RECENT DEVELOPMENTS IN VIRGINIA CIVIL LITIGATION

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I. INTRODUCTION.

This outline focuses on civil litigation developments from May 1, 2016, to May 31, 2017, of interest to Virginia practitioners. It discusses developments affecting civil practice and procedure in Virginia federal and state appellate courts, including relevant amendments to the Virginia Code, the Rules of the Supreme Court of Virginia, the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Unless otherwise noted, changes to the Virginia Code take effect July 1, 2017. The outline also summarizes published decisions dealing with civil procedure, contracts, employment law, insurance, torts and other areas of law.

II. MOST IMPORTANT DEVELOPMENTS COVERED BY THIS OUTLINE.[2]

A. Statutes and Rules.

1. Immunity of persons; defamation; statements regarding matters of public concern communicated to a third party; statements made at a public hearing.

   2017 Va. Acts 586 (H. 1941, S. 1413) (approved Mar. 16, 2017). Amends Va. Code § 8.01-223.2 to provide civil immunity for defamation, tortious interference or a violation of Va. Code § 18.2-499 based solely upon statements made (i) to a third party regarding matters of public concern that would be protected by the First Amendment or (ii) at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies, and authorities thereof, and other governing bodies of any local governmental entity. The bill further provides that the immunity does not apply to any statements made with actual or constructive knowledge that they are false, or with reckless disregard for whether they are false.

2. Civil action for unlawful creation of image of another or unlawful dissemination or sale of images of another.

   2017 Va. Acts 656 (S. 1210) (approved Mar. 20, 2017). Creates a civil cause of action against an individual who knowingly and intentionally (i) creates any videographic or still image of any nonconsenting person who is nude, clad in

[1] We are grateful to our colleague Kevin Elliker who helped digest many of the cases in the outline and provided helpful insights and editorial assistance with this effort.

[2] These summaries are repeated in the main outline but collected here for easy reference.

undergarments, or in a state of undress or (ii) captures an image of a person's intimate parts or undergarments when those captured parts or undergarments would not otherwise be visible to the general public. The bill also creates a civil cause of action against an individual who maliciously disseminates or sells any videographic or still image that depicts another person who is nude or in a state of undress where such person knows that he is not licensed or authorized to disseminate or sell such videographic or still image. The bill provides that compensatory damages, punitive damages, and reasonable attorney fees and costs may be awarded.

3. Demurrers; amended pleadings.

2017 Va. Acts 755 (H. 1816) (approved Mar. 24, 2017). Amends Va. Code § 8.01-273 to require that an amended pleading filed after a demurrer to an earlier pleading has been sustained must incorporate or refer to the earlier pleading being amended in order to preserve the right to challenge the dismissal of the original pleading on appeal. This bill is a recommendation of the Boyd-Graves Conference.

4. Disclosure of insurance policy limits; homeowners or personal injury liability insurance; personal injury and wrongful death actions.

2017 Va. Acts 44 (H. 1641) (approved Feb. 17, 2017). Creates new section of the Code of Virginia (§8.01-417.01) that allows an injured person, the personal representative of a decedent, or an attorney representing either to request the disclosure of the liability limits of a homeowners insurance policy or personal injury liability insurance policy prior to filing a civil action for personal injuries or wrongful death from injuries sustained at the residence of another person. The party requesting this information shall provide the insurer with (i) the date the injury was sustained; (ii) the address of the residence at which the injury was sustained; (iii) the name of the owner of the residence; (iv) the claim number, if available; (v) for personal injury actions, the injured person's medical records, medical bills, and wage-loss documentation pertaining to the injury; and (vi) for wrongful death actions, (a) the decedent's death certificate; (b) the certificate of qualification of the personal representative of the decedent's estate; (c) the names and relationships of the statutory beneficiaries of the decedent; (d) medical bills, if any; and (e) a description of the source, amount, and payment history of the claimed income loss for each beneficiary. The bill provides that in personal injury actions, the insurer only has to disclose liability limits if the amount of the injured person's medical bills and wage losses equals or exceeds $12,500. The bill also provides that disclosure of a policy's limits shall not constitute an admission that the alleged injury is subject to the policy. This bill was a recommendation of the Boyd-Graves Conference.

5. Va. Sup. Ct. R. 1:5(A)—curing signature defects.

New Rule 1:5(A), which becomes effective August 1, 2017, substantially changes existing law to provide a means for correcting previously fatal signature defects on various trial court and appellate pleadings, as follows: (1) A pleading submitted without signature by a pro se party or by an attorney on behalf of a represented party, or that was signed by an attorney not authorized to practice in Virginia, may, within a reasonable time, be corrected by motion for leave to file a properly signed pleading (if filed by a lawyer on behalf of a represented party, the motion and pleading must be signed by a Virginia-licensed attorney); such motions, subject to the sound discretion of the court, are to be liberally granted in the interests of justice, and courts may impose reasonable conditions to protect other parties from unnecessary burdens, including reimbursement of litigation costs, expenses and reasonable attorney's fees incurred solely as a result of the missing or defective signature; if such a motion is granted, the corrected pleading shall be deemed to relate back to the date of the original filing; (2) if an otherwise properly filed complaint is dismissed because it was signed by a person not authorized to practice law in Virginia, then, under Va. Code § 8.01-229(E)(1), the statute of limitations for refiling any claims asserted therein shall be computed without regard to the time that the dismissed action was pending; (3) if a notice of appeal is filed in a circuit court by an attorney or other purported representative not licensed to practice law in Virginia, a later notice of appeal filed on behalf of the party or parties relating to the same judgment or order may be filed on their behalf by a properly-licensed Virginia attorney within 90 days after the original, and such later notice of appeal shall relate back to the date of the original notice of appeal.

6. Fed. R. Civ. P. 6(d)—elimination of 3-Day service period for documents served electronically.

Rule 6(d) is amended effective December 1, 2016, to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

B. CASES.

1. Personal Jurisdiction—out-of-state corporations.

BNSF Railway Co. v. Tyrrell, No. 16-405, slip op. (U.S. May 30, 2017). Two employees sued their employer—a railroad—under the Federal Employers' Liability Act for their on-the-job injuries in Montana state court. Neither employee resided in Montana, nor was injured in Montana, and that state was not the railroad's state of incorporation or principal place of business. The railroad moved to dismiss both suits for lack of general in personam jurisdiction, arguing that it was not at "at home" in Montana under the U.S. Supreme Court's 2014 holding in *Daimler AG v. Bauman*. The Montana Supreme Court concluded that personal jurisdiction existed because the railroad had over 2,000 miles of railroad track and more than 2,000 employees located in Montana. The Supreme Court reversed, holding that the Montana state court's exercise of general in personam

jurisdiction over the railroad violated the Due Process Clause. The Court noted that the railroad was not incorporated or headquartered in Montana, the plaintiffs' injuries did not occur in Montana, and the magnitude of the railroad's in-state contacts was not substantial enough to render it "at home" in Montana, as its in-state contacts included about 6% of its total track mileage, about 5% of its employees, one automotive facility, and less than 10% of its revenue.

2. Federal court venue—domestic corporate defendants in patent cases.

TC Heartland LLC v. Kraft Foods Group Brands LLC, No. 16-341, slip op. (U.S. May 22, 2017). A company sued a competitor for patent infringement in Delaware federal district court. The competitor moved to transfer venue to Indiana, arguing that it did not "reside" in Delaware within the meaning of the patent venue statute (28 U.S.C. § 1400(b)). The district court rejected this argument and the Federal Circuit affirmed, applying its holding in prior cases that the general venue statute (28 U.S.C. § 1931(c)) supplies the definition of "reside" for the purposes of the patent venue statute, thereby allowing venue in any district where the defendant corporation is subject to personal jurisdiction. The Supreme Court reversed and remanded, reasoning that a domestic corporation "resides" only in its state of incorporation for purposes of the patent venue statute.

3. Hague Service Convention—service of process by mail.

Water Splash, Inc. v. Menon, No. 16-254, slip op. (U.S. May 22, 2017). A company sued a former employee in Texas state court alleging she was improperly working for a competitor. The former employee lived in Canada and the company executed service of process via mail. The employee declined to appear or answer and the company obtained a default judgment. The employee moved to set aside the judgment on the grounds of improper service, arguing that service by mail does not comport with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention). The trial court denied the motion but the Texas Court of Appeals concluded that the Hague Service Convention prohibits service of process by mail. The Supreme Court disagreed, holding that the Hague Service Convention does not prohibit service of process by mail, and that such service is permitted if two conditions are met: (1) the receiving state has not objected to service by mail; and (2) service by mail is authorized under otherwise-applicable law (i.e., the law of the jurisdiction where the action is brought).

4. Res judicata—enforcement of settlement agreements.

Funny Guy, LLC v. Lecego, LLC, 293 Va. 135, 795 S.E.2d 887 (2017). The circuit court properly dismissed a breach of contract suit on res judicata grounds under Rule 1:6 based upon that court's dismissal of an earlier action alleging breach of a purported agreement settling the contract claims at issue in the subsequent action. The Supreme Court held that, in the earlier action, plaintiff could have alleged its breach of contract cause of action in the alternative to the

breach of settlement agreement claim, and, therefore, under Rule 1.6, its failure to have done so barred assertion of the contract claim in plaintiff's subsequent action.

