust, and other instruments.
 - a) Wells Fargo Bank, N.A., v. Jones, Case No. CL20-1247 (*Prince George Cnty. Cir. Ct.* Mar. 24, 2021) (the Honorable Judge William Edward Tomko III);
 - b) LoanDepot.com, LLC v. Daughtry, CL21012441-00 (*Norfolk Cir. Ct.* Sept. 23, 2022) (Judge Jerrauld C. Jones) (The Court 1) declared that i) the borrowers were the sole owners of the subject property on the date of execution of a deed of trust, and ii) the lender was a *bona fide* purchaser for value, without notice of and takes free of the claims of others; and 2) reformed the legal descriptions of instruments in the chain of title.);
 - c) Empire Dev. Grp., LLC v. Ward, CL21002611-00 (*Portsmouth Cir. Ct.* June 24, 2022) (Judge Brenda C. Spry) (The legal description of a 1989 deed was reformed.);
 - d) Metro. Life Ins. v. Hill, CL18000268-00 (*Hopewell Cir. Ct.* Nov. 19, 2018) (Judge W. Allan Sharrett) (The Court 1) reformed the legal descriptions of three deeds in the chain of title, 2) decreed a deed of trust to be a valid and enforceable lien, and 3) reformed a deed by replacing the grantor.);
 - e) PNC Bank v. Crabb, CL18004704-00 (*Norfolk Cir. Ct.* Sept. 27, 2018) (Judge David W. Lannetti) (The Court reformed the legal

description of a deed and added two missing grantors, such that the full title was conveyed, and reformed the legal description to a deed of trust and declared the deed of trust a valid and enforceable lien.);

- f) Bronco FCU v. Cox, CL17000779-00 (*Suffolk Cir. Ct.* June 12, 2018) (Judge Carl E. Eason, Jr.) (The Court reformed the legal description of a deed of trust and declared that it adequately and unequivocally described the subject property.);
- g) Bank of N.Y. Mellon v. Thompson, CL17000741-00 (*Warren Cnty. Cir. Ct.* Dec. 21, 2017) (Lot lines among three contiguous parcels were vacated forming one parcel. The legal description of a subsequent deed of trust identified only one of the three lots. The Court reformed the legal description of the deed of trust to include the description of the parcel which include the three lots.);
- h) U.S. Bank, N.A. v. Davis, CL19-2983 (*Portsmouth Cir. Ct.* Sept. 27, 2019) (Judge Johnny E. Morrison) (The Court 1) reformed the legal description of a deed of trust, 2) declared that the deed of trust was an effective conveyance of the property at the time of its execution, 3) declared a foreclosure sale of the property valid, 4) declared the high bidder/plaintiff of the foreclosure sale the owner of the property, and 5) reformed the legal descriptions of a deed and the trustee's deed in the chain of title.);
- i) Metro. Life Ins. v. Slaton, CL18008174-00 (*Norfolk Cir. Ct.* Nov. 8, 2018) (Judge Everett A. Martin, Jr.) (The Court reformed the "Transfer of Rights in the Property" section of a deed of trust to include the address of a second parcel of real property encumbered by the deed of trust, and reformed the legal description of the deed of trust to include both lots encumbered by the deed of trust.);
- j) Am. Advisors Group v. Hoover, CL18001108-00 (*Smyth Cnty. Cir. Ct.* June 18, 2019) (Judge Deanis L. Simmons) (The Court reformed a pair of reverse mortgage deeds of trust and a trustee's deed to include the tax map numbers of all parcels encumbered, and reformed the legal description in the deed of trust, and declared the grantee of the trustee's deed as the owner of the subject property.);
- k) Freedom Mort. Corp. v. Otoo-Annan, CL18002544-00 (*Hampton Cir. Ct.* June 18, 2019) (Judge Christopher W. Hutton) (The Court reformed the legal descriptions of instruments in the chain of title, and declared a corrective affidavit recorded in the land records, attempting to correct errors in a deed in the chain of title, which contained minor scrivener's errors and a lot not conveyed by the deed it was correcting, null and void.);

- l) Davidson v. Montes, CL19001448-00 (*Chesapeake Cir. Ct.* July 24, 2019) (Judge Rufus A. Banks, Jr.) (The Court reformed the legal descriptions of the deeds and the deeds of trust of adjacent parcels, and declared that a survey dated October 1, 1964, which was not of record was a valid subdivision plat effective as of October 1, 1964.);
- m) Lancaster v. Byrum, CL 22002327-00 (*Suffolk Cir. Ct.* August 17, 2023) (Judge Carl E. Eason, Jr.) (The Court declared a commissioner’s deed erroneously conveying certain property null and void *ab initio* and partially setting aside a 2007 Order, and ordered three deeds and a survey to be recorded in the land records to resolve and settle the title issues.);
- n) Bank of Am., N.A. v. Daniel, CL19000468-00 (*Colonial Heights Cir. Ct.* June 25, 2020) (Judge Edward A. Robbins Jr.) (The Court reformed the legal descriptions of a deed of assumption and a subsequent deed of trust.);
- o) CIT Bank N.A. v. Hawks, CL13000321-01 (*Carroll Cnty. Cir. Ct.* Dec. 9, 2019) (Judge Brett L. Geisler) (The Court reformed the legal descriptions of a deed, deed of trust, and trustee’s deed in the chain of title.);
- p) In re McCargo, No. 20-30800-KLP (Bankr. E.D.Va. May 10, 2023) (Judge Keith L. Phillips) (The Bankruptcy Court approved a deed of correction and confirmation conveying the debtor’s interest in real property, and declared a deed of trust a valid and enforceable lien against the subject property upon the recordation of the deed of correction and confirmation.);
- q) In Manufacturers and Traders Trust Company, et al. v. Taylor, CL06-000066-00 (*King William Cnty. Cir. Ct.*, November 1, 2006) (Judge Thomas B. Hoover) (The Court reformed, *nunc pro tunc*, a refinance deed of trust by replacing an incorrect legal description with the correct legal description.)

D. Courts Will Reform Deeds and Deeds of Trust so as to “Relate Back” to the Effective Date of the Closing or Recordation of the Instrument.

- 1. Trout v. Jennelle, Case No. 06000987, 2007 Va. Cir. LEXIS 3117, at *9-10 (*Montgomery Cnty.* Apr. 17, 2007) (The Court reformed the legal description of a deed of trust *retroactive to date of closing*);
- 2. U S Bank Nat’l Ass’n v. Kamara, CL84193, 2009 Va. Cir. LEXIS 607, at *4-5 (*Prince William Cnty.* Feb. 20, 2009) (The Court appointed a special

commissioner to execute corrected deed of trust and record it with *retroactive effect to date of closing*); and

3. Bank of Am., N.A. v. Naff, Case No. CL16000844-00 2016 Va. Cir. LEXIS 305, at *4 (*Montgomery Cnty.* Jun. 23, 2016) (Judge Robert M. D. Turk) (The Court reformed a deed of trust *effective as of date of recordation* to correct legal description).

E. See also Virginia Code § 55.1-609, Regarding a Procedure Involving an Affidavit, Notice, and Other Specific Requirements to Correct Certain Limited Errors in Deeds and Deeds of Trust.

II. UNRECORDED DEED OF TRUST

Strategy:

- A. Do not contact the borrowers and ask them to come in and sign a new deed of trust because the original was lost and never recorded.
- B. Instead, immediately search the title to confirm the borrowers/grantors still own the property of record and then file a suit seeking a constructive trust, equitable lien, declaratory relief, and related claims together with filing a memorandum of *lis pendens* to “clog up” the title.
- C. Serve the suit and often the borrowers/grantors will retain counsel and try to resolve the matter.
- D. Beware of intervening lien creditors who properly recorded after the unrecorded deed of trust should have been recorded, but before the *lis pendens* is filed.
 1. WM Specialty Mort. v. Lazarte, No. CL 79670, 2008 Va. Cir. LEXIS 1224 (*Prince William Cnty.* Apr. 4, 2008) (On a motion granting an order for default judgment, the Court found that two lost and *unrecorded* refinance deeds of trust were valid, enforceable liens against the property.);
 2. Deutsche Bank National Trust Company v. Edwards, CL18-1313 (*Hampton Cir. Ct.* Aug. 13, 2018) (Judge Michael A. Gaten) (The Court declared that a deed of trust which was lost before it was a recorded in the land records was a valid lien as of the date on its face. The Court also appointed a Special Commissioner to execute a replacement deed of trust and record it in the land records.);
 3. The Bank of New York Mellon v. Gesek, CL14005187-00 (*Virginia Beach Cir. Ct.* June 9, 2015) (Judge James Clayton Lewis) (The Court appointed a Special Commissioner to execute and record another refinance deed of

trust, and the Court decreed that the refinance deed of trust is a valid and enforceable lien).

III. EQUITABLE SUBROGATION

Occasionally, lenders who believe they are secured by a “first” deed of trust are surprised to learn that they do not have the priority lien position they intended to have. For example, a lender may refinance and pay off a loan secured by a prior first-lien deed of trust and, due to a missed intervening judgment, the refinance lender may find its refinance deed of trust subordinate to the intervening judgment. Courts in Virginia have liberally applied the doctrine of equitable subrogation to provide relief from such errors under certain circumstances. Accordingly, real property lawyers should be aware of the doctrine’s applications and limitations. The following briefly summarizes the law on equitable subrogation in Virginia.

A. **Equitable Subrogation is Based Upon Principles of Equity and Justice, Fact-Specific, and is the Substitution of Another Person in the Place of a Creditor Whose Debt the Person Paid Off.**

1. In Asset Management Holdings, LLC v. Wells Fargo Bank, N. A. (In re Wagner), Case No. 12-13285-BFK, 2013 Bankr. LEXIS 4899 (Bankr. E.D. VA. Nov. 18, 2013), Judge Brian F. Kenney, applying Virginia state law, noted the Supreme Court of Virginia had described the principle of equitable subrogation as follows:

‘Subrogation is the substitution of another person in place of the creditor to whose rights he succeeds in relation to the debt. This doctrine is not dependent upon contract, nor upon privity between the parties; it is the creature of equity, and is founded upon principles of natural justice.’ 179 Va. at 401, 18 S.E.2d at 920. ‘Subrogation not being a matter of strict right, but purely equitable in its nature, dependent upon the facts and circumstances of each particular case, no general rule can be laid down which will afford a test in all cases for its application.’ Id. at 402, 18 S.E.2d at 920. Nevertheless, we have expressly acknowledged that ‘Virginia has long been committed to a *liberal application* of the principle of subrogation.’ Id.; (quoting Centreville Car Care, Inc. v. North Am. Mortg. Co., 263 Va. 339, 345 (2002) (quoting Federal Land Bank of Baltimore v. Joynes, 179 Va. 394, 401-02 (1942)). (emphasis added).

2013 Bankr. LEXIS 4899, at *18.

2. Judge Kenney further noted two principles that have been applied consistently by the Supreme Court in Virginia in the context of equitable subrogation:
 - a) *First, subrogation is not appropriate where intervening equities are prejudiced. Id. at *19.*
 - b) *Second, ordinary negligence of the party claiming equitable subrogation does not bar the application of subrogation, where the equities strongly favor the subrogee. Id.*
3. In addition, all of the cases agree that the application of the principle of equitable subrogation is necessarily “fact-specific.” Id.; See also Bank of N.Y. Mellon Trust Co., N.A. v. Tysons Fin., LLC (In re Botero-Paramo), 483 F. App’x 779, 786 (4th Cir. 2012) (Noting that “the fact-sensitive inquiry required in subrogation claims generally does not support bright line rules”).

Due largely to the “fact-specific” application of equitable subrogation, in Virginia, some cases are favorable and some cases are unfavorable.¹

B. Selected Cases.

1. An early Virginia case is Morgan v. Gollehon, 153 Va. 246 (1929).
 - a) Facts: When the property in this case was originally conveyed to a man and his mother, the sellers reserved a lien for a portion of the

¹ See Bankers Loan & Inv. Co. v. Hornish, 94 Va. 608 (1897); Helm v. Lynchburg Tr. and Sav. Bank, 106 Va. 603 (1907); Moritz v. Redd, 151 Va. 644 (1928); Morgan v. Gollehon, 153 Va. 246 (1929); Fed. Land Bank of Baltimore v. Joynes, 179 Va. 394 (1942); Thompson v. Miller, 195 Va. 513 (1954); G.E. Capital Mortg. Serv. v. Monno, 53 Va. Cir. 154 (Fairfax Cnty. 2000); Deutsche Bank Nat’l Tr. Co. v. Iqbal, 86 Va. Cir. 11 (*Fairfax Cnty.* 2012); Mortg. Elec. Registration Sys. v. Garnett, 84 Va. Cir. 72 (*Madison Cnty.* 2011); In re Wagner, 2013 Bankr. LEXIS 4899; In re Valley Vue Joint Venture, 123 B.R. 199; In re Reasonover, 236 B.R. 219 (Bankr. E.D. Va. 1999); In re Smith, Case No. 98-26931, Adv. Proceeding No. 99-02076 (Bankr. E.D. VA., July 12, 1999); *but see* First Cmty. Bank v. E. M. Williams & Sons, Inc. (In re E. M. Williams & Sons, Inc.), Case No. 08-30054-KRH, 2009 Bankr. LEXIS 1224 (Bankr. E.D. Va. May 8, 2009) (Huenekens, J.), *aff’d*, 2010 U.S. Dist. LEXIS 30709 (E.D. Va. Mar. 30, 2010); Meridian Title Ins. Co. v. Lilly Homes, Inc., 735 F. Supp. 182 (E.D. Va. 1990), *aff’d*, 934 F.2d 319 (4th Cir. 1991) (full text at 1991 U.S. App. LEXIS 11315); Deutsche Bank Nat’l Trust Co. v. United States, No. 1:12-cv-1059, 2013 U. S. Dist. LEXIS 107423 (E.D. Va. July 31, 2013) (Hilton, J.); Deutsche Bank Nat’l Trust Co. v. IRS, 361 F. App’x 527 (4th Cir. 2010); In re Perrow, 498 B.R. 560 (W.D. Va. 2013); So. Bank & Trust Co. v. Alexander (In re Alexander), No. 11-74515-565, 2014 Bankr. LEXIS 3048 (Bankr. E.D. Va. July 16, 2014) (St. John, J.); Home Bldg. Ass’n v. Mackall, 205 Va. 73 (1964); Centreville Car Care, Inc., 263 Va. 339 (2002); Mega Int’l Commerce Bank v. MCAP Capital, L.L.C., 74 Va. Cir. 132 (*Norfolk* 2007); Bristol Cnty. Ret. Sys. v. Senior Tour Players Fund I, L.P., No. 24302, 2006 Va. Cir. LEXIS 337 (*Loudoun Cnty.* Mar. 10, 2006); Nat’l Valley Bank v. United States Fid. & Guar. Co., 153 Va. 484 (1929); Wilson v. Moir (In re Wilson), 359 B.R. 123 (Bankr. E.D. Va. 2006); In re Botero-Paramo, 445 B.R. 530 (Bankr. E.D. Va. 2011), *aff’d*, 483 F. App’x 779 (4th Cir. 2012); Gregory v. United States Dep’t of Treasury – IRS, No. 1:12cv00042, 2012 U.S. Dist. LEXIS 159307 (W.D. Va. Nov. 7, 2012).

purchase price. The mother had a 1/3 life interest in the property with the remainder to her son. The son died, leaving his widow with a dower interest. The mother and widow borrowed money from a third-party to pay off the sellers' lien. The sellers' lien was paid off, and the third-party took a new lien on the land. But the lien was only effective as to the mother's and widow's limited interests in the land, not the whole fee. When the third-party loaned the money, he expected to receive a lien on the whole fee estate, not on the mother's and widow's partial interest. Thus, the third-party lender asked to be subrogated to the position of the sellers' original lien.

- b) Holding and Reasoning: The Court noted three classes of parties eligible for equitable subrogation and noted the lender was in the class least entitled to subrogation. Id. at 249. But the Court stated that subrogation is "generally allowed where the loan was made by one who took a security from the borrower which turned out to be invalid." Id. The Court reasoned that the widow and mother were certainly entitled to be subrogated to the sellers' original lien since they had paid it off for the benefit of the fee. Thus, the Court concluded that the widow and mother should be viewed as having assigned their right to be subrogated to the third-party lender, who would then stand in the shoes of the seller.

2. The Virginia case discussing equitable subrogation in the most detail is Federal Land Bank of Baltimore v. Joynes, 179 Va. 394 (1942).

- a) Facts: The case arose out of a complicated fact pattern involving priority of liens. A mother had a lien on property that she had deeded to her sons so that the land would secure an annuity to her. The mother's lien was the first lien on the property. The sons obtained a mortgage on the property, and the mother agreed to subordinate her lien to the bank mortgagor's deed of trust. Then the sons obtained a second mortgage from another bank, which was used to pay off the first mortgage. The mother did not agree to subordinate her lien to the second mortgage (the mortgage bank apparently forgot to have her sign the paperwork), so technically her lien was first in priority over the second mortgage.
- b) Holding and Reasoning: The Court allowed subrogation of the second mortgagor to the rights of the first mortgagor and kept the mother's lien in a junior position. The Court stated that "where the lender of money lent it with the intention and understanding that he be substituted to the position of the creditor whose debt he paid, but without taking an assignment, where there are no intervening

equities to be prejudiced, the matter will be treated as if an assignment has been executed.” 179 Va. at 402.

3. In U.S. Bank National Association, as Trustee v. Stiles, Case No. CL13001399-00 (*Stafford Cnty. Cir. Ct.* Apr. 4, 2014), a credit line deed of trust that was in a second lien position was not paid off and released in the closing of a loan refinancing the first deed of trust. The refinance lender filed a lawsuit seeking alternative forms of equitable relief, including equitable subrogation. The Court entered an order equitably subrogating the refinance deed of trust to the lien position of the first deed of trust that was paid off and released to extent of the pay-off amount. The Court ordered that “the Refinance Deed of Trust . . . shall be and hereby is equitably subrogated to the lien position of the Household Deed of Trust . . . to the extent of \$548,318.92” and “that the Refinance Deed of Trust . . . shall be and hereby does have priority over the Credit Line Deed of Trust. . . .”
4. In Wells Fargo Bank v. Anheuser-Busch Employees’ Federal Credit Union, Case No. CL14000190-00 (*Isle of Wight Cnty. Cir. Ct.* Feb. 24, 2014), a credit union scheduled a foreclosure sale based on a deed of trust that was in first lien position, according to the record title. Wells Fargo filed a complaint for injunctive relief, based on the theory that its later recorded refinance deed of trust was actually entitled to first lien position according to the doctrine of equitable subrogation, because its refinance loan had paid off a deed of trust that was recorded prior to the deed of trust held by the credit union. The Court entered an order enjoining the credit union’s foreclosure sale for 60 days pending further hearings. The Court stated, “The cloud on the title to the Property and the uncertainty as to the priority and extent of the deed of trust liens on the Property would have a chilling effect on the Foreclosure Sale, if the Court allowed it to proceed. It is likely that Plaintiffs will ultimately prevail on the merits of their case as set forth in the Complaint . . .” The case subsequently settled.
5. *Very Instructive Case: Chase Manhattan Mortgage Corporation v. Smith (In re Smith)*, Case No. 98-26931, Adv. Proceeding No. 99-02076 (Bankr. E.D. Va. July 1999), the Honorable Judge David A. Adams held that, based on Virginia state law, the doctrine of equitable subrogation, a refinance lender was entitled to equitably subrogate back to the lien position of and stand in the shoes of a prior purchase money deed of trust recorded *before* a later recorded judgment, thereby giving it priority over an intervening judgment.

In In re Smith in 1985, DePaul Hospital obtained a judgment for \$23,518 plus interest against William M. Smith and Jeanne Marie Smith in the Norfolk Circuit Court (the “DePaul Judgment”). In 1994, “William Smith, Sr.” (“Smith, Sr.”) “divorced and unremarried” acquired property by deed

in the City of Norfolk recorded in the Norfolk Clerk's Office. A portion of the purchase price paid by Smith was secured by a purchase money deed of trust ("PMDT"). Two years later, in 1996, Smith, Sr. obtained a new refinance loan which was used, in part, to pay off the loan secured by the 1994 PMDT. The refinance loan was secured by a recorded deed of trust against the Property in 1996 and the deed of trust loan was later assigned to Chase. The prior PMDT was released by a certificate of satisfaction. In 1998, Smith, Sr. filed a Chapter 13 bankruptcy petition which was later converted to a Chapter 7 at which time a trustee was appointed.

In April 1999, Chase filed an adversary proceeding asking this court to (a) declare the Chase Refinance Deed of Trust to be equitably subrogated back to the lien position of PMDT, and (b) declare the Chase Deed of Trust, *as subrogated to the PMDT*, had priority over the DePaul Judgment which was recorded *before* the Chase Deed of Trust. Once Chase was subrogated to the PMDT, the PMDT, under Virginia state law, took priority of the DePaul Judgment.

Judge Adams first found the resolution of the priority issue was governed by Virginia state law. In re Smith, (Order, p. 5). Next, Judge Adams found (a) "[e]quitable subrogation is a concept which is recognized in Virginia and which is *"liberally construed"* to give in fact reality to the intentions of the parties and (b) the "law of equitable subrogation was as set forth in Federal Land Bank of Baltimore v. Joynes, 179 Va. 394 (1942)." (emphasis added.) (Order, pp. 5-6.)

Based on the foregoing, Judge Adams then ruled, in relevant part, as follows:

Where, as here, a new mortgage (Saul Deed of Trust) is used to pay off an existing first mortgage (Purchase Money Deed Trust), but there is an intervening lien (Judgment) unbeknownst to the new mortgagee (B.F. Saul). The doctrine of equitable subrogation provides that the new or refinancing mortgagee (B.F. Saul) who pays off the existing first mortgage (Purchase Money Deed of Trust) is treated as having the same preferential position as a first mortgagee with priority over the intervening lien ("Judgment"). Based upon the facts of this case and as a matter of law, the Saul Deed of Trust is equitably subrogated to the position and all rights and remedies of the Purchase Money Deed of Trust including, but not limited to, priority over the Judgment.

(Order, pp. 5.6.)

The opinion of Judge Adams stands for the proposition, among others, that (a) equitable subrogation is to be “liberally construed to give in fact reality to the intentions of the parties,” (b) under equitable subrogation, where a refinance loan deed of trust paid off a prior loan, the refinance loan deed of trust will be subrogated back to the lien position of the deed of trust securing the paid off loan, and (c) the refinance loan deed of trust, as subrogated, will take priority over an intervening lien creditor. (Order, p. 5.)

6. In Bankers’ Loan & Inv. Co. v. Hornish, 94 Va. 608 (1897), a loan company advanced money to pay off notes secured by a first deed of trust with the understanding that it would have a first lien, but did not due to intervening judgments. The Court held that the loan company was subrogated to the rights of the noteholders who had priority over the intervening judgment creditors.
7. In Moritz v. Redd, 151 Va. 644 (1928), a man paid off a loan secured by a prior lien with the understanding that he would be the second lien holder, but there were intervening judgments. The Court awarded equitable subrogation, leaving the judgment creditors behind in priority, and noting that the “judgment creditors in this instance have in no just sense been prejudiced by applying the doctrine.” Id. at 653.

In short, under the facts of Hornish, Redd, and Smith, an intervening judgment lien creditor does *not* take priority of a later recorded deed of trust.

8. In Deutsche Bank National Trust Company v. Iqbal, 86 Va. Cir. 11 (*Fairfax Cnty.* 2012), a refinance deed of trust lender claimed it was entitled to, among other remedies, a constructive trust and equitable subrogation in a missing spouse case. In Iqbal, a couple both signed two purchase money deeds of trust in favor of WMC Mortgage Corporation, but the wife did not sign a subsequent refinance deed of trust granted in favor of Aegis Wholesale Corporation (“Aegis”). Deutsche Bank succeeded Aegis with respect to the refinance deed of trust and filed suit asserting claims for declaratory judgment, reformation of the deed of trust, equitable subrogation, unjust enrichment, imposition of a resulting trust and/or constructive trust and an award of monetary damages. The Iqbals failed to respond to the suit and the court entered an order finding them in default.

At a later hearing, Deutsche Bank moved for entry of a final order, specifically requesting that the court impose a constructive trust on both Iqbals’ interest in the property and, alternatively, requesting relief under a theory of equitable subrogation. The court questioned whether Deutsche Bank stated a cause of action against Ms. Iqbal and requested the lender brief the issue. After reviewing Deutsche Bank’s brief, the court issued an opinion and order. The trial court first determined that Deutsche Bank was unable to establish a basis for a resulting trust because it did not pay any

portion of the purchase price at the time of the original purchase and paid off the WMC deeds of trust not as its own, but as the owner's lender. However, the court found that Ms. Iqbal evidenced her intent to subject her interest in the property to WMC's liens, which were paid off with the refinance deed of trust. Therefore, the Iqbals would be unjustly enriched if Deutsche Bank could not foreclose and was left only with the husband's unsecured promise to repay the refinance loan. Accordingly, the court agreed that Deutsche Bank was entitled to have a constructive trust imposed against the property. The court also concluded that, although Aegis was negligent in not obtaining Ms. Iqbal's signature on the refinance deed of trust, failing to equitably subrogate the refinance deed of trust to the lien position of the purchase money deeds of trust would result in the Iqbals owning the property free and clear of any lien. Thus, the equities strongly weighed in favor of Deutsche Bank and it was entitled to equitable subrogation. In the order attached to the opinion, the court imposed a constructive trust, *nunc pro tunc* to the date the refinance deed of trust was recorded, under the same terms and conditions stated in the refinance deed of trust. The order does not address equitable subrogation and did not specifically reform the refinance deed of trust to add Ms. Iqbal as a grantor.

C. Equitable Subrogation is also Invoked in Situations Where, for Some Reason Other than Intervening Liens, the Security of One Who Paid Off a Prior Indebtedness is Void or Ineffective to Protect his or her Interests.

A Virginia case of this type is Helm v. Lynchburg Trust and Savings Bank, 106 Va. 603 (1907). Helm claimed that she did not sign a deed of trust and that another had forged her name to it. *The loan intended to be secured by the forged deed of trust was used to pay off prior encumbrances.* The Court recognized that if the deed of trust was invalidated as a forgery, the second bank that had paid off the prior lender with a first deed of trust was entitled to have a new lien placed upon the property in the lien position of the prior lender "upon the equitable principle of subrogation" because of the benefit that had been bestowed.

D. In No Other Jurisdiction has Equitable Subrogation Been More Firmly Adhered to or More Liberally Applied, to Meet the Exigencies of Particular Cases, than in Virginia.

"[T]he Virginia Supreme Court reiterated that 'Virginia has long been committed to a liberal application of the principle of subrogation.' [Centerville Car Care], 263 Va. at 345; see also Fed. Land Bank of Baltimore, 179 Va. at 402 ('In no other jurisdiction has the doctrine been more firmly adhered to or more liberally expounded and applied, to meet the exigencies of particular cases, than in Virginia') (quoting Sands' Adm'r v. Durham, 99 Va. 263, 38 S.E. 145 (1901));"

In re Wagner, 2013 Bankr. LEXIS 4899, at *20.

E. Equitable Subrogation is Primarily About Restoring the Interests of the Parties to their Intended Position Relative to Others.

In In re Smith, Judge David A. Adams emphasized that equitable subrogation is “liberally construed to give in fact reality to the intentions of the parties.” In re Smith (Order, at p. 5).

Similarly, in Asset Management Holdings, Judge Kenney reasoned: “At its heart, the doctrine of equitable subrogation is concerned with restoring the interests of the parties to their intended position relative to others.” In re Perrow, 2013 Bankr. LEXIS 3757, 2013 WL 4787956, at *14.” 2013 Bankr. LEXIS 4899, at *24. Judge Kenney further noted that “true” intervening lienholders in other published cases involving intervening lien creditors, really had “no bargained-for lien position with respect to the properties at issue.” Id., at *26; see also Deutsche Bank Nat’l Trust Co. v. U.S., No. 1:12-cv-1059, 2013 U.S. Dist. LEXIS 107423, at *1 (E.D. Va. July 31, 2013); Deutsche Nat’l Bank Trust Company v. Batmanghelidj (In re Batmanghelidj), No. 1:07cv683, 2007 U.S. Dist. LEXIS 68499 at *1 (E.D. Va. Sept. 17, 2007).

F. Another Factor Virginia Courts Consider is Balancing the Equities and Whether the Equities Favor the Claimant Seeking Equitable Subrogation.

1. Under Virginia law, even if a mortgage lender negligently omitted to record a deed of trust, this would constitute only “ordinary negligence” which is *not* a bar to subrogation. Fed. Land Bank of Baltimore, 179 Va. at 404; Asset Mgmt. Holdings, 2013 Bankr. LEXIS 4899, at *37.² Meridian Title, 735 F. Supp. at 186.
2. Negligence of the party claiming equitable subrogation or that party’s agent can be a defense. However, in Asset Management Holdings, the mortgage

² See Federal Land Bank, 179 Va. at 404 (Negligence was alleged because the second mortgagor failed to search title records. The Court said, however, that the “negligence of the subrogee must be more than ordinary negligence to bar the application of subrogation. Furthermore, the negligence should be chiefly of significance when there are subsequently intervening rights involved which would be prejudiced if subrogation were allowed.” Thus, the Court excused the lender’s failure to conduct a title search. Id.); Morgan, 153 Va. at 246 (Court held that a party’s negligence in failing to conduct a title search did not block equitable subrogation.); See also Centreville Car Care, 263 Va. at 345. (Supreme Court reversed trial court granting equitable subrogation to first priority position for lender where lender and/or its agent failed to uncover in a title examination defendants second deed of trust when it lent money to new purchasers and extinguished a former first deed of trust.); See also Deutsche Nat’l Bank Trust Co. v. Batmanghelidj, 2007 U.S. Dist. LEXIS 68499 (holding that equitable subrogation was not appropriate where it would place other liens in a worse position than they would be otherwise, where the borrower received a windfall by virtue of a cash disbursement of loan proceeds and where the equities did not strongly favor the subrogee.); Home Bldg. Assoc’n v. Mackall, 205 Va. 73 (1964) (Equitable subrogation will be denied if a party fails to establish the factual predicates entitling it to equitable subrogation. The plaintiff attempted to invoke equitable subrogation. The Court refused to apply the doctrine because the plaintiff introduced no evidence establishing that its funds had been used to pay off prior indebtedness.)

lender negligently did *not* conduct a prior title examination before recording the subject deed of trust and Judge Kenney still found in favor of the mortgage lender, under equitable subrogation. Asset Mgmt. Holdings, at *10.

3. In addition, if equitable subrogation is awarded, will there be prejudice to the intervening party because of the claimant's equitable subrogation rights? Remember that a claimant's equitable subrogation rights are **limited to the amount actually paid to the prior lienholder**³ (e.g., the prior lender to whom refinance proceeds were paid by the refinancing lender/claimant), to fully satisfy the prior loan and release the prior deed of trust. See In re Reasonover, 236 B.R. at 232 (limiting subrogee's rights to the amount paid to the prior lienholder).
4. Accordingly, for example, a prior lienholder would **not be prejudiced at all** by equitable subrogation because the lien position of the refinance lender/claimant, as subrogated, would actually be equal to the loan balance secured by the prior deed of trust to which the intervening lender was subordinate by virtue of the prior recorded deed of trust loan which was paid off by the refinancing lender/claimant.

IV. RESTRICTIVE COVENANTS

1. Under Virginia law, a restrictive covenant that runs with the land, also referred to as a real covenant, is enforceable upon proof of four distinct elements. These elements are:
 - (1) an intent evidenced by the original covenanting parties in the document that the burdens and benefits of the covenant **will run with the land**;
 - (2) privity between the original parties to the covenant, commonly referred to as horizontal privity;
 - (3) privity between the original parties to the covenant and their successors in interest, commonly described as vertical privity; and
 - (4) the covenant must "touch and concern" the land. Sonoma Dev., Inc. v. Miller, 258 Va. 163, 167 (1999).

³ But see Thompson v. Miller, 195 Va. 513 (1954) (equitable subrogation rights are limited to the amount actually paid to the prior lienholder, **plus interest**.)

2. The legal definition of “Restriction” – “A limitation (esp. in a deed) placed on the use or enjoyment of property.” *Black’s Law Dictionary* (10th ed.), p. 1508. The Supreme Court of Virginia has used the terms “restrictions” and “restrictive covenants” in multiple cases interchangeably and they are synonymous.
3. Virginia law is clear that ***when restrictions or restrictive covenants that “run with the land” are breached, they become or convert to mere personal covenants or choses in action.*** This rule is best illustrated by the case of Chesapeake & Ohio Ry. Co. v. Willis, 200 Va. 299, 304 (1958). Willis was a specific performance case where the predecessor landowners in a 100-year old deed covenanted to fence their property to keep their cattle away from the train tracks. No fences were ever built nor did the railroad demand them until 1952, when some of the current landowners’ cattle were hit and killed. When one of the owners sued to recover the value of the lost cattle, the railroad filed the cited action for specific performance of the covenants to build the fence. The Supreme Court of Virginia stated as follows:

It is equally well settled that a covenant of the nature of a covenant running with land, when broken ceases to pass with the land and becomes a mere personal covenant or chose in action. See Minor on Real Property, 2d Ed., Vol. 1, § 408, p. 547; 14 Am. Jur., Covenants, etc., § 40, p. 514; 21 C.J.S., Covenants, § 47, p. 933. (emphasis added.)

Willis, 200 Va. at 304.

The Court found that when the real covenant was breached it became a personal covenant or chose in action and no longer ran with the land. Accordingly, a five-year statute of limitations applied (damage to real property) and the statute of limitations had long since expired on the railroad’s personal covenant or chose in action. Id.

4. Several more recent circuit court decisions have followed the Willis holding. See Lee Rd. L.P. v. Markey Bus. Ctr. VI Bd., 23 Va. Cir. 386, 387 (*Fairfax Cnty.* 1991) (“***once breached, [the restrictive covenant] became a mere personal covenant which is only effective against the party who breached***”); St. Paul Fire and Marine Ins. v. W.S. Pinchbeck, Inc., 15 Va. Cir. 132 (*Chesterfield Cnty.* 1988) (citing Willis for the proposition that ***beached deed covenants become personal actions***).
5. Courts have generally looked with disfavor upon attempts to retroactively fix restrictive covenants that existed at the time of the violation. See Springer v. Gaddy, 172 Va. 533, 542 (1999) (“an owner whose land is subject to restrictions cannot violate them and, when a suit in equity is

brought against him, relieve his property of the restrictions by the payment of damages.” (citation omitted))

6. “In the construction of deeds, restrictive covenants and other instruments, the rule that the expression of a particular subject implies the exclusion of subjects not enumerated, or, *expressio unius est exclusio alterius*, has been held to be applicable. Yukon Pocahontas Coal Co. v. Ratliff, 181 Va. 195 (1943) (applying canon *expressio unius est exclusio alterius* (to express or include one thing implies the exclusion of others) in interpretation of deed); Bowman v. Wintergreen Prop. Owners Ass’n, 250 Va. 177 (1995) (applying canon in interpretation of restrictive covenants).
7. A recent unpublished decision from the Virginia Court of Appeals addressed the scope of the word “modify” when used in changes to restrictive covenants. In Dorcon Group, LLC v. Westrick, Record No. 1081-22-4 (Va. Ct. App. Aug. 1, 2023), the Court of Appeals held that an attempted “modification” of restrictive covenants to prohibit commercial activity on any subdivision lots, when plaintiff’s lot was previously permitted to conduct commercial activity in the original restrictions, was not a “modification,” but actually a new restrictive covenant.
8. Generally, “[w]hen [an] injunction is sought to enforce a real property right ... [t]he injury is deemed irreparable and the owner protected in the enjoyment of his property. . . .” Levisa Coal Co. v. Consol. Coal Co., 276 Va. 44, 62 (2008) (quoting Boerner v. McCallister, 197 Va. 169, 172 (1955)). An injunction is granted upon a breach of restrictive covenants “almost as a matter of course.” Norfolk S. Ry. Co. v. E. A. Breeden, Inc., 287 Va. 456, 465 (2014) (citation omitted).
9. The standard for when changed conditions have defeated the purpose of restrictive covenants was addressed in Deitrick v. Leadbetter, 175 Va. 170 (1940), in which several neighbors sued a fellow neighbor to enjoin her from using her residence as a tourist home in violation of a “residential use only” restrictive covenant. Id. at 172. The trial court rejected defendant’s argument that changed conditions had defeated the purpose of the restriction and enjoined the defendant from using her home as a business. Id. On appeal, the Supreme Court of Virginia affirmed the lower court and set forth the following test regarding the continued enforcement of restrictive covenants due to a change in conditions: “No hard and fast rule can be laid down as to when changed conditions have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement.” Id. at 177 (citation omitted); see Chesterfield Meadows Shopping Ctr. Assocs., L.P. v. Smith, 264 Va. 350 (2002) (finding a radical change where

area surrounding a historic building, that had been moved, had been transformed from once serene farm land, to a thriving commercial area.)

10. Dodd v. Graves, CL19-275-00 (*Northampton Cnty. Cir. Ct.* March 2, 2020) (Judge W. Revell Lewis, Jr.) (The Court declared plaintiff the sole owner of the subject property based on a deed recorded in the land records, free and clear of covenants and conditions subsequently recorded, subject to a subsequently recorded deed of trust, and barring individuals from enforcing the covenants and conditions.);
11. **NEW CASE:** Jeremy Kooiman, et al. v. Jeffrey Ornoff, Record No. 1758221 (Court of Appeals 1/30/2024) (Judgment affirmed as trial court did not err granting appellee’s request for injunctive relief against appellants and dismissing appellants’ complaint; no error interpreting covenants to bar appellants from using the basement of their home as their residence while renting the rest of the house; attorney’s fees issue not properly preserved, Rule 5A:18).

V. POSSIBILITIES OF REVERTER ARE SUBJECT TO A 10-YEAR LIMITATIONS PERIOD UNDER VIRGINIA CODE § 8.01-255.1.

- A. Virginia Code § 8.01-255.1 governs the statute of limitations for claiming land (1) subject to a condition subsequent⁴ following a breach of such condition *or* (2) the termination of a fee simple determinable, which gives rise to a “right of action,” is *ten (10) years* and provides, in relevant part, as follows:

8.01-255.1. Limitation of action for breach of condition subsequent or termination of determinable fee simple estate.

No person shall commence an action for the recovery of lands, nor make an entry thereon, by reason of a breach of a condition subsequent, or by reason of the termination of an estate of fee simple determinable, unless the action is commenced or entry is made within ten years after breach of the condition or within ten years from the time when the estate of fee simple determinable has been terminated. Where there has been a breach of a condition subsequent or termination of an estate fee simple determinable which occurred prior to July 1, 1965, recovery of the lands, or an entry may be made thereon by the owner of a right of entry or possibility of reverter, by July 1, 1977. (emphasis added).

⁴ Conditions subsequent are not favored in law. King v. Norfolk & W. Ry. Co., 99 Va. 625 (1901); N. Y. Indians v. United States, 170 U.S. 1 (1898); Conditions subsequent are strongly construed against the grantor. Wolverton v. Hoffman, 104 Va. 605 (1905).

- B.** Virginia Code § 8.01-255.1 was enacted in 1975 by the Virginia legislature for the purpose of statutorily creating a date certain as to when a limitations period would commence to run, and later to expire, thereby ending the “chilling effect” and extended uncertainty of such lapsed restrictions, which were common in deeds in the late 1800’s and early 1900’s, and in order to abrogate the often detrimental impact of such expired, and frequently long forgotten, yet unreleased restrictions.
- C.** Virginia Code § 8.01-255.1 was designed to avoid properties languishing and laying fallow, being perpetually tied up, and creating untenable clouds on title often long after the original grantor has passed away and their heirs, if any, have scattered and become difficult to locate in order to voluntarily resolve the issues and remove the cloud on title.
- D.** Virginia Code § 8.01-255.1 also sets forth a basis for a 15-year limitations period and provides, in pertinent part, as follows:
- “Possession of land after breach of a condition subsequent or after termination of an estate of fee simple determinable shall be deemed adverse and hostile from the *first* breach of a condition subsequent or from the occurrence of the event terminating an estate of fee simple determinable” (emphasis added).
- E.** Thus, the “*first*⁵ breach of a condition subsequent” statutorily commences the *accrual date* of a *right of action* under Virginia law for adverse possession which has a limitations period of fifteen (15) years. Virginia Code § 8.01-236. In short, upon the “first breach of a condition subsequent” a “right of action” accrued for the prior record owner, or the devisees or heirs of the prior owner, creating a possibility of reverter, meaning a “right” arose, at that time, for them to bring action, if they desired to, regarding the breach of the restriction.
- F.** If (1) the prior record owner or the owner’s heirs, do not commence an action or suit within fifteen (15) years of the breach, and (2) the current record owner and/or their later successors-in-title at the time remained in possession, such possession was statutorily “deemed adverse and hostile from the first breach of a condition subsequent.” *Id.*; Porter v. Wilson, 244 Va. 366, 370 (1992).
- G.** Likewise, at the same time, title by adverse possession *vested anew* in the current owner or any later successors-in-title, as applicable, concomitantly, the prior record owner or the prior record owner’s heirs were, as a matter of law, necessarily, at such time, *divested* under adverse possession of any such contingent interest in the

⁵ In Virginia, only the “slightest breach” is required to start the running of the statute of limitations. Int’l Surplus Lines Ins. Co. v. Marsh & McLennan, Inc., 383 F. 2d 124 (4th Cir. 1988); VMI v. King, 217 Va. 751 (1977).

property. McClanahan’s Adm’r v. Norfolk & W. Ry. Co., 122 Va. 705, 718 (1918) (“divested by . . . a subsequent disseisin for the statutory limitation period”).⁶

- H.** Cases involving possibilities of reverter: See Copenhaver v. Pendleton, 155 Va. 463 (1930); Hamm v. Hazelwood, 292 Va. 153 (2016); Commonwealth Transp. Comm’r v. Windsor Indus., 272 Va. 64, 79 (2006) (“*Where there is a breach of a condition subsequent upon which the possibility of reverter depends, the estate vested in the grantee does not cease in him and re-vest ipso facto in the grantor or his successors, but remains unimpaired in the grantee or his successors until entry, or its equivalent, by the grantor or his successors*; for the right to enforce the forfeiture may be waived, and the law, favoring the vested estate, will not permit its destruction until the right to forfeit has been exercised.” (emphasis added) (citing Sanford v. Sims, 192 Va. 644, 649 (1951); Copenhaver, 155 Va. at 479)); Braswell v. Braswell, 195 Va. 971 (1954); Sanford, 192 Va. at 648 (“A possibility of reverter is not an estate, present or future, but a possibility of having an estate In the case of a fee limited upon a condition subsequent it is a contingent right of re-entry upon condition broken. *It is a right inheritable at common law and in Virginia . . .*.”) (emphasis added.); Cnty. Sch. Bd. v. Dowell, 190 Va. 676, 687 (1950); Rockbridge Area Conservation Council v. Va. Outdoors Found., 94 Va. Cir. 520 (Rockbridge Cnty. 2016) (RACC does not contest that VOF had a fee simple interest when it purchased the property in 1988. The 1989 Agreement purports to grant RACC a reversionary interest in the House Mountain Property; however, as a matter of law, any type of reversionary interest lies with the grantor upon conveyance).

VI. JUDGMENTS: SELECTED ISSUES

A. Docketing and Indexing of Judgments.

“Every judgment shall, as soon as it is docketed, be indexed by the clerk in the name of each defendant . . . and shall not be regarded as docketed as to any defendant in whose name it is not indexed.” Virginia Code § 8.01-450 (emphasis added).

1. In Bankers Loan & Investment Co. v. Blair, 99 Va. 606 (1901), a judgment was indexed in the name of “May M. Simmons, who is claimed to be Mrs. T. Frank Simmons.” The Court stated: “Docketing and indexing that judgment in the name of *Mrs. T. Frank Simmons* was not constructive notice that it was a lien upon the house and lot standing upon the record in the name of *May M. Simmons*.” Id. at 611. There was no notice “that

⁶ As stated in Harkleroad v. Linkous, 281 Va. 12, 19 (2011): [I]nherent in the doctrine of adverse possession is the concept that the law will not permit an owner to be so dilatory as to remain unaware of the exclusive use of his property by a stranger claiming title for the statutory period of time. That ignorance is not a defense to the occupier’s assertion of adverse possession.

Mrs. T. Frank Simmons and May M. Simmons were the same person.” *Id.* The Court held “that the judgments asserted by [the judgment creditor] are not liens upon the house and lot mentioned. . . .” *Id.*

2. Richardson v. Gardner, 128 Va. 676, 678-87 (1920) (*omission of the proper name from the judgment index renders the lien invalid*);
3. In Reid v. I.R.S. (In re Reid), 182 B.R. 443 (Bankr. E.D.Va. 1995), the Bankruptcy Court held that a judgment indexed in the name of “**Gary A. Reid, Jr.**” in Fauquier County Circuit Court did not attach to property owned by “**Cary A. Reid, Jr.**” The Court stated: “[t]he difference between the two spellings involves only one letter in the first name; otherwise the two forms are identical, including the middle initial and the generation suffix. On the other hand, “Gary” is not only spelled differently from “Cary,” it is pronounced differently as well.” *Id.* at 447. The Court held that “the indexing of the lien in the name of Gary A. Reid, Jr. would not, on reasonable inspection of the judgment lien index, provide constructive notice of a tax lien against the debtor in this case, Cary A. Reid.” *Id.* Accordingly, the judgment did *not* attach to real property owned by Cary A. Reid, Jr. and the lien was declared void.;
4. In In re Walter M. Smith, Adv. Proceeding No. 99-02076-DHA (Bankr. E.D.Va. July 13, 1999), Judge David H. Adams of the United States Bankruptcy Court for the Eastern District of Virginia relied upon In re Reid in holding that a judgment obtained and indexed in the name of “**Walter M. Smith**” in the Circuit Court for the City of Norfolk did *not* attach to property owned by the debtor, “**Walter William Smith, Sr.**”

B. Rule of Inverse Order of Alienation.

The principle that a purchaser of a parcel of encumbered property may require a secured creditor to collect on a debt first from any parcel still held by the original owner, then from the parcel sold last, then next to last, and so on until the debt has been satisfied. — Also termed *rule of marshaling liens*. See Black’s Law Dictionary (11th ed.)

1. Virginia Code § 8.01-464 (which is statutory marshalling) states:

When the real estate liable to the lien of a judgment is more than sufficient to satisfy the same, and it, or any part of it, has been aliened, as among the alienees for value, that which was aliened last, shall, in equity, be first liable, and so on with other successive alienations, until the whole judgment is satisfied. And as among alienees who are volunteers under such judgment debtor, the same rule as to the order of liability shall prevail; but as among alienees for value and volunteers, the lands aliened to the latter shall be

subjected before the lands aliened to the former are resorted to; and in either case, any part of such real estate retained by the debtor shall be first liable for satisfaction of the judgment.

2. Accordingly, if a judgment debtor (a) currently owns certain real property and (b) conveyed certain property *by gift*, and (c) conveyed other parcels to third parties for consideration, all of which real property/parcels were conveyed “*subject to*” a judgment, the judgment creditor must sell the various properties in the following order:
 - a) First, any property retained/still owned by the owner/debtor.
 - b) Second, any property conveyed *by gift* by the former owner debtor.
 - c) Third, any property conveyed for consideration in reverse order or inverse order of sale (e.g., most recent sale sold first, and earliest sale sold last to satisfy the judgment, until the judgment is paid and satisfied in full.)
3. Virginia Code § 8.01-464 was construed by the Supreme Court of Virginia in Maness v. Tidewater Sand Co., 220 Va. 1042 (1980). In Maness, the judgment debtor owned three separate parcels of property on October 1, 1973, the date the judgment was docketed, which were subject in whole or in part to the lien of the judgment: (1) Parcel One, in which she owned an undivided one-third interest; (2) Parcel Two, which she owned in fee simple; and (3) Parcel Three, which she also owned in fee simple. Parcel Three had been conveyed by various deeds of trust as early as 1967. In December, 1973, the judgment debtor conveyed Parcel Two in its entirety to her brother by gift. In March, 1974, the judgment debtor died testate, leaving her entire estate to her son. The Court stated that Parcel One was the first parcel subject to the judgment lien, stating:

Parcel Three was found aliened first for value by execution of various deeds of trust thereon as early as 1967. Parcel Two was found aliened second by the conveyance to [the judgment debtor’s brother] in 1973, which was without consideration making him a volunteer alienee. Parcel One was found the last aliened as a result of the death of [the judgment debtor] in 1974, placing the devisee of her undivided one-third interest in that parcel also in a position of volunteer. *The commissioner also noted that if Parcel One is not considered as being aliened, it nevertheless must be sold first, under the provisions of the statute, because such parcel would be “real estate retained by the debtor” and thus first liable to the satisfaction of the judgment.* In the face of these findings supporting sale in inverse order of alienation, we cannot say that the court below erred by ordering the whole of Parcel One sold first.

Id. at 1049-50. (emphasis added).

4. Accordingly, in Maness, the Supreme Court of Virginia expressly recognized that a judgment lien must first be enforced against property “retained” by the judgment debtor before it can be enforced against alienated property. Therefore, even if the judgment was properly indexed and gave rise to a lien on the property prior to enforcing the judgment against property sold or gifted, it must first be enforced against the retained properties.

C. 20-Year Rule for Judgments Entered Prior to July 1, 2021

10-Year Rule for Judgments Entered On or After July 1, 2021.

1. An action to enforce a judgment must be brought within *20 years* of the *date* of the judgment for judgment orders entered *prior to July 1, 2021*.
2. An action to enforce a judgment must be brought within *10 years* of the *date* of judgment for a judgment order entered *on or after July 1, 2021*. Virginia Code § 8.01-251(A).
3. The limitation period can be extended for 10 years at any time prior to the expiration of the 20 year or 10 year (as applicable) limitation period. A judgment creditor or his assignee may record one additional extension by recording another certificate prior to the expiration of the original 10-year extension of the limitation period, which shall extend the limitations period of the right to enforce such judgment for an additional 10 years from the date of recordation of the second certificate. Virginia Code § 8.01-251(B).

D. 5-Year Rule as to “Grant for Value” by the Judgment Debtor.

If the judgment debtor conveys real property to a *third-party grantee for value*, (not necessarily a BFP) an action to enforce the judgment must be brought, *and a lis pendens must be filed*, within five (5) years of the date of recordation of the deed (or deed of trust) conveying the real property from the debtor to the grantee. Virginia Code § 8.01-251(C).

VII. “RECITALS OF ANY FACT IN A DEED . . . CONVEYING ANY INTEREST IN REAL PROPERTY SHALL BE PRIMA FACIE EVIDENCE OF THAT FACT.”

1. *A “recital” is a narration of [the] deeds, agreements, or facts as are necessary to explain the grantor’s title and the motives and reasons upon which the deed is founded and entered into.”* McCullough v. Dashiell, 78 Va. 634, 640 (1888). (emphasis added.)

2. Virginia Code § 8.01-389(C) provides, “[r]ecitals of any fact in a deed . . . conveying any interest in real property shall be prima facie evidence of that fact.” (emphasis added).
3. A deed containing all the essential recitals to bring it directly within the purview of this section, is “*prima facie evidence* that such sale regularly made, and that other recitals [therein] are true.” Saunders v. Terry, 116 Va. 495, 502 (1914) (emphasis added).
4. See also Howard v. Landsberg’s Comm., 108 Va. 161 (1908) (The recitals in a deed from a commissioner of a court are sufficient to show that the sale was regularly made then, by express terms of this section, *the deed is prima facie evidence that such sale was regularly made and that the other recitals of the deed are true, and it is unnecessary to introduce any portion of the record in support of such recitals until such presumption has been overcome.*);
5. Wills v. Chesapeake W. Ry. Co., 178 Va. 314 (1941) (Recital in a deed from a trustee that the creditor requested execution of trust is *prima facie true and must stand unless the contrary is proved by competent evidence.*);
6. Hyson v. Dodge, 198 Va. 792 (1957) (A deed of conveyance in the chain of title stating that the grantors therein are all the heirs at law of an intestate decedent shall be *prima facie evidence of that fact, which means that such a statement suffices for the proof of the identity of the heirs until the truth of the statement is contradicted and overcome by other evidence. The introduction of such a statement shifts the burden of going forward with the evidence to the litigant contending the contrary.*)
7. Osborne v. Richmond, 131 Va. 261, 263 (1921) (“*consideration of four hundred and ninety-five dollars in hand paid, the receipt whereof is hereby acknowledged*” was a recital which was *prima facie evidence and true unless disproven*) (emphasis added.);
8. As a result, a plaintiff in a suit relying upon recitals in deeds may use such recitals above to establish the plaintiff’s *prima facie* case if the recitals are sufficient and shift the burden to the defendant.
9. If the burden is shifted to the defendant and the defendant does not offer affirmative evidence to successfully rebut the established legal presumption in favor of plaintiff, the legal presumption establishing the plaintiff’s *prima facie* burden of proof will stand, and the plaintiff should prevail.

VIII. APPURTENANCES

1. Virginia Code § 55.1-303 (formerly, Virginia Code § 55-50, Virginia Code § 5168; Virginia Code § 2443; Code of 1849, p. 503-504, Sec. 7) have provided, in relevant part, for over 170 years as follows:

Every deed conveying land shall be construed to include all buildings, privileges and appurtenances of every kind belonging to the lands therein embraced unless an exception therefor is made in the deed.

(emphasis added).

2. “This section is merely an affirmation of the common law.” Whitmore v. Margaret Paxton Mem’l for Convalescent Children, 151 Va. 1018 (1928);
3. Burdette v. Brush Mt. Estates, LLC, 278 Va. 286, 292 (2009) (An easement is also “the *privilege* to use the land of another in a particular manner and for a particular purpose”); Russakoff v. Scruggs, 241 Va. 135, 138 (1991) (quoting Brown v. Haley, 233 Va. 210, 216 (1987));
4. See also Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383, 392 (1920) (referring to an easement as an *incorporeal hereditament*).
5. “Appurtenances” includes easements. Easements, whether affirmative or negative, are classified as either “appurtenant” or “in gross.”
6. An easement appurtenant, also known as a pure easement, has both a dominant and a servient tract and is capable of being transferred or inherited. It frequently is said that an easement appurtenant “runs with the land,” which is to say that the benefit conveyed by or the duty owed under such easement passes with the ownership of the land to which it is appurtenant.
7. See Cushman Va. Corp. v. Barnes, 204 Va. 245 (1963) (“When a portion of that lot was conveyed by the Watsons, it carried with it the use of the right of way, if accessible to it, unless an exception thereto was made in the deed.”);
8. Forbush v. Poe, 7 Va. Cir. 362 (*Warren Cnty.* 1986) (“Obviously, the easement did pass to the successors, *whether mentioned in the deed or not, unless expressly reserved by the language of the deed*, Virginia Code § 55-50; Corbett v. Ruben, 223 Va. 468 (1982)”);
9. Condon v. Powell, CL18001635-00 (*Hampton Cir. Ct.* Sept. 17, 2018) (Judge Michael A. Gaten) (The Court entered an order confirming that i) a

prescriptive easement exists for use as an appurtenance and which runs with the land and ii) and easement by necessity for access was established across a road on a subdivision which was never conveyed by the original owner of the property.);

10. Nishanian v. Sirohi, 243 Va. 337, 343 (1992) (“ . . . grant shall be construed to convey the fee simple, or whole estate the grantor has power to convey, unless a contrary intention appears in the deed. Our decisions have long been to similar effect: the language in a deed will be ***construed to pass to the grantee the greatest estate which the language employed is capable of conveying.***” (quoting Goodson v. Capehart, 232 Va. 232, 237 (1992)). (emphasis added); see Hamlin v. Pandapas, 197 Va. 659, 664 (1956);
11. In the case of Norfolk & Western Railway Co. v. Obenchain, 107 Va. 596 (1907), an industrial property was sold and a deed recorded that did not specifically mention a water easement necessary for the use of the property. Nevertheless, the Supreme Court of Virginia stated, “[i]t is true that the water right was not specifically mentioned in the deed from Mundy to the Riverside Company; but it was not reserved or excepted from that grant, and hence the easement passed from the grantor, as an appurtenance passing with the land, as fully as the buildings or other rights appertaining thereto.” Id. at 600.
12. Greenan v. Solomon, 252 Va. 50, 54 (1996) (Ownership of land acquired by adverse possession “includes those things which would pass with a transfer by deed Easements appurtenant to the possessed land are thus acquired; . . . “It is well established that a party who purports to convey an estate is estopped as against his grantee from asserting anything in derogation thereof. That is to say, a grantor cannot deny his title to the prejudice of his grantee. See School Board v. Smith, 134 Va. 98, 104, 113 S.E. 868, 869 (1922));
13. Clark v. Reynolds, 125 Va. 626, 634 (1919) (Court observed that the owner of an easement was not entitled to use it to benefit any place or parcel other than that for which it was originally established); Walton v. Holland, 238 Va. 687 (1989);
14. Lester Coal Corp. v. Lester, 203 Va. 93, 97 (1961) (“There was no merit to the contention that defendant, as a mere lessee, was not a successor or assign of Northern, hence took no rights under the easement. The lease granted to [the lessee] all the rights and privileges acquired by its lessor from Northern and [the lessee] was accordingly a successor in title to these rights, including the easement.”)
15. In Green v. Turner, 2010 Va. Cir. LEXIS 15 (*Amherst Cnty.* January 6, 2010), the Court found an implied easement of ingress and egress to and

from a public road shown on the plat, noting that the road has been used to access the property since 1923, and that the easement was “the most practical way to obtain” access to the public road, as “[i]t would be extremely difficult to develop a road over a different route through the mountainous property.” *Id.* at *4. Accordingly, it would appear that a party seeking an implied easement does not have to rule out every possible avenue to meet the “reasonably necessary” standard. Additionally, the court found that evidence met all of the requirements for an implied easement by demonstrating that the use was continuous, that the adjacent tracts originated from a common grantor, and that the easement was reasonably necessary for enjoyment of the property;

16. *Gish v. City of Roanoke*, 119 Va. 519, 531 (1916) (“Where a grantor conveys land by deed describing it as bounded by a road or street, the fee of which is vested in the grantor, he implies that such way exists and that the grantee acquired the benefit of it.”); *Walters v. Smith*, 186 Va. 159, 169-70 (1947);
17. *Robertson v. Robertson*, 214 Va. 76 (1973) (The owner of a dominate estate may not add other properties to the original parcels entitled to use the roadway. Such use would necessarily enlarge the burden on the original right of way, is impermissible, and would impose an additional burden on the servient estate which was not intended in the grant.);
18. In *Walters v. Smith*, 186 Va. 159 (1947), a parcel of property was sold with an alley adjacent to the parcel. The alley was mentioned in the deed to the parcel but no easement was expressly granted. The seller made many references to the buyer, Ms. Smith, that the alley improved the value of the parcel. Subsequent owners of the alley built a warehouse over it, blocking Ms. Smith's access. The Supreme Court of Virginia found an easement by implication in favor of Ms. Smith across the alley despite the fact that the deed did not expressly grant an easement for Ms. Smith to use the alley.

IX. ORDER OF PREFERENCE UNDER VIRGINIA LAW WHEN DETERMINING THE LOCATION OF A BOUNDARY LINE WHERE THERE ARE LEGAL INCONSISTENCIES IN THE DESCRIPTION OF THE LAND

1. *Under *Spainhour v. B. Aubrey Huffman & Associates, Ltd.*, 237 Va. 340, 347 (1989), the Supreme Court of Virginia reasoned that when determining where a boundary line exists, the courts have established a priority of evidence which grants a higher presumption of veracity to certain factors. “In the absence of evidence of contrary intent, a distinct order of preference governs inconsistencies in the description of land:*

- a) *natural monuments or landmarks;*
- b) *artificial monuments and established lines, marked or surveyed;*
- c) *adjacent boundaries or lines or adjoining tracts;*
- d) *calls for courses and distances;*
- e) *designation of quantity.”*

(Emphasis added).

Spainhour, 237 Va. at 346-47 (citing Providence Props. v. United Va./Seaboard Nat’l, 219 Va. 735, 745 (1979)).^{7 8}

2. ***Spainhour involved an action for surveyor malpractice against B. Aubrey Huffman & Associates, Inc. (“Huffman”) brought by Spainhour, the owner of property which Huffman surveyed, alleging negligence. Specifically, Spainhour alleged Huffman made two primary errors: (1) involving the failure to rely on a natural monument and (2) relying on the***

⁷ The Supreme Court of Virginia spoke to the evolution of the “order of preference rule” in *Providence*, 219 Va. at 744-45 and reasoned as follows:

We consider quantity to be the least reliable method of describing land. Reid v. Rhodes, 106 Va. 701, 707, 56 S.E. 722, 724 (1907). *Therefore, a description by acreage is inferior to all other deed descriptions.*

We have also approved the principle of construction that where there is a conflict, descriptions by distances *give way* to calls for known boundaries. Rucker v. Gregory, 191 Va. 697, 707, 62 S.E.2d 221, 226 (1950). In Fentress v. Pocahontas Club, 108 Va. 155, 159, 60 S.E. 633, 634 (1908), we affirmed the universal rule that a description by course and distance *must yield* to a description by natural or permanent objects called for as a boundary. And in Stacy v. Ritter Lumber Co., 114 Va. 133, 75 S.E. 1038 (1912), we held that a call to an adjoining property *would prevail* over a call for course and distance based upon a survey by a surveyor who did not go upon the land. Moreover, in Richmond Cedar Works v. West, 152 Va. 533, 540, 147 S.E. 196, 198 (1929) *we stated that calls for adjoining tracts of land are monuments and where they are certain are monuments of the highest dignity.* See also Clarkston v. Virginia Coal & Iron Co., 93 Va. 258, 24 S.E. 937 (1896).

From the foregoing cases has evolved the following order of preference rule applicable, in the absence of contrary intent, where deed descriptions are inconsistent[.] (emphasis added.)

⁸ Consistent with the “order of preference rule,” the Court, in Providence, 219 Va. at 746 noted as follows: “After a careful review of the record before us, we hold that the trial court was justified in applying the order of preference rule and in finding that the intent of the Norrises and of Waterfield in 1926 was to consummate the conveyance to Waterfield of the parcel bounded on the north by the 10-acre Waterfield parcel, on the east by the 12-foot right-of-way, on the south by land of J. T. Harper, and on the west by land of M. F. Forbes, *regardless of dimensions and area.*” (Emphasis added.)

quantity of acreage and disregarding inconsistent courses and distances. Huffman’s employee testified:

“[e]ither the acreage number on there is wrong or some or one of all of the courses and distances called for on that description have something wrong with it.”

Spainhour, 237 at 345.

3. The Supreme Court of Virginia opined regarding acreage:

“Acreage, based upon mathematic computation from courses and distances, and subject to the sum of all the errors in them, is the least reliable measurement.” Id.

4. At the conclusion of the trial, Spainhour, the owner, moved for summary judgment which the trial court denied. On appeal, the Supreme Court of Virginia found that, the law and facts were so clear that the trial court erred in dismissing Spainhour’s motion for summary judgment. Id. The Court reasoned as follows:

The sole question for the surveyor was whether the distance recorded in the 1907 deed should prevail over the inconsistent measurement of acreage. On that point, the rule is clear. “Quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances.” (emphasis added.) Reid v. Rhodes, 106 Va. 701, 707, 56, S.E. 722, 724 (1907) (emphasis added). (quoting Hunter v. Hume, 88 Va. 24, 29, 13 S.E. 305, 307 (1891)).

We conclude that Huffman was negligent as a matter of law, and that the court erred in denying Spainhour’s motions to strike and to grant summary judgment on the issue of liability. Accordingly, we will reverse the judgment, enter final judgment in Spainhour’s favor with respect to Huffman’s claim, enter judgment on the issue of liability in Spainhour’s favor with respect to Spainhour’s counterclaim, and remand the case for trial of the issue of damages on the counterclaim.

Spainhour, 237 Va. at 347.

5. A road shown on a plat incorporated into a deed is an “artificial monument” and is second only to “natural monuments and landmarks” in order of preference.⁹
6. The Supreme Court of Virginia spoke to the precise issue of an artificial monument like a “road” in Richmond Cedar Works v. West, 152 Va. 533 (1929). In West, a land owner brought suit against his neighbor for cutting timber on his property. The two properties were adjacent to each other and separated by the “eastern line of the Heron survey, whatever that is.” Id. at 536. The location of the boundary was the determining factor to the case. Along the boundary claimed by one of the parties was an iron pipe near a dead white oak tree that was referenced (the tree) in a recorded plat. The pipe was not referenced.
7. The Supreme Court of Virginia in West noted that in the absence of more certain information in the deeds, *monuments could establish a boundary*. The Supreme Court stated, “[t]he established rule that the location on the ground of courses and distances designated in the title papers must give way to known or reputed monuments, has reference only to monuments which are designated in the title papers.” Id. at 541 (emphasis added) (citation omitted). So, where, for example, a “road” is designated in the title papers in connection with a legal description, the road would take priority over inferior factors in the order of preference. A “road” would be second in order of priority as an “artificial monument” and therefore, inferior monuments “must give way” to the road.¹⁰
8. Under Spainhour: “In the absence of evidence of contrary intent, a distinct order of preference governs *inconsistencies* in the description of land “designated in the title papers”:
 - a) natural monuments or landmarks;
 - b) artificial monuments and established lines, marked or surveyed;

⁹ See State Sav. Bank v. Stewart, 93 Va. 447, 453 (1896) (“Where a map of land is referred to in a deed for the purpose of fixing its boundaries, the effect is the same as if it were copied into the deed); Richardson v. J. S. Hoskins Lumber Co., 111 Va. 755, 756 (1911) (A document incorporated by reference into a deed “is not to be regarded as extrinsic evidence, but part of the instrument itself”).

¹⁰ See Ettinger v. Oyster Bay II Cmty. Prop. Owners’ Ass’n, 296 Va. 280, 285 (2018) (“This Court has consistently held that quantity designations are ‘regarded as the least certain mode of describing land, and hence *must yield* to description by boundaries and distances’.” (citing Spainhour, 237 Va. at 347 (quoting Reid v. Rhodes, 106 Va. at 707) (emphasis added) “*In light of these precedents, the deed’s indication that Parcel E comprises 196,670 square feet must yield to the definite boundary of Hibiscus Drive.*” Id. at 286. (Emphasis added.)

- c) adjacent boundaries or lines or adjoining tracts;
- d) calls for courses and distances;
- e) designation of quantity.”

9. ***The rule in Spainhour:***

Example: If (a) natural monument or landmark contained in the legal description is inconsistent with b, c, d, or e above, then disregard, do not weigh, b, c, d, and e.

Example: If (d) above “designated in the title papers”/contained in the legal description is inconsistent with (b) above, disregard, do not weigh, (d).

X. VIRGINIA STATUTORY LAW AND CONTROLLING VIRGINIA PRECEDENT REGARDING THE DUTY OF THE SERVIENT OWNER NOT TO OBSTRUCT, NARROW, OR OTHERWISE BLOCK AN EASEMENT GRANTED WITH A SPECIFIC WIDTH.

1. **Virginia Statutory Law Prohibiting Obstruction of an Easement.**

Virginia Code, §55.1-305 (Enjoyment of Easement), provides as follows:

Unless otherwise provided for in the terms of an easement, [a] the owner of a dominant estate shall not use an easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement, and [b] the owner of the servient estate shall not engage in an activity or cause to be present any objects either upon the burdened land or immediately adjacent to such land that unreasonably interferes with the enjoyment of the easement by the owner of the dominant estate. For the purposes of this section, “object” does not include any fence, electric fence, cattle guard, gate, or division fence adjacent to such easement as those terms are defined in §§ 55.1-2800 through 55.1-2826. Any violation of this section may be deemed a private nuisance, provided, however, that the remedy for a violation of this section shall not in any manner impair the right to any other relief that may be applicable at law or in equity. (emphasis added.)

2. **Controlling Virginia Precedent Decided by the Supreme Court of Virginia Prohibiting Obstruction of an Easement Granted with a specific width in a deed.**

Under mandatory Virginia case law, an easement with a specific width of the easement (e.g., 50 feet wide) may not be narrowed and obstructed so as to bar or affect ingress and egress. There may be no fence, no trees, no obstacles, no other narrowing or other obstruction of a easement granted in a deed which has a specific grant of width.

- a) In Pizzarelle v. Dempsey, 259 Va. 521, 530 (2000), *the Supreme Court of Virginia found that the construction of a fence within a dedicated ingress-egress easement, with a specified granted 24-foot width was invalid and warranted injunctive relief. The fence reduced the width of the easement, as it allowed the defendant to appropriate five feet of land, and prevented the holders of the easement from using and enjoying it as intended. Id. at 531. Reasonableness and balance of equities are not relevant, and are not the test.* The Court found that the clear blocking of the easement, preventing ingress and egress to a portion of the easement (via the construction of a fence), *required no balancing of equities or reasonableness qualification* because the violation clearly impeded the purpose of the easement and the rights of its holder. Id.;
- b) In Snead v. C & S Properties Holding Co., 279 Va. 607, 615 (2010), *the Court found that the erection of a fence, planting and removal of trees and foliage, placing of signage, and installation of rip-rap within the bounds of a granted 60-foot ingress-egress easement, was clearly the usage of too much of the easement and called for injunctive relief, regardless of whether ingress and egress was still technically possible;*
- c) In Old Dominion Boat Club v. Alexandria City Council, 286 Va. 273, 284 (2013), *the Supreme Court of Virginia found, in a dispute over a city plan to allow a restaurant to build a dining deck in a pedestrian alley, that the construction of the deck was unlawful. It had the effect of reducing the 30-foot granted easement created for the purpose of allowing free use and passage;*
- d) In Ortiz v. Flattery, 63 Va. Cir. 309 (*Fairfax Cnty.* 2003), *a court found that a fence (constructed in the easement) had the effect of narrowing a fifty-foot granted easement to only eighteen feet, while blocking access to a portion of the easement entirely; this impediment justified immediate injunctive relief;*
- e) In Willing v. Booker, 160 Va. 461, 465 (1933), *the Supreme Court of Virginia held “where a reservation [or grant] is of a certain width, that width cannot be encroached upon.”* (emphasis added).

Pizzarelle, at 530; Ortiz, 63 Va. Cir. at 312. The Court has repeatedly restated this position. Snead, 279 Va. at 615.

