I. Commercial Law:

a. Statutory Changes (Federal)

i. DOL Change (executive; admin; professional classifies actions) “White Collar” overtime exemption under the Federal Labor Standards Act increasing minimum salary necessary; by slightly more than double from $455/week ($23,660/year) to $913/week ($47,476/year);

ii. Highly compensated employee threshold raised from $100K to $134,004.00;

iii. Minimum salary level adjustment every 3 years based on “40th percentile salary of salaried employees (lowest income region of the country); the HCE (highest income threshold) is moved to the 90th percentile and is also updated every 3 years;

iv. Up to 10% of salary charges can be in the form of non-discretionary bonuses, incentives or commissions so long as paid at least quarterly (Effective Date: December 1, 2016);

b. State Law

i. Virginia §64.2-719 - Authority for Circuit Court to create and establish a trust upon petition of interested parties

ii. Tolling statute of limitation: a non-suit now tolls both a contractual limitation and a statutorily governed limitation; this amendment to §8.01-229 overrules the Supreme Court of Virginia’s decision in Allstate v. Ploutis (September 2015) whereby a contractual limitation (in this case an insurance contract) was not tolled by taking of a non-suit and, therefore, the case was barred; now the two coincide which should smooth out litigation expectations of the parties and make a more uniform process; now all contractual limitations coincide with statutorily governed limitation periods.

1The Presenter acknowledges special recognition to the Charlottesville, Virginia law firm of MichieHamlett, PLC and Jordan E. McKay for first publication of and the providing of the research materials contained in this outline; along with gratitude, to Stephen E. Noona, Esq., Kauffman & Canoles, Attorneys at Law, with respect to the general summary on IP Law.
iii. LLCs: may keep their records “at its principal office address” or now provide its members with access to its records by electronic means, as an electronic record on a network or system;

iv. LLCs: §13.1-1015 an LLC may designate an “officer” of the LLC as its Registered Agent, including, a designated employee; no longer limited to just the member or the manager of the LLC (must still be available during regular business hours at the registered office to accept service of process, etc.);

v. New LLC law changes of VLLCA to allow for reorganizations of LLCs in bankruptcy; new entity conversion provisions and amends other rules to bring in conformity with similar provisions applicable to other business (corporation and partnership) entities.

vi. Small Business Investment Grant Fund (SBIGF) administration move from Department of Small Business and Supplier Diversity to the Virginia Small Business Financing authority. Grants are limited to $250K per eligible investor; the qualified investment period has been extended from January 1, 2015 to January 1, 2019.

vii. Virginia Public Procurement Act (small purchases, transportation related) §2.2-4303 is amended to provide that a public body may establish purchase procedure not requiring sealed bid for transportation related construction projects if the aggregate sum is not expected to exceed $25K.

viii. Landlord/Tenant: §55-225.12/55-428.27 GDC may terminate a lease on request of tenant or to order the dwelling unit surrendered to the landlord if the landlord prevails on the request for possession in an unlawful detainer action.

ix. Virginia Consumer Protection Act: it is a prohibited practice under the Virginia CPA of a supplier to fail to provide to a consumer written documentation required by the Federal Consumer Credit regulations. Virginia is, essentially, incorporating a requirement that whatever disclosures are required at the federal level must be given at the state level even if the transaction is not otherwise within the jurisdiction of the federal agency; or if the federal government does not act, there would be an independent violation of VACPA.
II. Contracts


i. The parties were involved in a governmental contract involving Afghanistan and the Bagram Air Force base; the matter went to mediation and the parties memorialized for the record the following language “We have convened today for the purposes of mediation. The parties have worked very hard and reached an agreement today to resolve some matters and to continue to work to resolve other matters. We wanted to memorialize this agreement on the record today, understanding that the lawyers will be putting together a more formal agreement later on. But the purpose of putting this on record is to have an enforceable agreement coming out today”

That was not enough! It is still just an agreement to agree. At the end of the day, it still was only an agreement to further negotiate. The Court will not be governed by labels but by the underlying facts and circumstances. What made this case worse is that the parties also agreed that they would “be free to resume litigation” if they could not “resolve the outstanding issues outside of the judicial process”; and, finally, they stated “neither party waived or released any claims or remedies they may otherwise have against the other”. Clearly, these are indications that full resolution of the matter has not occurred and, therefore, no full and binding agreement has been made that can be enforced, notwithstanding the language put into the record with the mediator/arbitrator.