5. Contributory Negligence—last clear chance.

Coutlakis v. CSK Transp., Inc., 293 Va. 212, 796 S.E.2d 556 (2017). The trial court erred in refusing to apply the last clear chance doctrine and in sustaining a demurrer to a complaint alleging wrongful death of plaintiff who had been killed by a passing train while walking along railroad tracks wearing earbuds. The Supreme Court held that a plaintiff's contributory negligence continuing to the time of an accident does not bar application of the last clear chance doctrine to remove the contributory negligence bar where, as here, the plaintiff alleges that defendant had the last clear chance to avoid the accident.

6. Statute of Limitations—Legal Malpractice: "continuous-representation" doctrine.

Moonlight Enterprises, LLC v. Mroz, 293 Va. 224, 797 S.E.2d 224 (2017). The Supreme Court held that the "continuous-representation" doctrine only tolls the statute of limitations on a legal malpractice claim while the particular lawyer who committed the alleged malpractice continues to represent the plaintiff in the same engagement. No tolling occurs based upon continued representation in the matter by different lawyers in the same law firm. Thus, the circuit court correctly held that the continuous-representation rule did not toll claims against a lawyer who had ceased providing services to the plaintiff prior to the expiration of the three-year statute of limitation, but erred in declining to apply the rule to dismiss claims against another lawyer in the same firm whose work for the plaintiff ended at a later date within the limitations period.

7. Statute of Limitations—Property Damage: "continuing trespass" doctrine.

Forest Lakes Cmty. Ass'n., Inc. v. United Land Corp. of Am., 293 Va. 113, 795 S.E.2d 875 (2017). The Supreme Court held that the five-year statute of limitations bars plaintiffs' claim alleging that defendant's repeated sediment discharges over many years allegedly damaged plaintiffs' lake, and confirmed that Virginia law does not recognize the "continuing trespass" doctrine adopted in some jurisdictions, which prevents the statute of limitations from running while multiple related acts of wrongdoing recur. Thus, the statute of limitations began to run when the first measurable damage occurred, notwithstanding the claimed subsequent damages. Subsequent compounding or aggravating damages attributable to the original instrumentality or human agency causing the initial damage do not restart a new limitations period for each increment of additional damage – even if such damages substantially increase in the future, or are expected to continue after the conclusion of the litigation.

8. Laches—patent infringement claims.

SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, No. 15-927, slip op. (U.S. May 22, 2017). A patent holder sued a competitor for patent infringement within the applicable six-year statute of limitations period. The competitor moved for summary judgment on the grounds of laches. The district court granted summary judgment and the Federal Circuit affirmed. The Supreme Court disagreed, holding that laches cannot be invoked as a defense against a patent infringement claim seeking damages that is brought within the applicable limitations period.

9. Legal Malpractice—Third-party beneficiary.

Thorsen v. Richmond SPCA, 292 Va. 257, 786 S.E.2d 453 (2016). The Supreme Court held that plaintiff sufficiently alleged facts that it was a third-party beneficiary of an engagement agreement between a lawyer and his deceased client, under which the decedent had retained the lawyer to draft a will that was intended to convey all of her estate to the plaintiff. While noting that such a claim is difficult to establish, the engagement terms showed that the specific purpose of the lawyer's services was to benefit plaintiff, Richmond SPCA, sufficient to give it standing to sue the lawyer for malpractice.

NOTE: The General Assembly changed the statute with HB 1617 · SB 1140. It revises Virginia Code § 64.2-520 to provide that a person who is not a party to the estate planning representative shall have standing to sue only if there is a written agreement between the individual who is the subject of the estate planning and the defendant expressly granting such standing.

10. Virginia Uniform Trade Secrets Act.

Babcock & Wilcox Co. v. AREVA NP, Inc., 292 Va. 165, 788 S.E.2d 237 (2016). The Supreme Court held that a Virginia Uniform Trade Secrets Act ("VUTSA") claim cannot be asserted for misuse of technology in violation of contractual terms in a license agreement; such a claim is merely a breach of contract.

11. Products Liability—"Crashworthiness" doctrine.

Holiday Motor Corp. v. Walters, 292 Va. 461, 790 S.E.2d 447 (2016). The Supreme Court held that an auto manufacturer has no duty to supply a convertible top that protects occupants from injury in a rollover crash, as Virginia does not recognize the so-called "crashworthiness doctrine" followed in certain other states.

12. Products Liability—superseding cause.

Dorman v. State Indus., Inc., 292 Va. 111, 787 S.E.2d 132 (2016). The Supreme Court held that the trial court properly allowed defendant water heater manufacturer in a product liability action to introduce evidence of other possible causes of plaintiff's injuries as potential superseding causes, and also did not err by issuing a superseding cause jury instruction. Defendant's evidence of other

potential causes of injury was sufficient to demonstrate that any negligence by defendant was superseded by another cause, and, therefore, was not an improper "empty chair" defense.

13. Medical malpractice—assault and battery.

Mayr v. Osborne, 293 Va. 74, 795 S.E.2d 731 (2017). The Supreme Court held that the trial court erred by refusing to dismiss plaintiff's assault and battery claim against a physician who, during an operation, had mistakenly fused the wrong level of the plaintiff's spine; where a physician negligently performs an operation to which a plaintiff has given consent, the claim is merely one of negligence and not battery.

14. Lay opinion of treating physician in med-mal cases.

Toraish v. Lee, __ Va. ___, __ S.E.2d __ (Apr. 13, 2017). The Supreme Court held that defendant physician's testimony in a medical malpractice action about what he would have done differently had he been aware of certain facts was admissible as a lay opinion. The trial court, therefore, did not err by refusing to exclude the testimony as unsupported expert testimony.

15. Wrongful discharge/*Bowman* claims.

Francis v. Nat'l Accrediting Comm'n, 293 Va. 167, 796 S.E.2d 188 (2017). The Supreme Court held that the trial court properly sustained a demurrer to a complaint alleging wrongful discharge in violation of public policy where defendant allegedly terminated plaintiff's employment in retaliation for exercising her statutory right to obtain a protective order against threats of violence by a co-worker. The complaint failed to allege that the termination itself violated the public policy stated in the protective order statutes by endangering her health and safety, or that the employer had otherwise prevented her from exercising her statutory right to seek a protective order.

16. Inconsistent awards and admissibility of evidence of emotional injuries.

Gilliam v. Immel, 293 Va. 18, 795 S.E.2d 458 (2017). The Supreme Court held that the trial court did not err by refusing to set aside as inconsistent a personal injury verdict in favor of plaintiff that awarded her $0 in damages, as the evidence of plaintiff's alleged injuries was in conflict, thereby entitling the jury to award no damages. Neither did the trial court err by refusing to admit evidence of allegedly racist remarks made by defendant after the accident. Such alleged remarks were not relevant to plaintiff's claimed mental anguish damages because they were made *after* the accident and, therefore, could not have constituted emotional damages arising from any physical injury sustained in the accident. The plaintiff asserted only a negligence claim, and in the absence of a claim for intentional or negligent infliction of emotional distress, mental anguish and other emotional injuries can be recovered only where they are the reasonable and proximate consequence of a plaintiff's bodily injuries.

17. Attorneys Fee Awards – Uniform Trust Code.

Reineck v. Lemen, 292 Va. 710, 792 S.E.2d 269 (2016). The Supreme Court held that the attorneys' fee provision of the Virginia Uniform Trust Code (Va. Code Ann. §64.2-795) does not contemplate awarding attorney's fees against a fiduciary in his or her personal capacity for actions taken in a representative capacity.

18. Uninsured Motorist – duty to settle.

Manu v. Geico Cas. Ins. Co., __ Va. __, __ S.E.2d __ (Apr. 27, 2017). The Supreme Court held that Va. Code § 8.01-66.1(D)(1) does not impose a duty upon an uninsured motorist insurance carrier to settle a case prior to the insured obtaining judgment against an uninsured tortfeasor.

19. Subject matter jurisdiction in courts not of record.

Parrish v. Fed. Nat'l Mortg. Ass'n, 292 Va. 44, 787 S.E.2d 116 (2016). The Supreme Court held that, in an unlawful detainer action brought by an owner of property who had taken title after foreclosure against former owners who were occupying the property, neither the General District Court, nor the Circuit Court on *de novo* appeal had subject matter jurisdiction to adjudicate the case because the defendant homeowners had raised a bona fide challenge to the validity of the plaintiff's title acquired through foreclosure. Courts not of record lack jurisdiction to try title to real property, and are divested of jurisdiction in unlawful detainer actions against a homeowner who asserts facts that, "if proven, they are sufficient to state a bona fide claim that the foreclosure sale and trustee's deed could be set aside in equity."

20. Federal court's inherent power—sanctions and attorneys' fees.

Goodyear Tire & Rubber Co. v. Haeger, No. 15-1406, slip op. (U.S. Apr. 18, 2017). Goodyear's bad-faith discovery misconduct led to sanctions. The district court awarded the opposing party all of its attorneys' fees incurred in the litigation, and the Ninth Circuit affirmed. The Court reversed and remanded, holding that, when a federal court exercises its inherent authority to sanction bad-faith conduct and award attorneys' fees, the award is limited to the fees the innocent party incurred solely because of the particular misconduct.