- f) Recently, the Circuit Court of *Gloucester County*, Judge Jeffrey W. Shaw, rendered an opinion in Bowles v. Coates, Case Number CL16000322-00 (*Gloucester Cnty. Cir. Ct.* Nov. 12, 2021), resolving a dispute regarding the permissible use of an easement on a road in a subdivision. Plaintiffs David and Abigail Bowles (“Plaintiffs”) obtained their property by a deed which conveyed to them their lot, *together with all rights-of-way and appurtenances thereunto belonging*,” and referenced a plat. The plat identified two purported roads, “**40 FT Snug Harbor Drive**” and “**50 FT ‘G’ Road**.” On the plat, the roads were shown as a separate parcel shaped like an “L” which was separate from the lots (the “Road Parcel”). Plaintiffs claimed that defendants had no right to use Snug Harbor Drive. Further, they claimed that defendants were interfering with their right to use Snug Harbor Drive. The Court determined that the easement was a “*private easement*,” or “*implied easement*” because it was acquired by the purchaser of a subdivision lot under a recorded plat rather than an “*express easement*.”
- g) In another recent case, the Circuit Court of *Gloucester County*, under similar circumstances to Bowles, granted temporary injunctive relief to the owners of a dominant estate of an easement. In Lineberry v. Andruilli, Case No. CL22-1192 (*Gloucester Cnty. Cir. Ct.* Dec. 16, 2022), the court ordered the defendant servient tract owners to take both prohibitory and mandatory actions in granting the plaintiff dominant estate owners access to an easement *along* and across a tract. The Lineberrys, the plaintiffs, filed suit against the defendants, the Andruillis, for temporary and permanent injunctive relief regarding easement access to a **30-foot-wide road** (the “Right-of-Way”) which bordered the Lineberry property a distance of over 500 feet. The Lineberrys alleged that the Andruillis have sought to restrict the Lineberrys’ access to and use of the easements, including by planting trees within the easements, erecting gates in the easements, and erecting fencing along the Lineberry and Andruilli property line, which prevents the Lineberrys from entering the easements at any point *along the easements*.

Upon hearing the evidence, the Court issued an order granting temporary injunctive relief for the Lineberrys holding that the Lineberrys are likely to succeed on the merits of their claim, the Lineberrys are likely to suffer irreparable harm without preliminary relief, the balance of equities tips in the Lineberrys’ favor, and a temporary injunction is in the public interest.

Specifically, the Court ordered the Andruilllis to (1) *remove* all fencing and other obstructions placed since September 2022 *along the property line*, (2) leave open at all times the gate they installed on the Right-of-Way, and (3) refrain from “interfering in any manner whatsoever” with the Lineberrys’ use and enjoyment of *each* easement.

- h) Carter v. Michell, CL19-281 (*Fluvanna Cnty. Cir. Ct.* June 29, 2020) (Judge Richard E. Moore) (The Court entered an order in which the parties acknowledged, ratified, and confirmed an easement for ingress and egress that existed and will exist for the successors-in-title.);
- i) P.W. Development, Inc. v. Earthton Holdings, LLC, CL20-0034 (*Williamsburg/James City Cnty. Cir. Ct.* Sept. 28, 2021) (Judge Holly B. Smith) (The Court granted an easement by prescription and an easement by estoppel, to run with the land and to be appurtenances for the property, for ingress and egress.)
- j) Jones v. S. BayShore LLC, No. 1712-22-1, 2024 Va. App. LEXIS 62 (Va. Ct. App. Feb. 6, 2024) (Because the plat incorporated into the deed fully described the metes and bounds of the visual easement area, the Court concluded, as a matter of law, that the deed was unambiguous as to the extent of that area. The Court further stated the appellants failed to prove that the appellees’ pier violates the terms of the visual easement.)

3. **Virginia Decisional Law Regarding Tortious Interference with an Easement.**

- a) *In Virginia, a separate and distinct cause of action exists for tortious interference with easement rights.* For example, the Court in Ortiz, 63 Va. Cir. at 312 reasoned as follows:

In determining whether interference with easement rights should create a cause of action in tort, it is necessary to examine what rights are created by the granting of an easement. An easement . . . is a privilege to use the land of another in a particular manner and for a particular purpose. It creates a burden on the servient tract and requires that the owner of that land refrain from interfering with the privilege conferred for the benefit of dominant tract.” Brown v. Haley, 233 Va. 210, 216 (1987); Bunn v. Offutt, 216 Va. 681 (1976); Tardy v. Creasy, 81 Va. 553 (1886). Applying that definition to the

case at bar, the Complainants have acquired the legal right to use the property of the Defendant landowners for ingress and egress and the Defendant landowners have incurred a duty to refrain from interfering with that right. *When that duty has been breached, logically the Complainants must have a cause of action allowing complete redress. If they have been damaged in a manner that mere restoration of the right to use the property will not correct, the law of tort will provide a remedy. The Court finds that a cause of action for tortious interference with easements exists.* (emphasis added).

- b) Waskey v. Lewis, 224 Va. 206 (1982) (holding that violation of easement constituted an injury entitled to equitable redress and finding that the chancellor may determine what, if any, further remedy was necessary to accomplish a just result);
- c) Fairfax Cnty. Park Auth. v. Atkisson, 248 Va. 142 (1994) (remanding a case concerning the violation of an easement and directing the chancellor to require the defendants to provide a new easement at their expense or otherwise remove all obstructions preventing use of the original easement);
- d) Zimmerman v. Brubaker, 57 Va. Cir. 332 (*Rockingham Cnty.* 2002) (ordering defendant to pay compensatory and punitive damages to plaintiff for deprivation of use of easement);
- e) Alves v. Stanojevic, 110 Va. Cir. 338, 346 (*Alexandria Cnty.* 2022) (awarding compensatory damages for tortious interference with easement);
- f) Canton Homeowner’s Association, Inc., et ux v. Christopher Rechlin, et ux, Case No. 23000441-00/01 (Judge Designate Timothy S. Fisher) (*Gloucester Cnty. Cir. Ct.* Dec. 22, 2003) (finding the Rechlins (husband and wife) committed a nuisance and trespass on the community pier easement and awarding compensatory and punitive damages against the Rechlins, jointly and severally).

XI. RIPARIAN RIGHTS UNDER VIRGINIA LAW (SELECTED ISSUES)

- A. *“[T]he title to the bed of the river in question is held by the Commonwealth for the benefit of all of its citizens, and that the riparian owner has certain rights with respect to it.”* (emphasis added.) Taylor v. Commonwealth, 102 Va. 759, 773 (1994);

- B. *The five (5) riparian rights of riparian owners which have been enumerated by the Supreme Court of Virginia are as follows:*

“First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.

“Second. The right of access to the water, including a right of way to and from the navigable part.

“Third. The right to build a pier or wharf out to navigable water, subject to any regulations of the State.

“Fourth. The right to accretions or alluvium.

“Fifth. The right to make a reasonable use of the water as it flows past or laves the land.”

Id.

- C. Every riparian owner has the right to the water frontage belonging by nature to his land. This right includes, among others, the right of access from the front of his land to the navigable part of the water course, and also the right to the soil under the water between his land and the navigable line of the water course, whereon he may erect wharves, piers, or bulkheads for his own use, or the use of the public, subject to such rules and regulations as the Legislature may see proper to impose for the protection of the public. [a riparian rights apportionment] Groner v. Foster, 94 Va. 650, 651 (1987);

- D. *Riparian rights constitute an interest in real property and “run with the land.”* Carr v. Kidd, 261 Va. 81, 90 (2001).

However, riparian rights can be reserved by a seller/grantor or otherwise “severed” in the chain of title and no longer run with the land. In Thurston, the Supreme Court elucidated that “[i] has long been assumed, and specifically recognized in Virginia, that riparian rights may be severed from the land to which they were once appurtenant and dealt with separate and apart therefrom.” Thurston, 205 Va. at 912; See also Marine Resources Commission v. Forbes, 214 Va. 109 (1973). Riparian rights may be severed from the highland by either a reservation in a deed conveying the highland or by a grant by the owner separate from a conveyance of the highland itself. See Irby v. Roberts, 256 Va. at 336.

- E. Terrell v. Adsit, et al., Law No. 7012 (*James City Cnty. Cir. Ct.* 1995) (Court held riparian rights were not excluded, reserved, or severed in prior deeds in the chain of title and, therefore, the riparian rights were conveyed to subsequent purchasers/grantees.)

- F. ***In Virginia, private ownership of a riparian boundary of waterfront property extends to the “mean low water mark (“MLWM”).*** See Virginia Code § 28.2-1202. The MLWM is actually a “mark” or line visible on the shoreline. The MLWM is “ambulatory” and can gradually and imperceptibly change over time due to accretion, reliction, erosion, and other factors affecting the MLWM. Riparian rights begin at the MLWM and extend into the water to the line of “navigability”. Taylor v. Commonwealth, 102 Va. at 773.
- G. Virginia Code § 28.2-1200 provides, in relevant part, that the “Commonwealth owns all of the beds of the bays, rivers, creeks and the shores of the sea.” ***The intention of this statute is that the Commonwealth owns the beds or bottoms of all “navigable” waterways.***
- H. ***The “test”, therefore, to determine whether the Commonwealth owns the bed of a waterway, is whether the waterway is “navigable”, which can be subjective.*** The Virginia Marine Resources Commission (“VMRC”) acts on behalf of the Commonwealth and ***regulates the use of the beds and the waters beyond the MLWM of the navigable “bays, rivers, creeks, and shores of the sea.”***
- I. Irby v. Roberts, 256 Va. 324 (1998) (permitting VMRC to regulate commercial and private use of submerged lands including the construction of piers out to navigable waters);
- J. See also Taylor, 102 Va. at 773 (the right to construct a pier extends out to navigable water subject to the regulations of the state).
- K. However, beds of waterways which are *not navigable*, or for other reasons, can be privately owned. Examples include the following:
1. The bed of *non-navigable streams* are owned by the adjacent riparian owner to the center line of the stream.
 2. The bed of a lake (littoral rights) is owned by the adjacent riparian owner to the center line of the lake.
 3. ***Typically, dredged or excavated upland of a private owner to create a canal that is filled with water from an artificial source or water from an adjacent navigable river or creek remain privately-owned by the upland landowner. Generally, the “bed” of this dredged canal filled with water even from a navigable waterway does not become owned by the Commonwealth beyond the MLWM.***
 4. The bed or bottom of submerged land where the title can be traced back to a “King’s Grant” from the King of England (1600’s-1776) with an unbroken chain of title to the current owner remains in private ownership.

- L. When a landowner grants an easement over a riparian area, that grant includes the riparian rights “necessary to fulfill the intent of the grant.” Irby v. Roberts, 256 Va. at 330. In Irby, the landowner’s grant of a right of way for the purpose of constructing a pier “permit[ted] the grantee to utilize the land within given bounds to build a pier and, thus, [conveyed] the necessary riparian right for that purpose.” Id. at 330.
- M. Garner v. Joseph, 300 Va. 344, 351 (2021) (As in Irby, the grantors of the 1959 deed granted an easement to construct a pier with “the necessary riparian right to fulfill that purpose.”)
- N. Right of Fishery
1. Commonwealth ex rel Attorney Gen. v. Newport News, 158 Va. 521, 526 (1932) (It is sometimes stated that the State holds the tidal waters and the lands thereunder upon a trust of the people of the State that they may enjoy the use thereof, not only for the purpose of navigation, but for the purpose of taking fish and shellfish, and that the State has no right to authorize or suffer them to be so used for any purpose which will destroy or substantially impair the use thereof by the people for fishery.)
 2. Buchanan v. Norfolk S. R. Co., 150 Va. 17, 28 (1928) (The lease is of all rights of fishery from or in front of the land. We take it that the lessees needed no permission of the owner of the shore to fish in the public waters. What they acquired by their lease then was the right to a limited use of the land owned by their lessor above high-water mark, **as incidental to the fishery**. What they paid for was **the riparian right of fishery** which was vested in the owner of the land above high water mark. The land conveyed to the railroad company was described as fronting on Chesapeake Bay, and the easement reserved was the right of their grantor to make a limited use of the land so conveyed above high water mark, that is, the right to such use as might be reasonably necessary of the land above high water mark as incidental to the exercise of the right of fishery “from or in front of” the land.
 3. Burr v. Kraft, 37 Va. Cir. 513, 513-514 (*Alleghany Cnty.* May 12, 1995) (The Court held that the right of fishery is not an incident of navigation nor part of the jus publicum with respect to that section of the Jackson River in question.)
- O. Riparian Rights Can be Acquired by Adverse Possession.
- In Scott v. Burwell’s Bay Improvement Ass’n, 281 Va. 704, 710 (2011), the Supreme Court of Virginia reasoned that, to prove adverse possession of riparian

rights against the true owner, “the plaintiff ‘must show actual, hostile, exclusive and continuous possession for the period of the statutory bar’ by ‘acts of such notoriety that the true owner has actual knowledge, or may be presumed to know, of the adverse claim.’” Custis Fishing & Hunting Club, Inc. v. Johnson, 214 Va. 388, 392 (1973) (quoting Leake v. Richardson, 199 Va. 967, 976 (1958)). The claimant must prove all the elements by clear and convincing evidence. Harkleroad v. Linkous, 281 Va. at 18.

P. A Prescriptive Easement May be Established to Maintain and Use an Encroaching Pier on the Adjacent Riparian Bottom of Another

1. A party may obtain a prescriptive easement to use riparian rights in a similar manner. Leake, 199 Va. at 977-78;
2. Saunders Yacht Yard, Inc. v. Crockett’s Landing, Inc., 65 Va. Cir. 514, 514 (**Lancaster Cnty.** 2001) Plaintiff purchased land on a creek with the intent to expand his existing boat yard and marina facilities. Defendant operated a commercial seafood business on adjacent property. **Forty-five years earlier, defendant’s predecessor built a pier**, which was used in the business. Plaintiff claimed that the pier encroached upon its property and sought an apportionment of the parties’ riparian rights. The court held that the line of navigability for purposes of riparian apportionment of the two properties was minus eight feet, based on the fact that the depth of the creek channel was 10 to 12 feet in the vicinity of the properties and that numerous vessels each drawing six feet had been regularly docketed at defendant’s pier. **The court held that, based on the line of navigability, the defendant’s pier substantially encroached upon the riparian bottom apportioned to plaintiff. The court, however, held that defendant had the right to use the part of its pier that extended across the riparian bottom apportioned to plaintiff by virtue of prescriptive use. The court held that the pier had been continuously used for more than 20 years and that the use was exclusive to defendant and its predecessors.** Accordingly, the court apportioned the parties’ riparian rights and held that, by prescriptive use, defendant had the right to continue to maintain and use the portion of its pier shown as encroaching on plaintiff’s riparian bottom.

XII. SIMULTANEOUS SEISIN/PURCHASE MONEY DEED OF TRUST DOCTRINE

A. What is the Doctrine of Simultaneous Seisin a/k/a Instantaneous Seisin/Purchase Money Deed of Trust Doctrine?

1. *Under the doctrine of simultaneous seisin a/k/a instantaneous seisin, a/k/a transition seisin, a purchase money deed of trust takes priority over the prior docketed and indexed liens of judgment creditors recorded in the same clerk’s office of a courthouse against the same debtor.*

2. The doctrine of instantaneous seisin has been recognized and upheld on several occasions by the Supreme Court of Virginia. The reasoning behind this doctrine was explained by the Court in 1915:

The creditor is in no just sense treated as a purchaser. He has no equity whatever beyond what justly belongs to the debtor. When, therefore, land is conveyed and the purchaser at the same time gives back a mortgage or other encumbrance [sic] to secure the purchase money, he does not thereby acquire any such seisin or interest as will entitle his wife to dower, or his creditor to subject the land to his debts discharged of the mortgage. In such case the deed and the mortgage are regarded as parts of the same contract and constitute but a single transaction, investing the purchaser with the seisin for a transitory instant only.

Charlottesville Hardware Co. v. Perkins, 118 Va. 34, 38 (1915) (quoting Summers v. Darne, 72 Va. (31 Gratt.) 791, 801 (1879)). The Court in Charlottesville Hardware went on to explain that

In one instance, a mortgage will have preference over a prior docketed judgment, and that is the case of a sale and conveyance of land, and a mortgage taken at the same time in return to secure the payment of the purchase money. The deed and the mortgage are considered as parts of the same contract, and constituting one act; and justice and policy equally require that no prior judgment against the mortgagor should intervene and attach upon the land during the transitory seisin to the prejudice of the mortgage.

(emphasis added). Charlottesville Hardware Co., 118 Va. at 39 (citing Chancellor Kent in his Commentaries, vol. 4, pp. 173-4).

- a) For example, in the case of Holland Jones Company v. J. T. Smith, Swift and Company docketed a judgment against Smith in October, 1921. The judgment was later assigned to Holland Jones Company. In February, 1923, Smith purchased a piece of property and entered into a deed of trust to secure payment for the same. In upholding the trial court's ruling that the lien of the purchase money deed of trust had priority over the lien of the judgment creditor, despite the judgment creditor's lien being recorded first in time, the Court noted that

It is a well settled principle that where a purchaser, contemporaneously with the execution and delivery

of the deed to the property sold, executes and delivers to the vendor a deed of trust thereon to secure the purchase money, the deed of bargain and sale and the deed of trust are to be regarded as parts of one transaction, and the vendee acquires temporary seisin only, and not such a property right as may be subjected to the lien of a judgment until the deed of trust debt is discharged.

152 Va. 707, 711 (1929) (citing Moomaw v. Jordan, 118 Va. 414 (1916)).

- b) The Circuit Court in Winchester, Virginia has also recognized this doctrine. In Lewandowski v. F. & M. Mortgage Services, 50 Va. Cir. 394 (*Winchester Cty.* 1999) Kathleen Lewandowski obtained a judgment against John Lewandowski which was docketed in August, 1996. In February, 1998, John Lewandowski acquired title to property in Winchester, the purchase of which was financed by a purchase money deed of trust. The circuit court held that the purchase money deed of trust was superior to the judgment lien of Kathleen L. Lewandowski due to the doctrine of instantaneous seisin.
- c) Wilson v. Moir (In re Wilson), 359 B.R. 123, 135-36 (Bankr. E.D. Va. 2006).

There are good reasons why a title examiner would not search the grantor index in the buyer's name as part of a title search for a transaction in which the buyer would be executing deeds of trust to secure the purchase price. As discussed earlier in this opinion, under § 55-105, Code of Virginia, the recording of a deed or contract before a party acquires legal title of record does not constitute constructive notice to subsequent purchasers or mortgagors. Additionally, in Virginia, the doctrine of "transitory seisin" would prevent any interest that is perfected simultaneously with the acquisition of title from achieving priority over a deed of trust to secure the purchase price of the property.

When, therefore, land is conveyed and the purchaser at the same time gives back a mortgage or other encumbrance to secure the purchase-money, he does not thereby acquire any such *seisin* or interest as will entitle his wife to dower, or his creditor to subject the

land to his debts discharged of the mortgage. In such cases the deed and mortgage are regarded as parts of the same contract, and constitute but a single transaction, investing the purchaser with *seisin* for a transitory instant only.

In short, the court cannot find that the mere recording of the Moir deed of trust prior to the time she acquired legal title of record would have provided either constructive or inquiry notice to 1st Mariner and Toone of the existence of a competing deed of trust. For that reason, the court agrees with TS3 and Toone that the priority of their respective deeds of trust are unaffected by, and are superior to, the Moir deed of trust, and the court will enter judgment in their favor to that effect. (citation omitted.)

- d) Straus v. Bodeker's Ex'x, 86 Va. 543 (1889) (judgment against buyer did not have priority over deed of trust for purchase price);
- e) Hurst v. Dulaney, 87 Va. 444 (1891) (wife's dower interest did not have priority over deed of trust for purchase price).
- f) Charlottesville Hardware Co. v. Perkins, 118 Va. at 38 (judgment lien was subordinate to deed of trust securing the purchase price even though the deed of trust was not recorded *until almost a year after the sale*, where recitals in the deed stated that a deed of trust had been executed)

XIII. LOAN FUNDS WIRED BY A LENDER TO A SETTLEMENT AGENT TO BE HELD IN TRUST CONSTITUTE "SPECIFIC PROPERTY" AND REMAIN THE PROPERTY OF THE LENDER AS LONG AS "TRACEABLE."

A. *Where loan funds are wired, for example, by a refinancing lender to a settlement agent to pay off a prior deed of trust loan and such funds were:*

(a) held by the settlement agent pursuant to express written escrow/closing instructions and,

(b) held pursuant to Virginia statutes, in trust, in a fiduciary capacity, and

(c) are diverted by a "hacker" or other fraud feisor,

(d) such funds remain traceable trust property, pursuant to Virginia case law and,

(e) therefore, “equitable title” remains in

(i) the refinancing lender to such funds or

(ii) into the property from which the prior deed of trust was released and into which the funds or benefits thereof were traceable.

B. In short, when loan funds from a lender are wired into a settlement/escrow agent’s escrow or trust account to be used in closing to, for example, pay off a seller’s deed of trust loan or to refinance an owner’s existing loan, the transfer and deposit of such funds are generally governed by the (1) the escrow/closing instructions, (2) Virginia statutory law, and (3) Virginia case law.

C. The Escrow/Closing Instructions.

The “general closing instructions” almost always provide that the loan funds sent to the settlement/escrow agent are to be held in an “express” trust to be disbursed only in strict adherence with settlement instructions.

D. Relevant Statutory Virginia Law.

In addition, Virginia Code § 55.1-1008 provides, in relevant part, as follows:

§ 55.1-1008 Conditions for providing escrow, closing, or settlement services and for maintaining escrow accounts.

A. All funds deposited with the settlement agent in connection with an escrow, settlement, or closing shall be handled in a fiduciary capacity and submitted for collection to or deposited in a separate fiduciary trust account or accounts in a financial institution authorized to do business in the Commonwealth no later than the close of the second business day, in accordance with the following requirements:

1. The funds shall be the property of the person entitled to them under the provisions of the escrow, settlement, or closing agreement and shall be segregated for each depository by escrow, settlement, or closing in the records of the settlement agent in a manner that permits the funds to be identified on an individual basis; and

2. The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.

B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed. Funds payable to persons other than the settlement agent shall be disbursed in accordance with § 55.1-903, . . . :¹¹

E. Applicable Virginia Case Law Regarding Express Trusts/Statutory Trusts.

1. In Fidelity National Title Insurance Company v. Washington Settlement Group, LLC, 87 Va. Cir. 77 (*Fairfax Cnty.* 2013), the Court held that Virginia Consumer Real Estate Settlement Protection Act (CRESPA), Virginia Code § 55-525.16 *et seq.*, (now § 55.1-1000 *et seq.* (RESA)) ***established a fiduciary duty upon settlement agents that was independent from the obligations contracted for by the parties (e.g., the loan/escrow instructions).*** *Id.* at 83;
2. In Virginia State Bar v. Goggin, 260 Va. 31 (2000), the Supreme Court of Virginia held where funds deposited in an attorney’s trust account were wired in by lenders in connection with upcoming closings to the attorney acting as settlement agent, the attorney’s trust account was frozen by the Virginia State Bar, the persons entitled to those funds (the lenders who wired the funds into the account right before the trust account was frozen by the Bar) retained ownership in the funds and were entitled to recover the full amount of their identifiable ownership interest/traceable funds where possible. *Id.* at 33.
3. See also Broaddus v. Gresham, 181 Va. 725, 731-32 (1943) (Clients’ funds deposited in an attorney’s trust account are funds held in trust. ***The clients retain an equitable or beneficial ownership interest in the funds.***)
4. ***Alternatively, such lender may be entitled to a constructive trust (a) in traceable funds, (b) in the property or accounts (e.g., house, car, boat, CD), into which the funds were traceable or (c) the property owner’s title or interest in the property which benefitted therein.***

¹¹ See Lynda L. Butler, “The Wet Settlement Act and the Problem of Delayed Disbursements” (1986), William & Mary Law School Scholarship Repository, *Popular Media*. 217, available at <https://scholarship.law.wm.edu/popular-media/217>; see also § 55.1-903. **Duty of Settlement Agent.** The settlement agent shall cause recordation of the deed, the deed of trust, or the mortgage or other documents required to be recorded and shall cause disbursement of settlement proceeds within two business days of settlement. A settlement agent may not disburse any or all loan funds or other funds coming into its possession prior to the recordation of any instrument except (i) funds received that are overpayments to be returned to the provider of such funds, (ii) funds necessary to effect the recordation of instruments, or (iii) funds that the provider has by separate written instrument directed to be disbursed prior to recordation of any instrument.

F. Applicable Virginia Case Law Regarding Imposing a Constructive Trust (Selected Issues)

1. The forms and varieties of constructive trusts are practically without event under Virginia law.

- a) In Virginia, the state law has long been that constructive trusts are created by law, “independently of the intention of the parties, to prevent fraud or injustice.” Leonard v. Counts, 221 Va. 582, 589 (1980) (citing Porter v. Shaffer, 147 Va. 921, 928 (1926));
- b) *The “forms and varieties [of constructive trusts] are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice.”* (emphasis added.) Patterson’s Ex’rs v. Patterson, 144 Va. 113, 124 (1926) (citation omitted).
- c) *Constructive trusts arise, independently of the intention of the parties, by construction of law; being fastened upon the conscience of him who has the legal estate, in order to prevent what otherwise would be a fraud. They occur not only where property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired, but it is contrary to the principles of equity that it should be retained, at least for the acquirer’s own benefit.* Faulknier v. Shafer, 264 Va. 210 (2002);
- d) Constructive trusts may be imposed to avoid unjust enrichment. Richardson v. Richardson, 242 Va. 242, 245 (1991).

2. In Virginia, a constructive trust is created and arises at the time of receipt by the constructive trustee of the “fruits of the ill gotten gain”.

In Virginia, the courts, in general, hold the view that the constructive trust arises at the time of the constructive trustee’s receipt or acquisition of property for another, as, for example, when the constructive trustee takes property in his own name which he was obligated to purchase for another.

- a) Pope v. Prince’s Adm’r, 105 Va. 209 (1906) (holding that the individual who sold an infant’s land became constructive trustee of sale proceeds *upon receipt*);
- b) In re Mid-Atl. Supply, Inc. of Va. v. Three Rivers Aluminum Co. (In re Mid-Atl. Supply Co.), 790 F.2d 1121 (4th Cir. 1986) (holding that a subcontractor-debtor *received* a check in constructive trust and allowing the trust claim in the bankruptcy.);

- c) Old Republic Nat'l Title Ins. Co. v. Tyler (In re Dameron), 206 B.R. 394 Bankr. E.D. Va. 1997), aff'd, 155 F.3d 718 (4th Cir. 1998) ([a] constructive trust is created not when decreed by a court but when the constructive trustee comes under a duty to make restitution.);
- d) Capital Investors Co. v. Ex'rs of the Estate of Morrison, 800 F.2d 424 (4th Cir. 1986) (“[w]here the title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust immediately arises It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when the duty is subsequently enforced.” Id. at 427 n. 5 (5 Scott on Trusts at §462.4)).

3. **Courts impose a constructive trust even if (a) transfer of property is not the result of a breach of duty or fraud, and (b) irrespective of whether the recipient of the “fruits of the ill gotten gain” had knowledge of the wrongdoing of breach of contract.**

- a) *The Supreme Court of Virginia will impose a constructive trust even though (a) a transfer of property is not the result of a breach of duty or fraud, and (b), irrespective of whether the recipient of the property had no knowledge of the wrongdoing or breach of contract.* Firebaugh v. Whitehead, 263 Va. 398, 403 (2002) (Court held the following description sufficient “parcels currently owned by Sowers lying on the northerly side of State Route 665 and designated as tax parcel #72-83 and tax parcel #72-53 and shown on that certain plat . . . a copy of which is recorded in Deed Book 336, Page 533.1” Id. at 401 (footnote omitted).
- b) In other words, even though a recipient of the “fruits of the ill-gotten gain” had no actual knowledge (as opposed to constructive notice or inquiry notice) of the “wrongdoing or breach of contract,” a Virginia state court may still impose a constructive trust. See Iqbal, 86 Va. Cir. at 13.

4. **Federal courts construing Virginia state law regularly recognize constructive trusts.**

- a) In re Wellington Apt. LLC, 350 B.R. 213 254 (Bankr. E. D. Va. 2006) (quoting Leonard v. Counts, 221 Va. at 589). (“The Court finds that the debtor has met its burden of proof and that the interests of WPN and WP New Orleans in the Poydras building *shall be held in a constructive trust* for the benefit of Wellington VA until such time that the debtor receives a return of the \$2,546,174.59.” Id.); See Prime Constr. Corp. v. Riverside Dev. Joint Venture A-1 (In re

Prime Constr. Corp.), 156 B.R. 176, 179 (Bankr. E.D. Va. 1993) (citation omitted);

- b) In re Mid-Atl. Supply Co., 790 F.2d 1121; Citizens Fed. Bank v. Cardian Mortg. Corp. (In re Cardian Mortg. Corp.), 122 Bankr. 255 (Bankr. E.D. Va. 1990) (Tice, J.) (holding that, under Virginia law, an erroneous credit to the debtor's bank account warranted the imposition of a constructive trust in favor of the bank which was entitled to the credit);
- c) Haley, Chisholm & Morris, Inc. v. Parrish, 127 B.R. 366, 370 (W.D. Va. 1991) (Michael, J.) (constructive trust imposed);
- d) In re Twin B. Auto Parts, Inc., 271 B.R. 71, 85 (Bankr. E.D. Va. 2001) (St. John, J.) (constructive trust imposed);
- e) Millard Refrigerated Servs., Inc. v. LandAmerica 1031 Exchange Servs. (In re LandAmerica Fin. Grp., Inc.), 412 B.R. 800, 814 (Bankr. E.D. Va. 2009) (Huennekens, J.) (express trust enforced).

5. **Generally, Where the Beneficiary of an Established Constructive Trust Holds Equitable Title to Certain Property and the Recipient of the Property Holds Only Legal Title to the Same Property, the Property Held in a Constructive Trust Does NOT constitute property of the bankruptcy estate.**

- a) Generally, equitable property interests in the form of constructive trusts do **not** constitute property of the **bankruptcy estate**. In re Cardian Mortg. Corp., 122 B.R. at 260-21;
- b) “[T]he classic definition of a trust [is that] the beneficiary has an equitable interest in the trust property while legal title is vested in the trustee.” Direct Capital Group, LLC v. Hadley (In re Hadley), Case No. 09-73717-FJS, 2011 Bankr. LEXIS 3194, at *32 (Bankr. E.D. Va. Aug. 19, 2011) (Santoro, J.);
- c) A trustee in bankruptcy therefore cannot sell property subject to a constructive trust because the debtor/constructive trustee *does not own both legal and equitable title*. The beneficiary of the constructive trust (e.g., the lender wiring the funds to a settlement agent which are diverted) retains an equitable interest in the property, and the subject property is not property of the debtor's estate;
- d) Hodges v. Phillips (In re Randle), Case No. 02-69781, 2003 Bankr. LEXIS 2022 (Bankr. E.D. Va. Dec. 9, 2003) (Tice, J.) (In this case

the constructive trustee, Deborah Randle’s chapter 7 bankruptcy trustee, would be unjustly enriched if the property on which the Hodges built their home and raised their children was deemed property of the bankruptcy estate).

XIV. AUTOMATIC SUBORDINATION

Virginia Code § 55.1-319 (Priority of refinance mortgage over subordinate mortgage) has been recently amended and provides as follows.

A. As used in this section:

“Refinance mortgage” means the mortgage, deed of trust or other instrument encumbering or conveying an interest in residential real estate containing not more than one dwelling unit to secure a refinancing.

“Refinancing” means the replacement of a loan secured by a prior mortgage with a new loan secured by a refinance mortgage and the payment in full of the debt owed under the original loan secured by the prior mortgage.

“Subordinate mortgage” means a mortgage or deed of trust securing an original principal amount not exceeding \$150,000, encumbering or conveying an interest in residential real estate containing not more than one dwelling unit that is subordinate in priority (i) under subdivision A 1 of § 55.1-407 to a mortgage, deed of trust or other security interest in real estate (otherwise known as the prior mortgage); or (ii) as a result of a previous refinancing.

B. *Upon the refinancing of a prior mortgage encumbering or conveying an interest in real estate containing not more than one dwelling unit, a subordinate mortgage shall retain the same subordinate position with respect to a refinance mortgage as the subordinate mortgage had with the prior mortgage, provided that:*

1. **Such refinance mortgage states on the first page thereof in bold or capitalized letters: “THIS IS A REFINANCE OF A (DEED OF TRUST, MORTGAGE OR OTHER SECURITY INTEREST) RECORDED IN THE CLERK’S OFFICE, CIRCUIT COURT OF (NAME OF COUNTY OR CITY), VIRGINIA, IN DEED BOOK _____, PAGE _____, IN THE ORIGINAL PRINCIPAL AMOUNT OF _____, AND WITH THE OUTSTANDING PRINCIPAL BALANCE WHICH IS _____ WHICH HAD AN INTEREST RATE OF _____ % PER ANNUM.”;**

2. ***The principal amount secured by such refinance mortgage does not exceed the outstanding principal balance [not the amount of payoff] secured by the prior mortgage plus \$5,000; and***

3. ***The interest rate of the refinance mortgage at the time it is recorded does not exceed the interest rate of the prior mortgage. The interest rate of the prior mortgage shall be stated on the first page of the refinance mortgage.***
- C. The priorities among two or more subordinate mortgages shall be governed by subdivision A 1 of § 55.1-407.
- D. The provisions of subsection B shall not apply to a subordinate mortgage securing a promissory note payable to any locality or any agency, authority, or political subdivision of the Commonwealth if such subordinate mortgage is financed pursuant to an affordable dwelling unit ordinance adopted pursuant to § 15.2-2304 or § 15.2-2305, or pursuant to any program authorized by federal or state law or local ordinance or resolution, for (i) low- and moderate-income persons or households or (ii) improvements to residential potable water supplies and sanitary sewage disposal systems made to address an existing or potential public health hazard, and which mortgage, if recorded on or after July 1, 2003, states on the first page thereof in bold or capitalized letters: “THIS (DEED OF TRUST, MORTGAGE OR OTHER SECURITY INTEREST) SHALL NOT, WITHOUT THE CONSENT OF THE SECURED PARTY HEREUNDER, BE SUBORDINATED UPON THE REFINANCING OF ANY PRIOR MORTGAGE.”

XV. TITLE CLEANSING RULE IN VIRGINIA REGARDING *BONA FIDE* PURCHASER FOR VALUE

- A. ***A bona fide purchaser is one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him on inquiry. See Jackson v. Counts, 106 Va. 7 (1906); Michie’s Jurisprudence, Bona Fide Purchasers. § 126.***
- B. ***Such notice “must be clear and strong and such as to fix upon [the purchaser] the imputation of mala fides.” Vicars v. Salyer, 111 Va. 307, 312 (1910).***
- C. Furthermore, “a creditor who puts out his money specifically on a particular piece of property, and secures from the borrower a conveyance of the legal title to the property, by way of pledge, mortgage or deed of trust as security for the loan, is, in equity, regarded as a purchaser for value to the extent of his debt. And rightly so, since to the extent of his debt he is the owner, and has legal title.” Ransome v. Watson’s Adm’r, 145 Va. 669, 676 (1926) (citing Lile’s Notes on Equity Jurisprudence, pp. 59, 60-61); see also Larchmont Homes, Inc. v. Annandale Water Co., 201 Va. 178, 181-82 (1959) (a deed of trust is a conveyance which vests legal title in the trustee named thereunder).
- D. In Jackson v. Counts, 106 Va. 7 (1906), incompetent grantors, through committees, brought an action against the original grantees, C. W. Jackson and M. L. Jackson, and a subsequent purchaser, Johnson, Briggs and Pitts, to set aside deeds on the

grounds that the grantors were “idiots, and were wholly incapable of making valid disposition of their property.” Id. at 9. The incompetent grantors alleged that the original grantees procured execution of the deeds by fraud. Subsequent to the original conveyance, the grantees, the Jacksons, who acquired the subject property from the alleged incompetents, conveyed the underlying coal to subsequent purchasers, Johnson, Briggs and Pitts. Id.

The trial court found that the original grantors were incompetent when the deeds were executed and that the Jacksons were aware of the grantors’ incompetence. Noting that a deed from an incompetent is “not absolutely void, but voidable only,” the trial court voided the deed to the Jacksons, but upheld the conveyance to the subsequent grantee, Johnson, Briggs and Pitts. Id. at 11-12. The trial court held further that the incompetent grantors’ remedy was for damages against the Jacksons who had knowledge of the original grantors’ incompetence. Id. at 9. The original grantor had no right of action against Johnson, Briggs and Pitts, who were subsequent bona fide purchasers for value. The Supreme Court of Virginia affirmed the trial court as being “plainly right.” Id. at 13; see Simon v. Marlow, 515 F. Supp. 947, 950 (W.D.Va. 1981) (referring to Jackson v. Counts, the court stated: “the effect of Jackson was that the *bona fide* purchaser for value took clear title to the property.”); See also Upton v. Hall, 225 Va. 168, 173 (1983) (“[A] contract made by a person who is mentally incompetent is voidable.”).

- E. In Simon v. Marlow, the plaintiff challenged a conveyance of property on the grounds that it was conveyed pursuant to a power of attorney which was void due to incompetence. The court held that the United States, a subsequent purchaser, held clear title to the property even if it had notice of the incompetence, since the property was conveyed through several *bona fide* purchasers first. 515 F. Supp. at 950. The Court reasoned as follows:

Moreover, the Supreme Court of Virginia has laid the foundation for this cleansing of title rule in Jackson v. Counts, 106 Va. 7, 54 S.E. 870 (1906).

The effect of Jackson was that the *bona fide* purchaser for value took clear title to the property. So, in fee simple conveyance, the *bona fide* purchaser has absolute power to dispose of the property. See Gordon Metal Company v. Kingan, 132 Va. 229, 234 (1922). In other words, the fee simple *bona fide* purchaser can convey his land to anyone, whether or not the prospective grantee knows of the previous grantor’s incompetence.

In the final analysis, any other doctrine than that advanced in the Jackson case would place all titles upon the hazard of disability with the discovery of any remote incompetent grantor. This disruption of alienation is repugnant to the

concept of fee simple ownership in Virginia. Therefore, a subsequent grantee with notice of a prior grantor's incompetence takes clear title if it has been conveyed through a *bona fide* purchaser for value.

Id. at 949-50 (emphasis added) (footnote omitted).

- F. In Walker v. Bruce, Chancery No. CH99-0631 (*Roanoke Cnty. Cir. Ct.* 1999), the Court ruled that a lender and trustee were *bona fide* purchasers without notice who could not be divested of title. In the Walker case, the nephew of a decedent conveyed the decedent's property to himself pursuant to a power of attorney given by the decedent. The nephew then encumbered the property with a deed of trust. A niece of the decedent brought suit challenging the validity of a conveyance pursuant to the power of attorney and the validity of the deed of trust on the basis that the nephew acquired the property by fraud and breach of fiduciary duty. In addition, she alleged that the power of attorney was invalid due to decedent's incompetence. The **Court granted a demurrer** that the lender and trustee were not on notice of any purported fraud, and that they held valid title to the property. The lender and trustee then proceeded to foreclose.
- G. In Wrenn v. Mullian, Chancery No. CH02-417 (*Chesterfield Cnty. Cir. Ct.* 2002), the trial **court granted a demurrer** that a lender and trustee were *bona fide* purchasers where they ascertained the title to the property by relying upon a recorded Will which was later determined to be fraudulent and impeached;
- H. In Drew v. Sparrow, Chancery No. CH01-037 (*Surry Cnty. Cir. Ct.* 2004), the Court held that Wells Fargo Bank, N.A. ("Wells Fargo"), the beneficiary of a deed of trust, and its trustee Nectar Projects, Inc. ("Nectar Projects"), were *bona fide* purchasers for value without notice that could not be divested of title. Drew, an heir of Clayton, filed a Bill of Complaint for Injunctive and Declaratory Relief seeking to invalidate two deeds for the same property into Sparrow, also an heir of Clayton, and a subsequent deed of trust on the property granted by Sparrow securing Wells Fargo. Pursuant to the first deed, Clayton deeded the property to Sparrow under a power of attorney in which Sparrow was appointed the attorney in fact. The second deed, executed after Clayton's death, deeded the property from all of Clayton's heirs, including Drew, to Sparrow. Drew alleged that the first deed was void because Sparrow breached her fiduciary duties as Clayton's attorney in fact. He alleged that the second deed into Sparrow was void because the grantors' signatures were forged. Relying primarily on Jackson v. Counts, the Court held that there was nothing about the second deed that would put a *bona fide* purchaser on notice of an alleged forgery, and that the second deed from all of Clayton's heirs remedied any breach of fiduciary duty allegedly involved in connection with the first deed. *Accordingly, Wells Fargo and Nectar Projects were bona fide purchaser for value without notice that could not be divested of title, and Drew's sole remedy was an action at law against Sparrow.*

- I. Another circuit court case: Baxter v. Land, et al., CL11-2200 (Judge Leslie L. Lilley) (*Virginia Beach* Nov. 7, 2011).

XVI. ADVERSE POSSESSION

A. Elements

1. Actual
2. Exclusive
3. Open/Notorious
4. Adverse/Hostile
5. Under a Claim of Right or Color of Title
6. Continuous
7. Continued for statutory period of 15 years
 - a) Virginia Code § 8.01-236
 - b) Statute operates as a bar against any attempt to recover land from a person who has adversely possessed land for 15 years. Harkleroad v. Linkous, 281 Va. 12 (2011) (vesting title in cotenants who were strangers in title to the original cotenancy, who established elements of adverse possession against other cotenants)
 - (i) Claimants improved and maintained property
 - (ii) Claimants paid property taxes
 - (iii) Claimants leased property to tenants who were in open occupation
 - (iv) Claimants' possession by itself constituted an ouster

B. Actual Possession

1. Actual possession is *prima facie* evidence of ownership in fee
2. Must be an entry that amounts to ouster of true owner. Nowlin v Reynolds, 66 Va. 137 (1874)
3. Constructive possession alone does not suffice. Woody v. Abrams, 160 Va. 683 (1933)

4. What constitutes actual possession
- a) Most commonly, occupancy, involving use or enjoyment, residence, cultivation, enclosure and improvement
 - b) Enclosure by fence, cultivation, clearing or any other plainly visible and notorious manifestation of sole, exclusive possession *bona fide* claim of title against that of all other persons. Roller v. Armentrout, 118 Va. 173 (1915) (dweller living in house on enclosed tract of land, having and using outbuildings, fruit trees, and a garden, cultivating part of the tract, and grazing entire tract had adverse possession of entire tract)
 - c) Temporary and sporadic cutting of timber does not suffice. Lennig's Ex'r v. White, 20 S.E. 831, 1 Va. Dec. 873 (1894)
 - d) Neither does occasional grazing of cattle. Whealton v. Doughty, 112 Va. 649 (1911)
 - e) But see Taylor's Devises v. Burnsides, 42 Va. 165, 192 (1844) ("Take, for example, the case of a town resident, who, claiming title to a lot or tract of woodland in the vicinity, openly, notoriously and habitually cuts and hauls from it his necessary supplies of fuel; or in like manner makes it a source of revenue, by sales of firewood or timber. . . . There cannot be stronger instances of actual possession than these, and other like cases which might be stated: but they can serve only for the purpose of illustration.")
 - f) Michael Louis Blakey v. The Unknown Heirs, Devises, Assigns, and Successors in Title of Ada Rebecca Price, Whose Names and Last Known Addresses are Unknown, Who are Made Parties Defendant by the General Description of Parties Unknown, Case No. CL23001257-00 (Judge William H. Shaw, III) (**Gloucester Cnty. Cir. Ct.** Jan. 5, 2024) ("Since 2003, Blakey has used and maintained roadways, cut down trees, mowed and landscaped, improved, used and possessed the Subject Property as his principal residence in an open, notorious, exclusive, non-permissive way under a color of title or claim of right, and he has paid real estate taxes and insured the Subject Property" "Pursuant to Count One of the Complaint, Blakey acquired the Subject Property from the Parties Unknown, if any there should be, by adverse possession, and the Parties Unknown have been ousted from title as a result, and they have lost any interest they may have held in and to the Subject Property as heirs at law of Ada Rebecca Price")

5. Possession of Part Can Be Possession of Whole

- a) Actual possession of part of a tract of land under a *bona fide* claim and color of title to the whole tract equals possession of the whole tract. Baldwin v. Mothena, 171 Va. 94 (1938);
- b) Maynard v. Hibble, 244 Va. 94 (1992) (under color of title describing entire parcel, possession of field being portion of parcel was possession of whole parcel)

6. Wild and Uncultivated Land

- a) The evidence needed to establish adverse possession by claim of right depends on the character of the land in dispute. Craig-Giles Iron Co. v. Wickline, 126 Va. 223 (1919). ***“In a settled and cultivated region an actual occupancy and pernanacy of the profits may be requisite; whilst in the wilderness a possession less definite might suffice.”*** Id. at 236 (emphasis added).
- b) In order for a claimant to establish a claim of adverse possession to wild and uncultivated land, it is only necessary for the claimant to change the condition of *a relatively small portion of such land*. Graves v. Grandstaff, 9 Va. Cir. 513 (***Shenandoah Cnty.*** 1982). In Graves, the plaintiffs claimed title by adverse possession to two tracts of mountain land in Shenandoah County, Virginia, consisting of approximately 110 acres in total. Id. at 513. The court acknowledged that because the property was wild and uncultivated land, it was “inadvisable” and “virtually impossible” for the claimant to have changed the character of the entire property, and decided the issue on whether it found that the property as a ***whole was “under the essential control” of the claimant.*** Id. at 517. Ultimately, the Court held that “[w]hile in a settled and cultivated area, a greater degree of possession might be necessary,” Id. at 516, the facts and circumstances established by the plaintiffs proved that they “made a sufficient change in condition of the land appropriate to this kind of land to clearly and unequivocally give notice to the world that they held both tracts adversely to all parties, including the true owners,” regardless of the fact that *“they did not change the condition of a large portion of either of these tracts.”* Id. at 517 (emphasis added).

C. Exclusive Possession

- 1. Must demonstrate unequivocal claim of ownership, and preclude all others, from trespassing on it, or using it as their own or in common with adverse possession claimant

2. Providence Forge Fishing & Hunting Club v. Miller Mfg. Co., 117 Va. 129 (1915) (fishing and hunting on pond, renting boats to others to fish and hunt on pond, and instructing agent not to permit others to boat or fish on pond without permission *not* sufficient to vest title by adverse possession against adjacent owner who also used pond for boating and fishing)
3. Even where there are multiple users of an easement, a claimant's use may still be exclusive "when each user independently asserts his right to enjoy the roadway for himself, that use may be exclusive, even though other persons assert similar rights for themselves." Ward v. Harper, 234 Va. 68, 71 (1987); see Burks Bros. of Va. v. Jones, 232 Va. 238, 246 (1986); Pettus v. Keeling, 232 Va. 483, 486 (1987).

D. Open and Notorious Possession

1. Because title by adverse possession is based in part on the laches of the true owner, possession must be visible and of sufficient notoriety that true owner may be presumed to know about it. Grappo v. Blanks, 241 Va. 58 (1991) (requirement is satisfied when possession is so obvious that true owner may be presumed to know about it)
2. However, proof of actual knowledge on the part of the true owner is not generally required. Boggs v. Bright, 222 F. 714 (E.D. Va. 1915), *rev'd on other grounds*, sub nom, Higgenbotham v. Briggs, 234 F.253 (4th Cir. 1916).
3. If the true record owner slumbers or stands idly by for over 20 years, the claimant, if all other requirements are met, will prevail in an adverse possession action. In Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 60 (1924), upholding the dismissal of plaintiff's quiet title action where defendants had possessed the land in question for over 20 years under a color of title, the Court observed that "[a]nd all this time, this complainant and those under whom it seeks to claim title to the property stand silently by without a word of protest against these things and never once make any claim that their rights were being violated."
4. "Equity aids the vigilant, not those who sleep on their rights." Birchwood-Manassas Assocs., L.L.C. v. Birchwood at Oak Knoll Farm, L.L.C., 290 Va. 5, 8, (2015) (quoting Chesapeake & Ohio Ry. Co. v. Willis, 200 Va. 299, 306 (1958)); "There is no principle of equity sounder . . . in all the fruits of peace than this: That he who slumbers over his rights, with no impediment to his asserting them, until the evidence upon which a counterclaim is founded, may, from lapse of time, be presumed to be lost." Hagan Estates, Inc. v. N.Y. Mining & Mfg. Co., Inc., 184 Va. 1064, 1074 (1946).

E. Adverse/Hostile Possession

1. “Hostile” is a bit of a misnomer, and does not require that the claimant show ill will or malevolence toward the true owner
2. All that is required in Virginia is that the possession be under a claim of right and *adverse* to the rights of the true owner. Kim v. Douval Corp., 259 Va. 752 (2000)
3. Field v. Pellegrino, CL22000753-00 (*Goochland Cnty. Cir. Ct.* April 25, 2023) (Judge Timothy K. Sanner) (The Court declared that the plaintiffs acquired the property by adverse possession and were the sole owners of the property, and that the defendants were clearly and undeniably barred by Virginia Code § 8.01-236 from making a claim to the subject property.)

F. Claim of Right

1. Mere possession without a claim of right, no matter for how long a period of time, never ripens into good title. Yellow Poplar Lumber Co. v. Thompson’s Heirs, 108 Va. 612 (1908)
2. An adverse possession claimant is entitled to a presumption of an adverse claim of right.
 - a) This is useful when seeking a default judgment
 - b) Burden of proof of adversity may be carried by presumption
3. Similarly, possession that begins as permissive never ripens into adverse possession
4. Nevertheless, the claim of right need not be expressed. A claim of right can be inferred from unequivocal conduct that is inconsistent with any other reasonable inference. Douval Corp., 259 Va. 756-57.

G. Color of Title

1. Defined as something that has the appearance of title, but is in fact not title
 - a) Any written instrument that purports to convey title to land, that defines the extent of the claim to the land, but is defective or invalid, is color of title. See Sharp v. Shenandoah Furnace Co., 100 Va. 27 (1901)
2. Significance is that under color of title, the limit of the parcel claimed is determined by the description contained in the title document

- a) But claimant must still satisfy all the elements of adverse possession with respect to the parcel claimed
- 3. Adverse possession under color of title for the statutory period will ripen into valid title. Marion Inv. Co. v. Virginia Lincoln Furniture Corp., 171 Va. 170 (1938)
- 4. Requirements for color of title
 - a) Must identify the land with sufficient certainty that the boundaries of the parcel may be determined by application of rules governing construction of deeds. Blacksburg Min. & Mfg. Co. v. Bell, 125 Va. 565 (1919)
- 5. Sample cases
 - a) Deed void for defects apparent on its face. Ritter Lumber Co. v. Edwards, 171 Va. 185 (1938)
 - b) Invalid and void tax deed. Yellow Poplar Lumber Co., 108 Va. 612 (1908)

H. Continuous Possession

- 1. Any break in possession, however slight, restores the seisen of the true owner
- 2. Once an adverse claimant vacates the premises, the true owner, by reason of his legal title, is regarded as in constructive possession, and the adverse period of the claimant ends. United States v. Tobias, 899 F.2d 1375 (4th Cir. 1990)
- 3. Possession is continuous only if it exists without interruption for the statutory period. Grappo v. Blanks, 241 Va. 58 (1991)
- 4. Tacking
 - a) Claimant may tack the period of his possession to the possession under claim of title of his immediate predecessor in title. Sims v. Capper, 133 Va. 278 (1922)
 - b) In order to tack several possessions together, there must be privity of estate, or the several estates must be somehow connected. Hollingsworth v. Sherman, 81 Va. 668 (1885)
 - c) The possession of trees may not be tacked to the possession of the surface of the land. Yellow Poplar Lumber Co., 108 Va. 612 (1908)

I. Permissive Possession is a Bar

1. To obtain title by adverse possession, as a general rule, the possession must be adverse in its inception. Thompson v. Camper, 106 Va. 315 (1906)
2. Accordingly, permissive possession will *not* ripen into adverse possession
 - a) For example, a tenant cannot dispute the owner's title during the tenancy. Fleming v. Lockhart, 171 Va. 127 (1938)
3. Where the original entry on another person's land was by agreement or permission, in the absence of an explicit disclaimer, possession, regardless of its duration, *presumptively continues as it began*. This presumption may be overcome by evidence of an adverse holding with notice to the true owner. Matthews v. Freeman Co., 191 Va. 385 (1950); see also Alford v. Alford, 236 Va. 194 (1988)
4. In a conveyance, the grantor reserved the right to occupy the land for a period of three years. During the period of three years for which she had reserved the right of occupancy, she married the claimant. Her husband moved into the house with her and claimed title to it by adverse possession. The claimant's occupancy began during the time when his wife under the reservation in her deed had the right to occupy the property. No notice was given that the husband was claiming adverse to his wife's tenancy or to the grantees' rights or title. Without such notice, the occupancy was permissive and the husband could not establish title to the land by adverse possession. Hall v. Clinchfield Coal Corp., 161 Va. 177 (1933)
5. ***A defendant must plead permission as an affirmative defense in response to a complaint claiming adverse possession. If a defendant fails to raise permission as an affirmative defense, the defense is deemed to be waived.*** Gregory v. Keith Williams Constr., L.L.C., 96 Va. Cir. 412, 415 (*Chesapeake* 2017); Quatannens v. Tyrrell, 268 Va. 360, 373 (2004).

J. Possession by Mistake May Ripen into Title by Adverse Possession

1. A mere "general" mistake, resulting in the occupation and possession of the land of another, without the intention to claim beyond the true boundaries of the parcel, will not ripen into title under a theory of adverse possession. See Stuart v. Meade, 119 Va. 753 (1916)

2. Where it is shown, however, that a specific intention exists on the part of the possessor to claim title to a definite line, which is in fact beyond the true boundary lines of the parcel, if that party takes and holds actual possession beyond his true boundary line, and with good faith, even though he is mistaken, claims title to and occupies the land, his possession is adverse to the extent of his actual possession. If that possession continues for the statutory period, title will vest under a theory of adverse possession

3. Hollander v. World Mission Church, 255 Va. 440 (1998)

a) A neighbor and her predecessors in title had used a disputed strip of land under the mistaken belief that it was their property. The trial court found that the possession was not adverse because there was no intent to oust the true owner of the property. The Supreme Court of Virginia reversed, holding that because the adverse claim was based not only on the deed descriptions, but also on the belief that the property line ran to a line of woods, the possession was accompanied by the required adverse or hostile intent

4. Quatannens v. Tyrell, 268 Va. 360 (2004)

a) A dispute arose over a narrow strip of land between adjoining landowners. The Quatannens were mistaken about the boundary of their land, and the disputed strip of land contained a small portion of a room of their house, part of a brick walkway, part of a paved parking area, and one side of a brick archway at the front of the house. All of these existed when the Quatannens purchased the house. The Quatannens asserted a quiet title claim based on a theory of adverse possession in the trial court. The trial court ruled that the Quatannens failed to establish ownership of the disputed land by adverse possession, apparently because it concluded that the element of hostile intent was not met. The Supreme Court discussed Hollander v. World Mission Church at some length, ruled that mistake did not preclude a finding of hostile intent, and reversed and remanded the case for entry of judgment in favor of the Quatannens. “[T]he possessor must profess, through words or actions, a belief that he is entitled to use the land and prevent others from using it in a manner that precludes the legal owner from exercising his rights over the property.” Id. at 372.

K. Importantly, title acquired by adverse possession is “a new, independent, unencumbered, and indefeasible title,” title vested anew in the claimant and/or their predecessors-in-title. Porter v. Wilson, 244 Va. 366, 370 (1992).

L. Likewise, at the same time title vested anew in the claimant, conversely, the record owner, and/or his or her predecessors-in-title were necessarily divested of any such

interest in the disputed property. See McClanahan's Adm'r v. Norfolk & W. Ry. Co., 122 Va. at 718 (“divested by . . . a subsequent disseisin for the statutory limitation period”).

- M. ***“[L]iens against the true owner were dependent on his title, that adverse possession conferred, not a derivative, but an independent paramount, title, and that therefore, when the paramount title matured by adverse possession, the former title was lost, and with it fell the lien, which was dependent upon it.”*** Virginia & W. Va. Coal Co. v. Charles, 254 F. 379, 391 (4th Cir. 1918) (emphasis added).
- N. Accordingly, since any lien on the record owner’s title to the property is dependent on the record owner’s title, a lender’s deed of trust lien, for example, can rise no higher than the record owner’s title and fails with such record owner’s title divestment of the property.
- O. ***Adverse Use and Occupation Sufficient to Raise Legal Presumption of Ownership That, Unless Rebutted, Will Establish a Claim of Right and Satisfy Prima Facie Case.***
1. “In Virginia, proof of an expressed intention to claim title is not necessary.” Christian v. Bulbeck, 120 Va. 74, 107 (1916) (citations omitted).
 2. “To establish claim of right as a requisite element of adverse possession by a party in possession against the record owner it is not necessary that the party in possession should have expressly declared his intention to hold the property as his own, nor need his claim thereto be a rightful or well-founded one. That his acts and conduct clearly indicate a claim of ownership as against the record title owner is enough, and it may be sufficient even though the disseisor has knowledge of a better title.
 3. Quatannens, 268 Va. at 364 (“ . . . occupation, use and improvement of the property can prove a *claim of right*. Occupation, use and improvement may also prove *actual possession*. Similarly, occupation, use, and improvement may also be used to establish *exclusivity and visibility*”) (emphasis added) (citations omitted);
 4. ***In Maynard v. Hibble, 244 Va. 94, 97-98 (1992), the Court held that Hibble had adversely possessed nine acres under a color of title theory because (a) Hibble’s possession of a part of that tract was possession of the whole tract described in his deed and (b) because Hibble’s other activities, including***

- (i) *paying taxes and homeowners association fees,*
- (ii) *posting the property,*
- (iii) *granting permission to hunt, and*
- (iv) *selling timber, were sufficient to establish the other required adverse possession elements.*

Id. at 97-98.

- 5. Zesinger v. Ford, Trustee, CL23001628-00 (*Williamsburg/James City Cnty. Cir. Ct.* Nov. 9, 2023) (Judge Holly B. Smith) (The Court 1) declared that the subject property was vested solely and exclusively in the plaintiffs in possession, 2) declared that the plaintiffs were the sole and exclusive owners of the property by adverse possession, and 3) declared that the defendants are barred from making a claim to the property pursuant to Virginia Code § 8.01-236.)
- 6. In Walton v. Rosson, 216 Va. 732, 735 (1976), “actual occupation, use and improvement of the premises, without payment of rent, . . . of another’s title or disavowal of [its] own title” *raises an important legal evidentiary presumption*” that they have held the Property under a claim of right.
- 7. *The actual occupation, use, and improvement of the premises by the third-party claimant or a co-tenant, as if he were in fact the owner thereof, without payment of rent, or recognition of title in another, or disavowal of title in himself, will be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted, will establish the fact of a claim of right.”* See Marion Inv. Co. v. Va. Lincoln Furniture Corp., 171 Va. 170, 182 (1938) (emphasis added);

P. Adverse Possession Against Cotenants

- 1. In general, the possession of one cotenant is the possession of all cotenants. The possession of one cotenant, therefore, can never be adverse until there is an actual ouster of the cotenants, or some equivalent act. See Rutledge v. Rutledge, 204 Va. 522 (1963)
- 2. *Harkleroad v. Linkous*, 281 Va. 12 (2011)
 - a) *This case provides an exception to the general rule stated above, or at least a variance, where the claimant is a stranger in title to the original cotenancy*
 - b) Linkous and his wife bought real property at a federal tax sale in 1991. Linkous made renovations, and rented the house until

sometime in 2007, when their ownership interest was questioned by prospective purchasers of the property. Linkous and his wife were unaware that Harkleroad and related parties claimed a one-half tenant in common interest in the property until 2007

- c) The Linkouses had improved and maintained the property, paid the property taxes, and leased the property to tenants who had openly occupied it, for a period in excess of the statutory requirement of 15 years
- d) Linkous filed a quiet title action in the trial court, and Harkleroad counterclaimed
- e) Although Harkleroad argued in the trial court that one cotenant may not assert a hostile possession of the property unless the other cotenants are ousted from the property by an affirmative notice of the intent to exclude them, the trial court ruled in the Linkouses' favor, vesting title to the entire property in them by adverse possession
- f) ***The Supreme Court of Virginia affirmed. Key to the decision was that the Linkouses were strangers to the original co-tenancy and had taken possession of the property through a conveyance that on its face purported to give them the right to possess the whole property. Therefore, the act of the Linkouses in taking possession of the entire property was itself an ouster of the other cotenants, and no further notice was required***

Q. Hostile Possession for Adverse Possession Purposes Among Co-Tenants.

1. ***The element of hostile position is an issue where one co-tenant or joint tenant asserts title over another tenant's share by adverse possession. See Harkleroad v. Linkous, 281 Va. at 19 (quoting Helms v. Manspile, 277 Va. 1, 7 (2009));***
2. ***See, e.g., Baber v. Baber, 121 Va. 740, 759 (1917) (“[T]he possession of one joint tenant, tenant in common, or parcener, is prima facie the possession of his fellow (and) it follows that the possession of one is never adverse to the title of the other, unless there be proved an actual ouster or disseisin or other act amounting to a total denial of the plaintiffs right as cotenant.”) (Emphasis added);***
3. ***This gives rise to a rebuttable presumption “against any occupancy of a co-tenant being hostile possession as to other cotenants with whom he is in privity.” Harkleroad, 281 Va. at 18. ”***

4. *However, significantly, “this [rebuttable] presumption does not apply when a . . . stranger [in title] to the original co-tenancy takes possession of the [subject] property. . . .” Harkleroad, 281 Va. at 19 (citing Shenandoah Nat’l Bank v. Burner, 166 Va. at 593 (1936));*
5. *This is “because the stranger to the original co-tenancy is not in privity with the other co-tenants and when he enters into the exclusive possession of the land, and claiming title to the whole, it is an ouster of the other co-tenants. Id.; see also Preston v. Virginia Mining Co., 107 Va. 245, 248 (1907); Johnston v. Virginia Coal & Iron Co., 96 Va. 158, 163 (1898)”;*
6. *The person entering and claiming title may establish his adverse possession if continued for the statutory fifteen year period. Id.*

XVII. 15-YEAR STATUTE OF LIMITATIONS

- A. Virginia Code § 8.01-230 (an “accrual” statute) provides, in pertinent part, “[i]n every action for which a limitation period is prescribed, *the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, . . . and not when the resulting damage is discovered . . .*” (emphasis added).
- B. Specifically, Virginia Code § 8.01-236 (a “time limitations” statute) provides, in relevant part, that “[n]o person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have *first accrued* to such person or to some other person through whom he claims . . .” (emphasis added);
- C. Pui Ho v. Rahman, No. 1585-22-4, 2024 Va. App. LEXIS 56 (Va. Ct. App. Feb. 6, 2024) (Moreover, the possessory period will not begin to run until the interest has been sufficiently invaded and possessed to satisfy all of the elements of adverse possession. “A mere naked possession without claim of right, that is the intention to use the land as his own to the exclusion of all others, can never ripen into a good title.” Radford Veneer Corp. v. Jones, 143 Va. 124, 128 (1925).)
- D. See Devers v. Chateau, 748 F.2d 902, 905-06 (4th Cir. 1984) (discussing the “15-year statute of limitations” that governs Virginia ejectment actions);
- E. Parker v. Griffin, 55 Va. Cir. 191, 192 (*Shenandoah Cnty. Cir. Ct.* 2001) (acknowledging that 15-year limitations period under Section 8.01-236 “establishes a fifteen-year limitations period for actions to recover any land” and noting the limitations period “applies to actions for ejectment and suits to quiet title by adverse possession”).

F. Recently, various circuit courts in Virginia have barred actual record owners due to the failure to file an ejectment action within 15 years.

1. L-Wood, Inc., So. Pine Specialists v. Kel-Wood Timber Pro. Co., Case No. CL 23000375-00 (*New Kent Cnty. Cir. Ct.* 2023) (Court held the Defendant and/or their predecessors-in-title, successors-in-title, or privies, were barred by the 15-year statute of limitations set forth in Virginia Code § 8.01-236, in addition to and separate and distinct from the claim of adverse possession in Count 1, based on the Defendants, or any one or more of them, having failed to make any known claim or file an action to recover any interest (e.g. ejectment), if any, in Parcel E within the 15-year period to re-enter the Property or bring an action to recover the Property);
2. Field v. Pellegrino, Case No. CL 22000753-00 (*Goochland Cnty. Cir. Ct.* 2023) (Court declared that the Defendants are clearly and undeniably barred by the 15-year statute of limitations, based on, *inter alia*, the silence and inaction of the Defendants and their predecessors in title, having failed to make any known claim or file an action to recover any interest, if any, in the Property pursuant to Virginia Code § 8.01-236);
3. Riverview Mgmt., LLC, v. Bowens, Case No. CL23-1417 (*Portsmouth Cir. Ct.* July 28, 2023) (Pursuant to Count II of the Complaint, in addition to, and separate and distinct from, the claim of adverse possession in Count I, the Defendants and/or their predecessors-in-title, successors-in-title, or privies, are barred by the 15-year statute of limitations set forth in Virginia Code § 8.01-236 based on the Defendants, or any one or more of them, having failed to make any known claim or file an action to recover any interest (e.g., *ejectment*), if any, in the Property within the 15-year period to re-enter the Property or bring an action to recover the Property. See Va. Code § 8.01-236);
4. The Circuit Court for the *City of Williamsburg and James City County*, Judge J. Warren Stephens, sitting by designation, sustained a plea in bar of the 15-year statute of limitations under Virginia Code § 8.01-236 in the case of Martin v. Mershon, Case Number CL 01009523-00 (2002);
5. See also Wells v. Edwards, Case No. CL23-74 (*Mathews Cnty. Cir. Ct.* August 11, 2023) (Judge Jeffrey W. Shaw);
6. Larry D. Wilson, sole Trustee of the Raymond L. Wilson Trust Dated January 28, 2010 v. Pembroke William Kenner, Jr. a/k/a Pembroke William Kenner, III, et al., Case No. CL23-277 (*Lancaster Cnty. Cir. Ct.* Dec. 8, 2023).

G. The statute of limitations is of particular importance in the context of property questions, because of the important public interest in ensuring that the title record is clear and free from unnecessary disputes. McClanahan's Adm'r v. Norfolk & W.

Ry. Co., 122 Va. 705, 715 (1918). (“The object of [statutes of limitations] is to quiet the titles to land, and prevent that confusion relative thereto which would necessarily exist if no period was limited within which an entry upon lands could be made. . . .” In this context, “a successful plea of the statute of limitations not only defeats an ejectment action, but also clears the way for title to be divested and conferred upon the adverse occupant.” Ferguson v. Stokes, 287 Va. 446, 451 (2014).

XVIII. CHILDREN BORN OUT OF WEDLOCK PROVING PATERNITY

1. Virginia Code § 64.2-102 (Meaning of child and related terms), provides, in pertinent part as follows:

*If, for purposes of this title or for determining rights in and to property pursuant to any deed, will, trust or other instrument, a relationship of parent and child must be established to determine succession or a taking by, through, or from a person:*¹²

1. An adopted person is the child of an adopting parent and not of the biological parents, except that adoption of a child by the spouse of a biological parent has no effect on the relationship between the child and either biological parent.
2. The parentage of a child resulting from assisted conception is determined as provided in Chapter 9 (§ 20-156 et seq.) of Title 20.
3. Except as otherwise provided by subdivision 1 or 2, a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
 - a. The biological parents participated in a marriage ceremony *before or after* the birth of the child, even though the attempted marriage was prohibited by law, deemed null or void, or dissolved by a court; or
 - b. Paternity is established by clear and convincing evidence, including scientifically reliable genetic testing, as set forth in § 64.2-103; however, paternity established pursuant to this subdivision is ineffective to qualify the father or his kindred to inherit from or through the child

¹² Virginia Code § 64.2-102 applies to testate succession or intestate succession. *Cf* Virginia Code § 64.2-543; Ware v. Crowell, 251 Va. 116, 119-120 (1996).

unless the father has openly treated the child as his and has not refused to support the child.

4. ***No claim of succession based upon the relationship between a child born out of wedlock and a deceased parent of such child shall be recognized unless, within one year of the date of the death of such parent***

(i) an affidavit by such child or by someone acting for such child alleging such parenthood has been filed in the clerk's office of the circuit court of the jurisdiction wherein the property affected by such claim is located and

(ii) an action seeking adjudication of parenthood is filed in an appropriate circuit court.

The one-year limitation period runs notwithstanding the minority of such child;

However, it [the one-year limitation period] does not apply in those cases where the relationship between the child born out of wedlock and the parent in question is established by

(a) a birth record prepared upon information given by or at the request of such parent;

(b) admission by such parent of parenthood before any court or in writing under oath; or

(c) a previously entered judgment establishing such parent's paternity by a court having jurisdiction to determine his paternity.

(emphasis added).

2. A central theme in Virginia Code § 64.2-102 of all three of these exceptions to the one-year limitation period is that “the alleged parent has notice that a child is claiming paternity and that the alleged parent is a participant in the process that is attempting to establish paternity.” Freeman v. Manns, No. 13-1042 2013 Va. Cir. LEXIS 161, at *7-8 (***Roanoke*** Aug. 14, 2013). (One-year limitation period in former § 64.1-5.1(4)(i) was not applicable where the relationship between the child and the parent was established by a birth record; the deoxyribonucleic acid testing documentation constituted such a birth record since the purported father had actual notice that the child

was claiming paternity, and the father was an active participant in the process that was attempting to establish paternity);

3. Belton v. Crudup, 273 Va. 368 (2007) (In a contested probate matter, a daughter born out of wedlock could not have shared in a decedent's estate because no action to adjudicate the alleged parent-child relationship was commenced within one year of the decedent's death; the fact that the daughter was initially included on a list of heirs filed by the administratrix was irrelevant.);

Thompson v. Banks, 61 Va. Cir. 539 (*Norfolk* 2003) (Circuit court denied an executor's motion for summary judgment because, although a claimant in a will contest failed to file an affidavit or an action seeking adjudication of parenthood within a year of the decedent's death, the claimant fell within a statutory exception to the filing requirement of subdivision 4 (i) of § 64.1-5.1 (now § 64.2-102) as the relationship between the claimant and her father was established by a birth record prepared upon information given by or at the request of her father.);

Johnson v. Branson, 228 Va. 65 (1984) (*Burden is on child, regardless of form of proceeding, to establish paternity by showing that the putative father gave consent to someone, other than the mother, responsible for providing vital statistics for the child's birth certificate that his name be listed as the father.*)

4. Virginia Code § 64.2-103 (Evidence of paternity), provides as follows:

A. *For the purposes of this title, paternity of a child born out of wedlock shall be established by clear and convincing evidence, and such evidence may include the following:*

1. That he cohabited openly with the mother during all of the 10 months immediately prior to the time the child was born;
2. That he gave consent to a physician or other person, not including the mother, charged with the responsibility of securing information for the preparation of a birth record that his name be used as the father of the child upon the birth record of the child;
3. That he allowed by a general course of conduct the common use of his surname by the child;
4. That he claimed the child as his child on any statement, tax return, or other document filed and signed by him with any local, state, or federal government or any agency thereof;

5. That he admitted before any court having jurisdiction to determine his paternity that he is the father of the child;
6. That he voluntarily admitted paternity in writing under oath;
7. The results of scientifically reliable genetic tests, including DNA tests, weighted with all the evidence; or
8. Other medical, scientific, or anthropological evidence relating to the alleged parentage of the child based on tests performed by experts.