b. Non-Compete Clauses - *Fame v. Allergy & Immunology, PLC* (City of Roanoke Circuit Court; December 2015):

i. We are always looking for the acceptable legal parameters of an enforceable non-compete arrangement with our former employees and fellow officers, directors and business associates; generally we know that they must be limited in duration, scope and geography; they must serve a legitimate business purpose and they must not be overly onerous or harsh and oppressive and thus become unenforceable;

ii. In the Fame case involving a Virginia based physician, Dr. Fame; the physician joined a board certified allergist and immunology group and signed the customary “non-member employment agreement” in which there was provided a 2-year
non-competition provision to avoid competition for a maximum of 2 years in a specified geographic range. This included a substantial part of the western part of the state, including, Blacksburg, Lexington, Christiansburg, Alleghany County, Rockbridge County, etc.;

The court found the provision(s) to be “ambiguous” because the court could not determine whether Dr. Fame was prohibited from treating the patients in this particular (Virginia) area no matter where his practice was (later) located; or whether he was only prohibited from treating the patients if his practice was located in those areas; therefore, the document was doomed by “ambiguity of intention” of the provision. Theoretically, Dr. Fame would need to check, even if his practice was on the west coast, whether or not he had a patient from any of these restricted areas located in Virginia;

However, even if the provision was unambiguous, it was deemed “unduly restrictive” in that Dr. Fame was forced to choose between a new career or a substantial relocation, either of which would severely curtail the physician’s legitimate efforts to earn a living.


i. Supreme Court of Virginia interpreted the Third Party Beneficiary statute §55-22 to include the alternative beneficiary in the Will of Alice Dumville; her mother had predeceased her and, therefore, her estate went to charity, however, due to an error in drafting only the personal property went to the charity ($72K) with the value of the real estate ($675K) going to the intestacy heirs as a result of the error in drafting (VA Code §64.2-200);

Previously it was generally thought, in the context of a Will or Trust in the Estate of Virginia, that there was “no standing” to file suit against the attorney by third parties because of a lack of privity, meaning, basically, a lack of a direct relationship. While cases might allow a named individual to seek relief associated with the dispositional process itself or to correct an error, i.e., when the evidence is clear, certain and unequivocal appropriate equitable actions could be taken, it was never anticipated that a party connected to the original contract for services would be able to establish “third-party beneficiary” status in the context of the “attorney-client relationship”. Matters now, however, are clearly different;
In this case, the court could not find any room in the language, i.e., any ambiguity, that would allow the court to act in such a manner as to modify the disposition so as to cure the failure to follow the testator’s desired intent; moreover, in this case there were competing recipient interests in opposition to those of the charity, i.e., the intestate (family related) beneficiaries. In this context, the court found itself unable to use its equitable powers to favor one party over the other and let the language stand as it was written;

The Supreme Court of Virginia, in reviewing the third-party beneficiary statute (Va Code §55-22) found that it only applies to “written contracts”. However the court found that the statute itself did not affect the common-law based action on an oral contract made for the benefit of a third party. The court, also, noted that the statute of frauds (Va Code §11-2) generally, applicable to real estate transactions, did not prohibit the ability of third party beneficiaries from suing upon oral contracts, which might have been the case had the S/F claim been made by one of the parties to the agreement during the executory stage of the agreement;

Finally, the statute of limitations issued was easily put to rest by the court. Normally there is a 3 year statute of limitations for professional malpractice. The will was drawn in 2003, therefore, the statute would have expired in 2006. Nevertheless, the court said, no, the statute does not begin to “toll”, i.e., commence, until the cause of action arises, i.e., after the death of the testator. Before the death of the testator there could be no cause of action because there is merely an expectancy not a right until death actually occurs. We know this because the testator could change his will at any time and, thereby, negate, the original disposition in favor of the party making the claim.

d. Third Party Beneficiary Case: Freeman v. Doubletree by Hilton (Norfolk Circuit Court - April, 2015)

i. The court denied a third party beneficiary claim by a guest who alleged she was injured when the hotel elevator became disabled between two floors. The elevator company, “Atlantic Blueridge” had a contract to repair and maintain the hotel’s elevators. The court stated that the hotel guest would have to “clearly and definitively” prove the contract between the hotel and Atlantic intended to confer some benefit onto the third party. The hotel guest was an incidental beneficiary of a contract as a hotel invitee and elevator rider. The absence of express language in the contract negated this third party beneficiary claim [I think the difference
between this case and Thorsen is that in Thorsen the court found the specific intent to benefit the decedent’s mother and the charity, almost as if this was the purpose in pursing the will in the first instance. Still, this is a hard distinction to make, although, we might see it if it were the freight or service elevator that we were talking about. If the general use hotel elevator contract for service and repairs is not intended to benefit the guest(s) using it, then what is its purpose anyway. More cases will certainly come down in Virginia now that we have this dichotomy in the law.