III. JURISDICTION, VENUE AND SERVICE OF PROCESS.

A. Virginia Statutes.

1. Personal jurisdiction over a person; domicile and residential requirements for suits for annulment, affirmance, or divorce; civilian employees and foreign service officers.

2017 Va. Acts 480 (H. 1737) (approved Mar. 13, 2017). Extends to all civilian employees of the United States, where current law applies to foreign service officers, certain requirements for a court to exercise personal jurisdiction over a person stationed in a territory or foreign country and establishing domicile in the Commonwealth for the purposes of an annulment, affirmance, or divorce. This bill is a recommendation of the Boyd-Graves Conference.

B. Federal Rules.

1. Time for service.

Rule 4(m) is amended effective Dec. 1, 2016 to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time set by Rule 4(m). This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

C. Cases.

1. Personal Jurisdiction—out-of-state corporations.

BNSF Railway Co. v. Tyrrell, No. 16-405, slip op. (U.S. May 30, 2017). Two employees sued their employer—a railroad—under the Federal Employers' Liability Act for their on-the-job injuries in Montana state court. Neither employee resided in Montana, nor was injured in Montana, and that state was not the railroad's state of incorporation or principal place of business. The railroad moved to dismiss both suits for lack of general in personam jurisdiction, arguing that it was not at "at home" in Montana under the U.S. Supreme Court's 2014 holding in *Daimler AG v. Bauman*. The Montana Supreme Court concluded that personal jurisdiction existed because the railroad had over 2,000 miles of railroad track and more than 2,000 employees located in Montana. The Supreme Court reversed, holding that the Montana state court's exercise of general in personam jurisdiction over the railroad violated the Due Process Clause. The Court noted that the railroad was not incorporated or headquartered in Montana, the plaintiffs' injuries did not occur in Montana, and the magnitude of the railroad's in-state contacts was not substantial enough to render it "at home" in Montana, as its in-

state contacts included about 6% of its total track mileage, about 5% of its employees, one automotive facility, and less than 10% of its revenue.

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TC Heartland LLC v. Kraft Foods Group Brands LLC, No. 16-341, slip op. (U.S. May 22, 2017). A company sued a competitor for patent infringement in Delaware federal district court. The competitor moved to transfer venue to Indiana, arguing that it did not "reside" in Delaware within the meaning of the patent venue statute (28 U.S.C. § 1400(b)). The district court rejected this argument and the Federal Circuit affirmed, applying its holding in prior cases that the general venue statute (28 U.S.C. § 1931(c)) supplies the definition of "reside" for the purposes of the patent venue statute, thereby allowing venue in any district where the defendant corporation is subject to personal jurisdiction. The Supreme Court reversed and remanded, reasoning that a domestic corporation "resides" only in its state of incorporation for purposes of the patent venue statute.

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4. Federal question jurisdiction/removal—Securities Exchange Act of 1934.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. __, 136 S. Ct. 1562 (2016). Shareholders sued several financial institutions in state court for violations of state law after they executed a "naked" short sale of stock. The financial institutions removed the case on two grounds: (a) federal question jurisdiction and (b) exclusive jurisdiction under the Securities Exchange Act of 1934. The shareholders moved to remand. The district court denied the motion but the Third Circuit reversed. The Supreme Court affirmed, reasoning that there was no federal question jurisdiction because the alleged claims arose under state law without raising any federal issues and there was no exclusive jurisdiction under

the Act because its Section 27 jurisdictional test is the same as the federal question jurisdiction test under 28 U.S.C. § 1331.

5. Federal question jurisdiction/removal—False Claims Act.

Commonwealth of Virginia ex rel. Hunter Labs., L.L.C. v. Commonwealth of Virginia, 828 F.3d 281 (4th Cir. 2016) (King, J.). In a state-law qui tam action brought under the Virginia Fraud Against Taxpayers Act, removal to federal court was improper despite the atmospheric allegations that the same conduct giving rise to the lawsuit may also have implicated violations of the federal False Claims Act; the federal courts lacked jurisdiction over suit because resolution of the action did not necessarily require the determination of a federal issue

6. Federal question jurisdiction/removal—Declaratory judgment involving federally-regulated entity.

Pressl v. Appalachian Power Co., 842 F.3d 299 (4th Cir. 2016) (Diana Motz, J.). No federal subject matter jurisdiction over a declaratory judgment action involving land dispute between property owners at Smith Mountain Lake and electric utility despite the fact that the land fell within the boundary of a hydroelectric project operated under a license issued by the Federal Energy Regulatory Commission

7. Federal question jurisdiction/removal—Federal officer removal by government contractor under 28 U.S.C. § 1442.

Ripley v. Foster Wheeler LLC, 841 F.3d 207 (4th Cir. 2016) (Thacker, J.). Federal removal jurisdiction exists for federal government contractor under 28 U.S.C. § 1442 (federal officer removal) asserting a failure to warn defense in state-court asbestos tort action. Therefore, the district court erred by remanding the case to state court; appeal of remand was permitted under a 2011 amendment to 28 U.S.C. § 1447 allowing appeals of remands of federal officer removals under 28 U.S.C. § 1442.

8. Article III case or controversy/injury-in-fact—congressional election district gerrymandering challenge.

Wittman v. Personhuballah, 578 U.S. __, 136 S. Ct. 1732 (2016). The district court struck down a Virginia congressional redistricting plan as unconstitutional racial gerrymandering. Virginia elected not to appeal, but certain members of Congress who had intervened to defend the plan asked the 4th Circuit to reverse. The Court dismissed the appeal for want of Article III jurisdiction because the members of Congress lacked standing to pursue it; none of the members resided or represented the districts at issue in the plan, and, therefore, they suffered no injury in fact required for Article III standing.

9. Article III case or controversy/injury-in-fact—challenge of party's choice of method for electing state senators.

24th Senatorial Dist. Republican Comm. v. Alcorn, 820 F.3d 624 (4th Cir. 2016) (Gregory, J.). The Court held that the Republican party legislative district committee and candidate challenging incumbent senator lacked standing to challenge the Republican party's decision to select state senators by convention instead of primary election, as neither had suffered a cognizable injury in fact under Article III. Both the party committee and the candidate were legally bound by the party's voluntary choice to hold a convention instead of a primary, and, therefore, had no legal right to complain about that choice.

10. Article III case or controversy/injury-in-fact—Fair Credit Reporting Act.

Dreher v. Experian Info. Sols., 856 F.3d 337 (4th Cir. 2017) (Thacker, J.). The Court held that plaintiff lacked standing to assert a violation of the Fair Credit Reporting Act despite his allegation that the defendant had failed to provide him with information required to be disclosed under the statute. Plaintiff failed to show that the denial of legally required information worked any real, concrete harm upon him sufficient to constitute an injury in fact for Article III purposes.

11. Article III case or controversy/injury-in-fact—data breach claim.

Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017) (Diaz, J.). The Court held that plaintiffs who sued after data breaches at veterans hospital lacked standing because the risk of future identify theft they complained of was too speculative to constitute an injury in fact required by Article III.

12. Diversity of citizenship—trusts.

Zoroastrian Ctr. & Darb-E-Mehr of Metro. Washington, D.C. v. Rustam Guiv Found. of N.Y., 822 F.3d 739 (4th Cir. 2016) (Agee, J.). The Court noted the circuit split on whether diversity of citizenship of a trust is determined by reference only to the citizenship of the trustee or to the trustee and all the beneficiaries. Based on the facts presented, however, the Court held that diversity existed regardless of which test is applied. Accordingly, the test for determining diversity of citizenship of a trust remains unsettled in the Fourth Circuit.

13. Subject matter jurisdiction in courts not of record.

Parrish v. Fed. Nat'l Mortg. Ass'n, 292 Va. 44, 787 S.E.2d 116 (2016). The Supreme Court held that, in an unlawful detainer action brought by an owner of property who had taken title after foreclosure against former owners who were occupying the property, neither the General District Court, nor the Circuit Court on *de novo* appeal had subject matter jurisdiction to adjudicate the case because the defendant homeowners had raised a bona fide challenge to the validity of the plaintiff's title acquired through foreclosure. Courts not of record lack jurisdiction to try title to real property, and are divested of jurisdiction in unlawful detainer actions against a homeowner who asserts facts that, "if proven, they are sufficient to state a bona fide claim that the foreclosure sale and trustee's deed could be set aside in equity."

IV. CAUSES OF ACTION AND DAMAGES.

A. Statutes.

1. Civil action for unlawful creation of image of another or unlawful dissemination or sale of images of another.

   2017 Va. Acts 656 (S. 1210) (approved Mar. 20, 2017). Creates a civil cause of action against an individual who knowingly and intentionally (i) creates any videographic or still image of any nonconsenting person who is nude, clad in undergarments, or in a state of undress or (ii) captures an image of a person's intimate parts or undergarments when those captured parts or undergarments would not otherwise be visible to the general public. The bill also creates a civil cause of action against an individual who maliciously disseminates or sells any videographic or still image that depicts another person who is nude or in a state of undress where such person knows that he is not licensed or authorized to disseminate or sell such videographic or still image. The bill provides that compensatory damages, punitive damages, and reasonable attorney fees and costs may be awarded.