B. A judgment establishing a father's paternity made by a court having jurisdiction to determine his paternity is sufficient evidence of paternity for the purposes of this section.

XIX. LIENS AND BANKRUPTCY

- A. Title examiners often run across judgment liens that creditors have docketed against the property of debtors who subsequently filed for bankruptcy and received a discharge. The important thing to remember is that while the discharge from bankruptcy may relieve debtors of their *personal liability* for a judgment, *it does not eliminate or "wipe out" the judgment lien.*

A "discharge" obtained from a bankruptcy court generally means "injunction against collection" of the in personam claim against the debtor for the discharged debt. In fact, interest continues to run on a discharged debt. However, unless there is a "lien avoidance" action successfully pursued in the bankruptcy court, the "lien" of a judgment or deed of trust passes through the bankruptcy and remains attached as a lien on any property to which it attached prepetition. In short, a "lien" is not "discharged."

- B. Perfected Liens (*in rem*) Pass Through Bankruptcy Unless Avoided; A Discharge is an Injunction Against Collection *in personam* Claims.**

Accordingly, once docketed in the circuit court clerk's office for the locality where a debtor's real property lies, the judgment is a "perfected lien" and can be removed only by an "Avoidance of Lien Order" from the Bankruptcy Court. In other words, post-discharge the creditor may no longer be able to garnish a debtor's wages to satisfy the debt, but the creditor still has a lien that can be enforced against the property unless the court orders its release. See, e.g., Cen-Pen Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995) ("A bankruptcy discharge extinguishes only *in personam* claims against the debtor(s), but generally has no effect on an *in rem* claim against the debtor's property.")

- C. After Debtor Receives a Discharge**

Once a debtor receives a discharge, a previously docketed judgment will not ripen into a lien against property purchased after a bankruptcy. See, e.g., Motley v. IRS (In re Motley), No. 7-95-02304, 1996 Bankr. LEXIS 504 (Bankr. W.D.Va. May 7, 1996) (post-discharge, pre-petition liens do *not* attach to after-acquired property). See also Ogburn v. Southtrust Bank (In re Ogburn), 212 B.R. 984 (M.D. Ala. 1995); Duncan v. Gunter Ins. Agency (In re Duncan), 60 B.R. 345 (M.D. Ala. 1986).

XX. UNRELEASED LIENS

Unreleased liens are a common problem and can take many different forms, but there are two basic types: the voluntary lien and the involuntary lien. While each must be released before closing, the resolution to each is quite different.

A. Voluntary liens are given by the property owner to secure a debt and usually take the form of a Deed of Trust or UCC financing statement.

1. Deed of Trust.

a) If the lienholder is a lending institution: Typically, banks and mortgage companies are diligent about the timely release of their deeds of trust. Contacting the bank, explaining the situation and requesting the necessary release may be all that is required.

b) If the lienholder is an individual: This is the more common scenario for unreleased deeds of trust. Instead of a bank loan, the farmer borrowed money from an individual, who recorded a deed of trust against the farm. The debt was paid on schedule, but no release was ever recorded.

i. First step: Contact the person, confirm the debt was satisfied and request a release.

ii. Deceased noteholder: If individual has died, contact the executor of his estate, heirs, legatees or personal representative – whomever has the authority to execute the release.

iii. Whereabouts unknown: If the individual cannot be found, go back to the original mortgagor and request evidence sufficient to satisfy the title company that the debt was paid. This process is significantly harder when the original mortgagor is not the seller, but a predecessor in title.

iv. ***10-year statute of limitations to enforce deeds of trust after original obligation last maturing became due without regard to acceleration.***

“No deed of trust or mortgage heretofore or hereafter given to secure the payment of money, and no lien heretofore or hereafter reserved to secure the payment of unpaid purchase money, shall be enforced after ten [10] years from the time when the original obligation last maturing thereby secured shall have become due and payable according to its terms and *without regard to any provisions for the acceleration of such date*; provided that the period of one year from the death of any party in interest shall be excluded from the computation of time.” Virginia Code § 8.01-241. (emphasis added)

- c) If the lienholder is uncooperative: Under Virginia Code § 55.1-339(B)(1), a lienholder – whether individual or institution – who refuses or fails to deliver a proper release within 90 days of notice that the debt has been satisfied, shall pay \$500 to the lien obligor.
- d) ***Settlement agent/title insurance company procedure: Many liens are paid off with funds disbursed in connection with a sale of property or a refinance loan paying off a prior loan on a closing conducted by a settlement agent. Virginia § 55.1-339(E) outlines the process by which a settlement agent can release a deed of trust that has been fully satisfied at closing.***
 - i. After or with full payment of the note secured by the deed of trust, the settlement agent or title insurance company shall deliver to the lien creditor by certified mail or guaranteed overnight delivery service, with receipt obtained, a Notice of Intent to Release the deed of trust along with a copy of the payoff letter and the release to be recorded.
 - ii. If the lienholder fails to execute and return the release within 90 days or otherwise send notice by certified mail or commercial overnight delivery service or U.S. Postal Service, and a receipt obtained, to the settlement agent or title insurance company either stating that a release has been recorded in the clerk’s office or objecting to the release of the deed of trust, the settlement agent or title insurance company may execute, acknowledge, and record in the circuit court clerk’s office of the jurisdiction in which the deed of trust is recorded, a certificate of satisfaction that includes

- (1) an affidavit as described in Virginia Code § 55.1-339(E)(2)(b) certifying that
 - (a) the settlement agent has satisfied the obligation secured by the deed of trust described in the certificate,
 - (b) that the settlement agent or title insurance company possesses satisfactory evidence of payment of the obligation secured by the deed of trust,
 - (c) that the lien of the deed of trust may be released,
 - (d) that the person executing the certificate is the settlement agent or the title insurance company or is duly authorized to act on behalf of same, and
 - (e) that the notice of intent to release was delivered to the lien creditor or services and the settlement agent or title insurance company has evidence of receipt; and
 - (2) a copy of the notice of intent that was sent to the lienholder.
- iii. The effect of the settlement agent's certificate of satisfaction is the same as if a formal release was executed: the lien no longer encumbers the property.
 - iv. Applicability: A settlement agent may use this procedure to effect the release a deed of trust after July 1, 2002, regardless of when the deed of trust was created, assigned or satisfied by the settlement agent's payment.
 - v. ***IMPORTANT LIMITATIONS: the procedure applies only to transactions involving***
 - (1) ***unimproved real estate located in the Commonwealth of Virginia with a lien to be released of \$1 million or less, or***
 - (2) ***real estate containing four or fewer residential units in which the deed of trust is fully released.***

The statute does not authorize use of the procedure to execute or record a certificate of partial satisfaction.

- vi. *The same procedure outlined in Virginia Code § 55.1-339(E) may also be used to effect the release of a judgment lien which became effective July 1, 2021, regardless of when the lien was created, assigned or satisfied by payment made by the settlement agent.*
- vii. Finally, settlement agents using the procedure may *not* take an assignment, or facilitate an assignment of the borrower's right to collect the \$500 penalty established in Virginia Code § 55-339(B)(1), mentioned above.

- 2. UCC-1 financing statements. Though recorded against the property, a UCC-1 often does not secure an interest in the real property (but consider whether certain items constitute a "fixture" or not). Instead it secures an interest in the personal or intangible property of the entity owning the real property on which the personal or intangible property is located. Nonetheless, it is a title defect and must be released. Because the statutory life of a UCC-1 is usually short, the secured party can usually be contacted to obtain a termination statement. See Virginia Code § 8.9-404 on termination statements.

B. Involuntary Liens are not liens granted to secure a debt. Rather, they attach because the property owner's failed to pay certain debts, such as taxes, judgments or money owed to contractors or subcontractors who worked on the property.

1. Tax Liens.

- a) Virginia Code § 58.1-3340 provides that there is a lien on real estate for the payment of taxes levied or assessed thereon, which is prior to all other liens or encumbrances. The real estate tax lien has priority over an earlier recorded deed of trust. In re Oglesby, 196 B.R. 938 (Bankr. E.D.Va. 1996). The code also provides that if the property is sold, the proceeds must be applied first to payment of the real estate taxes.
- b) Virginia Code § 58.1-3341 provides that no lien for real estate taxes due to either the Commonwealth or any political subdivision thereof which is delinquent for 20 years shall be enforced at any proceeding at law or in equity. At the end of the 20-year period, the lien is "barred and cancelled". Id.

2. Judgment Liens.

- a) Statutory foundation: Virginia Code § 8.01-458 provides that “[e]very judgment for money rendered in this Commonwealth by any state or federal court or by confession of judgment, as provided by law, shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, from the time such judgment is recorded on the judgment lien docket of the clerk’s office of the county or city where such land is situated. . . .”
- b) Process: A judgment lien is similar in effect to an unreleased deed of trust and can be addressed in much the same way:
 - i. First step: Ascertain whether the judgment has been paid and simply not released of record. If so, try to locate the judgment holder and seek a release.
 - ii. If defendant has paid but plaintiff has failed to release or discharge: The defendant, after 10 days’ notice, can apply to the court in which the judgment was rendered to have it marked satisfied and a certificate made to the court clerk. Virginia Code § 8.01-455(A). In such instance, the court may order the cost of such proceedings, including reasonable attorney’s fees, may be paid by the plaintiff for failing to release the judgment. Virginia Code § 8.01-455(B).
 - iii. See also procedure in Virginia Code § 55.1-339(E) to release judgment liens.
 - iv. If judgment holder cannot be located:
 - (a) Depending upon many factors, including when the lien was recorded, the amount of the lien and the likelihood of foreclosure, the purchaser may be able to persuade the title company to insure over the lien by providing an indemnity; however, often a case-by-case situation.
 - (b) Another option involves the payment into the proper court of “an amount sufficient to pay the principal, interest, and all costs due” in connection with the judgment and the court will direct the clerk to hold the funds in an interest bearing account and, upon such payment “the property of the defendant shall be free and clear of any lien created by any such judgment, or any execution issued thereupon.” Virginia Code § 8.01-456.

3. Mechanic's Liens.

- a) Creation of the lien: The right to a mechanic's lien in Virginia is statutorily created and the Supreme Court of Virginia requires strict adherence to these statutes. Rosser v. Cole, 237 Va. 572, 576 (1989). The validity of the lien depends upon compliance with the statutes and equitable rules are inapplicable. Feuchtenberger v. Williamson, Carroll & Saunders, 137 Va. 578, 585 (1923).
- b) General Requirements for enforcement of a Mechanic's Lien: A suit to enforce a mechanic's lien must be filed within six months from the filing of the memorandum of lien, or within sixty days from the time the building or structure is completed or the work is otherwise terminated, whichever occurs last. Virginia Code § 43-17.

XXI. EQUITABLE LIEN

- A. *A court of equity will enforce an unperfected agreement to create a security interest in particular property as an equitable mortgage upon the principal that equity will treat that as done which by agreement is to be done.* Harnsberger v. Wright, 185 Va. 586, 589 (1946). "An equitable lien arises...from a written contract which shows an intention to charge some particular property with a debt or obligation . . .". Noremac v. Centre Hill Court, 164 Va. 151, 162 (1935). The doctrine of equitable liens (mortgages) is widely accepted.
- B. In Hoffman v. First National Bank of Boston, 205 Va. 232, 236 (1964), the Supreme Court of Virginia stated the doctrine as follows: "...every express executory agreement in writing, whereby the contracting parties sufficiently indicate an intention to make some particular property, real or personal, or fund therein described or identified a security for a debt or other obligation creates an equitable lien upon the property so indicated which is enforceable against the property."
- C. *Cases in which courts have examined parties' intent and did subject real property to an equitable lien include the following:*
 1. In Guinee v. Prager (In re James R. Corbitt Co.), 20 B.R. 460 (Bankr. E.D. Va. 1982), the amended deeds provided that annual lot assessments "shall, when due, become a lien on the lot . . ." Id. at 461. The Court found an equitable lien to exist;
 2. The Court, in Brown v. Ford, 120 Va. 233, 245 (1917), found express executory agreements between the parties made the former debtor's estate "a security" for payment of materials and work supplied by the creditor, and consequently the Court found an equitable lien to exist;

3. In Malarkey v. Ballard, 137 Va. 631, 634 (1923), the creditor retained “the title of the goods and chattels” held by the debtor, and the Court found an equitable lien to exist when a second creditor took possession of the property;
4. In Kidwell v. Henderson, 150 Va. 829, 837 (1928), the debtor contracted to convey real estate “in trust” to secure the creditor’s notes. This contract was sufficient to create an equitable lien, despite the debtor’s death before the deed of trust was executed;
5. In Dulany v. Willis, 95 Va. 606, 607 (1898), the deed conveyed land “in trust” to secure notes. When the grantor died, his other creditors looked to the property for satisfaction. The court found an equitable lien in favor of the noteholder, based on the conveyance “in trust.”

D. *Other cases in which courts have examined parties’ intent and did not subject real property to an equitable lien include the following:*

1. In Hoffman, the Court ruled that because a sales contract did *not* contain an agreement for a lien or charge upon the leasehold for the benefit of a real estate broker, the court would not impose an equitable lien upon the realty. The Court, 205 Va. at 238, stated:

[t]he facts alleged in the petition do *not* establish that it was intended by the parties that the whole leasehold property would stand as security for the payment of the broker’s commissions, entitling [the broker] to a lien thereon ahead of all other liens and payable now, as claimed by him. (emphasis added).

2. In Harnsberger v. Wright, 185 Va. 586, 588 (1946), a laborer asserted an equitable lien upon the estate of the person with whom he contracted to perform services. The laborer based his claim upon a handwritten note, purportedly authored by the deceased, which expressed her desire that the laborer be paid his wages in full. The Court found that the handwritten note was *insufficient* to create an equitable lien upon the debtor’s estate, because the note did not evidence any intention to place a lien upon the property of the estate. Id. at 589.

XXII. EQUITY SHOULD DO WHAT SHOULD BE DONE

- A. A well-established equitable maxim is that equity considers as done that which ought to be done. This maxim was described by the Supreme Court of Virginia in Brown v. Ford, 120 Va. 233 (1917).

As stated by 2 Pomeroy's Equity (2nd ed.) sec. 1235: "The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described and identified, security for a debt or other obligation * * * creates an equitable lien upon the property so indicated which is enforceable against the property * * *

* Under like circumstances a mere verbal agreement may create a similar lien upon personal property."

'Whatever the form of the contract may be, if it is intended thereby to create a security it is an equitable mortgage enforced upon the principle that equity will decree that as done which by agreement is agreed to be done.'

Id. at 245.

- B.** *A well-established equitable maxim is that equity considers as done that which ought to be done. See Brown v. Ford, 120 Va. 233, 245 (1917); Campbell v. Corpening, 230 Va. 45, 49 (1985)("[E]quity treats as done what ought to be done"); Pleasants v. Pleasants, 221 Va. 1017, 1021 (1981)("Equity will decree that as done which by agreement is agreed to be done and is proper to fully effectuate the intentions of the parties concerned. See Dulaney v. Willis, 95 Va. 606, 608 (1898); 1 Minor on Real Property 773 (2d ed. Ribble 1928)"); Summers v. Darne, 72 Va. at 802 ("The principle upon which this doctrine proceeds is that a court of equity looks upon that as done which ought to be done."); Fed. Reserve Bank v. Peters, 139 Va. 45, 57 (1924)("Equity regards that as done which ought to have been done. Under such circumstances, the draft on the Bank of Commerce and Trusts was an equitable assignment of the funds to the Federal Reserve Bank of Richmond, and we will so adjudge.")*
- C.** The maxim that "equity regards as done that which ought to be done" was applied in a case involving the priority of various parties under deeds of trust on property recently in Isle of Wight County. In Farmers Bank v. Parker Energy & Petroleum Co., Inc., Chancery No. 4874 (*Isle of Wight Cnty. Cir. Ct.* 1996), three banks made loans to Parker, who had an undivided ¼ interest in a parcel of real estate, and attempted to secure those loans with a lien on Parker's interest in the property. Because Parker, individually, did not possess an ownership interest in the property at the time some of the instruments securing the loan were executed, the first two banks' loans were not properly secured. The third bank argued that its lien, secured by what was intended to be a second deed of trust on a ¼ interest in the property, was superior to the first two banks' liens.

The Commissioner in Chancery, in his report, applied the maxim that "equity regards as done that which ought to be done" in order to determine the priority of the liens. This, the Commissioner reasoned, was the only way to place the parties

in the security positions intended. The Honorable Westbrook J. Parker, Judge of the Isle of Wight Circuit Court, agreed with the Commissioner’s application of the maxim and affirmed the Commissioner’s findings. The Supreme Court of Virginia denied a petition for appeal on the grounds that there was no reversible error.

XXIII. A COURT CANNOT ENTER AN ORDER BASED ON FACTS NOT ALLEGED, OR ON A RIGHT NOT PLEADED, AND IF IT DOES, THE ORDER IS VOID.

A. The Supreme Court of Virginia has held that:

The basis of every right of recovery under our system of jurisprudence is a pleading setting forth facts warranting the granting of the relief sought. It is the *sine qua non* of every judgment or decree. *No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed* Pleadings are as essential as proof, the one being unavailing without the other. *A decree cannot be entered in the absence of pleadings upon which to found the same, and if so entered it is void* Every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense.

Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141 (1981) (quoting Potts v. Mathieson Alkali Works, 165 Va. 196, 207 (1935) (emphasis added)).

B. Consequently, “a litigant’s pleadings are binding upon him. His opponent is entitled to rely upon the position he takes, and should be able to prepare for trial with the assurance that this position will not be suddenly changed without notice.” Berry v. Klinger, 225 Va. 201, 207 (1983); Jenkins v. Bay House Assocs. L.P., 266 Va. 39, 43 (2003).

XXIV. A-Z: 26 “TITLE TIPS”

A. **A Misindexed or Unindexed Deed of Trust or Other Instrument Nonetheless Constitutes Constructive Notice.**

Jones v. Folks, 149 Va. 140, 142 (1927) (Deed of Trust submitted to the clerk of court and lodged for recordation, but not indexed in any manner by the clerk, nonetheless constitutes constructive notice).

B. **A Deed or Other Instrument Purporting to Convey or Transfer Real or Personal Property to a “Trust” Instead of to the “Trustee” or “Trustees” of the Trust Shall be**

Deemed to Convey or Transfer Such Property to the Trustee or Trustees as Fully as if Made Directly to the Trustee or Trustees.

Virginia Code § 64.2-772(E) provides that “[a] deed or other instrument purporting to convey or transfer real or personal property to a trust instead of to the trustee or trustees of the trust shall be deemed to convey or transfer such property to the trustee or trustees as fully as if made directly to the trustee or trustees.”

C. Except as Otherwise Provided by Statute, No Interest in Real Property Held as Tenants by the Entireties shall be Severed by Written Instrument Unless the Instrument is a Deed Signed by Both Spouses as Grantors.

Virginia Code § 55.1-136 (formerly Virginia Code § 55-20.2(A) and (B)) (codified in 2017) (Tenants by the entireties in real and personal property; certain trusts), provides as follows:

A. Any husband and wife may own real or personal property as tenants by the entireties for as long as they are married. Personal property may be owned as tenants by the entireties whether or not the personal property represents the proceeds of the sale of real property that the part of the one dying should belong to the other shall be manifest from a designation of a husband and wife as “tenants by the entireties” or “tenants by the entirety.”

B. *Except as otherwise provided by statute, no interest in real property held as tenants by the entireties shall be severed by written instrument unless the instrument is a deed signed by both spouses as grantors.*

D. Easement by Necessity – Severance Must Give Rise to the Necessity of the Easement

1. *In order to establish an easement by necessity the proponent must establish by clear and convincing evidence that:*

- (a) *the land must have been under common ownership at some time;*
- (b) *this unity of title must have been severed;*
- (c) *the severance must have given rise to the need for the easement;*
and
- (d) *there is no other reasonable access to a public way. See Clifton v. Wilkinson, 286 Va. 205 (2013) (current owner was not entitled to an easement by necessity where severance was a result of a taking by eminent domain); Carstensen v. Chrisland Corp., 247 Va. 433 (1994).*

2. *Regarding severance of title, all that is required is that the unity of title be severed. This does not mean that one parcel must be severed from a “parent tract” and conveyed out by the common owner to a third party in fee simple.*
3. *Even the severance of the legal title from the beneficial title of a property as with an owner granting a deed of trust to a trustee for the benefit of a lender will constitute severance.*
4. With respect to severance causing need for access, it is not enough to prove that access is needed. *The severance of title must cause the need for access.*
5. This sometimes will produce a rather harsh result such as that found in American Small Business Inv. Co. v. Frenzel, 238 Va. 453, 456-57 (1989). **In Frenzel, severance of title between two parcels occurred when the owner conveyed a deed of trust on one parcel, but not the other parcel. The parcels were later conveyed to separate owners. Subsequent to that conveyance, the Commonwealth condemned a portion of one of the parcels for a limited access highway, cutting off all access to a public road. The owner sought an easement by necessity but the Supreme Court ruled that because the need for access arose after the severance of title, caused by the deed of trust, an easement by necessity was impossible. See also Reams v. S. Title Ins. Corp., 43 Va. Cir. 494 (Richmond 1997).**

E. Property Held as JTWRORS With Others Holding Title as JTWRORS Passes Upon Death by Operation of the Deed to the Others Holding Title as JTWRORS to the Same Property.

Funches v. Funches, 22 Va. Cir. 319 (Fairfax Cnty. Cir. Ct. 1990), *aff’d* Funches v. Funches, 243 Va. 26, 30 (1992) (Here widow of the decedent was plaintiff; “companion” of the decedent who was defendant. Decedent and companion purchased property, but because marriage was not valid, what they thought was a tenancy by the entirety was just a joint tenancy – the fifth unity of TbyE – “persons” – was missing as they were unmarried.

Joint tenants each have an undivided interest in the whole. *One of them is not seized of a divided one-half and the other a remaining divided half. To the contrary, each has an undivided interest in the whole, not the whole of an undivided interest.* Neither can one be exclusively seized of one portion of the property and the other of another portion of the property. The possession and seizen of one joint tenant is the possession and seizen of the other.” Turner v. Turner, 185 Va. 505, 508 (1946). **When the decedent died, the entire estate passed to the survivor, cutting off the widow of the deceased joint tenant.**

F. JTWRORS Interest in Real Property May be Reached by His or Her Creditors.

1. Jones v. Conwell, 227 Va. 176 (1984), is authority for the general principle that whatever property a debtor may voluntarily transfer may be reached by his creditors. “The Jones decision, interpreting the language in § 8.01-81, held that

“joint tenants” encompassed the meaning of joint tenants with survivorship and that because a joint tenant with survivorship can convey his interest, a creditor can reach such ownership interest in a partition for the sale of the property for payment of the creditor’s judgment lien.” Bailey v. Much, 98 Va. Cir. 415 (Richmond July 8, 2010);

2. Kerr v. Dill, 72 Va. Cir. 148 (*Roanoke* 2006) (A joint tenancy is subject to partition by a judgment creditor of any joint tenant. However, only creditors with joint debts of both spouses may reach the property held by spouses as tenants by the entirety. In Virginia, a joint tenancy is subject to partition by a judgment creditor of any joint tenant.)

G. Where a Creditor With an Unsecured Claim Against a Debtor Holding Title to Real Property as JTWROS Does Not File Suit to Collect the Claim Until After a Debtor Holding Title to Real Property as JTWROS Dies Thereby Passing the Interest to the Surviving JTWROS, the Co-Tenant(s) Holding Title as Surviving JTWROS Take Free of the Claim.

First Nat’l Bank v. Price, 106 Va. Cir. 103, 105 (*Floyd Cnty.* 2020); First Nat’l Bank v. Sowers, 2020 Va. Cir. LEXIS 506, *5-6 (Cathy Sowers (“Cathy”) borrowed funds evidenced by an unsecured note from First National Bank (“FNB”) to purchase a vehicle in October, 2017. On January 18, 2018, Cathy, her husband, Dennis Sowers (“Dennis”) and Connie Price (“Connie”) purchased real estate as joint tenants with right of survivorship. On November 28, 2018, Cathy passed away. On November 21, 2019, FNB filed its complaint requesting the Court to order that Cathy’s interest in the jointly held real estate be used to satisfy the balance due on the note held by FNB. Defendant Dennis demurred arguing that Connie’s interest, by operation of law and by operation of deed, immediately passed and conveyed at her **death** to the remaining tenants holding title as JTWROS and was not subject to 64.2-532.

The court found Dennis did not inherit the property from Cathy; Cathy’s interest in the property passed to him and Connie by operation of law as surviving joint tenants. **Surviving joint tenants are neither heirs nor devisees.** See, e.g., Va. Code § 55.1-134; Funches, 22 Va. Cir. 319 (*Fairfax Cnty. Cir. Ct.* 1990) (aff’d Funches v. Funches, 243 Va. at 30); Conwell, 227 Va. at 181-82. Since subsequent provisions of the statute indicate that § 64.2-532 applies to real estate of the decedent held by an heir or a devisee, and this does not encompass property that passes to a surviving joint tenant through the right of survivorship because surviving tenants fall into either [*6] category, it can be reasonably be inferred that the legislature did not intend for § 64.2-532 to apply to abrogate the common law.

H. If One Tenant Holding Title to Real Property as JTWROS Conveys, or Contracts to Convey, His or Her Undivided JTWROS Share to a Third Person by Deed or Deed of Trust, the JTWROS is Severed as to that Tenant and His or Her JTWROS Interest

Converts to a Tenancy in Common as to the Remaining Persons Holding Title as JTWROS.

1. See Leonard v. Boswell, 197 Va. 713, 721 (1956) (One of two joint tenants may convey to a stranger, and his grantee, and the other remaining joint tenant, will both be tenants in common.);
2. Johnson’s Ex’r v. Nat’l Exch. Bank, 74 Va. (33 Gratt.) 473, 481 (1880) (“If one joint tenant *conveys* his share to a third person, according to the power reserved to him (notwithstanding he is otherwise seised only *per totum conjunctim*), or in *equity*, which looks upon what ought to be done as actually done, if he *contracts to convey*, the jointure, JTWROS, is severed, as to the tenant *so conveying* or so contracting; and as between his alienee and the other tenants, it is turned into a tenancy in common. *For instance, if A, B, and C hold title as JTWROS in fee, and A alienes to Z, Z is thenceforward, as to B and C, a tenant in common, but as between themselves, B and C are still and remain holding title as JTWROS as between each other.*” (emphasis added.) See also 5 M.J., Cotenants, §§ 31 and 40, pp. 59 and 74;
3. Tiffany on Real Property (Abr. Ed. 1940) (§ 284, says: “The unity of title is destroyed by conveyance by a joint tenant. If one of two joint tenants thus disposes of his interest, the other joint tenant and the grantee become tenants in common, while if one of three or more joint tenants conveys his interest to a third person, the latter becomes a tenant in common with the others, who, however, remain joint tenants as between themselves.” See also Va. Coal & Iron Co. v. Hylton, 115 Va. 418, 421, 422 (1913); Va. Coal & Iron Co. v. Richmond Etc. Corp., 128 Va. 258, 268 (1920).

I. The Object of a “Legal Description” of Land Sold, or in a Contract of Sale, or Conveyed in a Deed of Conveyance is Not in and of Itself, to Identify the Land Sold or Conveyed but to Furnish the Means of Identification.

1. Midkiff v. Glass, 139 Va. 218, 225 (1924) (*...great liberality is shown in the matter of description. In a description, that is certain which can be made certain. . . . The [purpose] of a description in a deed . . . is not to identify the land, but to furnish a means of identification*)” (citation omitted);
2. Harper v. Wallerstein, 122 Va. 274 (1918) (“The main object of a description of land sold or conveyed in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold – that it rarely does or can do, without helping evidence – but to furnish the *means* of identification and when this is done it is sufficient.” (citation omitted). Under Virginia law, a correct street address is sufficient to provide the means of identification for a parcel of real property resulting in a valid conveyance of such property);

3. Jennings v. City of Norfolk, 198 Va. 277, 285 (1956) The description must so describe and identify the property conveyed “as to afford the *means*, with the aid of extrinsic evidence, of ascertaining accurately what is conveyed and where it is;
4. Firebaugh v. Whitehead, 263 Va. 398, 401, 403 (2002) (Court held the following description sufficient “parcels currently owned by Sowers lying on the northerly side of State Route 665 and designated as Tax Parcel #72-83 and Tax Parcel #72-53 and shown on that certain plat . . . a copy of which is recorded in Deed Book 336, Page 533.”);
5. LoanDepot.com, LLC v. Smith, CL22000119-00 (*Portsmouth Cir. Ct.* Feb. 10, 2022) (Judge Kenneth R. Melvin) (Following the vacation of portion of a city street adjacent to the subject property, the Court confirmed, declared, and clarified that i) the refinance deed of trust adequately described and provided the “means” to describe the subject property and it was a valid lien against the entire property, and ii) an incorrect map book reference in a deed in the chain of title did not affect the validity of the deed.);
6. JVT Props., LLC v. Rumble, CL2104682P-00 (*Newport News Cir. Ct.* Feb. 24, 2022) (Judge Christopher R. Papile) (The Court 1) confirmed, declared, and clarified i) the first-priority lien position of a deed of trust, ii) the deed of trust provided the “means” to describe the property encumbered, and iii) the trustee’s deed was a valid conveyance of multiple contiguous lots and an adjacent alley, and 2) defined the legal description of the subject property.)

J. Co-Tenant’s Right of Contribution/Setoff/Allowance for Expenses Against other Co-Tenants Not Contributing.

1. See Ballou v. Ballou, 94 Va. 350, 352 (1897) (“To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants. . . . The allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the court to do justice.”);
2. Jenkins v. Jenkins, 211 Va. 797, 799-80 (1971) (“The doctrine is firmly established that a co-tenant who discharges an encumbrance upon the common property is entitled to ratable contribution from his co-tenant. . . . unless something more can be shown than the mere fact that one co-tenant is in possession of the premises, each co-tenant should be ratably responsible for taxes and other liens against the property”);
3. Collier v. Pittman, 72 Va. Cir. 292 (*Fairfax Cnty.* 2006) (plaintiffs seeking partition of a property paid off back taxes and a mortgage upon acquiring their interest in the property. Id. at 292. The court held that “[b]y paying both the mortgage and the taxes, the [plaintiffs] saved the property from foreclosure and benefited all co-owners.” Id. at 293.);

4. Grant v. Wynn, No. CL20000150-00 (*Portsmouth Cir. Ct.* Oct. 23, 2020) (Judge William S. Moore, Jr.) (The Court allotted remaining interest in subject property to Plaintiff to vest 100% interest in Plaintiff, and Plaintiff deposited outstanding assessed value of subject property into the Court less ratable contributions.);
5. Gandy v. PNC Mort., CL19009049-00 (*Norfolk Cir. Ct.* Sept. 10, 2020) (Judge James C. Hawks) (The Court allotted the remaining interest in the subject property to the plaintiff, with the plaintiff depositing an amount in the Court based on the assessed value of the property and the outstanding interests, awarding ratable contributions offset, thereby vesting the plaintiff with the entire interest in the subject property, subject to a deed of trust of record.)

K. Legal Access to Private Cemeteries is Required in Virginia.

1. Under Virginia law, by statute, certain groups have access to cemeteries and graves located on private property.
2. *Virginia Code § 57-27.1 permits (1) family members and descendants of the deceased that are buried on the property; (2) any cemetery plot owner; and (3) any person engaging in genealogy research access to the property.* Virginia Code § 57.27-1(A).
3. The visitors must provide reasonable notice to the property owner, occupant, or both, of the land the cemetery is located on, and the purpose of visits must be reasonable and limited to visiting or maintaining the graves or conducting research. Id.
4. If a traditional access route is not clearly visible, the landowner may regulate access, including the frequency, hours, and duration. Id.
5. Visitors are liable to the landowner for any damage caused by their access, but the landowner is immune from liability for any action arising out of the access in the absence of gross negligence or willful misconduct. Id.
6. Any person denied reasonable access may bring an action to enjoin the landowner from denying access. Id.
7. Notably, “[t]he provisions of this section shall not apply to any deed or other written instrument that creates or reserves a cemetery or gravesite on private property.” Id.

L. Privity in a Chain of Title is Not Only Vertical But is Also Horizontal.

1. Horizontal privity exists when current owners trace their titles back to a common grantor. There is vertical privity between the respective grantors and grantees in the chains of title of each individual current owner. See Waynesboro Village, L.L.C. v.

BMC Props., 255 Va. 75, 81 (1998); Sloan v. Johnson, 254 Va. 271, 276 (1997); Barner v. Chappell, 266 Va. 277, 283 (2003).

2. See Williams, et ux. v. Mills, Case No. CL 12-102 (Judge Glen A. Tyler) (Accomack Cnty. Cir. Ct. 2013) (“After a Deed of Correction, Plaintiff Williams was in vertical privity with a successor in title of a portion of the disputed property and then, after having privity, acquired standing to sue for reformation”)

M. Legal Presumption in Favor of Adverse User of a Roadway Across the Land of Another for More Than 20 Years, Shifts the Burden to the Owner of the Servient Estate to Rebut the Legal Presumption.

1. Significantly, under controlling Virginia precedent when there has been “open, visible, continuous, and unmolested use” of a roadway across property of another for the prescriptive period of 20 years, the use will be *presumed* to be under a claim of right, and shifts the burden to the owner of the servient estate *to rebut* this legal presumption in favor of the adverse user by showing that the use was permissive and not under a claim of right. Ward v. Harper, 234 Va. 68, 70 (1987); Pettus v. Keeling, 232 Va. 483, 485, 486-87 (1987); Accord Nelson v. Davis, 262 Va. 230, 235 (2001)
2. This presumption of a grant or adverse right does, in fact, establish a *prima facie* case and may be rebutted, albeit under a very high standard of proof, by evidence to the contrary. Chaney v. Haynes, 250 Va. 155, 159 (1995).
3. Accordingly, the adverse user is entitled by law to the rebuttable *presumption* that its use, and that of its predecessors-in-title, was adverse. The burden to rebut this *prima facie* legal presumption then shifts to the servient owner. If the servient owner is unable to make a “positive showing,” not based on circumstantial evidence, and prove, *by the very high standard of clear and convincing evidence*, that the use by the adverse user and its predecessors was permissive, and not adverse or that they ever “prevented” the predecessors-in-title from using the easement.
4. Importantly, circumstantial evidence may *not* be used to establish permissive use. To the contrary, “[t]here must be a positive showing” that the use was permissive. Causey v. Lanigan, 208 Va. 587, 593 (1968). (The “principles of circumstantial evidence do not apply” to rebut the presumption of adverse use.) In Causey, the Court held owner of servient tract *failed* to make a “positive showing,” mere circumstantial evidence being insufficient, and “the owner of the dominant tract *acquired* an easement by prescription as a matter of law.”) (emphasis added.) Id. 208 Va. at 593;
5. Craig v. Kennedy, 202 Va. 654, 658 (1961) (Owner of servient tract *failed* to present sufficient evidence to rebut the *prima facie* presumption of adverse use and the dominant owner *acquired* an easement by presumption.);

6. Owens v. Calo, 91 Va. Cir. 161, 162 (*Buchanan Cnty. Cir. Ct.* September 15, 2015). (The only relevant facts in dispute were whether the Defendants granted the Plaintiffs **permission to use** Tarzan Road and **whether the use was under a claim of right**. Defendants argued that Defendants gave Plaintiffs permission to use Tarzan Road. However, the evidence establishes that the Plaintiffs’ use of the road was without the Defendants’ permission because Defendant Estell Calo testified as such during the hearing. The court held Defendant owner of servient tract *failed* to rebut the *prima facie* presumption of adverse use and Plaintiffs, owner of the dominant tract acquired an easement by prescription.)
7. *Under Virginia law, an adverse user of the land of another for over 20 years actually “acquires” a prescriptive easement which legally vests in such adverse user and/or their predecessors-in-title upon the expiration of a 20-year prescriptive period; O’Malley v. Guido*, 13 Va. Cir. 205, 210 (*Fredericksburg Cty.* 1988) (“Because the use has continued for more than twenty years, the owners of 511 Charlotte Street have *acquired* a prescriptive easement for parking”) (Emphasis added.) Even though the adverse user may be the plaintiff, the owner of the servient estate has the *initial burden to rebut* this legal presumption which exists in favor of the adverse user by showing that the use was permissive and *not* under a claim of right;
8. Failure to object is acquiescence. Acquiescence is not the same as granting permission. Clark v. Reynolds, 125 Va. 626, 630-31 (1919). In Davis v. Wilkinson, 140 Va. 672, 679 (1924), we observed that “[f]ailure to object to the use of the way is very often stated by witnesses as consent to its use, yet such consent is mere acquiescence, and acquiescence is one of the elements upon which the ripening of the use into a legal right rests.” A failure to object is not the same as granting permission.
9. Martin v. Moore, 263 Va. 640, 647 (2002) (Court reasoned that even where there was evidence of permission, servient owner “never *prevented* the [dominant owner] from using the road.” (emphasis added). Accordingly, the Court held that where there was no “positive showing” sufficient to establish permissive use, the trial court correctly found an easement by prescription *was acquired* and affirmed the trial court.);
10. *This presumption of a grant or adverse right does, in fact, establish a prima facie case in favor of the adverse user from the start of the case even if the adverse/claimant users are the plaintiffs, and can only be rebutted by the servient owner/defendant producing evidence which rises to the level of the required “positive showing” of evidence (not merely circumstantial evidence) to the contrary.* If the servient owner/defendant fails to produce evidence making a “positive showing” of evidence, the prescription stands as unrelated and the plaintiff prevails. Chaney v. Haynes, 250 Va. 155, 159 (1995);

N. Parties to Real Estate Litigation are Often Estopped by the Explicit Language in the Deeds in Their Own Chain of Title.

1. A party to real estate litigation cannot rise any higher than (and is “subject to”) the plain and unambiguous language in the deeds, plats and other instruments in their own chain of title. Chavis v. Gibbs, 198 Va. at 383. (It is well settled that a purchaser is charged with notice of all of the facts appearing upon the face of the title papers under which he buys.)
2. *The doctrine of estoppel by deed is a common law doctrine which provides that “[o]ne who claims under a deed of confirms all its provisions and cannot establish his claim by adopting only those provisions which are in his favor while he repudiates or contradicts the others that are repugnant to his interest.”* 7A Michie’s Jurisprudence, *Estoppel* § 9, p. 453 (footnote omitted) (emphasis added); see Johnson v. Powhatan Mining Co., Inc., 127 Va. 352, 364 (1920).
3. Further, “those who derive title from or through the parties, ordinarily stand in the same position as the parties, and are bound by every estoppel that would have been binding on the parties.” Va. Elec. & Power Co. v. Buchwalter, 228 Va. 684, 688 (1985) (quoting Richmond Cedar Works v. West, 152 Va. 533, 543 (1929)).
4. Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc., 221 Va. 81, 86-87 (1980) (Court evaluated plaintiff’s claim of estoppel and whether plaintiff seeking to invoke the doctrine of estoppel met all of the elements).
5. Such party cannot (a) adopt what they deem to be favorable parts of the deeds or plats in their chain of title and then (b) repudiate or seek to ignore the provisions and descriptions that are repugnant to their interest and may be barred by the doctrine of estoppel by deed. Powhatan Mining, 127 Va. at 364.

O. If a Party/Grantor Conveys Property with a Covenant of Warranty, Such Party/Grantor is Estopped from Later Setting up a Claim “Either by Adverse Possession or any After-Acquired Title.”

1. Estoppel by deed is *not* the only ground upon which an estoppel arises. In Reynolds v. Cook, 83 Va. 817, 821 (1887), Judge Lewis, speaking for the Court, says: “[t]he general rule undoubtedly is, that where land is conveyed without warranty, the grantor is *not* estopped from setting up an after-acquired title. ***On the other hand, a covenant of warranty works an estoppel, and the reason usually given is that the estoppel prevents circuitry of action.***” (emphasis added). (citing Doswell v. Buchanan’s Ex’rs., 30 Va. 365 (1831); Gregory v. Peoples, 80 Va. 355 (1885);
2. In Flanary v. Kane, 102 Va. 547, 566 (1904), Judge Buchanan cites Reynolds v. Cook with approval; and in Nye v. Lovitt, 92 Va. 710, 717 (1896), the Supreme Court of Virginia said that “[i]n order to avoid circuitry of action, it has long been the rule that a vendor of land was estopped from setting up an after-acquired title

against his vendee, where there was a warranty or covenant for title, if the eviction of his vendee would result in an action upon the covenants”;

3. In Hurley v. Charles, 112 Va. 706, 712 (1911), the Supreme Court of Virginia reasoned as follows:

In Reynolds v. Cook . . . and Flanary v. Kane, . . . there were no covenants of warranty, but in the case before us there were the covenant of *special warranty* and the covenant of quiet possession, both of which would be broken should the plaintiff be permitted to assert claim to the land in controversy, either by adverse possession or any after-acquired title. See Virginia Code, 1904, sec. 2447, as to the effect of a covenant of special warranty.

4. In short, under Hurley, if a party/grantor conveys property with a covenant of warranty, such party/grantor is estopped from later setting up a claim “either by adverse possession or any after-acquired title.” (emphasis added). Id.

P. Virginia is a “Race Notice” Jurisdiction.

1. Virginia adheres to a “*first in time, first in right*” priority scheme. See Virginia Code § 55.1-407 (former Virginia Code § 55-96(A)(1))
2. Cruickshanks v. Permberton Oaks Townhouse Ass’n (In re Cruickshanks), 522 B.R. 881, 885 (Bankr. E.D. Va. 2014). (“In Virginia, the priority for liens conveyances depends upon a race to the courthouse. The person recording an interest in real estate first, absent a fraud of some sort, has priority over all those who record later”) (citation omitted);
3. Plum Creek Timberlands, L.P. v. Yellow Poplar Lumber Co., No. 1:13cv00062, 2016 U.S. Dist. LEXIS 155979, at *25 (W.D. Va. Nov. 10, 2016) (“Where two deeds purport to convey the same interest in real estate, Virginia law gives priority to whichever interest was first recorded. Virginia Code § 55-96(A)(1));
4. Cygnus Newport-Phase 1B, LLC v. City of Portsmouth, 292 Va. 573 (2016) (noting that under Virginia's “race notice” statute, “the first to record an interest in real estate has priority over those who subsequently record”);
5. Duty v. Duty, 276 Va. 298, 304 (2008) (“Ultimately, the trial court expressed the view that Code § 55-96(A)(1) makes Virginia a “race notice” state. Accordingly, in its final order, after holding that the evidence was insufficient to establish the source of title of the disputed parcel to either Margaret Duty’s deed or the predecessor-in-title to David Duty’s deed, the trial court held that, because Margaret Duty ‘was the first to record her deed with the Clerk’s Office of the Circuit Court of Russell County,’ she ‘is the valid title holder of the above described

land in dispute by nature of the priority of her deed and shall have clear and free title from Defendant, David Duty.”);

6. In Ballagh v. Gray, 50 Va. Cir. 12, 17 (*Bedford Cnty.* 1999) (The Court found that, “[n]evertheless, it is axiomatic that a property owner can convey, whether by deed, dedication, or any other form of conveyance, only that property that he actually owns, and obviously, a person cannot convey property owned by someone else.”)

Q. Regarding the Recording of a Memorandum of Lis Pendens, Clerks of Circuit Courts are Authorized and Directed to Admit to Record Memoranda of Lis Pendens for Actions Pending in any Court of this Commonwealth, or in any Other State, Federal, or Territorial Court

1. Virginia Code § 8.01-268 (When and how docketed and indexed), provides, in pertinent part, as follows:

A. No *lis pendens* or attachment shall bind or affect a subsequent *bona fide* purchaser of real or personal estate for valuable consideration and without actual notice of such *lis pendens* or attachment, until and except from the time a memorandum setting forth the title of the cause or attachment, the general object thereof, the court wherein it is pending, the amount of the claim asserted by the plaintiff, a description of the property, the name of the person whose estate is intended to be affected thereby . . . , shall be admitted to record in the clerk’s office of the circuit court of the county or the city wherein the property is located ***Clerks of circuit courts are authorized and directed to admit to record memoranda of lis pendens for actions pending in any court of this Commonwealth, or in any other state, federal, or territorial court*** Such memorandum shall not be deemed to have been recorded unless and until indexed as required by law.

B. ***No memorandum of lis pendens shall be filed unless the action on which the lis pendens is based seeks to establish an interest by the filing party in the real property described in the memorandum (emphasis added).***

2. The filing of the *lis pendens* in a circuit court is a ministerial task conducted by the clerk of that court. In re Loy, 380 B.R. 154, 166 (Bankr. E.D. Va. 2007).
3. Under Virginia law, the filing of *lis pendens* pursuant to Virginia Code § 8.01-268 serves merely as “notice of the pendency of a suit to anyone interested and a warning that he should examine the proceedings to ascertain whether the title to the property was affected or not by such proceedings.” Green Hill Corp. v. Kim, 842 F.2d 742, 744 (4th Cir. 1988) (citing Harris v. Lipson, 167 Va. 365 (1937)); Yowell v. Residential Mortg. Solution, LLC, 2011 U.S. Dist. LEXIS 91699 at *18 (W.D. Va. Aug. 17, 2011).

4. *A lis pendens does not constitute a defect in the title or in the marketability of the property. A memorandum of lis pendens neither creates nor enforces a lien. The lis pendens statute is applicable only to disputes concerning title to real property. Dak Props., Inc. v. Stewart Title Guar. Co., 20 Va. Cir. 196 (Fairfax Cnty. 1990).*
5. ***Lee v. Garrett Homes of Va., CH02-611, 60 Va. Cir. 235 (Spotsylvania Cnty. 2002) (lis pendens properly filed where plaintiff filed a suit claiming an equitable lien and constructive trust against the defendant's property.***

R. Duties, Obligations, and Rights Under Virginia Law of a Title Holder of a Life Estate and of the Remainderman.

1. ***With respect to real estate taxes, Virginia law is clear that the burden of payment is on the life tenant, rather than the remainderman. City of Richmond v. McKenny, 194 Va. 427, 430 (1952).***
2. It is well settled that the burden of paying taxes is upon the life tenant rather than upon the remainderman and it is the life tenant's duty to pay the taxes. Stark v. Norfolk, 183 Va. 282 (1944); Commonwealth v. Wilson, 141 Va. 116 (1925); Glenn v. West, 106 Va. 356 (1907).
3. ***Controlling Virginia precedent also imposes on a life tenant a duty of repair to the property. A tenant for life is obliged under common law to make all reasonable, ordinary and necessary repairs to preserve the estate or to prevent deterioration of the estate.*** Typical examples of required repairs are repairing a house that has become "run down," repairing fences and outbuildings that have become decayed and dilapidated; and putting improved real estate back in condition to be occupied. The tenant is required to perform maintenance repairs that will effectively stop other damage from occurring, such as painting to stop further surface deterioration, or roof repairs.
4. Waste is the destruction, or improper deterioration, or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate, as, for instance, a tenant for life. Misuse or abuse of buildings or other improvements on the premises may be considered waste according to the same principles as are applied to misuse of the land itself: if the conduct or neglect causes permanent injury to the inheritance, it is actionable as waste. Such misuse or neglect generally consists either of the failure to repair and maintain (typically forms of permissive waste) or of some active but abusive use of structures or equipment on the premises.
5. ***Simmons v. Lyles, 73 Va. 752, 757 (1880) (One of the duties devolving almost universally upon a tenant for life is to prevent the buildings and fences from going to decay by proper and suitable repairs, and also to keep down the interest accruing upon existing encumbrances. The rule with regard to the interest is said to be so inflexible that the tenant is required to pay it, even if it takes the whole***

of the rents and profits of the estate.) See also Poindexter's Ex'rs v. Green's Ex'rs, 33 Va. 504 (1835);

6. Adair v. Kuhn, 64 Va. Cir. 364, 365 (**Spotsylvania Cnty.** 2004) (Under the 1993 will, Kuhn, as life tenant, may use and enjoy the property during his lifetime, however, the life tenant's use is restricted by the condition that the interest of the remainderman will not be permanently diminished in value by Kuhn's neglecting to do that which an ordinary prudent person would do to preserve his own property);
 7. Feeney v. Feeney, No. CL 88191, 2019 Va. Cir. LEXIS 934, at *11-12 (**Loudoun Cnty.** June 13, 2019) (Ms. Feeney, by virtue of having a life estate, is prohibited from committing waste and encumbering the property. As such, she must pay for repairs and upkeep, pay property taxes and may not, on her own, liquidate the property);
 8. Findlay v. Smith, 20 Va. 134, 137 (1818) (holding a remainderman may seek an injunction against a life tenant for committing waste);
 9. Virginia Code § 58.1-3344 provides that taxes assessed against real estate are a lien on the property itself, not just the person listed as owner. Further, when taxes are assessed against a life tenant, both the life estate interest and the remainder interest in the property may be sold at a tax sale for delinquent taxes provided the owner of record is made party to the sale.
 10. In addition, in Virginia, by statute, pursuant to Virginia Code § 8.01-178.1, "[a]ny tenant of land or any person who has aliened land who commits any waste while he is in possession of such land, unless he has special license to do so, shall be liable for damages."
 11. Moreover, under Virginia Code § 8.01-178.2, "[a]ny person who is injured due to another person's committing waste on his land may recover damages for such waste by initiating a civil action."
 12. The possession of a tenant for life, as such, cannot be adverse to the remainderman or reversioner, because the right of action of the remainderman or reversioner does not accrue until the death of the tenant for life. It has been so held as to life tenants in right of dower and by the curtesy. Hannon v. Hounihan, 85 Va. 429 (1888).
- S. **Horn v. Webb, 882 S.E.2d 894, 900 (2023) (License Granted by Owner to Third Party Terminates when Grantor Sells the Property on Which the License is Exercised.)**

Last year, on February 9, 2023, the Supreme Court of Virginia decided and issued a published opinion in the case of Horn v. Webb, 882 S.E.2d 894, 900 (2023) which addressed, based on the facts therein, whether a certain interest was an easement or a license. The Court determined the subject interest was a license relying on prior Supreme Court of Virginia cases decided in 1952 and in 1976, respectively. See Eagle Lodge, Inc.

v. Hofmeyer, 193 Va. 864, 880 (1952) and Bunn v. Offutt, 216 Va. 681, 683 (1976). *Significantly, the Court in Horn ruled that a license is extinguished where the owner of the property who gave permission sells or otherwise transfers the property.*

T. Rules of Deed Interpretation Under Virginia Law as to When Parol Evidence is Admissible or is Not Admissible

1. *Parol Evidence is NOT Admissible into Evidence and Auxiliary Rules of Construction Should Not be Used Where Language in Deed or Other Instrument is Explicit, Clear, Plain, or Unambiguous and the Intention of the Parties is Free from Doubt.*

- a. Ellis v. Comm’r, 206 Va. 194, 202 (1965) (The main task of a court in construing a deed is to ascertain the true intention of the grantor as drawn from the entire instrument; Fitzgerald v. Fitzgerald, 194 Va. 925, 929 (1953)); Allen v. Green, 229 Va. 588, 593 (1985) (The instrument should be examined as a whole in order to determine the controlling intention.);
- b. The Supreme Court of Virginia has previously stated that where “the language in the deed . . . is clear, unambiguous, and explicit . . . ‘a court called upon to construe such a deed should look no further than the four corners of the instrument under review.’” Langman v. Alumni Ass’n of Univ. of Va., 247 Va. 491, 498-99 (1994) (quoting Trailsend Land Co. v. Va. Holding Corp., 228 Va. 319, 325 (1984));
- c. Furthermore, “if the language is explicit and the intention is thereby free from doubt, such intention is controlling, if not contrary to law or to public policy, and *auxiliary rules of construction should not be used.*” (emphasis added). Camp v. Camp, 220 Va. 595, 598 (1979); see also Langman, 247 Va. at 499 (citing Camp with approval);
- d. Although the rule of strict construction is to be applied to covenants respecting land, “. . . when the terms of a restrictive covenant ‘are clear and unambiguous,’ the language used will be taken in its ordinary signification, and the plain meaning will be ascribed to it.” Barris v. Keswick Homes, L.L.C., 268 Va. 67, 71 (2004);
- e. The Court is not free to rewrite a deed to express an intention that is otherwise not discernable, nor is parol evidence admissible to vary, contradict, add to, or explain the terms of a complete, unambiguous written deed or other instrument. Godwin v. Kerns, 178 Va. 447, 451 (1941); Walker v. Bowman, 227 Va. 209, 214 (1984);
- f. Accordingly, where the deed is explicit and unambiguous, a court should (a) “look no further than the four corners of the instrument under review,” and (b) apply the clear and explicit language in the deeds which is the sole

repository of the agreements and intentions of the parties to the deeds. Langman, 247 Va. at 498-99;

- g. See Irby v. Roberts, 256 Va. at 33 (Appellee servient estate owners sued appellant dominant estate owners to prevent the construction of a pier extending from the servient estate. The Supreme Court of Virginia reversed the trial court's holding in favor of the servient estate owners, finding the plat of the easement indicated the easement, *the language in the deed was not ambiguous*, the grant of the easement conveyed the necessary riparian rights to construct the pier, the intent to transfer the riparian rights was express in the language of the grant of the easement, and there was nothing in the deed to suggest the lines drawn on the plat restricted the length of the pier. Judgment in favor of the dominant estate owners.);

2. ***Parol Evidence is Admissible and Auxiliary Rules of Construction can be Used when Language in Deed or Other Instrument is Ambiguous or the Intention of the Parties is not Free From Doubt.***

- a. “Parol evidence is always admissible when it is necessary in order to identify, explain or define the subject-matter of a grant * * *, for without such evidence it would be impossible to give effect to the intentions of the parties.” S. & W. R. R. Co. v. Mann, 108 Va. 557, 560 (1908) (citing Carrington v. Goddin, 54 Va. 587 (1857); Reusens v. Lawson, 91 Va. 226, 235 (1895); New River Mineral Co. v. Painter, 100 Va. 507 (1902));
- b. Gordon v. Hoy, 211 Va. 539, 541 (1971) (“But where, as here, the language is ambiguous, the court in order to ascertain the intention of the parties looks to the language employed in the light of the circumstances surrounding the parties and the land at the time the deed was executed.” (quoting Cushman Va. Corp. v. Barnes, 204 Va. 245, 251 (1963); Stephen Putney Co. v. R.F. & P.R. Co., 116 Va. 211, 217 (1914));
- c. Where the ambiguity consists of uncertainty concerning the subject matter to which the language was intended to apply, this is a traditional reason warranting the admission of extrinsic evidence to identify, explain, or define the subject matter of a grant. Klingstein v. Vaughan, 149 Va. 147, 153 (1927); Midkiff v. Glass, 139 Va. 218, 225 (1924).;
- d. Without parol evidence, it is frequently impossible to give effect to the intention of the parties concerning the subject matter to which their language was intended to apply. South & W.R. Co. v. Mann, 108 Va. 557, 560 (1908));
- e. Evans v. Evans, 290 Va. 176, 187 (2015) (Court held husband’s unilateral execution of 1976 deed conveying his tenancy by entirety interest to wife was sufficient to *establish intent* to divest himself of tenancy by entirety

ownership in property in favor of fee simple ownership in wife and wife's specific reference in 1993 deed to the 1976 conveyance removed any doubt that wife was seized only of tenancy by entirety ownership in property). ***But see Virginia Code § 55.1-134(B) adopted in 2017 in response to Evans case.***

U. Proving Ownership by Tenants by the Entireties where Deed is Silent or Ambiguous.

1. Tenancy by the entirety is a legal fiction “based upon the same four unities that support joint tenancies [plus] a fifth unity . . . of marriage.” Rogers v. Rogers, 257 Va. 323, 326 (1999) (quoting Jones v. Conwell, 227 Va. 176, 181 (1984); see Virginia Code § 55.1-134(A);
2. Allen v. Parkey, 154 Va. 739 (1929) (“The effect of [this section] when an estate is conveyed to a husband and wife, is to convert a tenancy by entirety into a tenancy in common and of course to destroy survivorship.” But § 55-21 [now Virginia Code § 55.1-134(B)] provides that this section shall not apply when it was manifest from the instrument creating the estate that “it was intended that the part of the one dying should then belong to the others.”);
3. Roane v. Roane, 193 Va. 18, 26 (1951) (Corroborating evidence is permitted to prove form of tenancy in a deed);
4. Leonard v. Boswell, 197 Va. 713 (1956) (in the absence of a contrary public policy or prohibitive legislation, express intention of parties should override purely formalistic objections to real estate conveyancing based upon technical distinctions.);
5. In a recent case interpreting an old deed from 1967 which did not include express survivorship language involving a conveyance to husband and wife, Norfleet v. Harrison, CL17000300-00 (***Portsmouth Cir. Ct.*** 2017), the Honorable Judge Kenneth R. Melvin, simply interpreted the deed and determined the intent of the parties, “husband and wife” was, in fact, intended to hold title as T/EWROS. Judge Melvin granted relief under the declaratory judgment count of the complaint in that case without reforming the deed. *In so doing, he merely interpreted and declared the true intent of the parties* pursuant to Virginia Code § 8.01-184;
6. Likewise, in Vulcan Holdings, LLC, v. Short, Case No. CL20004182 (***Portsmouth Cir. Ct.*** July 9, 2021), the Honorable Judge C. Peter Tench, sitting by designation, in the Portsmouth Circuit Court, interpreted language in a will which devised property to four siblings as “joint tenants.” Based on tenor of will, practical considerations, corroborating evidence, the court declared the will devised the property to the four siblings as joint tenants with right of survivorship and also reformed the will to include the words “with rights of survivorship” following “joint tenants.”

V. Under Virginia Law, Issues Regarding Real Estate are Governed by the Law of the State Where the Property is Located.

Under Virginia law, issues regarding real estate are governed by the law of the state where the property is located. See Mort v. Jones, 105 Va. 668 (1905); Healy v. Chesapeake Appalachia, LLC, No. 1:10cv00023, 2011 U.S. Dist. LEXIS 759 at *12-13 (W.D. Va. Jan. 5, 2011). Therefore, if an action involves issues regarding real estate located in Virginia, under Virginia law, the issues therein are governed by the law of the Commonwealth of Virginia.

W. Under Virginia Law, Upon Automatic Termination of a Corporation, the Real Property and Other Assets of a Corporation Automatically Pass (Off-Record) to the Directors at the time of Termination as “Trustees in Liquidation.”

1. Upon automatic termination, the directors no longer function as directors of a corporation. Section 13.1-91 (now § 13.1-752) provides that they become “trustees” in dissolution. The real property and other assets of the corporation automatically pass to them **in their new capacity** as “trustees in liquidation.” This is the *res* of the trust they must administer.”) (citation omitted) (emphasis added);
2. Lifta Enters. v. Huh, 64 Va. Cir. 40, 44 (**Fairfax Cnty.** 2004) (“Clearly under [Va. Code § 13.1-752(A)] property passes to the director(s) as trustees automatically as of the day the corporate existence ceases.”);
3. Flip Mortg. Corp. v. McElhone, 841 F.2d 531, 535 (4th Cir. 1988) (“[T]he Supreme Court of Virginia has admonished that where possible every word of the statutes must be given meaning. This principle requires, in context of this case, a court to give meaning to the word “trustees” in § 13.1-91 (now § 13.1-752)”);
4. As the Supreme Court of Virginia has stated, “a dissolved domestic corporation is no corporation at all.” McLean Bank v. Nelson, 232 Va. 420, 426 (1986); accord Moore v. Occupational Safety & Health Review Comm’n, 591 F.2d 991, 995 (4th Cir. 1979); Hudgins v. IRS, 132 B.R. 115, 116-17 (E.D. Va. 1991);
5. However, Virginia Code § 13.1-755 (Survival of remedy after termination of corporate existence) provides as follows:

“The termination of corporate existence shall not take away or impair any remedy *available to or against the corporation* or its directors, officers, or shareholders for any *right or claim existing or any liability incurred prior to such termination*. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors, and officers shall have the power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim.” (emphasis added).

6. Accordingly, under Virginia law in an action to quiet title and for other relief as to real property located in Virginia, pursuant to Virginia Code § 13.1-755, the action and proceeding may be brought against such terminated corporation “in its corporate name,” even though both corporations are terminated or dissolved;
7. L-Wood, Inc., Southern Pine Specialists v. Kel-Wood Timber Products, CL23-375 (**New Kent Cnty. Cir. Ct.**, July 25, 2023) (The Court declared that plaintiff, as a statutory successor-in-title under Virginia Code § 13.1-752(A), declared that the defendants are barred from making a claim to the property pursuant to Virginia Code § 8.01-236, and liquidated and distributed a parcel of the property pursuant to Virginia Code § 13.1-747(B) and (D));
8. Dunn v. B&N Corporation, CL23-3959 (**Portsmouth Cir. Ct.** Jan. 5, 2024) (Where sole director of corporation passed away prior to automatic termination of corporation, the Court appointed a substitute “trustee in liquidation” of the automatically terminated corporation to list, market, and convey real property owned by the corporation at the time of termination.)
9. Regarding similar statutory provisions, automatic cancellation of Virginia limited liability company, see Virginia Code § 13.1-1050.2. See also, Morse v. Barwick, 84 Va. Cir. 496, 2012 Va. Cir. LEXIS 123 (**Norfolk** May 10, 2012).

X. Unconditional Delivery, Not Recordation, of a Deed to the Purchaser or his Agent is the Last Act Required to Convey Property Under a Deed Between the Parties.

1. Unconditional delivery of a deed is the last act required to make a deed effective as between the parties. See Crump v. Gilliam, 190 Va. 935, 941 (1950);
2. Recordation is required only to affect the rights of third parties, such as *bona fide* purchasers. See In re Alexander, 524 B.R. 82, 92 (E.D. Va. 2014).

Y. Partition Suits After Statutory Change Effective July 1, 2020.

1. *Effective July 1, 2020, the General Assembly of Virginia significantly changed the statutory procedures for partition of real property in Virginia by adopting, in a modified form, a National Model Act Known as the Uniform Partition of Heirs Property Act (the “UPHPA”).*
2. Virginia is now one of approximately 20 states across the country to have adopted the UPHPA. Although the General Assembly enacted and adopted the UPHPA, the partition statutes still begin with Virginia Code § 8.01-81 and end with Virginia Code § 8.01-93 as the statutes did before July 1, 2020. However, as will be demonstrated below, (a) many of the sections in between were repealed, (b) those sections which were not repealed are often materially different with new mandatory procedures, and (c) there are several completely new required steps and procedures

which the courts and the parties “*shall*” follow in order to comply with the new statutory scheme regarding partition in Virginia.

3. Of course, new statutory mandatory requirements necessarily come, at times, with certain new and different mandatory pleading requirements and new steps to be affirmatively alleged in order to comply with the new statutes and state a cognizable cause of action in a complaint for partition of real property in Virginia.
4. Hence, a complaint for partition must properly state a claim upon which relief can be granted for partition in compliance with the newly enacted statutes which create the right and the remedy – nothing more, nothing less.
5. In the context of a partition suit, where there have been repairs or replacements that constitute “permanent improvements” and/or where the “value of the common property has been enhanced” such repairs or replacements may be considered in a particular action under Virginia law. Shotwell v. Shotwell, 202 Va. 613 (1961).
6. The provision that a court of equity “may take cognizance of all questions of law affecting the legal title that may arise,” is applicable *only* to questions affecting the legal title to the subject of partition, ***and not to matters of general indebtedness between the parties***. Adkins v. Adkins, 117 Va. 445, 449 (1915) (Controlling Virginia decisional law is abundantly clear that the settlement of controversies that may arise between co-tenants growing out of their general indebtedness to each other are *not* the proper subject of consideration in a partition suit.)
7. In a partition suit, a plaintiff may request an award of reasonable attorney’s fees pursuant to Virginia Code § 8.01-92 for bringing the action on account of services rendered to defendants not represented by counsel; however, such request meet the requirements of the recent ruling by the Supreme Court of Virginia in Berry v. Fitzhugh, 299 Va. 111 (2020).

