THE WEST VIRGINIA STATE BAR 2014 ANNUAL MEETING

MAY 9-10, 2014
Charleston, WV

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The West Virginia State Bar Annual Meeting Speaker Agenda

Friday, May 9, 2014

7:30 to 8:45 a.m.
Registration

8:45 a.m.
Harry Deitzler
2013-2014 West Virginia State Bar President

Welcoming

9:00 to 9:50 a.m.
Rob Alsop
Bowles Rice

2014 Legislative Update

10:00 to 10:50 a.m.
William Hinerman
FBI

Internet Crime

11:00 to 11:50 a.m.
Shannon Smith
Kay Casto & Chaney

Keeping the Jury's Attention - How Technology Can Help

Saturday, May 10, 2014

8:30 a.m.
West Virginia State Bar Annual Business Meeting

8:30 a.m.
West Virginia State Bar YLS Annual Business Meeting

9:00 to 9:50 a.m.
Deborah Letz
Fastcase, Inc.

Fastcase Legal Reserach: Mobile Research for the Mobile Lawyer

10:00 to 11:40 a.m.
Chris Newbold
ALPS

Where's the Line? Managing the Daily Risks in Practicing the Law

OFFERING A TOTAL OF 6 HOURS OF CLE CREDIT, INCLUDING 5 HOURS OF ETHICS and/or LAW OFFICE TECHNOLOGY

William R. Hinerman

Graduated from West Virginia University with a JD and MPA in 1990. After graduation, he joined the Navy Judge Advocate General Corps where he worked doing criminal trials and handling international law issues. He has served as an adjunct professor at West Virginia University, Central Texas College, and the University of Maryland's overseas campuses. After completing active duty, he held various positions with the U.S. District Courts, including the positions of law clerk and Chief Deputy Clerk. He became the Unit Chief of the FBI's Internet Crime Complaint Center, located in Fairmont, WV, in 2010. He continues to serve in the Navy Reserves as a JAGC Officer specializing in Admiralty and International Law. He has served in 23 countries on 6 continents. He spent part of 2013 on recall to Active Duty in Afghanistan where he served as the Deputy Director of Rule of Law at the United States Embassy in Kabul.

Deborah Letz

Deborah Letz is a Legal Content Manager at Fastcase. She is a graduate of St. Mary's University School of Law in San Antonio, Texas. Before joining Fastcase as a Training and Reference Attorney, Ms. Letz was a briefing attorney at a state appellate court, served as an assistant appellate public defender, and taught legal research and writing as an adjunct professor at St. Mary's University School of Law. She is licensed in the States of Texas and Virginia.

Rob Alsop

- Graduated from the WVU College of Law
- Member, West Virginia University Board of Governors
- Chief of Staff to West Virginia Governor Earl Ray Tomblin (2010-2013)
- Chief of Staff to United States Senator Carte Goodwin (2010)
- Secretary of Revenue to West Virginia Governor Joe Manchin (2006-2007)
- General Counsel to the West Virginia Department of Revenue (2005-2006)
- Deputy General Counsel to West Virginia Governor Joe Manchin (2005)
- Law Clerk to the Honorable Robert King, United States Circuit Court of Appeals for the Fourth Circuit (2002-2003)
- Named to *The State Journal*'s 2009 Generation Next: 40 Under 40
- Currently is employed with the law firm of Bowles Rice in the firm's Charleston office

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Chris Newbold

Graduate of the University of Wisconsin-Madison
Received law degree from The University of Montana School of Law

Children's Book Author / serves as President & CEO at University Pride Publishing

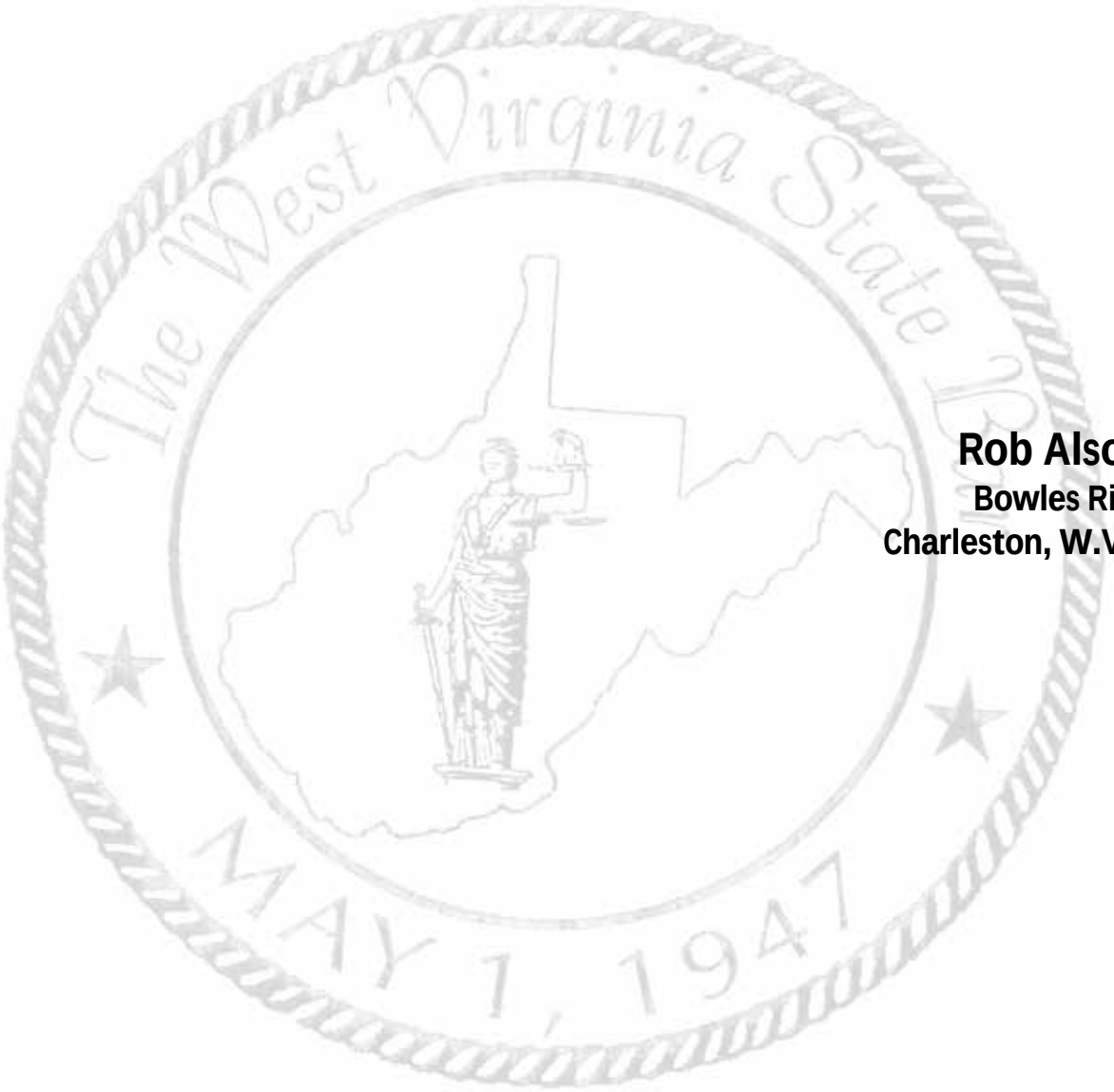
Member of Angel Investor Network at Missoula Economic Partnership
Participant at Leadership Montana

President and Principal Consultant at ALPS Foundation Services
Executive Vice President at ALPS (Attorneys Liability Protection Society) a Privately Held carrier endorsed by the WV State Bar
Serves as a senior advisor to the CEO of ALPS and is responsible for the strategic and operational advancement of a $70M company, including seven subsidiaries, whose lines of business include lawyers professional liability insurance, title insurance, investment services, trust administration, captive management services and non-profit consulting. His responsibilities include business development, subsidiary monitoring, enterprise risk management, business diversification, realization of cross-company synergies and bar association relationships nationwide.

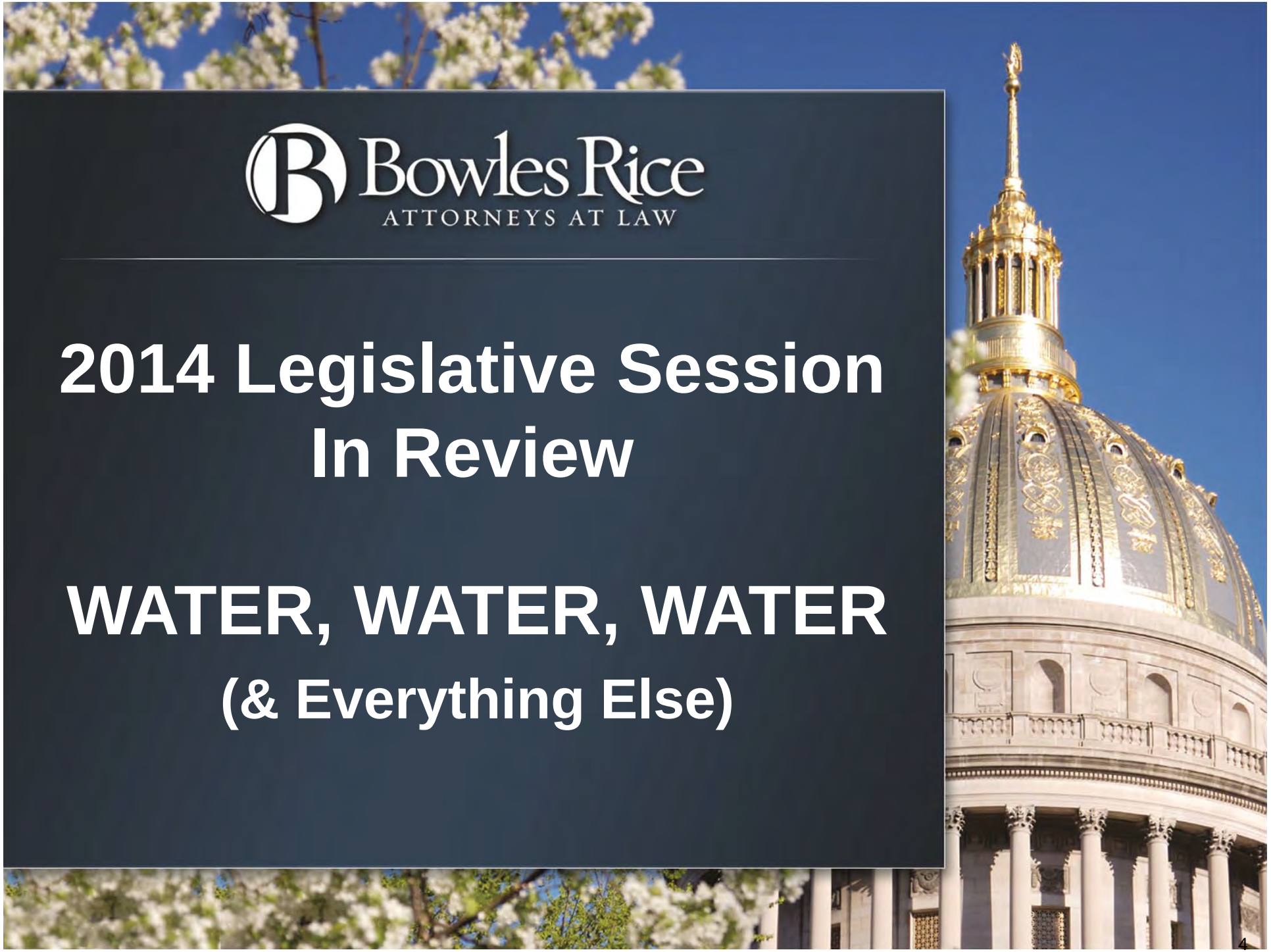
Shannon Smith

Attorney in the Morgantown office of Kay Casto & Chaney PLLC and is a member of the Litigation, Data Privacy and Cyber Security, and Energy Law practice groups. She graduated from the West Virginia University College of Law in 2006 where she was selected as a member of the *Order of the Barristers*. She is currently the District 14 Representative for the Young Lawyers Executive Committee and serves as the Vice President of the Monongalia County Bar Association. Shannon recently received the award for the WVU College of Law Women's Leadership Counsel's Outstanding Woman in the Law for Private Practice and the Westfield Insurance Golden Gavel Award for Successful Trial Results. Shannon has also earned an AV rating by Martindale-Hubbell and has been named as a West Virginia Super Lawyers Rising Star.

2014 Legislative Update



Rob Alsop
Bowles Rice
Charleston, W.Va.


Bowles Rice
ATTORNEYS AT LAW
2014 Legislative Session
In Review
WATER, WATER, WATER
(& Everything Else)

The 2014 Legislative Session

- Extremely difficult State budget
- Election year with shrinking margins between Republicans and Democrats
- Significant chemical spill the day after the Governor's State of the State that consumed much of the Session
- Significant legislation was passed, significant legislation failed, and significant legislation was vetoed.

Significant Adopted Legislation

- Senate Bill 373 – Chemical Spill Response
- Senate Bill 458 – Legal Aid Funding
- Senate Bill 356 – Procurement Reform
- House Bill 4283 – Minimum Wage
- Senate Bill 317 – Municipal Firearm Laws
- Senate Bill 461 – The Future Fund
- House Bill 4220 – Mandatory Arbitration
- House Bill 107 – Drill Cuttings & Waste
- House Bill 4360 – Zombie Debt Collection

Legislation that Failed to Pass

- Senate Bill 6 – Prescription Pseudoephedrine
- House Bill 4001 – False Claims Act
- House Bill 4463 – Campaign Finance
- House Bill 4375 – Public Retirement for Private Employees

Gubernatorial Vetoes

- House Bill 4588 – Pain-Capable Fetus Protection Act
- House Bill 4343 – Project Launchpad
- Senate Bill 477 – Teachers Planning Period
- Senate Bill 306 – Budget Bill (Line-Item)

Property Rights & Related Obligations

- Senate Bill 3 – Uniform Real Property Transfer on Death Act
- Senate Bill 383 – WV Residential Mortgage Lender Exceptions
- Senate Bill 414 – Non-Probate Appraisement Filings
- Senate Bill 572 – Perfection of Security Interest
- Senate Bill 574 – Cancellation of Mobile Home Certificates of Title
- House Bill 4012 – Uniform Law on Notarial Acts
- House Bill 4347 – Affirmative Defenses to Mechanics Liens

Insurance

- Senate Bill 621 – New Authority to Offer Flood Insurance in the State
- House Bill 4204 – Nonrenewal or Cancellation of Property Insurance Coverage

Crime & Penalties

- Senate Bill 90 – Interference with Emergency Services
- Senate Bill 397 – Exploitation of the Elderly
- Senate Bill 434 – Participation in Motor Vehicle Alcohol Test and Lock Program
- House Bill 4237 – Electronic Cigarettes

System of Justice

- Senate Bill 405 – Jury Qualification Forms
- Senate Bill 408 – Parole
- Senate Bill 470 – Jury Questionnaire Forms
- House Bill 4294 – Court Reporter Standards

General Business / Miscellaneous

- House Bill 3156 – Employee Organization Communications
- House Bill 4175 – Small Business Financial Assistance
- Senate Bill 328 – Repeal of Strategic Research and Development Tax Credit

Safety

- Senate Bill 376 – Training for Public Improvement Projects
- House Bill 3108 – Limitations on Employment in Nursing Homes
- House Bill 4284 – Pregnant Workers Fairness Act

Wrap-Up and Questions

- This presentation is not a legal opinion or binding advice. This presentation is intended as a general discussion, and is not intended to deal with any specific factual or legal issue.
- The appropriate statutes and regulations control.
- Special Session in May of 2014 to appropriate lottery funds and address minimum wage bill
- Questions?

2014 Legislative Session in Review

Water, Water, Water

(& Everything Else)

Presented at

The West Virginia State Bar Annual Meeting

Friday, May 9, 2014

by

Rob Alsop

Special Counsel, Bowles Rice LLP

I. Significant Legislation Adopted by the Legislature in 2014

A. Senate Bill 373 – Water Source Protection & Management Act.

1. Identification of Zone of Critical Concern. The Bureau for Public Health ("BPH") and the Division of Homeland Security and Emergency Management ("DHSEM") are required to compile an inventory of all potential ***sources of significant contamination*** contained within a public water system's ***zone of critical concern*** for all public water systems whose source of supply is obtained from a surface water supply source or a surface water influenced groundwater supply source. W. Va. Code § 22-31-4. Under this Act, a "zone of critical concern" is a corridor along streams within a watershed that warrants more detailed scrutiny due to its proximity to the surface water intake and the intake's susceptibility to potential contaminants within that corridor. The length of the zone of critical concern is based on a five-hour time-of-travel of water in the streams to the water intake, plus an additional one-fourth mile below the water intake. The width of the zone of critical concern is one thousand feet measured horizontally from each bank of the principal stream and five hundred feet measured horizontally from each bank of the tributaries draining into the principal stream. W. Va. Code § 16-1-2.

2. Regulations for Sources within a Zone of Critical Concern. If a source of significant contamination within the zone is not permitted, the Department of Environmental Protection ("DEP") may require the source to register and obtain a permit. W. Va. Code § 22-31-4. Additionally, each source in a zone of critical concern must be inspected annually. W. Va. Code § 22-33-18. Moreover, the DEP cannot grant a general National Pollutant Discharge Elimination System ("NPDES") permit for an above-ground storage tank in a zone of critical concern. W. Va. § Code 22-31-9.

3. Provision of List of Zones of Critical Concern to Water Utilities. The DEP is required to provide a copy of the compiled list of contaminants in each zone of critical concern to the affected public water system, the BPH, and the DHSEM. This will enable those entities to possess a compiled list of the types, quantities, characteristics and locations of all of the known potential contaminants within the zone of critical concern for each public water supply. W. Va. Code § 22-31-7.

4. Source Water Protection Plans by Public Water Systems. On or before July 1, 2016, each existing public water utility which draws and treats water from a surface water supply source or a surface water influenced groundwater supply source is required to submit to BPH an updated or completed source water protection plan for each of its public water system plants with such intakes to protect its public water supplies from contamination. The BPH is to make every effort to inform and engage the public, local governments, local emergency planners, local health departments, and affected residents at all levels of the development of the protection plan. The plans must be updated at least every three years or when there is a substantial change in the potential sources of significant contamination within the identified zone of critical concern. W. Va. Code § 16-1-9c.

The BPH is required to review plans submitted and provide a copy to the DEP. Thereafter, within one hundred eighty days of receiving a plan for approval, the BPH may approve, reject, or modify the plan as may be necessary and reasonable to satisfy the purposes of this article. The BPH is required to consult with the relevant local public health officer and conduct at least one public hearing when reviewing the plan. W. Va. Code § 16-1-9c.

5. Development of Contaminant Monitoring Systems. All public water utilities (including public service districts providing water service and municipally owned and operated utilities) that provide water to more than one hundred thousand customers are required to implement a regular monitoring system as specified to the same technical capabilities for detection as utilized by the Ohio River Valley Water Sanitation Commission ("ORSANCO"). W. Va. Code § 24-2G-1. Additionally, those public water utilities are required to provide testing for contamination of its water supply for at least three of the following contaminants, depending on the likelihood of contamination: (1) Salts or ions; (2) Metals, including heavy metals; (3) Polar organic compounds; (4) Nonpolar organic compounds; (5) Volatile compounds, oils and other hydrocarbons; (6) Pesticides; and (7) Biotoxins. Finally, if technology to adequately detect contaminants as required by this section proves to be not feasible to implement, the public water utility is required to report by January 1, 2015, such to the Joint Committee on Government and Finance as to why such technology is not feasible to obtain or use, and suggest alternatives. W. Va. Code § 24-2G-2.

6. Above Ground Storage Tank Regulation.

   A. The DEP is required to compile an inventory of all above ground storage tanks in the State. At a minimum, the inventory form is required to identify ownership of the tank, tank location, date of installation if known, type of construction, capacity and age of the tank, the type and volume of fluid stored therein, and the identity of and distance to the nearest groundwater public water supply intake and/or nearest surface water downstream public water supply intake. If the inventoried tank is regulated under any existing state or federal regulatory program, the owner of the tank is required to provide the identifying number of any license, registration or permit issued for the tank, and identify the regulatory standards and requirements the tank is required to meet. W. Va. Code § 22-30-4.

   B. To assure further protection of the water resources of the state, the DEP is required to develop a regulatory program for new and existing above ground storage tanks incorporating nationally recognized tank standards, such as those standards developed by the American Petroleum Institute ("API"), the Steel Tank Institute ("STI") or comparable authorities, and taking into account the size, location, and contents of the tanks. The DEP is required to permit the tanks. W. Va. Code § 22-30-5.

C. The DEP is to notify the BPH of above ground storage tanks in zones of critical concern, and take remedial and corrective action if necessary for non-compliant tanks. W. Va. Code § 22-30-5.

D. All above ground storage tanks must be inspected annually by a qualified registered professional engineer. W. Va. Code § 22-30-6.

E. Each owner or operator of an above ground storage tank is required to submit a spill prevention response plan for each above ground storage tank. Owners and operators of above ground storage tanks are required to file updated plans to be submitted by this section no less frequently than every three years. Each plan is to be site-specific; consistent with the requirements of this article; and developed in consultation with the BPH, county, and municipal emergency management agencies. W. Va. Code § 22-30-9.

F. The owner or operator of an above ground storage tank facility is required to provide notice to any public water system if the facility is located within the system's identified groundwater supply's source water protection area or within the system's surface water supply's zone of critical protection, to the local municipality, if any, and to the county in which the facility is located. The notice shall provide a detailed inventory of the type and quantity of fluid stored in above ground storage tanks at the facility and the material safety data sheets ("MSDS") associated with the fluid in storage. The owner or operator is required to also provide, as required by the DEP, a copy of the spill prevention response plan and any updates thereto, which have been approved by the DEP, to the applicable public water systems and county and municipal emergency management agencies. W. Va. Code § 22-30-10.

G. Each owner or operator of an above ground storage tank is required to pay an annual fee to establish a fund to assure adequate response to leaking above ground storage tanks. W. Va. Code § 22-30-13.

H. If the DEP receives evidence that an above ground storage tank may present an imminent and substantial danger to health, water resources or the environment, the DEP may bring suit in the Circuit Court of Kanawha County against any owner or operator of an above ground storage tank who has contributed, or who is contributing, to imminent and substantial danger to health, safety, water resources, or the environment to order the person to take action as may be necessary to abate the situation and protect human health, safety, water resources and the environment from contamination caused by a release of fluid from an above ground storage tank. The DEP is required to also provide immediate notice to the appropriate state and local government agencies and any affected public water system. In addition, the DEP must require notice of any danger to be promptly posted at the above ground storage tank facility containing the above ground storage tank at issue. W. Va. Code § 22-30-22.

I. The following types of above ground storage tanks do not require a permit: (1) an above ground storage tank containing drinking water, filtered surface water, demineralized water, non-contact cooling water, or water stored for fire or emergency purposes; (2) any natural gas or propane tanks regulated under NFPA 58-30A or NFPA 58-30B; (3) septic tanks and home aeration systems; (4) a pipeline facility, including gathering lines, regulated under the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979, or an intrastate pipeline facility regulated by the West Virginia Public Service Commission or otherwise regulated under any state law comparable to the provisions of either the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979; (5) equipment or machinery containing substances for operational purposes, including integral hydraulic lift tanks, lubricating oil reservoirs for pumps and motors, electrical equipment, and heating and cooling equipment; (6) a mobile tank, truck, or rail car that is located on a site for less than sixty consecutive calendar days; (7) liquid traps or associated gathering lines related to oil or gas production and gathering operations; (8) a surface impoundment, pit, pond, or lagoon; (9) above ground storage tanks for which spill prevention, control, and countermeasure plans are required by the Environmental Protection Agency ("EPA") under 40 CFR Part 112 (oil pollution prevention), unless located within a zone of critical protection. The DEP may also designate, by legislative rule, additional categories of above ground storage tanks for which an individual above ground storage tank permit may be waived. W. Va. Code § 22-30-25.

7. Formation of Public Water System Supply Study Commission ("Water Supply Commission"). A new Water Supply Commission is tasked with assessing source water protection plans; assessing effectiveness of Senate Bill 373; identifying financing and funding alternatives for alternative sources of water or increasing stability of supply; reviewing recommendations by the United States Chemical Safety and Hazard and Investigation Board; and developing measures designed to protect the integrity of public water service, including improvements to infrastructure and water supplies. W. Va. Code § 22-31-12.

8. Long-Term Medical Study. The BPH is required to endeavor to engage the Centers for Disease Control ("CDC") and other federal agencies for the purpose of creating, organizing, and implementing a medical study to assess any long-term health effects resulting from the chemical spill. The BPH must cause to be collected and preserved information from health providers who treated patients presenting with symptoms diagnosed as having been caused or exacerbated as a result of exposure related to the January 9, 2014, chemical spill. The BPH is required to analyze such data and other information deemed relevant by the BPH and provide a report of the commissioner's findings regarding potential long-term health effects of the January 9, 2014, chemical spill to the Joint Committee on Health by January 1, 2015, including the results of its

efforts to engage federal cooperation and assistance for a long-term comprehensive study on the costs of conducting such study on behalf of the State. W. Va. Code § 16-1-9e.

B. Senate Bill 458 – Legal Aid Funding Bill.

The Legislature increased the filing fees for instituting a civil action under the Rules of Civil Procedure, any statutory summary proceeding, any extraordinary remedy, the docketing of civil appeals or removals of civil cases from magistrate court, or any other action, cause, suit or proceeding from $155 to $200. All of the increase goes to a new fund, the Fund for Civil Legal Service for Low Income Persons. The Legislature also created a $200 filing fee for filing any pleading that includes a counterclaim, cross claim, third-party complaint or motion to intervene, with all monies to go to the Civil Legal Service Fund for Low Income Persons. W. Va. Code § 59-1-11.

C. Senate Bill 356 – Procurement Reform.

1. The Secretary of Administration and the Director of Purchasing are authorized to issue a cease and desist order to any spending unit when there is credible evidence that the spending unit has failed, whenever possible, to purchase commodities and services on a competitive basis or to use available statewide contracts. W. Va. Code § 5A-1-10.

2. The State may engage in reverse auctions for certain commodities if the reverse auction is likely to be fair, economical, and in the best interests of the State. W. Va. Code § 5A-3-10d.

3. The State is authorized to establish master contracts with pre-approved vendors and a direct ordering process. W. Va. Code § 5A-3-10e.

4. Grants are now subject to a new regulatory regime for procurement purposes. W. Va. Code § 5A-3-11.

5. All policy makers are required to undergo procurement training. W. Va. Code 5A-3-60.

D. Senate Bill 4283 – Minimum Wage, Maximum Hour, Overtime.

1. The minimum wage for all employees in the State of West Virginia becomes $8.00 on January 1, 2015, and $8.75 on January 1, 2016. W. Va. Code §21-5C-2.

2. Previously, the State's minimum wage and maximum hours standards were not applicable to an employer that was a "individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent of the persons employed by him are subject to any federal act relating to minimum wage, maximum hours and overtime compensation." This proviso was stricken, making all employers not only subject to the minimum wage laws of West Virginia, but also to the overtime and maximum hour provisions contained in Article 5C, Chapter 21 of the West Virginia

Code. This also includes placing all employers of the State under the jurisdiction of the Division of Labor as it relates to enforcement of the provisions of this article. W. Va. Code § 21-5C-1.

3. It appears as if the Legislature only intended to increase the minimum wage but not make previously exempted employers subject to West Virginia overtime and maximum hour laws. Accordingly, the Governor has indicated his intention to call an Extraordinary Session of the Legislature to alter the provisions of Senate Bill 4283 and effectuate an increase in the minimum wage without altering current law relating to overtime and maximum hour laws.

E. Senate House Bill 317 – Municipal Firearms Laws.

1. West Virginia's municipalities only have authority that is granted by the Legislature. In recent years, the Legislature has been experimenting with permitting municipalities to engage in more "Home Rule" activity – adopting local ordinances applicable only in cities. In 2012, the Legislature passed a bill that indicated that a city that wished to engage in expanded Home Rule activity had to give up significant authority relating to regulation of firearms.

2. House Bill 317 eliminates the provisions of the 2012 law that tied the authority of a municipality to regulate firearms to expanded Home Rule. In exchange, however, the State set up a new set of authorities for municipalities as it relates to their authority to regulate firearms (other than zoning authority):

   A. A municipality may prohibit a person from carrying or possessing a firearm in municipally owned or operated buildings.

   B. A municipality may prohibit a person from carrying or possessing a firearm openly or that is not lawfully concealed in a municipally owned recreation facility. However, a municipality may not prohibit a person with a valid concealed handgun permit from carrying an otherwise lawfully possessed firearm into a municipally owned recreation facility and securely storing the firearm out of view and access to others during their time at the municipally owned recreation facility.

   C. Whenever pedestrian or vehicular traffic is prohibited in an area of a municipality for the purpose of a temporary event of limited duration, not to exceed fourteen days, which is authorized by a municipality, a municipality may prohibit persons who do not have a valid concealed handgun license from possessing a firearm in the area where the event is held. W. Va. Code § 8-12-5a.

F. Senate House Bill 461 – The Future Fund.

The Legislature created a new fund – the West Virginia Future Fund. The Legislature created the Fund to conserve a portion of the State's revenue derived from the increased revenue proceeds received by the State as a result of any mineral production as well as other funding sources as the Legislature may designate in order to meet future needs. In years in which the State is financially stable, a portion of proceeds from severance taxes is dedicated to the Future Fund. Only investment income may be used, and it may only be used after the year 2020 and for economic development and diversification and infrastructure improvements. W. Va. Code § 11-13A-5b.

G. House Bill 4220 – Mandatory Arbitration in Nursing Home Contracts.

Every written agreement containing a waiver of a right to a trial by jury that is entered into between a nursing home and a person for the nursing care of a resident, must have as a separate and stand-alone document any waiver of a right to a trial by jury. At one point in time, this provision was to be applicable to ALL CONTRACTS involving a consumer. The Legislature, however, ultimately decided to limit the provisions to nursing homes. W. Va. Code §16-5C-21.

H. House Bill 107 – Drill Cuttings and Waste (First Extraordinary Session).

As the development and extraction of natural gas from the Marcellus Shale progresses, more and more attention has been paid to the disposal of drill cuttings and associated drilling waste. Under current law, the drill cuttings and associated drilling waste are disposed of in a commercial solid waste facility or pursuant to an agreement between the landowner and the producer, as approved by the DEP. House Bill 107 requires separate cells in landfills for drill cuttings and associated drilling waste and provides that the drill cuttings and associated drilling waste does not count against tonnage limits for certain permitted landfills. The landfills also are required to install radiation monitors and the DEP is required to promulgate rules for acceptable levels of radiation. W. Va. Code §§ 22-15-11; 22-15-8. This bill was passed during the First Extraordinary Session of the Legislature.

I. House Bill 4360 – Zombie Debt Collection.

House Bill 4360 added additional violations to the Consumer Credit and Protection Act. When seeking to collect a debt beyond the applicable statute of limitations, a debt collector is required to inform the consumer that the debt collector cannot sue on the debt and also inform the consumer whether the debt collector is authorized to report the debt to any credit reporting agencies. W. Va. Code § 46A-2-128.

II. Significant Legislation that Failed to Pass

A. Senate Bill 6 – Prescription Pseudoephedrine.

This bill would have made non-extraction and non-conversion resistant pseudoephedrine or phenylpropanolamine available by prescription only. The Senate passed the prescription only version. The House of Delegates passed a version that reduced the amount of pseudoephedrine

that is available for purchase by any one person during a year. The bill died in a conference committee during the last night of the Regular Session of the Legislature.

B. House Bill 4001 – False Claims Act.

The False Claims Act was mirrored after similar legislation that has passed in several states, including the Commonwealth of Virginia. At its heart, it provided that any person who presented false claims or made false representations to receive payment from the State of West Virginia is liable to the State for three times the amount of damages which the State sustains because of the act of that person, as well as costs, including attorneys' fees, of a civil action brought to recover any of those penalties or damages, and a civil penalty. The act had provisions that would have allowed private citizens to bring actions to enforce the provisions of the act, with the ability to recover 15% to 25% of the ultimate award. The provisions of the act provided for limitations on the ability to bring private suits in instances in which the State decided to prosecute an action for recovery. The bill was opposed by the business community and failed on the floor of the House of Delegates.

C. House Bill 4463 – Campaign Finance Reform.

This bill was another attempt by the Legislature concerning the disclosure of information on campaign contributions and spending. The bill would have regulated the treatment of functional equivalent of express advocacy as independent expenditures; disclosure requirements for corporations and certain other entities; disclaimer requirements for campaign disbursements; publication and distribution of statements and solicitations; and disclosures to shareholders, members, and donors of information on campaign-related disbursements. The bill was tabled on the floor of the House of Delegates.

D. House Bill 4375 – Public Retirement for Private Employees.

This legislation would have allowed employees who work for non-governmental employers that employ no more than 100 employees in West Virginia and who are not offered a currently active retirement program to participate in a retirement program run by the State Treasurer. Employers would have been required to make payroll deductions and remittances as requested by the employee in writing. The legislation would have created a Voluntary Employee Retirement Trust and charged the Treasurer to administer the Fund. This legislation passed the House of Delegates but did not pass the Senate.

III. Gubernatorial Vetoes

A. House Bill 4588 – Pain-Capable Fetus Protection Act.

This legislation provided that no person may perform or induce, or attempt to perform or induce, an abortion when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable post-fertilization age of the fetus is twenty or more weeks,

unless in the reasonable medical judgment of a reasonably prudent physician there exists a non-medically viable fetus or the patient has a condition that, on the basis of a reasonably prudent physician's reasonable medical judgment, so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function. The legislation also required reporting by those performing or inducing an abortion and provided for criminal penalties.

B. House Bill 4343 – Project Launchpad.

Project Launchpad, or the 2013 Economic Development Act, consisted of three parts:

1. West Virginia Launchpads for Economic Development: Under this act, counties and cities could have submitted applications for a particular geographic area to be selected as an economic development "Launchpad." The Governor would have then been authorized to establish up to 10 Launchpads. Each selected Launchpad would then become a favorable district for entities to receive state tax benefits including relief from business franchise, corporation net income, personal income, and sales and use taxes; local tax benefits include relief from business and occupation, business license, sales and use, and property taxes; with a claw back of benefits if a business closes prematurely or relocates.

2. Special Method for Appraising Certain Property in a Launchpad: Under this act the appraised value of property within the Launchpad would have been 5% of original cost.

3. Promoting West Virginia Employment Act: Businesses that create new jobs with good wages and benefits in the Launchpad would have been temporarily allowed to retain 75% of state employer withholding taxes attributable to the employees filling said jobs. Additionally, if a business provides employees with student loan payment assistance, it could have retained 95% of state employer withholding taxes. Employee salary and benefits must would have been required to meet pre-defined minimum requirements and there were claw back of benefits for non-compliance and real-time capability to capture metrics/benefits to the State of West Virginia.

C. Senate Bill 477 – Teachers Planning Period.

The purpose of this bill was to provide that teachers determine the use of time of a planning period.

IV. Selected Property Rights & Related Legal Obligations

A. Senate Bill 3 – Uniform Real Property Transfer on Death Act.

The bill The bill permits real property to be transferred by operation of law by means of a recorded transfer on death deed without probate. The bill also provides that prior to death the

owner of the real property retains full power to transfer or encumber the property or to revoke the transfer on death deed.