2. Punitive damages for persons injured by intoxicated drivers; evidence.

   2017 Va. Acts 671 (S. 1498) (approved Mar. 20, 2017). Amends Va. Code § 8.01-44.5 to add blood tests performed by the Department of Forensic Science pursuant to a search warrant as sufficient to create a rebuttable presumption in civil cases for punitive damages for injuries caused by intoxicated drivers based on certain blood alcohol measurements. The bill further establishes a rebuttable presumption applicable in a civil case for punitive damages for injuries caused by an intoxicated driver that a person who has consumed alcohol knew or should have known that his ability to drive was or would be impaired by such consumption.

3. Lien against person whose negligence causes injury; emergency medical services agency.

   2017 Va. Acts 603 (S. 867) (approved Mar. 16, 2017). Clarifies that whenever any person sustains personal injuries caused by the alleged negligence of another and receives emergency medical services and transportation provided by an emergency medical services vehicle, the emergency medical services provider or agency shall have a lien for the amount of a just and reasonable charge for the services rendered, not to exceed $200 for each emergency medical services provider or agency, on the claim of such injured person or of his personal representative against the person, firm, or corporation whose negligence is alleged to have caused such injuries

B. Contract Cases.

1. Legal Malpractice—Third-party beneficiary.

Thorsen v. Richmond SPCA, 292 Va. 257, 786 S.E.2d 453 (2016). The Supreme Court held that plaintiff sufficiently alleged facts that it was a third-party beneficiary of an engagement agreement between a lawyer and his deceased client, under which the decedent had retained the lawyer to draft a will that was intended to convey all of her estate to the plaintiff. While noting that such a claim is difficult to establish, the engagement terms showed that the specific purpose of the lawyer's services was to benefit plaintiff, Richmond SPCA, sufficient to give it standing to sue the lawyer for malpractice.

NOTE: The General Assembly changed the statute with HB 1617 · SB 1140. It revises Virginia Code § 64.2-520 to provide that a person who is not a party to the estate planning representative shall have standing to sue only if there is a written agreement between the individual who is the subject of the estate planning and the defendant expressly granting such standing.

C. Insurance cases.

1. Uninsured Motorist – duty to settle.

Manu v. Geico Cas. Ins. Co., __ Va. __, __ S.E.2d __ (Apr. 27, 2017). The Supreme Court held that Va. Code § 8.01-66.1(D)(1) does not impose a duty upon an uninsured motorist insurance carrier to settle a case prior to the insured obtaining judgment against an uninsured tortfeasor.

D. Tort cases.

1. Medical malpractice—assault and battery.

Mayr v. Osborne, 293 Va. 74, 795 S.E.2d 731 (2017). The Supreme Court held that the trial court erred by refusing to dismiss plaintiff's assault and battery claim against a physician who, during an operation, had mistakenly fused the wrong level of the plaintiff's spine; where a physician negligently performs an operation to which a plaintiff has given consent, the claim is merely one of negligence and not battery.

E. Employment cases.

1. Title VII of the Civil Rights Act of 1964—constructive-discharge claim accrual.

Green v. Brennan, 578 U.S. __, 136 S. Ct. 1769 (2016). A postal worker agreed to resign from his job. Then, 41 days after resigning and 96 days after agreeing to resign, he reported an unlawful constructive discharge to the EEOC and, thereafter, filed suit in federal district court. The district court dismissed the complaint as untimely because the worker had not reported the discharge to the

EEOC within 45 days of the "matter alleged to be discriminatory." The Tenth Circuit affirmed, holding that the 45-day limitations period began to run on the date the worker agreed to resign (as opposed to the actual date of his resignation). The Supreme Court reversed, explaining that an employee's resignation is part of a Title VII constructive-discharge claim. Therefore, on Title VII constructive discharge claims, the 45-day limitations period begins to run only after resignation, which occurs when the employee gives notice of resignation. Thus, the Supreme Court remanded the case to the lower courts to determine the date of the worker's notice of resignation.

2. Fair Labor Standards Act ("FLSA") – Exempt employees.

Morrison v. County of Fairfax, 826 F.3d 758 (4th Cir. 2016) (Harris, J.). The Court held that evidence presented at summary judgment stage was sufficient to show that Fairfax County fire captains were not exempt employees under the Fair Labor Standards Act, and, therefore, were entitled to overtime compensation.

3. Wrongful discharge/*Bowman* claims.

Francis v. Nat'l Accrediting Comm'n, 293 Va. 167, 796 S.E.2d 188 (2017). The Supreme Court held that the trial court properly sustained a demurrer to a complaint alleging wrongful discharge in violation of public policy where defendant allegedly terminated plaintiff's employment in retaliation for exercising her statutory right to obtain a protective order against threats of violence by a co-worker. The complaint failed to allege that the termination itself violated the public policy stated in the protective order statutes by endangering her health and safety, or that the employer had otherwise prevented her from exercising her statutory right to seek a protective order.

4. "At-will" employees/reasonable notice of termination.

Johnston v. Wood & Assocs., Inc., 292 Va. 222, 787 S.E.2d 103 (2016). The Court clarified that "reasonable notice" required to terminate an "at-will" employee means only "effective notice that the employment relationship has ended."

F. Civil Rights Cases.

1. § 1983—Free speech of government employees.

Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016) (Wilkinson, J.). The Court held that the Petersburg City Police Department's social networking policy (which the court characterized as "a virtual blanket on all speech critical of the government employer") violated police officers' First Amendment rights.

2. § 1983—Political expression of government employees.

Brickey v. Hall, 828 F.3d 298 (4th Cir. 2016) (Diaz, J.). Saltville police officer who was running for town council was fired by defendant police chief after making comments critical of him and the police department during plaintiff's campaign; the Court held that the police chief was entitled to qualified immunity because it was debatable at the time of plaintiff's termination whether his First Amendment free speech interests outweighed the public employer's interest in remedying insubordination.

3. § 1983—Political activity of government employees.

Loftus v. Bobzien, 848 F.3d 278 (4th Cir. 2017) (Agee, J.). The Court held that a Fairfax County Assistant County Attorney's First Amendment rights were not violated when she was fired after she had been elected to Fairfax City Council. The County's interest as an employer in avoiding a perceived ethical conflict of interest between it and the City outweighed any possible First Amendment rights of the employee, and neither a Virginia statute governing political activities of employees of localities nor a Fairfax County ordinance protecting the right of employees to participate in political activities otherwise established a private right of action.

G. Voting rights/election-related challenges.

1. Three-tiered ballot ordering not unconstitutional.

Libertarian Party of Va. v. Alcorn, 826 F.3d 708 (4th Cir. 2016) (Wilkinson, J.). The Court held that Virginia's three-tiered ballot ordering laws do not infringe on the constitutional rights of "minor" political parties. Those political parties have the same opportunity to meet the requirements to achieve "first-tier" status as all others, even though only the Republican and Democratic Parties currently hold that status under the law.

2. No constitutional requirement to show party affiliation of local election candidates on ballot.

Marcellus v. Va. State Bd. of Elections, 849 F.3d 169 (4th Cir. 2017) (Niemeyer, J.). The Court held that Virginia law allowing only federal, state-wide, and General Assembly candidates to be identified by political party did not violate the constitutional rights of local office candidates (e.g., board of supervisors) who sought to be identified by political party.

3. Photo-ID voting requirement not unconstitutional.

Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016) (Niemeyer, J.). The Court held that Virginia's voter identification law, requiring voters to show a valid photo ID, is not unconstitutional and did not violate the federal Voting Rights Act.

H. Other.

1. Fair Debt Collection Practices Act ("FDCPA")—permissible debt collection practice.

Midland Funding, LLC v. Johnson, No. 16-348, slip op. (U.S., May 15, 2017). A debt collector filed a claim in a bankruptcy proceeding for money owed by the debtor. The claim acknowledged that the limitations period had expired. The bankruptcy court disallowed the claim and the debtor sued the collector for a "false, deceptive, misleading, unfair, or unconscionable" debt collection practice under the Fair Debt Collection Practices Act ("FDCPA"). The Court held that the filing of a proof claim that is obviously time barred was not a prohibited debt collection practice, as the claim on its face indicated that the limitations period had expired and state law gives a creditor the right to payment of debt even after an expired limitations period.

2. Fair Housing Act ("FHA")—"aggrieved person" status.

Bank of America Corp. v. Miami, No. 15-1111, slip op. (U.S. May 1, 2017). The City of Miami sued several banks for violations of the FHA, alleging racial discrimination in real-estate transactions. The city further alleged that the violations caused a disproportionate number of foreclosures and vacancies in minority neighborhoods and diminished the city's property-tax revenue. The district court dismissed the suit on grounds that the harms alleged fell outside of the zone of interests that the FHA protects. The 11th Circuit reversed, holding that the City was an "aggrieved person" for FHA purposes because the injuries it complained of were foreseeable consequences of the defendants' alleged misconduct. The Supreme Court disagreed and reversed, holding that foreseeability of injury alone, as the 11th Circuit had ruled, is insufficient; rather, to be an "aggrieved person" under the FHA, there must be "some direct relation between the injury asserted and the injurious conduct alleged."

3. Uniformed Services Employment and Reemployment Act ("USERRA").

Clark v. Virginia State Police, 292 Va. 725, 793 S.E.2d 1 (2016). The Court held that a 1998 amendment to the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4323(b)(2), created a private right of action enforceable against States in their own courts, but that trial court correctly held defendant Virginia Department of State Police, as an arm of the Commonwealth, to be immune from suit under the holding of *Alden v. Maine*, 527 U.S. 706, 715 (1999).