Business Email Compromise:
The what, when and how

Tim Lynch,
Supervisory Secret Agent, FBI Washington Field Office
&

 KRISTA CHRISTENSEN, ESQ.
VP, Risk Manager, Cyber and Wire Strategies

1

CLASSIFICATION

Tim Lynch
Supervisory Special Agent
Washington Field Office

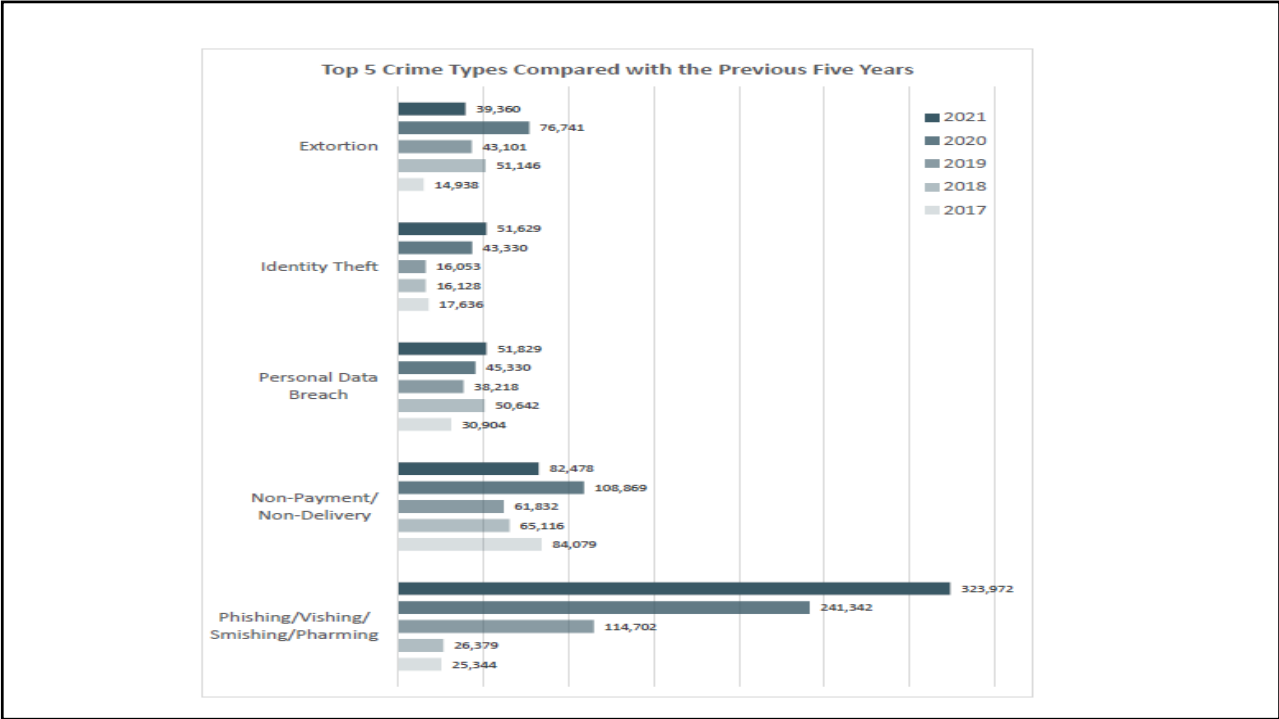
Desk: 703-686-6212
Cell: 571-409-0676
Email: tdlynch@fbi.gov



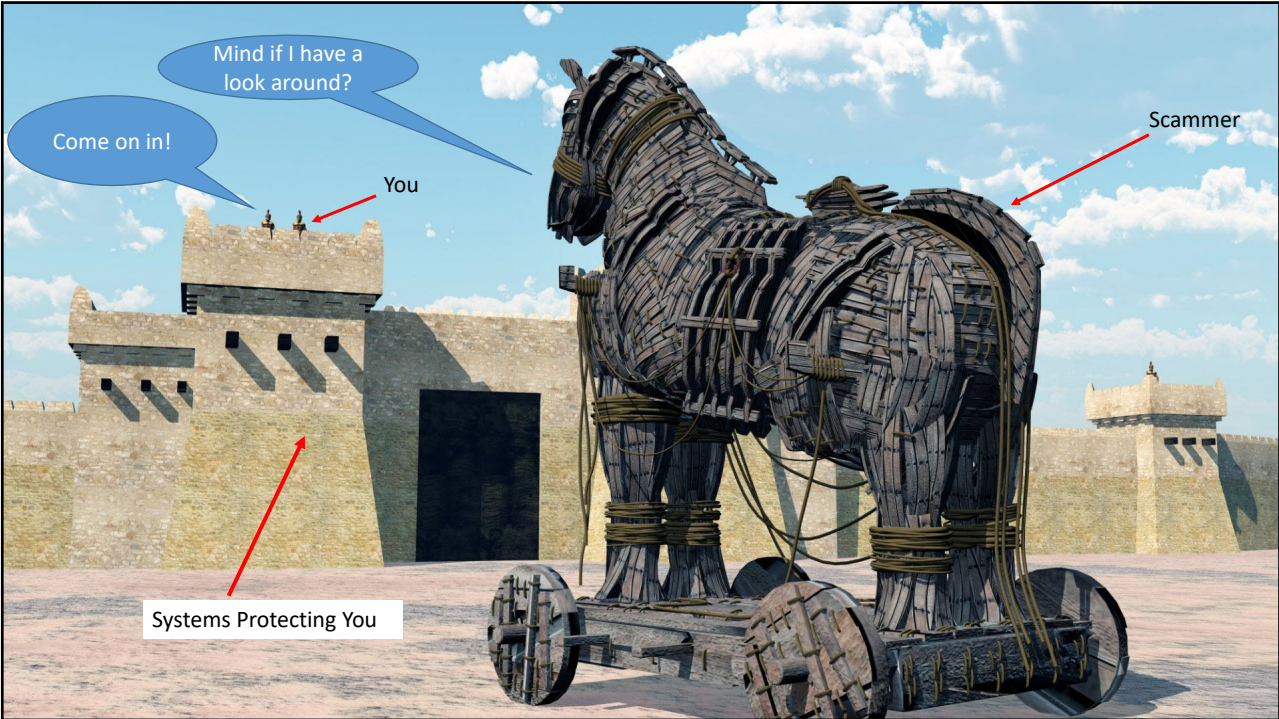
 **WASHINGTON FIELD OFFICE** 

CLASSIFICATION

2

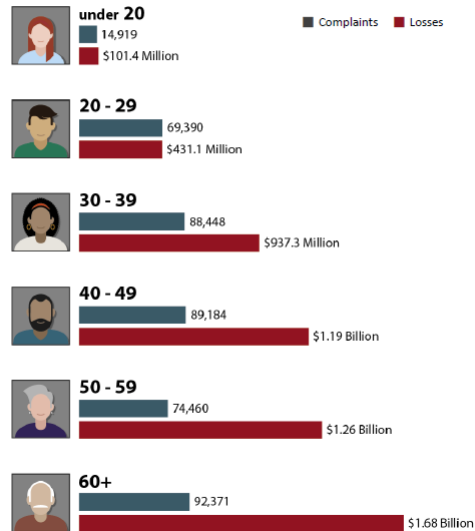


3



4

2021 Victims by Age Group¹⁷



5



Romance Scams *-\$738M*

- Most dating/social media sites
- Gain trust quickly as possible
- “Employed” outside U.S.
- Overseas “emergency”
- Will ask for money, services
- Isolate the victim

6

70%

Often run concurrently

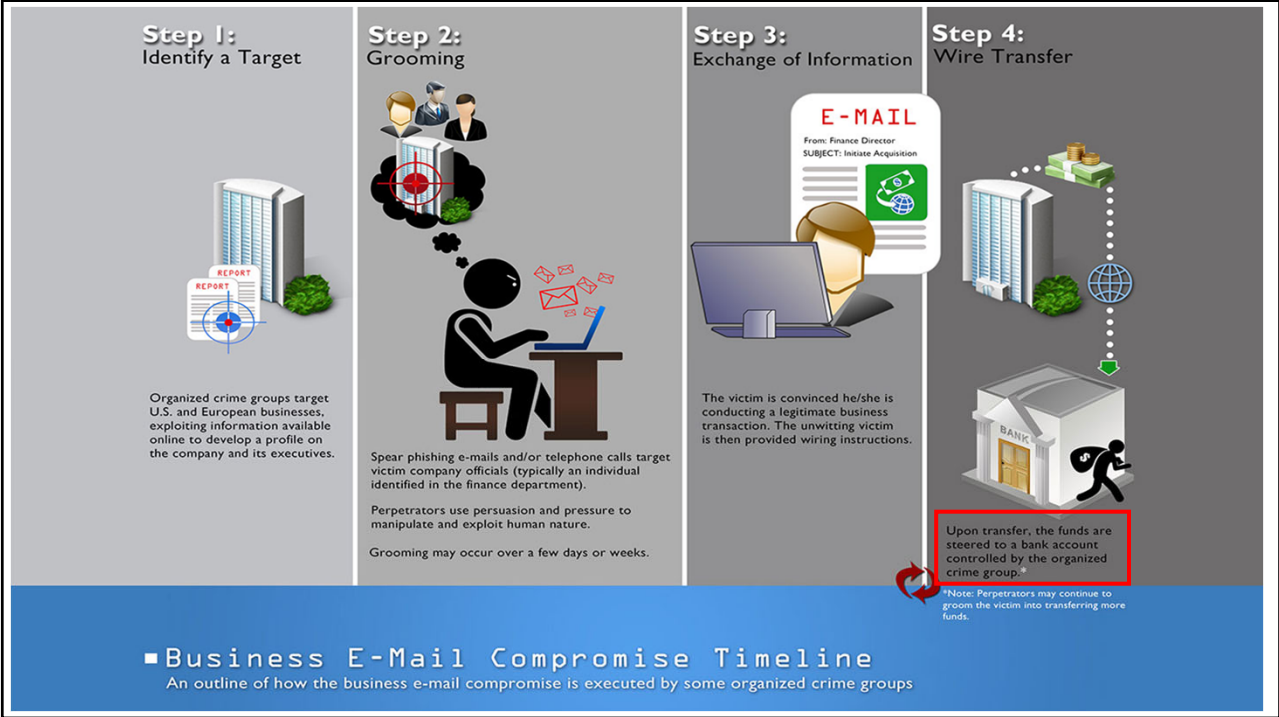
2021 Crime Types continued

By Victim Loss			
Crime Type	Loss	Crime Type	Loss
BEC/EAC	\$2,395,953,296	Lottery/Sweepstakes/Inheritance	\$71,289,089
Investment	\$1,455,943,193	Extortion	\$60,577,741
Confidence Fraud/Romance	\$956,039,740	Ransomware	*\$49,207,908
Personal Data Breach	\$517,021,289	Employment	\$47,231,023
Real Estate/Rental	\$350,328,166	Phishing/Vishing/Smishing/Pharming	\$44,213,707
Tech Support	\$347,657,432	Overpayment	\$33,407,671
Non-Payment/Non-Delivery	\$337,493,071	Computer Intrusion	\$19,603,037
Identity Theft	\$278,267,918	IPR/Copyright/Counterfeit	\$16,365,011
Credit Card Fraud	\$172,998,385	Health Care Related	\$7,042,942
Corporate Data Breach	\$151,568,225	Malware/Scareware/Virus	\$5,596,889
Government Impersonation	\$142,643,253	Terrorism/Threats of Violence	\$4,390,720
Advanced Fee	\$98,694,137	Gambling	\$1,940,237
Civil Matter	\$85,049,939	Re-shipping	\$631,466
Spoofing	\$82,169,806	Denial of Service/TDoS	\$217,981
Other	\$75,837,524	Crimes Against Children	\$198,950
Descriptors**			
Social Media	\$235,279,057	Virtual Currency	\$1,602,647,341

* Regarding ransomware adjusted losses, this number does not include estimates of lost business, time, wages, files, or equipment, or any third-party remediation services acquired by a victim. In some cases, victims do not report any loss amount to the FBI, thereby creating an artificially low overall ransomware loss rate. Lastly, the number only represents what victims report to the FBI via the IC3 and does not account for victim direct reporting to FBI field offices/agents.

**These descriptors relate to the medium or tool used to facilitate the crime and are used by the IC3 for tracking purposes only. They are available only after another crime type has been selected. Please see Appendix B for more information regarding IC3 data.

7



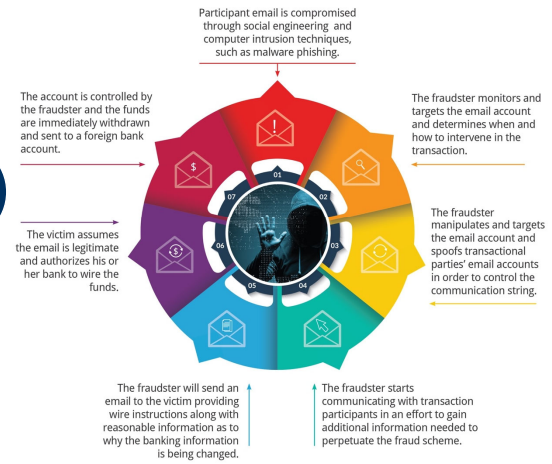
8

What is BEC in real estate?



BUSINESS EMAIL COMPROMISE

WIRESAFE | Inquire before you wire!



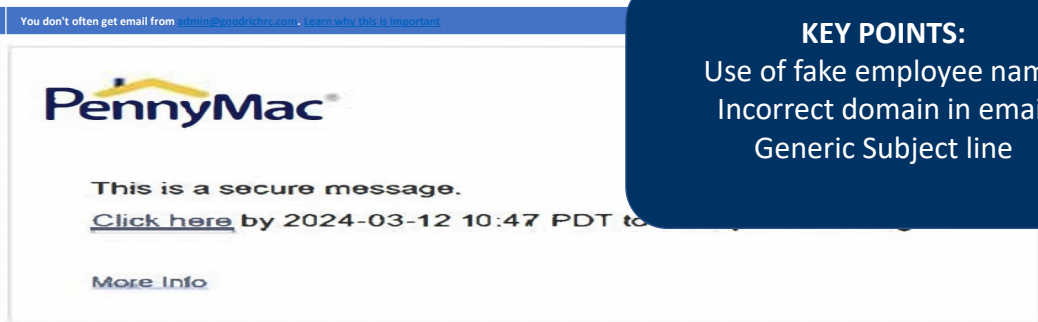
9

Phishing Emails

From: Jennifer Schlichter <admin@goodrichrc.com>
Sent: Wednesday, December 6, 2023 1:50 PM
To: [Redacted]
Subject: Payoff Quote completed [Redacted] Wednesday-December-2023 09:52 AM
Importance: High
 IMPORTANT NOTICE - This message sourced from an external mail server outside of the Company.



KEY POINTS:
 Use of fake employee name
 Incorrect domain in email
 Generic Subject line



Disclaimer: This email and its content are confidential and intended solely for the use of the addressee. Please notify the sender if you have received this email in error or simply delete it.
 Secured by Proofpoint Encryption, Copyright © 2009-2020 Proofpoint, Inc. All rights reserved.

10

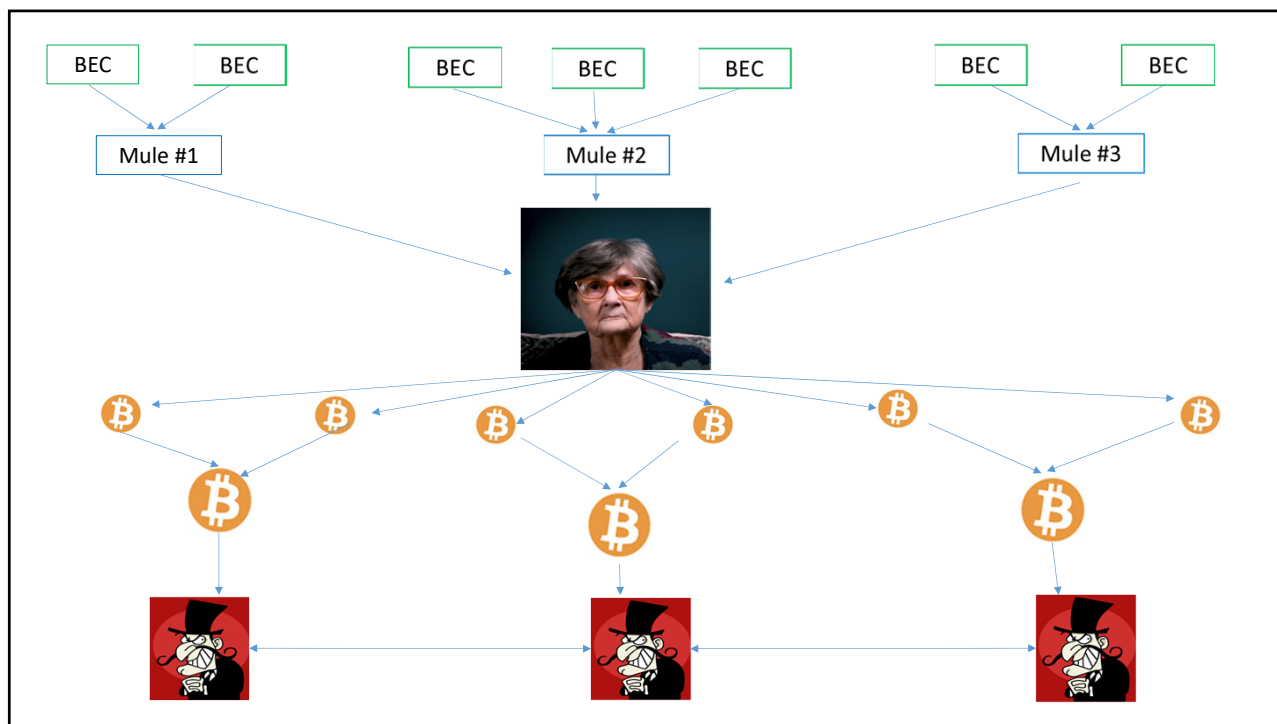
Caller ID Spoofing, Vishing and Smishing



11



12



13

From: Guy Eunoe [mailto:Guy.Eunoe@smithandonovan.com]
 Sent: Monday, December 18, 2017 1:40 PM
 To: [REDACTED]
 Cc: [REDACTED]
 <[REDACTED]>
 <[REDACTED]>
 Subject: Wire Instructions: D907 IMF HQ2











[REDACTED]

Reference to your correspondence with Sandy, kindly find attached the Wire Instructions to our Trust Account to receive the payment (\$161,246.00 ,less 5%) = \$153,183.00).

Kindly acknowledge receipt, and we look forward to receiving the wire confirmation from you either today or today (for our record and audit purpose).

Thanks,

14

 <p>DECEMBER 19</p>	 <p>1:10 PM: \$10,000</p>		
 <p>DECEMBER 20</p>	 <p>10:10 AM: \$10,000</p>	 <p>10:21 AM: \$10,000</p>	 <p>10:47 AM: \$81,080</p>
 <p>DECEMBER 21</p>	 <p>9:54 AM: \$10,000</p>	 <p>10:54 AM: \$10,000</p>	 <p>2:04 PM: \$10,000</p>

15

Los Angeles Times

CALIFORNIA

FBI takes down alleged Nigerian fraudsters in \$46-million case based in Los Angeles



For the record:
5:28 p.m. Aug. 23, 2019: A previous version of this article said the suspects are accused of stealing at least \$46 million. The alleged thefts totaled \$6 million, and authorities say the suspects attempted to steal an additional \$40 million.

SUBSCRIBERS ARE READING >

CALIFORNIA FOR SUBSCRIBERS
 How a man's death in Beverly Hills exposed a sprawling Hollywood drug delivery business

POLITICS FOR SUBSCRIBERS
 California set off a biofuel boom — but can it

Federal agents hold a detainee, second from left, at a downtown Los Angeles parking lot after pre-dawn raids Thursday. (Associated

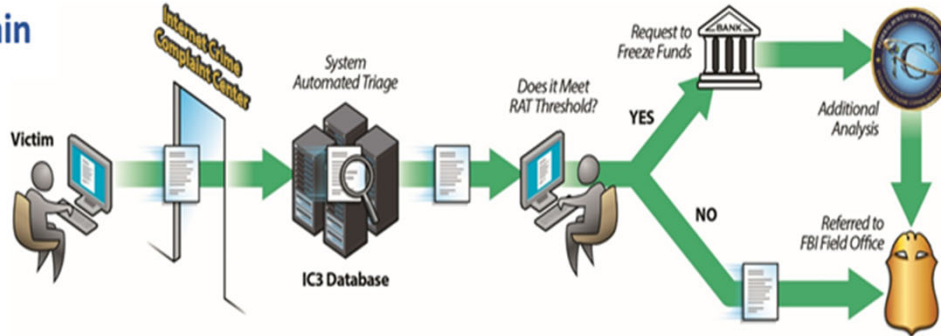
16

IC3 RECOVERY ASSET TEAM



The Internet Crime Complaint Center's Recovery Asset Team (RAT) was established in February 2018 to streamline communication with financial institutions and assist FBI field offices with the freezing of funds for victims who made transfers to domestic accounts under fraudulent pretenses.

Kill Chain

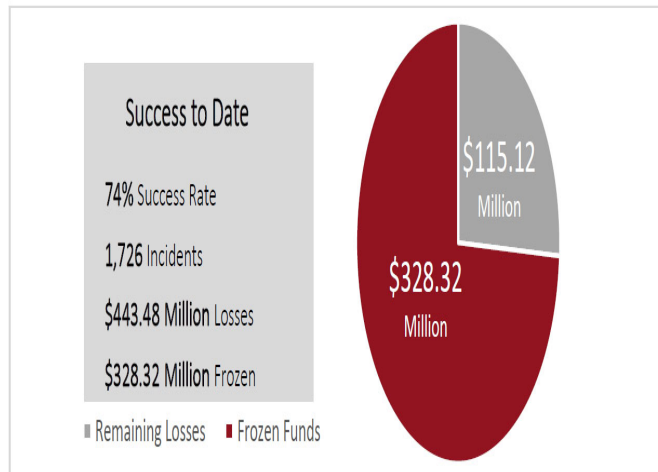


17

Financial Fraud Kill Chain

Notify ***immediately***:

1. Financial Institution
2. IC3.gov
3. Local FBI Office



18

Financial Fraud Kill Chain

The following information is provided to the FinCEN Rapid Response Team requesting initiation of the FFKC:

- Victim name
- Victim location
- Originating Bank Name
- **Originating Bank Account Number**
- **Beneficiary Name**
- *****Beneficiary Bank Account Number*****
- Beneficiary Bank Location
- Intermediary Bank Name
- SWIFT Number
- Date of Transfer
- Amount of Transfer
- Summary of Incident

19

Recognition



Understand that all funds related to the transaction are targets:

- Seller Proceeds
- **Buyer Closing Funds**
- Funding Loan
- **Payoff Loan Funds**
- Commissions

20

20

Payoff Fraud



Fraudsters are sending “updated” payoffs to settlement agent with altered banking information:

- Settlement agent receives an email purportedly from borrower or borrower’s representative asking for a copy of payoff
- Borrower or representative then advised they noticed an error, or that subsequent payment had been sent since the first payoff and an “updated” one has been requested from lender
- “updated” payoff sent via email, Fax (most common), eFax and courier service.
- Differences: banking information and removal of mailing payment option

21

21

Example of Attempt to Payoff Funds

From: Jane Doe<janedoerealtor@yahoo.com>
Sent: Thursday, January 27, 2022 2:17 PM
To: Settlement Agent<SA@fnf.com>
Subject: URGENT PAYOFF; Property Address

IMPORTANT NOTICE - This message sourced from an external mail server outside of the Company.
The seller would like to review the payoff for closing. Please kindly send.

Jane Doe Realtor

22

22

Example of Attempt to Payoff Funds

From: Jane Doe<Jane Doerealtor@yahoo.com>
Sent: Monday, January 31, 2022 1:26 PM
To: Settlement Agent<SA@fnf.com>
Subject: URGENT PAYOFF; Property

IMPORTANT NOTICE - This message sourced from an external mail server outside of the Company.

The seller said an updated payoff was sent to the title last week good through remains the same only some updated clause, **Kindly** check your fax or mail and **Advise** to use of the updated payoff and also let me know the changes in the payoff

Jane Doe Realtor

23

23

Example of Attempt to Payoff Funds

Correct Payoff

If the loan is less than 30 days past due the Principal Reduction Amount is deducted from the total amount due.

Funds received on or after February 04, 2022 will require an additional \$ 122.15 interest per Day.

Payoff funds being sent by mail must be directed to:

Rushmore Loan Management Services LLC
Attn: Payoff Department
15480 Laguna Canyon Road Suite 100
Irvine, CA 92618

These figures are subject to final verification by the Noteholder. Figures may be adjusted if any check/money order previously received is rejected by the institution upon which it was drawn.

If the loan is less than 30 days past due the Principal Reduction Amount is deducted from the total amount due.

Funds received on or after February 04, 2022 will require an additional \$ 122.15 interest per Day.

Fraudulent Payoff

These figures are subject to final verification by the Noteholder. Figures may be adjusted if the wire previously received is rejected by the institution upon which it was drawn.

24

24

Example of Attempt to Payoff Funds

Correct Payoff

Please wire funds to:

Institution: Wells Fargo
ABA Routing Number: Bank 121000248
Account Number: 4122029028
Reference: Loan Number
Borrower Name

Attn: Cashiering Department
Beneficiary: Rushmore Loan Management LLC
15480 Laguna Canyon Road
Suite 100
Irvine, CA 92618

Customer Care: 888-504-6700

Fraudulent Payoff

Please wire funds to:

Institution: JPMorganChase Bank
ABA Routing Number: 021000021
Account Number: 509236096
Reference: Loan Number
Borrower Name

Attn: Cashiering Department
Beneficiary: Rushmore Loan Management LLC
15480 Laguna Canyon Road
Suite 100
Irvine, CA 92618

Customer Care: 805-230-4115

25

25

Spoofting technology for fraudsters

Spoofting Websites such as emkei.cz that send emails, along with attachments that appear to be sent from legitimate sender.

- These emails are accepted to most email accounts due to lack of end point security despite not being an authorized sender.



I just tried to call you thrice just now but it would not go through. Outlines maybe having problem due to the bad reception area that I'm.

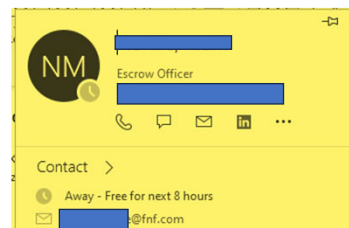
The matter has been turned over to our legal department, You should have an update tomorrow.

Thank you,

Escrow Officer
Florida Agency Services



Fidelity National Financial
A National Office of Chicago | Commonwealth | Fidelity



26

26

Another attempt to Divert Payoff

PAYOFF REQUEST [REDACTED]

SL [REDACTED]@saalemfive.com>
to [REDACTED]

Follow up.
Click here to download pictures. To help protect your privacy, Outlook prevented automatic download of some pictures in this message.

Payoff [REDACTED].pdf
744 KB

Please see attached payoff and wiring instructions

Thank You,

Actual email was sent from host name "emkej[.]cz" from "coolhousina[.]net" domain . IP address was from Malaysia

Wed 6/15/2022 12:14 PM

27

27

Attached Payoff

SalemFive
210 ESSEX ST
SALEM, MA 01970

Payoff Statement
Date: 06-15-2022
Account: [REDACTED]

TO: [REDACTED]
EMAIL: [REDACTED]@saalemfive.com
NEXT PAYMENT DUE DATE: 07-01-2022
NEXT RE TAX DUE: 11-01-2022

Call 800 850-5000 with questions regarding your statement.

Balance Description	Due Bank	Due Customer	Per Diem After 07-01-2022
Note Interest	1,176.14		32.30
Note Balance	336,807.71		
Escrow Balance	228.13		
Escrow Interest	(0.25)		0.00
Payoff Processing Charge	25.00		
Totals	338,236.73	0.00	

THIS PAYOFF REQUEST CONSISTS OF TWO PAGES. THIS PAGE PROVIDES THE PAYOFF FIGURES. THE SECOND PAGE PROVIDES OUR POLICIES AND PROCEDURES FOR HANDLING THE PAYOFF. PLEASE REVIEW THE SECOND PAGE CAREFULLY, AS WE REQUIRE YOU TO FOLLOW THESE POLICIES AND PROCEDURES IN ORDER FOR US TO PROPERLY PROCESS THIS PAYOFF.

** THIS PAYOFF STATEMENT EXPIRES 30 DAYS FROM THE ABOVE DATE **.

SalemFive

SPECIAL PROCEDURES FOR SALEM FIVE TO SALEM FIVE REFINANCES
If this is a Salem Five to Salem Five refinance, interest should only be collected through the funding date of the new loan. On that date, we will credit your Salem Five escrow/advance account for the new loan proceeds and debit the account to payoff the refinanced loan. DO NOT SEND US PAYMENT for the payoff of the refinanced loan, however you must send us recording information in order for us to prepare a discharge.

IMPORTANT INFORMATION REGARDING THIS PAYOFF STATEMENT

- Our policies for revisions to this payoff statements**
This statement is effective through the payoff date listed, and will not be honored more than 30 days from the request date at the top of the statement. If the payoff will not occur within 30 days of the request date, you must request a revised payoff statement. We do not provide payoff figures or revisions to payoff figures verbally.
- Payment cut-off time and policies regarding collection of payoff**
Interest must be paid through the date payoff funds are received in our office. Payoff funds must be received by 2:00 p.m. Eastern Time, Monday through Friday (excluding holidays) for same day credit. We only accept payoffs by domestic wire. If you need to verify wire instructions or have any questions, please contact us at (818) 869-1905. Wire to: Bank of America, N/A. Beneficiary: Carroll Salem Five Payoff Clearing Account, ABA #: 026009593, Account #: 898127572636. Reference: [REDACTED]
- Our policies for handling monies held in escrow**
Funds being held in escrow are credited towards the amount required to pay the loan in full. Therefore, a borrower may only expect a refund from us if the amount remitted to pay the loan in full is in excess of the required payoff amount less any escrow balance.
- Our policies regarding collecting payments and assessing late fees prior to payoff of the loan**
The borrower is expected to make all payments due on this loan up to the date it is paid-in-full. Late charges will continue to be assessed according to the terms of the loan agreement and the payoff amount must include any late charges assessed between the date of this statement and the date payoff funds are received in our office.
- Our procedures for discontinuing automatic payment services**
If this loan is set-up for automatic payments from a Salem Five account, or via ACH from another financial institution, the borrower must notify us in writing to stop this service.
- Our procedures for payment of escrow items after issuing a payoff statement**
Salem Five will not be responsible for the payment of taxes, any type of insurance or other escrow items as of the date of this payoff statement. It is the closing agent's responsibility to notify us if this loan will not be paid off so that this restriction can be removed from the account. We will not be responsible for fees or charges incurred as a result of the closing agent's failure to notify us that this loan is not being paid-in-full.

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Payoff Fraud- Protective Measures



- Obtain payoff statements as early as possible in the transaction to allow sufficient time to properly review and verify prior to disbursement.
- Compare banking information on all payoffs received from same payee.
- Verbally verify banking information and payoff amount directly with payee using known, trusted numbers rather than information from the payoff
- Use repetitive wire information within production systems or other secure databases to use for future wires made to the same payee. The repetitive information should be locked to restrict alterations.
- When verbal verification via a known, trusted number cannot occur, consider other payment options, including overnighting a check to the payee.



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Check, Call, Wait

Check - Email addresses, phone #

Call – A known number

Wait – Resist the urge to act quickly



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Rethink Communications



- Educate your clients! Provide expectations on how and when closing funds should be provided.
- Don't assume all emails received are legitimate. Be careful about opening attachments and downloading files from emails, even if it appears to be from someone you know.
- Communicate with transaction participants outside of email whenever possible.
- Limit transmission of information to participants that need it.
- If advised funds have been wired by any party, immediately ask when and where.



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Risk Management



- Always be suspicious of unsolicited e-mail (spam) from unknown parties or unexpected emails from known parties. DO NOT open spam e-mail, click on links in the e-mail or open attachments.
- Remind clients and customers to never wire money without double-checking that the wiring instructions are correct directly with the intended payee.
- Consider implementing a standard warning notice to your customers of the scam



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Risk Management



- **Avoid** sending sensitive or confidential information via standard e-mail.
- Obtain contact information for transaction participant's disbursement instructions for verification.
- Use the "Forward" option rather than the "Reply" option to respond to emails to ensure the intended recipient's correct e-mail is used.
- Establish other communications channels, such as a known, trusted telephone number to verify transactions and consider creating a password/passphrase

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Steps to take if fraud occurs:



See ALTA Rapid Response Plan for Wire Fraud Incidents:

1. The account owner should contact the financial institution immediately upon discovering the fraudulent transfer and request a recall due to fraud.
2. Request that the financial institution contact the corresponding financial institution where the fraudulent transfer was sent asking for an account freeze.
3. Notify the title/escrow company involved in the transaction
4. File a complaint with the Internet Crime Complaint Center at www.ic3.gov, regardless of the dollar amount
5. Contact your Federal Bureau of Investigation (FBI) office and Secret Service office.

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Another type of Wire Fraud- Seller Impersonation



- When property is vacant or non-owner occupied
- When property is free and clear
- When property has different address than the owner's address or tax address
- When property is for sale or sold below market value or recent sales price
- Seller wants a quick sale, generally less than 3 weeks with a cash buyer
- Seller claims to be out of state or country and will not attend signings and is difficult to reach via phone or video call.
- Seller demands proceeds to be wired and wants to use own notary
- Seller refuses or is unable to complete multifactor authentication or identity verification

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Seller Impersonation- Precautions



Contact seller using independent sources:

- Contact directly at an independently confirmed phone number
- Conduct independent research of property ownership through the county land records and recent picture of property owner and current seller
- Mail the seller at the address on tax records or appraisal district, property address, and grantee address (if different)
- Ask real estate agent if they have personal verified knowledge of the seller's identity and how the agent received the lead.

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Seller Impersonation- Precautions



Manage the Notarization:

- Require the notarization be performed by a vetted and approved remote online notary
- If remote online notarization is not available, select the notary. Ex- arranging seller to go to an attorney's office, title agency, or bank that uses a credential scanner or MFA to execute documents



Verify the seller's identity:

- Send the seller a link to perform identity verification (KBA, credential analysis, etc.)
- Run seller's email and phone number through a verification program
- Ask conversational questions about property that is not readily available in public records

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Seller Impersonation- Precautions



Use the Public Record:

- Compare the seller's signature to previously recorded documents
- Compare sales price to the appraisal, historical sales price, or tax appraised value



Control the Disbursement:

- Use a wire verification service or require a check for proceeds

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REMEMBER THE MOTTOS



CHECK, CALL, WAIT
and
INQUIRE BEFORE YOU WIRE

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CLASSIFICATION



Questions?

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WASHINGTON FIELD OFFICE

CLASSIFICATION

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THE ETHICS OF NEGOTIATION AND ADVERSARIES' MISTAKES

Hypotheticals

Thomas E. Spahn
McGuireWoods LLP

Hypothetical 1

You and your client are heading up to the fifth floor of the local courthouse for a trial in which your client stands to win a large verdict if things go well. When the elevator door opens on the third floor to let someone off there, you and your client both notice a large collection of bankers boxes with labels indicating that they are your adversary's lawyer's exhibits and notes. Your client immediately presumes that the boxes were delivered to the wrong floor, and understandably predicts that the adversary's lawyer will panic if she cannot find her files. Your client directs you not to alert the adversary or its lawyer about the mistaken delivery, unless the court or the adversary's lawyer directly asks if you know where her files might be. Sure enough, when you arrive in the courtroom and the bailiff announces that the judge is ready to start the trial, the other side's lawyer becomes almost delirious.

What do you do?

- (A) You must tell the adversary's lawyer about the mistaken delivery, over your client's objection.
- (B) You may tell the adversary's lawyer about the mistaken delivery, over your client's objection.
- (C) You must follow your client's direction.

Hypothetical 2

You represent an oil refinery accused by a local newspaper of generating emissions that make local residents ill. None of the residents have filed lawsuits or even contacted your client, but you worry that the articles might stir up local opposition to your client's operations. You plan to interview residents in several nearby neighborhoods, and ask them whether they have experienced any problems -- but you wonder about any disclosure obligations about your role.

What must or may you tell a local resident before beginning a substantive conversation?

- (A) You must disclose to the resident your role in representing the oil refinery.
- (B) You must disclose to the resident your role in representing the oil refinery, but only if you know or reasonably should know that the resident misunderstands your role.
- (C) You may not disclose to the resident your role in representing the oil refinery, unless your client consents.

Hypothetical 3

You represent the father of a young man who committed suicide while incarcerated in the county jail. You contacted a county corrections officer, who knew that you would probably add him to the litigation you plan to file. Although there is some dispute about your conversation with the officer, he later claimed that you told him that he would be covered by the county's insurance policy. The county has claimed that you violated the ethics rules prohibiting lawyers from giving any legal advice to adverse unrepresented persons.

If you told the corrections officer that he would be covered by the county's insurance policy, have you violated an ethics rule?

- (A) YES
- (B) NO

Hypothetical 4

You represent the wife in a divorce case. The husband has not retained a lawyer. You plan to communicate with the husband, and explain to him that you represent his wife. You would also like to send him a property settlement agreement, and ask him to sign it.

May you ask an unrepresented person to sign legal documents as long as you describe your role in representing the adversary?

- (A) YES
- (B) NO

Hypothetical 5

In your new position as a prosecutor, you have been increasingly dealing with undocumented immigrant defendants. Some of them do not have lawyers, and you wonder whether you can propose plea agreements to unrepresented criminal defendants if their acquiescence to the agreement would render them vulnerable to deportation.

What do you do?

- (A) You must disclose to the undocumented immigrant the risks of acquiescing to the plea agreement.
- (B) You may disclose to the undocumented immigrant the risks of acquiescing to the plea agreement, but you don't have to.
- (C) You may not disclose to the undocumented immigrant the risks of acquiescing to the plea agreement.

Hypothetical 6

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?
- (A) YES
- (B) NO
- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?
- (A) YES
- (B) NO
- (c) With your client's consent, may you tell the adversary that your "bottom line" purchase price in a deal is \$75,000 – if you and your client know that your client will actually pay \$85,000 if you must increase the offer to close the deal?
- (A) YES
- (B) NO

Hypothetical 7

You are trying to settle a complex case involving both automobile liability policies and workers compensation coverage. The lawyer representing your adversary clearly does not understand her client's right to subrogation in connection with proceeds of an uninsured motorist policy. You conclude that she does not understand the law in this area.

What do you do?

- (A) You must disclose the adverse law to your adversary.
- (B) You may disclose the adverse law to your adversary, but you don't have to.
- (C) You may not disclose the adverse law to your adversary, unless your client consents.

Hypothetical 8

On behalf of your client, you just made a \$100,000 offer to buy land from a farmer and his wife (who are represented by an unsophisticated lawyer). You know that the farmer thinks that your client's offer contains a provision under which your client would assume an existing mortgage -- although the offer does not.

What do you do?

- (A) You must disclose the absence of the provision.
- (B) You may disclose the absence of the provision, but you don't have to.
- (C) You may not disclose the absence of the provision, unless your client consents.

Hypothetical 9

You are representing the seller in negotiating a complex transaction memorialized in a 50-page draft agreement. One provision indicates that buyer's sole remedy for seller's breach of a covenant not to compete is return of the consideration allocated in the agreement for the covenant not to compete. Near the end of the drafting process, the buyer amends another provision in the agreement so that only one dollar is allocated to consideration for the covenant not to compete -- which essentially renders the covenant meaningless (because seller's breach would at most result in one dollar of damages). When you advise your client of the buyer's mistake, she directs you to keep it secret.

What do you do?

- (A) You must disclose the buyer's mistake.
- (B) You may disclose the buyer's mistake, but you don't have to.
- (C) You may not disclose the buyer's mistake, unless your client consents.

Hypothetical 10

Since late yesterday afternoon, you have been furiously exchanging draft contracts with a transactional counterparty. You finally reached agreement on the last few provisions, which the adversary's lawyer says she will write up while you head home for an hour or two of sleep. When you returned to the office this morning to check what the other lawyer prepared, you realize that she left out an important term (favorable to her client) to which you had agreed during the final negotiation discussion.

- (a) What do you do when dealing with your client?
- (A) You must disclose the adversary's mistake to your client.
 - (B) You may disclose the adversary's mistake to your client, but you don't have to.
 - (C) You may not disclose the adversary's mistake to your client.
- (b) What do you do when dealing with the adversary's lawyer?
- (A) You must disclose the adversary's mistake to the adversary's lawyer.
 - (B) You may disclose the adversary's mistake to the adversary's lawyer, but you don't have to.
 - (C) You may not disclose the adversary's mistake to the adversary's lawyer, unless your client consents.

Hypothetical 11

You generally represent plaintiffs in personal injury cases. Months ago, you reached a very complicated settlement arrangement with an insured defendant and its insurance company, which involves the latter making monthly payments to your client over the course of ten years. You told your client what payments to expect from the insurance company. After your client told you the first few checks from the insurance company exceeded what you told the client to expect, you determine that the insurance company apparently has miscalculated the amount it should pay under the complicated settlement agreement.

What do you do?

- (A) You must disclose the miscalculation to the insurance company.
- (B) You may disclose the miscalculation to the insurance company, but you don't have to.
- (C) You may not disclose the miscalculation to the insurance company, unless your client consents.

Hypothetical 12

You have not seen a judge quite as angry as this morning, when he asked you why you had not told the court and the litigants about your plan to declare bankruptcy late yesterday afternoon. The court had set aside three weeks for a trial which was set to start today, but which has now been put off by the bankruptcy filing. The court pointed out that your client's adversary had brought in witnesses from across the country, including very expensive expert witnesses. The court also noted the jury panel's inconvenience. The court bluntly tells you that she is inclined to severely sanction you for what you did -- unless you can convince her that your confidentiality duty prevented you from disclosing your client's bankruptcy plans.

What do you do?

- (A) You must disclose your client's bankruptcy plans to the court.
- (B) You may disclose your client's bankruptcy plans to the court, but you don't have to.
- (C) You may not disclose your client's bankruptcy plans to the court, unless your client consents.

Hypothetical 13

You are defending a young mother against a charge that she murdered her infant daughter because her childcare responsibilities impeded her social life. The prosecution has gathered damaging entries from your client's home computer, but appears to have overlooked some even more incriminating entries -- showing that someone used your client's computer to do a Google search for "fool-proof suffocation methods" on the day that your client's daughter was last seen alive.

What do you do?

- (A) You must disclose the incriminating searches to the prosecution.
- (B) You may disclose the incriminating searches to the prosecution, but you don't have to.
- (C) You may not disclose the incriminating searches to the prosecution, unless your client consents.

Hypothetical 14

You represent the plaintiff in a personal injury case. After several months of intense negotiations, it appears that you are nearing a settlement agreement with the defendant. However, you just learned that your client was killed last night in a car accident.

What do you do about your client's death?

- (A) You must disclose your client's death to the adversary.
- (B) You may disclose your client's death to the adversary, but you don't have to.
- (C) You may not disclose your client's death to the adversary.

Hypothetical 15

As the other side in a trial closes its case, you realize that the adversary's lawyer forgot to move into evidence a fairly important exhibit. You quickly huddle with your co-counsel to see what (if anything) you should do. From your experience, the judge handling the case would almost always allow a party to temporarily reopen its case to admit an exhibit like this.

What do you do?

- (A) You must disclose the mistake to the adversary.
- (B) You may disclose the mistake to the adversary, but you don't have to.
- (C) You may not disclose the mistake to the adversary, unless your client consents.

Hypothetical 16

Your client asked you to check with the other side's lawyer (with whom you have a very friendly relationship) to see if the other side intends to appeal a trial victory that you won several weeks ago. When you call the other lawyer to ask about her intent, you learn that the other side intends to appeal -- but quickly realize that the other lawyer has miscalculated the appellate deadline. You do not say anything about it during the call, but reflect upon this issue immediately after hanging up.

What do you do?

- (A) You must disclose the miscalculation to the adversary.
- (B) You may disclose the miscalculation to the adversary, but you don't have to.
- (C) You may not disclose the miscalculation to the adversary, unless your client consents.

Hypothetical 17

You have spent years earning a good reputation in your local court, but you worry that a troublesome client's actions might destroy it. In a hearing yesterday, you made several material factual representations to the court based on what your client had earlier told you. After the hearing, he confessed that some of the factual representations were wrong. Although your representations to the court did not constitute evidence, you immediately told your client that you had to correct your misstatements. However, he knew enough about your ethics duties to insist that you maintain the confidentiality of your post-hearing discussion and his confession -- and not correct your earlier representations.

What do you do?

- (A) You must disclose the correct facts to the court.
- (B) You may disclose the correct facts to the court, but you don't have to.
- (C) You may not disclose the correct facts to the court, unless your client consents.

Hypothetical 18

In your role as your firm's Ethics Counsel, you received urgent calls from two colleagues preparing for separate hearings set to start in a few hours.

First, one colleague thinks that the adversary's lawyer has not discovered your firm's client's guilty plea to bank fraud about fifteen years ago. That would be material in the upcoming hearing, and your colleague wonders whether he must alert the court to that very harmful fact if the other side does not bring it up.

The second call came from a colleague preparing to argue for a TRO, which the would-be adversary will not attend. She wonders if she must advise the court of an earlier lawsuit in which her client was found liable for stealing an employer's trade secrets. That fact would be damaging in your colleague's efforts to obtain a TRO for her client.

- (a)** Must your colleague advise the court of his client's earlier bank fraud guilty plea?

 - (A)** YES
 - (B)** NO

- (b)** Must your colleague advise the court of her client's earlier loss in the trade secrets case?

 - (A)** YES
 - (B)** NO

Hypothetical 19

Through several years of extensive discovery and frequent hearings in state court litigation, you and your colleagues have always been more diligent than your adversary's lawyers. The latest upcoming hearing is no exception. Your adversary's brief fails to cite several unfavorable decisions that one of your brightest new associates has found. One of the unfavorable decisions is from the circuit court where you are litigating, and another even worse decision is from a circuit court in another part of your state.

When you advised your client of the bad decisions, she asked you to keep that research confidential -- relying on some of your own statements to her about the breadth of your state's confidentiality duty.

- (a) What do you do about the unfavorable law from your circuit court?
- (A) You must disclose the adverse law to the court.
 - (B) You may disclose the adverse law to the court, but you don't have to.
 - (C) You may not disclose the adverse law to the court, unless your client consents.
- (b) What do you do about the unfavorable law from the other circuit court?
- (A) You must disclose the adverse law to the court.
 - (B) You may disclose the adverse law to the court, but you don't have to.
 - (C) You may not disclose the adverse law to the court, unless your client consents.

Hypothetical 20

You have been worried for weeks about your client's fate in an upcoming hearing. She had already been convicted of one check-kiting crime and the judge has a reputation for toughness on repeat offenders. To your surprise, when the judge asks the prosecutor if your client has any prior convictions, the prosecutor tells the judge that there have been no prior convictions. Your mind starts to race as you consider what you should do.

- (a) What do you do?
 - (A) You must disclose the prosecutor's mistake to the court.
 - (B) You may disclose the prosecutor's mistake to the court, but you don't have to.
 - (C) You may not disclose the prosecutor's mistake to the court, unless your client consents.

- (b) If the prosecutor turns to your client and asks "Right?" may you and your client remain silent?

- (c) If the judge asks "Is that right?" may you and your client remain silent?

Hypothetical 21

You represented a criminal defendant in a case tried by a judge without a jury. The judge announced from the bench that she found your client guilty of a felony. However, you were pleasantly surprised, and bit perplexed, when you received the court's final order -- because the judge mistakenly marked the "misdemeanor" box on the post-verdict form.

What do you do?

- (A) You must disclose the mistake to the court.
- (B) You may disclose the mistake to the court, but you don't have to.
- (C) You may not disclose the mistake to the court, unless your client consents.

THE ETHICS OF NEGOTIATION AND ADVERSARIES' MISTAKES

Hypotheticals and Analyses*

Thomas E. Spahn
McGuireWoods LLP

* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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Difference Between Ethics and Professionalism

Hypothetical 1

You and your client are heading up to the fifth floor of the local courthouse for a trial in which your client stands to win a large verdict if things go well. When the elevator door opens on the third floor to let someone off there, you and your client both notice a large collection of bankers boxes with labels indicating that they are your adversary's lawyer's exhibits and notes. Your client immediately presumes that the boxes were delivered to the wrong floor, and understandably predicts that the adversary's lawyer will panic if she cannot find her files. Your client directs you not to alert the adversary or its lawyer about the mistaken delivery, unless the court or the adversary's lawyer directly asks if you know where her files might be. Sure enough, when you arrive in the courtroom and the bailiff announces that the judge is ready to start the trial, the other side's lawyer becomes almost delirious.

What do you do?

- (A) You must tell the adversary's lawyer about the mistaken delivery, over your client's objection.
- (B) You may tell the adversary's lawyer about the mistaken delivery, over your client's objection.
- (C) You must follow your client's direction.

(C) YOU MUST FOLLOW YOUR CLIENT'S DIRECTION.

Analysis

It is important to distinguish between ethics and professionalism/civility.

Every state's ethics rules represent a balance between lawyers' primary duty to diligently represent their clients, and some countervailing duty to others within the justice system (or sometimes, to the system itself). In many situations, lawyers following the ethics rules might have to take steps that the public could consider unprofessional. For example, lawyers often must maintain client confidences when the public might think they should speak up -- disclosing a client's past crime, warning the

victim of some possible future crime, etc. In less dramatic contexts, lawyers generally must remain silent if their adversary's lawyer misses some important legal argument or defense, etc. Thus, ethics principles focus on lawyers' duties to their clients, and the limited ways in which those duties can be "trumped" by duties to others.

In contrast, professionalism has a much more modest focus. Professionalism speaks to lawyers' day-to-day interactions with other lawyers, with clients, with courts, and with others. Professionalism involves courtesy, civility, and the Golden Rule. When the ethics rules require lawyers to disagree with adversaries or their lawyers, professionalism calls for lawyers to do so without being personally disagreeable.

Historical Articulations

Lawyers have always faced the tension between: (1) their ethical duty to diligently serve their clients; and (2) their impulse to act courteously.

In 1820, one of the greatest English lawyers of the age – Lord Brougham – articulated lawyers' ethics duty of diligence in his defense of Queen Caroline in George IV's attempt to divorce her.

Lord Brougham, in his defense of Queen Caroline, in her divorce case, told the House of Lords: "I once before took occasion to remind your Lordships, which was unnecessary, but there are many whom it may be needful to remind, that an advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world -- that client and no other. . . . Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection.

Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (Dec. 1951), at 3-4.

Lord Brougham later explained his vigorous statement's goal -- threatening to disrupt English politics by disclosing that George IV was ineligible to sit on the throne because George had earlier been secretly married to a Catholic.

The real truth is, that the statement was anything rather than a deliberate and well-considered opinion. It was a menace, and it was addressed chiefly to George IV, but also to wiser men, such as Castlereagh and Wellington. I was prepared, *in case of necessity*, that is, in case the Bill passed the Lords, to do two things -- first, to resist it in the Commons *with the country at my back*; but next, if need be, to dispute the King's title, to show he had forfeited the crown by marrying a Catholic, in the words of the Act, "as if he were naturally dead." What I said was fully understood by Geo. IV; perhaps by the Duke and Castlereagh, and I am confident it would have prevented them from pressing the Bill beyond a certain point.

Id. at 4. The threat worked – the House of Lords rejected George IV's attempt to divorce Caroline.

Of course, Lord Brougham presumably was a properly courteous English gentlemen – not a jerk.

About 150 years later, another paradigmatic gentleman – Justice Lewis Powell – wrote essentially the same thing.

- In re Griffiths, 413 U.S. 717, 72, n14 (1973) ("Lawyers frequently represent foreign countries and the nationals of such countries in litigation in the courts of the United States, as well as in other matters in this country. In such representation, the duty of the lawyer, subject to his role as an 'officer of the court,' is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be. (emphases added)

Lord Brougham and Justice Lewis Powell were not scorched-earth litigators, they were courtly gentlemen. Their statements reflect what they properly viewed as lawyers' prime duty – serving their clients.

But good lawyers often feel the pull of another, sometimes countervailing, impulse – to be courteous. Perhaps predictably, another polished English lawyer articulated this laudable urge – which he called "obedience to the unenforceable."

- John Fletcher Moulton, Law and Manners, Atlantic Monthly, July 1924, at 1, 1-2, 2, 4 ("In order to explain this extraordinary title I must ask you to follow me in examining the three great domains of Human Action. First comes the domain of Positive Law, where our actions are prescribed by laws binding upon us which must be obeyed. Next comes the domain of Free Choice, which includes all of those actions as to which we claim and enjoy complete freedom. But between these two there is a third large and important domain in which there rules neither Positive Law nor Absolute Freedom. In that domain there is no law which inexorably determines our course of action, and yet we feel that we are not free to choice as we would. . . . [I]t is the domain of Obedience to the Unenforceable. The obedience is the obedience of a man to that which he cannot be forced to obey. He is the enforcer of the law upon himself."; "This country which lies between Law and Free Choice I always think of as the domain of Manners. To me, Manners in this broad sense signifies the doing that which you should do although you are not obligated to do it. I do not wish to call it Duty, for that is too narrow to describe it, nor would I call it Morals for the same reason. It might include both, but it extends beyond them. It covers all cases of right doing where there is no one to make you do it but yourself."; "The dangers that threaten the maintenance of this domain of Manners arise from its situation between the region of Absolute Choice and the region of Positive Law. There are countless supporters of the movements to enlarge the sphere of Positive Law. In many countries – especially in the younger nations – there is a tendency to make laws to regulate everything. On the other hand, there is a growing tendency to treat matters that are not regulated by Positive Law as being matters of Absolute Choice. Both these movements are encroachments on the middle land, and to my mind the real greatness of a nation, its true civilization, is measured by the extent of this land of Obedience to the Unenforceable. It measures the extent to which the nation trusts its citizens, and its existence and area testify to the way they behave in response to that trust. Mere obedience to Law does not measure the greatness of a Nation. It can easily be obtained by a strong executive, and most easily of all from a timorous people. Nor is the license of behavior which so often accompanies the absence of Law, and which is miscalled Liberty, a proof of greatness. The

true test is the extent to which the individuals composing the nation can be trusted to obey self-imposed law."; "The great principle of Obedience to the Unenforceable is no mere ideal, but in some form or other it is strong in the hearts of all except the most depraved. If you wish to know how strong, remember the account of the Titanic disaster [1912]. The men were gentlemen to the edge of death. 'Ladies first.' What was that? Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good Manners in the sense in which I have used the phrase. The feeling of obedience to the Unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved." (emphases added).

Most if not all lawyers face this tension between their duty of diligence and their urge to be civil.

Applicable Ethics Rules

Most bars emphasize lawyers' duty to zealously represent their clients in circumstances like this.

- Philadelphia LEO 2007-5 (3/2007) (analyzing the following situation: "While the inquirer was in the process of finalizing the inquirer's client's complaint, a complaint was filed by the landlord's counsel, a copy of which was forwarded to the inquirer by facsimile. The inquirer has never agreed to accept service of original process on behalf of the inquirer's client, and in fact, does not have permission to do so." (emphasis added); holding that the lawyer did not have to disclose his lack of authority to accept service of process, despite the impending running of the statute of limitations; "In the inquirer's professional opinion, the statute of limitations on those claims runs in May 2007. Further, in the inquirer's opinion, the filing of the complaint will not toll the statute because of opposing counsel's failure to act to effectuate proper service. The inquirer has thoroughly discussed the situation with the inquirer's client who has declined to give the inquirer authority to accept service of the complaint or authority to advise opposing counsel of the inquirer's lack of authority." (emphasis added); "[T]he choice as to whether to authorize one's lawyer to accept original process is simply a prerogative of the client which involves no criminal or fraudulent act. Further, subject to exceptions not relevant here, Rule 1.6 governing confidentiality, prohibits a lawyer from revealing information relating to the representation of a client. As a result, in the absence of permission from the client, the inquirer would commit a violation of Rule 1.6 by notifying opposing of the inquirer's lack of authority to accept service." (emphasis added)).

- Virginia LEO 1215 (1/31/89) (explaining that a lawyer may not disclose to the court or the prosecutor that the court had granted a continuance at the prosecutor's request and set the lawyer's client's first degree murder trial one day after the expiration of the time during which the prosecution could proceed; noting that the lawyer's client's case was originally set for trial within the permissible time limit, but that the prosecution later sought to rearrange trial dates of various co-defendants, and had arranged for a trial on a day that the lawyer had earlier advised the court he was available; "You were not consulted before the request for the continuance, nor have you consented to the continuance of this case. You allege that the time limitation for the prosecution of this felony will expire on February 8, 1989, one day before the case is set for trial pursuant to § 19.2-243 of the Code of Virginia."; "It is the opinion of the Committee that since you have no legal obligation to reveal the expiration of the limitations period, you may not reveal it to the detriment of your client.").
- Virginia LEO 920 (6/11/87) (assessing a situation in which a lawyer representing an employer in appealing the award of unemployment compensation to three company employees saw one of the employees outside the Virginia Employment Commission office while preparing for a hearing on another employee's unemployment benefits; explaining that the employee told the lawyer that he intended to be a witness at his colleague's hearing; noting that the employee preparing for his hearing knew that his colleague was present, but represented himself pro se at the hearing and indicated at the end that he had no other evidence to present; further noting that when the Commission ruled in favor of the company, the losing employee hired a lawyer, who asked for the hearing to be re-opened, arguing that the company's lawyer should have disclosed the availability as a witness of the other employee whom the lawyer saw outside the hearing room; concluding that the lawyer was not obligated to tell the Virginia Employment Commission about the unhelpful witness, and in fact had a duty not to make this disclosure -- because it would have hurt the lawyer's client (the company)).

In the extreme, bars can discipline lawyers for extreme misconduct amounting to a lack of courtesy.

For instance, under ABA Model Rule 4.4(a),

[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 4.4(a) (emphasis added). The ABA Model Rules Preamble similarly explains that

[a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.

ABA Model Rules Preamble [5] (emphasis added).

The ethics rules thus set a very low minimum standard of conduct. They do not condemn all actions that "embarrass, delay, or burden" third persons. Instead, the ethics rules only prohibit actions that "have no substantial purpose" other than to prejudice third persons in that way. Not surprisingly, not many actions fall below this line. Even the dimmest of lawyers can normally find some other arguable reason to have undertaken an unprofessional act.

Ethics Rules Allowing Lawyers to Act Professionally

The ethics rules describe several occasions during the course of an attorney-client relationship when lawyers have more power than they might realize to act professionally -- without falling short of their clear ethical duty to act as diligent client advocates.

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].
- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional

discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

- Third, although lawyers must diligently represent their clients, "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client." ABA Model Rule 1.3 cmt. [1].
- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1] (emphasis added).
- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

All of these provisions provide a framework for lawyers to act professionally while fulfilling their ethical duties.

Some courts have taken a refreshing or even comical approach in reining in overly aggressive lawyer or governmental litigation behavior.

- Hyperphrase Techs., LLC v. Microsoft Corp., No. 02-C-647-C, 2003 U.S. Dist. LEXIS 24345, at *1, *2 (W.D. Wis. July 1, 2003) (addressing plaintiffs' complaint that defendant Microsoft had filed pleadings several hours late; "In a scandalous affront to this court's deadlines, Microsoft did not file its summary judgment motion until 12:04:27 a.m. on June 26, 2003, with some supporting documents trickling in as late as 1:11:15 a.m. I don't know this personally because I was home sleeping, but that's what the court's computer docketing program says, so I'll accept it as true."; noting that nine lawyers representing the plaintiffs "promptly filed a motion to strike the summary judgment motion as untimely. Counsel used bold italics to make their point, a clear sign of grievous iniquity by one's foe."; "Wounded though this court may be by Microsoft's four minute and twenty-seven second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion four minutes and thirty seconds late, with supporting documents to follow up to seventy-two minutes later.").

- Zaug v. Va. State Bar, 737 S.E.2d 914, 915, 916, 918, 919 (Va. 2013) (reversing the sanction of a dismissal de minimis of a lawyer who spoke for sixty seconds to a represented plaintiff who had called the lawyer's partner but was transferred to the lawyer; explaining what occurred during the phone call; "The parties agree that Yanira [a represented plaintiff, who along with two other plaintiffs was pursuing a malpractice case against a doctor represented by Zaug's firm] was distraught. According to Zaug [lawyer whose partner was representing the defendant doctor in the malpractice case, and to whom the call was transferred because the lawyer representing the doctor was not available], the call lasted approximately 60 seconds. It is undisputed that Yanira told Zaug about the toll the litigation was taking on her family and that Vincent's [Yanira's husband, and co-plaintiff] deposition needed to be cancelled. According to Zaug, she apologized and told Yanira that she could not help her and that Yanira needed to contact Cofield [plaintiffs' lawyer]."; "According to Zaug, she then attempted to terminate the call but Yanira resisted 'with an outpouring of emotion.' Yanira said that she had been unable to reach Cofield and that she wanted to speak to Nagle [Zaug's partner, who was representing the doctor in the malpractice case]. Zaug reiterated that '[w]e can't help you. You need to try to reach Ms. Cofield. I'll try to contact Mr. Nagle and they'll have to sort this out.' She then terminated the call."; noting that plaintiff unsuccessfully sought to disqualify Zaug as counsel, and that plaintiff's lawyer filed a bar complaint against Zaug; noting the circuit court's failure to make any factual findings about when Zaug knew the identity of the caller and the subject of the communication; noting that Rule 4.2 cmt. 3 requires lawyers to "immediately terminate" any communication initiated by a represented adversary; quoting Virginia's oath taken by all new lawyers that they will "professionally and courteously" demean" themselves, and Virginia's Principles of Professionalism published on the State Bar website; "Professionalism embraces common courtesy and good manners, and it informs the Rules and defines their scope. Accordingly, we will not construe the Rule to penalize an attorney for an act that is simultaneously non-malicious and polite."; "The Rule categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications when they are initiated by others. But the Rule does not require attorneys to be discourteous or impolite when they do so."; "In this case, it is undisputed that Zaug did not initiate the telephone call. There is no evidence in the record, and the State Bar does not assert, that Zaug intended to gain advantage from it. Likewise, there is no evidence that Zaug deliberately or affirmatively prolonged it. On these specific and narrow facts, and construing Rule 4.2 to advance behavior that is both professional and ethical, we conclude that no violation occurred in this case." (emphases added)).

Best Answer

The best answer is **(C) YOU MUST FOLLOW YOUR CLIENT'S DIRECTION.**

b 12/10, 1.16

Disclosing Lawyers' Role

Hypothetical 2

You represent an oil refinery accused by a local newspaper of generating emissions that make local residents ill. None of the residents have filed lawsuits or even contacted your client, but you worry that the articles might stir up local opposition to your client's operations. You plan to interview residents in several nearby neighborhoods, and ask them whether they have experienced any problems -- but you wonder about any disclosure obligations about your role.

What must or may you tell a local resident before beginning a substantive conversation?

- (A) You must disclose to the resident your role in representing the oil refinery.
- (B) You must disclose to the resident your role in representing the oil refinery, but only if you know or reasonably should know that the resident misunderstands your role.
- (C) You may not disclose to the resident your role in representing the oil refinery, unless your client consents.

(B) YOU MUST DISCLOSE TO THE RESIDENT YOUR ROLE IN REPRESENTING THE OIL REFINERY, BUT ONLY IF YOU KNOW OR REASONABLY SHOULD KNOW THAT THE RESIDENT MISUNDERSTANDS YOUR ROLE

Analysis

The ethics rules' treatment of lawyers' communications with unrepresented persons seems counterintuitive and open to mischief.

1908 ABA Canons

A 1908 ABA Canon dealt with ex parte communications with represented and unrepresented persons in the same canon -- entitled "Negotiations with Opposite Parties."

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It

is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

ABA Canons of Professional Ethics, Canon 9 (emphasis added). Thus, ABA Canon 9 prohibited lawyers' misrepresentation when dealing with unrepresented persons, and prohibited lawyers from advising such persons "as to the law."

In two 1930s opinions, the ABA provided some guidance.

In 1931, the ABA explained that a lawyer could not provide legal advice to a divorce adversary.

- ABA LEO 58 (12/14/31) ("A member of the Association asks whether a lawyer who is consulted by a client who desires to procure a divorce, may properly confer with the adverse party in an attempt to get the adverse party to agree to a divorce and whether he may, at a conference with his client and the adverse party, give the adverse party legal advice in an attempt to secure the adverse party's consent to what will, in effect, be an agreed action. It is, of course, assumed that the adverse party is not at the time represented by counsel. . . . It would be a violation of Canon 9 for a lawyer consulted by a client who desires to procure a divorce to confer with the adverse party in an attempt to get the adverse party to agree to the divorce. A conference of the nature indicated in the question might easily lead to the giving of advice to the adverse party. Canon 9 provides that 'it is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.' The proper procedure for the lawyer representing a party seeking a divorce, and having occasion to communicate with the adverse party not represented by counsel, would be to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel. But the disapproval herein expressed should not be understood as condemning the laudable and proper efforts which an attorney may make to bring about a reconciliation between his client and an adverse spouse not represented by counsel, when such efforts involve no discussion of the facts which furnish, or might furnish, grounds for divorce." (emphasis added)).

Two years later, the ABA issued another opinion in a non-divorce setting. The ABA again warned the lawyer against giving advice to an unrepresented injured worker,

but somewhat surprisingly explained that the lawyer could provide a settlement document for the worker to sign.

- ABA LEO 102 (12/15/33) ("A member of the Association requests an opinion from the committee on the following question: 'Under the Workmen's Compensation Law of this state, compromise and lump sum settlements must be made on the joint petition of the employee and employer and with the approval of a court of competent jurisdiction. In rare instances is the employee ever represented by an attorney. Usually, the attorney for the employer, or the employer's insurer, prepares the petition, agreement of settlement and judgment; the employee appears in proper person and the employer through his or its attorney. Is it unethical or professionally improper for the attorney to so act?' . . . The question presented is not difficult to answer as to professional propriety. Cannon 9, among other things, provides, 'It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel and he should not undertake to advise him as to the law.' It is not professionally improper for the master's attorney to prepare settlement papers between master and servant in a personal injury claim of the servant where the statute compensating the servant for personal injuries provides that compensation for the injury may be made in a lump sum settlement on the joint petition of the master and servant, and approved by a court of competent jurisdiction. When the servant has no attorney, and the master's attorney is called upon by the master to prepare the papers to effectuate the agreed settlement, the attorney in drafting the settlement papers should refrain from advising the servant about the law, and particularly must avoid misleading the servant concerning the law or the facts. The attorney also should advise the court that he represents the master, or insurer; that he has prepared the papers in settlement, which had theretofore been agreed upon between the master and the servant; that the servant has no counsel; and that the servant is present in court in proper person. Within these limitations, the committee sees no professional impropriety in an attorney so acting." (emphases added)).

1969 ABA Code of Professional Responsibility

The 1969 ABA Model Code of Professional Responsibility also combined lawyers' communications with represented and unrepresented person in the same rule, although the latter appeared in a separate subsection.

During the course of his representation of a client a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the

interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

ABA Model Code DR 7-104(A)(2) (footnote omitted).

A Mississippi Supreme Court decision discussed the difference between Canon 9 and the ABA Model Code provision.

Canon 9 was succeeded by DR 7-104 of the Code of Professional Conduct and Ethical Consideration 7-18. DR 7-104's prohibitory language expresses essentially the same mandate as did Canon 9, but there are noticeable differences. The language in DR 7-104(A)(2) speaks in terms of an unrepresented "person" rather than Canon 9's "party," omits the proscription against "misleading" such a person and, while Canon 9 proscribed giving an unrepresented person "advice" as to the "law," DR 7-104(A)(2) speaks merely of "advice" without the qualifying language. Nevertheless, ABA Informal Opinion No. 1140 (adopted January 20, 1970) declares that the effect of former Canon 9 and DR 7-104(A)(2) "appears to be substantially the same," and DR 7-104(A)(2) [""]therefore simply carries forward the meaning and intent" of Canon 9. See ABA Informal Opinion #1140.

Attorney Q v. Miss. State Bar, 587 So. 2d 228, 232 (Miss. 1991).

Shortly after the ABA adopted its 1969 ABA Model Code, it issued three opinions involving lawyers' ex parte communications with an unrepresented divorce adversary.

In 1970, the ABA held that a lawyer could not ask an unrepresented adversary to sign documents in which the adversary relinquished any rights.

- ABA Informal LEO 1140 (1/20/70) ("What violation of professional ethics is involved in obtaining from a defendant in a domestic relations case a 'waiver' such as is widely used in (State)? A copy [sic] of such waiver is attached.' The form in question waives the issuance of and service of summons, waives any right to contest the jurisdiction or venue of the court and agrees that the case be submitted to the court in term time or in vacation and without further notice to the defendant. The form also waives notice to take depositions and agrees that depositions may be taken at any time without notice and without formality. . . . If the party to whom the waiver is presented is not represented by counsel, then both the present Canon 9 and Disciplinary Rule 7-104(A)(2)

would seem to prohibit the procedure regarding which you have inquired. The former states: . . . It is, therefore, the opinion of the Committee under both the present Canons of Ethics and the Code of Professional Responsibility that a violation of proper ethical conduct would be involved in the procedure which you describe." (emphasis added)).

Approximately two years later, the ABA reaffirmed its earlier position, despite a new "no-fault" divorce statute.

- ABA Informal LEO 1255 (12/15/72) [Reconsideration of 1140] ("On July 6, 1972, the Legislature enacted a new 'no-fault' divorce Act (S17, LB-820). You sent us a copy of a form of 'Appearance and Responsive Pleading of Respondent' which has been prescribed by the Supreme Court of under Section 7 of said Act which directed the Supreme Court to prescribe the form of all pleadings required by the Act. Neither the Act nor the Court gave any instruction with regard to the subject of your inquiry: i.e., whether it is ethical to submit or to mail such an Appearance and Responsive Pleading to the other party in a domestic relations case for signature where that other party is not represented by an attorney, if the respondent is simultaneously advised to see the attorney of his choice and the plaintiff's attorney knows of no contested issue. You noted that this appears to be unethical under our Informal Opinion 1140 and ask that we reconsider that Opinion in the light 'of the enclosed pleading prepared by the Supreme Court of .' [sic] Since, on the facts you state, a Responsive Pleading is involved the plaintiff's lawyer would be improperly advising both parties. The fact that the Court prescribed the form of the Responding [sic] Pleading is irrelevant to the issue you present. The question is not before us whether in such a case a plaintiff's lawyer may properly submit to the respondent for signature a waiver of the issuance and service of the summons and complaint and entry of appearance. Your suggestion that in some such instances 'there was really nothing being contested' does not meet the requirement of Disciplinary Rule 7-104(A)(2) that an attorney should not represent both parties even if there is 'a reasonable possibility of . . . conflict' of interests. In our judgment the practice of the plaintiff's lawyer submitting such a pleading to an unrepresented defendant for signature in a domestic relations case is susceptible of abuse and is unethical." (emphasis added)).

About three months later, the ABA backed off a bit from its earlier position, separating prohibited legal advice from the permissible forwarding of documents to an unrepresented person for signature.

- ABA Informal LEO 1269 (5/22/73) ("Our Informal Opinion 1255, dated December 15, 1972, advised your partner that in the opinion of the

Committee it would be subject to abuse and unethical for an attorney to submit or mail an appearance and responsive pleadings to the other party in a domestic relations case for signature where the other party is not represented by an attorney. We also reaffirmed Informal Opinion 1140. The preparation and submission of responsive pleadings to an unrepresented party would in the opinion of the Committee constitute the giving of advice in contravention of DR 7-104(A)(2). Your letter of January 6, 1973, now raises the question of whether it would be proper for plaintiff's counsel in a domestic relations case to submit to an unrepresented defendant for signature a waiver of the issuance and service of summons and the entry of an appearance. As long as these documents are not accompanied by or coupled with the giving of any advice to the defendant, they would constitute only communication with an unrepresented party and, accordingly, would be ethical and proper as not being violative of the prohibitions of the Code." (emphasis added)).

These three ethics opinions (which dealt with divorce, as did many early legal ethics opinions) started with an understandable position equating lawyers' preparation for signature of legal documents with unethically providing of legal advice to an unrepresented person. But the ABA then shifted, permitting lawyers to provide such legal documents.

1983 ABA Rules of Professional Conduct

ABA Model Rule 4.3. In 1983, the ABA Model Rules took a different approach.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ABA Model Rule 4.3 (as of 1983).

A comment provided guidance.

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer

should not give advice to an unrepresented person other than the advice to obtain counsel.

ABA Model Rule 4.3 cmt. (as of 1983) (emphasis added). Thus, the 1983 ABA Model Rules not only dropped the advice prohibition to a comment, it also used the word "should" -- instead of articulating an absolute prohibition.

The Model Code Comparison surprisingly explained that the earlier ABA Model Code provision was not a "direct counterpart to the rule."

There was no direct counterpart to this Rule in the Model Code. DR 7-104(A)(2) provided that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel."

ABA Model Rules Code Comparison (as of 1983).

To be sure, there are some differences.

First, the 1969 ABA Model Code required lawyers' initial disclosure of their role -- but in a surprisingly limited set of circumstance. One might have expected the rule to always require such disclosure. But ABA Model Rule 4.3 only requires lawyers to: (1) avoid "state[ing] or imply[ing]" that the lawyer is "disinterested" (which would amount to a misrepresentation); (2) correct the "misunderstanding" of the unrepresented person, but only when the lawyer "knows or reasonably should know" that the unrepresented person "misunderstand the lawyer's role in a matter." This is a surprisingly narrow disclosure duty.

Second, ABA Model Rule 4.3 dropped into a comment the prohibition on lawyers giving advice. The ABA/BNA Journal cited a 2002 ABA report in explaining the reason for what the Journal describes as a demotion.

When the Model Rules of Professional Conduct replaced the Model Code in 1983, the prohibition against 'advice' was

demoted to the comment because of the 'difficulty of determining what constitutes impermissible advice-giving.' ABA Report to the House of Delegates, No. 401 (February 2002); Model Rule 4.3, Reporter's Explanation of Changes.

ABA/BNA Lawyers' Manual on Profession Conduct, 71:505, July 28, 2004.

Whatever the reason for the ABA's relegation to a comment of the prohibition on lawyers giving advice to unrepresented persons, the ABA apparently later regretted that move. A reporter's note in the 2000 Restatement discusses this.

The scope of ABA Model Rule 4.3 with respect to giving advice to an unrepresented nonclient is unclear. The ABA Model Rule, quoted above, plainly does not carry forward the prohibition of the ABA Model Code. Indeed, absence of such a prohibition has been regretted by the drafter of the ABA Model Rules. See 2 G. Hazard & W. Hodes, *The Law of Lawyering* § 4.3:102, at 747-48 (1991 supp.) (regretting decision of drafters of ABA Model Rules to omit prohibition against "giving advice" from ABA Model Rule 4.3).

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000) (emphasis added).

As in other areas, many states retained the advice prohibition in their rules.

[As of 2002], [e]ven of the jurisdictions adopting the Model Rules did, however, retain a version of the Model Code's advice prohibition in their black-letter rule. ABA Report to the House of Delegates, No. 401 (February 2002); Model Rule 4.3, Reporter's Explanation of Changes.

ABA/BNA Lawyers' Manual on Profession Conduct, 71:505, July 28, 2004.

The 2000 Restatement noted the same phenomenon.

On the other hand, the Comment to ABA Model Rule 4.3 states that "during the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." Whether the Comment is merely advisory or, if mandatory, whether it is consistent with the Rule itself has not been frequently determined in decided cases. . . .

Several jurisdictions have explicitly retained the prohibition of the ABA Model Code against giving legal advice.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000) (emphasis added).

As explained below, the ABA moved the advice prohibition back into the black letter rule in 2002.

Third, it was unclear whether the comment prohibited lawyers from giving advice ("other than the advice to obtain counsel") to unrepresented persons applied only to adverse unrepresented persons. The pertinent comment sentence does not explicitly state that, but the previous sentence implies it.

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

ABA Model Rule 4.3 cmt. (as of 1983) (emphasis added).

Some critics noted ABA Model Rule 4.3's confusion about the role of adversity in analyzing the communications.