B. Senate Bill 383 – West Virginia Residential Mortgage Lender Exceptions.

This bill grants a limited exemption from the licensing requirements of the West Virginia Residential Mortgage Lender, Broker and Servicer Act and the West Virginia Safe Mortgage Licensing Act for self-financed home financing to residential real estate owners who in any calendar year period make no more than three residential mortgage loans to purchasers of residential real estate for all or part of the purchase price of the property against which the mortgage is secured. The owner must report the loan within thirty days to the Division of Financial Institutions and failure to timely report can result in the imposition of a $250 civil administrative penalty.

C. Senate Bill 414 – Non-Probate Appraisement Filing.

This bill eliminates the non-probate appraisement filing requirement with the State Tax Commissioner and requires that it be filed with the appropriate clerk of the county commission or fiduciary representative.

D. Senate Bill 572 – Perfection of Security Interest for As Extracted Minerals.

This bill corrects an omission in the Uniform Commercial Code pertaining to a mortgage filed in the county records as a financing statement, to perfect a security interest attaching to "as extracted minerals" and "timber to be cut."

E. Senate Bill 574 – Cancellation of Mobile Home Certificates of Title.

This bill provides for the handling of certified applications for cancellation of a mobile home certificate of title, when the mobile home becomes a permanent part of the real estate.

F. House Bill 4012 – Uniform Law on Notarial Acts.

This bill adopts the Revised Uniform Law on Notarial Acts.

G. House Bill 4347 – Affirmative Defenses to Mechanics Liens.

This bill provides an affirmative defense for homeowners against subcontractors when subcontractors seek relief from homeowners when the contractor has failed to pay the subcontractor. The affirmative defense is applicable when: (1) the property is an existing single-family dwelling; (2) the property is a residence constructed by the owner or under a contract entered into by the owner prior to its occupancy as the owner's primary residence; or (3) the property is a single-family, owner-occupied dwelling, including a residence constructed and sold for occupancy as a primary residence.

V. Insurance

A. Senate Bill 621 – Flood Insurance.

This bill provides new authority insurers to offer flood insurance in the State.

B. House Bill 4204 – Property Insurance Coverage.

This bill provides that no property insurance coverage policy in force for at least four years, may be denied renewal or canceled solely as a result of:

1. A single first-party property damage claim within the previous thirty-six months and that arose from wind, hail, lightning, wildfire, snow or ice, unless the insurer has evidence that the insured unreasonably failed to maintain the property and that failure to maintain the property contributed to the loss; or

2. Two first party property damage claims within the previous twelve months, both of which arose from claims solely due to an event for which a state of emergency is declared for the county in which the insured property is located, unless the insurer has evidence that the insured unreasonably failed to maintain the property and that failure to maintain the property contributed to the loss.

VI. Crime & Penalties

A. Senate Bill 90 – Interference with Emergency Services.

This bill provides that no person, with the intent to purposefully deprive another person of emergency services, may interfere with or prevent another person from making an emergency communication, which a reasonable person would consider necessary under the circumstances, to law-enforcement, fire, or emergency medical service personnel.

B. Senate Bill 397 – Exploitation of the Elderly.

This bill provides that any person who financially exploits an elderly person, protected person, or an incapacitated adult shall be guilty of larceny. The bill defines financially exploits as intentional misappropriation or misuse of funds or assets of an elderly person, protected person or incapacitated adult, but shall not apply to a transaction or disposition of funds or assets where the accused made a good faith effort to assist the elderly person, protected person or incapacitated adult with the management of his or her money or other things of value.

C. Senate Bill 434 – Participation in Motor Vehicle Alcohol Test and Lock Program.

This bill eliminates the revocation period for a DUI offender: (1) who applies to the Motor Vehicle Alcohol Test and Lock Program prior to the effective date of the revocation, (2) is

accepted into the Program, (3) successfully completes all terms of the Motor Vehicle Alcohol Test and Lock Program for a period equal to the minimum period for the use of the ignition interlock device plus any applicable minimum revocation period, and (4) waives the right to an administrative hearing.

D. House Bill 4237 – Electronic Cigarettes.

This bill prohibits the sale of alternative nicotine products to individuals under eighteen years of age and prohibits the use and possession of alternative nicotine products by an individual under eighteen years of age.

VII. System of Justice

A. Senate Bill 405 – Jury Qualification Forms.

This bill provides that upon the conclusion of a trial the juror qualification forms for persons serving on a particular trial jury may only be released with the written permission of the judge who presided over the trial or his or her successor. If the judge denies the request, the reasons for the denial must be in writing and be shared with all parties in the case and the person making the request within 30 days after filing the motion.

B. Senate Bill 408 – Parole.

This bill removes the eligibility for parole based on a record of good conduct for a period of at least three months immediately preceding the date of an inmate's release on parole. The bill also prohibits an inmate serving a sentence on a felony conviction who becomes eligible for parole consideration prior to being transferred to a correctional institution to make written application for parole.

C. Senate Bill 470 – Jury Questionnaire Forms.

This bill provides that completed grand jury questionnaire forms are confidential and may only be released from the custody of the clerk with the written permission of the circuit court.

D. House Bill 4294 – Court Reporter Standards.

This bill provides standards for court reporters and entities that provide court reporting services.

VIII. General Business / Miscellaneous

A. House Bill 3156 – Employee Organization Communications.

This bill provides that an employee organization or an agent of an employee organization may not be compelled to disclose any communication or information the employee organization or agent received or acquired in confidence from a public employee, while the employee organization or agent was acting in a representative capacity concerning a public employee

grievance or an investigation of a potential public employee grievance, regardless of whether the public employee is a member of the employee organization. This provision does not apply to written materials and an employee organization is required to report instances where it is necessary to prevent certain death or bodily harm, prevent a crime or fraud, or necessary to comply with a court order.

B. House Bill 4175 – Small Business Financial Assistance.

This bill is in response to the chemical spill and authorizes the Department of Commerce to make short-term, low-interest loans to small businesses in a state declaration of a state of emergency. The loans are available only when a Governor makes a written finding, that a substantial portion of small businesses within the relevant counties require emergency financial assistance and authorizes the Department of Commerce to issue loans. Up to $2 million in loans is authorized for any one state of emergency in the aggregate.

C. Senate Bill 328 – Repeal of Strategic Research and Development Tax Credit.

This bill repeals the Strategic Research and Development Tax Credit.

IX. Safety

A. Senate Bill 376 – Training for Public Improvement Projects.

This bill provides that a business entity providing services as a contractor or subcontractor under a contract, for the construction, reconstruction, alteration, remodeling or repairs of any public improvement, by or on behalf of a public authority, in excess of $50,000, must require that all employees assigned to the project successfully complete a ten-hour construction safety program designed by OSHA, no later than twenty-one calendar days after being employed at or assigned to the public improvement work site.

B. House Bill 3108 – Limitations on Employment in Nursing Homes.

This bill prohibits individuals convicted of certain crimes from working in a nursing home (absent approval from the Secretary of the Department of Health and Human Resources).

C. House Bill 4284 – Pregnant Workers Fairness Act.

This bill provides that employers must make reasonable accommodations to employees related to pregnancy, childbirth, or related medical conditions.

EXHIBIT -- ALL BILLS PASSED DURING 2014 REGULAR SESSION OF THE LEGISLATURE AND THE FIRST EXTRAORDINARY SESSION

***** DENOTES PASSAGE DURING FIRST EXTRAORDINARY SESSION**

Bill	Title	Effective Date
Property Rights & Related Legal Obligations		
SB 3	Creating Uniform Real Property Transfer on Death Act	90 Days from Passage - (June 5, 2014)
SB 383	Permitting certain residential real estate owners limited exemptions from licensing requirements for self-financed mortgages	July 1, 2014
SB 414	Redirecting nonprobate appraisement filings	July 1, 2014
SB 572	Relating to financing statements covering as-extracted collateral or timber to be cut	90 Days from Passage - (June 6, 2014)
SB 574	Clarifying mobile home permanently attached to real estate is not personal property under certain conditions	Passage - (March 8, 2014)
SB 585	Removing unconstitutional language regarding access to rail lines	90 Days from Passage - (June 6, 2014)
SB 601	Relating to property assessment appeals	90 Days from Passage - (June 6, 2014)
HB 2387	Relating to reasonable accommodations under the West Virginia Fair Housing Act for persons with disabilities who need assistive animals	90 Days from Passage - (June 6, 2014)
HB 4012	Relating to the Revised Uniform Law on Notarial Acts	July 1, 2014
HB 4347	Relating to affirmative defenses against mechanics' liens	90 Days from Passage - (June 6, 2014)
HB 4488	Eliminating the requirement for notarization of the articles of incorporation for cooperative associations	90 Days from Passage - (June 3, 2014)
Insurance		
SB 88	Relating to claims for total loss and debris removal proceeds under farmers' mutual fire insurance companies	90 Days from Passage - (June 6, 2014)
SB 427	Relating to motor vehicle insurance	90 Days from Passage - (June 6, 2014)
SB 431	Relating to issuance and renewal of certain driver's licenses and federal ID cards	90 Days from Passage - (June 5, 2014)
SB 621	Authorizing insurers offer flood insurance	90 Days from Passage - (June 5, 2014)
HB 4204	Relating to the nonrenewal or cancellation of property insurance coverage policies in force for at least four	90 Days from Passage - (June 6, 2014)

	years	
HB 4359	Relating to licensure of managing general agents of insurers	90 Days from Passage - (May 25, 2014)
HB 4432	Adopting Principle Based Reserving as the method by which life insurance company reserves are calculated	90 Days from Passage - (June 6, 2014)
Crime & Penalties		
SB 90	Creating criminal offense for interfering or preventing call for assistance of emergency service personnel	90 Days from Passage - (June 3, 2014)
SB 204	Relating to crime victims compensation awards	Passage - (March 8, 2014)
SB 353	Relating to timber theft from state forests	90 Days from Passage - (June 6, 2014)
SB 357	Relating to Logging Sediment Control Act civil and criminal penalties	90 Days from Passage - (June 5, 2014)
SB 397	Expanding scope of activities considered financial exploitation of elderly	90 Days from Passage - (June 6, 2014)
SB 403	Regulating importation and possession of certain injurious aquatic species	90 Days from Passage - (June 5, 2014)
SB 434	Eliminating revocation period for certain DUI offenders	90 Days from Passage - (June 6, 2014)
HB 4005	Relating to criminal offenses for child abuse and child neglect	90 Days from Passage - (June 6, 2014)
HB 4006	Relating to the possession and distribution of child pornography	90 Days from Passage - (June 6, 2014)
HB 4139	Restricting parental rights of child custody and visitation when the child was conceived as a result of a sexual assault or sexual abuse	90 Days from Passage - (June 6, 2014)
HB 4208	Banning synthetic hallucinogens	90 Days from Passage - (June 6, 2014)
HB 4237	Prohibiting the sale, distribution and use of electronic cigarettes, vapor products and other alternative nicotine products to persons under the age of eighteen	90 Days from Passage - (June 6, 2014)
HB 4393	Creating the Dangerous Wild Animals Act	90 Days from Passage - (June 4, 2014)
System of Justice		
SB 252	Allowing certain expelled students to return to school through Juvenile Drug Court	90 Days from Passage - (June 6, 2014)
SB 253	Clarifying code for Community-Based Pilot Demonstration Project to Improve Outcomes for At-Risk Youth	90 Days from Passage - (June 6, 2014)

SB 267	Ensuring state courts' jurisdiction of fraudulent or unauthorized purchasing card use	90 Days from Passage - (June 6, 2014)
SB 307	Relating to pretrial management of persons charged with committing crimes	90 Days from Passage - (June 12, 2014)
SB 387	Clarifying duly authorized officers have legal custody of their prisoners while in WV	90 Days from Passage - (June 4, 2014)
SB 405	Requiring presiding judge's permission to release juror qualification forms after trial's conclusion	Passage - (March 5, 2014)
SB 408	Relating to parole	Passage - (March 5, 2014)
SB 457	Requiring programs for temporarily detained inmates in regional jails	90 Days from Passage - (June 4, 2014)
SB 458	Dedicating certain circuit court fees to fund low-income persons' civil legal services	July 1, 2014
SB 470	Providing completed grand jury questionnaires are confidential	90 Days from Passage - (June 2, 2014)
SB 586	Removing unconstitutional language regarding jurors and verdicts in certain civil litigation	90 Days from Passage - (June 6, 2014)
HB 2757	Private cause of action for the humane destruction of a dog	90 Days from Passage - (June 6, 2014)
HB 4210	Juvenile sentencing reform	90 Days from Passage - (June 6, 2014)
HB 4294	Establishing standards for court reporters and entities that provide court reporting services	90 Days from Passage - (June 6, 2014)
HB 4402	Providing a procedure for the conditional discharge for first offense underage purchase, consumption, sale, service or possession of alcoholic liquor	90 Days from Passage - (June 3, 2014)
HB 4437	Relating to the Division of Juvenile Services	90 Days from Passage - (June 2, 2014)
HB 4504	Providing for sharing juvenile records in certain circumstances with another state	90 Days from Passage - (May 29, 2014)
HB 108 ***	Establishing a regulatory system for sexual assault forensic examinations	90 Days from Passage - (June 12, 2014)
General Business		
SB 202	Creating Benefit Corporation Act	July 1, 2014
SB 356	Relating to purchasing reform	90 Days from Passage - (June 6, 2014)
SB 535	Clarifying definition of "ginseng"	90 Days from Passage - (June 6, 2014)
HB 2803	Requiring electric utilities to implement integrated	90 Days from Passage -

	resource plans	(June 5, 2014)
HB 3011	Removing the provision that requires an applicant to meet federal requirements concerning the production, distribution and sale of industrial hemp prior to being licensed	90 Days from Passage - (June 6, 2014)
HB 3156	Granting a labor organization a privilege from being compelled to disclose any communication or information the labor organization or agent received or acquired in confidence from an employee	90 Days from Passage - (June 6, 2014)
HB 4175	West Virginia Small Business Emergency Act	Passage - (March 6, 2014)
HB 4184	Relating to the West Virginia Tourism Development Act	90 Days from Passage - (June 6, 2014)
HB 4220	Relating to waiver of jury trial in claims arising from consumer transactions	90 Days from Passage - (June 6, 2014)
HB 4283	Raising the minimum wage	90 Days from Passage - (June 6, 2014)
HB 4290	Revising the regulatory structure of money transmitters and other entities	July 1, 2014
HB 4360	Relating to consumer credit protection	90 Days from Passage - (June 6, 2014)
HB 4372	Permitting the Commissioner of Financial Institutions to require the filing of certain reports, data or information directly with the Division of Financial Institutions	90 Days from Passage - (May 25, 2014)
HB 4529	Relating to the sale of wine	90 Days from Passage - (June 5, 2014)
HB 4549	Clarifying the regulation of nonintoxicating beer brewers and distributors, agreements, networks, products, brands and extensions of a line of brands	90 Days from Passage - (June 6, 2014)
Taxation		
SB 327	Updating terms in Corporation Net Income Tax Act	Passage - (March 4, 2014)
SB 328	Terminating Strategic Research and Development Tax Credit	Passage - (March 5, 2014)
SB 331	Requiring certain accelerated payment of consumers sales and service and use tax and employee withholding taxes	Passage
SB 375	Excluding certain real and personal property from TIF assessment	90 Days from Passage - (June 6, 2014)
SB 402	Permitting recovery of service charge and fees charged to Tax Commissioner by financial institutions	90 Days from Passage - (May 21, 2014)

SB 416	Relating to tentative appraisals of industrial and natural resources property	90 Days from Passage - (June 2, 2014)
SB 439	Permitting Ohio County Commission levy special district excise tax for Fort Henry	Passage - (March 8, 2014)
SB 456	Extending expiration date for health care provider tax on eligible acute care hospitals	Passage - (March 6, 2014)
HB 4154	Fixing a technical error relating to the motor fuel excise tax	Passage - (March 5, 2014)
HB 4156	Electronic Toll Collection Act	90 Days from Passage - (June 6, 2014)
HB 4159	Updating the meaning of federal adjusted gross income and certain other terms	Passage - (March 5, 2014)
Safety		
SB 376	Requiring certain construction workers complete OSHA safety program	July 1, 2014
SB 378	Relating to special speed limitations as to waste service vehicles	90 Days from Passage - (June 3, 2014)
SB 380	Redefining "all-terrain and utility terrain vehicles"	90 Days from Passage - (June 6, 2014)
SB 603	Relating to testing for presence of methane in underground mines	90 Days from Passage - (June 4, 2014)
SB 623	Requiring notification of certain substance abuse screening of mine personnel	Passage - (March 8, 2014)
HB 2477	Permitting certain auxiliary lighting on motorcycles	90 Days from Passage - (June 6, 2014)
HB 2954	Requiring that members of the Mine Safety Technology Task Force are paid the same compensation as members of the Legislature	Passage - (March 8, 2014)
HB 3108	Relating to criminal background checks on applicants for employment by nursing homes	90 Days from Passage - (June 6, 2014)
HB 4186	Relating to the procedures for issuing a concealed weapon license	90 Days from Passage - (June 4, 2014)
HB 4242	Increasing gross weight limitations on certain roads in Brooke County	Passage - (March 7, 2014)
HB 4284	Pregnant Workers' Fairness Act	90 Days from Passage - (June 4, 2014)
HB 4304	Providing rules for motor vehicles passing bicycles on roadways	90 Days from Passage - (June 3, 2014)
HB 4346	Establishing separate standards of performance for carbon dioxide emissions	90 Days from Passage - (June 6, 2014)

HB 4392	Regulating persons who perform work on heating, ventilating and cooling systems and fire dampers	90 Days from Passage - (June 4, 2014)
HB 4431	Clarifying that persons who possess firearms, hunting dogs or other indicia of hunting do not necessarily need to have a hunting license	90 Days from Passage - (June 5, 2014)
HB 4449	Including proximity detection systems and cameras used on continuous mining machines and underground haulage equipment for tax credit purposes	90 Days from Passage - (June 4, 2014)
Domestic Relations		
SB 58	Relating to basis for voidable marriages and annulments	90 Days from Passage - (June 3, 2014)
HB 4445	Modifying the definition of "battery" and "domestic battery"	90 Days from Passage - (June 12, 2014)
HB 4349	Clarifying retirement dependent child scholarship and burial benefits under a Qualified Domestic Relations Order	90 Days from Passage - (June 6, 2014)
Health		
SB 394	Redesignating Health Sciences Scholarship Program as Health Sciences Service Program	90 Days from Passage - (June 4, 2014)
SB 395	Relating to operation and oversight of certain human services benefit programs	90 Days from Passage - (June 6, 2014)
SB 425	Relating to licensure, supervision and regulation of physician assistants	90 Days from Passage - (June 6, 2014)
SB 523	Providing for additional state veterans skilled nursing facility in Beckley	90 Days from Passage - (June 6, 2014)
SB 602	Requiring health care providers wear ID badges	90 Days from Passage - (June 4, 2014)
SB 619	Exempting certain critical access hospitals from certificate of need requirement	90 Days from Passage - (June 6, 2014)
HB 4188	Updating the authority and responsibility of the Center for Nursing	Passage - (March 5, 2014)
HB 4217	Relating to Medicaid reports to the Legislature	90 Days from Passage - (June 6, 2014)
HB 4245	Relating to anticipated retirement dates of certain health care professionals	90 Days from Passage - (June 5, 2014)
HB 4287	Administration of health maintenance tasks	Passage - (March 6, 2014)
HB 4312	Creating a certification for emergency medical technician-industrial	90 Days from Passage - (June 6, 2014)
HB 4318	Continuing education of veterans mental health	Passage - (March 8,

		2014)
HB 4332	Extending the time that certain nonprofit community groups are exempt from the moratorium on creating new nursing home beds	Passage - (March 7, 2014)
HB 4335	Relating to a child's right to nurse	90 Days from Passage - (June 6, 2014)
HB 4363	Creating an informal dispute resolution process available to behavioral health providers	90 Days from Passage - (June 5, 2014)
HB 4560	Relating to reimbursement for copies of medical records	90 Days from Passage - (June 6, 2014)
HB 4608	Defining dyslexia and dyscalculia	90 Days from Passage - (June 6, 2014)
Education		
SB 209	Allowing special needs students to participate in graduation ceremonies	Passage - (March 6, 2014)
SB 460	Permitting School of Osteopathic Medicine invest certain moneys in its foundation	90 Days from Passage - (June 2, 2014)
SB 483	Renaming administrative heads of Potomac campus of WVU and WVU Institute of Technology	Passage - (March 6, 2014)
HB 4003	Granting dual jurisdiction to counties where a student who lives in one county and attends school in another in order to enforce truancy policies	90 Days from Passage - (June 2, 2014)
HB 4228	Repealing or removing certain portions of education-related statutes that have expired	90 Days from Passage - (June 6, 2014)
HB 4302	Relating to elections for public school purposes	90 Days from Passage - (June 4, 2014)
HB 4316	Creating the student data accessibility, transparency and accountability act	90 Days from Passage - (June 6, 2014)
HB 4373	Relating to driver education programs	90 Days from Passage - (June 5, 2014)
HB 4384	Requiring teachers of students with exceptional needs to either be present at an individualized education program meeting or to read and sign a copy of the individualized education program plan	90 Days from Passage - (June 2, 2014)
HB 4457	Authorizing a legislative rule for the Council of Community and Technical College Education regarding WV EDGE program	Passage - (March 5, 2014)
HB 4496	Providing for the allocation of matching funds from future moneys deposited into the West Virginia Research Trust Fund	90 Days from Passage - (June 4, 2014)
HB 4618	Establishing transformative system of support for early	90 Days from Passage -

	literacy	(June 3, 2014)
HB 4619	Authorizing innovation school districts	90 Days from Passage - (June 6, 2014)
SB 1009 ***	Relating to computation of local share for public school support purposes	Passage - (March 14, 2014)
Environmental		
SB 373	Relating to water resources protection	90 Days from Passage - (June 6, 2014)
SB 454	Defining dam "owner"	90 Days from Passage - (June 6, 2014)
SB 485	Exempting DOH from certain permitting requirements of Natural Streams Preservation Act	90 Days from Passage - (June 6, 2014)
HB 4339	Ensuring that moneys from the Solid Waste Authority Closure Cost Assistance Fund are available to facilitate the closure of the Elkins-Randolph County Landfill and the Webster County Landfill	90 Days from Passage - (June 6, 2014)
HB 4480	Relating to investment of the Acid Mine Drainage Fund	90 Days from Passage - (June 6, 2014)
HB 107 ***	Relating to the disposal of drill cuttings and associated drilling waste generated from well sites at commercial solid waste facilities	Passage - (March 14, 2014)
Budget		
SB 306	Budget Bill	Passage - (March 14, 2014)
SB 315	Clarifying use of certain funds under Military Authority Act	Passage - (March 8, 2014)
SB 341	Making supplementary appropriation from State Excess Lottery Revenue Fund to Division of Human Services	Passage - (February 5, 2014)
SB 346	Making supplementary appropriation from Lottery Net Profits to DNR and Bureau of Senior Services	Passage - (January 29, 2014)
SB 391	Providing salary increase for teachers and school service personnel	July 1, 2014
SB 393	Amending funding levels and date Governor may borrow from Revenue Shortfall Reserve Fund	Passage - (March 8, 2014)
HB 4177	Making a supplementary appropriation to various agencies	Passage - (February 5, 2014)
HB 4178	Making a supplementary appropriation to the Department of Commerce, WorkForce West Virginia	Passage - (March 4, 2014)
HB 4182	Supplementing, amending, increasing, decreasing, and adding items of appropriations in various accounts	Passage - (February 5, 2014)

HB 4183	Supplementing, amending, decreasing, and increasing items of the existing appropriations from the State Road Fund to the Department of Transportation, Division of Highways	Passage - (March 7, 2014)
HB 4503	Declaring certain claims against the state and its agencies to be moral obligations of the state	Passage - (March 6, 2014)
HB 4621	Expiring funds to the Board of Risk and Insurance Management, Patient Injury Compensation Fund from the Board of Risk and Insurance Management Medical Liability Fund	Passage - (March 7, 2014)
SB 1002 ***	Expiring funds in State Fund, General Revenue, and making supplementary appropriation to MAPS	Passage - (March 14, 2014)
SB 1003 ***	Expiring funds in State Fund, General Revenue, and making supplementary appropriation to various accounts	Passage - (March 14, 2014)
SB 1005 ***	Authorizing salary increase for county commissioners and elected county officials	90 Days from Passage - (June 12, 2014)
State Government & Rules		
SB 140	Authorizing Department of Commerce promulgate legislative rules	Passage - (March 8, 2014)
SB 133	Authorizing DEP promulgate legislative rules	Passage - (March 8, 2014)
SB 155	Authorizing DHHR promulgate legislative rules	Passage - (March 8, 2014)
SB 165	Authorizing Department of Transportation promulgate legislative rules	Passage - (March 7, 2014)
SB 167	Authorizing Department of Revenue promulgate legislative rules	90 days from passage
SB 181	Authorizing Department of Administration promulgate legislative rules	Passage - (March 8, 2014)
SB 196	Authorizing Division of Rehabilitation Services promulgate legislative rule relating to Ron Yost Personal Assistance Services Board	Passage - (March 7, 2014)
SB 322	Providing state compensate officials, officers and employees every two weeks with certain exceptions	July 1, 2014
SB 325	Providing State Fire Marshal serve at will and pleasure of Fire Commission	90 Days from Passage - (June 6, 2014)
SB 350	Relating to Rural Rehabilitation Loan Program	Passage - (March 8, 2014)
SB 359	Reducing number of precincts for manual count in post-election canvass	Passage - (March 8, 2014)

SB 365	Relating to administration of Conservation Agency programs	Passage - (March 8, 2014)
SB 443	Relating to SPRS	Passage - (February 20, 2014)
SB 444	Relating to PERS	Passage - (February 20, 2014)
SB 452	Relating to TRS annuity calculation of member with reciprocal service credit	90 Days from Passage - (May 20, 2014)
SB 461	Creating Future Fund	90 Days from Passage - (June 6, 2014)
SB 469	Creating Veterans and Warriors to Agriculture Program	90 Days from Passage - (June 6, 2014)
SB 486	Establishing certain salary increases for State Police civilian and forensic lab employees	90 Days from Passage - (June 6, 2014)
SB 499	Making Prudent Investor Act primary standard of care for Investment Management Board	90 Days from Passage - (June 1, 2014)
SB 507	Relating to Board of Barbers and Cosmetologists	July 1, 2014
SB 547	Relating to number of municipal wards or election districts and council members	90 Days from Passage - (June 8, 2014)
SB 579	Creating Land Reuse Agency Authorization Act	90 Days from Passage - (June 6, 2014)
SB 553	Relating to certificates of nomination for elected office	90 Days from Passage - (June 6, 2014)
SB 558	Finding and declaring certain claims against state	Passage - (March 6, 2014)
HB 2606	Permitting the State Rail Authority to set the salary of the executive director	Passage - (March 8, 2014)
HB 4039	Authorizing miscellaneous boards and agencies to promulgate legislative rules	Passage - (March 8, 2014)
HB 4067	Authorizing the Department of Military Affairs and Public Safety to promulgate legislative rules	Passage - (March 5, 2014)
HB 4135	Designating the first Thursday in May the West Virginia Day of Prayer	90 Days from Passage - (June 5, 2014)
HB 4147	Relating to emergency preparedness	Passage - (March 8, 2014)
HB 4149	Allowing members of the Board of Public Works to be represented by designees and to vote by proxy	90 Days from Passage - (June 5, 2014)
HB 4151	Relating to military members and their spouses who obtain licensure through professional boards	90 Days from Passage - (June 2, 2014)

HB 4196	Requiring the Workforce Investment Council to provide information and guidance to local workforce investment boards that would enable them to better educate both women and men about higher paying jobs	90 Days from Passage - (June 5, 2014)
HB 4256	Amending the annual salary schedule for members of the state police	90 Days from Passage - (June 6, 2014)
HB 4268	Relating to the administration of veterans' assistance	90 Days from Passage - (June 6, 2014)
HB 4270	Relating to salaries of service employees of the state camp and conference center known as Cedar Lakes Conference Center	90 Days from Passage - (June 4, 2014)
HB 4278	Rewriting the procedure by which corporations may obtain authorization from the West Virginia Board of Medicine to practice medicine and surgery	90 Days from Passage - (June 6, 2014)
HB 4298	Changing the experience requirements of the composition of the members of the West Virginia Ethics Commission	90 Days from Passage - (June 6, 2014)
HB 4301	Allowing limited reciprocal use of hunting and fishing licenses with the Commonwealth of Kentucky	90 Days from Passage - (June 2, 2014)
HB 4350	Providing for the awarding of a West Virginia Veterans Medal and ribbon, and a West Virginia Service Cross and ribbon to certain qualifying West Virginia Veterans	90 Days from Passage - (May 27, 2014)
HB 4365	Relating to employer remittance and reporting of Teachers Retirement System member contributions to the retirement board	90 Days from Passage - (June 3, 2014)
HB 4410	Redefining auctioneer exceptions	90 Days from Passage - (June 6, 2014)
HB 4421	Allowing the lottery to pay prizes utilizing other payment methods in addition to checks	90 Days from Passage - (June 2, 2014)
HB 4425	Giving the Superintendent of State Police authority to hire additional staff	Vetoed
HB 4460	Relating to violating provisions of the civil service law for paid fire departments	90 Days from Passage - (June 5, 2014)
HB 4473	Relating to establishing voting precincts and changing the composition of standard receiving boards	90 Days from Passage - (June 6, 2014)
HB 4538	Relating to the Board of Dentistry	90 Days from Passage - (June 5, 2014)
HB 4552	Relating to the court of claims	90 Days from Passage - (June 6, 2014)
HB 101 ***	Relating to the transfer of certain revenues derived from lottery activities	Passage - (March 14, 2014)

HB 104 ***	Increasing the annual cap for collections into the Land Division special revenue account of the Department of Agriculture	90 Days from Passage - (June 12, 2014)
HB 106 ***	Relating to debt service on bonds secured by the State Excess Lottery Revenue Fund	Passage - (March 14, 2014)
Municipal Government		
SB 314	Appropriating hotel occupancy tax proceeds to counties with no more than one hospital	90 Days from Passage - (June 3, 2014)
SB 317	Relating to municipal firearm laws	Passage - (March 8, 2014)
SB 450	Relating to sale and consumption of alcoholic beverages in certain outdoor settings	Passage - (March 8, 2014)
SB 600	Relating to municipal ordinance compliance regarding dwellings unfit for habitation and vacant buildings and properties	90 Days from Passage - (June 4, 2014)
SB 631	Extending time for Fayetteville City Council to meet as levying body	Passage - (March 8, 2014)
HB 4259	Extending the time for the city council of the city of Sistersville, Tyler County, to meet as a levying body	Passage - (March 4, 2014)
HB 4601	Relating to fiscal management and regulation of publicly-owned utilities	90 Days from Passage - (June 6, 2014)

Internet Crime

William Hinerman
FBI
Fairmont, W.Va.

CYBER DIVISION
FEDERAL BUREAU OF INVESTIGATION

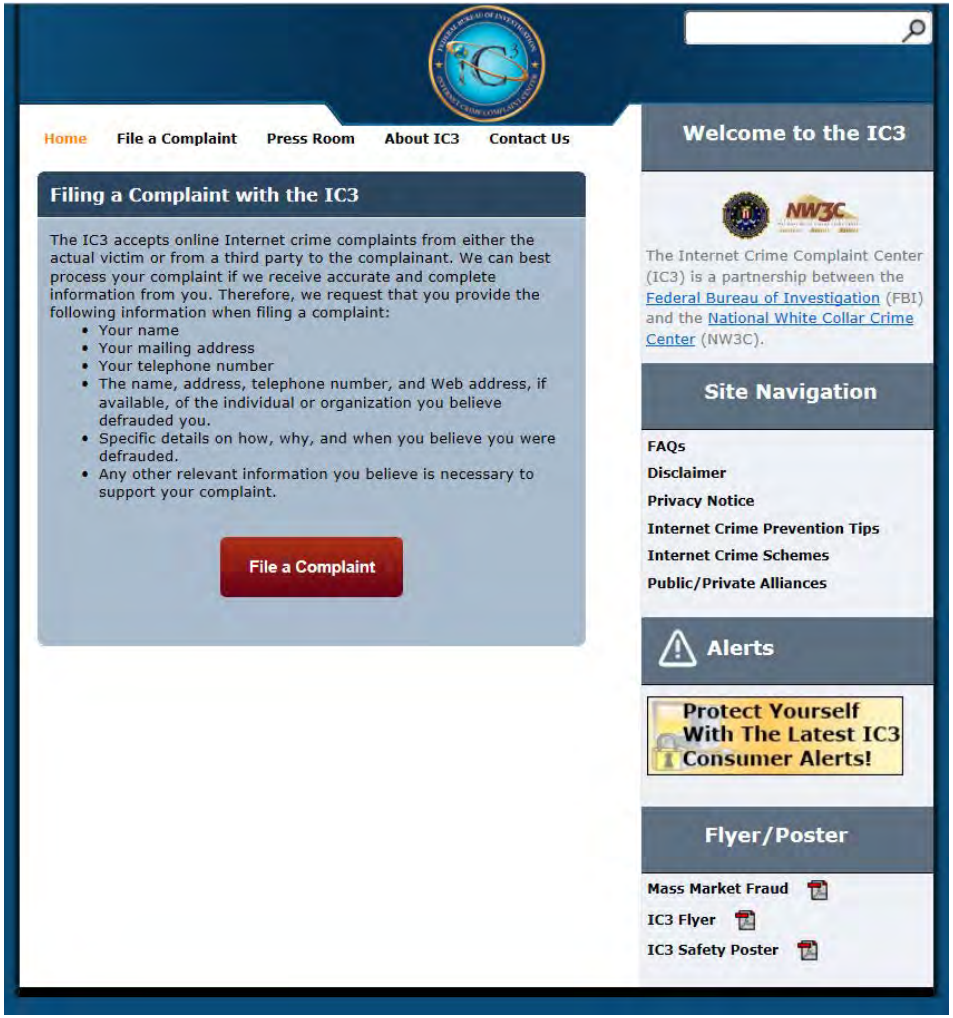
Internet Crime Complaint Center

Internet Crimes 2014

Bill Hinerman

Unit Chief

IC3 Website



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IC3 2010 COMPLAINTS

Complaints Received: 262,813

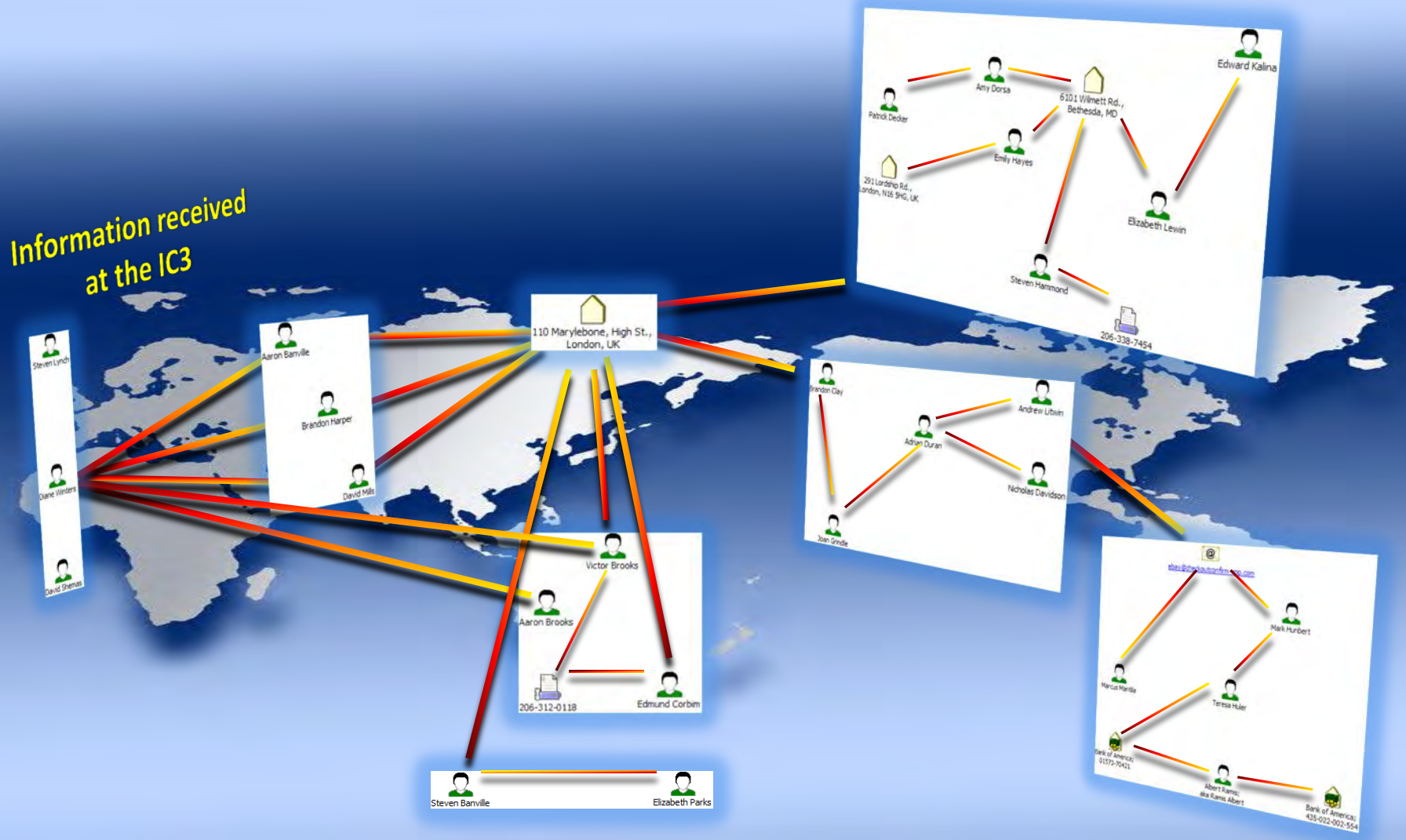
Complaints reporting loss: 119,477

Total adjusted loss: $782,159,556

Average loss for those reporting loss: $6,547

Fraud Complaints Referred: 121,710

*2010 Internet Crime Complaint Center Report



The IC3 can build cases by taking information provided by an agency and match complaints to show relationships among several Internet fraud schemes.