4. Virginia Uniform Trade Secrets Act.

Babcock & Wilcox Co. v. AREVA NP, Inc., 292 Va. 165, 788 S.E.2d 237 (2016). The Supreme Court held that a Virginia Uniform Trade Secrets Act ("VUTSA") claim cannot be asserted for misuse of technology in violation of contractual terms in a license agreement; such a claim is merely a breach of contract.

5. Detinue/"heart balm" statute.

McGrath v. Dockendorf, 292 Va. 834, 793 S.E.2d 336 (2016). The Supreme Court held that the trial court, in plaintiff's detinue action against his former fiancée, properly ordered the defendant to return an engagement ring given to her in contemplation of her marriage to plaintiff. The Virginia "heart balm" statute, Va. Code Ann. § 8.01-220, does not bar such an action to recover property transferred as a conditional gift, such as an engagement ring given in contemplation of marriage.

6. Products Liability—"Crashworthiness" doctrine.

Holiday Motor Corp. v. Walters, 292 Va. 461, 790 S.E.2d 447 (2016). The Supreme Court held that an auto manufacturer has no duty to supply a convertible top that protects occupants from injury in a rollover crash, as Virginia does not recognize the so-called "crashworthiness doctrine" followed in certain other states.

7. Clean Water Act—"jurisdictional determination" by Army Corps. of Engineers.

Army Corps of Engineers v. Hawkes Co., 578 U.S. ___, 136 S. Ct. (U.S. May 31, 2016). Mining companies obtained a jurisdictional determination ("JD") from the Army Corps of Engineers specifying that a particular property contained "waters of the United States" pursuant to the Clean Water Act. After exhausting administrative remedies, the companies sought review of the JD in district court under the Administrative Procedure Act ("APA"). The district court dismissed for lack of jurisdiction but the Eighth Circuit reversed. The Court affirmed, concluding that a JD is a final agency action judicially reviewable under the APA.

V. PLEADING, PRACTICE AND PROCEDURE.

A. Statutes.

1. Demurrers; amended pleadings.

2017 Va. Acts 755 (H. 1816) (approved Mar. 24, 2017). Amends Va. Code § 8.01-273 to require that an amended pleading filed after a demurrer to an earlier pleading has been sustained must incorporate or refer to the earlier pleading being amended in order to preserve the right to challenge the dismissal of the original pleading on appeal. This bill is a recommendation of the Boyd-Graves Conference.

2. Disclosure of insurance policy limits; homeowners or personal injury liability insurance; personal injury and wrongful death actions.

2017 Va. Acts 44 (H. 1641) (approved Feb. 17, 2017). Creates new section of the Code of Virginia (§8.01-417.01) that allows an injured person, the personal representative of a decedent, or an attorney representing either to request the

disclosure of the liability limits of a homeowners insurance policy or personal injury liability insurance policy prior to filing a civil action for personal injuries or wrongful death from injuries sustained at the residence of another person. The party requesting this information shall provide the insurer with (i) the date the injury was sustained; (ii) the address of the residence at which the injury was sustained; (iii) the name of the owner of the residence; (iv) the claim number, if available; (v) for personal injury actions, the injured person's medical records, medical bills, and wage-loss documentation pertaining to the injury; and (vi) for wrongful death actions, (a) the decedent's death certificate; (b) the certificate of qualification of the personal representative of the decedent's estate; (c) the names and relationships of the statutory beneficiaries of the decedent; (d) medical bills, if any; and (e) a description of the source, amount, and payment history of the claimed income loss for each beneficiary. The bill provides that in personal injury actions, the insurer only has to disclose liability limits if the amount of the injured person's medical bills and wage losses equals or exceeds $12,500. The bill also provides that disclosure of a policy's limits shall not constitute an admission that the alleged injury is subject to the policy. This bill was a recommendation of the Boyd-Graves Conference.

3. Initial hearings on a summons for unlawful detainer; amendments of amount requested on summons for unlawful detainer; immediate issuance of writs of possession in certain case judgments; written notice of satisfaction rendered in a court not of record.

   2017 Va. Acts 481 (H. 1811) (approved Mar. 3, 2017). Provides that, at the initial hearing on a summons for unlawful detainer, upon request of the plaintiff, the court shall bifurcate the unlawful detainer case and set a continuance date no later than 120 days from the date of the initial hearing to determine final rent and damages. The bill requires the court, on such continuance date, to permit amendment of the amount requested on a summons for unlawful detainer in accordance with the notice of hearing, evidence presented to the court, and the amounts contracted for in the rental agreement. The bill further clarifies types of judgments for which a writ of possession may be immediately executed but specifies that an eviction pursuant to such a writ shall not be executed (i) until the expiration of a tenant's 10-day appeal period or (ii) if a tenant perfects an appeal. The bill removes certain requirements for a written notice of satisfaction of judgment rendered in a court not of record.

4. Report of money kept by clerk; money held recorded in civil law book; recording in the order book.

   2017 Va. Acts 35 (H. 1630) (approved Feb. 17, 2017). Requires the clerk to make available to the Auditor of Public Accounts a copy of the annual report that the clerk is currently required to provide to the court regarding the receipt of money by the clerk. The bill further directs the clerk to record (i) trust fund orders and (ii) the annual trust fund report regarding the receipt of money in the civil order

book. The bill removes the requirement that such recordings are in addition to, but not in lieu of, any other required recording.

5. Form of garnishment summons; maximum portion of disposable earnings subject to garnishment.

2017 Va. Acts 36 (H. 1646, S. 1333) (approved Feb. 17, 2017). Provides that the form of garnishment summons will state that an employee who makes the minimum wage or less for his week's earnings will ordinarily get to keep 40 times the minimum hourly wage when such earnings are subject to a garnishment, not 30 times as stated in Title 8.01, Civil Remedies and Procedures. The bill is intended to reflect the current statutory requirement for exemptions in Title 34, Homestead and Other Exemptions, and is technical in nature. The bill further directs the Office of the Executive Secretary of the Supreme Court to update the form of garnishment summons accordingly.

6. Requests for medical records or papers; fee limits; penalty for failure to provide.

2017 Va. Acts 457 (H. 1689) (approved Mar. 13, 2017). Provides that the requestor of medical records or papers has the option of specifying in which format the records or papers are to be produced. The bill allows a health care provider to produce such records or papers in paper or other hard copy format if the items are requested to be produced in electronic format, but the health care provider does not maintain such items in an electronic format or have the capability to produce items in an electronic format. The bill increases from 15 to 30 days the time allowed for health care providers to comply with a request received for records or papers. The bill imposes maximum charges for the production of requested medical records or papers, which vary depending on the format in which the records are produced. The bill sets a maximum total fee of $150 for requests made on or after July 1, 2017, but before July 1, 2021, and $160 for requests made on or after July 1, 2021. The bill directs a provider to comply with a subpoena duces tecum by returning the specified records or papers either on the return date on the subpoena, or five days after receipt of a certification sent by the issuing party, whichever is later. If a court finds that such records or papers are not produced (i) for a reason other than compliance with privacy requirements or (ii) due to an inability to retrieve or access such records or papers, the subpoenaing party shall be entitled to a rebuttable presumption that expenses and attorney fees related to the failure to produce such records shall be awarded by the court.

B. Virginia Rules.

1. Va. Sup. Ct. R. 1:5—Counsel and Parties Without Counsel, amendment effective, January 1, 2017.

Virginia Rule 1:5 establishes the obligation that counsel must follow for identifying themselves in pleadings, signing those pleadings, and how they may

withdraw. The amendment to the rule imposes a similar obligation on non-represented parties, in conformance with Va. Code § 8.01-271.1.

2. Va. Sup. Ct. R. 1:5(A)—Curing Signature Defects, amendment effective August 1, 2017.

New Rule 1:5(A) substantially changes existing law to provide a means for correcting previously fatal signature defects on various trial court and appellate pleadings, as follows: (1) A pleading submitted without signature by a pro se party or by an attorney on behalf of a represented party, or that was signed by an attorney not authorized to practice in Virginia, may, within a reasonable time, be corrected by motion for leave to file a properly signed pleading (if filed by a lawyer on behalf of a represented party, the motion and pleading must be signed by a Virginia-licensed attorney); such motions, subject to the sound discretion of the court, are to be liberally granted in the interests of justice, and courts may impose reasonable conditions to protect other parties from unnecessary burdens, including reimbursement of litigation costs, expenses and reasonable attorney's fees incurred solely as a result of the missing or defective signature; if such a motion is granted, the corrected pleading shall be deemed to relate back to the date of the original filing; (2) if an otherwise properly filed complaint is dismissed because it was signed by a person not authorized to practice law in Virginia, then, under Va. Code § 8.01-229(E)(1), the statute of limitations for refiling any claims asserted therein shall be computed without regard to the time that the dismissed action was pending; (3) if a notice of appeal is filed in a circuit court by an attorney or other purported representative not licensed to practice law in Virginia, a later notice of appeal filed on behalf of the party or parties relating to the same judgment or order may be filed on their behalf by a properly-licensed Virginia attorney within 90 days after the original, and such later notice of appeal shall relate back to the date of the original notice of appeal.