The reporter's note in the 2000 Restatement (which is discussed more fully below) noted the first issue.

The heading of DR 7-104 refers to "one of adverse interest" (emphasis supplied). No similar language is found in either subpart of its operative text, and apparently no court has so limited the rule. ABA Model Rules of Professional Conduct, Rule 4.3 (1983) contains no similar heading. . . . On the other hand, the operative provisions of those rules, as well as the Section, come into play when the unrepresented nonclient is prejudicially misled. That presumably would

occur only in the context of adverse interests between the nonclient and the lawyer's client.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. c (2000).

ABA Model Rule 1.13. In another ABA Model Rule adopted in 1983, the ABA applied ABA Model Rule 4.3's basic principle in a specific setting -- when lawyers communicate with a corporate client's constituent.

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

ABA Model Rule 1.13(d) (as of 1983).

A comment provided some guidance.

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

When such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

ABA Model Rule 1.13 cmt. (as of 1983) (later numbered as cmt. [10], [11]).

Restatement

In 2000, the American Law Institute adopted its Restatement (Third) of Law Governing Lawyers (2000).

As in other areas, the Restatement articulated an approach that the ABA eventually adopted (the ABA Model Rules' 2002 changes are discussed below).

The Restatement predictably prohibits lawyers' representation when communicating with unrepresented parties, and then describes lawyers' disclosure obligation -- which follow the ABA Model Rules in recognizing the obligation only in certain circumstances.

In the course of representing a client and dealing with a nonclient who is not represented by a lawyer:

(1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and

(2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.

The Restatement (Third) of Law Governing Lawyers § 103 (2000).

The Restatement explains the rule's purpose.

Active negotiation by a lawyer with unrepresented nonclients is appropriate in the course of representing a client. In dealing with an unrepresented nonclient, a lawyer's words and actions can result in a duty of care to that person, for example, if the lawyer provides advice Lawyers should in any event be trustworthy. Moreover, by education, training, and practice, lawyers generally possess knowledge and skills not possessed by nonlawyers. Consequently, a lawyer may be in a superior negotiating position when dealing with an unrepresented nonclient, who therefore should be given legal protection against overreaching by a lawyer.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. b (2000) (emphasis added).

A comment explains the obvious prohibition on lawyers' misrepresentations.

This Section states two general requirements. First, the lawyer must not mislead the unrepresented nonclient to that person's detriment concerning the identity and interests of the person whom the lawyer represents. For example, the lawyer may not falsely state or imply that the lawyer represents no one, that the lawyer is disinterestedly protecting the interests of both the client and the unrepresented nonclient, or that the nonclient will suffer no harm by speaking freely. Such a false statement could disarm the unrepresented nonclient and result in unwarranted advantage to the lawyer's client.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. b (2000) (emphasis added).

The comment also addresses lawyers' surprisingly narrow disclosure obligation.

Second, the lawyer is subject to a duty of disclosure when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter and when failure to correct the misunderstanding would prejudice the nonclient or the nonclient's principal.

Id. (emphasis added).

As in other areas, the Restatement offers a more subtle analysis than the ABA Model Rules' comments. For instance, the Restatement makes the understandable point that lawyers' disclosure obligation depends in part on the unrepresented person's sophistication.

Application of the rule of this Section depends significantly on the lawyer's role, the status and role of the unrepresented nonclient, and the context. For example, a lawyer for an employee dealing with an official of an employer in a dispute over compensation may typically assume that the official will understand the lawyer's role once it is stated that the lawyer represents the employee. A lawyer dealing with a sophisticated business person will have less need for caution than when dealing with an unsophisticated nonclient.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. b (2000).

The Restatement next explains the basic principle's application even in nonadversarial settings. As explained above, the Restatement's reporter's note indicates that the ABA Model Rule dropped the explicit reference to adversity that had appeared in the ABA Model Code.

This Section applies to a lawyer's dealings with both unrepresented nonclients of adverse interest and those of apparently congruent interest. The Section applies to a lawyer's work in litigation, transactions, and other matters. It also applies to a lawyer representing a corporation or other organization in dealing with an unrepresented nonclient employee or other constituent of the organization.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. c (2000).

Turning to real-life scenarios, the Restatement confirms that lawyers may negotiate transactions with unrepresented adversaries.

In a transaction in which only one of the parties is represented, that person is entitled to the benefits of having a lawyer The lawyer may negotiate the terms of a transaction with the unrepresented nonclient and prepare transaction documents that require the signature of that party. The lawyer may advance the lawful interests of the lawyer's client but may not mislead the opposing party as to the lawyer's role. See also § 116, Comment d (lawyer has no obligation to inform unrepresented nonclient witness of privilege to refuse to testify or to answer questions that may incriminate).

The Restatement (Third) of Law Governing Lawyers § 103 cmt. d (2000) (emphasis added).

Interestingly, the Restatement supports the removal of a "legal advice" reference, explaining that lawyers are essentially giving "legal advice" when they provide information or documents to unrepresented persons.

Formerly, a lawyer-code rule prohibited a lawyer from giving "legal advice" to an unrepresented nonclient. That restriction

has now been omitted from most lawyer codes in recognition of the implicit representations that a lawyer necessarily makes in such functions as providing transaction documents to an unrepresented nonclient for signature, seeking originals or copies of documents and other information from the nonclient, and describing the legal effect of actions taken or requested.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. d (2000) (emphasis added).

The Restatement then provides several illustrations.

Lawyer represents Insurer in a wrongful-death claim asserted by Personal Representative, who is not represented by a lawyer. The claim concerns the death of Decedent assertedly caused by an insured of Insurer. Under applicable law, a settlement by Personal Representative must be approved by a tribunal. Personal Representative and Insurer's claims manager have agreed on a settlement amount. Lawyer prepares the necessary documents and presents them to Personal Representative for signature. Personal Representative, who is aware that Lawyer represents the interests of Insurer, asks Lawyer why the documents are necessary. Lawyer responds truthfully that to be effective, the documents must be executed and filed for court approval. Lawyer's conduct is permissible under this Section.

The Restatement (Third) of Law Governing Lawyers § 103 illus. 1 (2000) (emphasis added). One might have thought that the lawyer's explanation that courts must approve any settlement documents amounts to "legal advice." But as explained above, the Restatement deliberately avoided any prohibition on giving legal advice -- instead extending the prohibition to misrepresentations.

The next illustration involves an adversary who seems to misunderstand the lawyer's role.

Lawyer represents the financing Bank in a home sale. Buyer, the borrower, is not represented by another lawyer.

Under the terms of the transaction, Buyer is to pay the legal fees of Lawyer. Buyer sends Lawyer a letter stating, "I have several questions about legal issues in the house purchase on which you are representing me." Buyer also has several telephone conversations with Lawyer in which Buyer makes similar statements. In the circumstances, it should be apparent to Lawyer that Buyer is assuming, perhaps mistakenly, that Lawyer represents Buyer in the transaction. It is also apparent that Buyer misunderstands Lawyer's role as lawyer for Bank. Lawyer must inform Buyer that Lawyer represents only Bank and that Buyer should not rely on Lawyer to protect Buyer's interests in the transaction.

The Restatement (Third) of Law Governing Lawyers § 103 illus. 2 (2000). This illustration presents a fairly obvious case. It would have been interesting if the Restatement had offered a more subtle and difficult scenario. Perhaps the Restatement would not have known how to describe a lawyer's disclosure obligation if the adversary had not so clearly seemed to believe the lawyer was advising him or her.

The Restatement then focuses on lawyers' disclosure obligation within a corporate client entity -- offering a parallel to ABA Model Rule 1.13.

One comment warns that lawyers' failure to describe their role to a possibly adverse corporate constituent might result in a constituent's reasonable argument that the lawyer also represented the constituent.

A lawyer for an organizational client, whether inside or outside legal counsel . . . , may have important responsibilities in investigating relevant facts within the organization. In doing so, the lawyer may interview constituents of the organization, who in some instances might have interests that differ from those of the organization and might be at personal risk of criminal prosecution or civil penalties. A constituent may mistakenly assume that the lawyer will act to further the personal interests of the constituent, perhaps even against the interests of the organization. Such a mistake on the part of the constituent can occur after an extended period working with the lawyer on matters of common interest to the organization and the

constituent, particularly if the lawyer has formerly provided personal counsel to the constituent, and may be more likely to occur with inside legal counsel due to greater personal acquaintanceship. Such an assumption, although erroneous, may be harmless so long as the interests of the constituent and the organization do not materially conflict. However, when those interests do materially conflict, the lawyer's failure to warn the constituent of the nature of the lawyer's role could prejudicially mislead the constituent, impair the interests of the organization, or both.

An adequate clarification may in some instances be required to protect the interest of the organization client in unencumbered representation. Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the organization if the lawyer, even if unwittingly, thereby undertakes concurrent representation of both the organization and the constituent. Such a finding could be based in part on a finding that the lawyer's silence had reasonably induced the constituent to believe that the lawyer also represented the constituent. On forming a client-lawyer relationship with a constituent of an organization client Among other consequences, the lawyer may be required to withdraw from representing both clients because of the conflict.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. e (2000) (emphases added).

The Restatement then essentially warns lawyers not to go overboard the other way -- because emphasizing the lawyers' role unnecessarily might impede the lawyers' ability to obtain information the corporate client needs.

The lawyer's duty to clarify the nature of the constituent-lawyer relationship depends on the circumstances, and assessing the nature of such a duty requires balancing several considerations. In general, the lawyer may deal with the unrepresented constituent without warning provided the lawyer reasonably believes, based on information available to the lawyer at the time, that the constituent understands that the lawyer represents the interests of the organization and not the individual interests of the constituent In such a situation, no warning to the nonclient constituent is

required even if the constituent provides information or takes other steps against the constituent's own apparent best interests and even if the lawyer, were the lawyer representing only the constituent, would advise the constituent to be more guarded. The absence of a warning in such a situation will often be in the interests of the client organization in assuring that the flow of information and decisionmaking is not impaired by needless warnings to constituents with important responsibilities or information.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. e (2000).

A parallel reporter's note criticizes ABA Model Rule 1.13 as possibly going too far.

On the duty not to mislead a constituent, two general questions arise: (1) in what circumstances does a duty to warn arise; and (2) what is the minimal content of a warning when required? On the first issue, ABA Model Rules of Professional Conduct, Rule 1.13(d) (1983) provides: "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." Rule 1.13(d) is susceptible of a reading that mandates warning in every instance of adversity between organization and constituent, without regard to whether the constituent misapprehends the situation or to any lack of threatened prejudice to the constituent.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. e (2000)

(emphasis added).

The Restatement notes a mismatch between what was then ABA Model 1.13 and a comment -- explicitly adopting what it perceives as the black letter rule's narrower disclosure obligation.

On the second issue -- what is the required content of a warning when one is mandated -- the above-quoted Comment to Rule 1.13 mentions several warnings: (1) that the lawyer cannot provide legal services to the constituent

(although such a warning could be literally misleading, because consent of both organization and constituent may cure any conflict that otherwise bars representation by the lawyer); (2) that the constituent may wish to retain independent counsel (which may be true in some instances while not true and needlessly alarming in many others); and (3) that discussions between the lawyer and the constituent are not privileged (which is true as to the constituent, but, if the communication is privileged at all, not as to the organization). Each of the warnings may be problematical in many settings and should be regarded as suggestive only. None seems specifically required by ABA Model Rule 1.13(d) itself. The present Section and Comment follow ABA Model Rule 1:13(d) rather than its arguably more expansive Comment with respect to the content of a required warning and require only that the lawyer's role be clarified.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. e (2000).

The Restatement describes the circumstances requiring disclosure.

The present Section and Comment take the position that such a duty arises only when the lawyer is or reasonably should be aware that the constituent mistakenly assumes that the lawyer is representing or otherwise protecting the personal interests of the constituent, that the lawyer will keep their conversation confidential from others with authority in the organization, or that there is no material divergence of interest between constituent and organization -- and when failure to warn would materially and detrimentally mislead the person.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. e (2000).

The Restatement then shifts back to a scenario in which corporate clients' lawyers must correct a corporate constituent's confusion.

When the lawyer does not have a reasonable belief that the constituent is adequately informed, the lawyer must take reasonable steps to correct the constituent's reasonably apparent misunderstanding, particularly when the risk confronting the constituent is severe. For example, the constituent's expression of a belief that the lawyer will keep their conversation confidential from others with decisionmaking authority in the organization or that the

interests of the constituent and the organization are the same, when they are not, would normally require a warning by the lawyer. In all events, as required under this Section, a lawyer must not mislead an unrepresented nonclient about such matters as the lawyer's role and the nature of the client organization's interests with respect to the constituent.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. e (2000) (emphasis added).

The Restatement then closes with a discussion of lawyers' vulnerability to ethics charges or disqualification if they violate the disclosure obligations.

Professional codes provide for discipline of lawyers . . . for violation of the rule of the Section. A statement of an unrepresented nonclient induced by a lawyer's violation of this Section may be excluded from evidence in a subsequent proceeding. A document or other agreement induced by a lawyer's violation of the Section may be denied legal effect if found to have been obtained through misrepresentation or undue influence or otherwise in violation of public policy. In some situations, a lawyer's activities in violation of this Section may require the lawyer to exercise care to protect the interests of the unrepresented nonclient to the extent stated in other Sections When necessary in order to remedy or deter particularly egregious violations of this Section, a court may order disqualification of an offending lawyer or law firm.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. f (2000).

2002 ABA Model Rules Changes

The ABA did not revise ABA Model Rule 4.3, the comment, or the Model Code Comparison until 2002.

At that time, the ABA moved back into the black letter rule the prohibition on lawyers giving advice to unrepresented persons -- explicitly indicating that the prohibition only applied when lawyers deal with adverse unrepresented persons.

The current rule reads as follows:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3 (emphasis added to show the 2002 addition).

Also in 2002, the ABA expanded what had previously been the sole comment -- deleting the sentence about lawyers providing legal advice (which had been moved to the black letter rule), and apparently expanding the occasions on which lawyers must identify their role. Thus, the first comment indicates as follows:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

ABA Model Rule 4.3 cmt. [1] (emphasis added to show the sentence added in 2002).

Finally, in 2002 the ABA added a lengthy second comment providing additional guidance.

The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to

obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

ABA Model Rule 4.3 cmt. [2] (emphasis added).

Although this new comment warns lawyers about the danger of providing legal advice to adverse unrepresented persons, it somewhat surprisingly confirms that lawyers may still prepare documents for adverse unrepresented persons' signature.

State Rules

Most states adopted the basic ABA Model Rule 4.3 approach. But several states retained the prohibition on lawyers' advice to unrepresented persons left out of ABA Model Rule 4.3 in 1983.

Several jurisdictions have explicitly retained the prohibition of the ABA Model Code against giving legal advice.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000).

As also explained above, the ABA added that prohibition back to the black letter rule in 2002, which eliminated any divergence between the ABA Model Rules and those states.

As in other situations, some states have adopted a variation of ABA Model Rule 4.3.

- New Jersey Rule 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the

unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.").

Case Law

The case law reflects courts' differing positions on lawyers' freedom to communicate with unrepresented persons.

Older case law tended to emphasize lawyers' disclosure obligations when communicating with unrepresented parties.

Some decisions even required that lawyers use prescribed "scripts" when engaging in such communications.

- McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 112, 113 (M.D.N.C. 1993) (finding plaintiffs' lawyer violated Rule 4.3 when communicating with an unrepresented person; "The ABA Model Rule 4.3 imposes an obligation on an attorney to convey to the unrepresented witness the truth about the lawyer's role, representative capacity, and that he is not disinterested."; "In the instant case, the Court finds that plaintiffs' investigator not only failed to take these precautions but violated them in some instances (at least with MidSouth) by not fully disclosing his representative capacity and the true nature of the interview, and by not informing the employees of their right to refuse to be interviewed and to have their counsel present. It is not clear that this occurred with all of the employees. However, further exploration of this matter is not needed. The Court declines to impose any sanctions other than that which have already been imposed with respect to the similar violations with regard to MidSouth employees.").
- Neil S. Sullivan Assocs., Ltd. v. Medco Containment Svcs., 607 A.2d 1386, 1390 (N.J. Super. Ct. 1992) (approving plaintiffs' lawyer's ex parte telephone interview with defendant's former employee, but only under strict guidelines; "Plaintiff's counsel must abide by the guidelines of RPC 4.3 which dictate how an attorney should conduct an interview with an unrepresented person.

Plaintiff's counsel should disclose her role in this litigation, the identity of her client, and the fact that the former employer is a party adverse to her client. Likewise, plaintiff's attorney may not seek to elicit any privileged information.").

- In re Env'tl. Ins. Declaratory Judgment Actions, 600 A.2d 165, 171, 173 (N.J. Super. Ct. 1991) (allowing lawyers for plaintiff and defendant to conduct informal interviews of plaintiffs' former employees, but only following guidelines; "In short, RPC 4.3 requires more than the investigator identifying himself to the party being interviewed. ' . . . Rule 4.3, read in conjunction with Rule 4.2, requires more than a simple disclosure by the investigator of his identity qua investigator. To hold otherwise would in my judgment violate at least the spirit of the Rules. Rule 4.2 suggests that a relevant inquiry is whether an individual is represented since the Rule is only applicable if the lawyer 'knows' that the individual is 'represented by another lawyer.' The Rules contemplate that former employees, unrepresented by counsel, be warned of the respective positions of the parties to the dispute. [Monsanto, supra, 593 A.2d at 1017-18]"; "[T]his court will require all parties to this action who intend to interview former employees to abide by the guidelines set by this court as a prerequisite to any interview. No interview of any former employee shall be conducted unless the following script is used by the investigator or attorney conducting the interview: '(1) I am a (private investigator/attorney) working on behalf of _____. I want you to understand that _____ and several other companies have sued their insurance carriers. That said action is pending in the Union County Superior Court. The purpose of the lawsuit is to determine whether _____ insurance companies will be required to reimburse _____ for any amounts of money _____ must pay as a result of environmental property damage and personal injury caused by _____. I have been engaged by _____ to investigate the issues involved in that lawsuit between _____ and _____, its insurance company; (2) Are you represented by an attorney in this litigation between _____ and _____?"; "If answer is 'YES,' end questioning."; "If answer is 'NO,' ask: (3) May I interview you at this time about the issues in this litigation?"; "If answer is 'NO,' end questioning."; "If answer is 'YES,' substance of interview may commence.").
- Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013, 1017 & n.3, 1018, 1019, 1019-20. 1020 (Del. Super. Ct. 1990) (granting plaintiff's motion for a protective order following defendants' lawyer's violations of Rule 4.3; "The defendants assert that an investigator whose firm has been retained by a lawyer complies with Rule 4.3 by simply stating that he is an investigator seeking information. To support this contention the defendants have submitted the affidavits of two ethics experts, Professor Stephen Gillers and Professor Geoffrey C. Hazard, Jr. The defendants also assert that Rule 4.3 is designed to protect unrepresented persons from receiving legal advice or divulging information to an attorney whose interests are actually or potentially

adverse to those of the unrepresented person."; "I am mindful of additional affidavits filed by Professors Gillers and Hazard in the Motion for Reargument filed in the National Union [Nat'l Union Fire Ins. Co. of Pittsburgh v. Stauffer Chem. Co., Del. Super. C.A. No. 87C-SE-11-1-CV (filed Sept. 2, 1987)] matter discussed supra at footnote 1. I am simply not persuaded by the analysis of these respected academicians. Indeed, I choose to accept an earlier analysis of Professor Hazard developed in a context removed from the heat of partisan litigation." (emphasis added); "In my view Rule 4.3, read in conjunction with Rule 4.2, requires more than a simply disclosure by the investigator of his identity To hold otherwise would in my judgment violate at least the spirit of the Rules. Rule 4.2 suggests that a relevant inquiry is whether an individual is represented since the Rule is only applicable if the lawyer 'knows' that the individual is 'represented by another lawyer.' The Rules contemplate that former employees, unrepresented by counsel, be warned by the respective positions of the parties to the dispute. Indeed, Professor Hazard recognized that 'suitable controls and correctives can be envisioned that would prevent unjust advantage being realized from . . . unfair tactics.' Hazard Aff. Para. 13." (emphasis added); noting that the court had ordered defendant to send the following letter to any unrepresented person the defendant's lawyer wished to interview; "[R]ecognizing the need to take control of the process, the court further ordered that Aetna could not interview any former employee unless it first delivered to such employee a letter written by the magistrate which reads as follows: 'ATTACHMENT A'; '(Investigator's Letterhead)'; "Dear: This letter is being delivered to you pursuant to an order of a federal court. Please read the letter carefully so that you can decide whether or not you would be willing to allow me to interview you at a location of your convenience regarding your former employer, Upjohn."; "I am a private investigator who has been retained by certain insurers who are defendants in a lawsuit brought by your former employer. The lawsuit concerns Upjohn's efforts to obtain insurance coverage for certain environmental claims that have been made against Upjohn concerning various sites."; "In connection with the lawsuit, I am attempting to gather information about the manner in which Upjohn operated these sites. Such information may help my clients support their position against Upjohn that there is no insurance coverage for the environmental claims that are involved in the lawsuit. For that reason, I would like to interview you about these subjects."; "You have no obligation to agree to an interview. On the other hand, there is nothing that prevents you from agreeing to be interviewed. Whether or not you agree to an interview, you may be asked to give testimony in this case."; "Upjohn is willing to answer any questions you may have about this request for an interview, and to provide a lawyer to be with you for the interview if you desire or in the event that you are subpoenaed to testify. You are under no obligation to contact Upjohn if you do not want to. However, if you wish to do so, you may call [Upjohn's telephone number]."; "If you are agreeable to an interview, you will be asked to sign a copy of this letter acknowledging that you have read the letter and have voluntarily agreed

to be interviewed."; "I am satisfied that it is appropriate to conclude that when the investigators did not determine if former employees were represented by counsel, when the investigators did not clearly identify themselves as working for attorneys who were representing a client which was involved in litigation against their former employer, when investigators did not clearly state the purpose of the interview and where affirmative misrepresentations regarding these matters were made, Rule 4.2 and Rule 4.3 were violated.").

In 2000, the Restatement noted that some decisions required what could be characterized as a Miranda warning.

[A] number of decisions have stated an obligation on the part of the lawyer to advise the unrepresented nonclient to obtain the assistance of independent counsel, a requirement that goes beyond those stated in the Section or Comment.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000).

More recent case law tends to take exactly the opposite position -- deemphasizing lawyers' disclosure obligation when dealing with unrepresented adversaries.

- Freeman Equipment, Inc. v. Caterpillar, Inc., No. 16 C 9172, 2017 U.S. Dist. LEXIS 35230 (N.D. Ill. March 13, 2017) (analyzing communications between the plaintiff's lawyer and former employees of defendant; holding that the plaintiff's lawyer did not violate Rule 4.3, and that he did not seek privileged communications during the interviews; "Defendant argues that Mr. Padden's [Plaintiff's lawyer] phone call to Mr. Perry [Retired Caterpillar employee] violated Rules 4.3 and 4.4 of the Illinois Rules of Professional Conduct."; "On its face, the Perry Declaration does not suggest that Mr. Padden either stated or implied that he was 'disinterested' in this litigation. Rather, Mr. Perry states that Mr. Padden did not mention the litigation at all. In defendant's view, that omission was an ethical breach because Mr. Padden had an affirmative duty to inform Mr. Perry of the litigation, his role in it, and the fact that his client is adverse to Mr. Perry's former employer. . . . But even if I assume that Mr. Perry indeed failed to provide that information, it is clear that defendant suffered no harm as a result."; "Indeed, the record does not suggest that Mr. Padden sought, or obtained, any privileged information from Mr. Perry."; "Still, defendant insists that Mr. Padden's conversation with Mr. Perry 'related to privileged topics.' Reply, at 1. But 'topics' are not privileged; communications are, and only when all of the requisite conditions are met."; "None of the authorities defendant cites supports its assertion of a blanket privilege covering all information within that topic, and it offers no evidence

that Mr. Padden's questions either sought or elicited any specific, privileged information.").

- Bacote v. Riverbay Corp., 16 Civ. 1599 (GHW) (AJP), 2017 U.S. Dist. LEXIS 35098 (S.D.N.Y. March 10, 2017) (holding that a lawyer did not have to be a witness because he had recorded conversations of other police officers; analyzing New York Rule 4.3; "Before the conversation at issue took place, Cohen [Plaintiff alleged beating victim's lawyer] emailed Leath informing him that 'our interests are directly adverse and I cannot speak to you if you are represented by an attorney.' . . . Cohen also stated: 'I feel compelled to inform you that I am only looking out for the best interest of my client, Orrin Bacote.' Cohen did not suggest that he was disinterested, and indeed told Leath that he represented Bacote and that their interests were 'directly adverse.' . . . Cohen complied with Rule 4.3 before speaking with Leath, who was not confused as to Cohen's role in this litigation.").
- Todd v. Montoya, No. Civ. 10-0106 JB/WPL, 2011 U.S. Dist. LEXIS 14435, at *41, *44-45, *45 (D.N.M. Jan. 12, 2011) (concluding that a plaintiff's lawyer and his investigator did not violate Rule 4.3 in communicating with the father of a corrections officer involved in an incident for which the plaintiff sued; "The Defendants argue that rule 16-403 also requires a lawyer to state the reason for the interview and inform the unrepresented person that counsel may be present in the interview, and that he or she may refuse to give the interview. . . . The Court does not find the cases upon which the Defendants rely persuasive in its interpretation of rule 16-403's requirements." (emphasis added); "[The Court] will not interpret rule 16-403 to require that a lawyer inform an unrepresented person that counsel may be present in the interview and that he may refuse to give the interview. The Court believes that the New Mexico Rules of Professional Conduct require only that a lawyer make clear that he is not disinterested and the nature of his or her role when dealing with an unrepresented person whose interests conflict with his or her client's interests' and that a lawyer not give legal advice to the unrepresented person, other than the advice to secure counsel." (emphasis added); "It is important for the Court not to add requirements that the Rules of Professional Conduct do not contain, even if, in a particular circumstance, the Court might wish there had been a little more clarity. The ABA and the New Mexico courts have carefully struck a balance between the right to seek the truth and the right to counsel. A freewheeling court, adding requirements, could upset that balance. The Court should not disturb the balance the ABA and the New Mexico courts have struck by adding requirements, then confusing what conscientious and professional lawyers and investigators may do, and perhaps chilling informal discovery, which often informs pre-filing whether there is a case or not, quickly and relatively inexpensively, two things formal discovery often does not do." (emphasis added)).

- In re Jensen, 191 P.3d 1118, 1129 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role it was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion (emphasis added); ultimately issuing a public censure of the lawyer).
- Andrews v. Goodyear Tire & Rubber Co., Inc., 191 F.R.D. 59, 79, 79-80 (D.N.J. 2000) (finding that a plaintiff employee's lawyer did not violate Rule 4.3 in communicating with non-party management employee of defendant corporation; "If the approaching attorney ascertains that the person is neither actually represented by the organization's attorney nor has a right to such representation, the attorney has an obligation to 'make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney'" (citation omitted); "Nowhere in RPC 4.3 is there an obligation to secure any of this information before initiating contact with a potential witness. The Special Committee on RPC 4.2 clearly anticipated direct communication between an approaching attorney and the potential fact witness under RPC 4.3. Thus, the Magistrate Judge's ruling with respect to whether, pursuant to RPC 4.3, Bergenfield [Plaintiff's lawyer] was obligated to determine if Guffey [Manager for Defendant] was in the litigation control group or otherwise represented by counsel 'before making contact' with Guffey is clearly erroneous." (emphases added); "Prior to addressing the substantive conversation between Bergenfield and Guffey in order to determine if Bergenfield violated the RPCs, this Court must first note that Bergenfield was not obligated to follow an exact script when speaking with Guffey. If that were the case, the Special Committee on RPC 4.2 would have suggested a general script to be universally applied by practitioners. Furthermore, it is simply impractical to suggest, as Goodyear does, that every attorney, seeking to determine if a current employee of an organization is represented, is required to read in robot-like fashion from the same script. In fact, this Court believes such a requirement would seriously hinder an investigation by an attorney into the merits of the case. In spite of that belief, this Court recognizes that there should be a general format to which an approaching attorney should adhere in confronting a current or former employee of an organization which would insured that an attorney is abiding by his ethical obligations." (emphasis added)).
- Pritts v. Wendy's of Greater Pittsburgh Inc., 37 Pa. D. & C.4th 158, 167 (C.P. Allegheny, 1998) (denying defendant's motion for a protective order requiring

- that plaintiff's lawyer give what the court called a "Miranda" warning to unrepresented persons with which the plaintiff's lawyer communicates; "Obviously, an attorney violates Rule 4.3 if the attorney causes an unrepresented person to believe that he or she has an obligation to submit to an interview or if the attorney disregards the request of an unrepresented person that the interview be terminated. However, Rule 4.3 does not impose a 'Miranda' requirement that unrepresented persons be advised that they have the right to refuse to be interviewed or to be interviewed only with the company's attorney present. Furthermore, since Rule 4.2 does not extend to former employees, this rule cannot be the source of any 'Miranda' requirement. Consequently, there is no source for this 'Miranda' requirement in the Rules of Professional Conduct." (emphases added)).
- Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412, 418 (D. Utah 1991) (granting plaintiff's motion to conduct ex parte interviews of defendant bank's former tellers; "[M]entioned by the ABA Committee on Ethics and Professional Conduct were the ethical rules regarding the attorney-client privilege and Rule 4.3 which governs an attorney's dealings with an unrepresented party. It should be noted, however, that these two ethical restraints do not exhaust the list of potential rules which may apply to ex parte contact with former employees of a corporate party. Fortunately, the court is not called upon to compile such a list. Suffice it to say that the full spectrum of ethical requirements that bind the attorney in any other situation is equally binding when the attorney engages in ex parte contact with an unrepresented former employee of an opposing organizational party.").

Best Answer

The best answer to this hypothetical is **(B) YOU MUST DISCLOSE TO THE RESIDENT YOUR ROLE IN REPRESENTING THE OIL REFINERY, BUT ONLY IF YOU KNOW OR REASONABLY SHOULD KNOW THAT THE RESIDENT MISUNDERSTANDS YOUR ROLE.**

B 10/15

Distinguishing Between Legal Advice and Opinion

Hypothetical 3

You represent the father of a young man who committed suicide while incarcerated in the county jail. You contacted a county corrections officer, who knew that you would probably add him to the litigation you plan to file. Although there is some dispute about your conversation with the officer, he later claimed that you told him that he would be covered by the county's insurance policy. The county has claimed that you violated the ethics rules prohibiting lawyers from giving any legal advice to adverse unrepresented persons.

If you told the corrections officer that he would be covered by the county's insurance policy, have you violated an ethics rule?

(B) NO (PROBABLY)

Analysis

The 1908 ABA Canons indicated that lawyers

should not undertake to advise [an unrepresented party] as to the law.

ABA Canons of Professional Ethics, Canon 9.

The 1969 ABA Model Code similarly indicated that

a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel.

ABA Model Code DR 7-104(A)(2). Thus, the ABA Model Code's prohibition extended to any advice, not just advice about the law.

The 1983 ABA Model Rules did not include the advice prohibition in the black letter rule ABA Model Rule 4.3 (as of 1983). A comment included that prohibition.

During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

ABA Model Rule 4.3 cmt (as of 1983).

The Code Comparison inexplicably indicated that

There was no direct counterpart to this Rule in Model Code. DR 7-104(A)(2) provided that a lawyer shall not '[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel. . . .'

ABA Model Rules Code Comparison (as of 1983).

Under current ABA Model Rule 4.3, a lawyer communicating ex parte with unrepresented person.

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3 (emphasis added).

A comment provides additional guidance.

The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

ABA Model Rule 4.3 cmt. [2].

For obvious reasons, it can be very difficult to distinguish between lawyers' impermissible advice and ethically permitted opinions or explanations.

In some cases, courts find that lawyers have crossed the line -- violating Rule 4.3 by giving advice to unrepresented persons.

- In re Tun, Bar Dkt. No. 2009-D381, at 2 (D.C. Office of Bar Counsel Oct. 10, 2013) (issuing an informal admonition against a lawyer who advised an adverse witness that she had no Fifth Amendment grounds to avoid testifying; "When you interviewed SB, you were acting on behalf of your client, Mr. Smith. In addition, you knew that SB was unrepresented and that there was a 'reasonable possibility' that her interests would be 'in conflict' with your client's interests. Therefore, when SB asked you for advice regarding her constitutional rights, you should have said that you could not advise her, or advised her to secure her own counsel. Instead, you advised her that she had no Fifth Amendment grounds to avoid testifying against Mr. Smith. By doing so, you violated Rule 4.3(a)(1).").
- In re Jensen, 191 P.3d 1118, 1128 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role he was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion (emphasis added); ultimately issuing a public censure of the lawyer).
- Hopkins v. Troutner, 4 P.3d 557, 558, 560 (Idaho 2000) (affirming a judge's order setting aside a settlement, based on the defendant's lawyer's misconduct; relying on Rule 4.3; "Hopkins [Plaintiff, sexually abused by Defendant] expressed to Julian [Defendant's lawyer] a desire to settle the case and stated that he would do so for less than the offers of judgment tendered to other plaintiffs in similar cases filed against Troutner. Julian's affidavit filed in this case provided the following description of their discussion: 'He then solicited what I believe to be the value of this case, after informing me that he would certainly take much less than the Offer of Judgment previously filed herein to the other Plaintiffs. I told him, in my opinion, the case was worth \$3,000 to \$4,000.'"; "The following statement by the district judge reflects his analysis of what was impermissible about Julian's conduct and why that supported a decision to set aside the order of

dismissal: 'I'm not sure I know precisely what overreaching is, because I think it's more on the equitable side of the Court's jurisdiction and less on the legal side. Again I think Mr. Julian has been honest, not unethical and straightforward in this case. But I think when -- if he were to have said, 'You need to get your own -- form your own opinion about that, or find somebody to give you an opinion about that. My client would only pay you three or \$4,000,' that's different. But Mr. Hopkins was asking him, 'What's this case worth?' Under circumstances that should have led, I think, Mr. Julian to believe that his answer was going to be relied upon by Mr. Hopkins." (emphasis added); a dissenting judge disagreed; "I respectfully dissent from the opinion of the Court. In this case Hopkins made the decision to represent himself. He was competent to understand the nature of the proceedings in which he was involved. It is unrealistic under these circumstances to characterize the statements of Troutner's attorney as legal advice to Hopkins. It was a method of stating how much his client would pay as part of the negotiations initiated by Hopkins. Regardless, even treating the statements as legal advice, the settlement still should not be set aside."; also finding that plaintiff did not rely on defendant's lawyer's statement, because he insisted on more money than the lawyer had mentioned).

- Attorney Q v. Mississippi State Bar, 587 So. 2d 228, 232, 233 (Miss. 1991) (issuing a private reprimand of a lawyer for violation of Rule 4.3; "Canon 9 was succeeded by DR 7-104 of the Code of Professional Conduct and Ethical Consideration 7-18. DR 7-104's prohibitory language expresses essentially the same mandate as did Canon 9, but there are noticeable differences. The language in DR 7-104(A)(2) speaks in terms of an unrepresented 'person' rather than Canon 9's 'party,' omits the proscription against 'misleading' such a person and, while Canon 9 proscribed giving an unrepresented person 'advice' as to the 'law,' DR 7-104(A)(2) speaks merely of 'advice' without the qualifying language. Nevertheless, ABA Informal Opinion No. 1140 (adopted January 20, 1970) declares that the effect of former Canon 9 and DR 7-104(A)(2) 'appears to be substantially the same,' and DR 7-104(A)(2) therefore simply carries forward the meaning and intent' of Canon 9. See ABA Informal Opinion #1140."; "It is important to realize that we interpret Attorney Q's statements from the perspective of a reasonably intelligent non-lawyer in Robinson's position. We are not so much concerned with what Attorney Q may have intended; rather, our focus is upon what Robinson may reasonably have heard and understood. So viewed, we think the only fair interpretation of what Attorney Q said to Robinson is that, once served with the summons, she did not need to worry about the matter and did not need to do anything about it. Attorney Q compounded his felony some forty days later when he had a default judgment entered against Robinson, although he has been formally charged with no disciplinary offense in this regard. . . . In sum, we hold that on January 15, 1985, the Mississippi State Bar had in full force and effect a valid rule providing that, during the course of his representation of a client, a lawyer may not give advice to another who may be reasonably

perceived to have conflicting interests where the other is not represented by counsel, other than advice to secure counsel. We find by clear and convincing evidence that Attorney Q committed the acts described in the Complaint and in Part II above and that these acts constitute a violation of the rule.").

In contrast, some courts take a surprisingly forgiving view about whether lawyers have impermissibly provided advice to unrepresented persons, or merely offered their opinions or explanations.

- Hanlin-Cooney v. Frederick Cnty., Md., Civ. Case No. WDQ-13-1731, 2014 U.S. Dist. LEXIS 93602, at *22-23 (D. Md. July 9, 2014) (analyzing the implications of Rule 4.3 in connection with a plaintiff's lawyer's communications with a Frederick County, Maryland corrections officer, in connection with the plaintiff's lawsuit against a county and eventually the officer in connection with plaintiff's deceased son's suicide while an inmate; ultimately finding that plaintiff's lawyer did not violate Rule 4.3; "I do not find that Plaintiff's counsel violated Rule 4.3 by failing to properly identify their client or her interests. Mr. DeGrange [Correctional Officer] readily admitted at the hearing that not only did he understand that Plaintiff's counsel represented the family of Mr. Hanlin, he also understood that he would be sued in connection with Mr. Hanlin's suicide. . . . Similarly, I find no violation of Rule 4.3 by virtue of Plaintiff's counsel's alleged statements to Mr. DeGrange concerning insurance. It is quite clear that, in the present lawsuit, the interests of Plaintiff's counsel and the interests of Mr. DeGrange are adverse. However, as noted above, the Defendants have not established any specific instance where Plaintiff's counsel made a definitive statement concerning insurance. Even if the Defendants were to prove that Plaintiff's counsel affirmatively told Mr. DeGrange that he would be covered by the county's insurance, such a statement would not rise to the level of 'legal advice.' Plaintiff's counsel did not advise Mr. DeGrange to take any action on account of alleged statements concerning insurance. Indeed, any action that Mr. DeGrange would have taken in reliance on such statements is immaterial to his alleged conduct giving rise to his lawsuit." (emphasis added)).
- Zichichi v. Jefferson Ambulatory Surgery Ctr., LLC, Civ. A. No. 07-2774 SECTION "R" (5), 2008 U.S. Dist. LEXIS 63133, at *14-15, *15-16 (E.D. La. July 22, 2008) (finding that a lawyer did not violate Rule 4.3 when communicating with an unrepresented person; "Plaintiff has also questioned whether it was appropriate for Mr. Blankenship [Defendant's lawyer] to communicate with plaintiff, when he was unrepresented, regarding the termination of his JASC membership."; "Although Mr. Blankenship informed Dr. Zichichi of his client's position on plaintiff's membership interest in JASC, the Court does not find that by doing so Mr. Blankenship was giving plaintiff

legal advice in violation of Rule 4.3. Comment 2 of the ABA Annotated Model Rules of Professional Conduct provides: 'So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may . . . explain the lawyer's own view of . . . the underlying legal obligations.' Ann. Mod. Rules Prof. Cond. Rule 4.3 (6th Ed. 2007). Dr. Zichichi was aware that Mr. Blankenship represented JASC, and Dr. Zichichi's own affidavits and declarations indicate that he knew his interests were adverse to JASC before he called Mr. Blankenship on January 25, 2007. Furthermore, Mr. Blankenship did nothing more than give his opinion of the underlying legal obligations and told plaintiff to obtain counsel." (emphasis added)).

- Barrett v. Va. State Bar, 611 S.E.2d 375, 377078, 378, 379 (Va. 2005) (reversing the Virginia State Bar's three year suspension of a lawyer who communicated ex parte with his unrepresented wife after the they separated; finding that the lawyer did not violate Rule 4.3, but affirming the Bar's finding that the lawyer had violated other rules; remanding; "The Board found that Barrett [husband] violated this rule because it concluded certain statements in two electronic mail ('e-mail') communications he wrote to Rhudy [wife] after the separation, but before she retained counsel, constituted legal advice. On July 25, 2001, Barrett sent an e-mail to Rhudy containing the following: 'Venue will not be had in Grayson County. Virginia law is clear that venue is in Virginia Beach. . . . Under the doctrine of imputed income, the Court will have to look at your skills and experience and determine their value in the marketplace. . . . You can easily get a job . . . [making] \$2,165.00 per month. . . . In light of the fact that you are living with yourparents [sic] and have no expenses . . . this income will be more than sufficient to meet your needs. I . . . just make enough to pay my own bills . . . Thus, it is unlikely that you will . . . obtain spousal support from me. I . . . will file for . . . spousal support to have you help me pay you [sic] fair share of our \$200,000+ indebtedness. Since I am barely making it on my income and you have income to spare, you might end up paying me spousal support. . . . In light of the fact that . . . I . . . am staying in the marital [sic] home . . . I believe that I will obtain the children. . . . You will have to get a job to pay me my spousal support. . . . The Court will prefer the children staying with a [parent], . . . there is no question that I can set up a home away from home and even continue to home school our kids. Therefore, it is likely that you will lose this fight. And of course, if I have the kids you will be paying me child support. . . . I am prepared for the fight.'" (emphases added); "Barrett sent Rhudy another e-mail on September 12, 2001, in which he included the following: 'I will avail myself of every substantive law and procedural and evidentiary rule in the books for which a good faith claim exists. This means that you, the kids and your attorney will be in Court in Virginia Beach weekly. . . . You are looking at attorney's expenses that will greatly exceed \$10,000. . . . I will also appeal . . . every negative ruling . . . causing your costs to likely exceed \$30,000.00. . . . You have no case against me for adultery. . . . [The facts]

show[] that you deserted me. . . . Your e-mails . . . show . . . that you were cruel to me. This means that I will obtain a divorce from you on fault grounds, which means that you can say goodbye to spousal support. . . . I remain in the marital [sic] home . . . I have all the kids [sic] toys and property, that your parents' home is grossly insufficient for the children, that I can home school the older kids while watching the younger whereas you will have to put the younger in day care to fulfill your duty to financially support the kids, I believe that I will get the kids no problem. . . . The family debt . . . is subject to equitable distribution, which means you could be socked with half my law school [sic] debt, half the credit card [sic] debt, half my firm debt, etc." (emphases added); "[U]pon our independent review of the entire record, we find that there was no sufficient evidence to support the Board's finding that Barrett's e-mail statements to Rhudy were legal advice rather than statements of his opinion of their legal situation. Therefore, we will set aside the Board's findings that Barrett violated Rule 4.3(b).").

- Maryland LEO 2002-17 (2002) ("You have inquired as to whether it is permissible for an attorney to send a notice of default under a lease and a draft of a complaint for breach of that lease to a party to a lease who is not represented by counsel. Your intention in sending the communication in this form is to induce that party into compliance with the terms of the lease."; "Since your communications with the unrepresented party to the lease are nothing more than a transmission of your client's position that there has been a breach by that party for which your client intends to sue if that party fails to take steps to comply therewith, there is nothing improper in communicating that information to the unrepresented party, provided Rules 4.1 and 4.3 are adhered to." (emphasis added)).
- Brown v. Lange, 21 P.3d 822, 832 (Alaska 2001) (noting the difference between the ABA Model Rules and Alaska Rule 4.3, and finding that a plaintiff's lawyer did not improperly give "advice" to an unrepresented defendant; "Rule 4.3 and its Alaska commentary address the issue of communicating with unrepresented litigants in a way that might cause them to misunderstand the opposing lawyer's true intentions and interests. But compliance with Cook [Cook v. Aurora Motors, Inc., 503 P.2d 1046 (Alaska 1972)], Salomon [City of Valdez v. Salomon, 637 P.2d 298 (Alaska 1981)] and Hertz [Hertz v. Berzanske, 704 P.2d 767 (Alaska 1985)] creates no such danger. These cases require a plaintiff's attorney, before applying for default, 'to inquire into [the defendant's] intent to proceed and to inform [the defendant] of [plaintiff's] intent to seek a default.' Because the core purpose of this requirement is to ensure full disclosure of an impending conflict, nothing in Rule 4.3 or the Alaska commentary could conceivably bar such inquiry and notice." (footnote omitted); "The court nonetheless suggests possible problems arising from a sentence of commentary that appears in Model Rule 4.3; this Model Rule commentary warns: 'During the course of a lawyer's representation of a client, the lawyer should not give advice to an

unrepresented person other than the advice to obtain counsel.' But Alaska's commentary to Rule 4.3 conspicuously omits this sentence of the Model Rule commentary, even though the Alaska rule incorporates the rest of Model Rule 4.3's commentary. Because the omitted commentary strays so far from the text of the Rule itself, Alaska's decision to omit the commentary is hardly surprising. Moreover, even if the Model Rule's comment did apply in Alaska, it would not advance the court's position, since a plaintiff's attorney who notifies a pro se defendant that the plaintiff intends to apply for a default cannot plausibly be deemed to be giving the kind of 'advice to an unrepresented litigant' that the commentary forbids." (emphasis added; footnotes omitted)).

- First Nat'l Bank of St. Bernard v. Assavedo, 764 So. 2d 162, 163, 164(La. Ct. App. 2000) (finding a debtor was not improperly given "advice" by an employee of the creditor's law firm, who suggested that the debtor call the bank; "The defendants- reconvenors- relators, the Assavedos, were sued by bank on a promissory note. Dolores Assavedo was served with the citation and petition. She telephoned the attorney for the bank to inquire about the lawsuit (apparently using the attorney's name and telephone number appearing on the petition). She did not reach the attorney himself but spoke instead to an unnamed employee in the attorney's law firm office. The law firm employee told Mrs. Assavedo to have her son, Lonnie Assavedo, call a Mr. Rodney Loar at the bank."; "We do not believe that the employee who told Mrs. Assavedo to have her son call the bank gave 'advice' within the meaning of Rule 4.3. The term 'advice,' in the legal context, contemplates something of more substance than occurred in the discussion between the law firm employee and Dolores Assavedo in the present case. In this case, all that occurred of substance (allegedly) was later discussion between the bank employee and the Assavedos. Further, it is neither unusual nor undesirable for debtors to negotiate directly with their creditors without the intervention of counsel, so it cannot be said that the law firm acted maliciously. If the bank employee did act improperly, that was not the fault of the law firm employee. Also, Mrs. Assavedo sought to discuss the bank's lawsuit and, in terms of attorneys not taking advantage of unrepresented lay persons (the apparent policy of Rule 4.3), it probably was best that the law office directed Mrs. Assavedo to the bank rather than the law office dealing more extensively with Dolores Assavedo.").

Best Answer

The best answer to this hypothetical is **(B) PROBABLY NO**.

B 10/15

Preparing Legal Documents for Unrepresented Persons' Signature

Hypothetical 4

You represent the wife in a divorce case. The husband has not retained a lawyer. You plan to communicate with the husband, and explain to him that you represent his wife. You would also like to send him a property settlement agreement, and ask him to sign it.

May you ask an unrepresented person to sign legal documents as long as you describe your role in representing the adversary?

(A) YES

Analysis

The 1908 ABA Canon dealing with lawyers' communications with unrepresented persons did not address those lawyers' preparation of documents for presentation to the unrepresented persons. ABA Canons of Professional Ethics, Canon 9.

In 1933, an ABA legal ethics opinion indicated that lawyers could prepare settlement papers for presentation to and signing by an unrepresented person.

- ABA LEO 102 (12/15/33) ("A member of the Association requests an opinion from the committee on the following question: 'Under the Workmen's Compensation Law of this state, compromise and lump sum settlements must be made on the joint petition of the employee and employer and with the approval of a court of competent jurisdiction. In rare instances is the employee ever represented by an attorney. Usually, the attorney for the employer, or the employer's insurer, prepares the petition, agreement of settlement and judgment; the employee appears in proper person and the employer through his or its attorney. Is it unethical or professionally improper for the attorney to so act?' . . . The question presented is not difficult to answer as to professional propriety. Cannon 9, among other things, provides, 'It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel and he should not undertake to advise him as to the law.' It is not professionally improper for the master's attorney to prepare settlement papers between master and servant in a personal injury claim of the servant where the statute compensating the servant for personal injuries provides that compensation for the injury may be

made in a lump sum settlement on the joint petition of the master and servant, and approved by a court of competent jurisdiction. When the servant has no attorney, and the master's attorney is called upon by the master to prepare the papers to effectuate the agreed settlement, the attorney in drafting the settlement papers should refrain from advising the servant about the law, and particularly must avoid misleading the servant concerning the law or the facts. The attorney also should advise the court that he represents the master, or insurer; that he has prepared the papers in settlement, which had theretofore been agreed upon between the master and the servant; that the servant has no counsel; and that the servant is present in court in proper person. Within these limitations, the committee sees no professional impropriety in an attorney so acting." (emphases added)).

The 1969 ABA Model Code did not explicitly discuss lawyers' preparation of documents for presentation to unrepresented persons. ABA Model Code DR 7-104(A)(2).

A year after adopting the ABA Model Rules, the ABA took a narrow view of what lawyers could do in these circumstances.

- ABA Informal LEO 1140 (1/20/70) ("What violation of professional ethics is involved in obtaining from a defendant in a domestic relations case a 'waiver' such as is widely used in (State)? A copy [sic] of such waiver is attached.' The form in question waives the issuance of and service of summons, waives any right to contest the jurisdiction or venue of the court and agrees that the case be submitted to the court in term time or in vacation and without further notice to the defendant. The form also waives notice to take depositions and agrees that depositions may be taken at any time without notice and without formality. . . . If the party to whom the waiver is presented is not represented by counsel, then both the present Canon 9 and Disciplinary Rule 7-104(A)(2) would seem to prohibit the procedure regarding which you have inquired. . . . It is, therefore, the opinion of the Committee under both the present Canons of Ethics and the Code of Professional Responsibility that a violation of proper ethical conduct would be involved in the procedure which you describe." (emphasis added)).

Approximately two years later, the ABA reaffirmed its earlier position, despite a new "no-fault" divorce statute.

- ABA Informal LEO 1255 (12/15/72) (Reconsideration of 1140) ("On July 6, 1972, the Legislature enacted a new 'no-fault' divorce Act (S17, LB-820). You sent us a copy of a form of 'Appearance and Responsive Pleading of

Respondent' which has been prescribed by the Supreme Court of under Section 7 of said Act which directed the Supreme Court to prescribe the form of all pleadings required by the Act. Neither the Act nor the Court gave any instruction with regard to the subject of your inquiry: i.e., whether it is ethical to submit or to mail such an Appearance and Responsive Pleading to the other party in a domestic relations case for signature where that other party is not represented by an attorney, if the respondent is simultaneously advised to see the attorney of his choice and the plaintiff's attorney knows of no contested issue. You noted that this appears to be unethical under our Informal Opinion 1140 and ask that we reconsider that Opinion in the light 'of the enclosed pleading prepared by the Supreme Court' Since, on the facts you state, a Responsive Pleading is involved the plaintiff's lawyer would be improperly advising both parties. The fact that the Court prescribed the form of the Responding Pleading is irrelevant to the issue you present. The question is now before us whether in such a case a plaintiff's lawyer may properly submit to the respondent for signature a waiver of the issuance and service of the summons and complaint and entry of appearance. Your suggestion that in some such instances 'there was really nothing being contested' does not meet the requirement of Disciplinary Rule 7-104(A)(2) that an attorney should not represent both parties even if there is 'a reasonable possibility of . . . conflict' of interests. In our judgment the practice of the plaintiff's lawyer submitting such a pleading to an unrepresented defendant for signature in a domestic relations case is susceptible of abuse and is unethical." (emphasis added)).

About three months later, the ABA backed off a bit from its earlier position, separating prohibited legal advice from the permissible forwarding of documents to an unrepresented person for signature.

- ABA Informal LEO 1269 (5/22/73) ("Our Informal Opinion 1255, dated December 15, 1972, advised your partner that in the opinion of the Committee it would be subject to abuse and unethical for an attorney to submit or mail an appearance and responsive pleadings to the other party in a domestic relations case for signature where the other party is not represented by an attorney. We also reaffirmed Informal Opinion 1140. The preparation and submission of responsive pleadings to an unrepresented party would in the opinion of the Committee constitute the giving of advice in contravention of DR 7-104(A)(2). Your letter of January 6, 1973, now raises the question of whether it would be proper for plaintiff's counsel in a domestic relations case to submit to an unrepresented defendant for signature a waiver of the issuance and service of summons and the entry of an appearance. As long as these documents are not accompanied by or coupled with the giving of any advice to the defendant, they would constitute only communication with

an unrepresented party and, accordingly, would be ethical and proper as not being violative of the prohibitions of the Code." (emphasis added)).

The 1983 ABA Model Rules did not explicitly address lawyers' preparation of documents. ABA Model Rule 4.3.

The 2000 Restatement permits lawyers to prepare transactional documents for unrepresented persons' signature.

In a transaction in which only one of the parties is represented, that person is entitled to the benefits of having a lawyer The lawyer may negotiate the terms of a transaction with the unrepresented nonclient and prepare transaction documents that require the signature of that party. The lawyer may advance the lawful interests of the lawyer's client but may not mislead the opposing party as to the lawyer's role.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. d (2000) (emphasis added). An illustration confirms this approach.

Lawyer represents Insurer in a wrongful-death claim asserted by Personal Representative, who is not represented by a lawyer. The claim concerns the death of Decedent assertedly caused by an insured of Insurer. Under applicable law, a settlement by Personal Representative must be approved by a tribunal. Personal Representative and Insurer's claims manager have agreed on a settlement amount. Lawyer prepares the necessary documents and presents them to Personal Representative for signature. Personal Representative, who is aware that Lawyer represents the interests of Insurer, asks Lawyer why the documents are necessary. Lawyer responds truthfully that to be effective, the documents must be executed and filed for court approval. Lawyer's conduct is permissible under this Section.

The Restatement (Third) of Law Governing Lawyers § 103 illus. 1 (2000) (emphasis added).

A Restatement reporter's note expressly indicates that the Restatement rejects some states' prohibition on preparing such documents.

Some authorities interpret their lawyer code to prohibit a lawyer from preparing substantive legal documents for the unrepresented nonclient's signature -- again, a position not followed here.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000).

In 2002, the ABA revised ABA Model Rule 4.3. Among other things, a new comment explicitly permits lawyers to prepare documents for unrepresented persons.

The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

ABA Model Rule 4.3 cmt. [2] (emphasis added).

Most states seem to follow the new ABA Model Rule approach, which permits lawyers' preparation of documents for unrepresented persons' signatures.

Several North Carolina legal ethics opinions reflect the general trend in favor of lawyers' document preparation in such settings.

A 2003 North Carolina legal ethics opinion adopted a per se prohibition on lawyers preparing demonstrably harmful pleadings for unrepresented persons' signatures.

- North Carolina LEO 2002-6 (1/24/03) ("The Ethics Committee has been asked, on a number of occasions, whether a lawyer representing one spouse in an amiable marital dissolution may prepare for the other, unrepresented, spouse simple responsive pleadings that admit the allegations of the complaint. It is argued that, if this practice is allowed, the expense of additional legal counsel will be avoided and the proceedings will be expedited. The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an 'acceptance of service and waiver' form waiving the defendant's right to answer the complaint. . . . The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel." (emphasis added)).

Two lengthy 2015 North Carolina legal ethics opinions issued on the same day take a more subtle approach.

The first legal ethics opinion explained that lawyers may prepare pleadings for an unrepresented persons' signature and filing unless the pleadings would amount to relinquishment of the unrepresented persons' "significant rights."

- North Carolina LEO 2015-1 (4/17/15) (explaining that lawyers may prepare court documents for unrepresented adversaries, but not if the documents amount to providing legal advice to the adversaries or if the documents involve the adversaries relinquishing "significant rights"; "The survey of the existing opinions demonstrates that some pleadings or filings that solely represent the interests of one party to a civil proceeding may be prepared by a lawyer representing the interests of the opposing party."; "However, because of the prohibitions in Rule 4.3, a lawyer may not draft a pleading or filing to be signed solely by an unrepresented opposing party if doing so is tantamount to giving legal advice to that person. A lawyer may draft a pleading or filing to be signed solely by an unrepresented opposing party if the document is necessary to settle the dispute with the lawyer's client and will achieve objectives of both the lawyer's client and the unrepresented opposing party. Pursuant to Rule 4.4(a), which prohibits the use of 'means' that have no substantial purpose other than to embarrass, delay, or burden a third person, when presenting a pleading or filing for execution, the lawyer

must avoid using tactics that intimidate or harass the unrepresented opposing party." (emphasis added); "In applying these guiding principles, a lawyer must avoid the overreaching which is tantamount to providing legal advice to an unrepresented opposing party. The lawyer should consider whether (1) the rights, if any, of the unrepresented opposing party will be waived, lost, or otherwise adversely impacted by the pleading or filing, and the significance of those rights; (2) the pleading or filing solely represents the position of the unrepresented opposing party (e.g., an answer to a complaint); (3) the pleading or filing gives the unrepresented opposing party some benefit (e.g., acceptance of service to avoid personal service by the sheriff at the person's home or work place); (4) the legal consequences of signing the document are not clear from the document itself (e.g., the hidden consequences of signing a waiver of right to file an answer in a divorce proceeding has hidden consequences); (5) the pleading or filing goes beyond what is necessary to achieve the client's primary objectives; or (6) the pleading or filing will require the signature of a judge or other neutral who can independently evaluate the pleading or filing. If a disinterested lawyer would conclude that the unrepresented opposing party should not agree to sign the pleading or filing under any circumstances without advice of counsel, or the lawyer is not able to articulate why it is in the interest of the unrepresented opposing party to rely upon the lawyer's draft of the document, the lawyer cannot properly ask the unrepresented opposing party to sign the document." (emphasis added); "[A] lawyer may prepare the following pleadings or filings for an unrepresented opposing party: an acceptance of service, a confession of judgment, a settlement agreement, a release of claims, an affidavit that accurately reflects the factual circumstances and does not waive the affiant's rights, and a dismissal with (or without) prejudice pursuant to settlement agreement or release. However, prior to obtaining the signature of the unrepresented opposing party on the pleading or filing, the person must be given the opportunity to review and make corrections to the pleading or filing. It is recommended that the pleading or filing include a written disclosure that indicates the name of the lawyer preparing the document, and specifies that the lawyer represents the other party and has not and cannot provide legal advice to the unrepresented opposing party except the advice to seek representation from independent counsel." (emphasis added); "A lawyer should not prepare on behalf of an unrepresented opposing party a waiver of right to file an answer to a complaint, an answer to a complaint, or a waiver of exemptions. A waiver of notice of hearing should only be prepared for the unrepresented opposing party if the lawyer is satisfied that, upon analysis of the considerations indicated above, the lawyer is not asking the unrepresented opposing party to relinquish significant rights without obtaining some benefit." (emphasis added); "Neither of the above lists of pleadings or filings is intended to be exhaustive. Before determining whether a pleading or filing may be prepared for an unrepresented opposing party, the lawyer must conclude that she is able to comply with the guiding principles above." (emphasis added)).

On the same day, another North Carolina legal ethics opinion similarly tried to "thread the needle" in connection with lenders' lawyers' preparation of foreclosure waiver documents for unrepresented mortgage borrowers.

- North Carolina LEO 2015-2 (4/17/15) (explaining a lender's lawyer may prepare and obtain a signature from an unrepresented borrower on a waiver of foreclosure notice and right to a foreclosure hearing, unless the waiver was part of the borrower's primary residence mortgage's loan modification package; noting that "[i]t is common practice for lenders dealing with defaulted loans in excess of \$100,000 to require Notice Parties to execute a N.C. Gen. Stat. §45-21.16(f) waiver in connection with a forbearance, modification, or reinstatement agreement" -- which allow the borrowers to waive the right to notice and hearing in a non-judicial foreclosure; posing the question as follows: "May a lawyer who represents the lender on a debt of \$100,000 or more draft a N.C. Gen. Stat. §45-21.16(f) waiver form and provide the waiver form to unrepresented Notice of Parties for execution?"; answering as follows: "Yes, provided the lawyer complies with the requires of N.C. Gen. Stat. §45-21.16 and with Rule 4.3 (Dealing with Unrepresented Persons). However, in the consumer context, when the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting the waiver form for inclusion in a loan modification package for execution by the unrepresented borrower."; noting the North Carolina Bar's earlier application of Rule 4.3; "The Ethics Committee has previously considered whether a lawyer may prepare documents for execution by an unrepresented person. 2004 FEO 10 rules that the lawyer for the buyer in a residential real estate closing may prepare a deed as an accommodation to the needs of her client, the buyer, provided the lawyer makes the disclosures required by Rule 4.3 and does not give legal advice to the seller other than the advice to obtain legal counsel. Similarly, 2009 FEO 12 holds that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party as long as the lawyer explains who he represents and does not give the unrepresented party legal advice."; also noting that North Carolina LEO 2002-6 (1/24/03) and other earlier legal ethics opinions "held that a lawyer may not prepare an answer or an acceptance of service and waiver form for an unrepresented opposing party"; ultimately approving the lender's lawyer's preparation of the waiver documents; "Therefore, except as noted below, preparing a N.C. Gen. Stat. §45-21.16(f) waiver form for unrepresented Notice Parties is not tantamount to giving legal advice to an unrepresented person and the lender's lawyer may draft the waiver and give it to unrepresented Notice Parties if the lawyer does not undertake to advise the unrepresented Notice Parties concerning the meaning or significance of the waiver form or state or imply that the lawyer is disinterested."; noting an exception to this general rule; "There is an exception to this holding in the consumer context. When

the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting a waiver form for inclusion in a loan modification package for execution by the unrepresented borrower. In this context, preparation of the waiver form is tantamount to giving legal advice to an unrepresented person because the waiver prospectively eliminates a significant right or interest of the unrepresented person -- the borrower's right to notice of foreclosure upon default on the new or modified loan -- and there is a substantial risk that an unsophisticated, distressed borrower will not understand this."; also concluding that the analysis would be the same if the lawyer prepared and delivered the waiver "in conjunction with other lender prepared documents"; "Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party, the lawyer may inform the unrepresented person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature. In dealing with unrepresented Notice Parties, however, the lender's lawyer must fully disclose that the lawyer represents the interests of the lender and will draft the documents consistent with the interests of the lender. The lawyer may not give any legal advice to the Notice Parties except the advice to obtain legal counsel. Rule 4.3.") (emphases added).

The case law predictably reflects courts' punishment of lawyers' overreaching or deception.

- In Malofiy, 653 F. App'x 148, 150-51, 151, 152, 153 (3rd Cir. 2016) (suspending for three months and a day a lawyer for violating Rule 4.3 in obtaining an affidavit from an unrepresented person by pretending to be a witness rather than a lawyer, and then using the information against the unrepresented person; "Malofiy filed a copyright infringement lawsuit in the Eastern District of Pennsylvania in 2011 against the performing artist Usher, as well as other defendants, over the song 'Bad Girl.' Malofiy's client, Daniel Marino, alleged that he was one of the writers of the song but did not receive credit or proceeds. One of the other defendants was lyricist William Guice, who also worked on the song. Guice, who was unrepresented and previously had never been a defendant in a civil lawsuit, called Malofiy after receiving the complaint to find out what it was about. The core of the allegations is that, in this conversation and subsequent communications, Malofiy misled Guice into thinking he was a witness rather than a defendant who stood to face financial liability."; "Without advising him to get a lawyer, Malofiy secured Guice's agreement to sign the affidavit. He then sent Guice the affidavit in an e-mail whose subject line mentioned Usher, but not Guice, as a defendant."; "Either before Malofiy e-mailed the affidavit or shortly after, Beasley [lawyer who shared office space with Malofly] advised him that the

document should memorialize that Guice had been advised to get a lawyer but had chosen not to do so. Malofiy sent a follow-up e-mail to Guice saying that if he wanted 'to review [the affidavit] with a lawyer, that's fine too.' . . . Within the next week, Guice signed and returned the affidavit without having consulted an attorney."; "Guice never filed an answer to Marino's [Malofiy's client] lawsuit. As he later explained, he thought that his affidavit was the only response that was needed. Without notifying Guice in advance, Malofiy sought and obtained a default judgment against him in June 2012 based on his failure to file a responsive pleading. Guice received a copy of the request for a default judgment but did not understand what it meant and never responded to it."; "Judge Diamond, who was presiding over the Marino lawsuit, determined that Malofiy had violated Pennsylvania Rule of Professional Conduct 4.3 by obtaining an affidavit and deposition testimony from Guice without first advising him to get a lawyer or correcting his perception that he was merely a witness."; "[W]e must determine whether Malofiy's warning in the e-mail and his acknowledgment of Guice's status as a defendant satisfy Rule 4.3. The District Court determined that Malofiy's actions 'failed to adequately convey the adversity of interests between [his] client and Mr. Guice.' . . . We agree. Per Rule 4.3(c), Malofiy 'kn[ew] or reasonably should [have] know[n] that the unrepresented person misunderst[ood] the lawyer's role in the matter.' Rather than correct the misunderstanding, Malofiy continued to foster the impression that Guice was a witness rather than a person who stood personally to lose money. As the first comment to the rule makes clear, Malofiy should have remedied the confusion by explaining that Guice's interests were adverse to Marino's. However, he consistently suggested that the opposite was true.").

Best Answer

The best answer to this hypothetical is **(A) YES**.

B 10/15 1/16

Application to Prosecutors

Hypothetical 5

In your new position as a prosecutor, you have been increasingly dealing with undocumented immigrant defendants. Some of them do not have lawyers, and you wonder whether you can propose plea agreements to unrepresented criminal defendants if their acquiescence to the agreement would render them vulnerable to deportation.

What do you do?

- (A) You must disclose to the undocumented immigrant the risks of acquiescing to the plea agreement.
- (B) You may disclose to the undocumented immigrant the risks of acquiescing to the plea agreement, but you don't have to.
- (C) You may not disclose to the undocumented immigrant the risks of acquiescing to the plea agreement.

(A) YOU MUST DISCLOSE TO THE UNDOCUMENTED IMMIGRANT THE RISKS OF ACQUIESCING TO THE PLEA AGREEMENT

Analysis

The ABA Model Rules have always recognized that prosecutors' duties differ in at least some ways from lawyers in other contexts.

ABA Model Rule 3.8 is entitled "Special Responsibilities of a Prosecutor," and lists some of those different duties. And ABA Model Rule 3.8 cmt. [1] articulates the conceptual basis for the different duties.

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.

ABA Model Rule 3.8 cmt. [1].

In addressing prosecutors' communications with unrepresented persons, ABA Model Rule 3.8(c) provides that

The prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

ABA Model Rule 3.8(c). A comment provides additional guidance.

In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

ABA Model Rule 3.8 cmt. [2].

Not surprisingly, the country's focus on undocumented immigrants implicates ethics principles.

One of the complicating factors involves federal statute defining "deportable" aliens those convicted of a broad series of crimes, including state crimes.

Any alien who -- (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

8 U.S.C. § 1227(a)(2)(A)(i)(I-II) "Moral turpitude" standard can be very difficult to analyze.

The key United States Supreme Court case comes from the private side, not the prosecutorial side. In Padilla v. Kentucky, the United States Supreme Court held that a private lawyer provided ineffective assistance of counsel by not advising his client who faced deportation by pleading guilty in a marijuana-related offense.

- Padilla v. Kentucky, 559 U.S. 356, 359-60 & n.1 (2010) ("Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. . . . Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i). In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "'did not have to worry about immigration status since he had been in the country so long.'" Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney. Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a 'collateral' consequence of his conviction. . . . In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief. We granted certiorari . . . to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

Since Padilla, courts have set aside undocumented immigrants' sentences based on such ineffective assistance of counsel claims.

- Xia v. United States, Nos. 14-CV-10029 & 12-CR-934-9 (RA), 2015 U.S. Dist. LEXIS 94058, at *1, *10-11, *11, *11-12, *13, *13-14 (S.D.N.Y. July 20, 2015) ("Shu Feng Xia, a noncitizen now serving a sentence of a year and a day after pleading guilty to conspiracy to commit immigration fraud, moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Although he makes many arguments in support of his motion, Xia's principal claim is that his counsel was constitutionally ineffective for failing to direct the Court's attention to the deportation consequences of a sentence of one year or more. Xia argues that a sentence of less than a year -- that is, even two fewer days than what he received -- would have prevented him from being designated an 'aggravated felon' under federal immigration law and thus

could have saved him from mandatory deportation. For the reasons that follow, Xia's motion will be granted."; "Beginning in the mid-1980s, Congress enacted a series of laws that have increasingly favored the deportation of noncitizens who commit crimes. . . . The Supreme Court has recognized that these changes in the law 'have dramatically raised the stakes of a noncitizen's criminal conviction.' Padilla v. Kentucky, 559 U.S. 356, 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)."; Padilla thus recognized that the Sixth Amendment guarantee of the effective assistance of counsel requires that a lawyer 'inform her client whether his plea carries a risk of deportation.'" (citation omitted); "The question in this case concerns not convictions (resulting from guilty pleas or otherwise), but sentencing -- the second of the twin triggers that can lead to a noncitizen's deportation for committing a crime. Specifically, the question is whether the Sixth Amendment's guarantee of the effective assistance of counsel requires that a noncitizen's lawyer inform the sentencing judge that a given sentence carries an increased risk of deportation. On the facts of this case, the answer must be yes."; "Padilla makes plain that criminal defense attorneys cannot reasonably be tasked with the responsibility of becoming immigration law experts. Where, however, the adverse deportation consequences of a particular sentence are 'truly clear,' the logic of Padilla instructs that the obligation to alert a sentencing judge to those consequences is 'equally clear.'" (citation omitted); "This case falls into the latter category. While counsel did apprise the Court that Xia faced deportation, he characterized that prospect as certain, leading the Court to believe that the exercise of its discretion in imposing sentence had no bearing on the likelihood of Xia's deportation. That characterization was mistaken, and the Government does not now contend otherwise. As explained below, 'the terms of the relevant immigration statute are succinct, clear, and explicit,' . . . in providing that the risk of deportation for someone in Xia's shoes is directly affected by the term of his sentence -- with the one-year mark serving as a bright line between possible deportation and certain deportation. As a consequence of counsel's failure to draw the Court's attention to that unambiguous provision of federal immigration law, Xia now faces mandatory removal when he might have avoided it. And because he has established that his sentence would likely have been lower had the Court been told of that consequence, his sentence must be set aside.").

Not surprisingly, some of these ineffective assistance claims have failed.