Rank	State	Percent	Rank	State	Percent
1	California	13.40%	27	Louisiana	1.15%
2	Florida	7.97%	28	Connecticut	1.08%
3	Texas	7.22%	29	Kentucky	1.08%
4	New York	5.70%	30	Oklahoma	0.95%
5	New Jersey	3.81%	31	Kansas	0.84%
6	Pennsylvania	3.69%	32	Arkansas	0.80%
7	Illinois	3.50%	33	Utah	0.78%
8	Virginia	3.29%	34	Iowa	0.75%
9	Ohio	3.05%	35	Alaska	0.65%
10	Washington	2.71%	36	New Mexico	0.64%
11	North Carolina	2.64%	37	Mississippi	0.61%
12	Georgia	2.60%	38	West Virginia	0.53%

West Virginia

	Male		Female			
Age Range	Cmplts	Loss	Cmplts	Loss	Total Complaints	Total Loss
Under 20	19	$18,226	21	$12,190	40	$30,417
20 - 29	84	$35,856	151	$73,850	235	$109,707
30 - 39	111	$110,840	133	$77,454	244	$188,295
40 - 49	105	$150,473	174	$725,830	279	$876,304
50 - 59	122	$502,881	157	$753,903	279	$1,256,784
60 & Over	90	$88,217	88	$118,770	178	$206,988
Total	531	$906,496	724	$1,762,001	1,255	$2,668,497
			National Rank		38	35

IC3 STATS FOR WEST VIRGINIA

VICTIM

Year	# Complaints	Average Loss	Total Loss
2010	1,254	$1,634	$2,049,036
2011	1,415	$1,272	$1,799,880
2012	1,255	$2,126	$2,668,479
2013	1,244	$1,272	$1,582,368

SUBJECT

2010	236	$1,498	$ 353,528
2011	241	$2,716	$ 654,556
2012	202	$2,923	$ 590,446
2013	262	$1,596	$ 418,152

*IC3 Database

RECENT HIGH ACTIVITY IN WEST VIRGINIA

As reported by victims from January 1, 2012 to present:

- **Auction Fraud**
- **Account Hacking**
- **Advanced Fee Fraud**

MOST COMMON TYPES OF FRAUD:

Crimes Reported to the IC3

- Urgent/Violent
- Terrorism
- Hacking/Intrusion
- Phishing/Spam
- Presidential Threats
- Fraud
- Identity Theft
- Intellectual Property
- Stalking/Harassment
- Child Exploitation

PHISHING

- An e-mail from a subject which falsely claims to be an established legitimate enterprise
- The e-mail often directs the victims to visit a spoofed website where they are asked to update personal information
- Frequently involves spam
- Vishing, Smishing

CAN-SPAM ACT

- Controlling the Assault of Non-Solicited Pornography And Marketing

- Legislation drafted with input from ISPs, e-mail marketers, DOJ, and other agencies
  - Has both civil and criminal remedies
  - Signed by President on December 16, 2003 and most provisions took effect on January 1, 2004

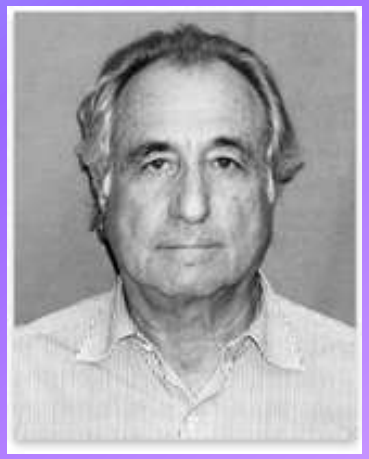
COMBATING COUNTERFEIT CASHIER CHECK FRAUD

HOW THE SCAM IS EXECUTED

Victim
Selling merchandise via online classified ad

Offer
Receive email from agent representing international buyer

Price
Agent provides cashier check in amount larger than purchase price



Shipper
Agent asks victim to remit overage to shipper located in USA

Deposit
Victim deposits Cashier Check - bank immediately releases funds as customer courtesy.

Wire Transfer
Victim has false sense that check has "cleared" - wires overage to shipper.

Counterfeit Check
Bank contacts victim. Victim is responsible for full amount of check plus fees.

FRAUDULENT CHECK SCAM TARGETING LAW FIRMS

FRAUDULENT CHECK SCAM TARGETING LAW FIRMS

- Client contacts firm
- Signs retainer agreement
- Client claims settlement is in progress

- Client sends the attorney a legitimate-looking check

THE CHECK

- The check is for more than the amount of attorney fees

- Attorney deposits the settlement check into the law firm account

- Sends to the client the amount of money over the amount of the attorney fees

- Normally, banks do not place a hold on the funds, so immediate access is possible

THE LOSS

- The Attorney deposits the fraudulent check
- Drafts a check for the difference between attorney fees and original fraudulent check
- Sends the client the difference
- Learns that the original check was fruadulent
- Loses the amount of the check plus fees

ATTORNEY SCAM

BREAKING NEWS | FEATURE REPORTS | LATEST NEWS | WORLD NEWS | AFRICAN NEWS | NEWS ARCHIVE | PHOTO NEWS

Nigerian Judge Rules O.K. to Extradite 419 Kingpin, Emmanuel Ekhator to U.S.

Published on July 27th, 2011

Emmanuel Ekhator

Federal Judge Binta Murtala Nyako on Thursday granted the prayers of the country's Economic and Financial Crimes Commission on an application for the extradition of notorious scam artiste **Emmanuel Ekhator** for extradition to the United States of America.

Justice Nyako ruled that the United States embassy in Nigeria must expeditiously issue visa to **Emmanuel Ekhator** to come to the U.S. in order to answer to charges of extortion, forgery fraud, conspiracy and illegal transfer of money.

The U.S. government had officially requested Ekhator's extradition in a letter written to Mrs. Farida Waziri, the Chairperson of EFCC sometime in 2010. The letter had requested that he be brought over in connection of scam. He was alleged to be the leader of a syndicate that specializes in defrauding American law firms as he often posed as a tax consultant who could help in solving visa and immigrations difficulties.

He often hired the law firms to assist him in sourcing clients who ultimately ended up as one of his foot soldiers. The supposed client would drop a fake check with the law firms, **Ekhator** would instruct unsuspecting lawyers to take an agreed percentage of the money and then he himself would take the lion share and disappear into thin air.

He has been on America's most wanted list for his infamy. The EFCC was able to nab him eventually and at the request of the Attorney-General and Minister of Justice, this suspect would have his day in a U.S. court.

http://www.sharpedgenews.com/news/2011/july/07-27-11/nig.shtml.

JURY DUTY SCAM

JURY DUTY SCAM

- Spam email containing a fraudulent subpoena commanding recipients to appear and testify before a Grand Jury.

- The email appears authentic by containing a court case number, federal code, name and address of a federal court, court room number, issuing officers' names, and a court seal.

- The email directs recipients to click the link provided in the e-mail to download and print associated information for their records. If the recipient clicks the link, it downloads malicious code onto their computer.

ADVANCE FEE SCHEMES

Debt Elimination

- The potential risk of identity theft is extremely high - participants provide all of their personal information in loan application.

Foreign Lottery

- Scammers will tell you that you've won and charge a fee to receive nonexistent winnings

Nigerian 419

- Scheme relies on convincing a willing victim to send money in installments of increasing amounts for a variety of reasons

419 SCAM

Hello, My name is Capt. Jeffery Simpson and I am an American marine serving in iraq of the Hqs. Multinational Corps Iraq, III Corps-Camp Victory, Baghdad. As you know, we are being attacked by insurgents everyday and car bombings.

We stumbled into Saddam Hussein's storage vault and discovered funds belonging to his family. The total amount is $10,570,000 (Ten million Five Hundred and Seventy Thousand US dollars) in cash, mostly 100 dollar bills tightly tied in $1000.00 bundles. We want to move this money to a reputable/ sincere person for safe keeping as far i will be sure it will be safe with you. This is the reason for contacting you.

I am ready to compensate you with a good percentage of the funds. The only thing required from you is just for you to help me move the funds from it current location into the sates or any safe location. If you are interested I will send you the full details.

My intension is to find a good and respectable partner with great repute that i can trust and willing assist me. Can i trust you? When you receive this letter, kindly send me an e-mail signifying your interest and i will communicate to you in full details. This is 100% risk free For Security reason do conatct me via my private box:- capt.j.s41@hotmail.com

Respectfully,
capt.Jeffery Simpson Ralia.

Ransomware Scam

- **Restricts access to the computer system**
- **Demands a “ransom” to be paid for the restriction to be removed**
- **Encrypts files on the system’s hard drive or may simply lock the system and display messages intended to coax the user into paying**
- **Typically enters the system like a conventional computer worm through, for example, a downloaded file or vulnerability in a network service**

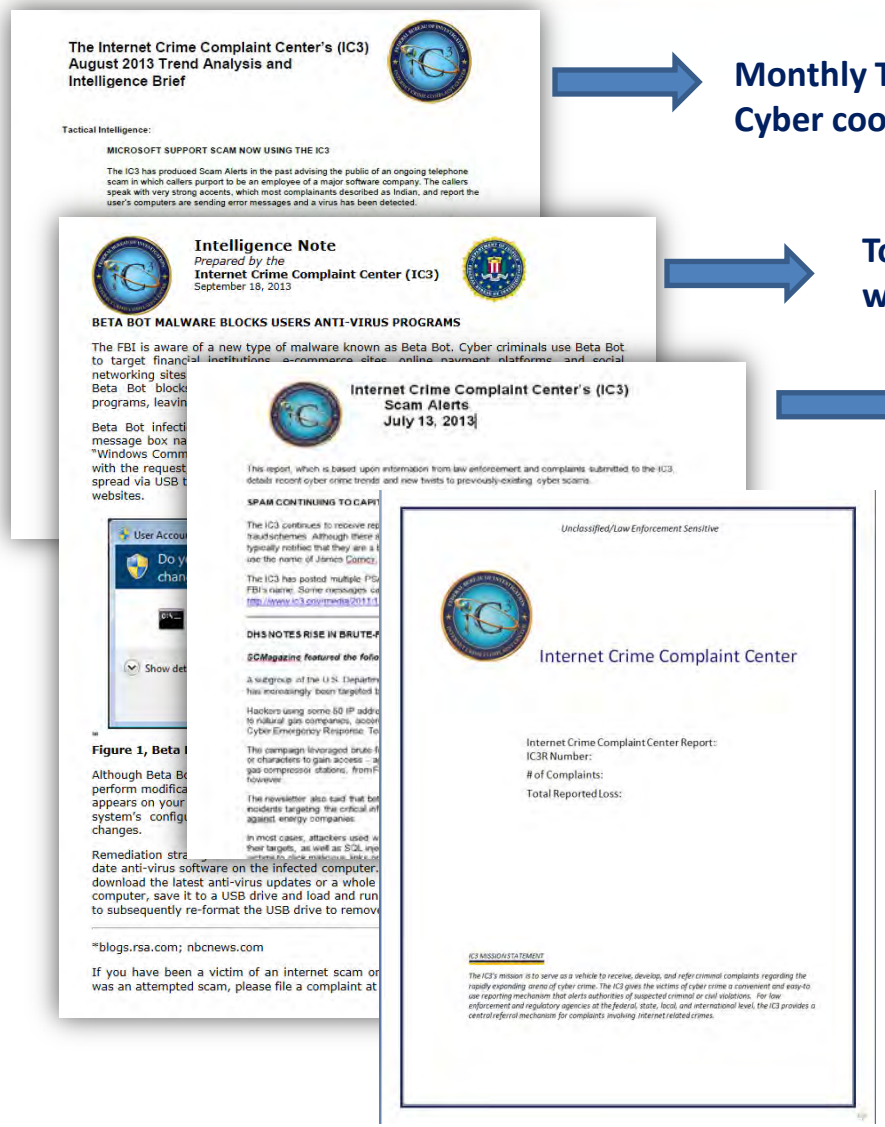
Man-in-the-Email Scam

- **Businesses receive a compromised email requesting a wire transfer to another business or bank account**

- **The email is spoofed by adding, removing, or changing characters making it difficult to identify from a legitimate request**

- **The scheme is usually not revealed until the supplier provides the goods and does not receive payment or during face-to-face conversations revealing the illegitimate wire transfer**

IC3 Dissemination of Intelligence



Monthly Trend Analysis: Disseminated to Legats, InfraGard, LEO, and Cyber coordinators in FBI Field Offices

To view PSAs, you may visit www.ic3.gov, www.fbi.gov, and/or www.lookstoogoodtobetrue.com

To view Scam Alerts, you may visit www.ic3.gov

Internet Crime Complaint Center Report (IC3R)

Questions, Comments, Concerns?

Keeping the Jury's Attention – How Technology Can Help

Shannon Smith
Kay Casto & Chaney

Keeping the Jury's Attention - How Technology Can Help

SHANNON P. SMITH
KAY CASTO & CHANEY PLLC
SSMITH@KAYCASTO.COM

KAY CASTO & CHANEY PLLC
Attorneys at Law

KAY CASTO & CHANEY PLLC
Attorneys at Law

We Are Teachers

EDUCATING THE JURY

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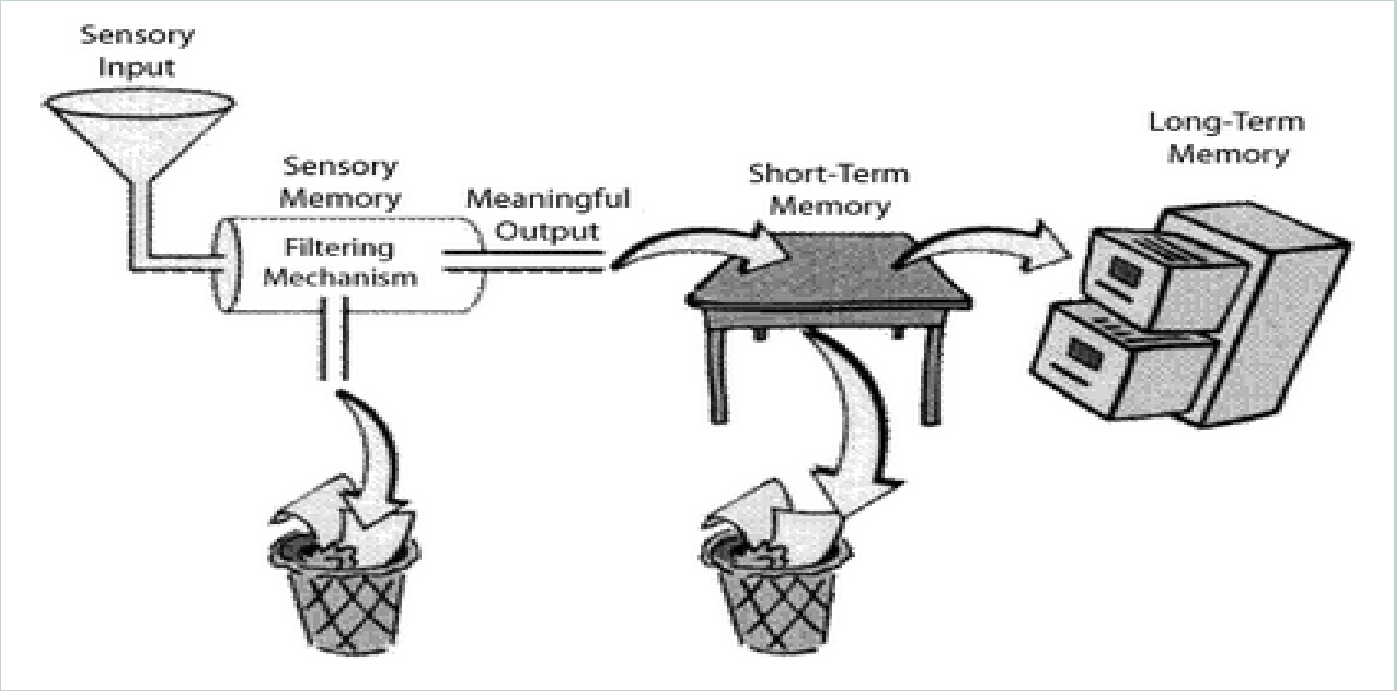
Attorneys at Law

We Are Teachers

- During trial, we are teachers.
- We are educating the jurors about our case.
- Everyone learns a bit differently.



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We Are Teachers

- Learning Styles
  - Visual (seeing gestures & picturesque language)
  - Aural (listening)
  - Read/write (reading)
  - Kinesthetic (fill in the blank learners)
  - Multi-modal (a little bit of everything) ~60% of people
- Multiple teaching techniques can help with retention and recall of information.
- Repetition works for all learning styles.

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Available Courtroom Technology

KNOW WHAT EXISTS

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Available Courtroom Technology

- http://www.wvnd.uscourts.gov/court-information

Court Information

- History
- Fee Schedule
- Hours and Holidays
- Standing Orders
- Employment Opportunities
- Naturalization Ceremonies
- Security Information
- Legal Advice
- Transcript Information and Forms
- Clarksburg Courtroom Technology
- Elkins Courtroom Technology
- Martinsburg Courtroom Technology
- Wheeling Courtroom Technology

Elkins Courtroom Technology

Elkins District Courtroom

- Evidence Presentation System - Document camera, DVD/VCR, computer and sound inputs, illustrator, and printer. Computer Video (VGA) and Audio inputs at counsel tables and Evidence Presentation cart. Video at counsel tables or from Evidence Presentation cart display on judge monitor, courtroom deputy monitor, witness monitor, monitors on counsel tables, monitors located in the jury box, projector and large projection screen and connections for a gallery monitor.
- Videoconferencing
- Telephone system tied to sound system
- 2 channel infrared transmitter - one channel for hearing impaired purposes, the other for second language (if interpreter is being used)

Elkins Magistrate Courtroom

- Videoconferencing
- Sound system

NOTE: All DVD players are capable of playing the following: DVD Video DVD-RW Music CD; MP3 audio tracks and JPEG image files of format conforming to ISO9660 Level 1/Level 2, or its extended format, Joliet.

DVD Players **cannot** play the following discs:

- Video CD's
- HD Layer of Super Audio CD's
- CD-ROMs/CD-Rs other than those recorded in the format listed above
- A DVD video with a different region code
- Data part of CD-Extras
- A disc recorded in a color system other than NTSC, such as PAL or SECAM
- DVD-ROMs
- A disc that has a non-standard shape
- DVD Audio Disks
- A disc with paper or stickers on it

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Juror Expectations

GIVE THEM WHAT THEY WANT

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Juror Expectations

- TV shows
- Movies
- Smart phones
- Social media
- Live coverage of trials
  - http://www.cnn.com/JUSTICE/
  - http://www.hlntv.com/clusters/justice

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Juror Expectations

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Stop Fighting It

GIVE IN TO THE TEMPTATION

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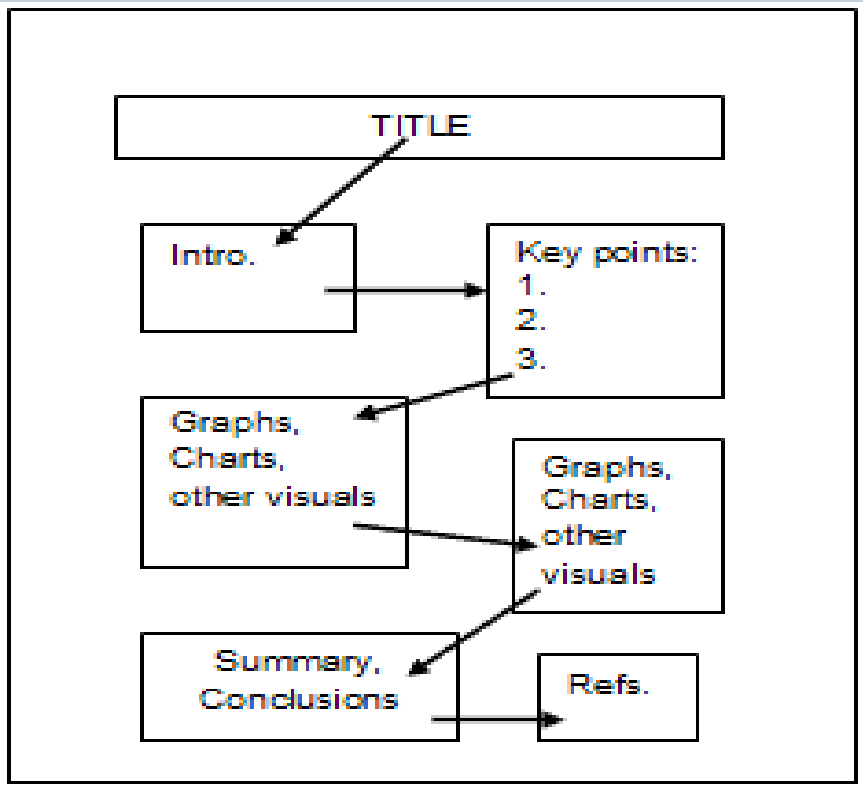
Stop Fighting It

- You don't have to give up your poster boards and laser pointers.



- Trial technology can include
  - animated or live-action accident reconstruction videos
  - electronic medical records
  - exhibit presentations
  - interactive displays
  - smart boards
  - day-in-the-life films

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Stop Fighting It

- There are ways to get around being the caveman lawyer.

- Technology does not have to be expensive.
- Use the overhead projector/ELMO.

- Use PowerPoint.
- Present photos via your laptop.

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Permitted Use

SEEK PERMISSION FROM THE COURT

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Permitted Use

U.S. Dist. Ct. N.D. W. Va. L.R. Civ. P. 85.03

- "PDAs, Blackberrys and laptop computers may be used to assist attorneys in data entry or data display in furtherance of courtroom proceedings."

U.S. Dist. Ct. S.D. W. Va. L.R. Civ. P. 16.7

- "(b) . . . counsel and unrepresented parties shall file, no later than 7 days prior to the final pretrial conference, a proposed pretrial order setting forth: (11) any courtroom technology requested for use at trial and a certification that the court's technology staff has been notified regarding such use no later than 7 days before the scheduled commencement of trial . . . ."

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PRINT FORM RESET FORM

USDC/ATTY-009 (7/13) | LR Civ P 7.1(a)(10) and LR CR P 12.1(c) Notice of Certification for Use of Courtroom Technology

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

AT SELECT ONE:

NOTICE OF CERTIFICATION FOR USE OF COURTROOM TECHNOLOGY

v.

Select: NUMBER

Comes now the Select: , by counsel, and do(es) hereby certify pursuant to

Select: that the court's technology staff was contacted by telephone or in person,

to arrange for the use of courtroom technology Select: action set for .

Anticipated Equipment Usage (select all that apply):

- ☐ VCR/DVD Player
- ☐ Document Camera
- ☐ Laptop
- ☐ Annotation System

☐ I request training/testing of anticipated equipment before the date of the use.

☐ I do not require training/testing.

http://www.wvsd.uscourts.gov/sites/default/files/forms/NoticeTechnologyCertification_1.pdf

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Opening Statements

LADIES AND GENTLEMEN OF THE JURY...

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Opening Statements

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Opening Statements

- Unless you are a talking bee, you may need something extra.
- Disclose to opposing counsel the exhibits/displays you intend to use.
- Consider obtaining an advance ruling from the Court as to the use of such exhibits/displays.
- New to using technology in the courtroom?
  - Consider using a simple bullet-point presentation – if you can say the words in the presentation without objection, then you can put those words in a simple bullet-point presentation.

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Opening Statements

- Have some experience using technology?
  - Consider a more sophisticated bullet-point presentation
    - E.g., a visual display with the full text of a document on one-half of the monitor and bullet points on the other half of the monitor.
  - Warning! Do not make the presentation argumentative.
    - Check to see whether your presentation contains
      - literal or fair characterizations of actual text

        vs.
      - argumentative or unfair characterizations of actual text

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Use With Witnesses

DEPOSITION TRANSCRIPTS & DEMONSTRATIVE AIDS

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Use With Witnesses

- Rule 32 – WV Rules of Civil Procedure
  - (a) Use of Depositions. At the trial . . ., any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
    - (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the West Virginia Rules of Evidence.
      - *Rule 613(a) – WV Rules of Evidence*: In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
    - (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, . . . may be used by an adverse party for any purpose.
    - (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

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Use With Witnesses

- Rule 32 – WV Rules of Civil Procedure
  - (c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form . . . . On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.
- Using deposition transcripts
  - Present the transcript on screen.
  - Video depositions.
  - Give the jury a better visual.
  - If reading a deposition or document, show it, too.
  - Appeal to all learning styles.

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Use With Witnesses

Let's try it.

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Common Objections

"Your Honor, I object!
This line of questioning is making my client look really bad."

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Common Objections

To Evidentiary Exhibits at Trial

- Completeness – Fed. R. Evid. 106, 611(a)
  - E.g.,
    - displays to the witness only a portion of a written document in a slide
    - uses callout boxes to extract and highlight relevant portions of the text without showing the balance of the document
- Unfairness – Fed. R. Evid. 403
  - E.g.,
    - if a document is shown in a different color or without margins
    - if a digital photograph is reduced or enlarged
    - if a digitally recorded video is edited or played at a speed other than normal
    - if still images from the video are used

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Common Objections

To Demonstrative Aids at Trial

- Unfairness
  - E.g.,
    - use of labels, colors, or various text treatments such as callout boxes, underlining, and highlighting of text from documents
    - where motion or sound is used
    - where a time line is utilized and the time intervals are chosen to make the time period appear longer or shorter than the actual time period
    - used to repetitively present a certain point
- Leading
- Argumentative
- Narrative
- No foundation
- Misstates evidence
- Assumes facts not in evidence
- Calls for lay opinion not meeting the requirements of Fed. R. Evid. 701

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Closing Arguments

"So, in closing: my opposing counsel is a very bad, bad man."

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Closing Arguments

- Reuse the best visuals. Don't just talk about it.
- May be able to present new materials to the jury (e.g., timelines).
- Seek advance approval from the Court as to demonstrative aids you intend to use.
- Edit the real-time transcript.
  - If real-time recording was used during trial, request that the real-time transcript be edited and certified before closing argument.
  - The edited, certified transcript can then be used for closing argument, with relevant portions shown to the jury on the monitors or projection screen.

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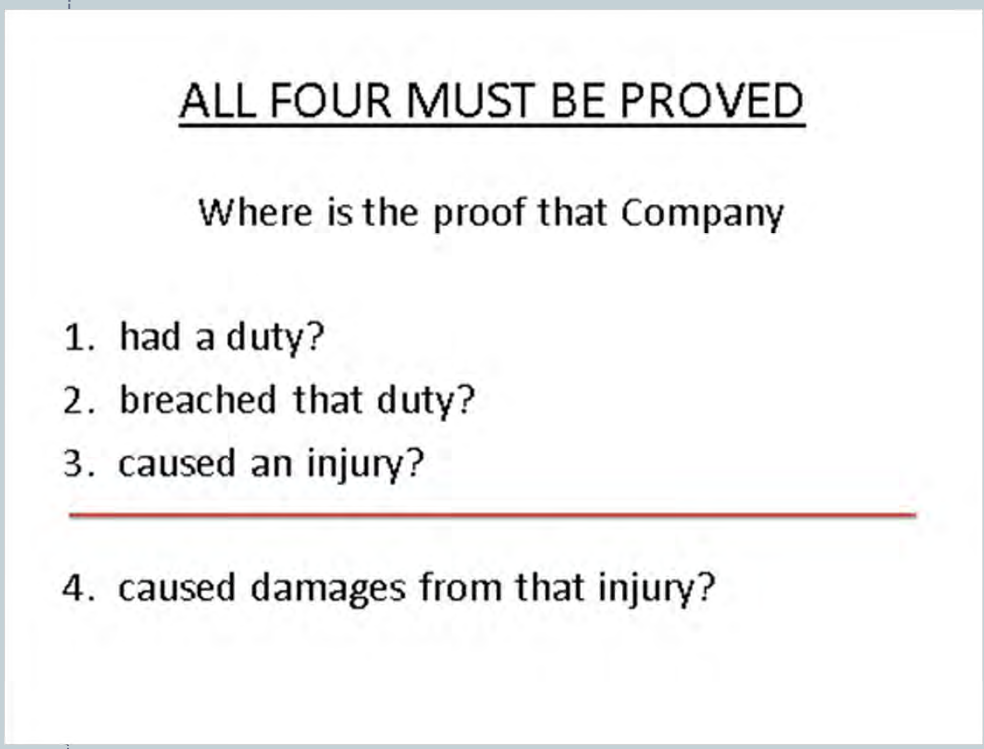
Closing Arguments

- Want simplicity? Use PowerPoint
  - Easy to use.
  - It gives you your outline.
  - Allows you to be more hands on.
  - Easy to follow.



Closing Arguments

Jury Instructions

Jurors are permitted to hear, see, and read instructions.

- W. Va. Code § 56-6-20
  - All instructions given shall be read by the court to the jury as the action and ruling of the court. . . . Every instruction or charge in writing read to the jury shall be a part of the record in the case.
- W. Va. Civ. Pro. R. 51/W. Va. Crim. Pro. R. 30
  - The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room.
- W. Va. Tr. Ct. R. 23.04 (Civil Matters)/W. Va. Tr. Ct. R. 42.04 (Criminal Matters)
  - Counsel may refer to the instructions to juries in their argument, but may not argue against the correctness of any instruction. . . . . No portion of a lawbook shall be read to the jury by counsel.

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Closing Arguments

Use technology to put those instructions in context.

- Use only the language read by the Court.
- Highlight the key phrases & law from the instructions.
- Tie the instructions back to your case.