C. Federal Rules of Civil Procedure.

1. Fed. R. Civ. P. 6(d)—Elimination of 3-Day service period for documents served electronically.

Rule 6(d) is amended effective December 1, 2016, to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

D. Cases.

1. Federal court's inherent power—sanctions and attorneys' fees.

Goodyear Tire & Rubber Co. v. Haeger, No. 15-1406, slip op. (U.S. Apr. 18, 2017). Goodyear's bad-faith discovery misconduct led to sanctions. The district court awarded the opposing party all of its attorneys' fees incurred in the litigation, and the Ninth Circuit affirmed. The Court reversed and remanded, holding that, when a federal court exercises its inherent authority to sanction bad-

faith conduct and award attorneys' fees, the award is limited to the fees the innocent party incurred solely because of the particular misconduct.

2. Federal court's inherent power—recalling a jury for error.

Dietz v. Bouldin, 578 U.S. __, 136 S. Ct. 1885 (U.S. June 9, 2016). In a negligence action, the parties stipulated to damages of $10,000 and the only disputed issue was whether the plaintiff was entitled to more damages. The jury returned a verdict in plaintiff's favor but awarded $0 in damages. The judge discharged the jury but, before they left the courthouse, he realized the error in the $0 verdict. The judge recalled the jury and questioned them about whether they spoke to anyone about the case. Satisfied with their answers, the judge gave clarifying jury instructions and the reassembled jury returned a verdict awarding plaintiff $15,000 in damages. The Ninth Circuit and the Supreme Court affirmed, holding that, notwithstanding the limited inherent power of a federal district court to rescind a jury discharge order and recall a jury in a civil case for further deliberations after identifying a jury verdict error, the district court, under the circumstances of the case, did not abuse that power.

3. Standing—Effect of prior bankruptcy.

Ricketts v. Strange, 293 Va. 101, 796 S.E.2d 182 (2017). The Supreme Court affirmed a trial court's holding that plaintiff lacked standing to assert a tort claim arising out of an auto accident because plaintiff had filed for bankruptcy and obtained a discharge prior to commencing suit and did not adequately disclose her tort claim in her bankruptcy schedules, rendering her claim property that remained held by her bankruptcy estate. In addition, the trial court properly denied plaintiff's motion to amend to join or substitute the bankruptcy trustee as a party, as a plaintiff without standing cannot cure the defect through amendment or substitution of parties.

4. Eminent Domain.

VEPCO v. Hylton, 292 Va. 92, 787 S.E.2d 106 (2016). The Court held that, in an eminent domain proceeding, a landowner waives any objection to the trial court's statutory jurisdiction to proceed with the case unless he or she states the grounds for the objection in an answer filed within 21 days of being served with the petition for condemnation. A general denial in the answer disagreeing with the bona fides of the condemnor's purchase offer is not sufficient, and any such objection is, therefore, deemed waived.

5. Land use—appeals of BZA decisions.

Boasso Am. Corp. v. Zoning Adm'r of the City of Chesapeake, 293 Va. 203, 796 S.E.2d 545 (2017). The Court held that the trial court properly dismissed petitioner's appeal of a Board of Zoning Appeals decision because it failed to name the local governing body for the locality as a party. The governing body is a necessary party in BZA appeals and a petitioner cannot cure the defect by

amending the petition to add the governing body after expiration of the applicable 30-day period under Va. Code Ann. § 15.2-2314 within which such appeals must be filed.

6. Federal preemption—Federal Arbitration Act ("FAA").

Kindred Nursing Centers, L.P. v. Clark, No. 16-32, slip op. (U.S. May 15, 2017). After nursing home residents died, their representatives, acting under powers of attorney, sued the nursing home. The nursing home moved to dismiss based on arbitration agreements signed by the representatives when the residents were admitted. The Kentucky Supreme Court invalidated the arbitration agreements, holding that, under the state's clear-statement rule, the power of attorney agreements did not sufficiently authorize the representatives to relinquish the residents' right to seek relief in court and receive a jury trial. The Supreme Court vacated that decision, however concluding that the Kentucky Supreme Court's application of state law impermissibly singled out arbitration agreements for disfavored treatment, in violation of the FAA. The FAA preempts any state law or doctrine that discriminates against arbitration of disputes affecting interstate commerce.

7. Federal preemption—Atomic Energy Act.

Va. Uranium, Inc. v. Warren, 848 F.3d 590 (4th Cir. 2017) (Diaz, J.) (petition for cert. filed, Apr. 21, 2017). The Court held that conventional uranium mining is not regulated by the federal Atomic Energy Act and therefore a Virginia moratorium on uranium development is not preempted by federal law.

VI. AFFIRMATIVE DEFENSES.

A. Statutes.

1. Immunity of persons; defamation; statements regarding matters of public concern communicated to a third party; statements made at a public hearing.

2017 Va. Acts 586 (H. 1941, S. 1413) (approved Mar. 16, 2017). Amends Va. Code § 8.01-223.2 to provide civil immunity for defamation, tortious interference or a violation of Va. Code § 18.2-499 based solely upon statements made (i) to a third party regarding matters of public concern that would be protected by the First Amendment or (ii) at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies, and authorities thereof, and other governing bodies of any local governmental entity. The bill further provides that the immunity does not apply to any statements made with actual or constructive knowledge that they are false, or with reckless disregard for whether they are false.

2. Duty of care to law-enforcement officers and firefighters; fireman's rule.

2017 Va. Acts 315 (H. 1590) (approved March 13, 2017). Amends Va. Code § 8.01-226 to provide that the common-law doctrine known as the fireman's rule, as described in the bill, shall not be a defense to tort claims by certain law enforcement officers injured in the line of duty. The fireman's rule presumes that fire fighters, police and other public safety officers assume the usual risks of injury in such employment, whether caused by a negligent or a non-negligent act of a tortfeasor.

3. Civil immunity for administration of medications to treat adrenal crisis.

2017 Va. Acts 713 (H. 1661) (approved Mar. 24, 2017). Amends Va. Code § 8.01-225 to provide that certain employees of public and private schools trained in the administration of injected medications for the treatment of adrenal crisis resulting from a condition causing adrenal insufficiency are immune from liability for civil damages for ordinary negligence in connection with the administration of such medications to a student diagnosed with a condition causing adrenal insufficiency, when the student is believed to be experiencing or about to experience an adrenal crisis in accordance with a prescriber's written order or instructions.

4. Civil liability for employees of institutions of higher education in administration of epinephrine, insulin, and glucagon.

2017 Va. Acts 294 (H. 1746, S. 944) (approved Mar. 3, 2017). Authorizes and provides liability protection for employees of a public or private institution of higher education who are authorized by a prescriber and trained in the administration of epinephrine, insulin, or glucagon to possess and administer such epinephrine, insulin, or glucagon.

B. Cases.

1. Res Judicata—constitutional challenges.

Whole Woman's Health v. Hellerstedt, 579 U.S. __, 136 S. Ct. 2292 (2016). Texas passed a law regulating abortions, imposing an "admitting-privileges requirement" and a surgical-center requirement. Before the law took effect, a group of abortion providers filed and lost a facial challenge to the constitutionality of the admitting-privileges requirement. After the law took effect, a different group of abortion providers filed a challenge to the constitutionality of both requirements. The district court overturned both requirements as unconstitutional, but the Fifth Circuit reversed, concluding that both claims were barred by res judicata. The Supreme Court disagreed and reversed, holding that the present action was sufficiently different from the prior suit to avoid the res judicata bar. For the admitting-privileges requirement, the providers had previously raised a facial challenge, but the present case was an "as applied" challenge resting on post-enforcement, concrete factual developments. The challenge to the surgical-

center requirement pertained to different and independent regulatory requirements from those challenged in the prior suit.

2. Res judicata—enforcement of settlement agreement.

Funny Guy, LLC v. Lecego, LLC, 293 Va. 135, 795 S.E.2d 887 (2017). The circuit court properly dismissed a breach of contract suit on res judicata grounds under Rule 1:6 based upon that court's dismissal of an earlier action alleging breach of a purported agreement settling the contract claims at issue in the subsequent action. The Supreme Court held that, in the earlier action, plaintiff could have alleged its breach of contract cause of action in the alternative to the breach of settlement agreement claim, and, therefore, under Rule 1.6, its failure to have done so barred assertion of the contract claim in plaintiff's subsequent action.

3. Contributory Negligence—Last Clear Chance.

Coutlakis v. CSK Transp., Inc., 293 Va. 212, 796 S.E.2d 556 (2017). The trial court erred in refusing to apply the last clear chance doctrine and in sustaining a demurrer to a complaint alleging wrongful death of plaintiff who had been killed by a passing train while walking along railroad tracks wearing earbuds. The Supreme Court held that a plaintiff's contributory negligence continuing to the time of an accident does not bar application of the last clear chance doctrine to remove the contributory negligence bar where, as here, the plaintiff alleges that defendant had the last clear chance to avoid the accident.