- Wisconsin v. Ortiz-Mondragon, 866 N.W.2d 717, 720-21 (Wis. 2015) ("We conclude that Ortiz-Mondragon is not entitled to withdraw his no-contest plea to substantial battery because he did not receive ineffective assistance of counsel. Specifically, his trial counsel did not perform deficiently. Because federal immigration law is not 'succinct, clear, and explicit' in providing that Ortiz-Mondragon's substantial battery constituted a crime involving moral turpitude, his attorney 'need[ed] [to] do no more than advise [him] that pending criminal charges may carry a risk of adverse immigration

consequences.' See *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010)]. Ortiz-Mondragon's trial attorney satisfied that requirement by conveying the information contained in the plea questionnaire and waiver of rights form -- namely, that Ortiz-Mondragon's 'plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.' Counsel's advice was correct, not deficient, and was consistent with Wis. Stat. § 971.08(1)(c) (2011-12). In addition, Ortiz-Mondragon's trial attorney did not perform deficiently by failing to further research the immigration consequences of the plea agreement. Because Ortiz-Mondragon failed to prove deficient performance, we do not consider the issue of prejudice." (footnote omitted)).

Prosecutors also have to deal with this issue. Specifically they must determine if they may enter into plea agreements with undocumented immigrants without disclosing the possible effect on the undocumented immigrants' status in the United States. This can be very complicated, because many state offenses can trigger deportation.

State criminal offenses that trigger mandatory deportation include, for example, a shoplifting offense with a one year suspended sentence; misdemeanor possession of marijuana with the intent to sell; or sale of counterfeit DVDs with a one year suspended sentence.

Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 Geo. L.J. , 10-11 (footnotes omitted. This article described many states' requirement that judges disclose the deportation implication of a plea bargain -- but argued for a similar obligation by prosecutors.

Prior to *Padilla*, approximately half of the fifty states already had a statute on the books requiring judges to issue advisals regarding immigration consequences to noncitizen defendants entering a plea of guilty, and this number has subsequently increased. Judicial inquiries into immigration consequences of a plea or into counsel's advice regarding immigration consequences of a plea or into counsel's advice regarding immigration consequences demand scrutiny for various reasons. By engaging in inquiries into citizenship or immigration status, judges run the risk of compelling disclosure of privileged attorney-client communication or violating noncitizen defendants' Fifth Amendment right

against self-incrimination. Apart from these legal considerations, there is the practical consideration that a nervous defendant taking a plea in front of a criminal judge will rarely be able to meaningfully process the many formalized warnings included in the plea colloquy. While these warnings may be administered in a way that is supportive of the spirit of Padilla, they are no replacement for meaningful advice by counsel.

Id. at 21 (footnotes omitted).

States have predictably taken the same approach as Padilla – either in judicial or bar pronouncements.

- Order Striking Plaintiffs' Opposition To Motion To Dismiss Third Amended Complaint at 1-2, *Free Range Content, Inc. v. Google, Inc.*, Case No. 14-cv-02329-BLF (N.D. Cal. Nov. 16, 2015), ECF No. 102 ("The Standing Order provides that footnotes 'are to be used sparingly and citations to textual matter shall not be contained in footnotes.' Standing Order at 4. Every page of the Opposition contains at least two—and, on one page, eight—footnotes. . . . The lines consumed by single-spaced footnotes outnumber the lines of double-spaced text on nearly half of the brief's pages. . . . Accordingly, the Court Strikes Plaintiffs' Opposition to Defendant's Motion to Dismiss the Third Amended Complaint. The Court orders Plaintiffs to file an opposition that complies with the Standing Order and Local Civil Rules, contains no footnotes, and does not exceed 25 pages inclusive of the signature page by no later than November 25, 2015.").
- Fuentes v. Clarke, 777 S.E.2d 550, 551, 553, 554 (Va. 2015) ("Betty Bustillo Fuentes, a lawful permanent resident of the United States, was indicted on a single count of grand larceny, in violation of Code § 18.2-95. In March 2012, Fuentes pled guilty pursuant to a plea agreement under Rule 3A:8(c)(1)(C). In the plea agreement, Fuentes admitted that she was guilty of the crime and acknowledged that her plea 'may place [her] at risk for deportation if [she was] not a citizen of the United States.' She also stated in it that she was represented by counsel, was satisfied with the representation, had read the plea agreement and reviewed it with counsel, and was entering the plea voluntarily. She and the Commonwealth agreed to a sentence of 3 years' incarceration, with all 3 years suspended subject to specified conditions."; "This case therefore is clearly distinguishable from Padilla [Padilla v. Kentucky, 559 U.S. 356 (2010)], where the petitioner's trial counsel affirmatively misadvised his client by telling him he didn't have to worry about any immigration consequences of his plea 'since he had been in the country so long.' 559 U.S. at 359 (internal quotation marks omitted). It is likewise distinguishable from Akinsade [United States v. Akinsade, 686 F.3d 248 (4th

Cir. 2012)], where the petitioner had been charged with one count of embezzlement by a bank employee, in violation of 18 U.S.C. § 656, and trial counsel affirmatively misadvised him that he could not be deported for a single conviction. 686 F.3d at 250. Unlike those cases, Fuentes' trial counsel did not affirmatively misadvise her by assuring her that she would not be deported."; "Fuentes' argument that trial counsel's advice was constitutionally inadequate because it was irrecoverably tainted by his belief that she was unlawfully present is also without merit. His belief arose directly from her statement that she was present unlawfully and 'had no papers.' It was not unreasonable for him to rely on her representation of her own immigration status and to provide immigration advice based on it."; "In this case, Fuentes' trial counsel correctly advised her that her conviction would likely result in her deportation, unless she found an exemption within the immigration system. That advice was correct regardless of the lawfulness or unlawfulness of her presence. He further admitted that he was not an immigration attorney and advised her to consult one. On the facts of this case, his performance satisfied the constitutional standard of reasonableness.").

- Virginia LEO 1876 (3/19/15) (prosecutors aware that non-citizen defendants without court-appointed counsel in a court which does not conduct plea colloquies may not offer a plea deal in exchange for a guilty plea without advising the defendant to obtain legal advice, or request that the court conduct a colloquy, about the plea deal's deposition implications).

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE TO THE UNDOCUMENTED IMMIGRANT THE RISKS OF ACQUIESCING TO THE PLEA AGREEMENT.**

B 10/15, 1/16

Negotiation/Transactional Adversaries' Misunderstanding of Clients' Intent

Hypothetical 6

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?

(A) YES

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

(A) YES

- (c) With your client's consent, may you tell the adversary that your "bottom line" purchase price in a deal is \$75,000 – if you and your client know that your client will actually pay \$85,000 if you must increase the offer to close the deal?

(A) YES

Analysis

In some situations, lawyers must assess whether the lawyer must or may disclose protected client information to correct a negotiation or transactional adversary's misunderstanding. Such negotiations or transactions can occur in a purely commercial setting or in connection with settling litigation.

The analysis frequently involves characterized statements that the lawyer or lawyer's client has made -- which might have induced the adversary's misunderstanding. This in turn sometimes involves distinguishing between harmless statements of intent and wrongful statements of fact. Most authorities label the former

"puffery" -- as if giving it a special name will immunize such statements from common law or ethics criticism. The latter type of statement can run afoul of both common law and ethics principles significantly. The ethics rules prohibit misrepresentation regardless of the adversary's reliance or lack of reliance, and regardless of any causation.

Under ABA Model Rule 4.1 and its state counterparts,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1

The first comment confirms that lawyers do not have an obligation to volunteer unfavorable facts to the adversary.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

Comment [2] addresses the distinction between factual statements and what many call "puffing."

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except when nondisclosure of the

principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

ABA Model Rule 4.1 cmt. [2] (emphasis added).

Not surprisingly, it can be very difficult to distinguish between ethical statements of fact and ethically permissible "puffing."

Perhaps because of this difficulty in drawing the lines of acceptable conduct, the ABA explained in one legal ethics opinion that judges should not ask litigants' lawyers about the extent of their authority.¹

The Restatement takes the same necessarily vague approach -- although focusing more than the ABA Model Rules on the specific context of the statements.

A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client.

¹ ABA LEO 370 (2/5/93) (unless the client consents, a lawyer may not reveal to a judge the limits of his settlement authority or advice to the client regarding settlement; the judge may not require the disclosure of such information; a lawyer may not lie in response to a direct question about his settlement authority, although "a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel.")

Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.

Restatement (Third) of Law Governing Lawyers § 98 cmt. c (2000) (emphasis added).

A 2015 California legal ethics opinion distinguished between statements that amount to harmless "puffery" and those that cross the line into knowing misrepresentations.

Some statements obviously violate the ethics rules, because they involve demonstrably false statements of objectively provable facts.

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "While the settlement officer is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff's wage loss claim. Attorney tells the settlement officer that Plaintiff was earning \$75,000 per year, which is \$25,000 more than Client was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which he does." (emphasis added); "Attorney's statement that Plaintiff was earning \$75,000 per year, when Plaintiff was actually earning \$50,000, is an intentional misstatement of a fact. Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery. As with Example Number 1, above, Attorney's statement constitutes an improper false statement and is not permissible." (emphasis added)).
- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "In response to Plaintiff's settlement demand, Defendant's lawyer informs the settlement officer that Defendant's insurance policy limit is \$50,000. In fact, Defendant has a \$500,000 insurance policy." (emphasis added); "Defendant's lawyer's inaccurate representations regarding Defendant's policy limits is an intentional misrepresentation of fact intended to mislead Plaintiff and her lawyer. See Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] (plaintiffs 'reasonably relied on the coverage representations made by counsel for an insurance company')). As with Example Number 1, above, Defendant's lawyer's intentional misrepresentation about the available policy limits is improper." (emphasis added)).

Some statements are also demonstrably false, but seem somewhat less objective than the easily analyzed misstatements.

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "In the settlement conference brief submitted on Plaintiff's behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness's account is undisputed, asserts that the eyewitness specifically saw Defendant texting while driving immediately prior the accident, and asserts that the eyewitness's credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident." (emphasis added); "Attorney's misrepresentations about the existence of a favorable eyewitness and the substance of the testimony the attorney purportedly expects the witness to give are improper false statements of fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the purpose of having the Defendant rely on them. The attorney has no factual basis for the statements made. Further, Attorney's misrepresentation is not an expression of opinion, but a material representation that "a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question . . ." (Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 313 [89 Cal.Rptr.2d 115], quoting Rest.2d Torts § 538). Thus, Attorney's misrepresentations regarding the existence of a favorable eyewitness constitute improper false statements and are not ethically permissible. This is consistent with Business and Professions Code section 6128(a) . . . , and Business and Professions Code section 6106 . . . , which make any act involving deceit, moral turpitude, dishonesty or corruption a cause for disbarment or suspension." (emphasis added)).

The existence of an eyewitness can be proven true or false. The question would presumably be closer if the lawyer directly testified that an eyewitness saw the accident, but stretched a bit when proclaiming to the adversary that the eyewitness will support the lawyer's client's version of the facts.

The 2015 California legal ethics opinion also included an illustration of classic permissible "puffery."

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted puffery; "While talking

privately outside the presence of the settlement officer, Attorney and Plaintiff discuss Plaintiff's 'bottom line' settlement number. Plaintiff advises Attorney that Plaintiff's 'bottom line' settlement number is \$175,000. When the settlement officer asks Attorney for Plaintiff's demand, Attorney says, 'Plaintiff needs \$375,000 if you want to settle this case.'" (emphasis added); "Statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or 'puffery,' are among those that are not considered verifiable statements of fact. A party negotiating at arm's length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise. Here, Attorney's statement of what the client will need to settle the matter is allowable 'puffery' rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Client's 'bottom line' settlement number." (emphasis added)).

The California legal ethics opinion also analyzed a statement that could fall into either category, depending on the facts.

- California LEO 2015-194 (2015) (finding that a lawyer's threat of bankruptcy when bankruptcy was not available to the client constituted an impermissible false representation of fact; "Defendant's lawyer also states that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict. In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy." (emphasis added); "Whether Defendant's lawyer's representations regarding Defendant's plans to file for bankruptcy in the event that Defendant does not win a defense verdict constitute a permissible negotiating tactic will hinge on the specific representations made and the facts known. Here, Defendant's lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy counsel before the mediation and was informed that Defendant is not legally eligible to file for bankruptcy. A statement by Defendant's lawyer that expresses or implies that Defendant's financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact. The conclusion may be different[,] however, if Defendant's lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge." (emphasis added)).

The California legal ethics opinion's analysis left two issues unaddressed. First, one might think that the defendant's lawyer could ethically state that the defendant

intends to declare bankruptcy -- even if a creditor could seek to have the bankruptcy action dismissed or could resist the discharge of any judgment. As long as the bankruptcy filing was not frivolous, one might think that the adversary's ability to challenge the filing (and even have it dismissed) would not prevent the filing itself. Every bar seems to take the position that a plaintiff can file a knowingly time-barred claim, even if the defendant could easily rely on the statute of limitations in seeking the action's dismissal. Perhaps that basic principle does not apply in the bankruptcy setting, but the California Bar could have explained why.

Second, the California legal ethics opinion indicated that its "conclusion may be different" if defendant's lawyer "does not know whether or not his client intends to file for bankruptcy." Id. In that scenario, one might wonder how the defendant's lawyer could "state[] that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict." Id. Lawyers generally cannot make such a definite statement if the defendant has not authorized it.

Ethics authorities and caselaw take a remarkably permissive attitude toward undeniable false statements in the negotiation context.

(a)-(c) A 1980 American Bar Foundation article explains that this type of tactic does not violate the ethics rules.

It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or

statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 932 (1980) (emphases added; footnote omitted).

An ABA legal ethics opinion defines this type of statement as harmless puffery rather than material misstatement of fact.

For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than \$ 200, when, in reality, it is willing to accept as little as \$ 150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.

ABA LEO 439 (4/12/06) (emphases added). The opinion makes essentially the same point a few pages later.

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Id. (emphases added). This sort of statement represents the classic type of settlement "bluffing" that the authorities seem to condone, and most lawyers expect during settlement discussions.

Courts and bars also anticipate that lawyers will exaggerate the strength of their factual and legal positions.

For instance, the 1980 American Bar Foundation article explains this common practice.

In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiating, it is the lawyer's right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

White, 1980 Am. B. Found. Res. J. at 931-32.

The American Bar Foundation article poses this question, but has a difficult time answering it.

Assume that the defendant has instructed his lawyer to accept any settlement offer under \$100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think \$90,000 will settle

this case. Will your client give \$90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of \$90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

Id. at 932-33 (emphasis added).

Some ethicists providing advice to lawyers in this situation might advise those lawyers to plan ahead -- by foregoing such settlement authority or otherwise telling the adversary at the very beginning of the settlement negotiations about how the lawyer might or might not respond to questions during the negotiations. The article describes this "solution" as unrealistic.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.

Id. at 933 (emphases added).

It would be easy to reach the opposite conclusion in this setting -- arguing that the adversary could not reasonably expect an honest answer to such a question. Instead, the adversary might be hoping to gain some insight into the possible outcome of negotiations by examining both the verbal and non-verbal responses to such a question.

The article's author ultimately concludes that lying is not permissible in this setting, but concedes that "I am not nearly as comfortable with that conclusion" as in situations involving more direct deception. Id. at 934.

A 2016 Seventh Circuit opinion applied this surprisingly permissive approach in reversing the criminal wire fraud conviction of a bank vice president.

- United States v. Weimert, 819 F.3d 351, 353, 353-54, 354, 356, 357, 357-58, 358, 364 (7th Cir. 2016) (reversing the wire fraud conviction of a bank vice president who the jury found had engaged in self-dealing; reversing the conviction because all of the allegedly fraudulent statements were instead non-actionable negotiation positions; noting that the parties to the transaction were fully informed of all of the elements of the transaction; explaining the background of the case and the basis of the court's reversal; "In the midst of the 2008-09 financial crisis, a Wisconsin bank called AnchorBank was struggling to stay above water. Under pressure to find cash to pay its own lenders, the bank's president told vice president David Weimert to try to sell the bank's share in a commercial real estate development in Texas. Weimert, who is the defendant and appellant in this criminal wire fraud case, successfully arranged a sale that exceeded the bank's target price by about one third. The deal also relieved the bank of a liability of twice the sale price."; "Given the version of the facts we must accept for this appeal, however, Weimert saw an opportunity to insert himself into the deal personally. He persuaded two potential buyers that he would be a useful partner for them. Both buyers included in their offer letters a term having Weimert buy a minority interest in the property. The bank agreed. It also agreed to pay Weimert an unusual bonus to enable him to buy the minority interest. We must also assume that the successful buyer, at least, would have been willing to go forward without Weimert as a partner, and that Weimert deliberately misled his board and bank officials to believe that the successful buyer would not close the deal if he were not included as a minority partner. The government prosecuted Weimert for wire fraud on the theory that his actions added up to a scheme to obtain money or property by

fraud, and the jury convicted him on five of six counts of wire fraud under 18 U.S.C. § 1343."; "We reverse and order judgment of acquittal, Federal wire fraud is an expansive tool, but as best we can tell, no previous case at the appellate level has treated as criminal a person's lack of candor about the negotiating positions of parties to a business deal. In commercial negotiations, it is not unusual for parties to conceal from others their true goals, values, priorities, or reserve prices in a proposed transaction. When we look closely at the evidence, the only ways in which Weimert misled anyone concerned such negotiating positions. He led the successful buyer to believe the seller wanted him to have a piece of the deal. He led the seller to believe the buyer insisted he have a piece of the deal. All the actual terms of the deal, however, were fully disclosed and subject to negotiation. There is no evidence that Weimert misled anyone about any material facts or about promises of future actions. While one can understand the bank's later decision to fire Weimert when the deception about negotiating positions came to light, his actions did not add up to federal wire fraud. Weimert is entitled to judgment of acquittal. We order his prompt release from federal prison, on the stated terms of supervised release in his sentence, pending issuance of our mandate." (emphases added); later explaining the role of deception in negotiations; "Some deceptions in commercial negotiations certainly can support a mail or wire fraud prosecution. A party may not misrepresent material facts about an asset during a negotiation to sell it. For example, a seller or his agent may not falsely tell potential buyers or investors that a piece of property has no history of environmental problems if soil and groundwater contamination on the property was discovered the year before. The buyer would be led to purchase a property worth far less than she was led to believe, given the looming remediation costs. Similarly, a company may not inform a potential investor that it expects patent protection for its key intellectual property if its patent application was recently rejected as barred by prior art. The investor would be led to believe that he was investing in a valuable asset that was actually worthless. The misrepresentation materially alter one party's understanding of the subject of the deal." (emphases added); "[T]he central issue in this case is whether the mail and wire fraud statutes can be stretched to criminalize deception about a party's negotiating positions, such as a party's bottom-line reserve price or how important a particular or how important a particular non-price term is. We conclude that they cannot." (emphasis added); "To take a simple example based on price, suppose a seller is willing to accept \$28,000 for a new car listed for sale at \$32,000. A buyer is actually willing to pay \$32,000, but he first offers \$28,000. When that offer is rejected and the seller demands \$32,000, the buyer responds: 'I won't pay more than \$29,000.' The seller replies: 'I'll take \$31,000 but not a penny less.' After another round of offers and demands, each one falsely labeled 'my final offer,' the parties ultimately agree on a price of \$30,000. Each side has gained from deliberately false misrepresentations about its negotiating position. Each has affected the other side's decisions. If the transaction involves interstate

wires, has each committed wire fraud, each defrauding the other of \$2,000? Of course not. But why not?" (emphasis added); "The better answer is that negotiating parties, and certainly the sophisticated businessmen in this case, do not expect complete candor about negotiating positions, as distinct from facts and promises of future behavior. Deception about negotiating positions -- about reserve prices and other terms and their relative importance -- should not be considered material for purposes of mail and wire fraud statutes." (emphasis added); "Weimert is entitled to a judgment of acquittal. All terms of the transaction, including Weimert's participation as a buyer, were disclosed to all interested parties. The government's evidence of deception -- all of it -- addressed not material facts or promises but rather parties' negotiating positions, which are not material for purposes of mail and wire fraud.").

Of course, lawyers who practice this aggressively risk reputational harm.

- Otto v. Hearst Commc'ns, Inc., No. 17-CV-4712 (GHW) (JLC), 2019 U.S. Dist. LEXIS 35051, at *1, *7, *8, *8-9, *21, *22-23, *32-33 & n.7, *36 (S.D.N.Y. Feb. 21, 2019) (analyzing the lawyers' alleged settlement negotiations deception; criticizing a plaintiff's lawyer representing a client who had taken a picture of President Donald Trump surprisingly attending a wedding at the New Jersey Trump-owned golf club; the plaintiff's lawyer's client had sued Hearst for copyright infringement; the plaintiff's lawyer had earlier sued Warner Brothers, and had settled that claim – and it then entered into a licensing agreement four days after the settlement; noting that the plaintiff's lawyer had assured Hearst during settlement negotiations that Warner Brothers licensing agreement was not part of a law suit settlement; "Settlement conferences are the lifeblood of a magistrate judge's work. Over time, we handle hundreds and eventually thousands of them. As a result, it is an all-too-familiar experience for a magistrate judge—or anyone engaged as a mediator—to observe the posturing and puffery that lawyers engage in during settlement negotiations. But must all material representations made during a settlement conference be truthful? And can a party rely on a purported misrepresentation at an off-the-record settlement conference as a basis for seeking sanctions? These questions lie at the heart of the pending cross-motions before the Court in this copyright infringement action."; explaining that the plaintiff sued Hearst for publishing a picture the plaintiff had taken at a wedding which occurred at President Trump's New Jersey golf club; Hearst alleged that the plaintiff's lawyer lied about payment it had received from another entity which had used the same picture—stating or implying that the payment was a license for use of the picture rather than part of a lawsuit settlement; "Hearst contends that 'after being presented with the claimed draft license, [its] counsel repeatedly asked [] Liebowitz and the Court whether the Purported License was in settlement of [Otto's] claims against another media entity,' to which it alleges '[] Liebowitz stated that it was not.' Hearst Mem. at 3; Bishop Decl. ¶ 10; Sitwala Decl. ¶ 4." (alterations

in original); “While Liebowitz neither confirms nor denies Hearst’s allegations, he argues that hypothetically if Hearst’s counsel had asked him at the conference whether Otto had settled his claims with another media company, specifically Warner Brothers Entertainment Inc. (‘Warner Bros.’), or whether his licensing agreement was part of a settlement agreement, then the correct hypothetical answer would have been ‘no’ based on the timing of the question—Otto’s settlement agreement with Warner Bros. was not executed until October 27, 2017, four days after the settlement conference. Otto Mem. at 4-5; Liebowitz Decl. ¶¶ 11-13; Bishop Decl., Ex. E: First Stipulation of Facts (‘Stipulation’) dated Dec. 20, 2017 ¶ 1, Dkt. No. 61-5.”; “Indeed, on October 27, 2017, a settlement agreement in Otto v. Warner Bros., No. 17-CV-4763 (LTS) (SN)—a similar copyright infringement action involving the Photograph—was executed. Bishop Decl., Ex. E: Stipulation ¶ 1. A licensing agreement between Otto and Warner Bros. was attached as an exhibit to this settlement agreement, and Otto explains that this was done with the specific intent of having the licensing agreement exist as a separately enforceable agreement. Otto Mem. at 5; Liebowitz Decl. ¶ 22. A stipulation of dismissal in Otto v. Warner Bros. was filed on October 30, 2017. Freeman Decl. ¶ 10, Ex. F: Stipulation of Dismissal with Prejudice at 8, Dkt. No. 69-6.”; ultimately concluding that the plaintiff’s lawyer had not engaged in sanctionable deception; “While the Court is troubled by the allegations surrounding Liebowitz’s purported misuse of the Warner Bros. license for purposes of attempting to set a damages figure at the settlement conference, it is not persuaded that sanctions are warranted under the particular circumstances of this case.”; “To the extent Liebowitz was attempting to use the potential Warner Bros. license as leverage to support a higher settlement demand in this case, and he thought that the license could be considered separately from the settlement agreement (or at least wanted to argue that it could) he was posturing about the value of Otto’s case at the conference, as lawyers often do. However, on the present record, the Court cannot conclude that the challenged conduct, as alleged, rose to the level of bad faith. While Hearst contends that Liebowitz’s representations about the purported license ‘ultimately derailed’ the settlement conference, Hearst Mem. at 9, that is a self-serving and ultimately unproveable characterization.”; quoting a 2004 article with several examples of possible settlement deception, John W. Cooley, Defining the Ethical Limits of Acceptable Deception in Mediation, 4 Pepp. Disp. Resol. L.J. 263, 264 (2004), “Cooley cites to an article, now 30 years old but still timely, that ‘poignantly illustrates the differences of opinion and confusion among the experts regarding truthfulness standards in negotiation. Using four hypothetical negotiation situations, the author conducted a survey of [15] participants, which included eight law professors who had written on ethics and negotiation, or both; five experienced litigators, a federal circuit court judge, and a [federal] [m]agistrate [judge].’ 4 Pepp. Disp. Resol. L.J. at 269. The four situations and how the 15 experts answered the ethical question posed by each of the situations are as follows: *Situation 1: Your clients, the defendants, have told you that you are*

authorized to pay \$750,000 to settle the case. In settlement negotiations after your offer of \$650,000, the plaintiffs' attorney asks, 'Are you authorized to settle for \$750,000?' Can you say, 'No I'm not?' Yes: Seven; No: Six; Qualified: Two[;] Situation 2: You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is 'disabled' when you know she is out skiing? Yes: One; No: Fourteen; Qualified: None[;] Situation 3: You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did? Yes: Five; No: Eight; Qualified: Two[;] Situation 4: In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression? Yes: Nine; No: Four; Qualified: Two." (first four alterations in original) (underscored emphasis added); ultimately concluding that the sanctions motion was a "close call" and warning the plaintiff's lawyer to be careful; "While there is an insufficient basis for the Court to impose sanctions against Liebowitz for violations of the professional rules of conduct on the current record, this motion was a close call and the Court strongly cautions Liebowitz and his law firm to be mindful of overplaying their hands (or worse) during settlement negotiations. If a license has been obtained as part of a settlement in another case, then the firm should be transparent in that regard and not try, as leverage, to pawn a license off as something other than a settlement. Lawyers have one treasured possession above all else, and that is their reputation. If it is squandered and lawyers become known for being untrustworthy, both their clients and the Court are ill-served. This is hardly the first time that Liebowitz and his firm have had their reputation called into question, and the Court can only hope it will be the last." (emphasis added)).

Best Answer

The best answer to (a) is (A) **YES**; the best answer to (b) is (A) **YES**; the best answer to (c) is **YES**.

B 8/11, 1/15, 10/15, 2/16

Negotiation/Transactional Adversaries' Legal Misunderstanding

Hypothetical 7

You are trying to settle a complex case involving both automobile liability policies and workers compensation coverage. The lawyer representing your adversary clearly does not understand her client's right to subrogation in connection with proceeds of an uninsured motorist policy. You conclude that she does not understand the law in this area.

What do you do?

- (A) You must disclose the adverse law to your adversary.
- (B) You may disclose the adverse law to your adversary, but you don't have to.
- (C) You may not disclose the adverse law to your adversary, unless your client consents.

**(C) YOU MAY NOT DISCLOSE THE ADVERSE LAW TO YOUR ADVERSARY,
UNLESS YOUR CLIENT CONSENTS**

Analysis

Lawyers sometimes assess whether they must or may disclose protected client information to correct a negotiation/transactional adversary's misunderstanding about the law. Although ethics rules and authorities have debated knowledge of the law's protection under ABA Model Rule 1.6 and other confidentiality rules, the issue is largely mooted by the majority approach concluding that lawyers generally have no duty to correct adversaries' misunderstanding of the law that was not induced by some misrepresentation.

Not surprisingly, bar groups and others which stress lawyers' confidentiality duty deemphasize or even prohibit lawyers' disclosure of some legal development that benefits the adversary but harms the client.

For instance, in the run-up to the ABA's 1983 adoption of its ABA Model Rules, the American Trial Lawyers issued its own proposed ethics principles. One example indicated that a lawyer representing a real estate buyer would violate the ethics rules by advising the seller about a zoning change (successfully sought by that lawyer) that would obviously have increased the real estate's value.

A lawyer represents a client negotiating the purchase of real estate. During negotiations, the parties and their lawyers discuss the adverse effect of existing zoning restrictions, which prevent commercial development of the property. Just prior to formalizing an agreement of sale, however, the buyer learns that his lawyer has persuaded the zoning board to change the zoning to permit commercial use. The buyer decides not to tell the seller about the imminent zoning change. The buyer's lawyer would commit a disciplinary violation by informing the seller.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, illus. 1(d), Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

Most authorities hold lawyers do not have a duty to disclose adverse law to a negotiation adversary.

- Philadelphia LEO 2005-2 (4/2005) ("The inquirer represents a truck driver who suffered serious injuries in a motor vehicle accident during the course of his employment. The driver of the other vehicle was at fault. The inquirer pursued three sources of recovery for the client: (1) workers compensation benefits; (2) a third party claim against the driver of the other vehicle who has a policy limit of \$25,000, and (3) underinsured motorist benefits with a policy limit of \$100,000. The workers compensation insurer is paying lost wage and medical benefits. The insurance company for the other driver has tendered the \$25,000 policy limit. Inquirer has not yet settled the underinsured

motorist claim, but inquirer believes that the full \$100,000 will be offered to the client. The workers compensation insurance adjuster, in discussing with the inquirer the workers compensation subrogation lien, limited the discussion of the lien to the \$12,000 net proceeds to the client from the third-party action and stated that there could be no subrogation lien in the underinsured motorist action. This, according to the inquirer, is wrong as a matter of law. In fact, according to the inquirer, workers compensation carriers have the right to a subrogation lien in the proceeds of an uninsured motorist action. The inquirer's question is whether he or she has an ethical obligation to disclose to the workers compensation insurance adjuster that the law permits the carrier to have a subrogation lien in the proceeds from the underinsured motorist claim. Of course, if inquirer made this disclosure, the adjuster would demand a share of the client's recovery from the underinsured motorist claim. Pennsylvania Rule of Professional Conduct 4.1 (the 'Rules') does not compel disclosure because the inquirer has not made a false statement of material fact or law. The omission at issue, i.e., the failure to correct the mistake of law, is not the kind of false statement Rule 4.1 would prohibit. Furthermore, the committee concludes that Rule 8.4's prohibition of dishonesty, fraud, deceit or misrepresentations does not require the correction of the adjuster's mistake of law. Finally, Rule 3.3 does not compel disclosure because there have been no representations of law made to a tribunal in the facts presented. For these reasons, the committee has concluded that the inquirer has no ethical duty to comment on the adjuster's mistake of law." (emphasis added).

- ABA LEO 387 (9/26/94) (posing the following question: "Does a lawyer have an ethical duty to inform an opposing party that the statute of limitations has run on the claim over which they are negotiating?"; answering as follows: "[T]he lawyer is not ethically obligated to reveal to opposing counsel the fact that her client's claim is time-barred in the context of negotiations").
- Rhode Island LEO 94-40 (7/27/94) ("The inquiring attorney represents a plaintiff in a personal injury matter. The attorney believes that his/her client's claim may be barred by a recent development in Rhode Island case law. Notwithstanding this information, an out-of-state insurance company made an offer of settlement. The attorney asks if the continuation of negotiations regarding a settlement with the insurance company would violate any ethical rules in light of the change in case law. . . . A lawyer generally has no affirmative duty to inform an opposing party of statutory or case law adverse to his/her client's case. Since the inquiring attorney is not making false representations in this matter, Rule 4.1 is not being violated." (emphasis added)).

As in other areas, courts tend to be more result-driven, and occasionally recognize such a duty.

- Hamilton v. Harper, 404 S.E.2d 540, 542 n.3, 544 (W. Va. 1991) (invalidating a settlement agreement in which plaintiff's lawyer accepted a \$100,000 settlement from Nationwide without advising the insurance company that a federal court had recently granted Nationwide a summary judgment in a declaratory judgment case which had eliminated Nationwide's possible liability; "While we do not dispose of this case on the grounds of misrepresentation or fraud, we take a particularly dim view of the Hamiltons' attorney's failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamiltons' counsel, in our opinion, would have required him to voluntarily disclose that information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of his failure to disclose, e.g. this appeal."; finding that the settlement agreement was unenforceable for "failure of consideration," rather than concluding that the plaintiff's lawyer had engaged in fraudulent conduct.).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE ADVERSE LAW TO YOUR ADVERSARY, UNLESS YOUR CLIENT CONSENTS.**

B 1/15, 10/15

Negotiation/Transactional Adversaries' Factual Misunderstanding

Hypothetical 8

On behalf of your client, you just made a \$100,000 offer to buy land from a farmer and his wife (who are represented by an unsophisticated lawyer). You know that the farmer thinks that your client's offer contains a provision under which your client would assume an existing mortgage -- although the offer does not.

What do you do?

- (A) You must disclose the absence of the provision.
- (B) You may disclose the absence of the provision, but you don't have to.
- (C) You may not disclose the absence of the provision, unless your client consents.

**(C) YOU MAY NOT DISCLOSE THE ABSENCE OF THE PROVISION, UNLESS
YOUR CLIENT CONSENTS (MAYBE)**

Analysis

The ABA Model Rules recognize a limited duty by lawyers to correct a negotiation adversary's misunderstanding not resulting from the lawyer's or the client's factual misstatements.¹

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

¹ Authorities agree that lawyers must correct their own misstatements or their client's misstatements that might mislead a transactional counterparty. Restatement (Third) of Law Governing Lawyers § 98 cmt. d (2000) ("A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises, unless the lawyer takes other corrective action. . . . Disclosure, being required by law . . . , is not prohibited by the general rule of confidentiality Disclosure should not exceed what is required to comply with the disclosure obligation, for example by indicating to recipients that they should not rely on the lawyer's statement."); Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, ABA Litigation Ethics 1 (Summer 2005) (explaining that a lawyer learning that her client had lied to a transactional counterparty must correct the client's lie before consummating a settlement).

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1(b).

Comment [1] provides some explanation.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

The Restatement deals in several places with a lawyer's silence in the face of a negotiation/transactional adversary's misunderstanding of facts.

In one section, the Restatement explains that

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

(a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Restatement of the Law (Second) Contracts, § 161 (1981). A comment sets a fairly high disclosure duty.

One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation, which may be grounds either for avoidance under § 164 or for reformation under § 166. . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief In the case of standardized agreements, these rules supplement that of § 211(3), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing contained a particular term. Like the rule stated in Clause (b), that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

Restatement of the Law (Second) Contracts, § 161 cmt. e (1981).

The Restatement includes an illustration of this concept.

A, seeking to induce B to make a contract to sell a tract of land to A for \$ 100,000, makes a written offer to B. A knows that B mistakenly thinks that the offer contains a provision under which A assumes an existing mortgage, and he knows that it does not contain such a provision but does not disclose this to B. B signs the writing, which is an integrated agreement. A's non-disclosure is equivalent to an assertion that the writing contains such a provision, and this assertion is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164. Whether, at the request of B, the court will decree that the writing be reformed to add the provision for assumption is determined by the rule stated in § 166.

Restatement of the Law (Second) Contracts, § 161 cmt. e, illus. 12 (1981).

Another Restatement section states a more obvious rule -- requiring lawyers to comply with any legal compulsion requiring disclosure of facts.

A lawyer communicating on behalf of a client with a nonclient may not . . . fail to make a disclosure of information required by law.

Restatement (Third) of Law Governing Lawyers § 98(3) (2000).

A Restatement comment bluntly states that

In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct.

Restatement (Third) of Law Governing Lawyers § 98 cmt. e (2000).

Bars and courts have taken differing positions on a lawyer's duty in this setting.

Of course, lawyers and their clients must comply with any specific mandatory disclosure requirements.

- Order at 5, Palacino v. Beech Mountain Resort, Inc., No. 1:13cv334 (W.D.N.C. Dec. 11, 2015), ECF No. 57 (fining a lawyer \$1000 after concluding that she had not complied with federal rules requirements to disclose all of her client's insurance coverage; "As a threshold matter, the Court finds that Defendant violated the initial disclosure requirements of Rule 26(a) as well as this Court's Pretrial Order, which directed Defendant to provide the required information by April 9, 2014. (Order, Mar. 11, 2014.) Defendant was obligated to notify Plaintiffs of the existence of the umbrella policy that might satisfy a potential judgment in this case by April 9, 2014. Fed. R. Civ. P. 26(a)(1)(A)(iv). By waiting nearly a year to provide this information to Plaintiffs, Defendant failed to comply with its legal obligations imposed by the Federal Rules of Civil Procedure and this Court's Pretrial Order.").

Some states have seemingly increased lawyers' disclosure obligation by removing the confidentiality reference. For instance, Virginia's Rule 4.1(b) indicates as follows:

[i]n the course of representing a client a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is

necessary to avoid assisting a criminal or fraudulent act by a client.

Virginia Rule 4.1(b). Deleting the phrase "unless disclosure is prohibited by Rule 1.6" removes the confidentiality duty's ability to "trump" the disclosure duty.

Most authorities go the other way -- requiring lawyers to stay silent in the face of an adversary's factual misunderstanding that the lawyer or the lawyer's client did not induce.

For instance, a 1965 ABA legal ethics opinion emphasized lawyers' duty of confidentiality in describing lawyers' approach to negotiations.

- ABA LEO 314 (4/27/65) (explaining that lawyers who learn that their clients have provided false information to the IRS may withdraw, but may not disclose the client's deception, because the IRS is not a tribunal; "The Committee has received a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers practicing before it."; "The Internal Revenue Service is neither a true tribunal, nor even a quasijudicial institution. It has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute."; "The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement; if the client refuses, the lawyer's obligation depends on all the circumstances."; "Fundamentally, subject to the restrictions of the attorney-client privilege imposed by Canon 37 [emphasizing "the duty of a lawyer to preserve his client's confidences"], the lawyer may have the duty to withdraw from the matter. If for example, under all circumstances, the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate himself from any such reliance unless it is obvious that the very fact of disassociation would have the effect of violating Canon 37. Even then, however, if a direct question is put to the lawyer, he must at least advise the service that he is not in a position to answer." (emphasis added); withdrawn in ABA LEO 352 (7/7/85), which explained the criticism of ABA LEO 314's position that lawyers may take positions with the IRS "just as long as there is a reasonable basis" for doing so; concluding that lawyers "may advise reporting a position on a [tax] return" even though the lawyer "believes the position probably will not prevail," there is no "substantial authority"

supporting the position -- as long as the position satisfies ABA Rule 3.1's requirement that lawyers may assert a position "which includes a good faith argument for an extension, modification or reversal of existing law.").

A thoughtful 1980 article published by the American Bar Foundation bluntly stated that all settlement negotiations involve deception.

On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 927 (1980).

Thus, some ethics opinions take a narrow view of lawyers' duty to correct a negotiating counterparty's misunderstanding.

- N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03) (holding that a litigant's lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure; "A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead. If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction." (emphases added); "It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which

there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.").

- New York County LEO 686 (7/9/91) ("If, based on information imparted by the client, a lawyer makes an oral representation in a negotiation, which is still being relied upon by the other side, and the lawyer discovers the representation was based on materially inaccurate information, the lawyer may withdraw the representation even if the client objects. The Code of Professional Responsibility does not require the lawyer to disclose the misrepresentation.").

Some ethics opinions seem to require such disclosure. A 2015 California legal ethics opinion presented one scenario in which a lawyer would violate the ethics rules by failing to disclose a material fact unknown to the adversary. The scenario involved a lawyer scheduling settlement negotiations in an unemployed client's case against a former employer seeking lost wages, among other things. In the Bar's scenario, the lawyer deliberately scheduled the settlement negotiations the day before the client was to begin a new job, which allowed the client and lawyer to honestly say to the adversary that the client was still unemployed. However, the Bar explained that a wage-loss claim assumes continuing losses in the future -- which would be inconsistent with the lawyer's knowledge that the client would start a new job the next day.

- California LEO 2015-194 (2015) (finding that a lawyer making a true but misleading statement about a client's employment had a duty to disclose additional facts to avoid an impermissibly misleading statement to an adversary; "The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff's efforts to obtain other employment in mitigation of her damages and the results of those

efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff's starting salary will be \$75,000.00. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff's new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney makes a settlement demand that lists lost future earnings as a component of Plaintiff's damages and attributes a specific dollar amount to that component."; "This example raises two issues: the failure to disclose the new employment, and client's instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, assuming that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job, including in the list of Plaintiff's damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because the Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. See, e.g., Scofield v. State Bar (1965) 62 Cal.2d 624, 629 [43 Cal.Rptr. 825] (attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant, disciplined for making affirmative misrepresentations with the intent to deceive); Pickering v. State Bar (1944) 24 Cal.2d 141, 144 [148 P.2d 1] (attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)). Second, Attorney was specifically instructed by Plaintiff, his client, not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client's instructions, rule 3-700(B)(2) requires withdrawal if an attorney's representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff's instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If the client refuses, Attorney must withdraw under rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Formal Opn. No. 2013-189; 8/ see also Los Angeles County Bar Association Opn. No. 520).").

Other bars have also indicated that lawyers in some situations must affirmatively disclose adverse facts to the adversary.

- Pennsylvania LEO 97-107 (8/21/97) (analyzing a settlement agreement that was premised on a client's inability to convey a timeshare by deed; explaining that after negotiating a settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the timeshare by deed; holding that the lawyer must disclose that fact; "Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false." (emphasis added)).

Courts show the same dichotomy.

Some courts find that lawyers need not disclose adverse facts to an adverse party entering into settlement negotiations before the completion of discovery.

- Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731, 734, 736 (N.C. Ct. App. 2009) (addressing a situation in which a plaintiff settled with the seller of a large boat for any past problems with the boat, and reserved only the right to pursue claims against the seller based on warranty work; rejecting the plaintiff's effort to void the settlement after discovering "that Hardin's boat, while being shipped from Cruisers' manufacturing facility in Wisconsin to North Carolina, had been involved in a collision with a tree"; explaining that "Hardin had the ability by virtue of the civil discovery rules to obtain from defendants -- prior to entering into the settlement agreement -- information about the pre-sale collision. Hardin, therefore, could have, through the exercise of due diligence, learned of the supposed latent defect."; noting that "Hardin cites no authority -- and we have found none -- requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have information it would prefer not to disclose prior to settlement."; also explaining that "Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in Talton [Talton v. Mac Tools, Inc.], 453 S.E.2d 563 (N.C. Ct. App. 1995)], he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that

would have persuaded him not [to] sign the release when he has not demonstrated that defendants had any duty to disclose those facts.").

- Brown v. County of Genesee, 872 F.2d 169, 173, 175 (6th Cir. 1989) (reversing a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen (which was an important element in a settlement); first noting that "counsel for Brown could have requested this information from the County, but neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct."; criticizing the lower court's analysis; "[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. 'An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to "fraud upon the court" for purposes of vacating a judgment under Rule 60(b).'" (emphasis added) (citation omitted); also noting that the county's lawyer was not certain that the claimant misunderstood the facts; "The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.").

In contrast, several courts either criticized, imposed liability, refused to dismiss cases or otherwise condemned lawyers who did not disclose adverse facts.

- Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 28-29, 32 n.6, 33, 38 (Cal. Ct. App. 2004) (reversing a dismissal of a fraud action against Jones Day for representing a buyer in a corporate transaction who did not advise the seller of shares of a "toxic" financing deal that adversely affected the value of the shares in the new company that the seller obtained; affirming dismissal of a negligent misrepresentation claim against Jones Day, but declining to find against Jones Day on the fraud claim; noting in the

description of the case that Jones Day won summary judgment in other similar cases against it; "A shareholder in a company acquired in a merger transaction sued the law firm which represented the acquiring company for fraud. He alleged the law firm concealed the so-called toxic terms of a third party financing transaction, and thus defrauded him into exchanging his valuable stock in the acquired company for 'toxic' stock in the acquiring company. The law firm demurred. It contended it made no affirmative misstatements and had no duty to disclose the terms of the third party investments to an adverse party in the merger transaction. We conclude the complaint stated a fraud claim based on nondisclosure. The complaint alleged the law firm, while expressly undertaking to disclose the financing transaction, provided disclosure schedules that did not include material terms of the transaction." (emphases added); "The demurrer to Vega's cause of action for negligent misrepresentation was properly sustained by the trial court, since such a claim requires a positive assertion. . . . Since no positive assertions are alleged, other than the comments that the financing was 'standard' and 'nothing unusual,' no claim for negligent misrepresentation is stated."; "Jones Day specifically undertook to disclose the transaction and, having done so, is not at liberty to conceal a material term. Even where no duty to disclose would otherwise exist, 'where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated." . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud." (citation omitted) (emphasis added); "Jones Day contends that Vega's claims are barred by the doctrine of res judicata, because Jones Day obtained summary judgment in its favor on fraud claims in earlier lawsuits brought by three other shareholders, who subsequently waived, abandoned and dismissed their respective appeals. Jones Day argues Vega was in privity with each of those three shareholders, because he is also a former shareholder in MonsterBook, his fraud claim is the same as their claims, he knew about their lawsuits, and he is using the same attorney. This relationship, Jones Day contends, is sufficiently close to justify application of the principle of preclusion. Again, we cannot agree."; "While Jones Day obtained summary judgment on fraud claims by three other shareholders, Vega was not a party to those lawsuits.").

- Statewide Grievance Comm. v. Egbarin, 767 A.2d 732, 735 (Conn. App. Ct. 2001) (suspending for five years a lawyer for making a true but misleading statement -- providing lenders copies of his tax return, but failing to explain that he had not actually paid the taxes; "As a condition to receiving the loans, the defendant provided Sanborn [mortgage company] and the Picards [couple whose property defendant purchased, who also made a \$30,000 loan to him] with copies of his 1992 and 1993 federal income tax returns. The defendant's 1992 federal income tax return listed an adjusted gross income of \$93,603 and a tax liability of \$26,210. His 1993 federal income tax return stated that the adjusted gross income was \$116,950, with a tax owing of

\$31,389."; "As of the date of the closing, however, the defendant had in fact not paid, not even filed for, the amounts due and owing on the 1992 and 1993 federal income tax returns. The defendant did not disclose either to Sanborn or to the Picards that he had not paid his 1992 and 1993 federal income tax obligations.").

- Neb. v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who knew that an unrepresented counterparty was unaware of a \$1,000,000 insurance policy that the lawyer's client had available; "On November 5, 1985, respondent Addison visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. Addison became aware at this meeting that Winchester was under the false impression that State Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, Addison negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for \$45,000 of the State Farm settlement of \$100,000, and an additional \$15,000 if and when Medina settled with Allstate, plus another \$5,000 if the settlement proceeds from Allstate exceeded \$40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained by fraudulent misrepresentations made by respondent Addison."; "In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).").
- Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a \$1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller amount; noting that a letter in the lawyer's file mentioned the larger insurance policy).

In 1999, the District of New Mexico dealt with what the court found was "sharp practice." A plaintiff's lawyer, who had deliberately picked an effective date of a release knowing the release would not cover an additional claim that his client eventually asserted. The court held that the plaintiff had not acted unethically, but decried the unprofessional conduct.

Pendleton v. Cent. N.M. Corr. Facility, 184 F.R.D. 637, 640, 638, 640-41, 641 (D.N.M. 1999) (rejecting defendant's claim for sanctions based on "a material misrepresentation by Plaintiff's attorney as to why he sought the change in the effective date of the release in CIV 96-1472."; finding that defendant's argument procedurally defective; also finding plaintiff's claim for sanctions against defendant procedurally defective; describing the background of the parties' competing claims for sanctions: "Defendant's counsel drafted the settlement documents in the prior action unaware of the CNMCF Warden's August 28, 1997 letter or Plaintiff's retaliation claim. As drafted, the effective date of the release was to be the date Plaintiff executed the document. On September 2, 1997, Plaintiff's counsel (Mr. Mozes) requested that the release be effective only through August 21, the date of the settlement conference. When questioned why, Plaintiff's counsel responded that such was his normal practice. Defendant contends that based on this representation, its counsel agreed to the request. Plaintiff's counsel discussed the change in a September 2, 1997 letter indicating that 'we will release the "State" up through the date of the Settlement Conference, August 21, 1997.'" (emphases added); "Although Rule 11(c)(1)(A) provides that 'if warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [for sanctions]' (emphasis added), the court does not believe that such fees are warranted, even in the face of Defendant's non-compliance with the safe-harbor provisions of Rule 11, because of the sharp practices engaged in by the Plaintiff's counsel."; "As we go through this life we learn, and sometimes the hard way, who we can trust to be candid and who we cannot. It is unfortunate that some attorneys apparently feel no obligation to their fellow attorneys, but then again, as the saying goes, 'it's a short road that doesn't have a bend in it.' The Rules of Professional Conduct and the case law suggest that, even in the context of finalizing a settlement agreement and release, a knowing failure to disclose a non-confidential, material and objective fact upon inquiry by opposing counsel is improper. See 2 N.M. R. Ann. (1998), Rules of Professional Conduct, Preamble, A Lawyer's Responsibilities ('As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.');

id. § 16-401 ('In the course of representing a client a lawyer shall not knowingly [] make a false statement of material fact or law to a third person.');

id. § 16-804(C); ABA/BNA Lawyers' Manual on Professional Conduct, § 71:201 ('An omission of material information that is intended to mislead a third person may constitute a 'false statement.'). The court agrees with Defendant that the failure to disclose a fact may be a misrepresentation in certain circumstances. See Restatement (Second) of Torts § 529 & cmt. A ('A statement containing a half-truth may be as misleading as a statement wholly false.')(1977)."; "What is particularly troubling in this case is that the second retaliation lawsuit arose directly and immediately out of efforts to settle the prior action. Holding back information that if divulged might have led to a quick low-cost resolution of this action without resort to additional

litigation is exactly the type of conduct that the public finds abhorrent and that contributes to the low esteem that the bar currently is trying to reverse." (emphasis added); "Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference. The profession is more than a business, and should remain so. As professionals we should, while trying to solve our clients' problems, make every effort to avoid needless litigation. The conduct employed in this case certainly was not calculated to achieve that end." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE ABSENCE OF THE PROVISION, UNLESS YOUR CLIENT CONSENTS (MAYBE).**

B 1/15, 2/15, 4/15, 10/15

Transactional Adversaries' Substantive Mistakes

Hypothetical 9

You are representing the seller in negotiating a complex transaction memorialized in a 50-page draft agreement. One provision indicates that buyer's sole remedy for seller's breach of a covenant not to compete is return of the consideration allocated in the agreement for the covenant not to compete. Near the end of the drafting process, the buyer amends another provision in the agreement so that only one dollar is allocated to consideration for the covenant not to compete -- which essentially renders the covenant meaningless (because seller's breach would at most result in one dollar of damages). When you advise your client of the buyer's mistake, she directs you to keep it secret.

What do you do?

- (A) You must disclose the buyer's mistake.
- (B) You may disclose the buyer's mistake, but you don't have to.
- (C) You may not disclose the buyer's mistake, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE BUYER'S MISTAKE, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

Analysis

In some situations, a negotiation/transaction adversary makes a substantive mistake. For instance, the adversary might forget to ask for an indemnity in a situation which would normally call for an indemnity. Or the adversary might make changes in one part of a lengthy contract that has implications in another part of the contract, which the adversary does not realize. These mistakes differ from what might be considered drafting mistakes (sometimes called "scrivener's errors"), such as overlooking a necessary comma, or failing to include a provision that the negotiating parties agree to add to a contract, etc.

Some transactional adversaries' mistakes can result in billion dollar consequences.

- Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.), 777 F.3d 100, 105 (2d Cir. 2015) (analyzing the effect of a Mayer Brown paralegal's mistake in drafting a document releasing JP Morgan's security interests in certain General Motors assets; explaining that GM wanted to pay off a synthetic lease secured by two UCC statements, but that the paralegal accidentally listed on the release security for a \$1,500,000,000 term loan JP Morgan had made to General Motors; noting that lawyers at General Motors, its law firm Mayer Brown, JP Morgan, and its law firm (Simpson Thacher) all missed the mistake; explaining that General Motor's unsecured creditors committee had claimed in bankruptcy court that JP Morgan was not a secured lender in connection with that \$1,500,000,000 term loan amount -- which would make JP Morgan an unsecured creditor in the General Motors bankruptcy; noting that the Delaware supreme court had answered a certified question by holding under Delaware that JP Morgan could "authorize" the release even if it did not intend to release the securities; "Mayer Brown prepared a Closing Checklist, draft UCC-3 termination statements, and an Escrow Agreement, all aimed at unwinding the Synthetic Lease but tainted by one crucial error: The documents included a UCC-3 termination statement that erroneously identified for termination a security interest related not to the Synthetic Lease but to the Term Loan. The critical question in this case is whether JPMorgan 'authorize[d] [Mayer Brown] to file' that termination statement."; "After Mayer Brown prepared the Closing Checklist and draft UCC-3 termination statements, copies were sent for review to a Managing Director at JPMorgan who supervised the Synthetic Lease payoff and who had signed the Term Loan documents on JPMorgan's behalf. Mayer Brown also sent copies of the Closing Checklist and draft UCC-3 termination statements to JPMorgan's counsel, Simpson Thacher, to ensure that the parties to the transaction agreed as to the documents required to complete the Synthetic Lease payoff transaction. Neither directly nor through its counsel did JPMorgan express any concerns about the draft UCC-3 termination statements or about the Closing Checklist."; "From these facts it is clear that although JPMorgan never intended to terminate the Main Term Loan UCC-1, it authorized the filing of a UCC-3 termination statement that had that effect. . . . JPMorgan and Simpson Thacher's repeated manifestations to Mayer Brown show that JPMorgan and its counsel knew that, upon the closing of the Synthetic Lease transaction, Mayer Brown was going to file the termination statement that identified the Main Term Loan UCC-1 for termination and that JPMorgan reviewed and assented to the filing of that statement. Nothing more is needed."; reversing the bankruptcy court's grant of summary judgment in favor of JP Morgan; instructing the

bankruptcy court to enter partial summary judgment for the unsecured creditors committee).

- Gavin Broady, [Simpson Thacher May Be Haunted By \\$1.5B Loan Gaffe](#), Law360, Jan. 29, 2015 ("While [Mayer Brown LLP](#) originated the paperwork error that doomed [JPMorgan Chase & Co.](#)'s secured interest in a \$1.5 billion loan tied up in the [General Motors Corp.](#) bankruptcy, experts say the [Simpson Thacher & Bartlett LLP](#) team that missed the gaffe is a far more likely target for any resulting legal malpractice litigation."; "In the latest dramatic reversal in the Byzantine fallout of GM's bankruptcy, the Second Circuit [recently determined](#) that JPMorgan will have to live with the consequences of a Mayer Brown paralegal's error that slipped through multiple layers of review and put millions -- if not billions -- of dollars at risk."; "Firms will no doubt be closely watching the case to see how any malpractice claims shake out, but in the meantime many attorneys are taking a hard look at how a blunder of this magnitude could occur with a pair of sophisticated law firms at the helm."; "Errors like this happen because to err is human, especially when multiple layers of delegation occur and there are not careful checks and balances on the work as it proceeds back up the 'food chain,'" Jacobowitz [Univ. of Miami Law School professor] said. 'Firms need to provide training on legal ethics and professional liability as well as have checks and balances to review legal work.'"; "Cozen O'Connor LLP partner H. Robert Fiebach said that over-reliance on delegation coupled with lax oversight is the likely culprit here, noting that the Second Circuit opinion explicitly states that the paralegal tapped by Mayer Brown was 'unfamiliar with the transaction or the purpose of the request.'"; "The problem is that in most transactional firms a lot of responsibility is given to a paralegal, and often the paralegal's work is not carefully reviewed by the lawyer, which is exactly what happened here,' according to Fiebach. 'These kinds of errors are not all that unusual. It's only the number of zeroes on the transaction that makes your eyebrows raise.'").

Courts and bars seem to agree that lawyers generally have no duty to transactional adversaries, other than to avoid fraudulent representations or asserting clients' misconduct.

In 2015, a Michigan appellate court vigorously rejected plaintiff's argument that she should be entitled to recover from defendant Progressive \$28,000 to cover a hospital bill -- which arrived after she had given Progressive a full release in return for a

\$78,000 settlement on a personal injury claim. The court repeatedly blamed the plaintiff's predicament on her lawyer rather than defendant Progressive or its lawyer.

When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. . . . Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the \$28,000 charge -- even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge. . . . If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. . . . If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement. . . . Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts. . . . Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.

Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-20 (Mich. Ct. App. Mar. 5, 2015)¹ (emphasis added).

¹ Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-4, *4-5, *5, *16, *19-20, *20 (Mich. Ct. App. Mar. 5, 2015) (analyzing efforts by a car accident plaintiff who settled her personal injury protection claim against defendant Progressive for \$78,000 for which she gave Progressive a full release; noting that days after the settlement she received a \$28,000 from the hospital at which she was treated, which was in addition to the surgeon's bill; explaining that plaintiff sought to void the settlement agreement because Progressive was aware of the hospital bill but that she was not aware of it at the time she settled with Progressive; reversing the trial court's order voiding the settlement; noting plaintiff's lawyer could have handled the settlement differently, but had failed to protect his client; "When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. There are many other ways plaintiff or her lawyer could have settled her claim besides a universal settlement that wiped the slate clean of any claims incurred prior to the date of settlement. But they did not do so. Instead, they settled for a complete waiver of claims for \$78,000, and Progressive paid this sum to buy its peace and achieve finality in this litigation." (footnote omitted); "Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the \$28,000 charge -- even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge." (footnotes omitted); "If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. And, were we to credit the theory that opposing counsel had a duty to notify plaintiff of the \$28,000 charge, then this case would stand for the novel theory that opposing counsel has a duty to do what is in fact, law, and professional obligation, the duty of plaintiff's lawyer. It is the obligation of plaintiff's attorney to ensure his client knows that a settlement, like the one at issue here, encompasses all claims. If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement."; "Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts."; finding that the settlement did not result from a "mutual mistake," but rather because plaintiff's lawyer had not protected his client; "Here, plaintiff seeks to engage in exactly this sort of obligation shifting: because her trial attorney did not consider that she might face additional (and perhaps unknown) charges for PIP benefits incurred before November 5, 2013 -- i.e., the \$28,942 Synergy billing - - she argues that Progressive had a duty to inform her of this billing during the settlement negotiation. Of course, Progressive has no such duty. Progressive, as a defendant in litigation, is in an adversarial position with plaintiff, and, as such, has every right to protect its interest and to expect that courts will uphold a settlement freely entered into by the parties. Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.").

Other courts take the same approach, although perhaps without the vehement language.

- Lighthouse MGA, L.L.C. v. First Premium Ins. Grp., Inc., 448 F. App'x 512, 516, 517, 518 (5th Cir. 2011) (holding that the general counsel of a party in a transaction did not jointly represent the counterparty, and did not engage in an affirmative misrepresentation about a forum selection clause in the contract; concluding that the lawyer did not have a duty to tell the unrepresented counterpart about the forum selection provision; finding that the lawyer did not have a conflict under Rule 1.7; "Lighthouse's Director of Marketing has affirmed that the general counsel was 'the attorney for First Premium,' and there is no evidence in the record that the general counsel ever undertook to give legal advice to Lighthouse or purported to draft the contract on Lighthouse's behalf. As First Premium notes, even if Lighthouse subjectively believed that First Premium's general counsel was also Lighthouse's attorney, such a belief would not be reasonable." (footnote omitted); finding the lawyer did not violate Rule 4.3 by providing advice to an unrepresented party; "As First Premium notes, no authority supports Lighthouse's contention that First Premium's general counsel provided legal advice to Lighthouse merely by drafting the contract."; concluding that the lawyer did not violate Rule 8.4(c)); "There is no evidence that the general counsel made any false or misleading statements to Lighthouse. To the extent that Lighthouse's argument is based on the general counsel's failure to point out of explain the forum selection clause to Lighthouse, First Premium's general counsel did not have a fiduciary relationship with Lighthouse that would give rise to a duty to convey that information under Louisiana law.").
- Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986) (holding that a lawyer did not have a duty of professional care to an unrepresented counterparty in a real estate transaction).

This hypothetical comes from a 2013 California legal ethics opinion. California LEO 2013-189 (2013)² started with a basic scenario:

² California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure

to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only \$1 as consideration for the covenant not to compete with \$4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only \$1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of \$1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only \$1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only \$1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete.

California LEO 2013-189 (2013).

Scenario A involves an adversary's substantive mistake.

Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only \$1 as consideration for the covenant not to compete with \$4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only \$1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of \$1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form.

Id.

The legal ethics opinion started its analysis with a general statement:

Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. (emphasis added). On the other hand,

an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of this scenario:

In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only \$1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney.

Id. (emphasis added).

Scenario B involved what would be considered an adversary's scrivener's error -- which raises different issues.

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE BUYER'S MISTAKE, UNLESS YOUR CLIENT CONSENTS (PROBABLY).**

B 1/15, 10/15

Transactional Adversaries' Scrivener's Errors

Hypothetical 10

Since late yesterday afternoon, you have been furiously exchanging draft contracts with a transactional counterparty. You finally reached agreement on the last few provisions, which the adversary's lawyer says she will write up while you head home for an hour or two of sleep. When you returned to the office this morning to check what the other lawyer prepared, you realize that she left out an important term (favorable to her client) to which you had agreed during the final negotiation discussion.

- (a) What do you do when dealing with your client?
- (A) You must disclose the adversary's mistake to your client.
 - (B) You may disclose the adversary's mistake to your client, but you don't have to.
 - (C) You may not disclose the adversary's mistake to your client.

(B) YOU MAY DISCLOSE THE ADVERSARY'S MISTAKE TO YOUR CLIENT, BUT YOU DON'T HAVE TO (PROBABLY)

- (b) What do you do when dealing with the adversary's lawyer?
- (A) You must disclose the adversary's mistake to the adversary's lawyer.
 - (B) You may disclose the adversary's mistake to the adversary's lawyer, but you don't have to.
 - (C) You may not disclose the adversary's mistake to the adversary's lawyer, unless your client consents.

(A) YOU MUST DISCLOSE THE ADVERSARY'S MISTAKE TO THE ADVERSARY'S LAWYER

Analysis

In some situations, lawyers or their clients make what could be called a scrivener's error. These differ from substantive mistakes, such as forgetting to negotiate a provision that would normally be found in a contract, etc.

A scrivener's error often involves a typographical mistake, a failure to highlight a change, etc. In today's fast-paced and electronic communication-intensive world, such mistakes can occur easily.

- Jim Carlton, Fresh Dispute Mars Bay Area Transit Deal, Wall St. J., Nov. 18, 2013 ("An unusual dispute threatens to undo a contract agreement between management and labor leaders of the Bay Area Rapid Transit (BART) system, raising the possibility of another crippling public-transit strike."; "The dispute centers on a provision in the contract that allows workers to take up to six weeks of paid family leave. Management says the provision was never agreed to and was left in as a result of a clerical error. Representatives of the two unions, Amalgamated Transit Union (ATU) Local 1555 and Service Employees International Union (SEIU) Local 1021, say BART negotiators were fully aware of it."; "Labor experts said that, while unusual, it isn't unprecedented for a dispute to arise over the terms of a labor contract after it has been ratified. 'There are a number of cases that arise in arbitration over the allegation that something is in the agreement as a result of a mutual mistake,' said William B. Gould IV, emeritus professor of law at the Stanford Law School and former chairman of the National Labor Relations Board."; "In the BART case, 'there is certainly some kind of screw-up,' Mr. Gould added. 'The question is really going to be, if they are unable to resolve this through discussion and negotiations, was this a mutual mistake?").
- BBC News (Europe), Bank Clerk Falls Asleep On Keyboard And Accidentally Transfers £189 Million To Customer, June 10, 2013 ("A German labour court has ruled that a bank supervisor was unfairly sacked for missing a multi-million-euro error by a colleague who fell asleep during a financial transaction. The clerk was transferring 64.20 euros (£54.60) when he dozed off with his finger on the keyboard, resulting in a transfer of 222,222,222.22 euros (£189Million). His supervisor was fired for allegedly failing to check the transaction. But judges in the state of Hesse said she should have only been reprimanded.").
- Brad Heath, Small Mistakes Cause Big Problems, USA Today, March 30, 2011 ("If you're reading this in New York, you're probably too drunk to drive. That's because lawmakers accidentally got too tough with a get-tough drunken-driving law, inserting an error that set the standard for 'aggravated driving while intoxicated' below the amount of alcohol that can occur naturally. The one-word mistake makes the new law unenforceable, says Lieutenant Glenn Miner, a New York State Police spokesman. However, drivers with a blood-alcohol content of 0.08% or higher can still be prosecuted under other state laws. In the legislative world, such small errors, while uncommon, can carry expensive consequences. In a few cases around the nation this year, typos and other blunders have redirected millions of tax

dollars or threatened to invalidate new laws. In Hawaii, for instance, lawmakers approved a cigarette-tax increase to raise money for medical care and research. Cancer researchers, however, will get only an extra 1.5 cents next year -- instead of the more than \$8 million lawmakers intended. That's because legislators failed to specify that they should get 1.5 cents from each cigarette sold, says Linda Smith, an adviser to Governor Linda Lingle."; "New York's mistake came in a bill meant to set tougher penalties and curb plea bargains for drivers well above the legal intoxication standard. Instead of specifying blood alcohol as a percentage, as most drunken-driving laws do, New York set its threshold as 0.18 grams --'so low you can't even measure it,' Miner says.").

- Anahad O'Connor, New York State Backs Remorseful Buyers at Rushmore Tower, The New York Times, April 9, 2010 ("Call it the multimillion-dollar typo. On Friday, the New York State attorney general's office ruled in favor of a group of buyers who were looking to back out of their multimillion-dollar contracts at The Rushmore, an expensive Manhattan condominium building along the Hudson River. The buyers found an unusual loophole -- a seemingly minor typo in a date in the densely worded 732-page offering plan -- and used it to argue that they deserved their hefty deposits back."; "In this case, the typo got in the way. Instead of stating that buyers had the right to back out if the first closing did not occur before September 1, 2009, the offering plan stated that buyers had the right to back out if the first closing did not occur before September 1, 2008, which was the first day of the budget year, not the last. Ultimately, the first closing took place in February 2009. The sponsors argued that they made a trivial mistake -- a typo that lawyers refer to as a 'scrivener's error' -- that should be overlooked. But the attorney general's office disagreed. It sided with the buyers.").
- Mizuho Securities Sues Tokyo Stock Exchange Over 41 Billion Yen Trade Fiasco, Kyodo News, Oct. 28, 2006 ("Mizuho Securities Company filed a lawsuit Friday against Tokyo Stock Exchange (TSE) Inc. at the Tokyo District Court for 41.5 billion yen in damages, claiming the bourse caused it huge losses when the TSE computer system failed to process a correction to an erroneous order the brokerage placed last December. The suit brought by Mizuho Securities, a unit of Mizuho Financial Group Inc., marks the first time a brokerage has sued the operator of the Tokyo Stock Exchange over equity trading. Last December, a Mizuho Securities clerk mistakenly entered a sell order for 610,000 shares in staffing company J-Com Company for 1 yen each. The actual order was one share for 610,000 yen. As soon as the brokerage noticed the mistake, it tried to withdraw the sell order but the TSE's computer system took time to process the cancellation order. Sources said earlier this month that Mizuho lost about 40.7 billion yen buying back all the shares from people who bought at the erroneous price and said the brokerage has calculated 40.4 billion yen of that loss was due to a system failure at the TSE.").

- Grant Robertson, Comma Quirk Irks Rogers Communications, The Globe & Mail, Aug. 6, 2006 ("It could be the most costly piece of punctuation in Canada. A grammatical blunder may force Rogers Communications Inc. to pay an extra \$2.13-million to use utility poles in the Maritimes after the placement of a comma in a contract permitted the deal's cancellation. The controversial comma sent lawyers and telecommunications regulators scrambling for their English textbooks in a bitter 18-month dispute that serves as an expensive reminder of the importance of punctuation. Rogers thought it had a five-year deal with Aliant Inc. to string Rogers' cable lines across thousands of utility poles in the Maritimes for an annual fee of \$9.60 per pole. But early last year, Rogers was informed that the contract was being cancelled and the rates were going up. Impossible, Rogers thought, since its contract was iron-clad until the spring of 2007 and could potentially be renewed for another five years. Armed with the rules of grammar and punctuation, Aliant disagreed. The construction of a single sentence in the 14-page contract allowed the entire deal to be scrapped with only one-year's notice, the company argued. Language buffs take note -- Page 7 of the contract states: The agreement 'shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.'"; "Had it not been there, the right to cancel wouldn't have applied to the first five years of the contract and Rogers would be protected from the higher rates it now faces. 'Based on the rules of punctuation,' the comma in question 'allows for the termination of the [contract] at any time, without cause, upon one-year's written notice,' the regulator said. Rogers was dumbfounded. The company said it never would have signed a contract to use roughly 91,000 utility poles that could be cancelled on such short notice. Its lawyers tried in vain to argue the intent of the deal trumped the significance of a comma. 'This is clearly not what the parties intended,' Rogers said in a letter to the CRTC.").
- Gladwin Hill, For Want of Hyphen, N.Y. Times, July 27, 1962 ("The omission of a hyphen in some mathematical data caused the \$18,500,000 failure of a spacecraft launched toward Venus last Sunday, scientists disclosed today. The spacecraft, Mariner I, veered off course about four minutes after its launching from Cape Canaveral, Florida, and had to be blown up in the air. The error was discovered here this week in analytical conferences of scientists and engineers of the National Aeronautics and Space Administration, the Air Force and the California Institute of Technology Jet Propulsion Laboratory, manager of the project for N.A.S.A. Another launching will be attempted sometime in August. Plans had been suspended pending discovery of what went wrong with the first firing. The hyphen, a spokesman for the laboratory explained, was a symbol that should have been fed into a computer, along with a mass of other coded mathematical instructions. The first phase of the rocket's flight was controlled by radio signals based on this computer's calculations. The rocket started out

perfectly on course, it was stated. But the inadvertent omission of the hyphen from the computer's instructions caused the computer to transmit incorrect signals to the spacecraft.").

One author predicted more such errors as lawyers and clients use AI to prepare documents.

- Andrew Strickler, Typos Stage A Resurgence As Attys Turn To Document Makers, Law360, Sept. 9, 2016 ("With BigLaw under pressure to cut out duplicative work and slash client bills, the profession's growing reliance on newfangled document generators is leading to more old-school typos, experts say, raising the specter of more malpractice claims focused on seemingly minor drafting flaws."; "While keyboard flubs, transposed numbers and other so-called scrivener's errors trigger a far smaller percentage of suits against lawyers than allegedly bad advice or conflicts, liability experts say the perils of automated drafting systems -- and lawyers' failures to triple-check every word of binding legal documents -- are becoming increasingly clear in a rising tide of suits aimed at attorneys.").