1. Where is the proof that Company had a duty?

Maintain premises with ordinary care

Reasonable diligence

✓Scheduled maintenance procedures
✓Respond to tenant phone calls
✓Responded to weather

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Types of Technology

CHOICES FOR YOUR PRACTICE

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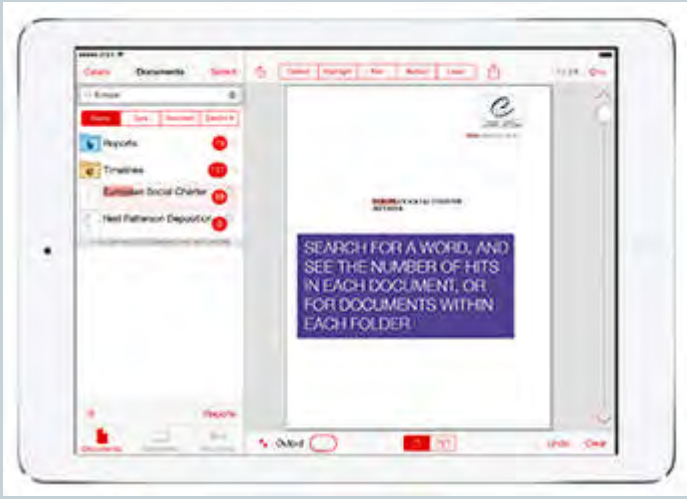
Types of Technology

TrialPad

- http://www.litsoftware.com/products/trialpad/



ExhibitView PC & ExhibitView iPad

- http://www.exhibitview.net/

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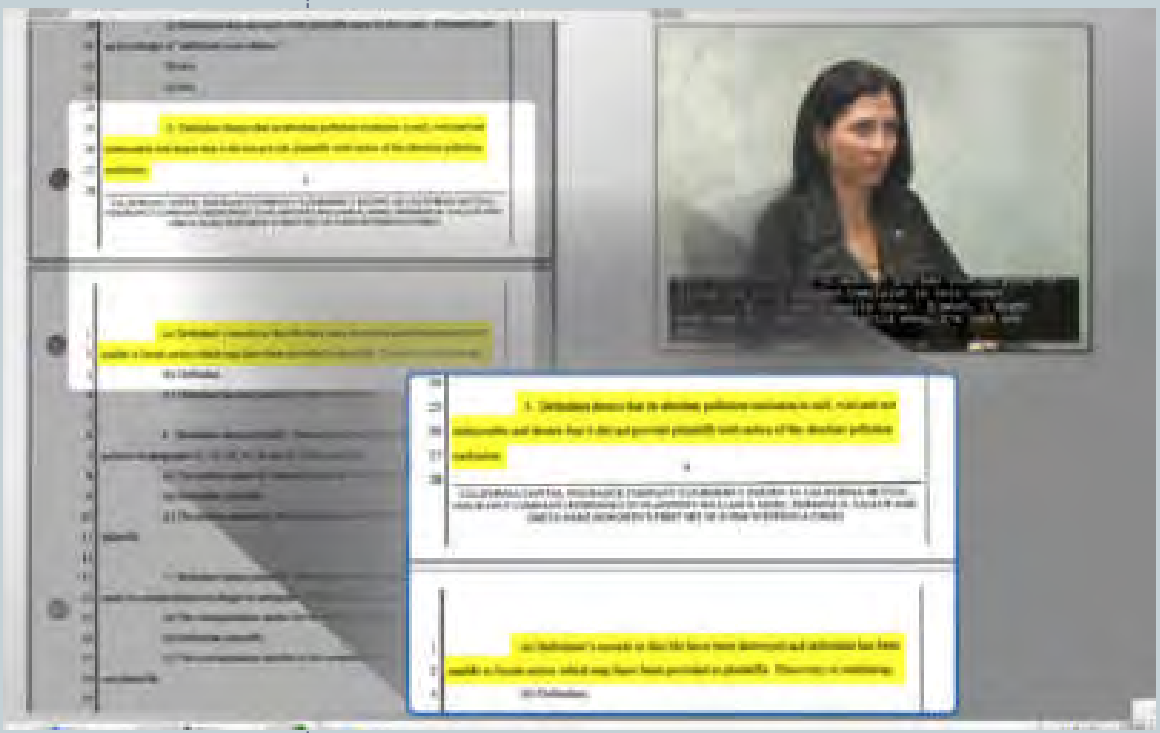
Types of Technology

TrialDirector

- http://www.indatacorp.com/TrialDirector.html



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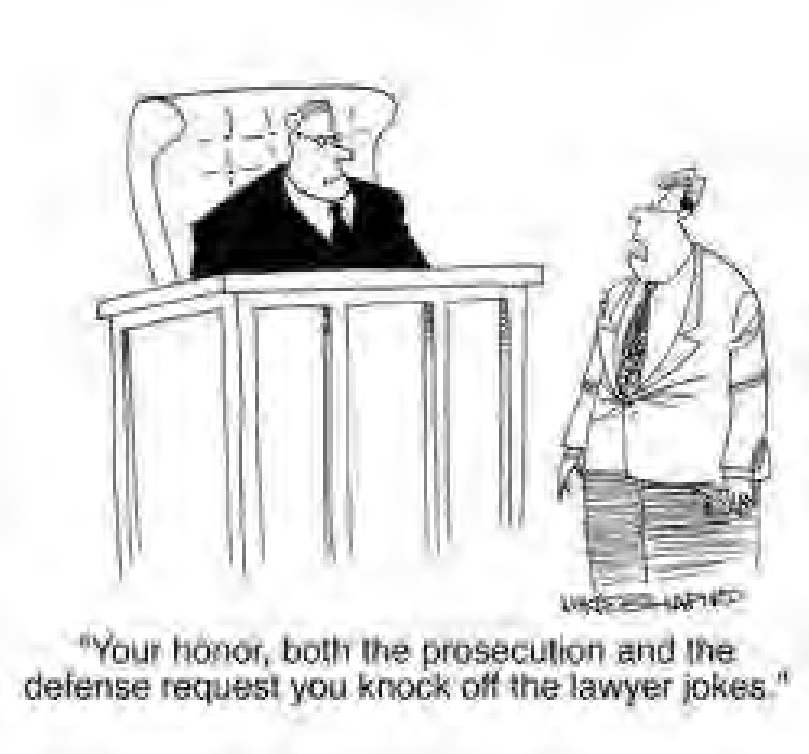
Tips From The Bench



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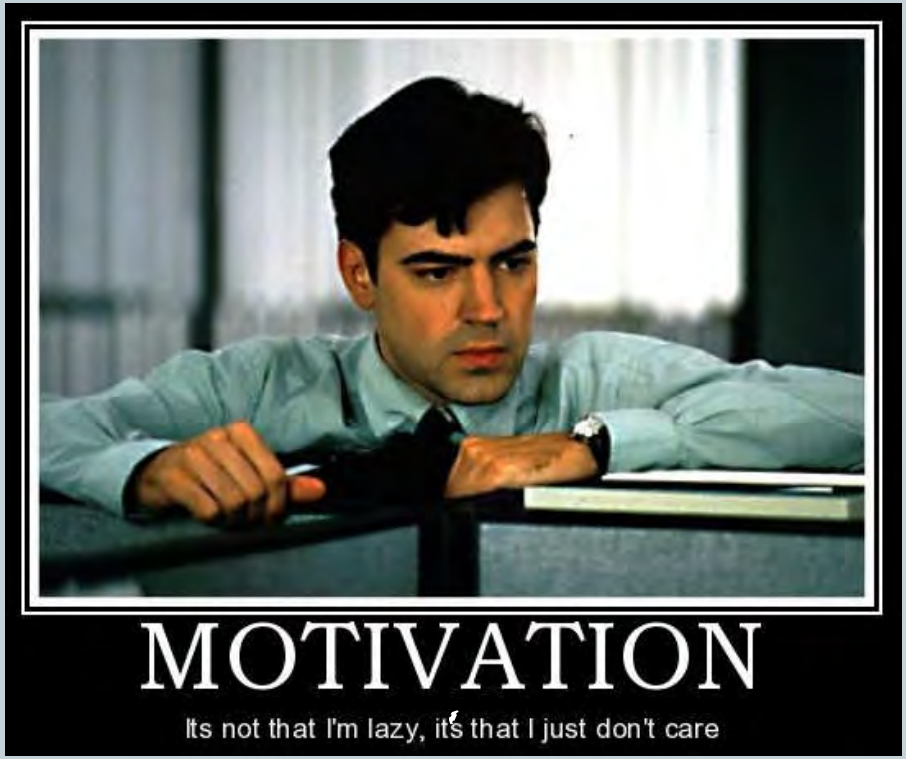
Tips From The Bench

Don't get lazy.

- Technology will not morph an unprepared trial lawyer into a successful trial lawyer .
- Technology will never replace the time, effort, and hard work (and facts) required to win.
- Be prepared, focused, organized, and articulate.



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Tips From The Bench

- Know your courtroom.
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Deborah Letz
Fastcase Inc.

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The West Virginia State Bar & Fastcase

May 10, 2014

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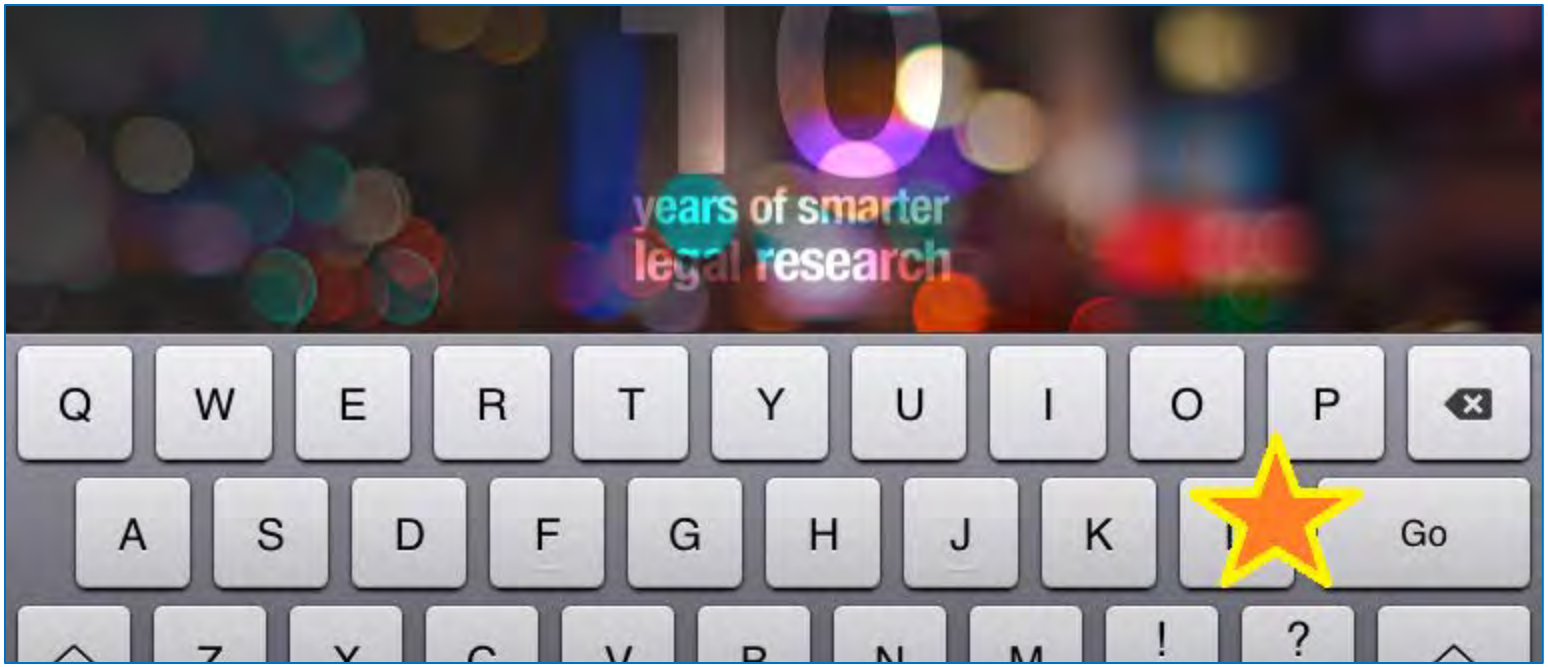

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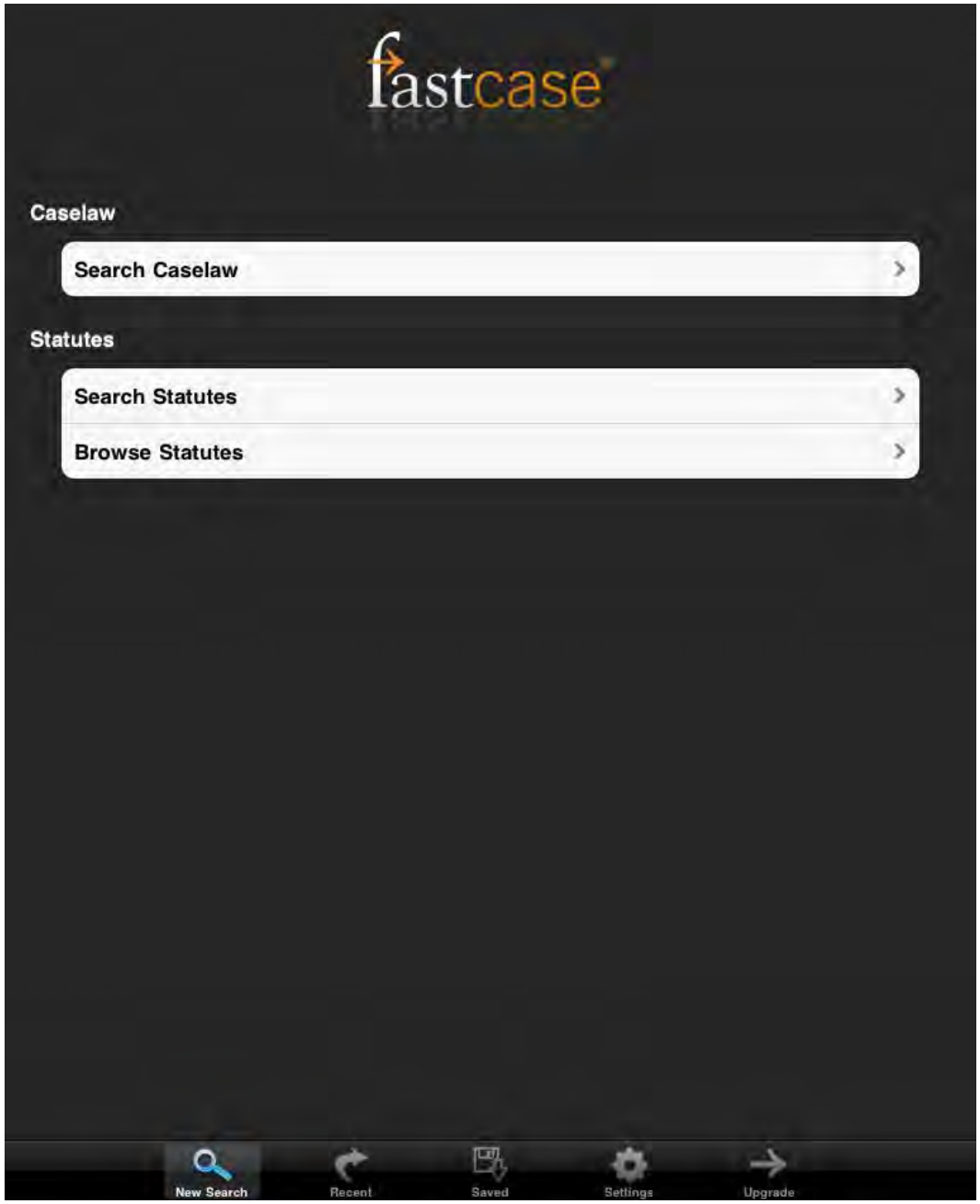

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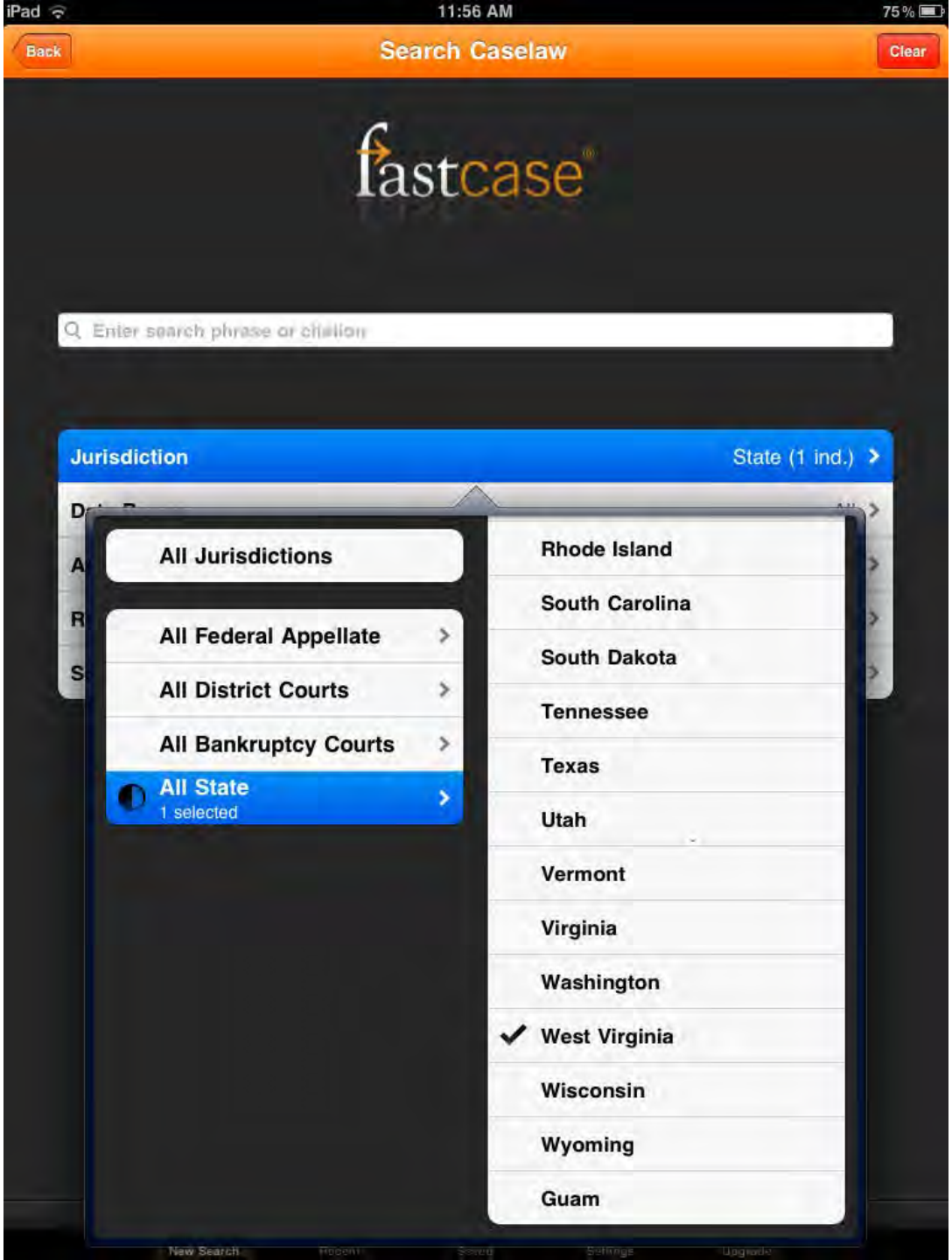
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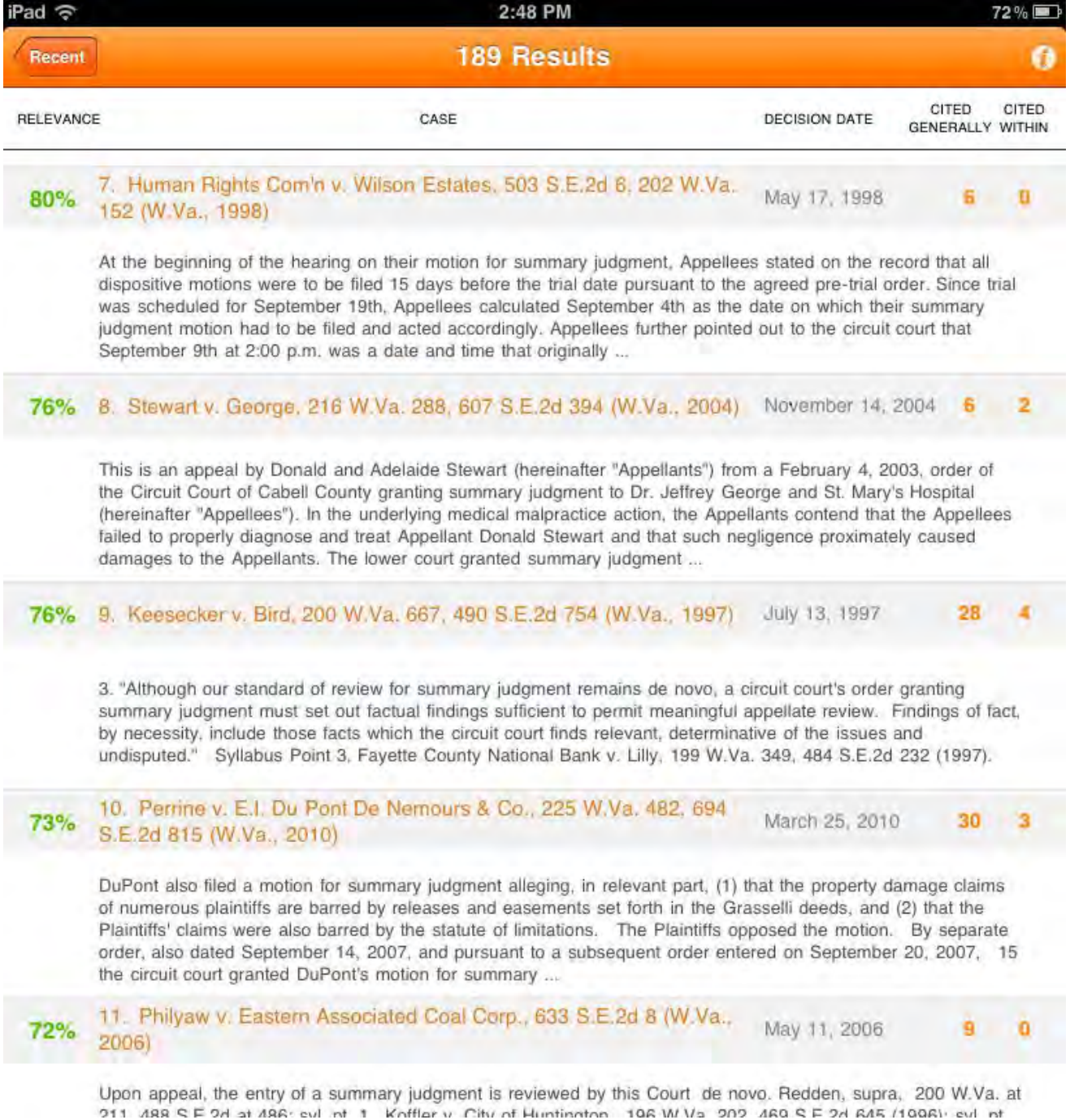
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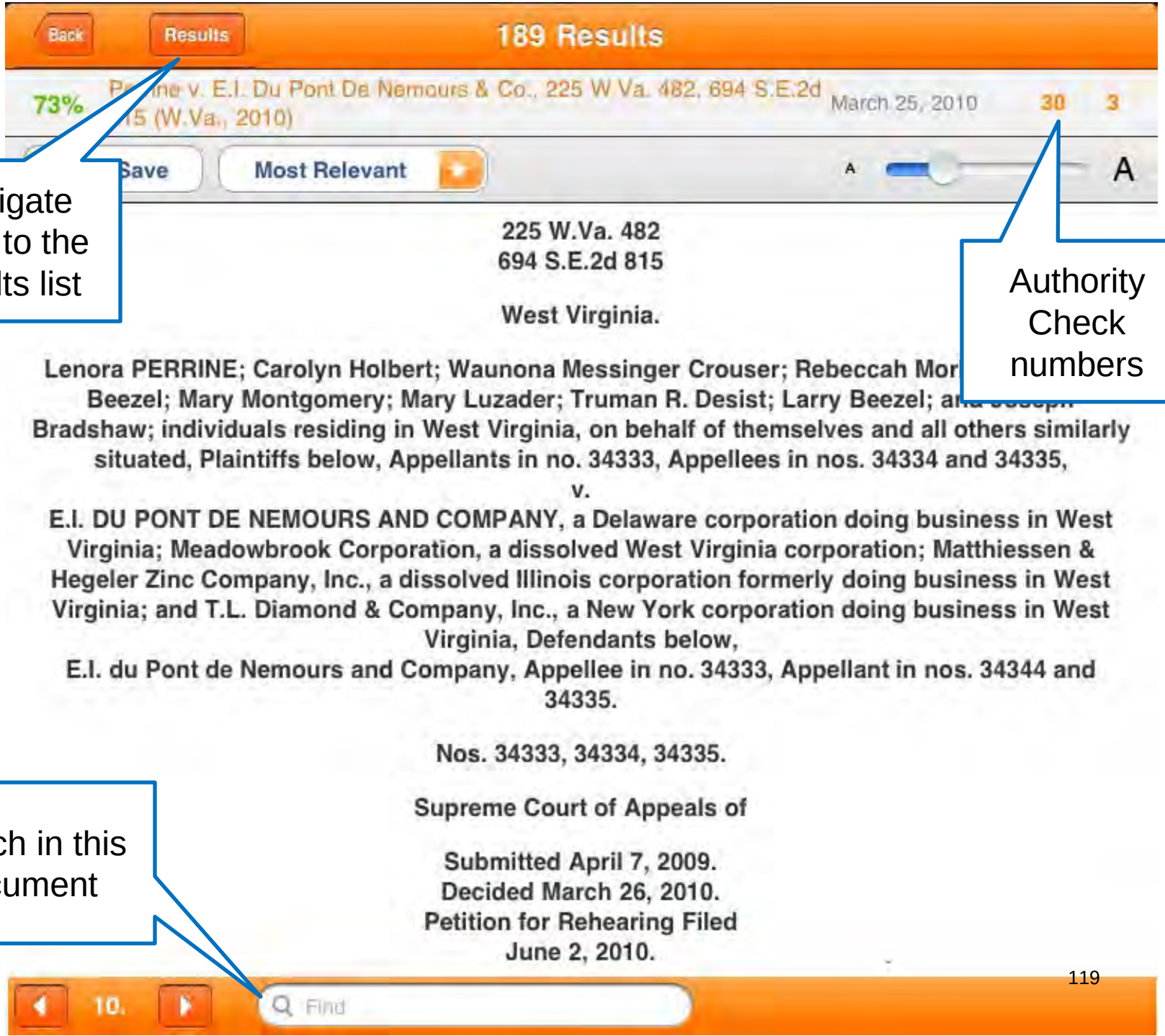
7. Human Rights Com'n v. Wilson Estates, 503 S.E.2d 6, 202 W.Va. 152 (W.Va., 1998)
May 17, 1998
6
0
At the beginning of the hearing on their motion for summary judgment, Appellees stated on the record that all dispositive motions were to be filed 15 days before the trial date pursuant to the agreed pre-trial order. Since trial was scheduled for September 19th, Appellees calculated September 4th as the date on which their summary judgment motion had to be filed and acted accordingly. Appellees further pointed out to the circuit court that September 9th at 2:00 p.m. was a date and time that originally ...
76%
8. Stewart v. George, 216 W.Va. 288, 607 S.E.2d 394 (W.Va., 2004)
November 14, 2004
6
2
This is an appeal by Donald and Adelaide Stewart (hereinafter "Appellants") from a February 4, 2003, order of the Circuit Court of Cabell County granting summary judgment to Dr. Jeffrey George and St. Mary's Hospital (hereinafter "Appellees"). In the underlying medical malpractice action, the Appellants contend that the Appellees failed to properly diagnose and treat Appellant Donald Stewart and that such negligence proximately caused damages to the Appellants. The lower court granted summary judgment ...
76%
9. Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (W.Va., 1997)
July 13, 1997
28
4
3. "Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syllabus Point 3, Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).
73%
10. Perrine v. E.I. Du Pont De Nemours & Co., 225 W.Va. 482, 694 S.E.2d 815 (W.Va., 2010)
March 25, 2010
30
3
DuPont also filed a motion for summary judgment alleging, in relevant part, (1) that the property damage claims of numerous plaintiffs are barred by releases and easements set forth in the Grasselli deeds, and (2) that the Plaintiffs' claims were also barred by the statute of limitations. The Plaintiffs opposed the motion. By separate order, also dated September 14, 2007, and pursuant to a subsequent order entered on September 20, 2007, 15 the circuit court granted DuPont's motion for summary ...
72%
11. Philyaw v. Eastern Associated Coal Corp., 633 S.E.2d 8 (W.Va., 2006)
May 11, 2006
9
0
Upon appeal, the entry of a summary judgment is reviewed by this Court de novo. Redden, supra, 200 W.Va. at



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Perrine v. E.I. Du Pont De Nemours & Co., 225 W.Va. 482, 694 S.E.2d 815 (W.Va., 2010)

Cited Generally (30) | Cited Within (3)

	CASE	DECISION DATE	CITED GENERALLY
1.	Patrick v. PHH Mortg. Corp. (N.D.W.Va., 2014)	February 25, 2014	0

(JUDGE GROH) MEMORANDUM OPINION AND ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Currently pending before the Court is Defendant PHH Mortgage Corporation's Motion for Summary Judgment filed on November 22, 2013. On January 14, 2014, Plaintiffs filed their Response to Defendant PHH Mortgage Corporation's Motion for Summary Judgment. On January 31, 2014, Defendant filed its Reply. Therefore, the motion has been fully briefed and is ripe for this Court's review. For the...

2.	Green Tree Servicing, LLC v. Figgatt (W.Va., 2013)	October 22, 2013	0

(Raleigh County 10-C-930-B) MEMORANDUM DECISION This matter came before this Court upon the appeal filed by Petitioner Green Tree Servicing, LLC ("Green Tree"), of the August 23, 2012, final order of the Circuit Court of Raleigh County, West Virginia, in which the circuit court concluded that Green Tree had violated various provisions of the West Virginia Consumer Credit and Protection Act, West Virginia Code §§ 46A-1-101 to 46A-8-102, and was subject to statutory penalties therefor. During...

3.	JWCF, LP v. Farruggia (W.Va., 2013)	October 7, 2013	0

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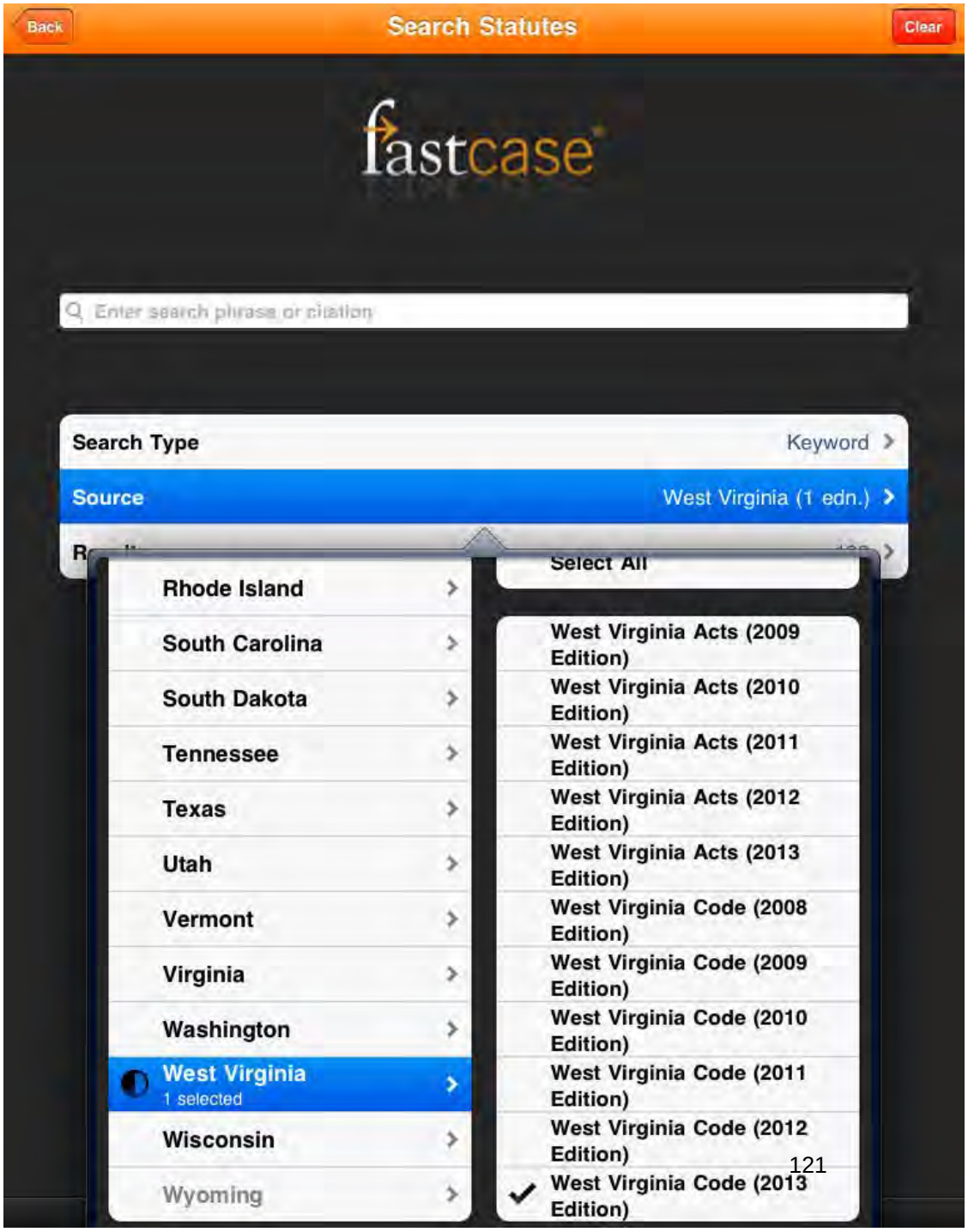

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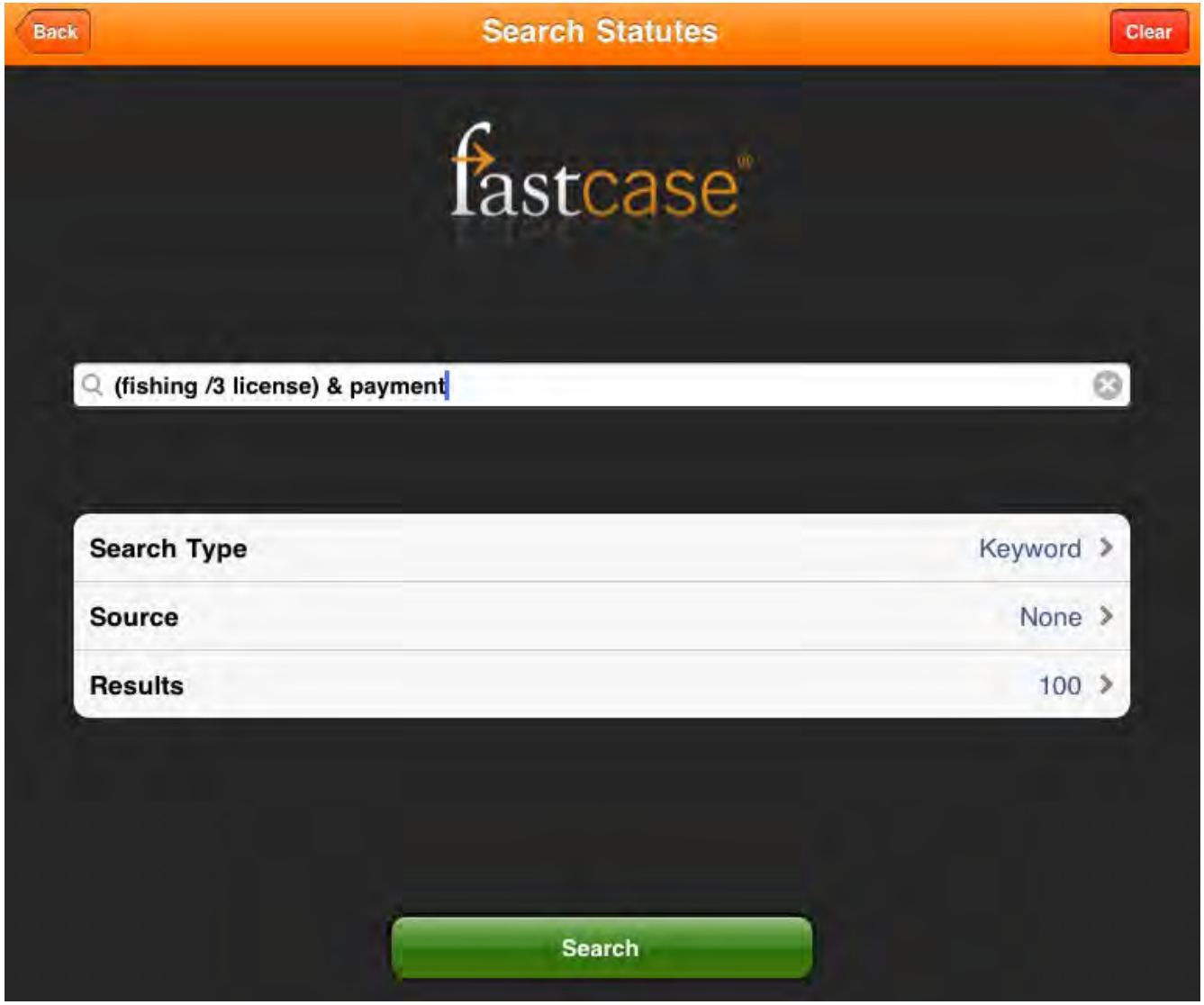
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RELEVANCE	SHORT NAME	CITATION
100%	1. When licenses or permits not required.	WV Code 20-2-28

(b) Any bona fide resident of this state who is totally blind may fish in this state without obtaining a fishing license. A written statement or certificate from a duly licensed physician of this state showing the resident to be totally blind shall serve in lieu of a fishing license and shall be carried on the person of the resident at all times while he or she is fishing in this state.