4. Statute of Limitations—Property Damage: "continuing trespass" doctrine.

Forest Lakes Cmty. Ass'n., Inc. v. United Land Corp. of Am., 293 Va. 113, 795 S.E.2d 875 (2017). The Supreme Court held that the five-year statute of limitations bars plaintiffs' claim alleging that defendant's repeated sediment discharges over many years allegedly damaged plaintiffs' lake, and confirmed that Virginia law does not recognize the "continuing trespass" doctrine adopted in some jurisdictions, which prevents the statute of limitations from running while multiple related acts of wrongdoing recur. Thus, the statute of limitations began to run when the first measurable damage occurred, notwithstanding the claimed subsequent damages. Subsequent compounding or aggravating damages attributable to the original instrumentality or human agency causing the initial damage do not restart a new limitations period for each increment of additional damage – even if such damages substantially increase in the future, or are expected to continue after the conclusion of the litigation.

5. Statute of Limitations—Legal Malpractice: "continuous representation" doctrine.

Moonlight Enterprises, LLC v. Mroz, 293 Va. 224, 797 S.E.2d 224 (2017). The Supreme Court held that the "continuous-representation" doctrine only tolls the statute of limitations on a legal malpractice claim while the particular lawyer who committed the alleged malpractice continues to represent the plaintiff in the same

engagement. No tolling occurs based upon continued representation in the matter by different lawyers in the same law firm. Thus, the circuit court correctly held that the continuous-representation rule did not toll claims against a lawyer who had ceased providing services to the plaintiff prior to the expiration of the three-year statute of limitation, but erred in declining to apply the rule to dismiss claims against another lawyer in the same firm whose work for the plaintiff ended at a later date within the limitations period.

6. Statute of Limitations – Suits against governments sponsored enterprises.

Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp., 855 F.3d 573 (4th Cir. 2017) (Duncan, J.). Virginia's five-year statute of limitations for contract claims, not the federal six-year limitations period for suits against the United States, applied in a claim against Freddie Mac and the Federal Housing Finance Agency, because Freddie Mac was created by Congress as a private corporation, did not qualify as a federal government instrumentality, and the government did not exert ownership or control over it. In addition, Freddie Mac's status as a non-federal entity did not change as a result of a 2008 federal statute placing it under the conservatorship of the Federal Housing Finance Agency, as, in assuming such capacity, the FHFA is deemed to step into the shoes of Freddie Mac as a private party.

7. Statute of Limitations – "Discovery Rule" under Comprehensive Environmental Resources, Compensation and Liability Act ("CERCLA").

Blankenship v. Consolidation Coal Co., 850 F.3d 630 (4th Cir. 2017) (Niemeyer, J.). Virginia's statutes of limitations apply to state-law claims brought by landowners against coal mining company due to damage wrought by dewatering operation, and such limitations period was not preempted by the CERCLA discovery rule. Nor were those state-law limitations periods tolled by alleged concealment of dewatering activities because the company publicly sought permission to conduct such activities, published notice of its intention to undertake them, and conducted its operations openly over land and into an exhausted mine.

8. Laches—patent infringement claims.

SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, No. 15-927, slip op. (U.S. May 22, 2017). A patent holder sued a competitor for patent infringement within the applicable six-year statute of limitations period. The competitor moved for summary judgment on the grounds of laches. The district court granted summary judgment and the Federal Circuit affirmed. The Supreme Court disagreed, holding that laches cannot be invoked as a defense against a patent infringement claim seeking damages that is brought within the applicable limitations period.

9. Products Liability—superseding cause.

Dorman v. State Indus., Inc., 292 Va. 111, 787 S.E.2d 132 (2016). The Supreme Court held that the trial court properly allowed defendant water heater manufacturer in a product liability action to introduce evidence of other possible causes of plaintiff's injuries as potential superseding causes, and also did not err by issuing a superseding cause jury instruction. Defendant's evidence of other potential causes of injury was sufficient to demonstrate that any negligence by defendant was superseded by another cause, and, therefore, was not an improper "empty chair" defense.

VII. TRIAL PROCEEDINGS AND EVIDENCE.

A. Statutes.

1. Nurse practitioner as expert witness; scope of activities.

   2017 Va. Acts 413 (H. 1609) (approved March 13, 2017). References the specific Code section outlining the scope of a nurse practitioner's activities in the context of the current provision that authorizes a nurse practitioner to testify as an expert witness within the scope of his or her activities.

2. Digital certification of government records.

   2017 Va. Acts 738 (S. 1341) (approved Mar. 24, 2017). Provides for the Secretary of the Commonwealth, in cooperation with the Virginia Information Technologies Agency, to develop standards for the use of digital signatures by government agencies on electronic records generated by such agencies. The bill further provides that such agencies may provide copies of digital records, via a website or upon request, and may charge a fee of $5 for each digitally certified copy of an electronic record. Any digitally certified record submitted to a court in the Commonwealth shall be deemed to be authenticated by the custodian of the record. The bill defines "agency" to include all state agencies and local government entities, including constitutional officers, except circuit court clerks.

B. Rules.

1. Va. Sup. Ct. R. 2:615—Exclusion of Witnesses, amendment effective September 30, 2016.

   Virginia's Rule 615 governs the exclusion of witnesses from trials and specifies certain individuals who are exempt from exclusion. The amendment adds to the list, in unlawful detainer cases filed in general district court, the "managing agent" of the lessor.

2. Va. Sup. Ct. R. 4:1—Costs of Discovery in Eminent Domain Proceedings, amendment effective, January 1, 2017.

   Virginia Rule 4:1(b)(4)(D) specifies that the condemnor in eminent domain proceedings shall bear the cost of discovery, if it initiates discovery. The

amendment to the rule limits the costs recoverable by the condemnee to "reasonable" costs.

3. Medical Malpractice Rules of Practice, Rule 3—Designation of Panel; Certificate of Parties, amendment effective July 1, 2017.

Rule 3 of the Medical Malpractice Rules of Practice governs the composition of the medical review panel. The rule significantly reduces the required number of members of the panel—by roughly 75%. Attorney membership is reduced from 240 to 50, and health care providers are reduced from 915 to 235. Corresponding reductions are made to the numbers of each type of health care provider.

C. Cases.

1. Attorneys fee awards under Title VII of the Civil Rights Act of 1964.

CRST Van Expedited, Inc. v. EEOC, 578 U.S. __, 136 S.Ct. 1642 (2016). The EEOC sued an employer for sexual harassment of female employees under Title VII of the Civil Rights Act of 1964. The district court dismissed the claims because the EEOC had not adequately investigated or attempted to conciliate its claims before filing suit. The district court also declared the employer a prevailing party and awarded its attorneys' fees pursuant to Title VII's fee-shifting statute. The Eighth Circuit reversed. On remand, the EEOC settled the claims and the district court again declared the employer the prevailing party, awarding attorneys' fees. The Eighth Circuit reversed again, concluding a Title VII defendant can only be a "prevailing party" by obtaining a "ruling on the merits." The Supreme Court disagreed, interpreting the statute and holding that a favorable ruling on the merits is not a necessary predicate to find that a defendant is a prevailing party for fee-shifting purposes under Title VII.

2. Attorneys fee awards—factors relevant to fee awards generally.

Lambert v. Sea Oats Condo. Ass'n, Inc., __ Va. __, __ S.E.2d __ (Apr. 13, 2017). The Supreme Court held that the trial court erroneously ruled that plaintiff's request for $8,232.00 in attorneys' fees was excessive because plaintiff had only sought and recovered an award of $500 in damages. The amount of damages sought or recovered is one relevant factor in determining the reasonableness of an attorneys' fee request, but the trial court abused its discretion by relying exclusively on that factor to deny plaintiff's fee request.

3. Attorneys Fee Awards – Uniform Trust Code.

Reineck v. Lemen, 292 Va. 710, 792 S.E.2d 269 (2016). The Supreme Court held that the attorneys' fee provision of the Virginia Uniform Trust Code (Va. Code Ann. §64.2-795) does not contemplate awarding attorney's fees against a fiduciary in his or her personal capacity for actions taken in a representative capacity.

4. Lay opinion of treating physician in med-mal cases.

   Toraish v. Lee, __ Va. ___, __ S.E.2d __ (Apr. 13, 2017). The Supreme Court held that defendant physician's testimony in a medical malpractice action about what he would have done differently had he been aware of certain facts was admissible as a lay opinion. The trial court, therefore, did not err by refusing to exclude the testimony as unsupported expert testimony.

5. Admissibility of sales volume data and absence of injuries in product liability cases.

   Dorman v. State Indus., Inc., 292 Va. 111, 787 S.E.2d 132 (2016). The Supreme Court held that, in a product liability action against a water heater manufacturer, proof of the sales volume of the product at issue was not improper evidence showing an absence of other injuries, but was admissible as relevant to the merchantability of the product as shown by its acceptance in the marketplace.

6. Inconsistent awards and admissibility of evidence of emotional injuries.

   Gilliam v. Immel, 293 Va. 18, 795 S.E.2d 458 (2017). The Supreme Court held that the trial court did not err by refusing to set aside as inconsistent a personal injury verdict in favor of plaintiff that awarded her $0 in damages, as the evidence of plaintiff's alleged injuries was in conflict, thereby entitling the jury to award no damages. Neither did the trial court err by refusing to admit evidence of allegedly racist remarks made by defendant after the accident. Such alleged remarks were not relevant to plaintiff's claimed mental anguish damages because they were made *after* the accident and, therefore, could not have constituted emotional damages arising from any physical injury sustained in the accident. The plaintiff asserted only a negligence claim, and in the absence of a claim for intentional or negligent infliction of emotional distress, mental anguish and other emotional injuries can be recovered only where they are the reasonable and proximate consequence of a plaintiff's bodily injuries.