Ethics authorities usually do not deal with such drafting errors, but rather with more substantive mistakes or misunderstanding.

(a) In 1986, the ABA explained that a lawyer in this situation did not have to advise a client of the adversary's scrivener's error.

- Informal ABA LEO 1518 (2/9/86) (analyzing the following situation: "A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance." (emphasis added); concluding that the lawyer must advise the adversary of the mistake but need not advise the lawyer's client of the mistake; "The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation. A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983)." (emphases added); "The client does not have a right to take unfair advantage of the error. The client's

right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by A and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."; providing a further explanation in a footnote; "The delivery of the erroneous document is not a 'material development' of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a 'material fact' which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer." (emphasis added); also analyzing the impact of ABA Model Rule 1.6, and the opinion's deliberate lack of an analysis if the client wanted to take advantage of the adversary's mistake; "Assuming for purposes of discussion that the error is 'information relating to [the] representation,' under Rule 1.6 disclosure would be 'impliedly authorized in order to carry out the representation.' The Comment to Rule 1.6 points out that a lawyer has implied authority to make 'a disclosure that facilitates a satisfactory conclusion' -- in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to expl[oi]t the error.").

(b) The next question is whether a lawyer in this situation must advise the adversary of the error.

The ABA dealt with this situation in ABA LEO 1518 (2/9/86). As explained above, the ABA concluded that "the omission of the provision from the document is a 'material fact' which . . . must be disclosed to [the other side's] lawyer." Id.

The Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement Negotiations 57 (Aug. 2002). The Guidelines explain that "[i]t would be unprofessional, if not unethical,

knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement." Id.

Other authorities agree. See, e.g., Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 815 (2001) ("the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

Predictably, courts have little patience with transactional or litigation adversaries' attempt to exploit a scrivener's error.

- Cadbury UK Ltd. v. Meenaxi Enterprise, Inc., Cancellation No. 92057280, Trademark Trial & Appeal Board, at 3, 4, 9, 10, 11, 13 (USTPO July 21, 2015) (compelling responses to document requests, and rejecting the recipient's delay in responding to the document requests based on requesting party's obviously incorrect designation of the entity from which it sought the document; "As to the merits, this dispute centers on a typographical error. Respondent concedes that it made a typographical error in its document requests, inadvertently referring in the preamble to Petitioner as 'Venture Execution Partners, Inc.,' instead of 'Cadbury UK Limited.'"; "Petitioner argues that the typographical error was a crucial mistake, the result of which is that the document requests were never directed to Petitioner."; "The isolated reference to Venture Execution Partners, Inc., was clearly a typographical error; it did not cause a matter of real confusion or misunderstanding. The motion to compel is the result of Petitioner's attorney apparently concluding, upon the discovery of a typographical error, that he had found an excuse to become pedantic, unreasonable, and uncooperative. The Board expects each party to every case to use common sense and reason when faced with what the circumstances clearly show to be a typographical error." (emphasis added); "Although the mistake of mentioning a third party in the preamble to Respondent's First Set of Requests for the Production of Documents and Things suggests that the document requests were modeled from another case in which Respondent or its prior counsel was involved, the refusal of Petitioner to provide any response to the requests is untenable. If Petitioner had any doubt as to the document requests, it should have contacted Respondent for clarification rather than simply refusing to respond."; "The Board expects that when there is an obvious and inadvertent typographical error in any discovery request or other filing -- particularly where, as here, the intended meaning was clear—the parties will not require the Board's intervention to correct the mistake." (emphasis added); "It also must be stressed that Petitioner's conduct has not

demonstrated the good faith and cooperation that is expected of litigants during discovery. Such conduct has delayed this proceeding, unnecessarily increased the litigation costs of the parties, wasted valuable Board resources, and interfered with Respondent's ability and, indeed, its right, to take discovery. If Respondent perceives Petitioner as not having complied with the terms of this order, or can establish any further abusive, uncooperative, or harassing behavior from Petitioner, then Respondent's remedy will lie in a motion for entry of sanctions. Sanctions the Board can order, if warranted, may include judgment against Petitioner.").

- Stare v. Tate, 98 Cal. Rptr. 264, 266, 267 (Cal. Ct. App. 1971) (analyzing a situation in which a husband negotiating a property settlement with his former wife noticed two calculation errors in the agreement; noting that the husband nevertheless signed the settlement without notifying his former wife of the errors; explaining the predictable way in which the issue arose: "The mistake might never have come to light had not Tim desired to have that exquisite last word. A few days after Joan had obtained the divorce he mailed her a copy of the offer which contained the errant computation. On top of the page he wrote with evident satisfaction: 'PLEASE NOTE \$100,000.00 MISTAKE IN YOUR FIGURES. . . .' The present action was filed exactly one month later."; pointing to a California statute allowing lawyers to revise written contracts that contain a "mistake of one party, which the other at the time knew or suspected."; revising the property settlement to match the parties' agreement).

A lawyer may even face bar discipline for trying to take advantage of an adversary's drafting error.

- Alan Cooper, Roanoke Lawyer gets reprimand in case with divorce drafting error, Va. Law. Wkly., Nov. 9, 2010 ("Richard L. McGarry represented his sister in her divorce, and in drafting the final order the husband's lawyer made a mistake. The sister owed her ex more than \$11,000, but the order switched the parties, and stated the man owed the money. McGarry's position was that the order had been entered and had become final. The judge later corrected the order. The VSB [Virginia State Bar] 8th District Disciplinary Committee issued a public reprimand without terms, citing the disciplinary rule that prohibits taking action that 'would serve merely to harass or maliciously injure another.' . . . The husband's attorney, Stacey Strentz, drafted the final order, but inadvertently said in it that the husband owed the sister the child's support arrearages. The judge entered the order on Oct. 15, 2007. A short time after the order was entered, Strentz discovered the error and asked McGarry to cooperate in presenting a corrected order. He refused and instead contacted the Division of Child Support Enforcement and demanded that the agency take action to collect the arrearages. On Oct. 25, Strentz mailed McGarry notice of a hearing for Nov. 6 to correct a clerk's error as set forth in Virginia

Code § 8.01-428.2. The provision is an exception to the general rule that a court order becomes final after 21 days. The matter was not heard that day because the judge was ill. Despite Strentz's effort to correct the order, McGarry wrote the Division of Child Support Enforcement on Nov. 5 that the order was final and could not be modified under Rule 1:1 of the Rules of the Supreme Court of Virginia even if Strentz claimed she had made a mistake. . . . On Nov. 8, McGarry wrote Strentz contending that the error was a 'unilateral mistake' that could not be corrected. He cited cases in support of his position that the findings of fact . . . did not support that conclusion. . . . The VSB district committee concluded that McGarry had violated Rule 3.4 of the Rules of Professional Conduct, in taking action that 'would serve merely to harass or maliciously injure another,' and Rule 4.1, in knowingly making a false state[ment] of fact or law. Although McGarry said he believed the committee strayed across the line and considered a legal matter rather than an ethical one, he emphasized that he has no criticism of the committee. 'I don't want anybody to think I'm trying to re-chew this bitter cabbage,' he said."

In 2013, a California legal ethics opinion¹ dealt with a similar situation, although the lawyer seeking the opinion had made a scrivener's error by not highlighting a

¹ California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only \$1 as consideration for the covenant not to compete with \$4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only \$1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of \$1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and

change that the lawyer intended to point out to the transactional adversary as part of the negotiation process.

After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only \$1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies

Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only \$1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only \$1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

California LEO 2013-189 (2013) (emphasis added).

The legal ethics opinion started its analysis with a general statement:

Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. On the other hand,

an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of Scenario B:

Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any

such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing. . . . Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.

Id. (emphases added) (footnote omitted).

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Not all authorities agree that lawyers must disclose an adversary's mistake of this sort.

In 1989 a Maryland legal ethics opinion seemed to take the opposite position -- in an analogous situation.

- Maryland LEO 89-44 (1989) ("The issue which you raise is basically as follows: what duty of disclosure, if any, does a lawyer have in negotiating a transaction when the other party's counsel has drafted contracts which fail to set forth all of the terms which you believe have been agreed to, and where the omission results in favor of your client?"; "[T]he Committee is of the opinion that you are under no obligation to reveal to the other counsel his

omission of a material term in the transaction. Based on the facts set forth in your letter, it does not appear that you or your client have made any false statement of material fact or law to the other side at any time during the negotiations, and, furthermore, the omission in no way is attributable to a fraudulent act committed by you or your client. To the contrary, it appears that the omission was made by the other counsel either negligently or, conceivably, because they do not believe that the terms were part of the transaction. In either case, Rule 5.1(a), based on these facts, does not require you to bring the omission to the other side's attention." (emphasis added)).

This situation fell somewhere between a pure scrivener's error (such as those discussed above) and a more substantive error such as failing to negotiate for an indemnity provision that most parties would normally have included in an agreement.

Best Answer

The best answer to (a) is **(B) YOU MAY DISCLOSE THE ADVERSARY'S MISTAKE TO YOUR CLIENT, BUT YOU DON'T HAVE TO (PROBABLY)**; the best answer to (b) is **(A) YOU MUST DISCLOSE THE ADVERSARY'S MISTAKE TO THE ADVERSARY'S LAWYER.**

B 1/15, 10/15

Transactional Adversaries' Post-Agreement Mistakes

Hypothetical 11

You generally represent plaintiffs in personal injury cases. Months ago, you reached a very complicated settlement arrangement with an insured defendant and its insurance company, which involves the latter making monthly payments to your client over the course of ten years. You told your client what payments to expect from the insurance company. After your client told you the first few checks from the insurance company exceeded what you told the client to expect, you determine that the insurance company apparently has miscalculated the amount it should pay under the complicated settlement agreement.

What do you do?

- (A) You must disclose the miscalculation to the insurance company.
- (B) You may disclose the miscalculation to the insurance company, but you don't have to.
- (C) You may not disclose the miscalculation to the insurance company, unless your client consents.

(A) YOU MUST DISCLOSE THE MISCALCULATION TO THE INSURANCE COMPANY (PROBABLY)

Analysis

In some situations, adversaries make mistakes in implementing an agreement rather than during the negotiation process. Despite every parent's admonition to a child to give back any overpayment the child receives from a store clerk, lawyers' duties involve a more complicated analysis -- given lawyers' confidentiality duty.

Within just about a year of each other, two well-respected bar associations reached opposite conclusions about lawyers' duties in such a situation.

In 2006, the Philadelphia Bar pointed to several likely factors that would require lawyers to disclose overpayments to their clients.

- Philadelphia LEO 2006-2 (4/2006) (analyzing a lawyer's obligation to notify an insurance company that was overpaying the lawyer's client; analyzing the following scenario: "The inquirer represents an individual whose parents (now deceased) were allegedly victims of a fraudulent estate planning and annuities scheme. A lawsuit has been filed against the insurance company, among others. Although the lawsuit has been pending for about one year, the insurance company has been making payments on the annuity and has continued to do so. . . . The payments made and retained thus far by inquirer's client have been sufficient to fully compensate him for all damages sustained plus attorney's fees and costs through the filing of the Complaint. . . . The inquirer has requested an opinion as to whether he has an affirmative obligation to inform counsel for the insurance company that monthly payments continue to be made over and above the compensatory damages claim." (emphasis added); analyzing the applicability of Rules 3.3, 3.4 and 4.1.; "Rule 3.3 requires a lawyer to correct any misstatement of material fact. If the complaint is no longer accurate with respect to the claims, the inquirer may have an obligation to amend pursuant to the Pennsylvania Rules of Civil Procedure. Also, to the extent that representations have been made to the tribunal that are inaccurate, the inquirer is under an obligation to correct these misstatements. This would include discovery as well. If the issue arises at a deposition or in response to discovery requests, the inquirer must ensure that the information regarding payments made and the amounts of those payments is disclosed. Should this issue have already been addressed during discovery, the inquirer also has an affirmative obligation to amend or supplement any such discovery if the responses are no longer accurate."; "Looking at Rule 3.4, in this case, it is the insurance company itself that is the best source for information regarding payments and amounts of payments. Therefore, counsel for the insurance company has access to the best source for this evidence and the inquirer is not obstructing access to evidence regarding payment amounts or the schedule of payments by not making disclosure of the additional payments. The provisions of Rule 4.1 may have a significant impact on the inquirer[']s situation. To the extent that the continued payments have been made in error, the criminal law on conversion, including but not limited to Pa. C.S.A. Title 18 §3924, may be implicated where the inquirer and/or his client know the payments were made by mistake but have nevertheless retained the payments. If the retention of this money paid in error is, in fact, considered criminal, then Rule 4.1(b) is implicated and disclosure to the carrier is necessary to avoid aiding and abetting a criminal or fraudulent act. Under these circumstances, disclosure would be specifically allowed by the exceptions to confidentiality as contained in Rules 1.6 (c)(2) and (c)(3)."; "The Committee advises that Rule 1.15(c) requires the placement of the excess funds in escrow and that distributions from those funds not be made. In fact, to disburse payments made in error to the inquirer's client might be aiding and abetting a criminal act." (emphasis added)).

In contrast, one year later the Los Angeles Bar reached the opposite conclusion (which was not surprising, given California's very strong confidentiality duty).

- Los Angeles County LEO 520 (6/18/07) (addressing a plaintiff's lawyer's ethics obligations upon discovering that pursuant to a complicated settlement defendant had overpaid; explaining that plaintiff's lawyer first had an obligation to advise the plaintiff of the erroneous payment, including "the possible risks of keeping the funds paid to Plaintiff in error"; also dealing with the possible duty to advise the defendant of its error; "The scope of this duty of secrecy is broader than the attorney-client privilege. It extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which likely would be detrimental or embarrassing to the client. . . . The rule applies even where the facts are already part of the public records or where there are other sources of information."; "where counsel has obtained information detrimental to the client and the client asks counsel to keep that information confidential, the duty to preserve secrets obligates counsel to abide by his or her client's wishes not to disclose the overpayment."; directing that the lawyer "use every effort to cause the client to disclose the overpayment," but ultimately holding that "the duty to preserve secrets obligates Counsel to abide by his or her client's wishes not to disclose the overpayment" (emphasis added); also concluding that "Counsel is not obligated to continue representing the client," (emphasis added) and therefore may withdraw; "To assist the client in committing a fraud on the adverse party would be a violation of the State Bar Act. Cal. Bus. & Prof. Code §6106; see also Cal. Rules of Prof. Conduct, Rule 3-210. However, the issue of whether the facts presented here constitute fraud by the client is a legal issue and, in keeping with its longstanding policy, the committee declines to address legal issues raised by an inquiry." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE MISCALCULATION TO THE INSURANCE COMPANY (PROBABLY).**

B 1/15, 10/15

Clients' Silence About Litigation Tactics

Hypothetical 12

You have not seen a judge quite as angry as this morning, when he asked you why you had not told the court and the litigants about your plan to declare bankruptcy late yesterday afternoon. The court had set aside three weeks for a trial which was set to start today, but which has now been put off by the bankruptcy filing. The court pointed out that your client's adversary had brought in witnesses from across the country, including very expensive expert witnesses. The court also noted the jury panel's inconvenience. The court bluntly tells you that she is inclined to severely sanction you for what you did -- unless you can convince her that your confidentiality duty prevented you from disclosing your client's bankruptcy plans.

What do you do?

- (A) You must disclose your client's bankruptcy plans to the court.
- (B) You may disclose your client's bankruptcy plans to the court, but you don't have to.
- (C) You may not disclose your client's bankruptcy plans to the court, unless your client consents.

(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S BANKRUPTCY PLANS TO THE COURT, UNLESS YOUR CLIENT CONSENTS

Analysis

Predictably, trial courts and even some appellate courts sanction or otherwise criticize lawyers for not having disclosed their client's litigation plans -- if the silence interfered with the court's docket or otherwise burdened the court.

- Kennedy v. Samsung Electronics America, Inc., Civ. No. 2:14-4987, Civ. No. 2:15-4054, 2018 U.S. Dist. LEXIS 84442 (D.N.J. May 21, 2018) (criticizing a Squire Patton Boggs lawyer for not advising the court of an MDL litigation focusing on the same issues; "To this Court's understanding, at the same time Messrs. Nagel and Oliss were hashing out the settlement papers and months after informing this Court they reached a settlement, the MDL parties -- which included SEA's counsel, Mr. Oliss -- entered mediation. On March 30, 2018, the MDL parties informed the MDL Court 'they have agreed to the material terms of a global settlement and release of all relevant claims on a nationwide class basis as to all Defendants, subject to final review and

approval of a written settlement by all the parties and their counsel.”; “While the MDL parties negotiated and reached a global settlement, Messrs. Nagel and Oliss advised this Court for the first time of their inability to settle Kennedy and Orenstein. . . . Counsels stated this despite the Court having previously received such assurances from the Mediator and counsel in its August and November 2017 hearings that the matters had been settled. . . . Conspicuously, during the same time the MDL parties appeared closer to reaching a negotiated settlement, the talks between Plaintiffs' and SEA's counsels broke down. Counting on the MDL to sweep up Kennedy and Orenstein, SEA would have had little motivation to agree on written terms.”; “The Court will therefore enforce the settlement agreement reached by SEA and Plaintiffs in June 2017, pursuant to the Order accompanying this Opinion. The fact that no final, executed, written document has yet emerged is immaterial.”; “[F]or reasons unknown, and to this Court's bewilderment, Mr. Oliss declined to take similar measures in this case, and SEA omitted Kennedy and Orenstein from its motion to transfer and consolidate the washing machine cases for pretrial proceedings in the MDL. . . . As a result, the Court remained entirely unaware of the MDL's existence until the status conference on April 24, 2018. Nevertheless, Mr. Oliss insists that Kennedy and Orenstein 'involve different allegations than the 26 cases included in the MDL,' which each 'involve[] allegations that Samsung top-load washers have a propensity toward excessive vibration and explosion' . . . Mr. Oliss misses the point: the MDL Rules require parties to alert the Panel of potential tag-alongs, not make an independent assessment of whether a particular case -- having not reached discovery -- belongs for consideration before the Panel.”; “At the very least, SEA's counsel exhibited poor judgment and a misunderstanding of its obligations under MDL 7.1(a). Again, the Rules require notice of potential tag-alongs, because the Panel -- not counsel -- enjoys exclusive authority to decide which cases belong to a multidistrict litigation, the purpose of which is to prevent waste and confusion caused by simultaneous overlapping litigation in different federal courts. . . . Plaintiffs' counsel wrote to Mr. Oliss twice in October of 2017, concerned that the MDL 'appears to have swept up a drain pump case.' Mr. Oliss provided no written response, nor did he alert the Panel. Instead, Mr. Oliss appropriated the Panel's authority unto himself, exercised that authority and remained silent while this Court continued to expend resources on a matter that Mr. Oliss likely anticipated would be eviscerated by a nationwide MDL settlement, after already having committed to a settlement in Kennedy and Orenstein.”; “The Court will not at this time -- but may in the future -- address why SEA's counsel ignored the Federal Rules of Multidistrict Litigation and arguably took actions inconsistent with its client's interests, or why counsel chose not to inform the Court of the ongoing MDL until the latest moment possible, causing the expenditure of unnecessary public resources. For the reasons stated in the previous section, Kennedy and Orenstein were settled on June 13, 2017, and reaffirmed in August and November of 2017. That settlement is now enforced pursuant to the accompanying Order.”).

- Sessner v. Merck Sharp & Dohme Corp., 89 A.3d 191, 191-92, 192-92, 193 (N.J. Super. Ct. App. Div. 2014) (chastising a lawyer for not having advised the court of an earlier settlement; reported in an April 23, 2014, Law 360 article by Joshua Alston under the headline NJ Court Skins Attys for Divulging Merck Deal Months Later; "We were on the eve of filing a comprehensive opinion on the many issues raised in this appeal when, on April 9, 2014, respondent's counsel advised the matter had settled. Upon further inquiry, we learned the parties reached a settlement months ago. Despite our discretion to file an opinion when notified at such a late hour, we have decided not to file our opinion on the merits and now write to dismiss the appeal with the emphatic reminder that counsel must advise this court in a far more timely manner of a settlement or serious settlement discussions so that scarce judicial resources are not needlessly wasted."; "In the last Court Term more than 6200 appeals and 8400 motions were filed. Some of the appellants are incarcerated and a favorable result could result in their freedom. In other cases the welfare of children is at stake. For attorneys in a civil case in an appeal with a voluminous record to neglect to notify us of a settlement for four months is unconscionable."; "Because of the enormous amount of time needlessly expended in this matter, we have seriously considered the imposition of sanctions against both counsel pursuant to Rule 2:9-9, but instead have determined that the publication of this decision is sufficient deterrent to repetition. It is within our discretion to issue an opinion when notified of a settlement shortly before an opinion is scheduled to be released, and we have done so many times. We nonetheless dismiss this appeal.").
- In re Squire, Ch. 7 Case No. 13-62070, 2014 Bankr. LEXIS 1291, at *2-3, *3-4, *4 n.4, *8, *9, *9-10, *13, *15-16, *16 (N.D.N.Y. Mar. 26, 2014) (acknowledging that a lawyer did not have a duty to return a creditor's call before claiming that the creditor had violated the bankruptcy stay in attempting to collect from the debtor, but nevertheless criticizing the lawyer, as reported in an April 11, 2014, article by John Caher in the New York Law Journal under the headline: Lawyer's 'Tactic' in Bankruptcy Cases Draw Judge's Ire; "On January 14, an employee of Berkshire [Bank] telephoned Debtor's counsel, James Selbach, to inquire if the Debtor wanted the ACH [Automated Clearing House] payments to continue and left the specific message on his voicemail with information for a return call. . . . At the hearing, Attorney Selbach acknowledged that he received Berkshire's message on his voicemail but never returned the phone call nor did his office otherwise respond to Berkshire's inquiry as to discontinuance of the ACH payments. Attorney Selbach stated that it is not unusual for debtors to want to continue ACH payments on a loan for various reasons including, for example, when there is a non-filing co-debtor on a loan, the loan is secured, or a loan is to be reaffirmed. Attorney Selbach indicated that it is his practice to instruct clients at the outset of filing bankruptcy to affirmatively communicate with any financial institution if they wish to have ACH payments

continue so as not to interrupt the flow of payments." (footnote omitted); "Sixteen days after Berkshire initiated contact with Debtor's counsel, on January 30, 2014, an attempted \$199.53 ACH transfer from Debtor's Citizens Bank account to Berkshire failed due to insufficient funds in Debtor's account, for which Debtor was assessed a \$35.00 service charge. At 12:55 p.m. that same day, Debtor's counsel filed the subject motion, supported by counsel's boilerplate memorandum of law seen frequently in support of like motions brought by Attorney Selbach in other cases before this court. Among other recitals, the attorney's affirmation in support of the motion states: 'On January 30, 2014 Berkshire took . . . (\$199.53) from the Debtor's bank account, . . . causing the account to have a negative balance. This confused the Debtor and obviously caused a great inconvenience. Debtor has suffered actual damages in the form of emotional distress.'" (internal citation and footnotes omitted); "In 2013, Attorney Selbach filed in this District 43 motions alleging violations of the automatic stay or discharge injunction. For the first 3 months of this year, he has filed 22 such motions."; "There was still time for Berkshire to terminate the ACH payments had it received a timely negative response to its January 14 inquiry, or, after having received no response, before the anticipated January 30 deduction."; "While the automatic stay puts a kibosh on postpetition collection activities, it should not be interpreted to eliminate appropriate civil discourse regarding postpetition financial intentions. Debtor cites no authority to support the position that a creditor may not freely inquire of a debtor's counsel regarding a debtor's intention with respect to a particular obligation."; "The free flow of information between a creditor and counsel for a debtor should be encouraged and not discouraged for the system to function properly. Accordingly, Berkshire did not willfully violate the automatic stay simply by calling Debtor's counsel to inquire about the Debtor's intentions regarding the ACH payments."; "Within the time that counsel took to write down his notes and task his paralegal with contacting the client, counsel could have picked up the phone and communicated to Berkshire to terminate the ACH payments. Notwithstanding Berkshire's misguided inquiry, it would, in this court's opinion, have been better practice for counsel to have returned the phone call and nipped in the bud the events which followed. This court emphasizes that counsel did not have an affirmative obligation to do so, nor, by virtue of Berkshire's phone call, did the burden shift to the Debtor to terminate the ACH payments. However, in this court's opinion, when presented with a clear opportunity to intervene and preclude aggravation and potential emotional distress to one's client, good advocacy suggests that counsel intervene. By electing not to return Berkshire's phone call, Mr. Selbach does not negate the creditor's ultimate violation. At the same time, this court will not reward tactics intent upon generating anticipated attorneys' fees."; "[G]iven counsel's frequent refrain that it takes a sanctions motion to get a creditor's attention, there is an irony not lost on the court that when, in the present instance, this creditor reached out to get debtor-counsel's attention, the response came by motion alleging a violation."; "Apart from tailoring the affirmation by

specifically referring to the creditor as Berkshire and inserting the specific date that this case was commenced, the numbered paragraphs of the affirmation contain identical language to similar motions filed in this court. The one exception is paragraph 6 which, in its specific recitals, misstates the operative facts.").

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).
- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).

- Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

On the other hand, some courts have found such tactics acceptable, even if frustrating.

- Wolters Kluwer Fin. Servs., Inc. v. Scivantage, 564 F.3d 110, 114, 115 (2d Cir.), cert. denied, 130 S. Ct. 625 (2009) (upholding sanctions against a former Dorsey & Whitney lawyer for several inappropriate actions, but also addressing another action taken by the Dorsey lawyer, which the district court had sanctioned: "The district court found that Dorsey's main purpose in filing a Rule 41 voluntary dismissal of the Wolters litigation was to judge-shop in order to conceal from its client 'deficiencies in counsel's advocacy' that had been noted by the district judge in New York. The district court reasoned that this sort of judge-shopping was an improper purpose and was accordingly sanctionable."; reversing this sanction; explaining that plaintiffs may freely dismiss actions under Rule 41; "It follows that Dorsey was entitled to file a valid Rule 41 notice of voluntary dismissal for any reason, and the fact that it did so to flee the jurisdiction or the judge does not make the filing sanctionable. Accordingly, because the district court made no finding that Dorsey acted in bad faith in voluntarily dismissing the case under Rule 41, and because Dorsey was entitled by law to dismiss the case, the district court's sanction against Dorsey for filing the voluntary dismissal must be reversed." (emphasis added)).
- Saltire Indus., Inc. v. Waller, Lansden, Dortch & Davis, PLLC, 491 F.3d 522, 525, 530 (6th Cir. 2007) ("In its complaint, Saltire alleges that Waller Lansden made a secret agreement with the IDB [co-defendant] to voluntarily dismiss the IDB from the Norman case once the action was remanded back to state court. According to Saltire, Waller Lansden added the IDB as a sham defendant solely to defeat diversity jurisdiction and thus force the case back to state court because '[Waller Lansden] believed the State Court Action to be much more valuable in the State Court -- where it would be tried before an elected local judge -- rather than in the Federal Court, where it would be tried before a judge appointed by the President for a lifetime term.'"; "What Waller Lansden's actions boil down to, in our view, is litigation

strategy. Litigation strategy cannot, without more, support an action for fraud." (emphasis added)).

In 2011, the North Carolina Bar similarly found nothing improper about an aggressive litigation tactic.

- NC LEO 2011-3 (4/22/11) (finding that an immigration lawyer could file an appeal to essentially buy more time, which might allow his client to be deported rather than convicted of a crime in the United States; "Client A is arrested for driving while impaired. The magistrate sets a secured bond of \$2000, schedules the trial for district court and notifies U.S. Immigration and Customs Enforcement (ICE) that Client A may be in the country illegally. Client A is taken to the county jail to wait for trial. At Client A's first appearance, the judge appoints Attorney A to defend him. ICE determines that Client A is an undocumented alien and gives the jail notice that it should be advised when Client A is released. Once Client A's bond is paid, Client A will be held in the jail for an additional 48 hours to give ICE the opportunity to begin proceedings. If ICE does not serve Client A with a notice to appear within this time period, the jail will release him. Client A tells Attorney A that he wants to be deported as soon as possible and does not want a conviction on his record. Attorney A discusses Client A's options with him. If Client A pays the bond, ICE will probably come to the jail, transport him to a federal holding facility and begin removal proceedings within 48 hours of paying the bond. Once Client A is deported, the State might dismiss Client A's DWI charge. Attorney A knows that, should Client A someday choose to re-enter the United States legally, a DWI conviction would be detrimental to an immigration application or an application for a work permit. Attorney A is aware that the existence of an ICE detainer is only an indication that Client A might be removed before the resolution of the case. ICE may choose not to pick Client A up; it may serve him and then release him pending a removal hearing; it may offer him an immigration bond which can be posted so that he can secure his release during immigration proceedings; or he may be eligible for a remedy, such as cancellation of removal, which would allow him to receive permanent residency in the United States."; posing the following question: "May Attorney A enter a notice of appeal knowing that Client A's pending deportation may result in the dismissal of the superior court case?" (emphasis added); analyzing the issue as follows: "Rule 3.1 prohibits a lawyer from advancing frivolous or meritless proceedings or arguments but permits a lawyer in a criminal proceeding that may result in incarceration the leeway to 'so defend the proceeding as to require that every element of the case be established.' Comment [1] to the rule observes that '[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.' Rule 3.2 requires a lawyer to make reasonable efforts to expedite litigation 'consistent with the interests of the client'. However, comment [1] to this rule adds, '[t]he question is whether

a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.' Filing a notice of appeal for Client A is not, in itself, frivolous or meritless because Client A has a constitutional right to a trial de novo in superior court before a jury. The question is whether the pleading is interposed for an improper purpose which would violate not only Rule 3.1 but also the prohibition on conduct prejudicial to the administration of justice set forth in Rule 8.4(d). Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact to a court. This prohibition applies to statements in pleadings as well as to statements in open court. Rule 3.3, cmt. [3]. Comment [3] to the rule adds that '[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.' Although Attorney A believes that Client A may not be available for trial in superior court, a client's presence is not always necessary to resolve a case in superior court. If a trial is necessary, it can be done by written waiver if the court permits. Moreover, by the time the case is reached for trial, the client may, in fact, be available. Lastly, it is unlikely that the State will actually dismiss the charges simply because the defendant has been removed. Therefore, filing a notice of appeal for Client A does not violate the rules." (emphasis added)).

This hypothetical comes from a 2008 Virginia Supreme Court decision -- reversing a trial court's sanction of a lawyer who did not disclose the client's intent to declare bankruptcy.

- McNally v. Rey, 659 S.E.2d 279, 281, 283 (Va. 2008) (holding that a lawyer does not have a duty to advise the adversary if the lawyer's client is planning to declare bankruptcy; explaining that defendant declared bankruptcy the evening before a scheduled Virginia Circuit Court trial, and that the Circuit Court had imposed sanctions upon the lawyer; explaining that the client's lawyer had asserted the attorney-client privilege in declining to answer the Circuit Court's questions about the circumstances of the bankruptcy filing; "McNally filed a letter with the circuit court on November 20, 2006, responding to the circuit court's consideration of sanctions against him for the bankruptcy filing. He stated 'it would have been an ethical violation for me to disclose my client's intention to file a bankruptcy (which was clearly a client confidence) unless the client specifically authorized me to do so.' McNally also asked that he be subject to a 'properly file[d]' motion and be given an opportunity to respond: 'I respectfully believe that I am entitled to due process on this issue.'" (emphasis added); noting that the court awarded sanctions against the lawyer after finding that "the conduct of Mr. McNally in filing pleadings indicating an intent to try the case while in fact knowing that bankruptcy was to be filed was not in good faith and was for an improper purpose including to needlessly increase the cost of litigation to the Plaintiffs. As a result, Plaintiffs incurred unnecessary legal and expert fees and costs in preparing the case

for trial. The Court on its own initiative as permitted by law believes the appropriate sanction is that Counsel for Defendant, John [J.] McNally personally pay the legal fees, expert charges, and costs incurred by Plaintiffs from November 8, 2006 until notified of the bankruptcy on the evening of November 14 as well as the cost of the jury.""; finding that the lower court had abused its discretion in imposing sanctions; "There is simply nothing in the record before this Court that supports this finding. There is no evidence in the record that McNally's act of filing the witness and exhibit list was not well grounded in fact. There is nothing in the record before this Court that supports a finding that the witness and exhibit list was interposed for an improper purpose, such as to harass or cause unnecessary delay, or needless increase in the cost of litigation. . . . Simply stated, the record before this Court is devoid of any evidence that supports the circuit court's award of sanctions. McNally's act of filing the witness and exhibit list, as required by the circuit court's own pretrial order, did not violate Code § 8.01-271.1. Additionally, counsel of record in a state court proceeding, who represents a litigant contemplating filing a petition in bankruptcy in a federal bankruptcy court, does not have an obligation to inform opposing counsel or the circuit court that the attorney's client is considering filing a petition in bankruptcy. A litigant's decision to file a petition in bankruptcy while litigation is pending does not constitute a violation of Code § 8.01-271.1 provided such filing is in compliance with the federal Bankruptcy Code, 11 U.S.C. § 101, et seq. To hold otherwise would have a chilling effect upon the rights of litigants and their attorneys when such litigants seek to avail themselves of their statutory rights set forth in the federal Bankruptcy Code. Therefore, we hold that the circuit court abused its discretion by imposing sanctions upon McNally." (emphases added)).

Best Answer

The best answer to the hypothetical is **(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S BANKRUPTCY PLANS TO THE COURT, UNLESS YOUR CLIENT CONSENTS.**

B 1/15, 10/15

Litigation Adversaries' Factual Misunderstanding

Hypothetical 13

You are defending a young mother against a charge that she murdered her infant daughter because her childcare responsibilities impeded her social life. The prosecution has gathered damaging entries from your client's home computer, but appears to have overlooked some even more incriminating entries -- showing that someone used your client's computer to do a Google search for "fool-proof suffocation methods" on the day that your client's daughter was last seen alive.

What do you do?

- (A) You must disclose the incriminating searches to the prosecution.
- (B) You may disclose the incriminating searches to the prosecution, but you don't have to.
- (C) You may not disclose the incriminating searches to the prosecution, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE INCRIMINATING SEARCHES TO THE PROSECUTION, UNLESS YOUR CLIENT CONSENTS

Analysis

The litigation context involves somewhat subtle and often contradictory disclosure issues. On one hand, the intensely adversarial nature of litigation would tend to diminish most lawyers' possible impulse to be charitable to an adversary who has made a mistake. On the other hand, at least in civil litigation, various rules require pre-trial disclosures and supplemental discovery responses have largely eliminated lawyers' ability to take advantage of an adversary's mistake.

Civil Adversarial Proceedings

In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts. The very nature of the adversarial proceeding requires each

side to use available discovery to uncover helpful facts, then present them to the court or the fact finder

Some courts apply the majority rule (allowing lawyers to stay silent even in the face of an adversary's misunderstanding) if the adversary does not have a lawyer.

- Illinois LEO 12-07 (1/2012) ("Attorney does not have an obligation under R.P.C. Rule 3.3 to tell the court that the unrepresented adversary has a defense based on a written agreement that the attorney's client signed with the adversary and which the attorney now believes in good faith is unenforceable." (emphasis added); presenting the factual situation; "Attorneys representing party A in litigation against unrepresented party B is aware that the two parties entered into a written agreement that would constitute a potential defense in favor of B, but the attorney has a good faith belief that the agreement is unenforceable. Client A did not consult with the attorney before entering into the agreement."; "In the situation at hand, the lawyer is aware that the signed agreement between the lawyer's client and the unrepresented party constitutes a potential defense to the lawyer's client's claim; however, the lawyer also has good faith belief that the agreement is unenforceable. Under these circumstances the lawyer need not advise the court of the potential defense. Rule 3.3 (a) (2) provides that a lawyer shall not knowingly fail to disclose legal authority known to the lawyer to be directly adverse to the position of the client or offer evidence that is false. In the case at hand, the attorney has a good faith belief that the contract is unenforceable. This good faith belief supports the conclusion that the lawyer's failure to disclose the existence of the agreement does not contravene Rule 3.3." (emphasis added); "Moreover, sub-section (a)(2) prohibits a lawyer from failing to disclose 'legal authority' which is adverse to his or her client's position. The rule does not require the lawyer to disclose facts which are contrary to the client's position. Such disclosure, of course, would be an onerous burden in litigation, since a lawyer would generally be aware of 'facts' contrary to his or her client's position. Here, the existence of an agreement which might exonerate the adversary is a fact which his [sic] not required to be disclosed by the lawyer. The lawyer, of course, could be in violation of sub-sections (a)(1) or (a)(3) if her [sic] or she makes false statements about the agreement or its existence.").

In contrast, lawyers may not point to their confidentiality duty as an excuse for not disclosing misstatements to the court or other deceptive conduct.

- People v. Petsas, 262 Cal. Rptr. 467, 468, 469, 472 (Cal. Ct. App. 1989) (reversing the dismissal of an insurance crime charge against a lawyer, whose client was harmed in two separate accidents on the same day;

explaining that the lawyer had arranged for a doctor to prepare two separate reports about the client's injury, each of which referred to one of the accidents but not the other; noting that the doctor had earlier indicated that it was impossible to separate the injuries caused by the two separate accidents; further explaining that the lawyer used the two separate reports to settle both cases; "Following the first accident, Banks made an appointment to see Dr. Terry Forward, a chiropractor in Foster City. Banks saw Forward the following day and told her that he had been involved in two automobile accidents, and that he had been injured in both. Neither Banks nor Forward was able to segregate the injuries to a particular accident."; "On February 2, 1984, respondent asked Forward to prepare medical reports covering Bank's injuries. Respondent asked for two reports, with separate cover pages identifying the accidents. In response Forward furnished respondent with two reports. Each report contained cover pages narrating the history of a single accident. . . . Each report then contained identical medical statements of diagnosis, treatment and prognosis. Neither report contained any reference to diagnosis of, treatment for, prognosis concerning, or any history of injuries received by Banks in two separate accidents on the same day. The section of the identical medical statement contained in each report concerning past medical history indicated that Banks had 'none.'" (footnote omitted); "[I]t is true an attorney has an ethical obligation not to disclose information adverse to his client which is obtained in confidence. We agree, however, with the finding implicit in the magistrate's order holding respondent to answer that his acts in this case cannot be so characterized. Here, respondent affirmatively represented that his client's injuries were the result of a single accident when in fact he knew they were not. Further, he submitted claims for all damages resulting from two successive accidents on the same day to the carriers of two separate insureds, concealing from each of them the fact that the damages he thus sought for his client stemmed from the trauma of both accidents. There is a distinct difference between restricting an attorney from divulging information learned in confidence from a client, and proscribing him from knowingly making affirmative false representations regarding a claim or claims of that client." (emphases added; emphasis in original indicated by italics)).

Ex Parte Proceedings

Interestingly, the ethics rules apply quite differently in ex parte proceedings.

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d).

A comment to ABA Model Rule 3.3 explains the basis for this important difference.

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 any 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.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.

Subsection (1) prohibits *ex parte* presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.

To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

The Restatement acknowledges that lawyers in certain types of proceedings have a higher duty of candor.

In some special proceedings, public policy requires unusual candor from an advocate. The candor required is determined by the legal requirements applicable to such a proceeding. In some jurisdictions, for example, unusual candor is required in proceedings seeking custody of a child, in applications for the involuntary commitment of a person for mental disability, and in reports by trustees or executors. Similarly, a lawyer representing a class in a class action has duties of care toward the class and may be taking a position that requires an informed decision by the tribunal. In such circumstances (as in an application for a fee to be awarded out of the class recovery), the lawyer must disclose information necessary for the tribunal to make an adequately informed decision. That may be particularly true where the lawyer's position is supported by the opposing party, as following a settlement agreement between the parties.

Restatement (Third) of Law Governing Lawyers § 112 cmt. c (2000).

Not surprisingly, courts take the same approach.

- In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully advising [the court in an *ex parte* proceeding] of all relevant aspects of the pending parallel proceeding" in another court).
- Time Warner Entm't Co., L.P. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an *ex parte* proceeding, in which the adversary system lacks its

usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

[a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to

submit the treating physician's adverse letter to the administrative law judge at the hearing.

[A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Criminal Proceedings

In contrast to civil litigation, criminal litigation frequently involves a mismatch of disclosure obligations. Prosecutors usually must disclose exculpatory evidence, while defense lawyers can normally stand silent in the face of prosecutors overlooking incriminating evidence.

The highly publicized Casey Anthony case highlighted this issue.

- Casey Anthony: Did She Do A Google Search For "Fool-Proof Suffocation"?, Associated Press, Nov. 26, 2012 ("The Florida sheriff's office that investigated the disappearance of Casey Anthony's 2-year-old daughter overlooked evidence that someone in their home did a Google search for 'fool-proof' suffocation methods on the day the girl was last seen alive." (emphasis added); "Orange County sheriff's Captain Angelo Nieves said Sunday that the office's computer investigator missed the June 16, 2008, search. The agency's admission was first reported by Orlando television station WKMG. It's not known who performed the search. The station reported it was done on a browser primarily used by the 2-year-old's mother, Casey Anthony, who was acquitted of the girl's murder in 2011."; "Anthony's attorneys argued during trial that Casey Anthony helped her father, George Anthony, cover up the girl's drowning in the family pool."; "WKMG reports that sheriff's investigators pulled 17 vague entries only from the computer's Internet Explorer browser, not the Mozilla Firefox browser commonly used by Casey Anthony. More than 1,200 Firefox entries, including the suffocation search, were overlooked." (emphasis added); "Whoever conducted the Google search looked for the term 'fool-proof suffocation,' misspelling 'suffocation,' and then clicked on an article about suicide that discussed taking poison and putting a bag over one's head."; "The browser then recorded activity on the social networking site MySpace, which was used by Casey Anthony but not her father." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE INCRIMINATING SEARCHES TO THE PROSECUTION, UNLESS YOUR CLIENT CONSENTS.**

B 1/15, 10/15

Clients' Death

Hypothetical 14

You represent the plaintiff in a personal injury case. After several months of intense negotiations, it appears that you are nearing a settlement agreement with the defendant. However, you just learned that your client was killed last night in a car accident.

What do you do about your client's death?

- (A) You must disclose your client's death to the adversary.
- (B) You may disclose your client's death to the adversary, but you don't have to.
- (C) You may not disclose your client's death to the adversary.

(A) YOU MUST DISCLOSE YOUR CLIENT'S DEATH TO THE ADVERSARY

Analysis

This hypothetical raises the issue of a litigant's duty to update the adversary on potentially material facts as they develop.

The ABA has explicitly indicated that a lawyer engaged in settlement discussions with an adversary must disclose his client's death to opposing counsel.

In 1995, the ABA noted that a lawyer whose client has died immediately begins acting on behalf of another principal (normally, the executor). The ABA explained that the presence of a new principal amounted to the type of material fact that a lawyer must disclose to the attorney and the court.

- ABA LEO 397 (9/18/95) ("The Committee agrees with the . . . conclusion that counsel has a duty to disclose the death of her client to opposing counsel and to the court when counsel next communicates with either. The death of a client means that the lawyer, at least for the moment, no longer has a client and, if she does thereafter continue in the matter, it will be on behalf of a different client. We therefore conclude that a failure to disclose that

occurrence is tantamount to making a false statement of material fact within the meaning of Rule 4.1(a).6. (As noted above, Comment [1] to Rule 4 states that misrepresentations can "occur by failure to act.") Prior to the death, the lawyer acted on behalf of an unidentified client. When, however, the death occurs, the lawyer ceases to represent that identified client. Accordingly, any subsequent communication to opposing counsel with respect to the matter would be the equivalent of a knowing, affirmative misrepresentation should the lawyer fail to disclose the fact that she no longer represents the previously identified client." (emphasis added)).

Most bars take the same approach.

- Illinois LEO 96-3 (7/96) ("The Committee believes that the ABA's conclusion regarding the lawyer's duty under ABA Model Rule 4.1(a) would be the same under Illinois Rule 4.1(a). In addition, if the lawyer is authorized to continue the prosecution of whatever claim or claims exist on behalf of the decedent's estate, the Committee believes that the death of the claimant is a 'material fact' within the meaning of Illinois Rule 4.1(b) as well. Therefore, disclosure to the adverse party is necessary to avoid assisting a fraudulent act on the part of the lawyer's new client, the executor or administrator of the decedent's estate. Finally, the failure to make such disclosure might well be considered conduct involving "deceit or misrepresentation" within the meaning of Rule 8.4(a)(4). For these reasons, the lawyer must make timely disclosure of the client's death with respect to the pending personal injury matter." (emphasis added)).

An older ethics opinion took the opposite approach.

- Virginia LEO 952 (7/31/87) ("A client authorized an attorney to settle his personal injury case within a range of values. A demand was made and a counteroffer was received from the insurer. Following receipt of the counteroffer, the client died and the administrator of the estate authorized the attorney to accept the last settlement offer which was within the range authorized by the client. It is not improper, given the above, for the attorney not to disclose the death of his client to the insurance company absent a direct inquiry from the insurance company regarding the client's health. The committee opines that in order to avoid an appearance of impropriety, the attorney should disclose the death of his client at the time he accepts the offer of settlement and let the opposing side know that the client authorized the range for settlement prior to his death and that the estate's administrator has also authorized the settlement.").

Courts generally agree that lawyers face sanctions or discipline if they keep their client's death secret.

- Mok v. 21 Mott St. Restaurant Corp., 14-cv-8081 (PKC), 2017 U.S. Dist. LEXIS 145794 (S.D.N.Y. Sept. 8, 2017) (“In this Memorandum and Order, the Court concludes that the attorney for the plaintiff in this action should be sanctioned under the inherent power of the Court and 28 U.S.C. § 1927. The attorney did not disclose to the Court or to opposing counsel that his client had died until eight months after the client's death and four months after he says he learned of it. The death of the client was highly material to the value of this wage and hour action because his client never testified at a deposition and, thus, proving the claim would have been exceedingly difficult. Instead, he obtained adjournments from the Court on the premise that he was negotiating a settlement with defendants on behalf of his client. The adjournments had the effect of delaying the filing of a Joint Pretrial Order that would have disclosed that his client would not be a witness at trial. He did not disclose the death to the defendants or the Court until after he announced that an agreement-in-principle had been reached to settle the case. Even then, he only disclosed the date of the death under a Court Order to do so. The attorney was previously sanctioned in this action for other conduct.”).
- In the Matter of Dmitry N. Feofanov, No. 6224899, Ill. Supreme Ct. No. M.R. 28675 (Ill. May 18, 2017) (censuring a lawyer for failing to disclose his client's death; "After learning of Krystek's death, Respondent sent settlement demands to NMAC on September 21 and October 30, 2015, even though he no longer represented Krystek and did not have authority to make these, or any, demands. When he sent these settlement demands, Respondent knew that they were false because Krystek had not authorized either demand."; "Respondent also sent a settlement demand to the Nissan dealership on October 19, 2015, and he sent a letter seeking to arbitrate the claim on January 5, 2016. When Respondent sent these letters, he no longer represented Krystek and did not have authority to make settlement demands on Krystek's behalf or pursue the claim in arbitration. When Respondent made the October 19, 2015 demand, he knew that the offer was false because Krystek was no longer his client and he had not authorized the demand. When Respondent offered to arbitrate the claim, he knew that the offer was false because Krystek was no longer his client and had not authorized him to pursue arbitration of the claim against the Nissan dealership."; "Respondent also appeared in court, purportedly on Krystek's behalf, on September 23, September 24, October 27, December 18, 2015 and February 19, 2016. At each of the court appearances, Respondent did not disclose to defendants' counsel or the court that Krystek had died in July or that Respondent had learned of his death on or about September 3, 2015. Respondent knew that these court appearance, purportedly on behalf of Krystek, were false because Krystek was no longer his client and Respondent had no authority to appear in court on his behalf. Respondent's appearances in court were also misrepresentations, because those

appearances falsely represented to the court and opposing counsel that Krystek had a continuing involvement in the case.").

- In re Gilbreth, ARDC Disciplinary Comm'n. Supreme Court Order M.R. 28008 (Ill. May 18, 2016) (censuring a lawyer who did not inform the opposing party that his client had died before settling a personal injury case).
- Robison v. Orthotic & Prosthetic Lab, Inc., 27 N.E.3d 182, 185, 186, 186-87 (Ill. App. Ct. 2015) (voiding a product liability case settlement, because the plaintiff's lawyer had not advised the defendant that his client had died; "An attorney's employment and his authority are revoked by the death of his client, and an attorney cannot proceed where he does not represent a party to the action. . . . Generally, the attorney-client relationship is terminated by the death of the client, and thereafter, the authority of the attorney to represent the interests of a deceased client must come from the personal representatives of the decedent."; "In this case, the plaintiff, Randy Robison, died on January 20, 2013. Upon Randy Robison's death the product liability action was without a plaintiff, and the Crowder firm's authority to act on behalf of Randy Robison terminated. Under our procedural rules, this cause of action is one that survives the death of a party, and the personal representative of the decedent's estate is permitted to file a motion for substitution. . . . The motion for substitution is to be filed within 90 days after the party's death is suggested of record, and the date of the actual death is not a factor."; "Settlement negotiations commenced in September 2013, and an agreement was ostensibly reached on September 24, 2013. The defendant, however, had no knowledge about the plaintiff's death or the appointment of a personal representative throughout the period of settlement negotiations. Mr. Gilbreth acknowledged that he did not disclose these facts to the defendant until November 15, 2013, weeks after the settlement was reached and months after the plaintiff's death. Mr. Gilbreth also acknowledged that the disclosure of the plaintiff's death would have adversely impacted the settlement value of the case. He stated that he believed that the decision to withhold the information was in his clients' best interest and was in keeping with the rules of professional responsibility. We strongly disagree. We find that the arguments expressed by Mr. Gilbreth are specious and incredible, and we are concerned about his professional judgment in this case. In failing to disclose the fact of the plaintiff's death, Mr. Gilbreth intentionally concealed a material fact that would have reduced the overall value of the claim for damages. In addition, and equally troubling, Mr. Gilbreth led the defendant to believe that he had authority to negotiate a settlement of the litigation on behalf of the party plaintiff, when the action was without a plaintiff as the plaintiff had died and a representative had not been submitted. Given Mr. Gilbreth's intentional misrepresentations and material omissions prior to and during the settlement negotiations, we conclude that the settlement agreement is invalid and unenforceable, and that the trial court erred in granting the motion to enforce it. Accordingly, we hereby

vacate the order granting the motion to enforce settlement and remand the cause of the circuit court for further proceedings."; "Rule 8.3 requires a lawyer to report unprivileged knowledge of misconduct involving fraud, dishonesty, or deceit, or misrepresentation by another lawyer to the Illinois Attorney Registration and Disciplinary Commission (ARDC). See Ill. R. Prof. Conduct (2010) R. 8.3 (eff. Jan. 1, 2010); In re Himmel, 125 Ill. 2d 531, 539, 533 N.E. 2d 790, 793 (1988)."; "In this case, we believe that the material omissions and misrepresentations made by Mr. Gilbreth, which were detailed earlier in this decision, constitute serious violations of Rule 8.4. We also believe that defense counsel possessed sufficient knowledge to trigger a duty to report Mr. Gilbreth's misconduct to the ARDC, and that the failure to report the misconduct constitutes a potential violation of Rule 8.3. See Himmel, 125 Ill. 2d 540-43, 533 N.E.2d at 793-94. Therefore, we will direct the clerk of this court to transmit a copy of this opinion to the Attorney Registration and Disciplinary Commission for its consideration of the actions of the attorneys in this case.").

- In re Lyons, 780 N.W.2d 629, 631, 631-32, 632, 633, 634-35 (Minn. 2010) (indefinitely suspending a lawyer, and barring the lawyer from seeking a reinstatement for one year, for (among other things) failing to disclose the death of his client; "Lyons was admitted to practice law in Minnesota on October 28, 1994. At all times relevant to these proceedings, Lyons was engaged in the practice of law at a law firm known as the Consumer Justice Center, P.A., in Vadnais Heights, Minnesota. Lyons has been disciplined on seven previous occasions."; "In 2006, Lyons was retained by a man who had been erroneously reported by Trans Union, LLC, a credit reporting agency, to be dead. In September 2006, a complaint against Trans Union under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2000), was filed in the United States District Court for the District of Montana."; "The client died on October 9. On October 26, 2007, Trans Union sent an email to Lyons offering to settle the claim for \$ 19,000. The following day, Lyons accepted the offer by email and requested that opposing counsel '[d]raft the release and order the check made payable to [the Consumer Justice Center] trust account.' Lyons did not inform Trans Union of the client's death. On November 6, Trans Union sent Lyons a settlement agreement and release. The following week, Lyons emailed Frampton, asking whether the client's wife could sign the agreement as 'power of attorney.' Frampton replied that the client's wife could sign the settlement agreement because she was the personal representative of the estate."; "In an email to Trans Union dated January 7, 2008, Lyons noted that he was '[s]till working on [the client] who was hospitalized and I think the release is being signed by his wife or power of attorney.'"; "Upon receiving the signed settlement agreement, Trans Union emailed Lyons asking if the client had passed away. Two days later, Lyons responded, 'Yes -- HOW IRONIC.' The referee found and Lyons does not dispute that this e-mail on January 31, 2008, was Lyons's first disclosure to Trans Union that the client had died. The day following Lyons' disclosure,

Trans Union asked, 'When did he die? When did you find out?' Lyons replied, 'Unsure. Recently.' Trans Union responded by asking, 'Did he die before or after we agreed to settle?' Lyons replied, 'We settled before I found out he passed away.' Trans Union again asked, 'Did [the client] die before or after we agreed to settle?' Lyons replied that the client 'died after we agreed to settle.' Trans Union demanded to know, 'On what date did [the client] die? On what date did you find out?' Lyons replied, 'Unsure of exact dates -- sorry. I learned about it from local counsel afterwards -- that is why we had to redo the signature block to estate after you sent it to us with only [the client's] name.'"; "Trans Union indicated that it would not be bound by the settlement and, as a result, Frampton filed an action in Montana state court to enforce the settlement agreement."; "Lyons does not challenge the referee's finding that he failed to disclose the client's death to Trans Union before accepting Trans Union's settlement offer. Nor does Lyons challenge the referee's finding that he made a number of misrepresentations to Trans Union regarding when the client died and when he learned of the client's death.").

- Edison v. Hearing Panel of the Disciplinary Bd. of the N.D. Supreme Court, 724 N.W.2d 579, 580, 581, 583 (N.D. 2006) (reprimanding a defendant's lawyer who did not disclose the death of his client, and relied on the statutes of limitations defense in seeking to dismiss the plaintiff's automobile accident case against his client; concluding that the lawyer had no duty to disclose the client's death, and improperly filed a pleading on behalf of the dead person; "On March 14, 2002, Harrie [respondent lawyer] was retained by the insurance company to defend the lawsuit. On March 18, 2002, Harrie received a file from the insurance company which included a letter from Welch's insurance agent to the insurance company indicating Ellen Welch had died. The file did not indicate when Ellen Welch had died or how Muhammed [opposing party in underlying suit] had served process on her. On March 27, 2002, Harrie served an answer on Muhammed on behalf of 'Defendant Ellen Welch.'"; "On May 23, 2002, Harrie informed Muhammed's attorney that 'Ellen Welch's surviving husband, Patrick [Welch], signed for the certified mail' and 'it appears that service was improper and that the claim against Ellen Welch is barred by the statute of limitations.'"; "The district court subsequently granted summary judgment dismissal of Muhammed's action against Welch, concluding the action was barred by the statute of limitations. In Muhammed v. Welch, 2004 ND 46, P12, 675 N.W.2d 402, we concluded the service of process was insufficient. However, we reversed the summary judgment and remanded for further proceedings to determine whether Welch was equitably estopped from claiming the statute of limitations as a defense."; "The official comment to Rule 4.1 makes clear that an attorney generally does not have an affirmative duty to inform an opposing party of relevant facts, and we reject disciplinary counsel's assertion that Harrie had an affirmative duty to immediately disclose Ellen Welch's death before serving any pleadings in this case. However, Harrie served an answer and

amended answer on behalf of Ellen Welch, and at least by the time of the amended answer, Harrie had actual knowledge that Welch had died.").

- Harris v. Jackson, 192 S.W.3d 297, 306 (Ky. 2006) (holding that a lawyer had acted improperly in failing to disclose a death of one of his clients "until the period to revive the action against Harris's estate had lapsed. Not only did he fail to disclose, he continued to participate in discussions, negotiations, depositions, and other pre-trial activities, even with the court, as if Harris was still alive.").
- In re Becker, 804 N.Y.S.2d 4, 5 (N.Y. App. Div. 2005) (suspending a New York lawyer for three months for failing to disclose his client's death before settling a slip and fall case against the City; "Respondent's misconduct occurred while handling a personal injury matter for Ruth Kurtz as a result of her 1993 trip and fall on a sidewalk and consequent ankle fracture. Mrs. Kurtz died in 1994 as a result of bone cancer, but respondent did not discover this until 1997 after he received a \$55,000 settlement offer from the defendant, the City of New York, and forwarded the proposed settlement to Mrs. Kurtz."; explaining that the lawyer submitted settlement documents to New York City without disclosing that his client had died nearly three years earlier; also noting that the lawyer endorsed the settlement check along with the deceased client's son).
- In re Hayes, No. 6192974, 2004 Ill. Atty. Reg. Disc. LEXIS 126, at *1-3, *3-4 (Ill. Attorney Disciplinary Comm'n Hearing Bd. Mar. 24, 2004) (censuring a lawyer who did not disclose the death of her client to a workers' compensation board or the adversary's lawyer; "On June 19, 1999, Cook died of causes unrelated to the above claim. Cook's workers' compensation claim abated on his death, pursuant to 820 ILCS 305/8(e)(19), because he left no surviving spouse or dependents. The Respondent learned of Cook's death on or about June 21, 1999. On July 16, 1999, the Respondent telephoned Dollar General's lawyer, William Hardy, for the purpose of settling Cook's workers' compensation case. The Respondent represented to Hardy that she was calling on behalf of Cook, and she did not disclose that Cook was deceased. The Respondent intentionally failed to disclose Cook's death to Hardy because she knew his death would adversely impact the workers' compensation claim. During the telephone conversation on July 16, 1999, the Respondent and Hardy agreed to settle Cook's claim for \$8,890.22, which included \$5,237 for Cook's 'man as a whole' claim. Also, on July 16, 1999, the Respondent sent Hardy a letter in which she identified Cook as her client and confirmed the terms of the settlement agreement. She did not disclose in the letter that Cook had died. The Respondent knew or should have known that both her statement to Hardy on July 16, 1999, that she was representing Cook and her failure to disclose Cook's death to Hardy were false and/or misleading."; "On May 24, 2001, the Respondent filed a motion in the workers' compensation case (No. WC 56002) to enforce the settlement

agreement she had reached with Hardy. The motion was filed on behalf of the estate of Cook. The Respondent knew or should have known that her assertion in the motion that she was representing the estate of Cook was false because attorney Reed had represented the executor of Cook's estate, and the estate had been closed in October 2000. Additionally, the Respondent's claim in the motion that the settlement with Hardy, on behalf of Dollar General, should be enforced was frivolous because Cook's workers' compensation claim, with the exception of medical benefits that had been paid, abated upon Cook's death.").

- Kingsdorf v. Kingsdorf, 797 A.2d 206 (N.J. Super. Ct. App. Div. 2002) (holding that a lawyer must tell the adversary about the client's death; noting that the lawyer was representing the husband in various matters, including a divorce, and reached a settlement after his client had died; concluding that the failure to disclose the client's death amounted to fraud on the court because the death abated a pending divorce action, terminated the decedent's son's guardianship, and automatically resulted in joint tenancy property passing to the surviving wife; referring the matter to the bar to deal with the lawyer's conduct, but not reaching any conclusions about the lawyer's possible ethics violations; reversing an order enforcing the settlement agreement reached after the client had died but before the lawyer advised the counterparty of the client's death).
- In re Forrest, 730 A.2d 340, 342 (N.J. 1999) (suspending for six months a lawyer who did not disclose the death of his client to the court, an arbitrator and the adversary's lawyer; "In December 1993, knowing of Mr. Fennimore's death, respondent served unsigned answers to interrogatories . . . on his adversary, Christopher Walls, Esq. Neither the answers nor the cover letter indicated that Mr. Fennimore had died. On June 8, 1994, respondent and Mrs. Fennimore appeared at a mandatory automobile arbitration proceeding Before to the proceeding, respondent advised Mrs. Fennimore that she should not voluntarily reveal her husband's death in her testimony before the arbitrator. When the arbitrator inquired about Mr. Fennimore's absence, respondent replied that he was 'unavailable.' The arbitrator awarded \$ 17,500 to Mrs. Fennimore and \$ 6000 to Mr. Fennimore. At no time before, during, or after the arbitration proceeding did respondent or Mrs. Fennimore inform the arbitrator that Mr. Fennimore had died.").
- Ky. Bar Ass'n v. Geisler, 938 S.W.2d578, 578-79, 580 (Ky. 1997) (issuing a public reprimand of a lawyer who did not disclose her client's death to the court or the adversary's lawyer; "McNealy died on January 26, 1995. Shortly thereafter respondent contacted Ford and stated that her client wanted to settle the case and asked him to forward an offer of a settlement. After an exchange of offers and counter-offers, a settlement was reached on February 9, 1995. On February 23, 1995, McNealy's son, Joe, was duly appointed as the administrator of his father's estate. Ford eventually

forwarded the settlement documents along with a settlement check to respondent on March 13, 1995. On March 22, 1995, Ford received back the settlement documents which had been executed by Joe. Upon receipt of the signed documents, Ford learned for the first time of McNealy's death. Ford took no further action to bring the court's attention to the settlement documents that were signed by the Administrator, but instead, sent the agreed order of dismissal to the circuit court which was signed and entered by the court. No appeal was taken. Thereafter, Ford filed a bar complaint against respondent on May 5, 1995 due to her failure to advise Ford that her client, McNealy, had passed away during the settlement negotiation period of January 26, 1995 through February 9, 1995."; "[W]e hold that the respondent's failure to disclose her client's death to opposing counsel amounted to an affirmative misrepresentation in violation of our SCR 3.130-4.1."; "While the comments to SCR 3.130-4.1 do indicate that there is no duty to disclose 'relevant facts,' those same comments go on to state that: 'A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.' Consequently, respondent cannot reasonably argue that her failure to reveal this critical piece of information constituted ethical conduct within the framework of SCR 3.130-4.1." Thus, a lawyer must disclose his client's death in the course of settlement negotiations.).

- Virzi v. Grank Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 508, 512, 512-13 (E.D. Mich. 1983) ("On June 2, 1983, plaintiff's attorney prepared and filed a mediation statement for plaintiff with the mediation panel. Three days later, plaintiff died unexpectedly from causes unrelated to the lawsuit. On June 14, 1983, the case was mediated, and the mediation panel placed an evaluation of \$35,000 on the case. At the time of the mediation hearing, plaintiff's attorney did not know that his client had died."; "On July 5, 1983, counsel for plaintiff and defendants appeared before this Court at a pretrial conference and, after negotiations, entered into a settlement of the lawsuit for the amount of the mediation award -- \$35,000. At no time, from the time plaintiff's attorney learned of the plaintiff's death until the agreement to settle the case for \$35,000 at the pretrial conference, did plaintiff's attorney notify defendants' attorney or the Court of the death of the plaintiff."; "There is no question that plaintiff's attorney owed a duty of candor to this Court, and such duty required a disclosure of the fact of the death of a client. Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel, even though counsel did not ask whether the client was still alive. Although each lawyer has a duty to contend, with zeal, for the rights of his client, he also owes an affirmative duty of candor and frankness to the Court and to opposing counsel when such a major event as the death of the plaintiff has taken place."; "This Court feels that candor and honesty necessarily require disclosure of such a significant fact as the death of one's client. Opposing counsel does not have to deal with his adversary

as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate. The handling of a lawsuit and its progress is not a game. There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel. At the same time, counsel has a duty to zealously represent his client's interests. That zealous representation of interest, however, does not justify a withholding of essential information, such as the death of the client, when the settlement of the case is based largely upon the defense attorney's assessment of the impact the plaintiff would make upon a jury, because of his appearance at depositions. Plaintiff's attorney clearly had a duty to disclose the death of his client both to the Court and to opposing counsel prior to negotiating the final agreement. For the foregoing reasons, the settlement will be set aside and the case reinstated in the docket for trial.").

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE YOUR CLIENT'S DEATH TO THE ADVERSARY.**

B 4/15, 10/15

Litigation Adversaries' Minor Litigation Mistakes

Hypothetical 15

As the other side in a trial closes its case, you realize that the adversary's lawyer forgot to move into evidence a fairly important exhibit. You quickly huddle with your co-counsel to see what (if anything) you should do. From your experience, the judge handling the case would almost always allow a party to temporarily reopen its case to admit an exhibit like this.

What do you do?

- (A) You must disclose the mistake to the adversary.
- (B) You may disclose the mistake to the adversary, but you don't have to.
- (C) You may not disclose the mistake to the adversary, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE MISTAKE TO THE ADVERSARY, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

Analysis

The 1908 ABA Canons of Professional Ethics included a provision granting lawyers responsibility with what the provision called "incidents of the trial."

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

ABA Canons of Professional Ethics, Canon 24 (emphasis added).

The 1969 ABA Model Code of Professional Responsibility emphasized clients' power, while acknowledging lawyers' normal role in determining how to advance clients' interests.

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 and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

ABA Model Code of Professional Responsibility, EC 7-7 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct seem to stress lawyers' ability to make certain decisions. As one rule explains, clients set the ultimate objectives after consulting with a lawyer, but

normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.

ABA Model Rule 1.2 cmt. [2].

Thus, lawyers

may have authority to exercise professional discretion in determining the means by which a matter should be pursued.

ABA Model Rule 1.3 cmt. [1]. The same comment indicates that "[a] lawyer is not bound . . . to press for every advantage that might realized for a client." Id.

Discovery and trials obviously can generate a spectrum of situations in which a lawyer's adversary might make some mistake, overlook an argument or fact, miss a deadline, etc. States generally emphasize lawyers' duties as advocates in such contexts.

- Env't Specialist, Inc. v. Wells Fargo Bank Nw., N.A., 782 S.E.2d 147, 148, 150, 151-52, 152 (Va. 2016) (reversing a trial court's \$1200 sanction against the plaintiff's lawyer for refusing defendant Wells Fargo's request for an extension to answer a mechanic's lien case; "The trial court . . . stated that it had issued the \$1200 sanctions award against ESI's counsel 'for its failure to voluntarily extend the time in which Wells Fargo might file its answer.' In its order, the trial court recites no statute or rule authorizing its award, nor does it invoke its inherent authority to do so."; "While professionalism embraces aspirational values of civility, courtesy, public service and excellent work product, legal ethics rules and statutory provision of sanctions express the lowest level of permissible conduct at the Bar, below which an attorney may be subject to discipline or sanctions. The legal profession has been self-regulating, and its attempts to regulate the conduct of its members has created a tension between the aspirational goals of professionalism and the bare minimum of ethical requirements and conduct required by written rules and statutes."; "It is important to recognize, however, that the principles of professionalism are aspirational, and, as we stated when this Court approved their adoption, they 'shall not serve as a basis for disciplinary action or for civil liability.' . . . Moreover, the principles themselves recognize that conflicts may arise between an attorney's obligations to a client's best interests and the professional courtesy of agreeing to an opposing counsel's request for an extension of time. . . . In this case, it is clear that the trial court sanctioned plaintiff's counsel 'for its failure to voluntarily extend the time in which Wells Fargo might file its answer.' However, in this case, counsel may not have been acting in his client's best interests if he had agreed to the requested extension of time. In fact, ESI directed counsel not to agree to the requested extension."; "We applaud the bench and the bar as they encourage the aspirational values of professionalism. But there is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of aspirational standards, and behavior that is subject to discipline and/or sanctions. In this case, Wells Fargo was in default. Counsel for ESI satisfied his obligation to pursue his client's best interest, and in this case followed the client's express direction. Counsel did not engage in behavior that could be characterized as unprofessional, an ethics violation or behavior that is subject to statutory sanctions. Accordingly, we reverse the trial court's order awarding \$1200 in sanctions against plaintiff's counsel for counsel's failure to voluntarily extend the time in which Wells Fargo could file its answer.").

- Virginia LEO 920 (6/11/87) (assessing a situation in which a lawyer representing an employer in appealing the award of unemployment compensation to three company employees saw one of the employees outside the Virginia Employment Commission office while preparing for a hearing on another employee's unemployment benefits; explaining that the employee told the lawyer that he intended to be a witness at his colleague's hearing; noting that the employee preparing for his hearing knew that his colleague was present, but represented himself pro se at the hearing and indicated at the end that he had no other evidence to present; further noting that when the Commission ruled in favor of the company, the losing employee hired a lawyer, who asked for the hearing to be re-opened, arguing that the company's lawyer should have disclosed the availability as a witness of the other employee whom the lawyer saw outside the hearing room; concluding that the lawyer was not obligated to tell the Virginia Employment Commission about the unhelpful witness, and in fact had a duty not to make this disclosure -- because it would have hurt the lawyer's client (the company)).

In many situations, lawyers familiar with the pertinent court can predict that the court will grant the adversary's request for relief from a mistake. Perhaps the most common example involves an adversary's minor delay in answering a complaint, which theoretically could result in a default judgment -- but which nearly always results in the court's grant of relief permitting the tardy filing of a response. It is probably fair to say that the less dispositive the adversary's mistake, the more likely a court is to provide such relief.

In 1995, a North Carolina legal ethics opinion explained that lawyers could ethically advise the adversary of such a missed answer deadline.

- North Carolina RPC 212 (7/21/95) (analyzing a lawyer's ability to notify the opposing party's lawyer that 30 days had passed since the filing of the complaint without an answer being filed; ultimately posing the question: "May Attorney A call Attorney X to remind him to file the answer or must Attorney A proceed with obtaining an entry of default against the defendant?"; explaining that the lawyer could notify the other lawyer; "A lawyer may contact an opposing lawyer who failed to file a pleading on time in order to remind the other lawyer of his error and to give the other lawyer a last opportunity to file the pleading. Such conduct is not unethical but rather illustrates the level of professional courtesy and consideration that should be

encouraged among the members of the bar. Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to represent a client zealously 'by avoiding offensive tactics or by treating with courtesy and consideration all persons involved in the legal process.' Furthermore, Rule 7.1(b)(1) authorizes a lawyer 'where permissible, [to] exercise his or her professional judgment to waive or assert a right or position of the client.' It is also observed in the Comment to Rule 7.1 that '. . . a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. . . .' Thus, the rule does not require the client's consent prior to notifying the opposing lawyer."; "In many situations, professional courtesy urges notification to the other lawyer of the failure to file a pleading. However, a lawyer is not ethically required to do so. In some situations, for example where opposing counsel is known to procrastinate or delay or the interests of the client will be materially prejudiced by notifying opposing counsel, a lawyer may determine that the appropriate tactic is to proceed with obtaining an entry of default or other appropriate remedy." (emphasis added)).