69%	2. Payment by credit card or payment plan; suspension of licenses for failure to make payments or appear or respond; restitution; liens.	WV Code 50-3-2a

(b) Unless otherwise required by law, a magistrate court may collect a portion of any costs, fines, fees, forfeitures, restitution or penalties at the time the amount is imposed by the court so long as the court requires the balance to be paid in accordance with a payment plan which specifies: (1) The number of payments to be made; (2) the dates on which the payments are due; and (3) the amounts due for each payment. The written agreement represents the minimum payments and the last date those payments ...

44%	3. Form of notice of action against a license.	WV Code 48-15-205

Under West Virginia law, your failure to comply as described in Section 1 may result in an action against certain licenses issued to you by the State of West Virginia. Action may be taken against a driver's license, a recreational license such as a hunting and fishing license and a professional or occupational license necessary for you to work. An application for a license may be denied. A renewal of a license may be refused. A license which you currently hold may be suspended or restricted in its ...

44%	4. Free fishing days.	WV Code 20-2-44

The Director may designate up to two days each year as free sport fishing days. On a designated free fishing day, an individual is entitled to fish for all legal fish in all counties of the state without having a valid West Virginia fishing license and without the payment of any license fee, subject to the same privileges and restrictions applicable to a holder of any such license.

35%	5. Class Xs resident senior hunting, fishing and trapping license.	WV Code 20-2-42x

(f) A Class XS license is valid for the lifetime of the purchaser without payment of additional fees for the privileges associated with the Class X license, Class CS stamp and the Class O stamp. This is a base license and does not require the purchase of a prerequisite license to participate in the activities specified in this section, except as noted.

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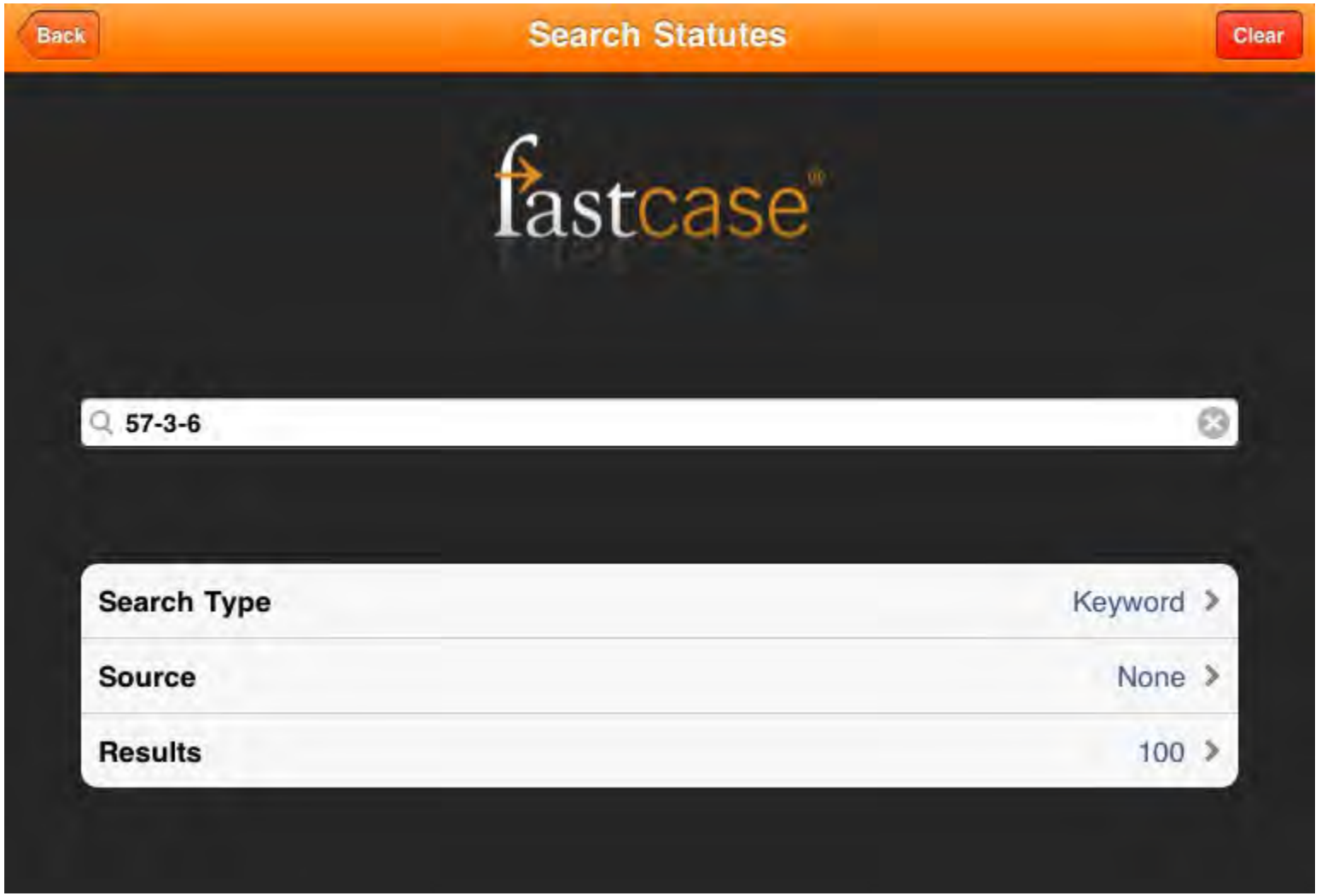
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In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise) be a competent witness on such trial or examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone.

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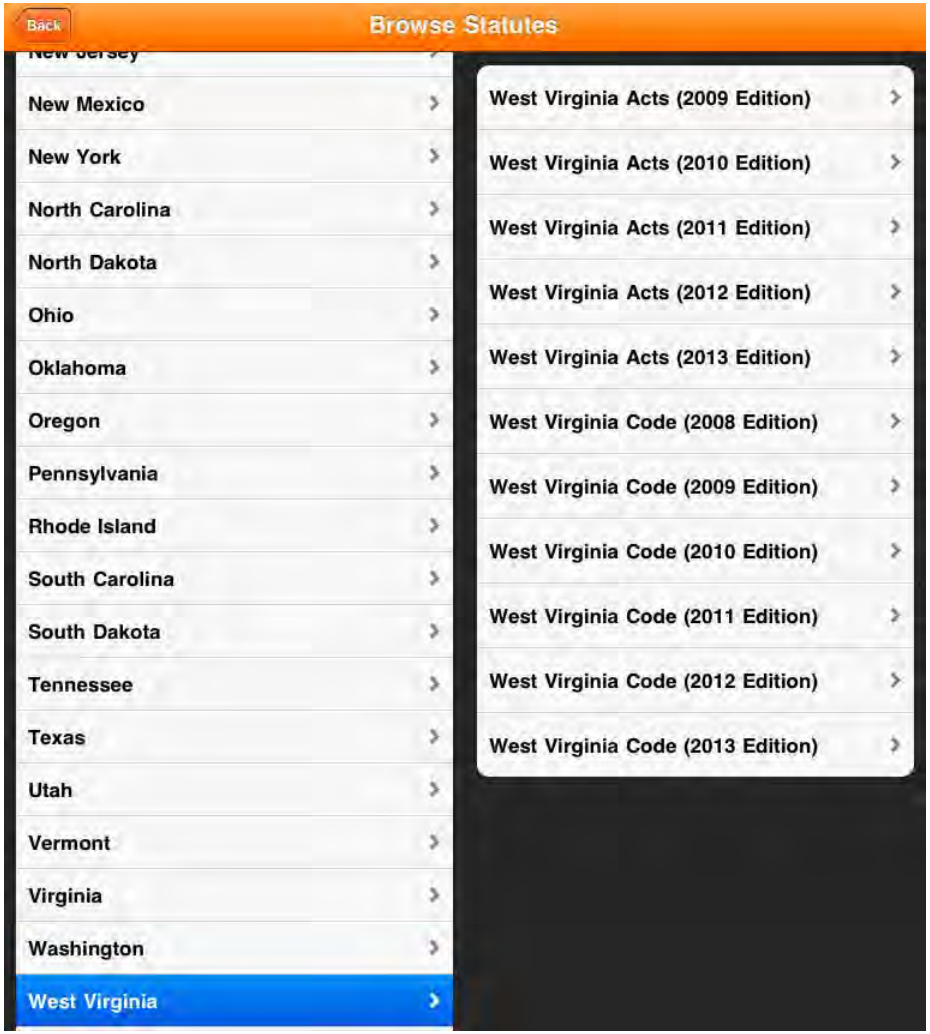

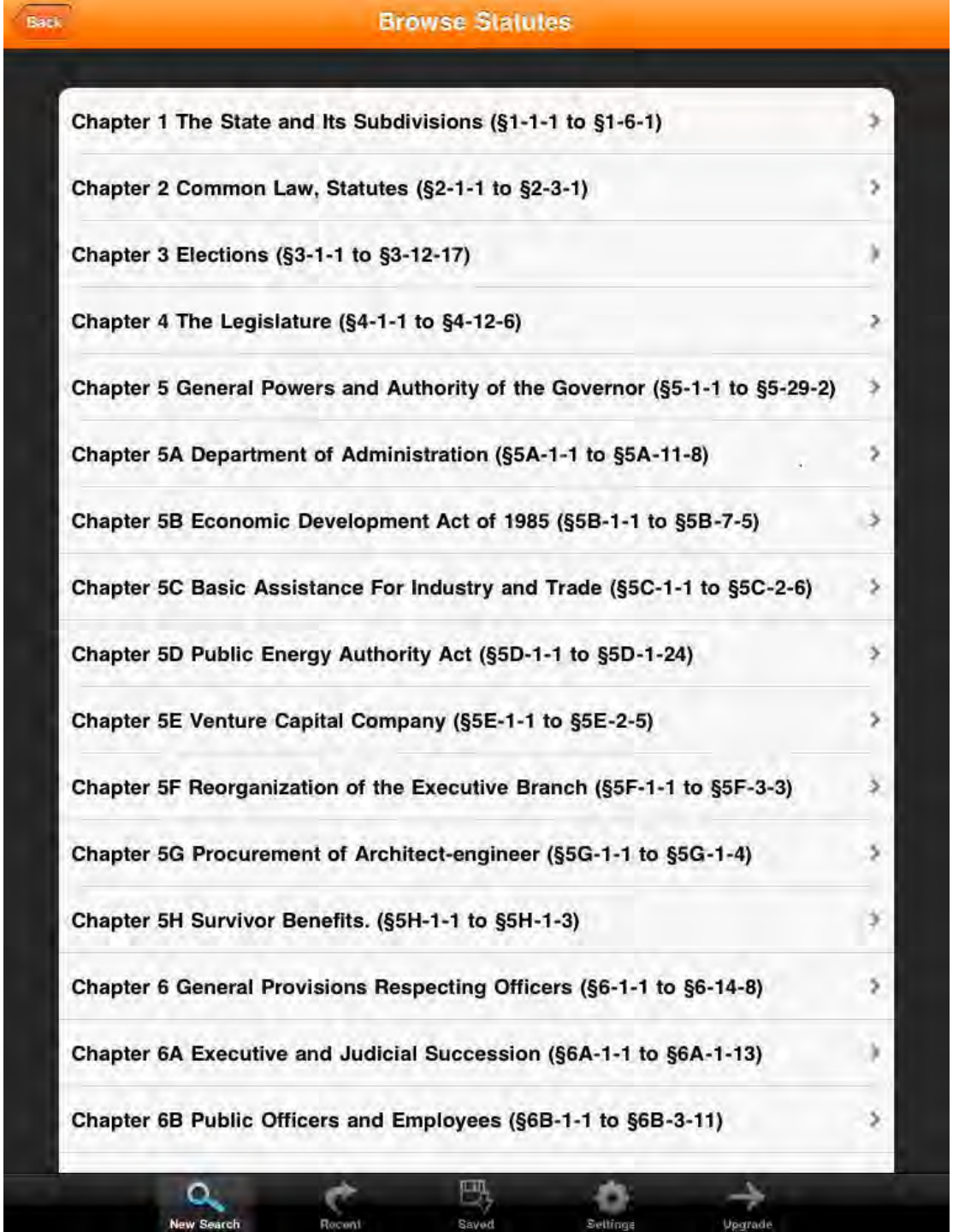
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Chapter 5C Basic Assistance For Industry and Trade (§5C-1-1 to §5C-2-6)
Chapter 5D Public Energy Authority Act (§5D-1-1 to §5D-1-24)
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Chapter 54 Eminent Domain (§54-1-1 to §54-3-5)
Chapter 55 Actions, Suits and Arbitration (§55-1-1 to §55-18-2)
Chapter 56 Pleading and Practice (§56-1-1 to §§56-11-1 to 56-11-11)
Chapter 57 Evidence and Witnesses (§57-1-1 to §57-5-12)
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Chapter 59 Fees, Allowances and Costs (§59-1-1 to §59-3-9)
Chapter 60 State Control of Alcoholic Liquors (§60-1-1 to §60-9-9)
Chapter 60A Uniform Controlled Substances Act (§60A-1-101 to §60A-...
Chapter 61 Crimes and Their Punishment (§61-1-1 to §61-13-6)
Chapter 62 Criminal Procedure (§62-1-1 to §62-15-13)
Chapter 63 Repeal of Statutes (§63-1-1 to §63-1-5)
Chapter 64 Legislative Rules (§64-1-1 to §64-11-5)
Article 1 Legislative Acts and Resolution (§57-1-1 to §57-1-14)
Article 2 Writings and Statements of Priv (§57-2-1 to §57-2-4)
Article 3 Competency of Witnesses (§57-3-1 to §57-3-10)
Article 4 Depositions and Perpetuation of (§57-4-1 to §57-4-7)
Article 5 Miscellaneous Provisions (§57-5-1 to §57-5-12)

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§57-3-1 Party or interested person competent as witness; exception as to transaction or communication with deceased or insane person; right of perso...

§57-3-2 Competency of husband and wife to testify.

§57-3-3 Testimony of husband and wife in criminal cases.

§57-3-4 Confidential communications between husband and wife.

§57-3-5 Competency of convicts as witnesses.

§57-3-6 Competency of accused as witness.

§57-3-7 No person incompetent as witness by reason of race or color.

§57-3-8 Competency of chiropractors as witnesses.

§57-3-9 Communications to priests, nuns, clergy, rabbis, Christian Science practitioners or other religious counselors not subject to being compelled as...

§57-3-10 Reporters' Privilege.

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RELEVANCE	CASE	DECISION DATE	CITED GENERALLY	CITED WITHIN
100%	1. State v. McAboy, 236 S.E.2d 431, 160 W.Va. 497 (W.Va., 1977)	July 5, 1977	67	3

Had the Revisers or the Legislature truly intended to change the law on impeachment by prior conviction as it existed before 1931, language similar to that found in W.Va.Code, 57-3-5, could have been added to W.Va.Code, 57-3-6. It is also apparent that the purpose of the revision to W.Va.Code, 57-3-6, was to clarify the waiver problem and was not intended to change the law with regard to the use of prior convictions for impeachment of defendant's credibility.

81%	2. State v. Simmons, 148 W.Va. 340, 135 S.E.2d 252 (W.Va., 1964)	March 17, 1964	10	2

Let us consider first the testimony of the defendant. On cross-examination he was asked if he had sold whiskey at his bus home. He answered, after his objection to the question was overruled, that he had not. While it is true that under the provisions of Code, 1931, 57-3-6, a defendant who voluntarily testifies in his behalf shall be subject to cross-examination as any other witness, such requirement is not without limitation. The pertinent part of Code, 1931, 57-3-6, reads: 'In any trial * * ...

75%	3. State v. Bragg, 140 W.Va. 585, 87 S.E.2d 689 (W.Va., 1955)	June 7, 1955	47	4

If error was committed, it was in the admission of testimony of a separate offense, not connected with the alleged crime for which defendant was on trial, and for which he had not been theretofore convicted. The rule is well established that when one is on trial for a particular offense, proof of his guilt of other offenses, wholly unconnected with that for which he is upon trial must be excluded. However, there are exceptions to the rule that are as well established, and as has been said 'founded ...

74%	4. State v. Clark, 170 W.Va. 224, 292 S.E.2d 643 (W.Va., 1982)	June 23, 1982	23	10

1. "In a criminal case, where the defendant has exercised his right not to testify, statements of the prosecuting attorney, in his argument of the case before the jury, that there had been no denial of the testimony introduced by the State, without specific[170 W.Va. 225] reference to the failure of the defendant to testify, does not come within the inhibition of Code, 57-3-6...." Syl. pt. 1, State v. McClure, 163 W.Va. 33, 253 S.E.2d 555 (1979), quoting, syl. pt. 3, State v. Simon, 132 W.Va ...

66%	5. State Of West Va. v. Simon, 52 S.E.2d 725, 132 W.Va. 322 (W.Va., 1949)	February 15, 1949	36	9

in his argument of the case before the jury, that there had been no denial of the testimony introduced by the State, without specific reference to the failure of the defendant to testify, does not come within the inhibition of Code, 57-3-6, which is that "his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by any one".

66%	6. State v. Ramey, 212 S.E.2d 737, 158 W.Va. 541 (W.Va., 1975)	March 11, 1975	15	2

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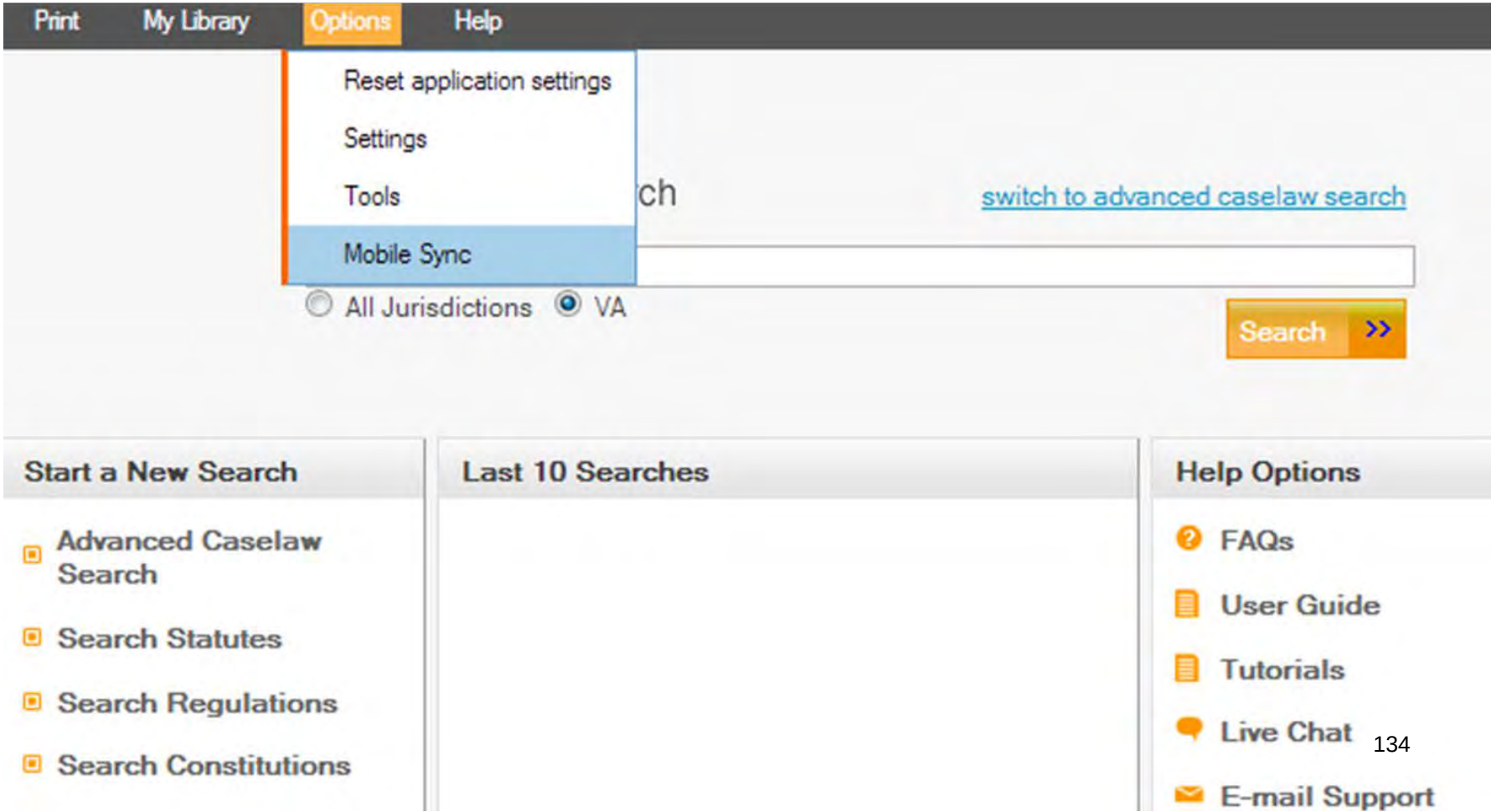

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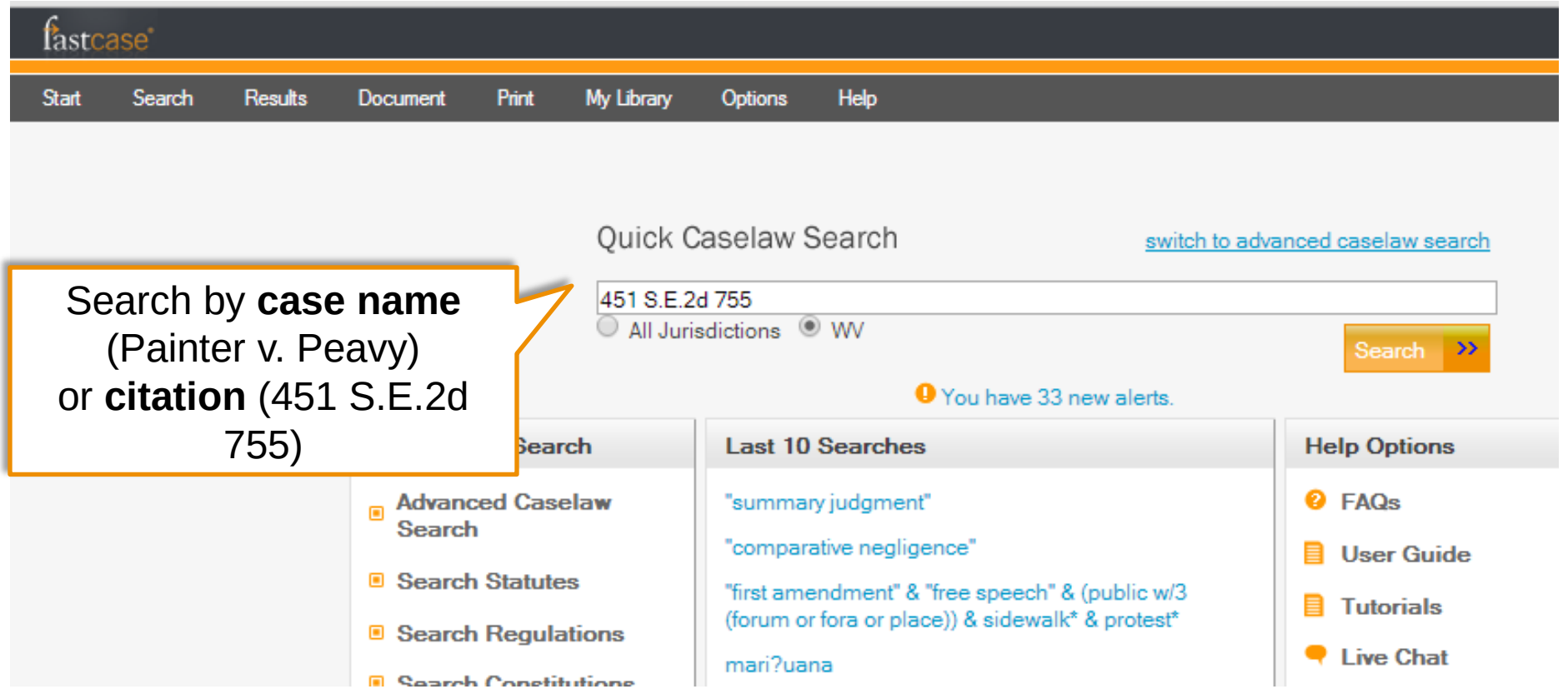

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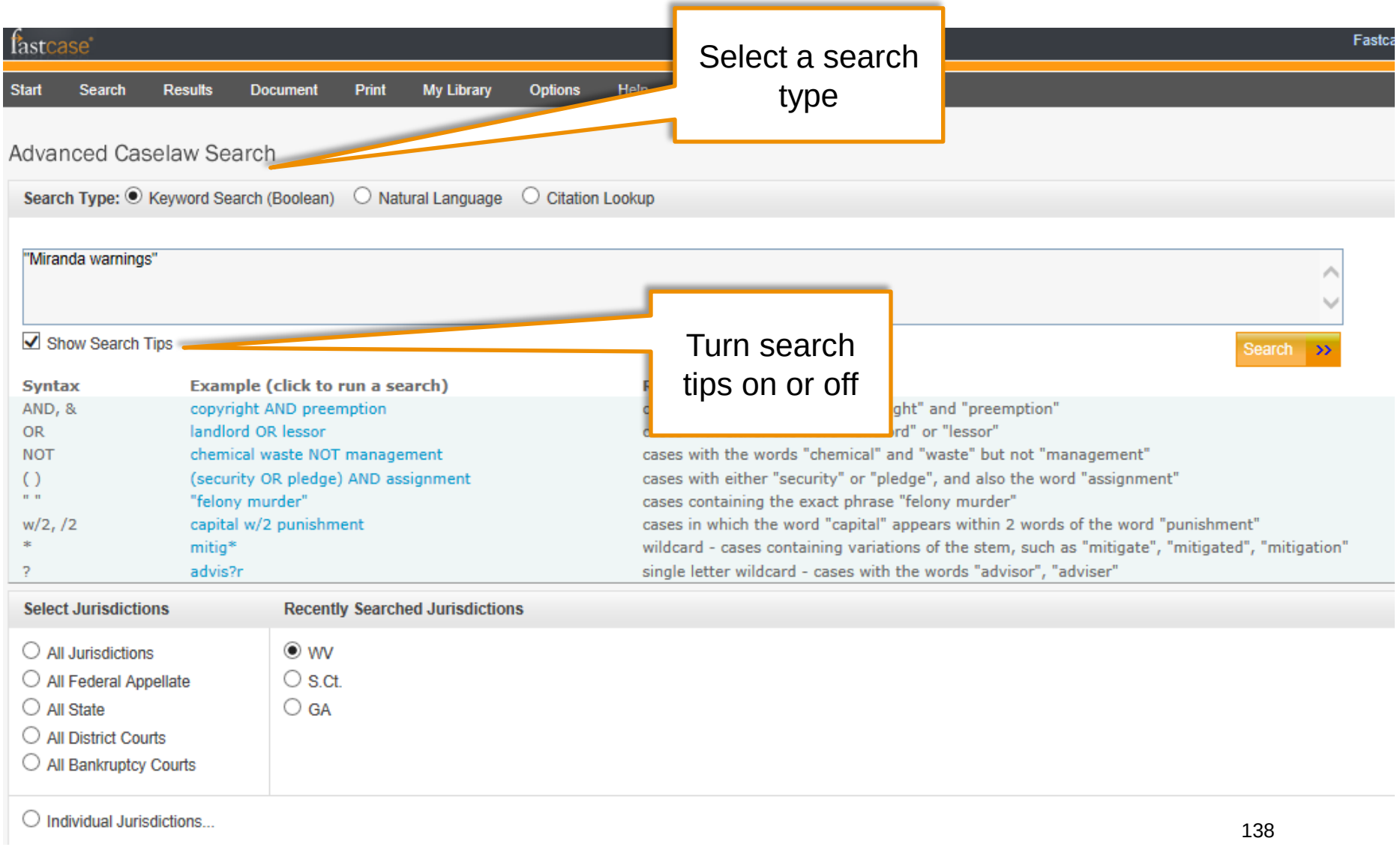

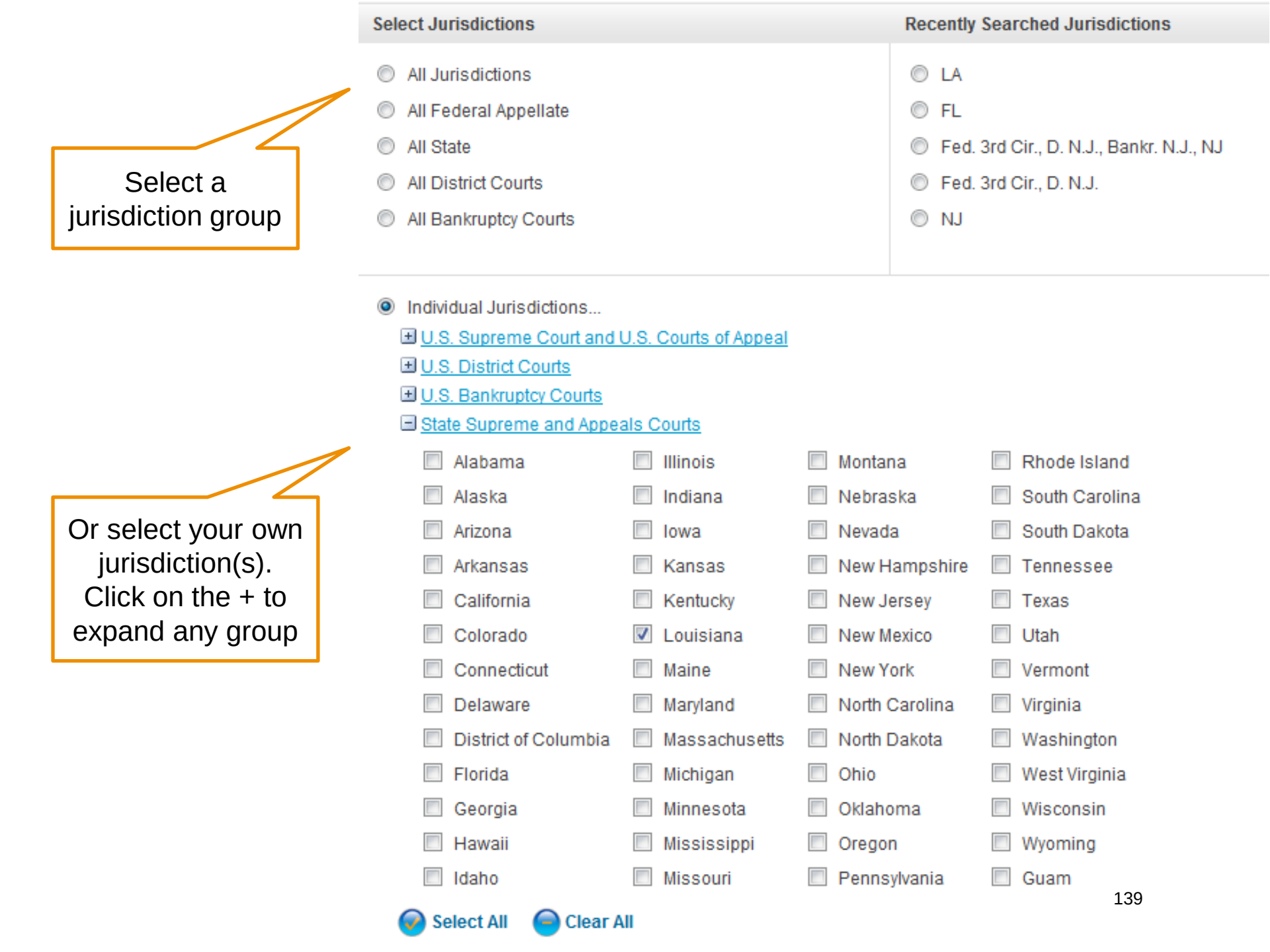
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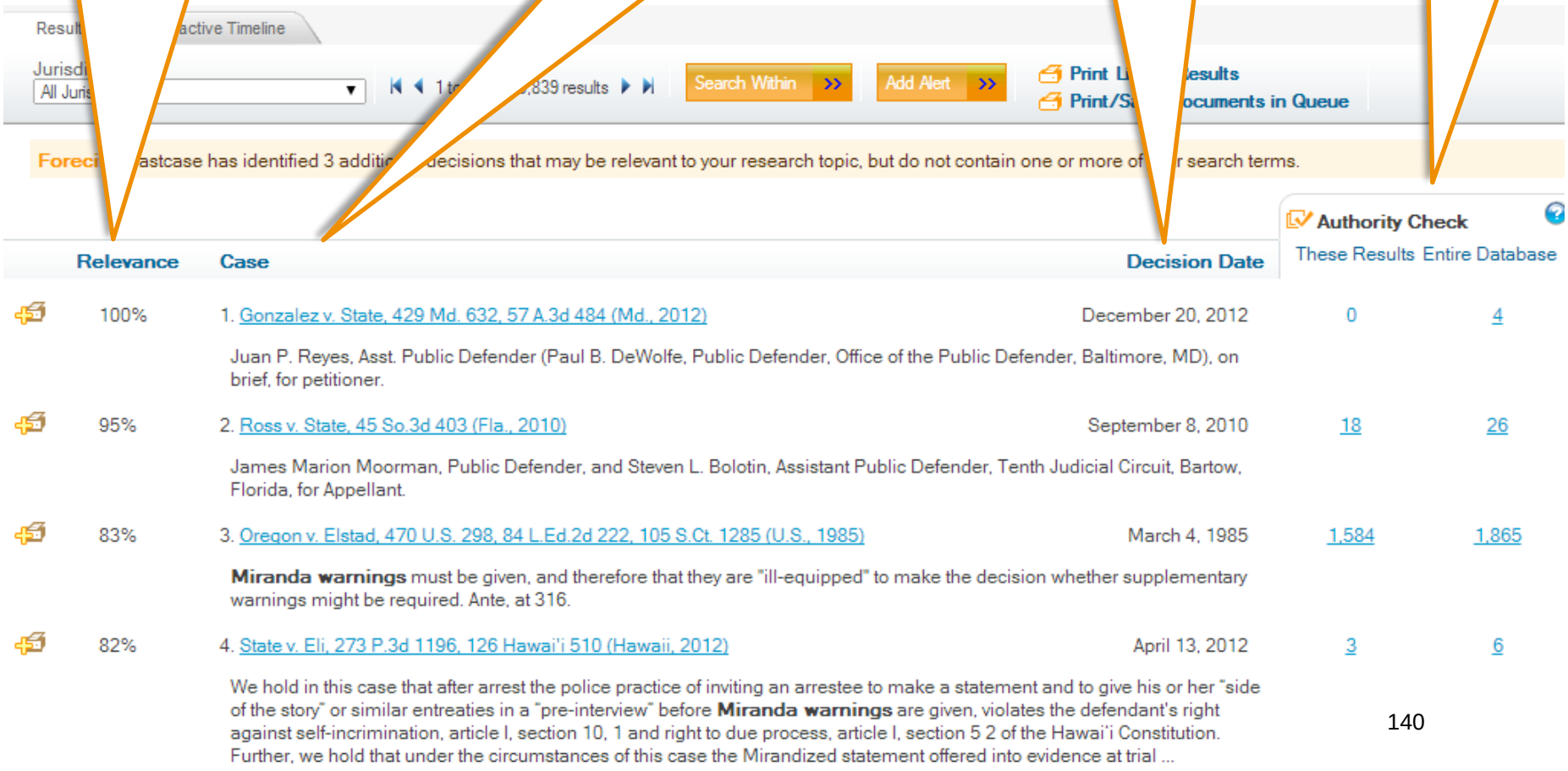