III. Employment Law

a. Virginia continues to be a stalwart jurisdiction in upholding the common law principles for “employment at will”

ii. In a 2016 case, Johnston v. William E. Wood & Associates, Inc., the Supreme Court of Virginia affirmed the circuit court’s decision (Virginia Beach) that when an employment contract does not specify a time period for duration, either party is ordinarily is at liberty to terminate it “at will” upon giving reasonable notice. The employee sued on the basis that termination without any “advanced notice” was “unreasonable”, per se. The court felt that if there should be a change to this long standing rule in Virginia it should be done by the legislature.


i. The case involved an unlawful termination claim based upon repeated sexual advances made by her married boss. The Plaintiff alleged wrongful discharge in violation of public policy. There were discussions of Virginia’s former (now declared unconstitutional) fornication statutes;

The District Court found that the plaintiff could bring a wrongful discharge based on her “refusal to aid and abet adultery”. The District Court found that Virginia’s public policy against adultery reasonably encompassed aiding and abetting adultery as well, notwithstanding the Martin case (Sup. Of VA 2005), in which the fornication statute was struck down as unconstitutional as applied to consenting adults. Therefore, Virginia’s “public policy” is violated when an employee is discharged for refusal to aid and abet adultery.
The key takeaway from this is not about the sexual demands put upon a subordinate in an employer/employee context, rather the potential for employers to face liability for other seemingly unrelated issues when terminations occur that can be tied, in some manner, to an argument that the behavior relates to some “public policy of Virginia”.

For example, if there is a public policy toward protecting our children and proper parenting and supervision, might it be argued that an employee who was terminated because of “a scheduling compliance” failure relating to a deemed more urgent need by the employee relating to the employee’s children, possibly, giving rise to a cause of action for “improper termination”; we can easily make a better case by moving toward a health issue; disability, etc., it is a slippery slope when the nexus is tied to something as ephemeral as “general public policy”.

c. Negligent Supervision

i. Virginia has a history and a host of cases going back to at least 1988 (Chesapeake & Potomac Telephone Co. v. Dowdy) whereby the courts stated “in Virginia there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here”. The case has been cited repeatedly over the years to stand for the proposition that “no cause of action exists for negligent supervision”. However, the recent case of Bush v. Serco, Inc. (Norfolk Circuit Court - September 2015) has modified this principle of law. The Bush case is particularly egregious and the harm to the employee overwhelming (loss of life); It is often said that “hard cases make bad law”, this may be one of them.

ii. In Bush the Plaintiff, a cleaning company employee, was electrocuted while cleaning an electric junction box on the USS Normandy. The Plaintiff alleged that the employer told him to be on the look out for lock out tags or redflags that indicated danger or hazardous condition. However, while cleaning the electric junction box no such lockout tag or redflags were present. According to the Plaintiff, the successor to the deceased employee, the lock out tags and redflags had been removed by the Defendant, Serco, Inc., a subcontractor, to perform electrical repairs and maintenance on the ship and were not, thereafter, replaced at the conclusion of the contracted activity.
iii. The court attempted to draw a distinction between the facts in the two cases; one in which an employee had difficulty coping or contending with circumstances of his employment and the other regarding “safe-place-to-work case” by including Bush in the later, the court allowed the Plaintiff to proceed on his negligent supervision claim. I am sure we have not heard the final word on this case, I assume once it has been tried (as this was a case on a motion to dismiss) the case will reach its way to the appellate courts and possibly the Virginia Supreme Court.

d. **Lanham Act - Belmora LLC v. Bayer Consumer Care AG (4th Circuit, 2016):**

   i. The **Lanham Act** will now prevent the filing of a false advertising, false association and trademark cancellation claim in the United States even if the Plaintiff does not own a US registered trademark or even use the claimed trademark that is subject to infringement in the United States.

   Bayer marketed “Flanax” which is a pain relieving medication (Naproxen) in Mexico. It did **not** use the Flanax name in the US. Belmora, LLC, began using the same Flanax mark in the United States 10 years ago and actually owns a US registration for the mark. Bayer succeeded at the trademark trial appeal board. The Federal District Court overruled the decision finding that Bayer lacked standing; the 4th Circuit reversed and said that the plain language did not require the Plaintiff to possess or have used a trademark in the US merely false advertising and false association was sufficient. Bayer was allowed to proceed with its damages and it was able to have cancelled Belmora’s trademark(s) notwithstanding that it had been using such mark(s) unsupported for 10 years.


   i. A former employee does not breach his fiduciary duty to his employer when he simply orders business cards for his new business and contacts a potential client prior to his resignation; and secondly plaintiff cannot bring a VUTSA claim when it fails to establish that it maintained the confidentiality of the alleged trade secret information;

   The court found that “an employee has the right to make arrangements during his employment to compete with his
employer after resigning his post" the right is not absolute, the court will take a case by case look at the "specific conduct taken prior to resignation to determine if it breaches a fiduciary duty" with the employer. Here the court found that the employee did not contact an existing clients prior to the resignation. They only contact potential future clients and had their business cards made. These two events alone were not sufficient to constitute a breach of fiduciary duty or a violation of the tortious interference statute or statutory business conspiracy claim. The dismissal of the trade secrets claim was important because without it there could be no tortious interference and could be no unlawful act for business conspiracy: This case could go in the “Employment Section” in that the court often referred to the fact that there was a lack of an “employee handbook” containing a confidentiality provision. The case would have probably at least survived summary judgement had there been a clear enunciation of company policy regarding the business systems and the confidential and proprietary nature thereof. Employment handbooks are needed for many purposes and every ongoing business should have one.