Lawyers might find themselves trying to convince their clients that seeking some material advantage based on an adversary's fairly minor mistake could well frustrate or even anger the court. Such tactics ultimately tend to work to clients' detriment.

Lawyers unable to convince their clients not to seek some advantage based on an adversary's minor mistake might well end up in court. Lawyers in that position must remember to submerge their own interest to that of the clients'. As tempting as it would be for the lawyer to essentially tell the court, "I realize that this is stupid, but my client has insisted that I seek default judgment based on a one-day delay in the adversary's response," such a lawyer cannot make such a statement. The lawyer's own personal interest in preserving his or her reputation and standing with the court cannot affect the lawyer's duty to diligently represent the client.

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE MISTAKE TO THE ADVERSARY, UNLESS YOUR CLIENT CONSENTS (PROBABLY).**

B 4/15, 10/15

Litigation Adversaries' Major Case-Dispositive Mistakes

Hypothetical 16

Your client asked you to check with the other side's lawyer (with whom you have a very friendly relationship) to see if the other side intends to appeal a trial victory that you won several weeks ago. When you call the other lawyer to ask about her intent, you learn that the other side intends to appeal -- but quickly realize that the other lawyer has miscalculated the appellate deadline. You do not say anything about it during the call, but reflect upon this issue immediately after hanging up.

What do you do?

- (A) You must disclose the miscalculation to the adversary.
- (B) You may disclose the miscalculation to the adversary, but you don't have to.
- (C) You may not disclose the miscalculation to the adversary, unless your client consents.

**(C) YOU MAY NOT DISCLOSE THE MISCALCULATION TO THE ADVERSARY,
UNLESS YOUR CLIENT CONSENTS**

Analysis

Some situations involve the unfortunate conflict between most lawyers' laudable desire to act professionally and their ethics duties to their clients.

Interestingly, analyzing lawyers' ethical obligations in such situations might depend on the tribunal's role in the process.

Lawyers' Discretion to Notify Adversaries of Their Mistakes Without a Tribunal's Involvement

If a tribunal has not yet focused on some case-dispositive claim or affirmative defense, litigators generally have no duty to advise their adversaries of some fatal mistake. Perhaps the most stark example involves the adversary missing a statute of limitations or (in a perhaps even more likely dispositive error) missing an appellate filing

deadline. A party missing a statute of limitations might seek relief under some estoppel or other theory, but missing an appellate filing deadline often presents a nearly impossible hurdle to overcome.

The ABA Model Rules' analysis of such situations begins with ABA Model Rule 1.2. That Rule emphasizes clients' right to set a representation's ultimate goal, then acknowledges that lawyers have some discretion in determining how to achieve that goal.

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

ABA Model Rule 1.2(a) (emphasis added).

ABA Model Rule 1.2's comments continue this theme -- recognizing but strictly limiting lawyers' discretion.

The first comment emphasizes clients' right to define the representation's goal.

Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

ABA Model Rule 1.2 cmt. [1].

The second comment notes that lawyers have some discretion to select the means by which they can meet the client's goal, but ultimately concluding that lawyers must either defer to their clients' judgment or withdraw from the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

ABA Model Rule 1.2 cmt. [2] (emphases added).

ABA Model Rule 1.3 parallels this approach. The rule itself indicates that

[a] lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Model Rule 1.3.

The first comment to that rule emphasizes the duty's strength and breadth.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

ABA Model Rule 1.3 cmt. [1] (emphases added).

The rest of this comment contains an odd dichotomy.

A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Id.

The first sentence explains that lawyers do not have to seek every advantage. However, the next sentence indicates only that lawyers "may" have some discretion to determine how to achieve clients' stated goal. That seems inconsistent with ABA Model Rule 1.2 cmt. [2], which explains that lawyers must withdraw if they cannot resolve any "fundamental disagreement" with the client "about the means to be used to accomplish the client's objectives." The sentence after that focuses on lawyers' professionalism rather than substance.

Thus, it is unclear why a lawyer is not "bound . . . to press for every advantage that might be realized for a client" -- other than perhaps whatever "advantage" would come from incivility or unprofessional conduct. After all, ABA Model Rule 1.2 demands that lawyers must press for every advantage, and withdraw if they cannot follow the client's direction about whether and how to do that.

Two comments later, the ABA Model Rules again acknowledge a very limited amount of lawyer discretion in pursuing their clients' chosen objective.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change

of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

ABA Model Rule 1.3 cmt. [3] (emphasis added). Thus, this comment extends some discretion to lawyers, but limited to scheduling -- and even then only if exercising such discretion "will not prejudice" the client. In contrast to comments that use words like "fundamental" and "unreasonable," that sentence contains no modifier in prohibiting lawyers from taking any steps that will prejudice the client (presumably in any way).

ABA Rule 1.3 and its accompanying comments seem to permit lawyers' agreement (without the client's explicit consent) to minor delays in depositions, moving the location of meetings, etc. The Rule does not on its face support lawyers' acts of "professionalism" or "civility" that would prejudice the client -- apparently to any degree. Thus, a lawyer could not point to these provisions in justifying a call to the adversary's lawyer reminding her of some important argument she has overlooked, deadline she is about to miss, etc.

To be sure, lawyers might have some power at the beginning of a representation to assume such authority, as long as they can do so while competently, diligently, and loyally representing their client.

Lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as

repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Lawyers can either make their services available only under this condition, or agree with the client to such a limit. ABA Model Rule 1.2(c) cmt. [6].

Thus, presumably lawyers may make their services available only if they retain the discretion to take actions that might prejudice the client but satisfy the lawyer's sense of professionalism. Similarly, lawyers and clients can agree that the lawyer may exercise such discretion. Of course, presumably no bar would permit such an arrangement if the lawyer could materially prejudice the client in using such discretion. Thus, even that recognized possibility would not allow lawyers to alert an adversary of some dispositive mistake -- absent the client's consent at the time, rather than in advance.

And the rules indicate what lawyers must do during a representation if they feel uncomfortable in pressing for an advantage on which the client insists.

Lawyers may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1), (4) (emphasis added).

All of these ethics rules and comments apply only at the margins -- and do not justify lawyers alerting an adversary who is about to commit a dispositive mistake that benefits the lawyer's client.

The issue is closer if the court would be likely to preclude the client from taking advantage of the adversary's mistake. For instance, many courts will vacate a default judgment if the adversary fails to answer, as long as the adversary has a legitimate

excuse for not doing so. In that situation, a lawyer representing the client who would benefit from the default judgment might decide not to push that point, because it would be unavailable and perhaps even counterproductive -- if it would annoy or anger the judge. But the lawyer presumably must discuss the issue with the client.

But a lawyer will not find any justification in the ethics rules for relieving the adversary of a case-dispositive error that a court might not or cannot forgive.

Lawyers Obligations and Discretion when Dealing with Tribunals

If these types of issues play out in front of a tribunal, the ethics rules' application becomes much more complicated.

Lawyers' duty to protect their clients' interest then might conflict with the duty to affirmatively disclose unhelpful law to the tribunal, or to avoid misrepresentations to the tribunal.

ABA Model Rule 3.3 indicates that

[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphasis added). A comment provides some guidance.

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. 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)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4]. This comment seems to focus on an advocate's affirmative false statement of legal principles. It clearly focuses on presentations of the law to the tribunal.

The Restatement takes essentially the same approach as the ABA Model Rules.

In representing a client in a matter before a tribunal, a lawyer may not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000) (emphasis added).

The Restatement explicitly indicates that

"[l]egal authority" includes case-law precedents as well as statutes, ordinances, and administrative regulations.

Restatement (Third) of Law Governing Lawyers §111 cmt. d (2000) (emphasis added).

This principle focuses on advocates' description of the law to the tribunal.

However, it is less clear how the principle applies in other tribunal-related contexts, such as pleadings that do not purport to describe the state of the law.

Perhaps most significantly, neither the ABA Model Rules nor the Restatement have attempted to reconcile this disclosure obligation with the universally accepted principle that lawyers may file on their clients' behalf knowingly time-barred claims, as long as the claim still exists.

The ABA and the Restatement approach recognizes the statute of limitations as an affirmative defense that litigants may or may not assert. Thus, the ABA has indicated that lawyers may file a knowingly time-barred claim, as long as it still exists.

- ABA LEO 387 (9/26/94) ("We conclude that it is generally not a violation . . . to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of

the civil claim creates an affirmative defense which must be asserted by the opposing party [W]e do not believe it is unethical for a lawyer to file suit to a time-barred claim.").

State bars have taken the same approach. New York LEO 475 (10/14/77); Oregon LEO 2005-21 (8/05); North Carolina LEO 2003-13 (1/16/04); Pennsylvania LEO 96-80 (6/24/96).

Although several courts have disagreed with this approach, as a matter of ethics it seems clear that lawyers may file knowingly time-barred claims.

These legal ethics opinions do not deal with this well-recognized principle's arguable inconsistency with lawyers' ethical obligation to disclose adverse law (including adverse statutory law). Presumably that latter obligation does not apply because the tribunal has not yet become involved in assessing the litigants' legal rights. If the defendant raises a statute of limitations defense, it means that its lawyer already knows about that law. And the plaintiff's lawyer obviously could not deny its existence.

If the defendant's lawyer does not realize that the plaintiff's claim might be time-barred, the issue never comes before the tribunal. In other words, plaintiffs' lawyers never have the opportunity to advise the tribunal about the adverse statute of limitations that bars their clients' claims, because the statute of limitations runs before the tribunal deals with that issue. Neither the rules nor common sense would require plaintiffs' lawyers to notify defendants' lawyers of the adverse statute of limitations when filing the complaint.

The same process presumably plays out if an adversary is about to miss an appellate filing deadline. If a litigant's lawyer knows that the adversary is about to miss

the deadline, the litigant's lawyer presumably does not have a duty to tell the adversary -- let alone tell the tribunal.

In contrast, the tribunal's involvement in the process might trigger some disclosure duty under state versions of ABA Model Rule 3.3(a)(2). For instance, the adversary might seek some relief from either the trial court or an appellate court after having missed an appellate filing deadline. In that setting, if the adversary overlooks an applicable statute (such as a law extending the appellate filing deadline for a party in the hospital or serving in the military overseas, etc.) or case law recognizing some other forgiving argument, the litigant's lawyer presumably would have to disclose that to the tribunal.

Although it is unclear why the rules don't require litigators to make the same disclosure in the absence of the adversary's request for judicial relief, courts and bars apparently have not required litigators to do so.

Legal Ethics Opinions

Interestingly, there appear to be no widely-publicized legal ethics opinions dealing with lawyers' duty of confidentiality in such settings.

A 1989 Virginia legal ethics opinion indicated that a criminal defense lawyer must remain silent if the prosecutor sets a trial date past the time at which the law permits the prosecution to proceed -- after emphasizing that the criminal defense lawyer had nothing to do with setting his client's trial date.

- Virginia LEO 1215 (1/31/89) (explaining that a lawyer may not disclose to the court or the prosecutor that the court had granted a continuance at the prosecutor's request and set the lawyer's client's first degree murder trial one day after the expiration of the time during which the prosecution could proceed; noting that the lawyer's client's case was originally set for trial within the permissible time limit, but that the prosecution later sought to rearrange

trial dates of various co-defendants, and had arranged for a trial on a day that the lawyer had earlier advised the court he was available; "You were not consulted before the request for the continuance, nor have you consented to the continuance of this case. You allege that the time limitation for the prosecution of this felony will expire on February 8, 1989, one day before the case is set for trial pursuant to § 19.2-243 of the Code of Virginia."; "It is the opinion of the Committee that since you have no legal obligation to reveal the expiration of the limitations period, you may not reveal it to the detriment of your client.").

In 2007, the Philadelphia Bar dealt with such a similar situation -- requiring a lawyer to stay silent even in the face of an adversary's misunderstanding that the lawyer could accept service of process. That issue was case-dispositive, because of the statute of limitations' running.

- Philadelphia LEO 2007-5 (3/2007) (analyzing the following situation: "While the inquirer was in the process of finalizing the inquirer's client's complaint, a complaint was filed by the landlord's counsel, a copy of which was forwarded to the inquirer by facsimile. The inquirer has never agreed to accept service of original process on behalf of the inquirer's client, and in fact, does not have permission to do so." (emphasis added); holding that the lawyer did not have to disclose his lack of authority to accept service of process, despite the impending running of the statute of limitations; "In the inquirer's professional opinion, the statute of limitations on those claims runs in May 2007. Further, in the inquirer's opinion, the filing of the complaint will not toll the statute because of opposing counsel's failure to act to effectuate proper service. The inquirer has thoroughly discussed the situation with the inquirer's client who has declined to give the inquirer authority to accept service of the complaint or authority to advise opposing counsel of the inquirer's lack of authority." (emphasis added); "[T]he choice as to whether to authorize one's lawyer to accept original process is simply a prerogative of the client which involves no criminal or fraudulent act. Further, subject to exceptions not relevant here, Rule 1.6 governing confidentiality, prohibits a lawyer from revealing information relating to the representation of a client. As a result, in the absence of permission from the client, the inquirer would commit a violation of Rule 1.6 by notifying opposing of the inquirer's lack of authority to accept service." (emphasis added)).

The paucity of ethics guidance on this issue seems odd. One would think that lawyers wishing to act "professionally" would ask ahead of time if they can alert adversaries' lawyers about some case-dispositive mistake. It would be distressing to

think that lawyers do not face at least some temptation to help a brother or sister lawyer avoid per se malpractice, loss of employment, or destruction of a reputation. But few if any lawyers ask bars where to draw the line between permissible disclosure and impermissible prejudice to the client.

Perhaps the profession does not want to articulate the extent of lawyers' duty to stand silent while the adversary's lawyer takes an action or fails to take an action a result of which that lawyer's "client's legal position may be destroyed" (in the words of ABA Model Rule 1.3 cmt. [3]).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE MISCALCULATION TO THE ADVERSARY, UNLESS YOUR CLIENT CONSENTS.**

B 4/15, 10/15

Lawyers' Duty to Correct Their Earlier Misstatements to Courts

Hypothetical 17

You have spent years earning a good reputation in your local court, but you worry that a troublesome client's actions might destroy it. In a hearing yesterday, you made several material factual representations to the court based on what your client had earlier told you. After the hearing, he confessed that some of the factual representations were wrong. Although your representations to the court did not constitute evidence, you immediately told your client that you had to correct your misstatements. However, he knew enough about your ethics duties to insist that you maintain the confidentiality of your post-hearing discussion and his confession -- and not correct your earlier representations.

What do you do?

- (A) You must disclose the correct facts to the court.
- (B) You may disclose the correct facts to the court, but you don't have to.
- (C) You may not disclose the correct facts to the court, unless your client consents.

(A) YOU MUST DISCLOSE THE CORRECT FACTS TO THE COURT

Analysis

The ABA Model Rules prevent lawyers from knowingly making false statements of fact to the tribunal, or failing to correct material false statements they made to the court thinking them to be true.

A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

ABA Model Rule 3.3(a)(1) (emphasis added).

A comment provides some additional explanation.

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of

the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2] (emphasis added).

Interestingly, before the ABA's Ethics 2000 changes (adopted in February 2002), the prohibition only precluded lawyers' knowingly false statements of "material" facts.

Of course, lawyers must also remember the two more general rules prohibiting misstatements or deceptive silence. Under ABA Model Rule 4.1,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Taking even a broader approach (not limited to acting "in the course of representing a client"), Rule 8.4 indicates that it is "professional misconduct" for a lawyer to

engage in conduct involving dishonesty, fraud, deceit or misrepresentation [or] engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(c), (d).

Not all states take the same approach. For instance, D.C. Rule 3.3(a)(1) recognizes such a duty only if the correction would not require the lawyer to violate D.C. Rule 1.6.

A lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.

D.C. Rule 3.3(a)(1) (emphasis added). A Comment provides additional guidance on this unique D.C. Rule.

If the lawyer comes to know that a statement of material fact or law that the lawyer previously made to the tribunal is false, the lawyer has a duty to correct the statement, unless correction would require a disclosure of information that is prohibited by Rule 1.6. This provision in paragraph (a)(1) differs from ABA Model Rule 3.3(a)(1), which requires a lawyer to disclose information otherwise protected by Rule 1.6 if necessary to correct the lawyer's false statement. If Rule 1.6 permits a lawyer to disclose a client confidence or secret, D.C. Rule 3.3(a)(1) requires the lawyer to disclose that information to the extent reasonably necessary to correct a false statement of material fact or law. Nothing in D.C. Rule 3.3(a)(1) limits any disclosure duty under Rule 4.1(b) when substantive law requires a lawyer to disclose client information to avoid being deemed to have assisted the client's crime or fraud.

D.C. Rule 3.3(a)(1) cmt. [2] (emphasis added).

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE CORRECT FACTS TO THE COURT.**

B 1/16

Role of the Adversary's Lawyer's Presence

Hypothetical 18

In your role as your firm's Ethics Counsel, you received urgent calls from two colleagues preparing for separate hearings set to start in a few hours.

First, one colleague thinks that the adversary's lawyer has not discovered your firm's client's guilty plea to bank fraud about fifteen years ago. That would be material in the upcoming hearing, and your colleague wonders whether he must alert the court to that very harmful fact if the other side does not bring it up.

The second call came from a colleague preparing to argue for a TRO, which the would-be adversary will not attend. She wonders if she must advise the court of an earlier lawsuit in which her client was found liable for stealing an employer's trade secrets. That fact would be damaging in your colleague's efforts to obtain a TRO for her client.

- (A) Must your colleague advise the court of his client's earlier bank fraud guilty plea?

NO

- (B) Must your colleague advise the court of her client's earlier loss in the trade secrets case?

YES

Analysis

Lawyers' obligation or discretion to disclose unfavorable facts to courts depends in most jurisdictions on whether an adversary is present.

(a) In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts.

The very nature of the adversarial proceeding requires each side to use available discovery to uncover helpful facts, then present them to the court or the fact finder. It is usually inconceivable that a court would require a lawyer to voluntarily alert the other

side to facts that might assist its case. Of course, litigants must respond to discovery, unless the court sustains an objection. And most rules require litigants to supplement discovery if they learn of responsive facts. But generally lawyers have no duty to assist their adversaries by voluntarily telling them about harmful facts.

Still, some courts have sanctioned lawyers for remaining silent.

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).
- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's [lawyer] silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into

the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).

- Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

It can be difficult to point to any provision in the ethics rules requiring disclosure in many situations like this -- although in some contexts a court could justifiably find some implicit misrepresentation that the lawyer should have corrected.

In most situations involving courts sanctioning of lawyers for their silence, the courts rely on their inherent power to oversee proceedings. These courts apparently rely on their role in assuring justice and seeking the truth. Some might think that such judicial actions risk changing the judicial role from a neutral umpire to a more active participant in the adversarial process, but lawyers who ignore this possible judicial reaction do so at their own risk.

At least one jurisdiction takes a different approach -- sometimes requiring lawyers to disclose unfavorable facts even in an adversial proceeding.

A lawyer shall not knowingly . . . fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

New Jersey Rule 3.3(a)(5) (emphasis added). This apparently unique provision requires lawyers to disclose unfavorable facts if the court might be misled in the absence of knowing those unfavorable facts.

Notably, the New Jersey Rule's exception to this disclosure duty is much more limited than one might think at first blush. The Rule allows lawyers to refrain from disclosing material facts protected by "a recognized privilege" (presumably such as the attorney-client privilege or the work product doctrine). However, those evidentiary protections are far more narrow than the ethics confidentiality duty. This means that the New Jersey rule may require lawyers to disclose material facts that deserve only confidentiality protection, but not privilege or work product protection.

(b) Interestingly, the ethics rules are dramatically different in ex parte proceedings.

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d).

A comment to ABA Model Rule 3.3 explains the basis for this important distinction.

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 any 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.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.

Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.

To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

Not surprisingly, court decisions take the same approach. In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully advising [the court in an ex parte proceeding] of all relevant aspects of the pending parallel proceeding" in another court); Time Warner Entm't Co. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an ex parte proceeding, in which the adversary system lacks its usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

[a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to submit the treating physician's adverse letter to the administrative law judge at the hearing.

[A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Surprisingly, at least one jurisdiction's ethics rules do not contain this exception for ex parte proceedings. D.C. Rule 3.3.

BEST ANSWER

The best answer to (a) is (C) **YOU MAY NOT DISCLOSE THE ADVERSE MATERIAL FACTS TO THE COURT IF THE OTHER SIDE DOES NOT, UNLESS YOUR CLIENT CONSENTS**; the best answer to (b) is (A) **YOU MUST DISCLOSE THE ADVERSE MATERIAL FACTS TO THE COURT.**

B 1/16

Courts' Legal Misunderstanding Based on Litigants' Failure to Cite Relevant Law

Hypothetical 19

Through several years of extensive discovery and frequent hearings in state court litigation, you and your colleagues have always been more diligent than your adversary's lawyers. The latest upcoming hearing is no exception. Your adversary's brief fails to cite several unfavorable decisions that one of your brightest new associates has found. One of the unfavorable decisions is from the circuit court where you are litigating, and another even worse decision is from a circuit court in another part of your state.

When you advised your client of the bad decisions, she asked you to keep that research confidential -- relying on some of your own statements to her about the breadth of your state's confidentiality duty.

- (a) What do you do about the unfavorable law from your circuit court?
- (A) You must disclose the adverse law to the court.
 - (B) You may disclose the adverse law to the court, but you don't have to.
 - (C) You may not disclose the adverse law to the court, unless your client consents.

(A) YOU MUST DISCLOSE THE ADVERSE LAW TO THE COURT

- (b) What do you do about the unfavorable law from the other circuit court?
- (A) You must disclose the adverse law to the court.
 - (B) You may disclose the adverse law to the court, but you don't have to.
 - (C) You may not disclose the adverse law to the court, unless your client consents.

(B) YOU MAY DISCLOSE THE ADVERSE LAW TO THE COURT, BUT YOU DON'T HAVE TO (PROBABLY)

Analysis

(a)-(b) As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer's duty to act as a

diligent advocate for the client, forcing the adversary's lawyer to find any holes, weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

Not surprisingly, this issue has vexed bars and courts trying to balance these principles. Furthermore, their approach has varied over time.

This issue involves more than ethics rules violations. Courts have pointed to a variety of sanctions for lawyers who violate the courts' interpretation of their disclosure obligation.¹

ABA Approach

The ABA's approach to this issue shows an evolving increase and later reduction in lawyers' disclosure duties to the tribunal.

The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

¹ Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonert, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo ex rel. Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's Cnty., 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. Cnty. of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

ABA Canons of Professional Ethics Canon 22 (1908) (emphases added). This provision essentially precluded affirmative misrepresentations of law to the tribunal.

Twenty-seven years later, the ABA issued ABA LEO 146. Citing the lawyer's role as "officer of the court" and "his duty to aid the court in the due administration of justice," the ABA interpreted Canon 22 as requiring affirmative disclosure of "adverse" court decisions.

Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?

....

We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

The ABA revisited the issue again fourteen years later. In ABA LEO 280, the ABA noted that a lawyer had asked the ABA "to reconsider and clarify the [Ethics] Committee's Opinion 146." The ABA expanded a lawyer's duty of disclosure beyond its earlier discussion. To be sure, the ABA began with a general statement of lawyers' duties to diligently represent their clients.

The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position.

ABA LEO 280 (6/18/49). However, the ABA then dramatically expanded the somewhat vague disclosure obligation it had first adopted in LEO 146.

We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seem [sic] to warrant. Close cases can obviously be suggested, particularly in the case of decisions from other states where there is no local case in point A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.

Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of

authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. (emphases added). Thus, the ABA expanded lawyers' disclosure obligation to include any cases (even those from other states) that the court "should clearly consider in deciding the case."

The ABA Model Code of Professional Responsibility DR:7-106(B)(1)² (adopted in 1969) and the later ABA Model Rules of Professional Conduct (adopted in 1983) contain a much more limited disclosure duty.

A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

Comment [4] of the Model Rules provides a fuller explanation.

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. 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)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

² ABA Model Code of Professional Responsibility DR 7-106(B)(1) (1980) ("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." (footnote omitted)).

ABA Model Rule 3.3 cmt. [4] (emphases added).

The 1983 ABA Model Rules apparently presume that legal research and the resulting knowledge of adverse decisions are not subject to lawyers' confidentiality duty.

However, that presumption stands on shaky ground. Under ABA Model Rule 1.6(a), lawyers may not "reveal information relating to the representation of a client" unless some exception applies. Legal research clearly uncovers "information relating to the representation of a client." The ABA Model Rules comment describing the broad scope of lawyers' confidentiality duty explains that

[t]he confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

ABA Model Rule 1.6 cmt. [3] (emphasis added). That description seems to cover legal research.

However, that Comment's next sentence explains that lawyers may not disclose "such information" -- "except as authorized or required by the Rules of Professional Conduct or other law." Id. (emphasis added). That Comment (as well as common sense) means that lawyers' separate duty to disclose adverse authority trumps any confidentiality duty.

The ABA explained some of its evolving approach in a legal ethics opinion decided shortly after the ABA adopted the Model Rules. In ABA Informal Op. 1505, the ABA dealt with a plaintiff's lawyer who had successfully defeated defendant's motion to dismiss a case based on a "recently enacted statute."

[D]uring the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at

issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

ABA Informal Op. 1505 (3/5/84) (emphasis added). The plaintiff's lawyer explained that the issue was not then before the court, but "may well be revived because the prior ruling was not a final, appealable order." Id. He asked the ABA whether he had to advise the trial court at that time, or whether he could "await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants" in his case. Id.

The ABA indicated that the plaintiff's lawyer must "promptly" advise the court of the other decision.

[T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."

. . . .

While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

Id. (emphasis added). Thus, the ABA noted that ABA Model Rule 3.3(a)(3) required the plaintiff's lawyer to promptly disclose such a decision from the "controlling jurisdiction."

Restatement Approach

The Restatement takes essentially the same approach as the ABA Model Rules take, but with more explanation.

In representing a client in a matter before a tribunal, a lawyer may not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000).

The Restatement explains what the term "directly adverse" means in this context.

A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers § 111 cmt. c (2000) (emphasis added).

Another comment explains that the duty covers statutes and regulations, as well as case law.

"Legal authority" includes case-law precedents as well as statutes, ordinances, and administrative regulations.

Id. cmt. d. The same comment discusses what the term "controlling jurisdiction" means.

Legal authority is within the "controlling jurisdiction" according to the established hierarchy of legal authority in the federal system. In a matter governed by state law, it is the relevant state law as indicated by the established hierarchy of law within that state, taking into account, if applicable, conflict-of-laws rules. Ordinarily, it does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a decision of another district court or of the court of appeals from another circuit would not ordinarily be considered authority from the controlling jurisdiction by the sitting tribunal. However, in

those jurisdictions in which a decision of a court of coordinate jurisdiction is controlling, such a decision is subject to the rule of the Section.

Id. (emphasis added). The Reporter's Note contains even a more specific definition of the decisional law falling under the obligation.

Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Id. Reporter's Note cmt. d (emphases added). A comment also explains the timing of a lawyer's obligation.

The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Id. cmt. c.

Unfortunately, the Restatement's two illustrations do not provide much useful guidance. Illustration (1) involves a lawyer arguing to the court that the state law did not give an adversary a cause of action, even though the lawyer knew that a state law did just that. Illustration (2) involves a lawyer representing to a court that the lawyer had cited "all relevant decisions in point" -- despite knowing of another decision adverse to the lawyer's position. Id. illus. 1 & 2. Thus, those two illustrations involve lawyers

affirmatively misrepresenting the state of the law when communicating to a tribunal.

The illustrations do not explore the much more difficult situation -- involving a lawyer's failure to mention unhelpful case law, but not affirmatively telling the court that there is no contrary decisional law.

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.

Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

State Ethics Rules

Most states follow the ABA Model Rules approach.

Only one state appears to have explicitly indicated what the ABA Model Rules and most states presume -- that legal research does not fall within lawyers' confidentiality duty.

"Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

New York Rule 1.6(a) (emphasis added).

Although most states follow the ABA Model Rules approach, some take a different approach. For instance, New York does not require disclosure of "legal authority in the controlling jurisdiction" that is adverse to the client, but instead requires disclosure of an apparently narrower range of adverse authority.

A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

New York Rule 3.3(a)(2) (emphasis added). Although New York's Comments do not explain the distinction between this approach and the ABA Model Rules' approach, it seems to be different. For instance, law from another state circuit or district might fall within the ABA Model Rules' definition of "legal authority in the controlling jurisdiction" (the state) -- but not the "controlling legal authority." In some states, various circuit courts at the trial or the appellate level take differing approaches to issues such as the required imminence of litigation required to claim work product protection. So in that setting, the ABA Model Rules would require lawyers to disclose a sister court's adverse authority, while the New York formulation would not.

Another state uses a different formulation that seems to fall somewhere between the New York approach and the ABA Model Rules approach.

A lawyer shall not knowingly . . . 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.

Virginia Rule 3.3(a)(3) (emphasis added). As explained above, the ABA Model Rules require the disclosure of case law from the "controlling jurisdiction," not just "controlling" case law.

Yet another jurisdiction takes a unique approach which is not obvious on its face.

A lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client.

D.C. Rule 3.3(a)(3) (emphasis added). The reference to "legal authority in the controlling jurisdiction" follows the ABA Model Rules formulation, and presumably includes law that does not control in the case -- as does the language of other jurisdictions mentioned above. However, the unique phrase "known to the lawyer to be dispositive of a question at issue" would seem to exclude from lawyers' disclosure duty adverse authority that does not control in the case. In other words, legal authority that does not control in the case but is instead from a sister court (for example) would not be "dispositive of a question at issue" in the case.

Case Law

Courts analyzing lawyers' obligations to disclose adverse law have provided some guidance on a number of issues.

Although all courts apparently agree that a lawyer's disclosure duty extends beyond just those cases that control the decision before the court, some courts take a remarkably broad approach. Several federal courts have continued to follow the old ABA approach -- essentially requiring lawyers to disclose to tribunals any adverse decisions that a reasonable lawyer would think the court would want to consider.

In Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533 (W.D. Pa. 2001), vacated by uncontested joint motion, Case No. 99-1707, 2002 U.S. Dist. LEXIS 11870 (W.D. Pa. June 14, 2002), the court explained the purpose of the disclosure obligation.

The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second, revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

Id. at 539 (emphasis added). The court then explained the difference between ABA LEO 280 (6/18/49) and the approach taken by the Pennsylvania Bar Association in April 2000. The court rejected the Pennsylvania Bar's approach in favor of the fifty-two-year-old ABA approach.

The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case." . . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.

Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania's interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.

...

In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

Id. at 539-40 (emphases added). Thus, the Western District of Pennsylvania's decision required lawyers to disclose far more than the current ABA Model Rules or the Pennsylvania ethics rules (as interpreted the previous year by Pennsylvania lawyers).

An earlier federal district court decision implicitly took the same approach -- criticizing a lawyer for not disclosing a decision issued by another state's court. In Rural Water System #1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997), aff'd in part and rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.), cert. denied, 531 U.S. 820 (2000), the court indicated that a lawyer should have advised the court of a Sixth Circuit case ("Scioto Water") -- but also the lower court decision in that case, and a Colorado Supreme Court Case.

It is hardly the issue that the rules of professional conduct require only the disclosure of controlling authority, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the Scioto Water decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.

...

This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the

strength of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995) (en banc). RWS # 1's counsel should have brought the Scioto Water decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

Id. at 1498 n.2 (emphases added). Thus, the Northern District of Iowa expected the lawyer to point out Colorado case law.

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.

At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water [Scioto Cnty. Reg'l Water Dist. No. 1 Auth. V. Scioto Water, 103 F.3d 38 (6th Cir. 1996)] decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio In Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

Id. Despite this criticism, the court seems not to have sanctioned the lawyer -- acknowledging that the lawyer's "omission, as a practical matter is slight." Id.

Other courts have not been quite as blunt as this, but clearly expect lawyers to disclose decisions that the ABA Model Rules and the Restatement approach would not obligate the lawyers to disclose to the court. See, e.g., State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (explaining that it was "disturbed" that a litigant's lawyer had not included a United States Supreme Court decision in his briefing, without explaining whether the decision was directly adverse to the lawyer's position).

Best Answer

The best answer is (a) is (A) YOU MUST DISCLOSE THE ADVERSE LAW TO THE COURT; (b) is (B) YOU MAY DISCLOSE THE ADVERSE LAW TO THE COURT, BUT YOU DON'T HAVE TO (PROBABLY)

B 1/16

Courts' Factual Misunderstanding Based on Litigation Adversaries' Mistakes

Hypothetical 20

You have been worried for weeks about your client's fate in an upcoming hearing. She had already been convicted of one check-kiting crime and the judge has a reputation for toughness on repeat offenders. To your surprise, when the judge asks the prosecutor if your client has any prior convictions, the prosecutor tells the judge that there have been no prior convictions. Your mind starts to race as you consider what you should do.

- (a) What do you do?
- (A) You must disclose the prosecutor's mistake to the court.
 - (B) You may disclose the prosecutor's mistake to the court, but you don't have to.
 - (C) You may not disclose the prosecutor's mistake to the court, unless your client consents.

**(C) YOU MAY NOT DISCLOSE THE PROSECUTOR'S MISTAKE TO THE COURT,
UNLESS YOUR CLIENT CONSENTS (PROBABLY)**

- (b) If the prosecutor turns to your client and asks "Right?" may you and your client remain silent?

(A) YES (PROBABLY)

- (c) If the judge asks "Is that right?" may you and your client remain silent?

(B) NO (PROBABLY)

Analysis

Lawyers face a very difficult dilemma when dealing with a court's mistaken reliance on an adversary's innocent misstatement.

To serve their clients, lawyers may wish to leave the court's mistake uncorrected. However, lawyers would also justifiably worry that judges would think less of them by

allowing the judge to make rulings or take other actions based on a mistake. Lawyers must be careful not to let those worries outweigh their duty to diligently serve a current client -- because lawyers must place the current client's interests above the lawyer's own reputational interest or their desire to avoid the judge's doubts about the lawyer's ability to represent future clients.

In 1951, Boston lawyer Charles Curtis wrote a law review about lawyers' duty to advocate for their clients. Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (Dec. 1951).

Among other things, Curtis explained lawyers had no duty to correct a court's mistaken understanding of the facts.

I have said that a lawyer may not lie to the court. But it may be a lawyer's duty not to speak. Let me give you a case from the autobiography of one of the most distinguished and most conscientious lawyers I or any other man has ever know, Samuel Williston. In his autobiography, Life and Law, he tells of one of his early cases. His client was sued in some financial matter. The details of the claim are not important. Willston, of course, at once got his client's letter file and went through it painstakingly, sorting, arranging, and collating it. The letters, we may well believe, told the whole story, as they usually do in such a case. Trial approached, but the plaintiff's lawyers did not either demand to see the correspondence, nor ask for their production. "They did not demand their production and we did not feel bound to disclose them." At the close of the trial, "In the course of his remarks the Chief Justice stated as one reason for his decision a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behavior in keeping silent, I was somewhat uncomfortable at the time."

Id. at 9-10 (emphases added) (footnote omitted). Curtis acknowledged that in contrast to this situation, lawyers must advise the court about adverse law.

In 1953, an ABA legal ethics opinion emphasized lawyers' confidentiality duty. In ABA LEO 287 (6/27/83),¹ the ABA dealt with the several scenarios involving a criminal sentencing.²

¹ ABA LEO 287 (6/27/53) (analyzing two situations, one of which involved a client's admitted perjury and the other involved a court's error about a client's criminal record; analyzing the following scenario: "A convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, 'You have no criminal record, so I will put you on probation.' Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record? . . . Suppose, under the above circumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose the court the true facts as to his client's criminal record?"; "Turning to the second inquiry, relative to the convicted client up for sentence, whose lawyer sees the court put him on probation by reason of the court's misinformation as to his criminal record, known to the lawyer: If the client's criminal record was communicated by him to his counsel when seeking professional advice from him, Canon 37 would prevent its disclosure to the court unless the provisions of Canons 22, 29 and 41 require this. If the court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence. We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity. If the fact of the client's criminal record was learned by the lawyer without communication, confidential or otherwise, from his client, or on his behalf, Canon 37 would not be applicable, and the only problem would be as to the conflicting loyalties of the lawyer on the one hand to represent his client with undivided fidelity and not to divulge his secrets (Canon 6), and on the other to treat the court in every case in which he appears as counsel, with the candor and fairness (Canon 22) which the court has the right to expect of him as its officer. In this case we deem the following considerations applicable. If the court asks the lawyer whether the clerk's statement is correct, the lawyer is not bound by fidelity to the client to tell the court what he knows to be an untruth, and should ask the court to excuse him from answering the question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth. Even, however, if the court does not directly ask the lawyer this question, such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court. The situation is analogous to that discussed in our Opinion 280 where counsel knows of an essential decision not cited by his opponent and where his silence might reasonably be regarded by the Court as an implied representation by him that he knew of no such authority. If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record, the lawyer's duty of candor and fairness to the court requires him, in our opinion, to advise the court not to rely on counsel's personal knowledge as to the facts of the client's record. While doubtless a client who would permit the court, because of misinformation, to be unduly lenient to him would be indignant when his lawyer volunteered to ruin his chance of escaping a jail sentence, such indignation would be unjustified since the client's bad faith had made the lawyer's action necessary. The indignation of the court, however, on learning that the lawyer had deliberately permitted him, where no privileged communication is involved, to rely on what the lawyer knew to be a misapprehension of the true facts, would be something that the lawyer could not

In the first scenario, the court mistakenly believed that the lawyer's client had no previous record, based on a court employee's incorrect statement to the court:

[a] convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, 'You have no criminal record, so I will put you on probation.' Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?

ABA LEO 287 (6/27/53) (emphasis added).

appease on the basis of loyalty to the client. No client may demand or expect of his lawyer, in the furtherance of his cause, disloyalty to the law whose minister he is (Canon 32), or 'any manner of fraud or chicane.' (Canon 15). If the lawyer is quite clear that the court does not rely on him as corroborating, by his silence, the statement of the clerk or of his client, the lawyer is not, in our opinion, bound to speak out."; a dissenting opinion stated as follows: "We can not subscribe to the majority opinion. Canon 29 expressly provides: The counsel upon the trial of the cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. No good reason exists for ignoring the plain and unmistakable mandate of this Canon. Canon 29 is based upon sound public policy which singles out perjury because perjury strikes at the roots of our American system of jurisprudence [sic]. Perjured testimony poisons the well-springs and makes a mockery of justice. Canon 29 enjoins lawyers, as officers of the court, to protect the cause of justice and to assist public authorities in stamping out perjury, no matter by whom committed. The sweeping provisions of Canon 29 do not give a lawyer his choice to report only that perjury which is committed by the opposite party, but requires him to report any perjury, including that committed by his own client or witnesses. No exception is made in Canon 29 as to the manner in which the knowledge of perjury is acquired by the lawyer. No longer is a trial supposed to be a 'Game' to be played by unscrupulous laymen with lawyers as mere pawns. Canon 29 seeks to make a trial an organized search for the truth -- charging the lawyers with the duty of seeing that no litigant prevails through perjury."; "In the second set of facts, a convicted client stood before the court for sentence. At this critical juncture the court sought information as to whether the defendant had a criminal record. The clerk informed the court that the defendant had no criminal record. The lawyer knew that his client did have a criminal record. Under these circumstances can a lawyer stand idly by in open court and permit the court to be deceived at a time when the lawyer knows that the court is relying upon an untrue statement? In Opinion 280 it was held that a lawyer could not remain silent when he knows of an essential decision not cited by his opponent, but is required to volunteer such citation no matter whether it affects his client adversely. We think that Canons 29, 41, 15 and 22 require the lawyer to see that his client gives the court the truth about his criminal record or the lawyer must do so himself. Specifically, we think the answer should be in the affirmative to all three questions propounded in the second inquiry. The method by which the lawyer brings the true information to the knowledge of the court is a mere detail. Whether the lawyer asks for a recess to advise privately with his client about disclosing the truth, or whether the lawyer makes the suggestion to his client in open court, is merely a choice of procedure. In our opinion the lawyer's duty under these circumstances is to see that his client reveals the truth to the court about his criminal record, and if the client refuses, the lawyer's duty to do so becomes mandatory under Canons 29 and 41.").

² ABA LEO 287 also addressed as separate scenario in which a client committed perjury in seeking a divorce.

The majority held that in this first scenario (where the court did not ask anyone to confirm the court's understanding), the lawyer could remain silent.

If the lawyer is quite clear that the court does not rely on him as corroborating, by his silence, the statement of the clerk or of his client, the lawyer is not, in our opinion, bound to speak out.

Id.

The second scenario involved the lawyer's client affirmatively lying to the court in response to the court's direct question to the client about his criminal record.

[s]uppose, under the above circumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose the court the true facts as to his client's criminal record?

Id. (emphasis added).

The majority held that the lawyer could remain silent even in this situation.

If the court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence.

Id. (emphasis added).³

The third scenario involved a court directly asking the defendant's lawyer about the defendant's criminal record.

³ In 1987, a ABA legal ethics opinion explained that a lawyer in this situation would have to correct the client's false statement to the court, based on the 1983 ABA Model Rules. ABA LEO 353 (4/20/87).

Assume further a situation in which the judge following the conviction asks the defendant's lawyer whether his client has a criminal record.

The majority offered a more subtle analysis of this third scenario.

In this case we deem the following considerations applicable. If the court asks the lawyer whether the clerk's statement is correct, the lawyer is not bound by fidelity to the client to tell the court what he knows to be an untruth, and should ask the court to excuse him from answering the question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth.

Even, however, if the court does not directly ask the lawyer this question, such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court. The situation is analogous to that discussed in our Opinion 280 where counsel knows of an essential decision not cited by his opponent and where his silence might reasonably be regarded by the Court as an implied representation by him that he knew of no such authority. If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record, the lawyer's duty of candor and fairness to the court requires him, in our opinion, to advise the court not to rely on counsel's personal knowledge as to the facts of the client's record. While doubtless a client who would permit the court, because of misinformation, to be unduly lenient to him would be indignant when his lawyer volunteered to ruin his chance of escaping a jail sentence, such indignation would be unjustified since the client's bad faith had made the lawyer's action necessary. The indignation of the court, however, on learning that the lawyer had deliberately permitted him, where no privileged communication is involved, to rely on what the lawyer knew to be a misapprehension of the true facts, would be something that the lawyer could not appease on the basis of loyalty to the client. No client may demand or expect of his lawyer, in the furtherance of his cause, disloyalty to the law whose minister he is (Canon 32), or 'any manner of fraud or chicanery.' (Canon 15).

Id. (emphases added).

Thus, the ABA LEO 287 majority suggested that the lawyer try to dodge the court's question. And the majority also held that the lawyer must affirmatively "advise the court not to rely on counsel's personal knowledge as to the facts of the client's record" -- if the lawyer believes that the court is relying on the lawyer's silence as "corroborating the correctness of the statement by the clerk or by the client that the lawyer has no criminal record." ABA LEO 287 did not provide any guidance to lawyers attempting to determine if the court was relying on their silence in that way.

This is unfortunate, because it would seem extremely difficult for lawyers to determine whether courts are relying on their silence as some corroboration of a clerk's misstatement to the court.

An ABA LEO 287 a dissenting opinion contended that the lawyer must affirmatively disclose the client's criminal record in all three of the scenarios: (1) when a court employee provided information to the court that the lawyer knew to be inaccurate; (2) when the client affirmatively lied to the court about the lack of criminal record; and (3) when the court either asked the defendant's lawyer whether the defendant had a criminal record, or apparently relied on the lawyer's silence as corroboration that the defendant did not have a criminal record.

[A] convicted client stood before the court for sentence. At this critical juncture the court sought information as to whether the defendant had a criminal record. The clerk informed the court that the defendant had no criminal record. The lawyer knew that his client did have a criminal record. Under these circumstances can a lawyer stand idly by in open court and permit the court to be deceived at a time when the lawyer knows that the court is relying upon an untrue statement? In Opinion 280 it was held that a lawyer could not remain silent when he knows of an essential decision not cited by his opponent, but is required to volunteer such citation no matter whether it affects his client

adversely. We think that Canons 29, 41, 15 and 22 require the lawyer to see that his client gives the court the truth about his criminal record or the lawyer must do so himself.

Specifically, we think the answer should be in the affirmative to all three questions propounded in the second inquiry. The method by which the lawyer brings the true information to the knowledge of the court is a mere detail. Whether the lawyer asks for a recess to advise privately with his client about disclosing the truth, or whether the lawyer makes the suggestion to his client in open court, is merely a choice of procedure. In our opinion the lawyer's duty under these circumstances is to see that his client reveals the truth to the court about his criminal record, and if the client refuses, the lawyer's duty to do so becomes mandatory under Canons 29 and 41 (emphasis added).

Id. (emphases added).

Over thirty years later, the ABA analyzed the same three scenarios under the 1983 ABA Model Rules. ABA LEO 353 (4/20/87).

ABA LEO 353 came to a different conclusion about the second scenario -- in which the lawyer's client explicitly lied in response to the court's question to him about his criminal record. Relying on ABA Model Rule 3.3, ABA LEO 353 explained that

[w]hen the lawyer cannot persuade the client to rectify the perjury, [the lawyer must] disclose the client's false statement to the tribunal.

Id.

The other two scenarios involved more subtle issues -- because they did not involve the lawyer's client flatly lying to the court. Instead, they involved the court's misunderstanding based on a court clerk's unintentional misstatement to the court, or the lawyer's failure to directly respond to the court's question to the lawyer about the client's criminal record. Thus, in those scenarios a third party (the court) operated under a misunderstanding through no fault of the client or the lawyer.

ABA LEO 353 came to the same conclusion about the first and the third scenarios addressed in the earlier ABA LEO 287.

In the first scenario,

[t]he judge is told by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based on his own investigation or from his client's disclosure to him.

Id. ABA LEO 353 explained that in ABA LEO 287's conclusion that the lawyer must remain silent in that setting

[i]s still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited under Rule 1.6, from disclosing information relating to the representation.

Id.

ABA LEO 353 described the third scenario from the earlier ABA LEO 287 as follows:

the judge asks the defendant's lawyer whether his client has a criminal record.

Id. Interestingly, ABA LEO 353 lumped that scenario in with the first scenario -- finding that the lawyer may not disclose the client's criminal record to the court.

In situations (1) and (3) Opinion 287 is still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited under Rule 1.6 from disclosing information relating to the representation.

Id.

In a footnote, ABA LEO 353 provided some guidance to a lawyer put in this awkward position.

Although in situation (3), where the court puts a direct question to the lawyer, the lawyer may not reveal the client's confidences, the lawyer, also, must not make any false

statements of fact to the court. Formal Opinion 287 advised lawyers facing this dilemma to ask the court to excuse the lawyer from answering the question. The Committee can offer no better guidance under the Model Rules, despite the fact that such a request by the lawyer most likely will put the court on further inquiry, as Opinion 287 recognized.

Id. at n5 (emphasis added).

In what presumably was a deliberate move, ABA LEO 353 did not address ABA LEO 287's discussion of the lawyer's obligation (as ABA LEO 287 put it) "even . . . if the court does not directly ask the lawyer" about the client's criminal record, but rather if "such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court."

As explained above, ABA LEO 287 explained that the lawyer must affirmatively "advise the court not to rely on counsel's personal knowledge as to the facts of the client's record" -- if

the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record.

ABA LEO 287.

ABA LEO 353 presumably would come to the same conclusion as the earlier ABA LEO 287. A lawyer in that situation does not have to disclose the client's criminal record, but must affirmatively warn the court not to rely on the lawyer's personal knowledge of the client's criminal record -- not just if the court directly asks the lawyer, but also in a situation where the lawyer hears the court employee providing inaccurate information to the court. The older ABA LEO 287 did not provide any useful guidance to lawyers trying to determine if courts were relying on the lawyer's silence as some collaboration of the court clerk's misstatement to the court. Perhaps ABA LEO 353 did

not know what to say about that either, so it simply ignored that part of the earlier opinion. This silence is just as unfortunate as the earlier ABA LEO 287's failure to explain when lawyers must speak up in that setting.

At least one state takes a different position in its black letter ethics rules, requiring lawyers to disclose facts to avoid their misunderstanding, unless a "recognized privilege" protects the disclosure.

- New Jersey Rule 3.3(5) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.").

Interestingly, one of the few recent decisions on this issue comes from New Jersey, and seems to contradict the New Jersey Rule. In 2015, a New Jersey court found that a defense lawyer could stand silent rather than inform the court or the prosecutor that his client's license had been suspended for drunk drinking.

- State v. Kane, Dkt. No. A-5773-13TI, 2015 N.J. Super. Unpub. LEXIS 277, at *22-23 (N.J. Super. Ct. App. Div. Feb. 17, 2015) (holding that a lawyer representing a client in a traffic case based on the client's driving with a suspended license did not have to inform the court or the prosecutor that the client's license had been suspended for drunk driving, and thus rendered the client vulnerable to a much more serious charge; "[W]e reject the State's claim that defense counsel was obligated under R.P.C. 3.3(a)(5) or other ethical rules to spotlight the statute's potential application adverse to his client's interests. The situation here is markedly distinguishable from In re Seelig, 180 N.J. 234, 850 A.2d 477 (2004, in which a defense attorney affirmatively misled a municipal judge about the facts in a vehicular case, i.e., whether the victims had died. As the municipal prosecutor honestly acknowledged here, it was his responsibility to be aware of the Title 2C provision's potential applicability, and to refrain from participating in the entry of a guilty plea to a lesser charge that would have double jeopardy implications for a future prosecution for an indictable offense. The fact that the municipal prosecutor accepted that the original plea was his mistake and decided not to file an application or pursue means to have the plea vacated speaks volumes. There was no 'fraud' or unethical behavior by the defense here.").

A chronological review of state ethics opinions shows an evolution toward disclosure in scenarios like this.

- North Carolina CRP 313 (2/5/82) (assessing the following question: "Client X is charged with driving under the influence on April 27. X is subsequently charged with driving under the influence on May 11. On May 25, X pleads guilty to the April 27 charge of driving under the influence. On June 10, X pleads guilty to the May 11 charge of driving under the influence. At the June 10 hearing the State submits a record check of X's driving history. The conviction on May 25 does not appear on that driving record. At no time does the court ask Attorney A, X's attorney, if there are any other convictions or if the driving record is accurate. Nor does Attorney A in any way insinuate to the court that this is Client X's first offense." (emphasis added); "If the court does not ask Attorney A directly or indirectly about Client X's driving record, is Attorney A under any ethical compulsion to advise the State or the court of the prior conviction not shown on Client X's driving record at the time the State made its check?" (emphasis added); providing the following opinion: "No. Attorney A is obligated to protect the confidences and secrets of his client. DR 4-101. The term "secret" indicates any information gained in the professional relationship the disclosure of which would be detrimental to the client. DR 4-101(A). Certainly, the disclosure of the prior conviction would be detrimental to Client X. Attorney A is not violating any of the prohibitions of DR 7-102 in his failure to volunteer the information that there had been a prior conviction after the date when the State last checked Client X's driving record and which had not yet shown up at the time the State checked the record. The American Bar Association has ruled that an attorney has no duty to correct the court's misinformation when the court is about to impose a sentence based on misinformation about the client's previous criminal record or lack of a previous criminal record if the attorney's information was received from the client. Formal Opinion 287 (June 27, 1953). This opinion was further discussed in Formal Opinion 341 where the American Bar Association indicated that an attorney should protect any information received in connection with his professional relationship with the client. Only if DR 4-102(C) applies or if the information is obtained outside of the attorney-client relationship would disclosure be appropriate. Formal Opinion 341 (September 30, 1975). If Attorney A had learned about X's prior conviction through discussions in the community or simply by reading of it in the newspaper, the information would not be a secret of the client. But, even though it may be known to the community and may be a matter of public record, it remains a secret which Attorney A is obligated to protect if Attorney A's knowledge of it comes through representation of the client either in the proceeding itself or through the client's communication to him." (emphasis added)).

- Texas LEO 504 (08/1994) (concluding that a lawyer did not have to speak up and correct a Court's misunderstanding about a criminal client's criminal record, which the court misunderstood based on the prosecutor's mistaken statement to the court that the client had no criminal record, explaining the factual background; ". . . Judge then asked the prosecutor, 'Does the defendant have any prior convictions?'" The prosecutor mistakenly stated to the court that police records reflect that defendant has no prior convictions. Prosecutor turned to the defendant and asked, 'Right?' The defendant and defense counsel make no statement and the court granted probation of defendant's sentence." "When the judge asked the prosecutor about prior convictions of defendant, defense counsel knew that the prosecutor's statement to the court was inaccurate because defendant had previously informed defense counsel about his prior felony convictions. After the trial concluded, defense counsel advised defendant that if he is asked by probation officials about his prior arrests or convictions, defendant must answer and must answer truthfully. In fact, probation officials subsequently learn about defendant's prior convictions as a result at a post-trial interview in which the defendant answered such questions truthfully about his prior convictions."; "The particular question presented in the Statement of Facts does not involve a lawyer knowingly making a false statement of material fact or law, or a situation where the client has permitted perjury or made a fraudulent statement in which the lawyer's silence may be tantamount to assisting a criminal or fraudulent act. Rather, the situation presents the issue of whether a lawyer may remain silent when neither he nor his client has made a false statement to the tribunal, but the lawyer knows that the court is relying upon mistaken or inaccurate information stated in court to the benefit of his client."; "Under Texas Disciplinary Rule 3.03(a)(1) of the Texas Disciplinary Rules (and Model Rule 3.3(a)(1) and if a judge specifically asks the defendant's lawyer whether his client has any prior criminal convictions, the lawyer may not make any false statements of fact to the court. If the question by the court to the defendant's lawyer follows an inaccurate statement in court by another person such as in the Statement of Facts, the lawyer must correct the inaccurate information made in court by a person other than the lawyer or his client, or make some other statement to the court indicating that the lawyer refuses to corroborate the inaccurate statement, or the lawyer may ask the court to excuse him from answering the question. If the lawyer refuses to corroborate the inaccurate statement or ask to be excused from answering the question, the court is at least alerted to a problem and presumably will inquire further to discover the truth."; "Under Texas Disciplinary Rule 3.03(a)(5) further provides that a lawyer shall not knowingly 'offer or use evidence that the lawyer knows to be false.' Does silence by the lawyer and his client in the situation described in the Statement of Facts constitute the use of evidence that the lawyer knows to be false? . . .silence by the lawyer under the Statement of Facts should not be deemed to be 'use' of false testimony under Texas Disciplinary Rule 3.03(a)(5)."; "Since neither lawyer or his client in the Statement of Facts

made a false statement to the court, the lawyer has not violated Texas Disciplinary Rule 3.03(a)(1); since the client did not commit fraud or perjury, the lawyer's silence does not constitute assisting a criminal or fraudulent act. The lawyer may remain silent without violating Texas Disciplinary Rule 3.03, and therefore is prohibited under the Texas Disciplinary Rule 1.05 from disclosing confidential information about his client's prior convictions.").

- North Carolina LEO 98-5 (4/16/98) (holding that a criminal defendant's lawyer can remain silent while the prosecutor gives incorrect information to the court about the client's record, but cannot assist the client in petitioning for a limited driving privileges by implicitly relying on the fact that there had been no prior DWIs; posing the question as follows: "Client was charged with driving while impaired (DWI). Attorney A represented him at trial where Client was convicted. At the sentencing hearing, the prosecutor informed the court that Client had no record of prior convictions for DWI. Attorney A and Client were aware, however, that Client was convicted of DWI in federal court but the federal court failed to forward information regarding the conviction to the North Carolina Department of Motor Vehicles for inclusion in Client's driving record. Therefore, when the prosecutor checked the driving record, he found no record of the prior conviction. At the sentencing hearing, Attorney A and Client remained silent when the prosecutor informed the court that Client had no prior convictions for DWI. Neither Attorney A nor Client made any affirmative misrepresentations to the court about Client's driving record. The judge sentenced Client to punishment level three which can only be imposed if the court determines that the defendant has not been convicted of a prior DWI within the previous seven years." (emphases added); "Was it unethical for Attorney A to remain silent when he heard the prosecutor give erroneous information to the court?"; answering as follows: "No, it was not unethical for Attorney A to remain silent. The burden of proof was on the State to show that the defendant's driving record justified a more restrictive sentencing level. A defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward. The duty of confidentiality to the client is paramount provided the defense lawyer does not affirmatively misrepresent the facts to the court. See Rule 1.6(c) and Rule 3.3(a)(1) of the Revised Rules of Professional Conduct; CPR 313 (lawyer may not volunteer to the court confidential information about a client's prior convictions); and RPC 33 (lawyer may not reveal confidential information about a client's prior criminal record to the court but may not misrepresent the client's criminal record). Although Rule 3.3(a)(2) prohibits a lawyer from failing to disclose a material fact to a tribunal 'when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,' this rule was not violated because Client's driving record was inaccurate through no fault of Client and Client did not criminally or fraudulently conceal the prior conviction from the prosecutor or the court." (emphases added)).

Most lawyers probably would err on the side of correcting courts' mistakes based on an adversary's innocent misstatement. Outside the criminal setting, most lawyers would not face any problems even if they arguably violated their confidentiality duty by taking such corrective action. However, the constitutional issues implicated in criminal cases should give lawyers pause if their instincts lead them in the direction of disclosure.

Many lawyers cite their role as "officers of the court" in deciding to speak up and correct the prosecutor's undoubtedly innocent misstatement. But that role does not change the basic nature of lawyers' primary duty to advocate for their clients. In the broad-ranging debate resulting in the ABA's 1983 adoption of the ABA Model Rules, the American Trial Lawyers issued proposed ethics rules that emphasized this advocacy duty. These proposed rules' introduction provided the American Trial Lawyers' stark view of what it means to be an "officer of the court."

Recognizing that the American attorney functions in an adversary system, and that such a system expresses fundamental American values, helps us to appreciate the emptiness of some clichés of lawyers' ethics. It is said, for example, that the lawyer is an 'officer of the court,' or an 'officer of the legal system.' Out of context, such phrases are at best meaningless, and at worst misleading. In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of a court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Preamble, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

Best Answer

The best answer to (a) is (C) **YOU MAY NOT DISCLOSE THE PROSECUTOR'S MISTAKE TO THE COURT, UNLESS YOUR CLIENT CONSENTS (PROBABLY)**; the best answer to (b) is (A) **PROBABLY YES**; the best answer to (c) is (B) **PROBABLY NO**.

B 4/15, 10/15

Courts' Scrivener's Errors

Hypothetical 21

You represented a criminal defendant in a case tried by a judge without a jury. The judge announced from the bench that she found your client guilty of a felony. However, you were pleasantly surprised, and bit perplexed, when you received the court's final order -- because the judge mistakenly marked the "misdemeanor" box on the post-verdict form.

What do you do?

- (A) You must disclose the mistake to the court.
- (B) You may disclose the mistake to the court, but you don't have to.
- (C) You may not disclose the mistake to the court, unless your client consents.

(A) YOU MUST DISCLOSE THE MISTAKE TO THE COURT (PROBABLY)

Analysis

Courts make mistakes – including scriveners errors. One well-known DC Federal Judge joked about the issue.

- Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 54 (D.D.C.2009) (in an opinion by Magistrate Judge John Facciola, rejecting plaintiffs' argument that defendant's production of a privileged document was intentional rather than inadvertent because a lawyer had reviewed the document and authorized its production; "According to plaintiffs, if the disclosure was by a lawyer, then it clearly was not mistaken and not inadvertent; if it was by a non-lawyer, then defendants did not take reasonable steps to protect privilege. . . . The premise of that statement is wrong. Lawyers make inadvertent mistakes; it is judges who never make mistakes.").

Lawyers dealing with courts' scrivener's errors must balance their duty of loyalty to their clients and their duties as officers of the court.

Balancing these duties can be very difficult, because lawyers must not forfeit some advantage for a current client because the lawyer is worried about her "image"

before the court (which is a personal interest) or the effect it will have on the lawyer's representation of other future clients before that court.

One state's old state ethics opinions concluded that lawyers did not have a duty to disclose courts' scrivener's errors that benefit their clients.

- Virginia LEO 1400 (3/12/91) (explaining that a criminal defense lawyer representing a client found guilty of a felony is under no duty to reveal that the sentencing document later signed by the judge erroneously stated that the defendant was found guilty only of a misdemeanor (assuming that the lawyer did not endorse the document or otherwise participate in drafting it); concluding that the lawyer was ethically obligated not to reveal the error, because the revelation would damage the client.).
- Virginia LEO 1186 (2/13/89) (assessing a situation in which a court-appointed lawyer represents a criminal defendant, against whom two offenses have been docketed for trial on the same date and time; explaining that the court arraigns only on one charge, and the court does not address the second charge; concluding that even if the client had been in pretrial confinement because of the overlooked second criminal charge, the lawyer had a duty not to reveal the court's failure to address the second charge; acknowledging that determining whether the lawyer must fill out a form (a standard "Time Sheet") that might reveal the court's mistake is a question of law beyond the Bar's jurisdiction, but the lawyer may not "enhance" the time sheet to present a misleading impression; "The Committee would opine that defense counsel is not under any affirmative obligation to reveal that the court has overlooked his client's second criminal charge, even if the client had been in pretrial confinement because of that charge, unless the client requested that he inform the court of the omission. Under DR:7-101(A)(3), it would be unethical for an attorney to reveal information that would prejudice or damage his client.").
- Virginia LEO 561 (4/10/84) (assessing a situation in which after winning a motion, a lawyer prepared a decree accidentally broader than the court's ruling; concluding that because the lawyer had not intentionally misdrafted the decree, the lawyer may now assert a res judicata defense based on the overbroad decree; warning that the lawyer must concede the circumstances of the drafting should the adversary raise it.).

In contrast, another states' older legal ethics opinion took just the opposite approach -- requiring lawyers to advise courts of their factual error.

- Wisconsin LEO E-84-7 (1984) (explaining that a criminal defense lawyer must tell a court of the clerk's error in indicating charges against a lawyer's client had been dismissed; analyzing the following scenario: "An attorney represents a criminal defendant charged with two misdemeanors. At a court appearance, the district attorney indicates to the court that the state will dismiss one of the charges, but wishes to proceed on the other charge. At that time, the matter is set for a jury trial. A week before trial, the attorney learns from the clerk of court that both cases against the defendant are indicated as dismissed on the court's docket. Does the attorney have an obligation to bring this apparent error to the attention of the district attorney, the court or the court's staff?" (emphasis added); explaining the lawyer's duty to disclose the error; "The attorney does not have an obligation to inform the district attorney of the apparent error on the court's docket. The district attorney has an obligation to represent the state competently and zealously. It is the responsibility of the district attorney in diligently pursuing the obligations of his or her position to discover the discrepancy. . . . However, the attorney has an obligation to inform the court's staff of the apparent error. In State v. Barto, 202 Wis. 329, 331, 232 N.W. 553 (1930), the Wisconsin Supreme Court stated that when a person enters the practice of law, he or she 'thereby assumes certain duties and obligations and is required to conform to certain standards in three principal relations: (1st) in his relation to his client; (2nd) his relation to the courts and fellow practitioners; and (3rd) his relation to the public. . . .' The court further stated that an attorney has a duty of absolute fidelity and loyalty to the cause of his or her client. However, the court added, if a conflict arises between a lawyer's duty to his or her client and the court, his or her duty to the court must prevail. 202 Wis. at 331. An attorney's duty to the court is a result of his or her role as officer of the court. . . . This duty applies in civil and criminal cases. . . . In the present situation, it is most certainly to the client's benefit if the error remains undiscovered. However, in light of the above, the attorney's duty to inform the court of the apparent error must prevail." (emphases added)).

The dichotomy between these two approaches has continued.

A 2011 North Carolina ethics opinion required disclosure.

- North Carolina LEO 2011-12 (10/21/11) (analyzing the following scenario: "Lawyer has a client in custody who has numerous cases pending in district court. Lawyer negotiates a plea agreement with the assistant district attorney (ADA) whereby all but two of the charges will be dismissed. Lawyer asks for the client to be brought into the courtroom to enter his plea. At that time, Lawyer is informed that the client has already been taken back to the jail. Lawyer and the ADA agree to continue the case to the next business day. When Lawyer subsequently goes to visit his client in jail, he is told that the client was released because all of his charges were dismissed. Upon investigation, Lawyer confirms that all of the client's charges had been

voluntarily dismissed. The dismissals are clearly the result of an error by the clerk of court and do not reflect the plea agreement entered into by Lawyer and the ADA." (emphasis added); explaining that the lawyer had a duty to disclose the clerk's error; "The preamble to the Rules of Professional Conduct provides that as a member of the legal profession, a lawyer is an 'officer of the legal system.' Rule 0.1. Rule 8.4(d) states that it is professional misconduct for a lawyer to 'engage in conduct that is prejudicial to the administration of justice.' Similarly, Comment [2] to Rule 3.3 (Candor Toward the Tribunal) refers to the special duties of lawyers as officers of the court to 'avoid conduct that undermines the integrity of the adjudicative process.' Under Rule 3.3, for example, a lawyer has a duty to disclose a client's false testimony even though it may have grave consequences for the client, where the alternative is that the lawyer cooperate in deceiving the court thereby subverting the truth-finding process which the adversary system is designed to implement. Rule 3.3, Cmt. [11]. Thus, if a conflict arises between a lawyer's duty to his client and his duties as an officer of the court, the lawyer's duty to the court must prevail." (emphasis added); distinguishing the situation from an earlier legal ethics opinion; "This inquiry differs from that addressed in 98 FEO 5, which provides that a defense lawyer does not have a duty to inform the court of an inaccurate driving record presented by the prosecutor. In the situation addressed in 98 FEO 5, both advocates are present in court and each is expected to present evidence and carry his burden of proof. The opinion states that the burden of proof is on the state to show that the defendant's driving record justifies a more restrictive sentencing level and that the defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward. In the instant inquiry, Lawyer knows that his client's charges were dismissed in error and that 'justice' (in the form of a negotiated plea to which Lawyer and the client agreed) was not carried out. Therefore, Lawyer has an obligation to inform the court or the clerk of court of the apparent error. Accord Wis. Formal Ethics Op. E-84-7 (1984) (defense attorney has obligation to inform the court or the court's staff of clerk of court's error).").

In 2016, the Maryland Bar dealt with this issue -- and reached a different conclusion. Maryland LEO 2016-04 presented a scenario involving a court clerk repeatedly preparing erroneous records involving a criminal defendant -- and a criminal defense lawyer's rebuffed effort to advise the clerk of a mistake which favored the lawyer's client.

You advise that you represented a criminal defendant in post-conviction proceedings. The post-conviction court resentenced your client, giving him credit for time he had

already served indicating that he should receive credit from date A to date B.

To document this, the court issued a Commitment Record in order to specifically inform the Division of Corrections exactly how much additional time the defendant must serve. This Commitment Record was incorrect because it did not give defendant all of the credit for time served that the court had earlier granted him on the record.

You then wrote the court asking the judge to correct the Commitment Record. The court did not respond to your letter so you called chambers and were directed to speak with the courtroom clerk. You did so, and the clerk then issued a new Commitment Record.

When you received this new Commitment Record it was still incorrect, but this time the error was in your client's favor, which would allow him to be released earlier than the court had intended. You again spoke with the clerk, who insisted that she had carefully reviewed the record and that it was correct.

Id. (emphases added).

The Maryland Bar's choice of words was interesting. Maryland LEO 2016-04 indicated that the lawyer "again spoke with the clerk" after the lawyer received the erroneous but favorable Commitment Record. Id. Although the legal ethics opinion indicated that after that conversation the clerk "insisted that she had carefully reviewed the record and that it was correct," the factual description did not explicitly indicate that the lawyer told the clerk that she had made a mistake or (especially) that the mistake was in the client's favor. Id. For instance, perhaps the lawyer "spoke with the clerk" in asking the clerk whether she had double-checked the Commitment Record, etc. Id.

Maryland Bar's summary of Maryland LEO 26-04 implied that the lawyer explicitly disclosed the clerk's mistake.

Whether an attorney has any duty to take steps to correct a sentencing order prepared by the clerk which erroneously

states the sentence in his client's favor after the mistake was brought to the attention of the court, referred to, and rejected by, the clerk

Id. (emphasis added).

Later in the legal ethics opinion, the Maryland Bar also indicated that through the lawyer's conversations with the clerk, "all facts, both supportive of, and adverse to [the] client were discussed." This implies that the lawyer's second conversation with the clerk explained the situation -- which involved facts "adverse" to the lawyer's client. But the description is still somewhat ambiguous.

Maryland LEO 2016-04 explained the obvious conflict between the lawyer's duty of candor to the tribunal and duty of confidentiality to the client.

This matter involves the interplay between a lawyer's duty of Candor Toward the Tribunal, MRPC 3.3, and a lawyer's duty of confidentiality concerning information relating to representation of a client, MRPC 1.6. This topic of the proper application of required disclosures under Rule 1.6 has been the subject of much discussion and controversy over the years and has been seen as especially problematic in the context of criminal defense practice (See Hazard and Hodes, The Law of Lawyering, 3d Edition §9.19). While there is no clearly definitive answer, the Committee believes that when the competing interests are properly weighed, the correct response is that you have done all that you have to do.

Id. (emphasis added).

The Maryland Bar concluded that the lawyer did not have to take any further steps to correct the clerk's mistake. The court noted that "[n]o false statement was made to the court and so there is nothing to correct" under Maryland Rule 3.3. Id. Likewise "there was no criminal or fraudulent act committed" by the client. Id. Maryland

LEO 2016-4 ultimately concluded that no Maryland Rule 1.6 exception applied to require or even permit disclosure of the clerk's mistake.

It should come as no surprise that bars have had trouble dealing with lawyers' duties in this context. Many judges would be embarrassed by a scrivener's error, and would think less of a lawyer who knew of the error but did not help the judge avoid such embarrassment. If the scrivener's error has some substantive impact, judges' frustration or even anger at such lawyers could dramatically affect the lawyer's reputation before the judge and perhaps even more widely. As bars have generally loosened lawyers' confidentiality duty, they are more likely to permit or even require lawyers to disclose such scrivener's errors. And it would be safe to assume that a lawyer having discretion to do so would jump at the chance.

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE MISTAKE TO THE COURT (PROBABLY).**

B 4/15, 10/15