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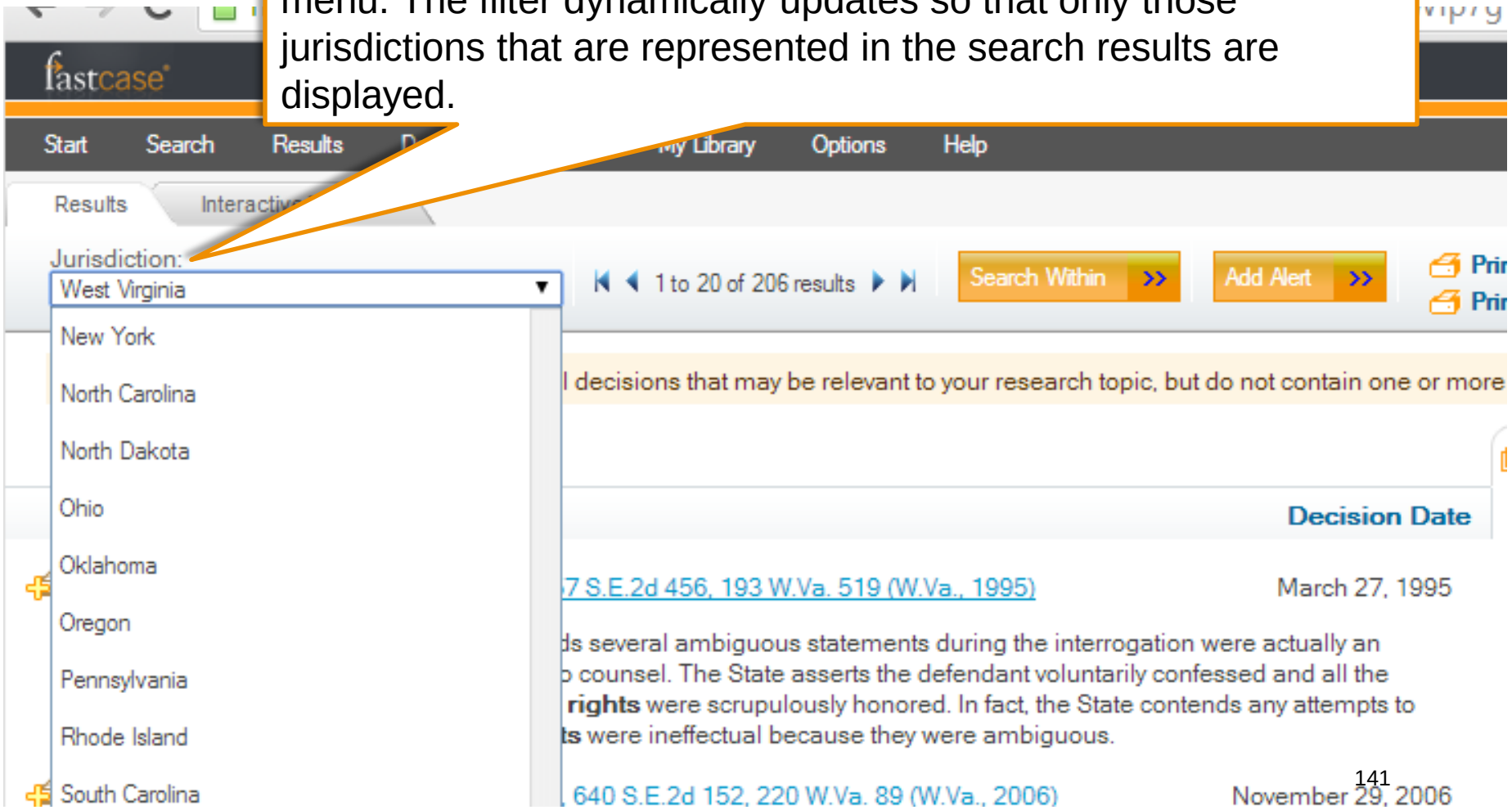

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	Relevance	Case	Decision Date	Authority Check: These Results	Authority Check: Entire Database
	100%	1. State v. DeWeese, 582 S.E.2d 786, 213 W. Va. 339 (W.Va., 2003)	April 15, 2003	5	23
		2. Waiver of **Miranda warnings**. As previously noted, the trial court also concluded that defense counsel expressly waived the right to have **Miranda warnings** given. While not absolutely clear, the record does suggest that defense counsel was asked whether reading **Miranda warnings** were necessary. Defense counsel indicated the warnings did not have to be given. 18 Assuming that this scenario did in fact occur, it does not help the State.			
	63%	2. State v. Davis (W.Va., 2013)	November 21, 2013	0	0
		8. "A trial court's determination of whether a custodial interrogation environment exists for purposes of giving **Miranda warnings** to a suspect is based upon whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest." Syl. pt. 1, State v. Middleton, 220 W. Va. 89, 640 S.E.2d 152 (2002), overruled on other grounds by State v. Eilola, 226 W. Va. 698, 704 S.E.2d 698 (2010).			
	55%	3. State v. Preece, 383 S.E.2d 815, 181 W.Va. 633 (W.Va., 1989)	July 14, 1989	14	16
		Recently, the court addressed the issue in terms of routine traffic investigations in Berkemer v. McCarty. A highway patrolman followed a person who was driving erratically for two miles, then "forced" the driver to stop. Berkemer, 468 U.S. at 423, 104 S.Ct. at 3141, 82 L.Ed.2d at 324. When the accused exited the car, he exhibited signs of intoxication. The patrolman immediately decided to arrest the driver but did not tell him. Instead, without **Miranda warnings**, the patrolman asked the accused to ...			
	46%	4. State v. Middleton, 640 S.E.2d 152, 220 W.Va. 89 (W.Va., 2006)	November 29, 2006	7	13
		Justice Albright also suggests that because Mr. Middleton was a suspect the protections of Miranda were applicable. This position is inconsistent with well-settled law. The United States Supreme Court "decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 1529, 128 ...			
	45%	5. State v. Jones, 193 W.Va. 378, 456 S.E.2d 459 (W.Va., 1995)	March 6, 1995	7	21
		4. "A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of **Miranda warnings** is not enough, by itself, to break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the **Miranda warnings**; and the purpose or flagrancy ...			
	44%	6. State v. Guthrie, 518 S.E.2d 83, 205 W. Va. 326 (W.Va., 1999)	June 25, 1999	8	27

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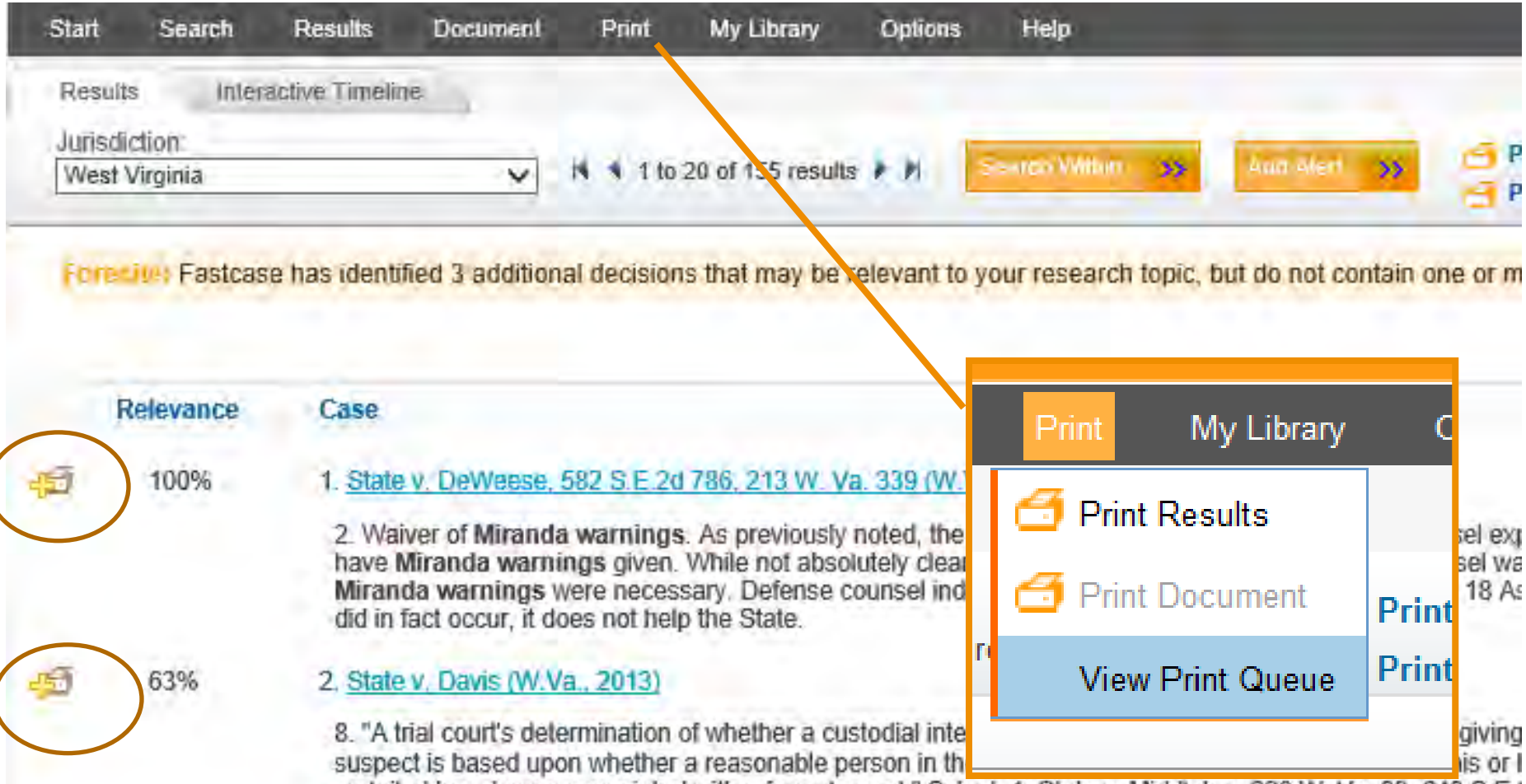
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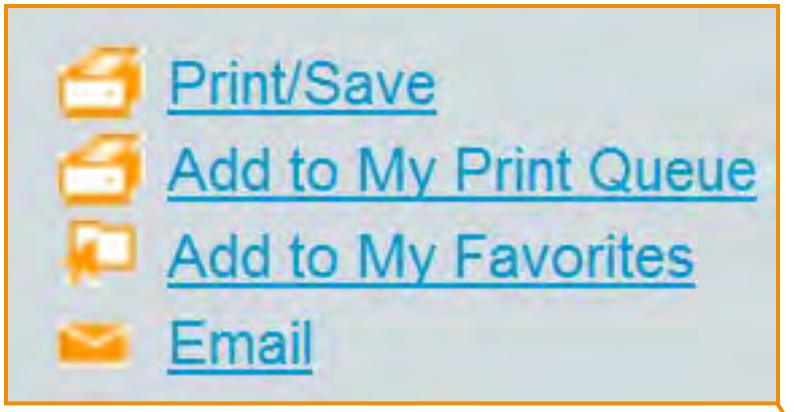

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5 State v. Jones, 193 W.Va. 378, 456 S.E.2d 459 (W.Va., 1995)
6 State v. Guthrie, 518 S.E.2d 83, 205 W Va. 326 (W.Va., 1999)
7 State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (W.Va., 1995)
8 State v. Giles, 395 S.E.2d 481, 183 W.Va. 237 (W.Va., 1990)
9 State v. Bradshaw, 457 S.E.2d 456, 193 W.Va. 519 (W.Va., 1995)
10 Hughes v. Gwinn, 290 S.E.2d 5, 170 W.Va. 87 (W.Va., 1982)
11 Mark E.P., Matter of, 363 S.E.2d 729, 178 W.Va. 652 (W.Va., 1987)
12 State v. Newcomb, 679 S.E.2d 675, 223 W. Va. 843 (W.Va., 2009)
State v. Ramsey, 545 S.E.2d 853, 209

State v. Preece, 383 S.E.2d 815, 181 W.Va. 633 (W.Va., 1989)

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383 S.E.2d 815

181 W.Va. 633

STATE of West Virginia
v.
David PREECE.

No. 18564.

Supreme Court of Appeals of
West Virginia.

July 14, 1989.

Page 816

[181 W.Va. 634] Syllabus by the Court

1. Miranda warnings are required whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense.

2. When ruling upon a motion to suppress a statement made by a suspect pursuant to a traffic investigation due to the investigating officer's failure to provide Miranda warnings, the trial court must determine whether the statement was the result of custodial interrogation.

3. The sole issue before a trial court in determining whether a traffic investigation has escalated into an accusatory, custodial environment, requiring Miranda warnings, is whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest.

4. "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. pt. 3, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978).

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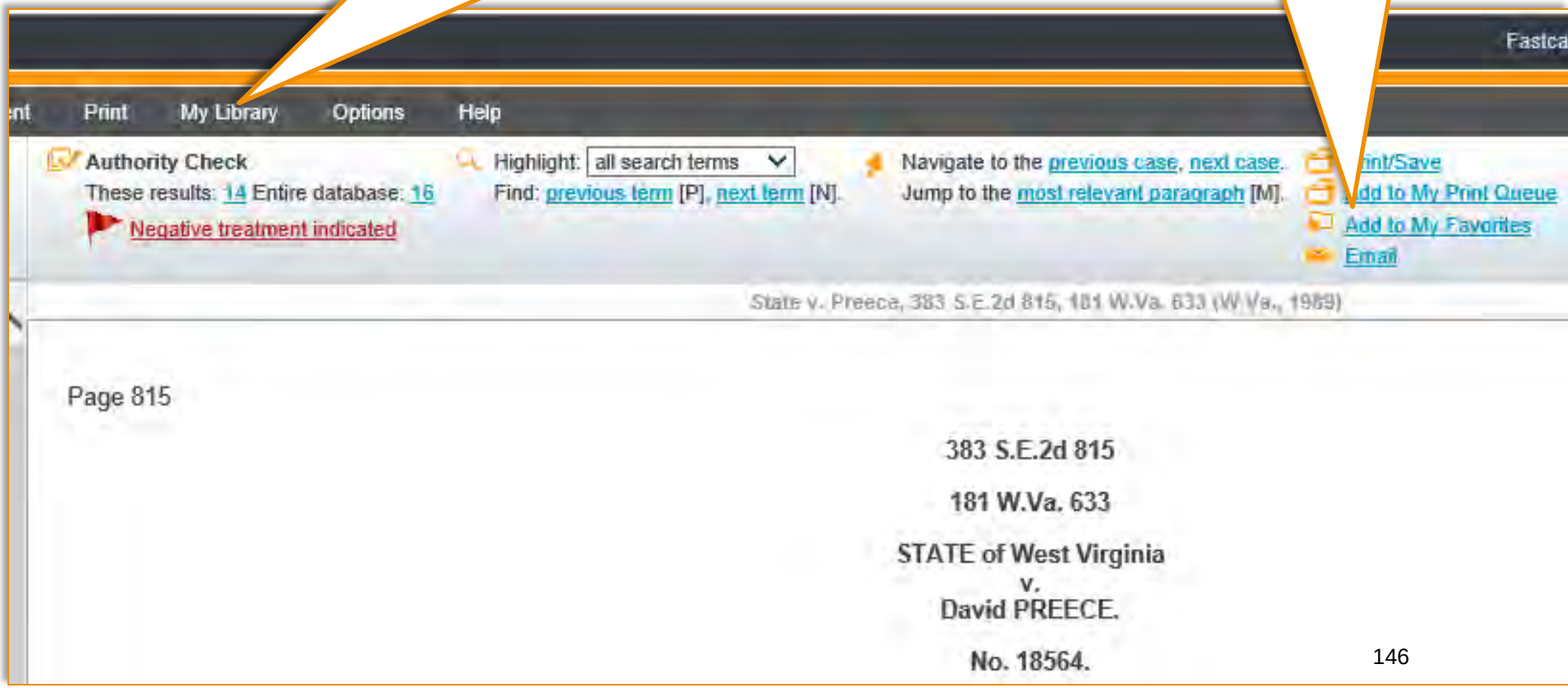

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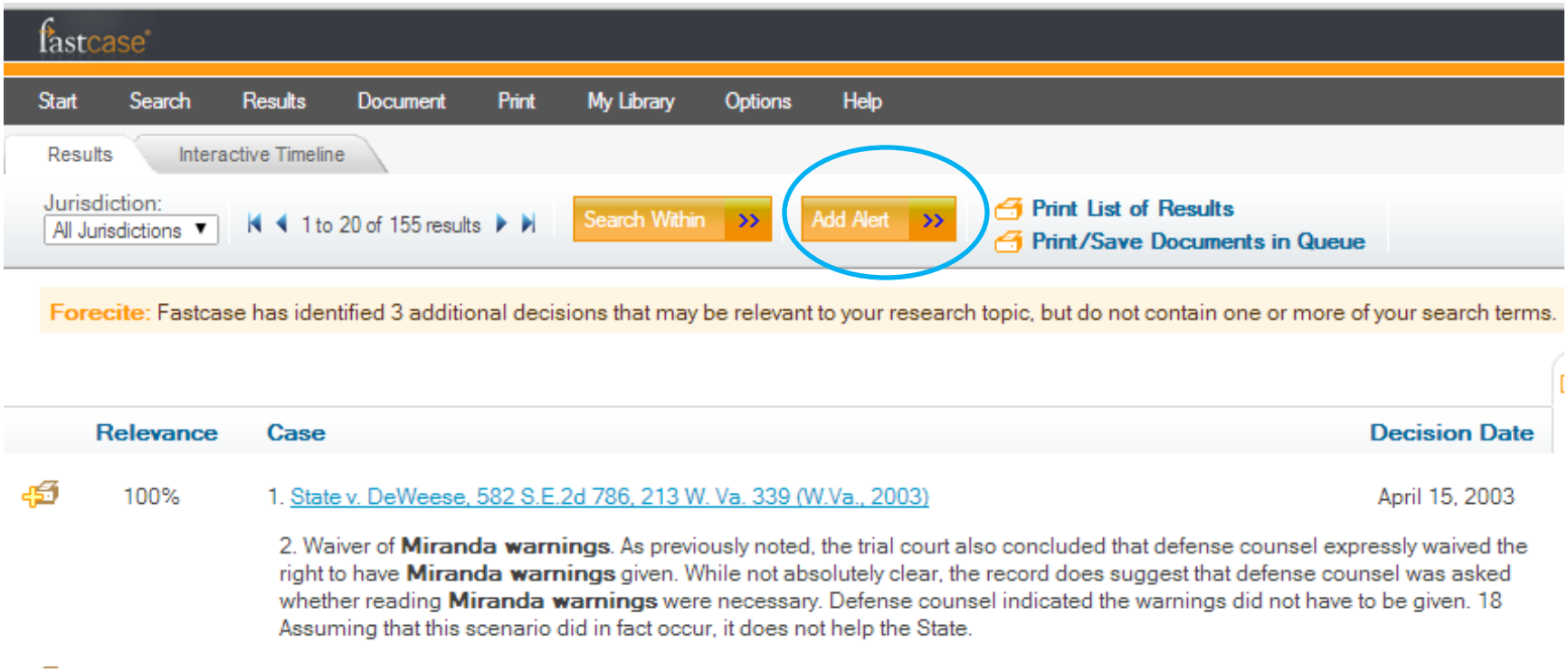
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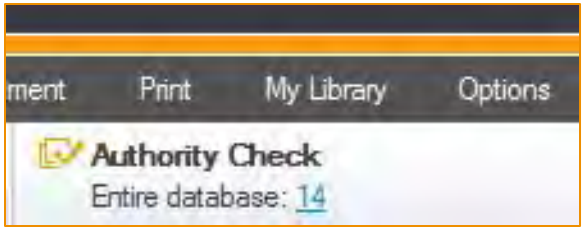

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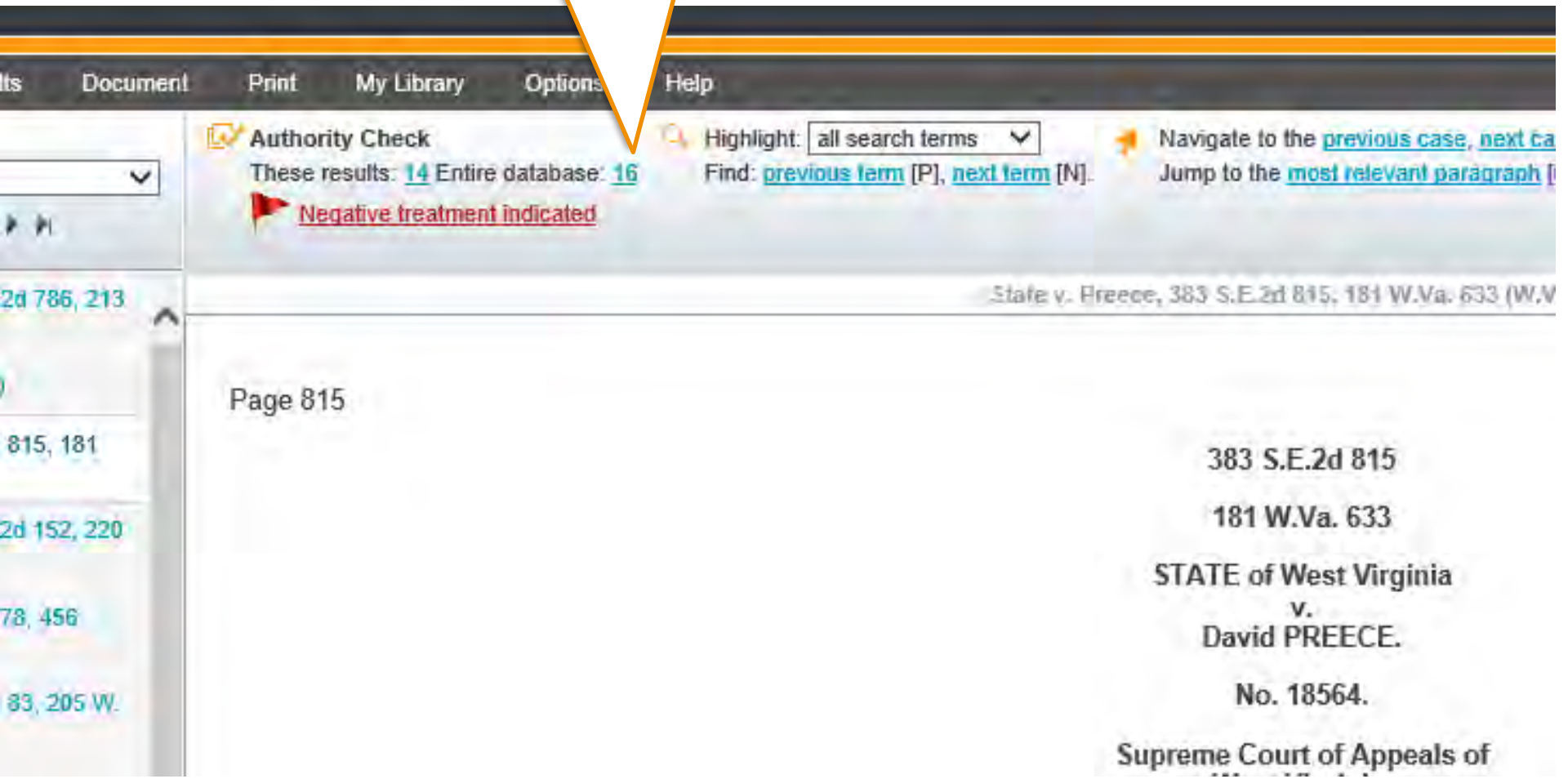

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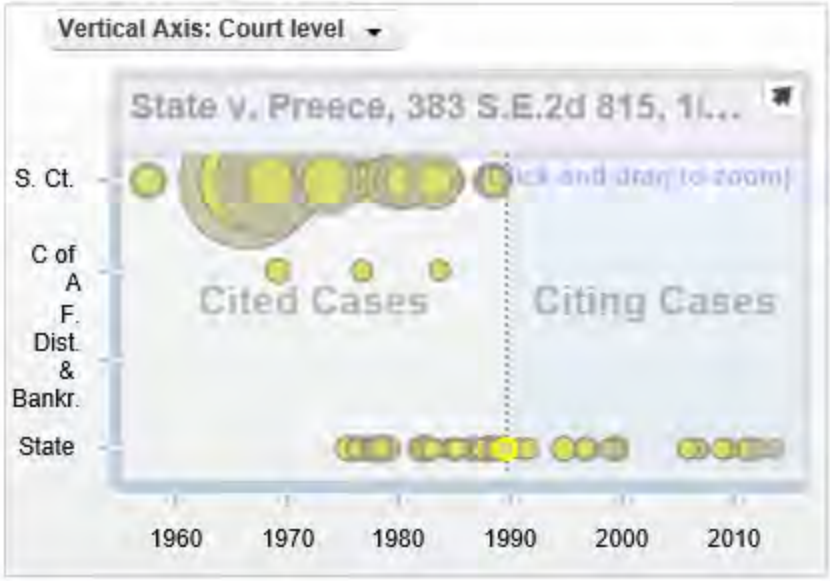

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...custody and . . . subject[] . . . [that person] to the actual control and will of the" arresting officer. Syl. Pt. 1, in part, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987), overruled on other grounds, State v. Honaker, 193 W.Va. 51, 454 S.E.2d 96 (1994); see also Syl. Pt. 3, in part, **State v. Preece, 181 W.Va. 633, 383 S.E.2d 815 (1989), overruled on other grounds, State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)** (an arrest or custodial detention equivalent to an arrest exists when "a

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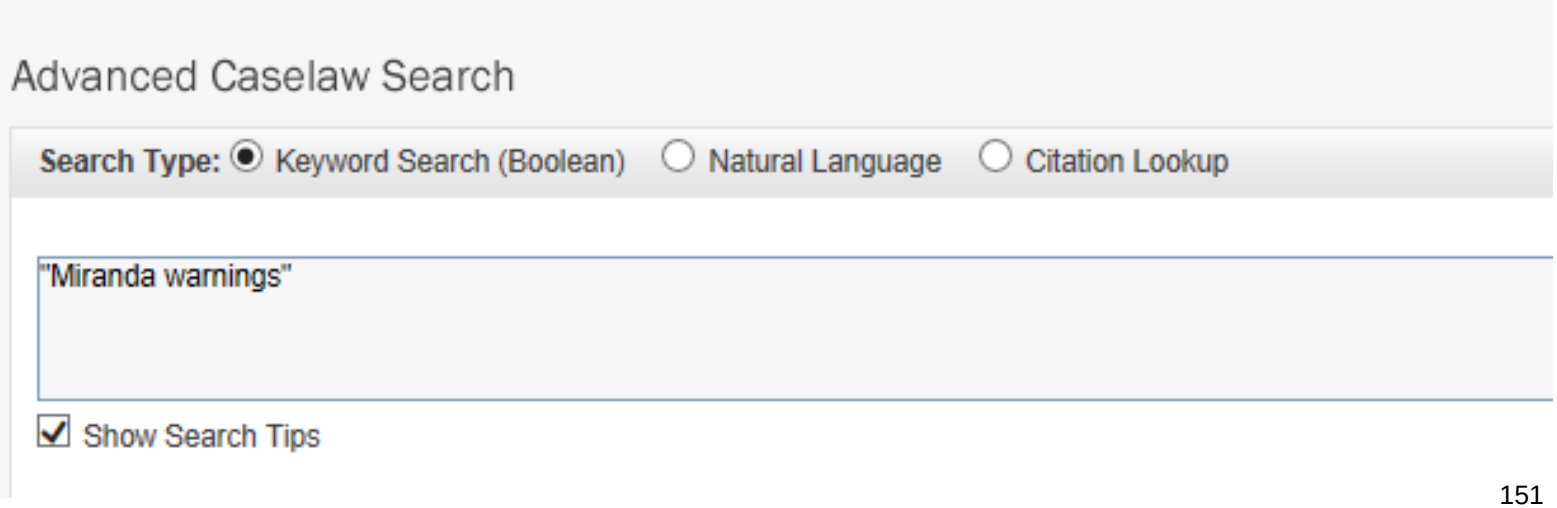

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		2. Waiver of **Miranda warnings**. As previously noted, the trial court also concluded that defense counsel expressly waived the right to have **Miranda warnings** given. While not absolutely clear, the record does suggest that defense counsel was asked whether reading **Miranda warnings** were necessary. Defense counsel indicated the warnings did not have to be given. 18 Assuming that this scenario did in fact occur, it does not help the State.			
	63%	2. State v. Davis (W.Va., 2013)	November 21, 2013	0	0
		8. "A trial court's determination of whether a custodial interrogation environment exists for purposes of giving **Miranda warnings** to a suspect is based upon whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest." Syl. pt. 1, State v. Middleton, 220 W. Va. 89, 640 S.E.2d 152 (2002), overruled on other grounds by State v. Eilola, 226 W. Va. 698, 704 S.E.2d 698 (2010).			
	55%	3. State v. Preece, 383 S.E.2d 815, 181 W.Va. 633 (W.Va., 1989)	July 14, 1989	14	16
		Recently, the court addressed the issue in terms of routine traffic investigations in Berkemer v. McCarty. A highway patrolman followed a person who was driving erratically for two miles, then "forced" the driver to stop. Berkemer, 468 U.S. at 423, 104 S.Ct. at 3141, 82 L.Ed.2d at 324. When the accused exited the car, he exhibited signs of intoxication. The patrolman immediately decided to arrest the driver but did not tell him. Instead, without **Miranda warnings**, the patrolman asked the accused to ...			
	46%	4. State v. Middleton, 640 S.E.2d 152, 220 W.Va. 89 (W.Va., 2006)	November 29, 2006	7	13
		Justice Albright also suggests that because Mr. Middleton was a suspect the protections of Miranda were applicable. This position is inconsistent with well-settled law. The United States Supreme Court "decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 1529, 128 ...			
	45%	5. State v. Jones, 193 W.Va. 378, 456 S.E.2d 459 (W.Va., 1995)	March 6, 1995	7	21
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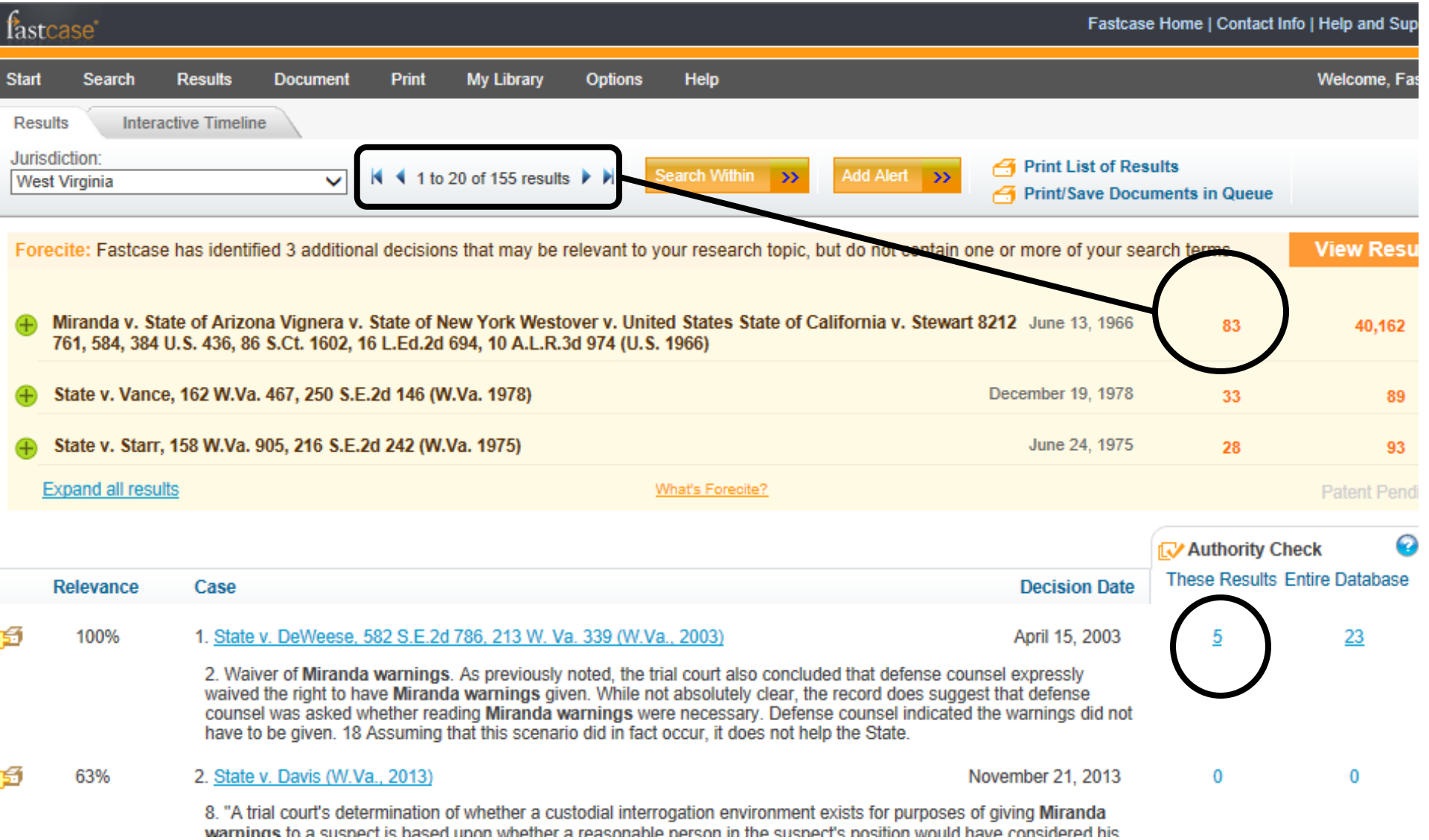
	44%	6. State v. Guthrie, 518 S.E.2d 83, 205 W. Va. 326 (W.Va., 1999)	June 25, 1999	8152	27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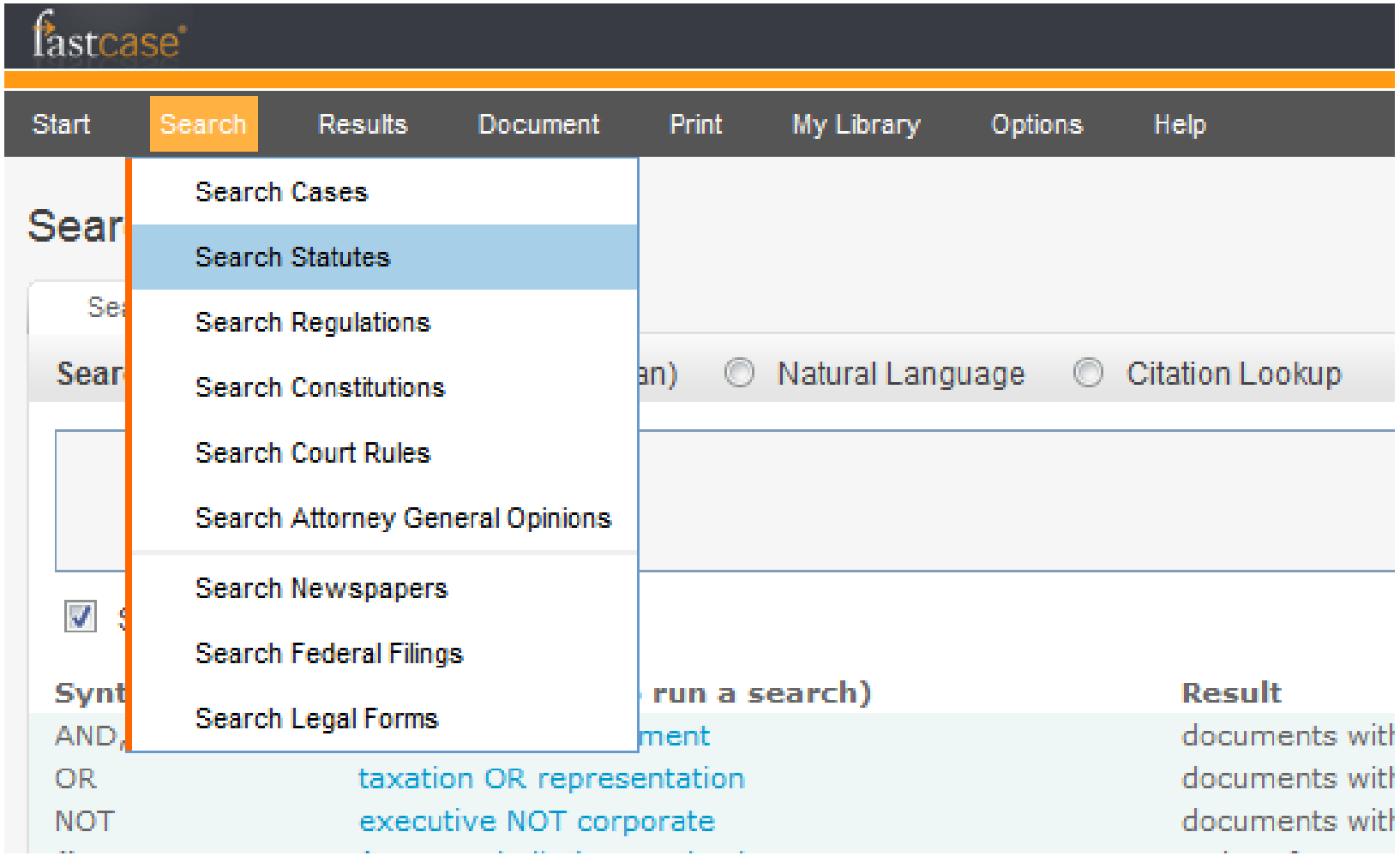