IV. Corporate Law

a. Southern Bank & Trust Co. v. Joshi (Virginia Circuit Court, 2015):

   i. In this case the court holds that Virginia Code §13.1-1041.1 allows the circuit court to enter a “charging order” against the member of a professional limited liability company (PLLC) to the same extent as a creditor who is allowed to proceed against a normal LLC.

   ii. The court noted that the creditor “has only the right to receive any distribution to which the judgement creditor would otherwise have been entitled to receive in respect to the LLC member interest”. This is the right decision I don’t know why any would have thought otherwise. The sanctity of a “professional LLC”, whether it be for doctors, architects, lawyers or anyone else, to the extent of creditor claims, is hardly different from a normal LLC. In neither case does the creditor have any opportunity to involve itself in the management or affairs of the business.

b. Virginia Indoor Clean Air Act (“VICAA”):

   i. Court case: Va Dep’t of Health v. Kepa, Inc. - Supreme Court of Virginia (2015): the VICAA applied to the owner of a café and hookah lounge, because the café’s restaurant business was not
separate from its business as a retail tobacco shop; the VICAA has a provision that accepts restaurant that are operating on premises owned by a tobacco manufacturing facility, not the case here;

ii. "She-Sha Café and Hookah Lounge" was operating in Blacksburg, Virginia since 2003. In 2009 the VICAA was adopted. The Virginia Department of Health cited the business for allowing smoking upon restaurant premises; the Virginia Court of Appeals reversed and found She-Sha exempt from the VICAA.

The Supreme Court, first of all, did not grant any type of "grandfather clause" status to the business, which it might have done due to its very limited segment in the market. The court found that She-Sha was licensed as a "food establishment" by the Department of Health and could not allow customers to smoke on site, unless She-Sha provided a separate non-smoking area, which it did not.

V. Intellectual Property Law

a. The Four Basic Categories

i. Patent - Patent law is the only public way to protect the "pure idea" rooted in the Constitution and Title 35 of the US Code. In exchange for explaining an invention, the patent gives the patentee an exclusive right to practice the invention to the exclusion of others for a period of roughly 20 years;

ii. Copyright - Copyright law provides protection for the "expression of an idea", not the idea itself; copyrights are protected under the Constitution and Title 17, "the Copyright Act of 1976"; the Copyright Act codified Title 17 and provides 3 methods for recovery of damages: Copyright owner's actual damages; any additional profits of the infringer created by the unauthorized use of the copyright; statutory damages;

iii. Trademark - Protects things that "evoke the source of the idea" or products that use the idea; protects the public to assure that the producer is the true producer rather than an imitating competitor; and reduces costs of shopping and making purchasing decisions by being able to follow the mark;

1. The Lanham Act under federal law governs trademarks; one acquires trademark rights in anything used to identify the source or the product or service
through use. Registration of the trademark is not a prerequisite; a trademark owner’s right to bring claims asserting trademark infringement does not depend on registration but instead focuses on use;

iv. Trade Secrets - One corresponding provision of state law that relates to intellectual property is of course the Virginia Uniform Trade Secrets Act (VAUTSA); Trade Secret law harbors immense power and potency for those who dare to understand and harness it. Common law based trade secret law is simple but shrouded in unjustified mystery and shunned for the far more glitzy trademark, copyright and patent law protections under federal law.

v. In Virginia the VAUTSA legislation protects “anything of economic value that you take reasonable precautions to keep secret”. Today with computers and software we have a bevy of law suits involving efforts to “monetize patents” based upon patents issued for “business methods and other activity”. The best defense is that a process is not patentable because it “covers an abstract idea rather than a patentable innovation” think of the endless battles between Samsung and Apple;

The recent cases provide a contrast between non-abstract claims directed to an improvement to computer functionality and abstract claims that are directed, for example, to generalize steps to be performed on a computer using conventional computer activity;

The Fundamental Laws of Nature are clearly abstract as will not be patentable; simple processes automated through general computers that are not improvements will not be patentable. Patents that claim improvements to computer processes automated through general computers that are not improvements will not be patentable. Patents that claim improvements to computer processes are more likely to be patentable.

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