7. Legislative Privilege.

   Edwards v. Vesilind, 292 Va. 510, 790 S.E.2d 469 (2016). The Supreme Court clarified that legislative privilege under the Speech or Debate Clause of the Constitution of Virginia: (1) extends to all communications integral to legitimate legislative activities of members of the General Assembly regardless of where and to whom they are made; and (2) can be invoked by employees of the Division of Legislative Services, or by a General Assembly member's aides or consultants who are acting as an "alter ego" to the legislator in connection with his or her legislative activities.

VIII. APPELLATE PRACTICE.

A. Statutes.

1. Petition for appeal to Supreme Court; time frame for filing of petition.

   2017 Va. Acts 651 (S. 946) (approved Mar. 20, 2017). Expresses the time frame within which petitions for appeal from a final judgment of a trial court or the State Corporation Commission to the Supreme Court shall be filed, currently expressed in months, in an equivalent number of days. This bill is a recommendation of the Judicial Council of Virginia.

2. Petition for appeal to Supreme Court; time period within which petition must be presented.

   2017 Va. Acts 652 (S. 947) (approved Mar. 30, 2017). Authorizes the Supreme Court of Virginia to grant a 30-day extension of the deadline for presentation of the petition for appeal in all cases for good cause shown. Under current law, the Court may grant an extension in criminal cases only. The bill also expresses time periods, currently expressed as months, in an equivalent number of days to reduce ambiguity. This bill is a recommendation of the Judicial Council of Virginia.

B. Rules of the Supreme Court of Virginia.

1. Va. Sup. Ct. R. 5:5—Filing Deadlines, amendment effective April 17, 2017.

   These amendments conform to changes in Rule 5:21 that alter the subsections where deadlines for filing notices of appeal and petitions for appeal are found.

2. Va. Sup. Ct. R. 5:6—Forms of Briefs and Other Papers, amendment effective December 15, 2016.

   Virginia Rule 5:6 imposes the many rules governing the content and format of the brief. Under the old rule, only three fonts were allowed for briefs: Courier, Arial, and Verdana. The amendment expands the list of acceptable fonts to include:

   Arial
   Cambria
   Century
   Century School Book
   Constantia
   Courier New
   Franklin Gothic Book
   Georgia
   Palatino Linotype
   Tahoma
   Times New Roman

Verdana

[Still prohibited are Comic Sans MS, *Freestyle Script*, and ***Harlow Gold Italic***.]

3. Va. Sup. Ct. R. 5:13—Record on Appeal: Preparation and Transmission, amendment effective July 1, 2017.

   Virginia Rule 5:13 specifies how the tribunals are to compile and transmit the records for review by the Supreme Court. The one amendment to the rules changes the length of time that the clerk of the lower tribunal must retain the record after the notice of appeal has been filed with the lower tribunal. The old retention period was 21 days; the new period is 90 days.

4. Va. Sup. Ct. R. 5:17—Petition for Appeal, amendment effective July 1, 2017.

   Virginia Rule 5:17, among other things, specifies the time limit for the filing of a petition for appeal direct from a trial court order. The amendment changes that time limit from the somewhat ambiguous "three months" to the more precise, "90 days."

5. Va. Sup. Ct. R. 5:21—Special Rules Applicable to Certain Appeals of Right, effective July 1, 2017.

   Virginia Rule 5:21 provides the rules that apply to certain appeals of right to the Supreme Court, such as appeals from the State Corporation Commission. As with similar amendments to Rule 5:17, this amendment changes the time for filing a petition for appeal from the final order of the State Corporation Commission from "4 months" to the more precise 120 days.

6. Va. Sup. Ct. R. 5:24—Security for Appeal, amendment effective January 1, 2017.

   Virginia Rule 5:24 generally sets for the rules for posting security for appeals as required by Va. Code § 8.01-676.1. The amendment to the rule specifies that the time prescribed by Va. Code § 8.01-676.1(B) to post the security is not jurisdictional, meaning it can be extended by the Court. Similar amendments have been made to Va. Sup. Ct. R. 5A:17, which provides analogous rules for practice in the Court of Appeals.

7. Va. Sup. Ct. R. 5:30—Briefs of Amicus Curiae, amendment effective January 1, 2017.

   Virginia Rule 5:30 provides the rules governing practice by amicus curiae in the Supreme Court. The amendments to this rule generally clarify what amici must do to be able to file at all, when they are to file, and what format the brief should take. Specifically, the amendment (1) eliminates the previous rule, which allowed, in addition to the United States and the Commonwealth of Virginia, parties who had obtained written consent of the parties to file an amicus brief

without leave of court; (2) requires parties seeking leave of court to state whose side they will support, attempt to obtain consent of the parties, and identify any party that consents; and (3) clarifies that an amicus not supporting either party must file its brief when the appellant's brief is due and in accordance with the rules governing the content of the appellant's brief.

8. Various Rules. Amendments to website addresses, email addresses, and file format types, effective April 1, 2017, and May 1, 2017.

The website address for the Virginia Supreme Court has changed. It is now http://www.vacourts.gov. That change required a series of amendments to rules that included URLs and email addresses. *See, e.g.*, Va. Sup. Ct. R. 5:26 (addressing general requirements for all briefs and providing a link to guidelines). The amendments simply change the URL and email addresses. Some of these rules also referenced the PDF format as "Adobe Acrobat Portable Document Format (PDF)." The amendments remove the trade name "Adobe Acrobat." Rules affected by this amendment are 5:26, 5A:19, 5A:25, 5:20, 5:37, 5A:15A, 5:32, and 5A:34

C. Federal Rules of Appellate Procedure.

1. New certificate of compliance requirement and word limits for motions, responses, replies, petitions, and answers.

Amendments to Rules 5, 21, 27, 35, and 40 convert existing page limits to word counts for petitions for permission to appeal and answers thereto, petitions for mandamus or other extraordinary writ and answers thereto, motions and responses and replies thereto, and rehearing and en banc filings. The amendments apply a conversion rate of 260 words per page to the current page limits, to yield the following word limits:

- Rule 5 petitions for permission to appeal, answers in opposition, and cross-petitions are limited to 5,200 words (formerly 20 pages);
- Rule 21 petitions for mandamus or other extraordinary writ and answers thereto are limited to 7,800 words (formerly 30 pages);
- Rule 27 motions and responses thereto are limited to 5,200 words (formerly 20 pages);
- Rule 27 replies are limited to 2,600 words (formerly 10 pages);
- Rule 35 and 40 rehearing and en banc filings are limited to 3,900 words (formerly 15 pages).

2. Reduction in word limits for briefs.

Amendments to Rules 28.1 and 32, effective December 1, 2016, reduce the word limits for briefs by applying the assumption that one page is equivalent to 260 words, in lieu of the former assumption that there are 280 words to a page. Rule 32 reduces the length limits for briefs filed where there is no cross-appeal as follows:

- Principal briefs are limited to 13,000 words (formerly 14,000 words);
- Reply briefs are limited to 6,500 words (formerly 7,000 words);
- Amicus briefs are limited to 6,500 words (formerly 7,000 words).

Rule 28.1 reduces the length limits for briefs filed in cross-appeals as follows:

- Appellant's opening brief is limited to 13,000 words (formerly 14,000 words);
- Appellee's opening and response cross-appeal brief is limited to 15,300 words (formerly 16,500 words);
- Appellant's response and reply cross-appeal brief is limited to 13,000 words (formerly 14,000 words);
- Appellee's reply brief is limited to 6,500 words (formerly 7,000 words);
- An amicus brief in support of an opening brief is limited to 6,500 words (formerly 7,000 words);
- An amicus brief in support of an opening and response cross-appeal brief is limited to 7,650 words (formerly 8,250 words).

3. Elimination of 3-day service period for documents served electronically.

   The amendment to Rule 26(c) removes service by electronic means from the modes of service that allow 3 added days to act after being served. For deadlines running from the date of service of a document, 3 days will no longer be added if the document was served electronically. Elimination of the 3 days formerly allowed for electronic service shortens the time period for filing a response brief after electronic service of the opening brief and shortens the time period for filing a reply brief after electronic service of the response brief. Elimination of the 3 days formerly allowed for electronic service also shortens the time period for filing a response after electronic service of the motion and shortens the time period for filing a reply after electronic service of the response.

4. New provisions for filing amicus briefs in connection with requests for panel or en banc rehearing.

Amendment of Rule 29, effective December 1, 2016, establishes procedures for amicus briefs filed during consideration of whether to grant panel or en banc rehearing, extending most of the provisions applicable to amicus briefs filed at the merits stage to amicus briefs filed at the petition for rehearing stage. The United States, its officer or agency, or a state may file an amicus brief in connection with a request for panel or en banc rehearing without consent of the parties or leave of court. Leave of court is required for any other amicus brief. An amicus brief at the petition for panel or en banc rehearing stage may not exceed 2,600 words. An amicus curiae supporting a rehearing petition or supporting neither party must file its amicus brief, accompanied by a motion if required, within 7 days of filing of the rehearing petition. An amicus curiae opposing a rehearing petition must file its amicus brief, accompanied by a motion if required, no later than the date set by the court for a response to the petition.