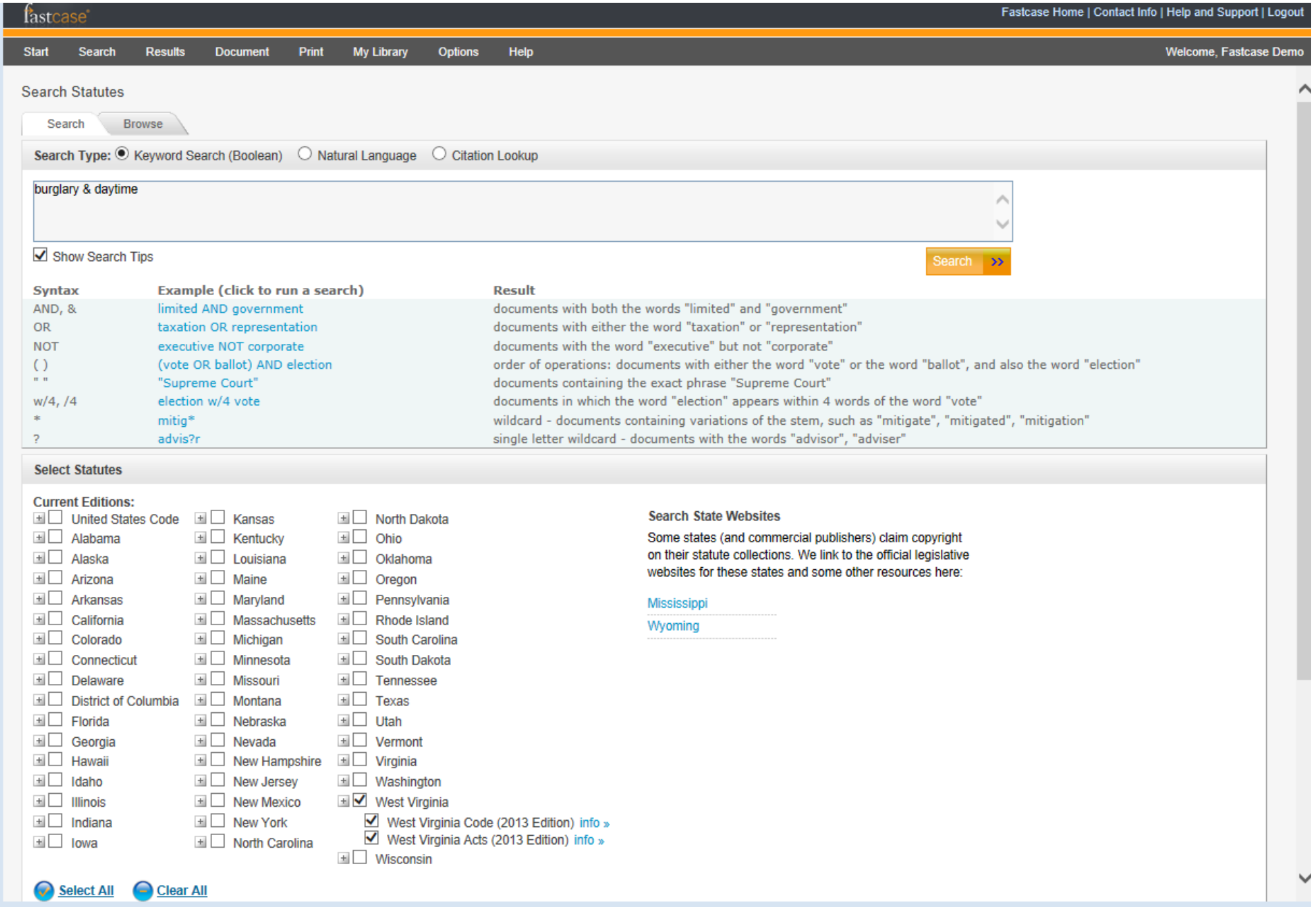
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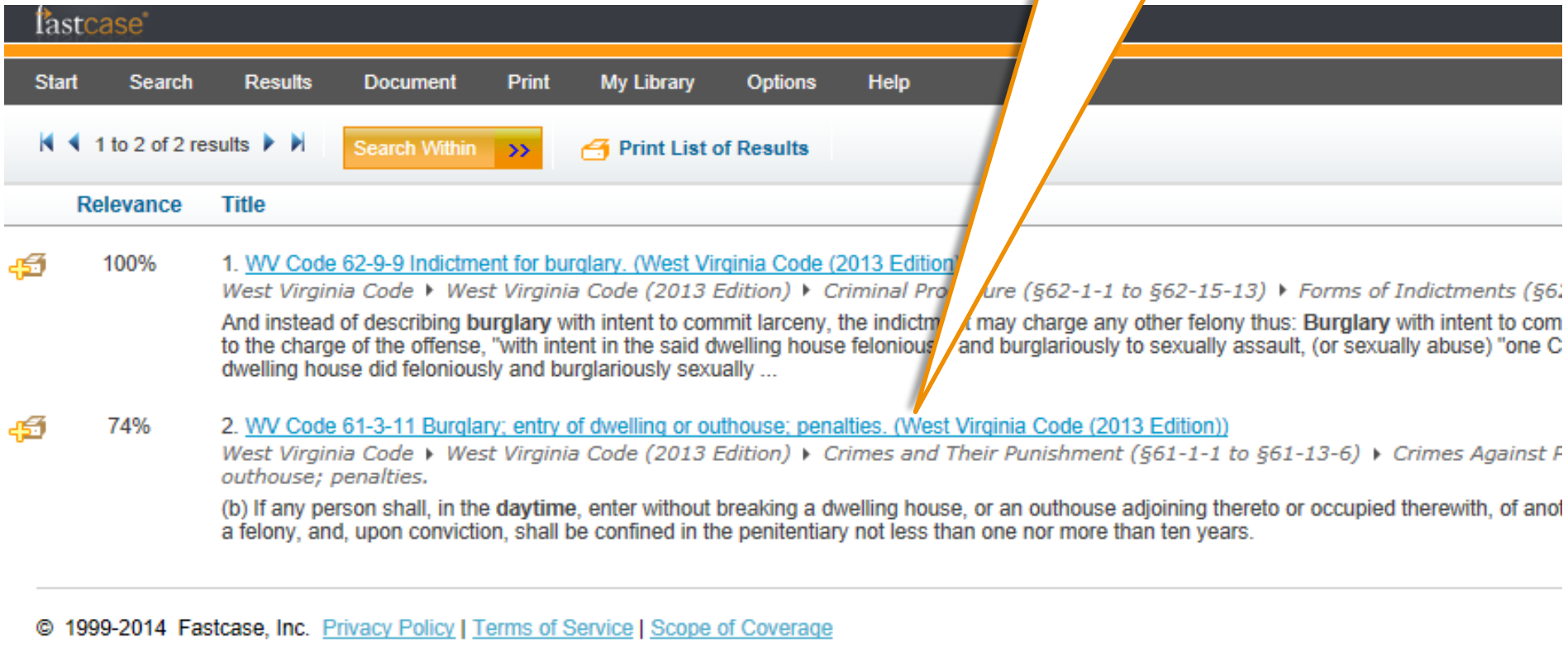

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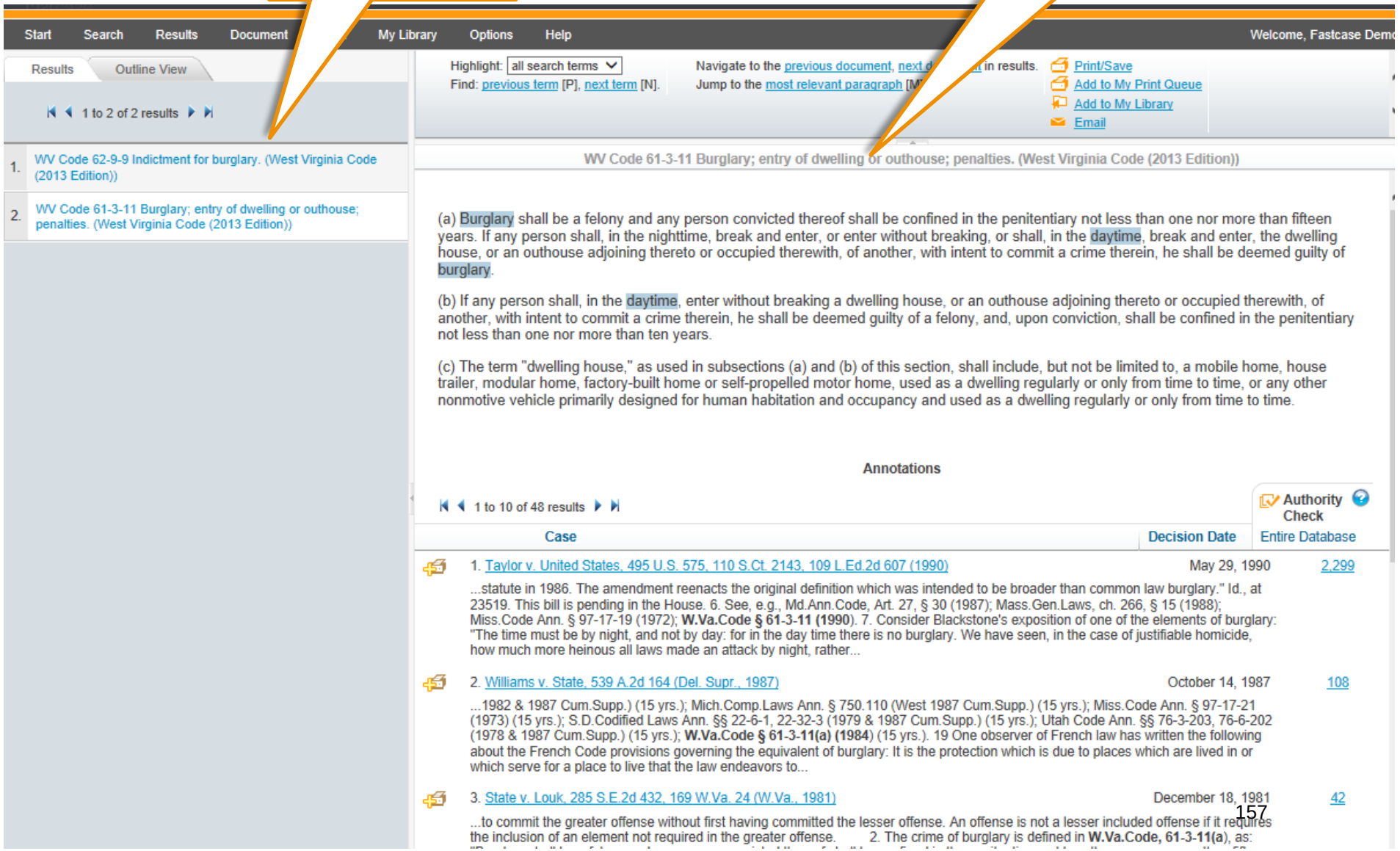

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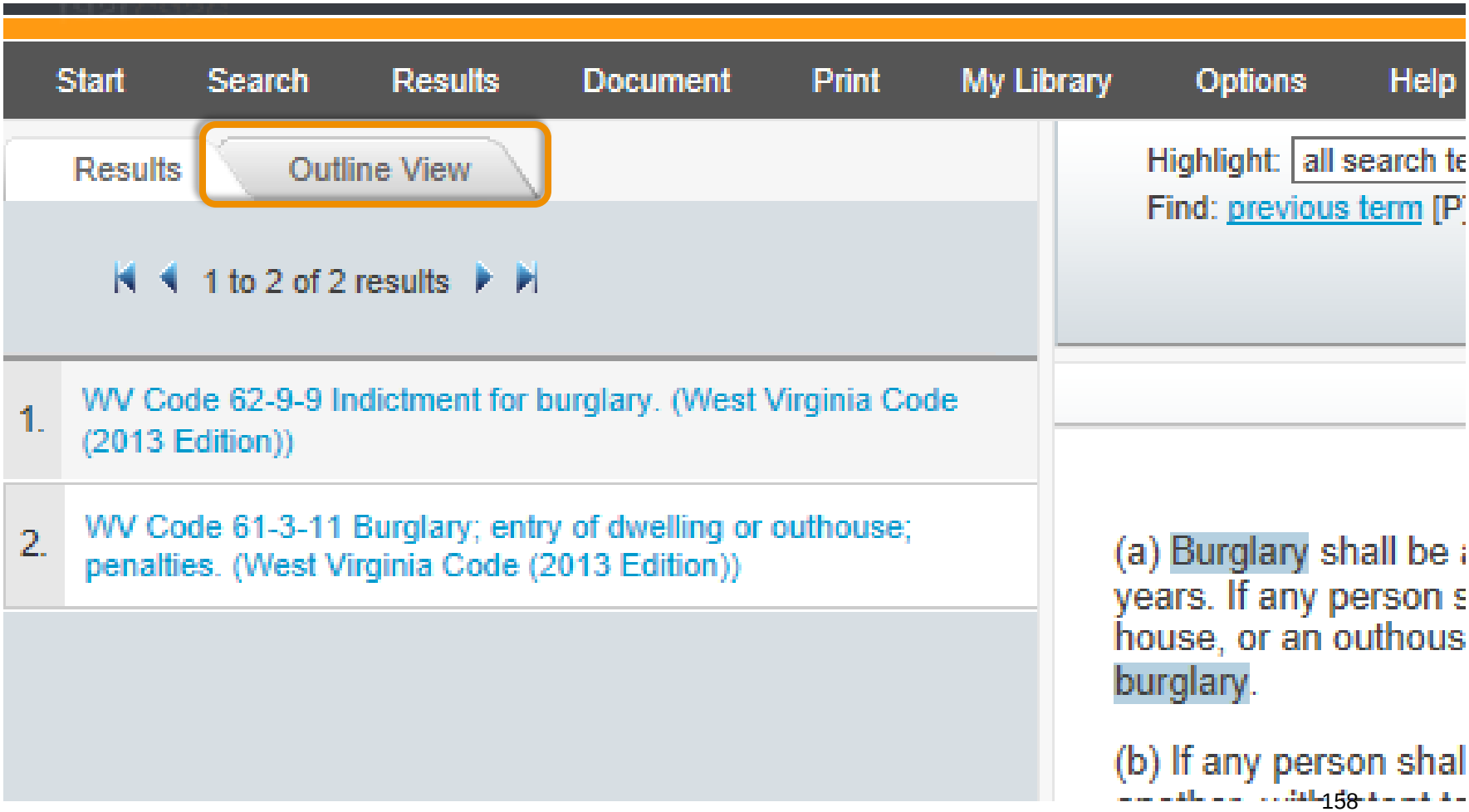

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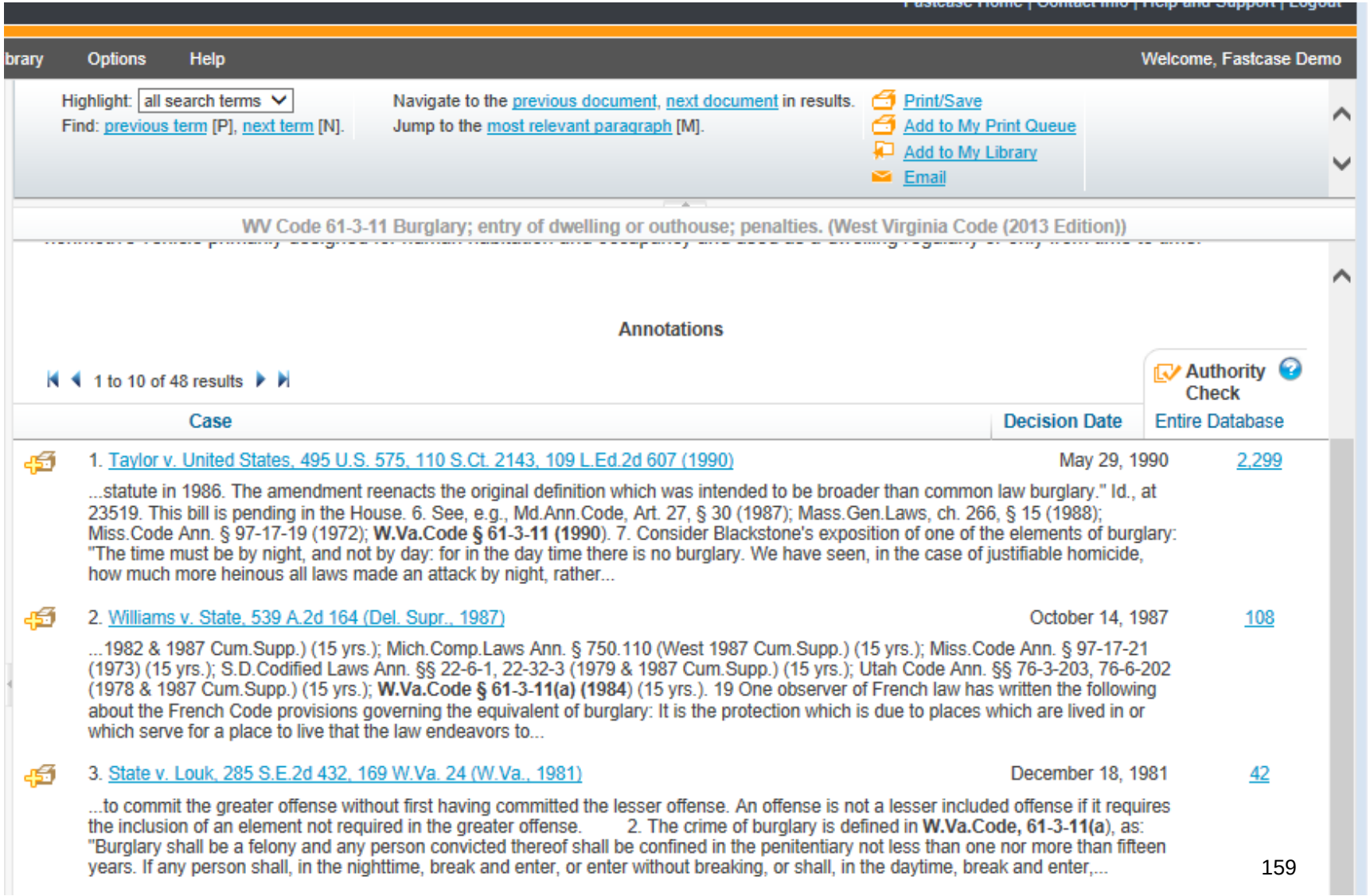

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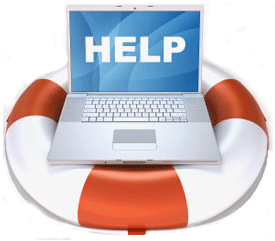

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CHRIS L. NEWBOLD is Executive Vice President of ALPS Corporation and its primary subsidiary, the ALPS Property & Casualty Company. ALPS is recognized nationally as one of the largest risk retention groups, providing lawyers' professional liability insurance to over 13,500 lawyers in 24 jurisdictions as well as other products and services of value to the legal community. In his role as Vice President, Mr. Newbold is responsible for strategic and operational planning, enterprise risk management, bar association relations and business diversification opportunities.

Internally at ALPS, Mr. Newbold has developed leading conceptual models for strategic planning which have driven proven results, ensured board and staff accountability, focused organizational energies, embraced change, integrated budgeting and human resource functions into the process and enabled a common vision for principal stakeholders. Externally, Mr. Newbold is a nationally-recognized strategic planning facilitator in the bar association and bar foundations worlds, conducts risk management seminars on best practices in law practice management and recently expanded his practice to include captive insurance associations and other insurance-related operations.

Mr. Newbold received his law degree from the University of Montana School of Law in 2001, and holds a bachelor's degree from the University of Wisconsin-Madison. Following his graduation from law school, he served one year as a law clerk for the Honorable Terry N. Trieweiler of the Montana Supreme Court. He began his career at ALPS as President and Principal Consultant of ALPS Foundation Services, a non-profit fundraising and philanthropic management consulting firm.

Chris is currently a member of the State Bar of Montana, the American Bar Association and is involved in a variety of charitable activities. Mr. Newbold and his wife Jennifer, a University of Montana graduate and attorney, have a 7-year old son, Cameron, a 6-year old daughter, Mallory and a two-year old daughter, Lauren. Chris and his family reside in Missoula, Montana.

This program is designed to be interactive. After viewing a series of video vignettes, the audience along with the presenters will participate in a discussion of a series of questions that address the issues raised in each vignette.

Our goals are to create an awareness of learning opportunities and to discuss possible solutions to the issues raised. We intend to emphasize that attorneys should take time to reflect upon ethical issues and professionalism on a more frequent basis. Ultimately, we want the attendees to leave the program with a greater sensitivity of the many ethical issues in play each day, better prepared to view these issues as learning opportunities, and more willing to take advantage of these opportunities so that the issues are responsibly addressed and resolved.

The presentation contains a description of each vignette before the vignette starts. The characters and events in this program are fictional. Any likeness to real individuals or events is unintended and coincidental.

Note: Although the vignettes may be presented as taking place outside of your jurisdiction, please apply the Rules of Professional Conduct and Ethical Opinions of your jurisdiction to the analysis of the issues presented. Selected excerpts of the relevant rules of your jurisdiction are included with these materials.

Vignette One: "The Case of the Mangled Metadata"

(This vignette opens in the office of Natalie, a senior partner in a law firm, as she sits working at her desk.)

Phil: Hey Natalie.

Natalie: You're here awfully early.

Phil: Yeah, I'm preparing for a hearing today. I've got a serious problem with one of my employment cases.

Natalie: Which one?

Phil: The Lauren Adams case.

Natalie: Is that the one against Genfirst?

Phil: Right.

Natalie: What's going on? You've faced off against them before.

Phil: That's part of the problem. This thing has gotten really acrimonious. We're a couple of weeks away from trial and they've just filed a motion to disqualify me as counsel.

Natalie: You're kidding. Is this the same case where they accused you and the client of destroying evidence?

Phil: Yeah, that's part of the basis for the motion to disqualify. I'd gotten a pretty good settlement against Genfirst in that earlier case, so Lauren Adams called me because she thought I might be able to help her, too. Genfirst told her that they were going to let her go. They said budget cuts and she was pretty upset…

… so before she left the company she copied some information.

(The scene now shifts back in time to a conference room where Phil was talking with his client, Laura Adams.)

Lauren: So you can imagine how upset I was and I did something that I didn't really think was a big deal. Before I turned my laptop in, I downloaded some company files onto a couple of my own thumb drives. And now they're suing me.

Phil: For stealing trade secrets. 1300 pages of confidential and proprietary information and they're demanding immediate return of the files.

Well, we'll need to explore whether the information you downloaded truly qualifies as "trade secret" information. How did they find out you'd taken the documents?

Lauren: I don't know, I guess I must have left tracks somehow.

Phil: Do you still have the thumb drives?

Lauren: Yes, I do.

Phil: And their files are still on them?

Lauren: Yes.

Phil: Why did you want to take the files in the first place?

Lauren: Because I wanted to use the information to start my own company. I helped create a lot of the protocol information I downloaded. They shouldn't be able to stop me from using my knowledge to start a new business. That's unfair.

Phil: Did you sign a non-compete or a confidentiality agreement when they first hired you?

Lauren: I think I signed a confidentiality agreement, but I thought that was to prevent me from sharing information while I was there at the company. This isn't sharing information. Besides, this is small potatoes compared to all the other work they do.

Phil: Well, Lauren, this is a very serious lawsuit. But I've faced off against Genfirst in the past. I'm going to need a little time to look at the information you downloaded and any documents they claim support their lawsuit.

Did you make any other copies of these files?

Lauren: Well, yeah.

Phil: Then you've gotta delete them. And we have to give these thumb drives back to Genfirst.

Lauren: Well, they're my thumb drives, not the company's. Why should they get them?

Phil: Because they contain the first copies you made of the proprietary files. They want them back and they want any other copies that might have been made to be destroyed.

Lauren: Okay, but I've got some of my own proprietary stuff for my new business on those drives. I can't give those files to Genfirst.

Phil: Well then, I guess what I'll have to do is consult with an IT expert I know about separating out the files. If he can do it without destroying any information from the files, Genfirst will get their files back, and you can get your personal files back, and then I'll have the IT guy delete everything from the thumb drives. That way we can show Genfirst that we've prevented any improper use of company information.

Lauren: Okay, so long as they don't get my new information.

(We shift back to Natalie's office where Phil continues with his story.)

Phil: So I went to Bob Nelson, this IT expert, and I told him the situation, and I asked him if separating the files would preserve all the information and he said yes. He said he would put Lauren's files on one set of CDs and Genfirst's files on another set of CDs, and we could then give each party their own set. I even let Genfirst's counsel know that's what

we planned to do, and there was no objection. So Bob separated the files and copied them onto separate CDs and deleted all the data on the thumb drives.

Natalie: And if you'd kept them intact that would just invite additional claims from Genfirst for failing to heed their demand to return the files.

Phil: Exactly, and if I'd turned over the original thumb drives to Genfirst, I'd have exposed Lauren's personal and proprietary information to her adversary.

Natalie: It sounds like what you did was appropriate under the circumstances. And you told them what you were doing?

Phil: Yes. Bob deleted the data off the thumb drives. And I delivered Genfirst's set of CDs to their lawyer along with affidavits stating that my IT expert had permanently deleted all the files from the two thumb drives, and that any other copies of those files had also been permanently destroyed. And they raised no objection -- at that time.

Natalie: No, but they did raise the stakes, as I recall.

Phil: Yeah. They decided to go after a half a million in damages and more than a million in attorney's fees. So we filed a $10 million dollar counterclaim. Then, six months after I'd given them back their files, they petitioned a judge to sanction me for spoliation of evidence.

Natalie: That was the metadata issue, right?

Phil: Right. They claimed that deleting the files from the original thumb drives destroyed important metadata that was evidence that revealed the exact date and time that Lauren downloaded each file from her company laptop. And that metadata wasn't transferred to the CD copies we'd given them.

Natalie: And the reason they waited six months was?

Phil: Who knows? I think the onus was on them to instruct me on how to preserve their own data. And I think they gave up their right to object by waiting so long. I told them everything I was doing right from the beginning.

Natalie: But the judge hasn't ruled on the sanctions motion, has he?

Phil: No, he decided to wait until the trial to make that decision. That was seven months ago, and the trial is coming up in about three weeks, which leads me to the bigger problem I was talking about.

Natalie: The motion to disqualify you.

Phil: Right. Genfirst wants to disqualify me because they want to call me as a witness at trial!

Natalie: A witness?

Phil: Yes! They're saying my version of how the metadata was destroyed differs from Lauren's version, and they want to call me to impeach her testimony, which creates a conflict…

Natalie: …and requires your disqualification, at least according to Genfirst.

Phil: That's it.

Natalie: Does her version of events really differ from yours?

Phil: I think this is more about Genfirst's lawyers not wanting to try another case with me as opposing counsel. I took 'em to the cleaners in the earlier case.

Natalie: So they're taking a scorched earth approach.

Phil: Yeah. But I've got a hearing in front of the judge today at 11. And I'm going to argue that I'm not a necessary witness. I mean, they can establish any key facts about this metadata with other witnesses, they don't need me.

Natalie: If you get disqualified, that's going to be a real hardship on your client.

Phil: I'm going to argue that, too. Trial is only a couple of weeks away.

Natalie: Well, good luck. Keep me posted on how it goes.

(The scene now shifts to the courthouse parking lot where Phil is about to place a call to Natalie.)

Natalie: This is Natalie.

Phil: Hey, Natalie, it's Phil.

Natalie: How'd it go?

Phil: Not well. I'm out.

Natalie: With the trial only two weeks away!

Phil: Three weeks, yeah, I know, but the judge ruled I have a conflict with Lauren's version of events.

Natalie: Really?

Phil: Yeah, and he and I disagreed about whether I was a necessary witness. He didn't rule on the spoliation motion. That's still being carried over to trial.

Natalie: What about your client? Doesn't this cause your client significant prejudice?

Phil: He delayed the trial so Lauren can get new counsel.

Natalie: Well, at least you can help them get ready.

Phil: No, I can't. The judge ordered me to have only limited contact with Lauren and her new lawyer, nothing substantive.

Natalie: Wow. So what now?

Phil: I'm not sure. I guess I need to prepare to be a witness. Make some notes about what happened today.

Natalie: Have you called our malpractice carrier?

Phil: Good point, I haven't yet, but I will when I get back to the office, although I'm not sure this'll be covered.

Natalie: Because it's for sanctions.

Phil: Yeah, we'll have to see. I may need counsel myself. I'll let you know what I find out once I get to the office and call them.

Natalie: Please do.

Questions to Consider:

A) What happens when a lawyer becomes a potential witness regarding issues surrounding how evidence was handled? Is this an actual conflict of interest? If so, does the conflict truly rise to the level of requiring disqualification? What might have the lawyer done here to prevent the problem from ever arising?

B) When a lawyer has a conflict and must withdraw or is ordered by a court to withdraw, can the lawyer continue to provide any information or assistance to new counsel? If so, under what circumstances and are there any boundaries here?

C) Many attorneys might look at how the evidence was handled and conclude that the steps the attorney took in this situation were prudent and reasonable. Would you agree? After all, the IT expert gave his assurance that the data would be preserved. Can assurances like that be relied upon or is more required of an attorney? What are a lawyer's obligations when handling evidence? Did this lawyer meet those obligations?

D) We get a sense that describing this litigation as acrimonious may in fact be an understatement. Scorched earth tactics can lead to all kinds of professionalism concerns. Are there any parameters around scorched earth tactics? What are they; and if there aren't, should there be? Do such tactics really benefit the client? Regardless of your position, defend it.

E) Would you report this situation to your malpractice carrier? Would there be coverage for sanctions if the court awards any? If the judge decides to issue an instruction to the jury on spoliation of evidence, that could have a negative impact on the client's case. If the client asserts a malpractice claim against the lawyer over how the evidence was handled as a result of the fallout of the jury instruction, would your malpractice policy cover that?

Reference Points for these Questions:

Rule 1.1 Competence
Rule 1.3 Diligence
Rule 1.4 Communication
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: General Rules
Rule 1.15 Safekeeping Property

Rule 1.16 Declining or Terminating Representation
Rule 3.1 Meritorious Claims and Contentions
Rule 3.4 Fairness to Opposing Party and Counsel
Rule 3.7 Lawyer as Witness

Vignette Two: "Where is the Line?"

(This vignette opens in the office of Christine Thomas who is in a meeting with Jane, her bookkeeper.)

Christine: Overall the numbers look good this month. The accounts receivable aging report keeps getting better and better. I love it, although it looks like I'll have to check back in with Mr. Daniels. Is he still ignoring your messages?

Jane: Yes, and he hasn't made any further payments like he promised.

Christine: Hmm. I think I have an appointment with him next Thursday. We'll have a little chat. If this keeps up, I may have to tell him I can't continue to handle his divorce.

Okay, what else do we need to talk about? I've gotta leave for the airport soon.

Jane: Well, you know the Stevens have been disputing their bill. Plus I just received notice about a $3500 chargeback on their credit card payment, along with the fee and that leaves us with a shortfall in the trust account…

Christine: …because we withdrew some funds a few weeks ago. How much are we down?

Jane: Just over $1700.

Christine: Okay, move $1700 from the savings account and add the fee for the chargeback to the Stevens' outstanding balance. I may end up writing that off but I want all the room for negotiation that I can get.

Jane: I'll take care of it right away. There's another issue I'm worried about even more. Did you hear about what happened over at Downing & Jacobson?

Christie: No.

Jane: Well, a friend of mine over there called me on the QT and told me that their accounting department got hacked with a virus or something, and apparently it captured their bank log-in credentials and now there's more than $52,000 missing from several accounts.

Christine: Oh, no.

Jane: Oh, yeah. They've had to shut down their network till they figure out what happened. My friend can't sleep worrying about it and she says everyone's afraid about what might happen.

Christine: Wow. I was just talking to Don Jacobson yesterday. I wondered why he seemed so distracted.

Jane: Christine, what if something like this had happened to us? I mean, you hear about this kind of thing in the news all the time, but they're a big firm with good security systems.

Christine: It does sound scary.

Jane: Do you think there's more we could do to protect ourselves from something like this? My friend said something about breach notification laws. I've never even heard of that.

Christine: I have, but that's about it. Let me look into it and see what I can learn. I think we're okay because our IT guy assures me that we've got a good firewall and good Internet security software. We run a pretty tight ship here.

Jane: Well, Don's firm did, too.

Christine: Point taken. Listen, one more thing. We just talked about the success we've had on the aging receivables, right?

Jane: Yeah ...

Christine: Well, I think that's directly tied to our accepting credit cards. I think it's a win all around. We spend less time on collections and we pass along the service fees so it costs us nothing.

Jane: I agree. We should have started years ago.

Christine: So I'd like to start advertising the fact that we offer that. I want more of our clients to take advantage of the option. Can you put together a few ideas and meet with our marketing rep about it? I want her to take a look at updating our whole ad campaign statewide.

Jane: Okay. You still want to continue with using the local numbers statewide that all ring through to this location?

Christine: Absolutely. We've gotten a lot of business with that strategy.

Jane: I'll see if I can have something for you early next week.

Christine: Great.

(A short time later Christine's paralegal, Suzanne, steps in with a list of last minute concerns.)

Suzanne: Christine, I know you don't have time for this right now, but I thought you ought to see this.

Christine: You've gotta be kidding me, an advertising violation? I know who made this complaint.

Suzanne: Who?

Christine: Mike Kingston. He's just jealous of the following I have on LinkedIn and Twitter. He's been a follower himself since I started and the other day he sent me an email. Said he was gonna file a complaint if I didn't change my ways.

Suzanne: Why now? You've been doing this quite a while, and you take all the right security and confidentiality precautions.

Christine: I think it was when I got my 500th follower. That did it for him, I guess.

Suzanne: Well, I don't know what his problem is. He should try it himself. You've certainly gotten additional business from it. I mean, when you posted "Slam dunk on custody, tell your friends to check out my website," we got a lot of hits, and calls right after that.

Christine: Same thing happened when I posted "Another win today and my client couldn't be happier, who's next?" And when I posted that I'd just published that article on protecting your wealth, and said let me know if you'd like a copy, how many downloads did we get?

Suzanne: I think fifty or sixty. And you got a dozen calls about trusts after you posted "Trust documents upheld, call me for a free consultation."

Christine: I know, every business in the country does that kind of stuff! It should be fine as far as the ethics rules are concerned.

Suzanne: I guess Mike believes otherwise.

Christine: He just doesn't understand how much work it took me to get where I am. I have a right to toot my own horn, don't I?

Suzanne: I know. What can I do?

Christine: I'll just have to deal with it when I get back.

Suzanne: Also, I just wanted to let you know I'm finished with the draft property settlement documents you were working on for Judge Padden.

Christine: I yeah, I was going to ask you about that. Forward 'em to me and I'll review 'em and email them to him as soon as I get through airport security.

Suzanne: Okay. There's something else, the Phillips matter.

Christine: What? I think I'm about to lose it with this schedule of mine, definitely catching up with me. I'm gonna get a triple espresso at the airport. Now, what are we talking about?

Suzanne: You drafted an estate plan for the Phillips years ago ...

Christine: Okay?

Suzanne: ... and when Mr. Phillips got really sick you had several conversations with the children ...

Christine: Right, he passed on several months ago. You're talking about the suit the children have brought against Williamson, the PR of the estate.

Suzanne: Yes, well not only are they upset with Williamson, they're upset with you, too. They don't want you to represent Williamson against them. And they've filed a disqualification motion.

Christine: Oh, really?

Suzanne: Yeah. They say all those conversations you had with them when their father was dying created an attorney/client relationship, and now they say you have a conflict of interest that requires…

Christine: …disqualification.

This is just one of those days, I guess. They should know better. They know I never sent any of them a bill for my services. I always billed the estate. They knew I was their father's attorney, not theirs!

Suzanne: I know, it's crazy. And there's one more thing that just came up.

Christine: What? Make it fast.

Suzanne: Remember that email we sent out to the beneficiaries of the Johnson estate? Well, Bob Johnson called and said one of the email addresses was incorrect. But nothing bounced back, so it looks like someone got something they shouldn't have.

Christine: Wait, which email? What was in it?

Suzanne: It was the email we sent to all the beneficiaries asking for confirmation of the information we have on file: names, addresses, social security numbers, you know.

Christine: And it went where?

Suzanne: That's just it, I'm not sure where it went, or who got it.

Christine: We sent somebody's personal information including their social security number to an UNKNOWN PERSON?

Suzanne: That's pretty much it. What do you want me to do?

Questions to Consider:

A) We saw in the opening scene that Ms. Thomas, a solo attorney, is practicing under the name of Thomas & Thomas, PC. Is this ethical? Under what circumstances? If it is ethical under certain circumstances, how should Ms. Thomas handle her letterhead? What about her statewide advertising campaign. Can a solo attorney advertise statewide, listing local phone numbers that ring back to the only true office? Assume that she has the necessary technology in place to provide the services she claims she can provide on a statewide basis. Does that even matter?

B) Consider the statements Ms. Thomas posted to her profile page on LinkedIn or perhaps even tweeted out. Is she right? Can she make these kinds of statements or has "the other lawyer" voiced a legitimate concern? Do our advertising rules even apply to this setting? If so, what is the impact of our rules on lawyers participating in the social media space? Consider the likes of Facebook, LinkedIn, Twitter, and blogs. What if clients or "friends" post comments or reply with accolades along the lines of "Chris is the best divorce lawyer in the state" or "Chris delivered on every promise she made. If you want to win, there's really on one choice in this town, it's Chris?"

C) There are several email issues raised in this vignette. The first concerns the sending of draft documents that contain personally identifying information that could be useful to an identity thief should that information fall into the wrong hands. What are our ethical obligations when it comes to the sending of attachments that contain client confidences via email? Should the attachment ever be encrypted? Does the fact that the intended recipient is a judge on the state Supreme Court make any difference? To further compound the problem, Ms. Thomas is planning on sending this email from the airport apparently using an open unsecure public Wi-Fi network. Is this ethically permissible? Let's assume that Ms. Thomas has not discussed these issues with her client, the judge. Should she have? After all, whose confidences are they? Asked another way, do we need informed consent before emailing client confidences in an insecure manner? Thinking about the email sent to the wrong address, what now? What steps would you advise she take or is this misdirected email a non-issue?

D) How are lawyers to properly handle credit card chargebacks? Can one simply move money from another account to cover the shortfall? What if money isn't available to cover the shortfall? Can the associated fees of a chargeback be passed along to the client? How about the transaction fees that you incur, may these be passed along to your clients? May a lawyer advertise that the firm accepts credit cards? If so, may a lawyer go even further and encourage a client to use their credit card as the preferred method of payment? How are unearned fees placed on a credit card to be handled? If unearned fees charged to a credit card must be refunded, how is this properly handled?

E) Who is Ms. Thomas's client in the Phillips matter? What additional information would you want to know that would help you to decide? Might the children be right about the presence of a conflict? If you see no conflict, support your position. If you see a conflict, again, support your position. To those of you who feel that a conflict does exist here, would this conflict be waivable? If so, how might Ms. Thomas have gone about having the conflict waived? If not, why not? What steps could Ms. Thomas have taken to prevent this whole situation from ever evolving?

F) The final issue raised in this vignette really focuses on cyber liability. Start with the basic issue of taking steps to prevent someone from hacking into your network in some fashion. Is there an ethical obligation to take steps to prevent theft of data? If a lawyer purchases a laptop, a tablet, a smartphone, or wants to use Wi-Fi or Dropbox does this decision mandate the lawyer have some basic understanding as to how to responsibly use the device or service? We learn that a firm has suffered a breach. If you were in Don's shoes, how would you handle the situation?

What are your obligations and responsibilities? In terms of prevention, is Chris right? Can she relax knowing that her IT consultant has taken of things?

Relevant Rules to Consider

Rule 1.1 Competence
Rule 1.3 Diligence
Rule 1.4 Communication
Rule 1.5 Fees
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: Current Clients
Rule 1.15 Safekeeping Property
Rule 7.1 Communications Concerning a Lawyer's Services
Rule 7.2 Advertising
Rule 7.3 Direct Contact with Prospective Clients
Rule 7.5 Firm Names and Letterheads

Selected Excerpts from
The West Virginia Rules of Professional Conduct

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services, and;

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations;

(2) the client is advised of and does not object to the participation of all the lawyer involved; and

(3) the total fee is reasonable.

(4) The requirements of "services performed" and "joint responsibility" shall be satisfied in contingent fee cases when: (1) a lawyer who is regularly engaged in the full time practice of law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred; (2) the client is advised that the lawyer who is more experienced in the area or field of law being referred will be primarily responsible for the litigation and that there will be a division of fees; and (3) the total fee charged the client is reasonable and in keeping with what is usually charged for such matters in the community.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client form committing a criminal act; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer representation of the client.

Rule 1.7 Conflict of Interest: General Rules

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) IOLTA (Interest on Lawyers Trust Accounts). A lawyer who receives client funds that are nominal in amount or are expected to be held for a brief period shall establish and maintain a pooled, interest or dividend-bearing account for the deposit of such funds, at an eligible financial institution which carries federal deposition insurance, in compliance with the following provisions:

(1) The account shall include only such client funds that are so nominal in amount or are expected to be held for such a brief period of time such that the funds cannot earn income for the client in excess of the costs of securing that income. In determining whether a client's funds can earn income in excess of costs, the lawyer or law firm shall consider the following

factors:

(i) The amount of the funds to be deposited;

(ii) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(iii) The rates of interest or yield at financial institutions where the funds are to be deposited;

(iv) The cost of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

(v) The capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients;

(vi) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

(2) The lawyer shall review the account at reasonable intervals to determine whether circumstances warrant further action with respect to the funds of any client.

(3) Lawyers may only establish and maintain an IOLTA Trust Account at an eligible financial institution. To qualify as eligible, the financial institution must:

(i) be certified by the West Virginia State Bar to be in compliance with the Rule; and

(ii) be a federally-insured and state or federally-regulated financial institution authorized by federal or state law to do business in West Virginia, or an open-end investment company registered with the federal Securities and Exchange Commission and authorized by federal or state law to do business in West Virginia.

(4) Participation by banks, savings and loan associations, and investment companies in the IOLTA program is voluntary. An eligible financial institution that elects to offer and maintain IOLTA accounts shall meet the following requirements:

(i) The eligible financial institution shall pay no less on its IOLTA accounts than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts. Interest and dividends shall be calculated in accordance with the eligible institution's standard practices for non-IOLTA customers. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an eligible institution may consider, in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is an IOLTA account. Nothing in this rule shall preclude an eligible institution from paying a higher interest rate or dividend than

described above or electing to waive any fees and services charges on an IOLTA account.

(ii) An eligible institution may choose to pay the highest interest or dividend rate in (d)(4)(I), less allowable reasonable fees as set forth in (d)(4)(iv), if any, on an IOLTA account in lieu of establishing it as a higher rate product.

(iii) The IOLTA Trust Account shall be an interest or dividend-bearing account. Interest- or dividend-bearing account means: (a) an interest-bearing checking account; (b) a check account paying preferred interest rates, such as money market or indexed rates; (c) a government interest-bearing checking account such as accounts used for municipal deposits; (d) a business checking account with an automated investment sweep feature which is a daily (overnight) financial institution repurchase agreement or an open-end money market fund; or (e) any other suitable interest or dividend-bearing account offered by the institution to its non-IOLTA customers. A daily financial institution repurchase agreement must be fully collateralized by or invested in Securities and may be established only with an eligible institution that is well-capitalized or adequately capitalized as those terms are defined by applicable federal statutes and regulations. An open-end money market fund must be invested in U.S. Government Securities and must hold itself out as a money-market fund as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000. United States Government Securities are defined to include debt securities of Government Sponsored Enterprises, such as, but not limited to, debt securities of, or backed by, the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation.

(iv) Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest or dividends earned on an IOLTA account. Allowable reasonable fees are defined as per check charges, per deposit charges, a fee in lieu of minimum balances, sweep fees, FDIC insurance fees, and a reasonable IOLTA account administrative fee. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges shall be collected from the principal balance deposited in an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the IOLTA account, including bank overdraft fees and fees for check returns for insufficient funds. Fees and service charges in excess of the interest or dividends earned on one IOLTA account for any period shall not be taken from interest or dividends earned on any other IOLTA account or accounts or from the principal of any IOLTA account.

(v) As an alternative to the rates required under (d)(4)(I), an eligible institution may choose to pay on IOLTA accounts an amount equal to 65% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first calendar day of the month. The amount is net of all allowable reasonable fees under (d)(4)(iv). This initial benchmark rate of 65% of the Federal Funds Target Rate may be adjusted once a year by the West Virginia State Bar, upon 90 days' written notice to financial institutions participating in the IOLTA program at which time financial institutions may elect to pay the new benchmark amount or may choose among the other options

at (d)(4)(i).

(5) The lawyer shall direct the depository institution:

(i) To remit interest or dividends, on at least a quarterly basis, net of allowable reasonable service charges or fees, if any, to the West Virginia State Bar; and

(ii) To transmit with each remittance to the West Virginia State Bar, a statement in any form and through any manner of transmission approved by the State Bar showing the name of the lawyer or law firm on whose account the remittance is sent and the amount of the remittance attributable to each, the account number for each account, the rate and type of interest or dividend, the amount and type of allowable reasonable service charges or fees; and the average account balance for the reporting period; and

(iii) To transmit to the depositing lawyer or law firm a report in accordance with the institution's normal procedures for reporting to depositors.

(6) An attorney or the law firm with which the attorney is associated may be exempt from the requirements of this Rule if:

(i) the nature of the attorney's or law firm's practice is such that the attorney or law firm never receives client funds that would require a Trust Account;

(ii) the attorney is a full-time judge, government attorney, military attorney, or inactive attorney; or

(iii) The West Virginia State Bar's Board of Governors, having received a petition requesting an exemption, may exempt the attorney or law firm from participation in the program for a period of no more than 2 years when service charges on the attorney's or law firm's Trust Account equal or exceed any interest generated or when compliance with the Rule would create an undue hardship on the lawyer and would be extremely impractical.

(e) A lawyer may not be charged with any breach of the Rules of Professional Conduct or other ethical violation with regard to either the good faith determination of whether client funds are nominal in the amount or are expected to be held for a brief period or the failure to establish and maintain a pooled, interest or dividend-bearing, federally-insured depository account for the deposit of such funds in accordance with Rule 1.15(d).

(f) All interest transmitted to the West Virginia State Bar, shall be distributed by that entity as follows: (1) an annual fee not to exceed thirty thousand dollars shall be retained by the West Virginia State Bar, for administration of the fund, with a detailed annual accounting of services performed in consideration for such fee to be filed for public inspection with the Supreme Court of Appeals; (2) special grants not to exceed fifteen percent of the fund's annual receipts to WV CASA Network, coordinating agency for court-appointed special advocate programs, in the amount of 43.5 percent of special grant funds available; to the West Virginia Fund for Law in the Public Interest, Inc., in the amount of 19.3 percent of special grant funds available; to the Appalachian Center for Law and Public Service, in the amount of 7.72 percent of special grant funds available; to the Elder Law Program of the North Central West Virginia Legal Aid Society, Inc., in the amount of 24.125 percent of special grant funds available; and to the Child Law Services of Mercer County 5.355 percent of special grant funds available; and (3) Seventy-five percent (75%) of the remaining funds to Legal Aid of West

Virginia and twenty-five percent (25%) of the remaining funds to Mountain State Justice or such other method of distribution as may hereinafter be adopted by order of the Supreme Court of Appeals. Any funds distributed by the West Virginia State Bar, pursuant to this subdivision shall not be used by the recipient organization to support any lobbying activities.

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c)When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an

extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonable diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this rule; may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization; and may pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person or telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication and shall be maintained as required by Rule 7.2(b).

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Answer Set

Vignette One: "The Case of the Mangled Metadata"

A. Lawyer as a Witness: What happens when a lawyer becomes a potential witness regarding issues surrounding how evidence was handled? Is this an actual conflict of interest? If so, does the conflict truly rise to the level of requiring disqualification? What might have the lawyer done here to prevent the problem from ever arising?

Rule 3.7 Lawyer As a Witness. Rule 3.7(a) applies to Phil in this Vignette and states: "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client."

1. Analysis: In this scenario, it seems highly likely that Phil's testimony would be prejudicial to his client, Lauren, as it would impeach or contradict her testimony. This creates a potential conflict of interest for Phil. Moreover, **Rule 3.7(b)** provides: "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by **Rule 1.7** or **1.9**."

In other words, in this scenario Phil's conflict is imputed to the other lawyers in the firm and the entire firm is disqualified under **Rule 1.10,** which is the imputed disqualification rule. Normally, absent a conflict of interest, **Rule 3.7** only requires that the witness-lawyer withdraw as counsel of record in a case, but another lawyer in the same firm may take over as counsel in the case even if Phil has to testify as a witness.

Phil could have sequestered and preserved the electronically stored information (ESI) in the media given him by Lauren, given notice to opposing counsel, and have the court rule on how to handle the evidence. However, this would require admitting that Lauren stole property belonging to her former employer, unless Lauren can establish that she had lawful access to the information and is was not required to return any copy she had of the data as part of her confidentiality agreement with her former employer. Since this is a past crime, Phil cannot disclose this without Lauren's consent or unless legally compelled to do so. See **Rule 1.6.**

B. Can a Lawyer with a Conflict Assist New Counsel? When a lawyer has a conflict and must withdraw or is ordered by a court to withdraw, can the lawyer continue to provide any information or assistance to new counsel? If so, under what circumstances and are there any boundaries?

1. Generally, **Rule 3.7** operates to personally disqualify only the lawyer-witness. The lawyer-witness must step down as counsel in the litigation in which he or she must testify. Another lawyer in the same firm may assume the role as counsel for the client in the litigation. The lawyer-witness may work with and assist the client (or successor lawyer) behind the scene.

In this case, however, because there is also a conflict under **Rule 1.7** and the lawyer-witness and the firm must withdraw completely from the representation of the client. Neither may continue to represent Lauren Adams in any way, even behind the scene. Their duty, under **Rule 1.16,** to take reasonable steps for the continued protection of their former client's interests would include cooperating with her successor counsel in the matter in terms of turning over client file, etc. See Rule **1.16(d).**

2. **Consider:** The lawyer has been disqualified because of a conflict of interest and new counsel has been retained. Can the disqualified counsel consult with new counsel on issues related to local custom and practice, jurisdiction, jury selection and other strictly legal and procedural (i.e., non-evidentiary issues) that may be pertinent to the defense of the case but which do not implicate any attorney-client privileged communications or information? This would likely not be appropriate either. Though the information being provided may be limited to non-evidentiary issues it does not change the fact there is a conflict and the lawyer should entirely remove herself from the matter and let new counsel handle it.

C. Lawyer's Obligations when Handling Evidence. Many attorneys might look at how the evidence was handled and conclude that the steps the attorney took in this situation were prudent and reasonable. Would you agree? After all, the IT expert gave his assurance that the data would be preserved. Can assurances like that be relied upon or is more required of an attorney? What are a lawyer's obligations when handling evidence? Did this lawyer meet those obligations?

1. **Rule 3.4(a)** provides that a lawyer shall not: "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

2. **Analysis:** Genfirst might accuse Phil of having altered the ESI, but it seems clear on the facts that Phil was trying to preserve the evidence and relied upon the representations of an expert that no data would be altered or removed. For purposes of **Rule 3.4(a)**, the bar would have to prove by clear and convincing evidence that Phil acted willfully or intentionally, and not merely by inadvertence or mistake. Assuming Phil exercised reasonable care and diligence in the selection of the expert, Phil should be permitted to rely on an expert's assurances that the data will not be lost, altered or destroyed by any examination or testing of the evidence. Again, normally, a lawyer should reach out to the opposing side and reach an agreement regarding non-destructive testing or examination of relevant evidence instead of acting unilaterally. In this case, unfortunately, reaching out to opposing counsel would possibly substantiate Genfirst's accusation that Lauren Adams misappropriated information belonging to Genfirst and that Adams' possession and use of the information without authorization violated her confidentiality agreement and violated the criminal and civil law. Voluntary disclosure of such information would be detrimental and embarrassing to Lauren Adams. **Rule 1.6(a)**. Ultimately, however, Lauren Adams and her counsel would likely be compelled to reveal this information.

3. **Spoliation, What Is It:** Spoliation refers to the destruction (or material alteration) of evidence or to the failure to preserve property for another's use as evidence in litigation that is actually pending or reasonably foreseeable at the time of the destruction or alteration. If a party either fails to preserve or destroys potential evidence in foreseeable litigation, it risks sanctions for the spoliation of evidence. Several case examples follow:

- **Sanctions Granted for Social Media Spoliation: Gatto v. United Air Lines, Inc., 2013 WL 1285285 (D.N.J. Mar. 25, 2013).** "In this personal injury dispute, the defendants sought spoliation sanctions arising out of the plaintiff's destruction of relevant social media evidence. Despite complying with a court order mandating the plaintiff to change his Facebook password to allow the defendants counsel to access the plaintiff's social media account, the plaintiff deactivated his Facebook account after receiving an alert from Facebook that his account was being accessed by an unfamiliar IP address in New Jersey. The parties disputed over exactly how the information on the account was permanently deleted ("as noted by the defendants, the procedures for deactivating versus permanently deleting a Facebook account are not identical"), however, the court found it sufficient that any "scenario involves the withholding or destruction of evidence." The court stated that spoliation occurs wherever a party fails to "preserve property for another's use in pending or reasonably foreseeable litigation." Assessing whether an adverse inference instruction was appropriate, the court found three of the four factors clearly favored the defendants: the plaintiff was in control of the social media account, the evidence was potentially relevant to damages and it was reasonably foreseeable that the evidence would be discoverable. Regarding the second factor, which requires "actual suppression or withholding of evidence," the court found that plaintiffs deactivation of the account was sufficient. The court granted the defendants' request for an adverse inference instruction."

- **Court Determines Preservation Duty Does Not Extend to Possible Defense Theories.** *E.I. du Pont de Nemours and Co. v. Kolon Indus*., Inc., 2011 WL 1597528 (E.D. Va. Apr. 27, 2011. "In this trade secrets litigation, the defendant sought spoliation sanctions alleging the plaintiff deleted e-mail accounts and documents of four former employees containing evidence highly probative to its defenses. In light of a parallel criminal investigation into the former employee's alleged misappropriation, the government instructed the plaintiff to keep the matter confidential. Although the plaintiff's initial litigation hold issued to 18 potential custodians was twice expanded as the matter progressed, the defendant argued that critical information was lost due to the plaintiff's failure to incorporate employees likely to be relevant to the suit. Citing Victor Stanley, the court held that the scope of a party's duty to preserve is not absolute, but must only be reasonable and proportional to the circumstances. The court found this standard did not require the plaintiff to anticipate preserving evidence potentially relevant to possible defense theories fashioned by the defendant. Accordingly, the court determined the plaintiff's preservation efforts did not constitute the willful spoliation required to grant an adverse inference instruction and denied the motion."

- **Court Imposes Adverse Inference Sanction for Bad Faith Spoliation**. *E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc.,* 2011 WL 2966862 (E.D. Va. July 21, 2011). "In this ongoing trade secrets litigation, the plaintiff sought sanctions alleging the defendant spoliated evidence by deliberately destroying relevant ESI and engaged in prolonged efforts to conceal misconduct. Offering a "no harm, no foul" defense, the defendant claimed that because many of the deleted files were recovered, no spoliation occurred and the plaintiff suffered no prejudice. Finding the defendant did not engage in a widespread effort to delete relevant information, the court however determined the litigation hold notices were inadequate and, according to forensic analysis, several key employees intentionally and in bad faith destroyed approximately 12,836 e-mails and 4,975 electronic files." Declaring these deletions significant in substance and number, the court held that due to spoliation

by the defendant, the plaintiff manufacturer was entitled to sanctions consisting of: (1) attorneys' fees and costs incurred in moving for sanctions; and (2) an adverse inference instruction regarding spoliation. The court determined that the record established intentional and bad faith deletion of relevant files and e-mail by key employees of the defendant after suit was filed. Ultimately, jurors deliberated for two days before finding Kolon liable for wrongfully obtaining proprietary information about Kevlar from DuPont, resulting in a $919 million jury verdict for DuPont.

- **Federal Court Rules for Further Briefings on Reasonableness of Fee Request under State Law.** *E.I. DuPont de Nemours and Co. v. Kolon Industries, Inc.,* 2012 WL 6540072 (E.D. Va. Dec. 13, 2012). "In this trade secret litigation, plaintiff sought attorneys' fees in the total amount of nearly $19 million in fees related to defendant's spoliation of evidence and misappropriation of trade secrets pursuant to the Virginia Uniform Trade Secrets Act (VUTSA), and over $10 million in non-taxable costs pursuant to the court's inherent authority under 28 U.S.C. 1927. VUTSA provides that "[i]f the court determines that . . . (ii) willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party." Following two years of discovery and motions practice, a jury found that the defendant had willfully and maliciously misappropriated and used 149 of the plaintiff's trade secrets, which the court in this case recognized. The court thus moved on to address the reasonableness, under Virginia law, of the plaintiff's request for fees related to defendant's spoliation and misappropriation of trade secrets, ruling that the court's inherent federal authority did not overcome the assessment of reasonableness under state law. In the end, the court stated that further briefing is required to determine reasonableness of the plaintiff's fee request, and denied the award of non-taxable costs based on lack of support for that award under federal or state law."

  *Summaries for all of the above cases were provided by the Ediscovery blog By Kroll Ontrack. This is an excellent resource for e-discovery information and can be found at: http://www.krollontrack.com/resource-library/case-law/?caseid=26491

- In the "slip and fall" case of *Aaron v. Kroger L.P.*, 2011 U.S. Dist. LEXIS 111004 (E.D. Va. Sept. 27, 2011)(Norfolk), the Court held that "Kroger was on notice of Plaintiff's request that the evidence be preserved. Kroger also knew or should have known that the security video footage — whether or not it showed Plaintiff's actual fall — might later prove relevant, such that preserving the tapes was clearly the more prudent course of action. Because this Court finds that Kroger willfully and deliberately destroyed the video footage from the day of the incident in question, Plaintiff's request for an adverse inference instruction is granted."

4. **Culpable State of Mind.** "Courts differ on the state of mind requirements needed to issue sanctions on a charge of spoliation. To make a finding of spoliation in federal court, a court must be satisfied that (1) the party alleged to have spoliated evidence had a duty to preserve the evidence; and (2) the party then breached the duty through the destruction or alteration of the evidence. Some courts add a third requirement that the moving party must show the evidence destroyed was relevant. *Centrifugal Force, Inc*. (S.D.N.Y. May 11, 2011). "In order to demonstrate prejudice, the party making the spoliation motion must demonstrate that the destroyed evidence would have been relevant to the pending litigation. *Byrnie v. Town of Cromwell*, 243 F.3d 93, 108 (2d Cir. 2001). Once a court determines the duty was breached, any level of fault, whether it is bad faith, willfulness,

gross negligence, or ordinary negligence, suffices to support a finding of spoliation. In other words it does not matter whether the evidence is lost or destroyed inadvertently, for reasons unrelated to the litigation, or from intentional acts, calculated to prevent the other party from accessing the evidence. Typically, the court does consider culpability when deciding on the sanction to be imposed, and for the most sever sanction of dismissal a showing of willful intent is necessary in many jurisdictions.

5. **Imposition of Sanctions:** Following a finding of spoliation, the court may impose sanctions. Courts have broad discretion to choose an appropriate sanction, but the sanction typically will be crafted to (1) "level the evidentiary playing field" and prevent the spoliating party from profiting from its actions; and (2) sanction (punish/deter) the improper conduct. When assessing what sanction to impose, courts consider the degree of culpability and the extent of the prejudice, if any. Generally, entry of default judgment, dismissal, or other similar sanction, is justified only in circumstances of bad faith or other like action, and courts impose sanctions that dispose of a case only in the most egregious circumstances. However, bad faith conduct by a one party may not be needed to justify dismissal if the spoliation effectively renders the other party unable to prosecute or defend its case.

   Note: The United States Court of Appeals for the Fourth Circuit has prescribed the following approach for district courts considering dismissal as a sanction for a given instance of spoliation: dismissal is appropriate only if either (1) the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.

   *Information in sections 4-5 above was provided in the article "Spoliation of Evidence" by Robert Chappell, III and Erin E. Kessel, both of the firm Spotts Fain in Richmond Virginia (January 2, 2012).

6. **Litigation Holds**: Counsel's duties in connection with litigation holds:

   - First, counsel should not only issue the initial litigation hold when litigation becomes reasonably likely, but should also reissue litigation hold letters periodically to remind current employees and educate new employees about the litigation hold;

   - Second, counsel should communicate directly with the "key players," and not simply act through management; and

   - Third, counsel should instruct all employees to provide electronic copies of relevant active files and make sure that all backup media is identified and stored in a safe location.

     Zubulake v. UBS Warburg LLC (Zubulake V), 229 F.R.D. 422 (S.D.N.Y. 2004).

7. **Development of a Litigation Hold Policy.** Lawyers counseling business entities should provide information on developing a litigation hold plan. See the Sedona Conference Commentary on Legal Holds: The Trigger and the Process (WG1) 8 (2007), available at http://www.thesedonaconference.org for further assistance.

8. **Third Parties and Vendors:** In considering what evidence must be preserved in connection with a litigation hold, it is important to not overlook evidence that is held in the custody of third parties. In fact, Fed. R. Civ. P. 34(a)(1) requires production of relevant evidence if it is within the responding party's "possession, custody, or control." This rule,

therefore, expressly requires parties to look beyond their own four walls and preserve information they control in the hands of third parties. Make sure that litigation hold notices go out to third parties who hold evidence under the control of the party. *See, e.g., In re NTL, Inc. Sec. Litig*., 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (preservation required where parties had legal right and practical ability to obtain documents from the third party, and "therefore had the necessary 'control' of those documents to be able to preserve and produce them in this litigation").

9. **Litigation Hold Letter:** Documenting the institution of the litigation hold is the best way to prove that the lawyer discharged the obligation to preserve evidence even if the client did not comply. The issuance of written litigation hold letters has become the standard-of-care way to establish compliance with evidence preservation obligations and be aware that the message coming out of the federal courts is that the failure to issue a litigation hold letter is gross negligence. Courts want to see a traceable, auditable process that they can look at and easily follow. A consistently applied hold is defensible. A good resource to assist with this and that can be found on line is *The Perfect Preservation Letter,* by Craig Ball (2006) at: http://www.craigball.com/perfect%20preservation%20letter.pdf.

10. **Ramifications of Spoliation:** The court may impose sanctions that can be an award of attorney's fees and costs, an adverse inference instruction, a shifting of the burden of proof to the offending party, and default judgments or dismissals with prejudice against the offending party. Regarding a motion for sanctions for spoliation, courts will carefully review the totality of the circumstance before determining what, if any, sanctions are appropriate.

Tips for the Litigator*
Some tips related to the issue of spoliation include:

- Advise the new litigation client of the duty to preserve relevant evidence and the consequences for failing to do so. The client should be advised orally and in writing, preferably in the initial engagement letter.

- Clients with document retention/destruction policies should be advised that they must impose a document hold (electronic and hard copies) on relevant evidence once litigation is anticipated.

- Send a writing advising opposing counsel of his or her obligation, and that of the client, to preserve relevant evidence. This reminder may be helpful in securing appropriate remedies should spoliation subsequently occur.

- Advise clients to image computer hard drives that may contain relevant data once litigation is anticipated. This is helpful in deflecting later claims that electronic evidence was altered or removed.

*These tips were provided by Scott C. Ford of McCandlish Holton in his article "Avoiding the Spoliation Trap—Tips for the Litigator, Litigation News, (Fall 2007).

11. **Metadata Destruction:** As of December 2006, the Federal Rules of Civil Procedure (the "FRCP") were amended to reflect growing technology and the need to address ESI. Although not specifically mentioned in the revised rules, when it comes to ESI a necessary question arises about how these rules should apply to metadata. Given the dynamic nature

of metadata, it is especially easy to alter it and thus commit spoliation. How then does an organization avoid spoliation sanctions, considering how relatively easy it is to alter metadata during the day to day operation of any business application?

When and how metadata should be preserved are topics of great debate and the cause of much frustration. Metadata can be important for many evidentiary purposes, and it often plays a critical role in authentication of documents. Specifically, what is metadata? While not foolproof, "metadata is a distinctive characteristic of all electronic evidence that can be used to authenticate it if the ESI is requested in its "native format". *See Lorraine v. Markel*, 241 FRD 534 (D. MD. May 4, 2007). Metadata describes the history, tracking, or management of an electronic document. It includes hidden text, formatting codes, formulae, and other information associated with an electronic document. The Southern District of New York in *Aguilar v. Immigration & Customs Enforcement Division* identified three types of metadata: substantive, system, and embedded. *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008), citing The Sedona Principles, Second Edition: Best Practices Recommendations and Principles for Addressing Electronic Document Production, Cmt. 12a (Sedona Conference Working Group Series 2007).

Companies must be proactive and vigilant with their digital records. The first step is in the development and implementation of a clear and exhaustive records retention policy. A clear policy is one that provides guidelines for creation, storage, and preservation. Preservation of metadata should include, at minimum, system and embedded metadata. Having such a policy in place will help ensure compliance with the rules and also will reduce the resources, like time and money, spent in anticipation of litigation. If litigation is pending, then for discovery preservation purposes, the amount and type of metadata that may need to be preserved may need to be broadened. It will often depend on the specifics of the case. Courts are looking for parties to preserve information that would render the document "usable." What is reasonably usable depends on the particular circumstances of a case. According to the Sedona Principles, some factors counsel should consider include: "(a) the forms most likely to provide the information needed to establish the relevant facts of the case; (b) the need for metadata to organize and search the information produced; (c) whether the information sought is reasonably accessible in the forms requested; and (d) the requesting party's own ability to effectively manage and use the information in the forms requested." Due consideration should be given to the form in which records are ordinarily maintained.

*Credit for this information should be given to *Metadata in Court: What RIM, Legal and IT Need to Know*, by John Isaza, Esq., (November 2012) ARMA International Education Foundation. http://www.armaedfoundation.org/pdfs/Isaza_Metadata_Final.pdf

- **The Leading Metadata Cases:** *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, (S.D.N.Y. 2008). The court reasoned that if the metadata was essential to the plaintiff's claims, they would have sought it initially instead of waiting. When metadata is not sought as part of initial discovery request, the requesting party must show relevance before court will order production by other side. Other cases dealing with metadata include *Williams v. Sprint,* 240 FRD 640*,* Court required production of formulas behind spreadsheet that had been scrubbed when the documents was first produced. *Maverick Recording Co. v. Harper,* 598 F.3d 193 (5th Cir. Tex. 2010), the plaintiff recoding company sought and received metadata to prove the defendants were responsible for file sharing*. United States v. Welton,* 2009 US Dist. Lexis 110657 (C.D. Cal. 2009), in *Welton*, metadata was used to establish the defendant's timing in accessing the documents which supported "a finding of knowing possession," an element of the crime charged of child pornography. It was also

used to determine if the images were transmitted over the internet in violation of interstate commerce laws and was deemed insufficient. *Lake v. City of Phoenix, 218 P.3d 1004 (AZ Sup. 2009).* The Arizona Supreme court ruled that metadata associated with public records are indeed a part of the public record itself. Therefore, government entities must ensure the capture of metadata not just in the event of litigation, but also for public records requests. See *O'Neill v. City of Shoreline*, 187 P. 3d 822 (Wash App. 2008) (where the Washington Court of Appeals held that metadata contained in emails received by the Mayor in her personal account and referenced at a city council meeting were part of the public record). For a more in depth discussion of these cases see: *Metadata in Court: What RIM, Legal and IT Need to Know*, by John Isaza, Esq., (November 2012) ARMA International Education Foundation. http://www.armaedfoundation.org/pdfs/Isaza_Metadata_Final.pdf.

- **Practice Management:** Scott Lefton suggests that many lawyers, litigation support personnel, and paralegals intake evidence, process or load evidence into a review platform, and are responsible for maintaining it throughout the life of a case. Are we possibly altering the metadata? Yes, and we need to change the way we handle ESI that maybe evidence. One of the best tools available; it's a staple in the forensic community with a cult-like following, is called FTK Imager. It's FREE, incredibly simple to use, and you can download it at: http://accessdata.com/support/product-downloads.

  The following information is provided by *eDiscovery Insight, "Are You Guilty of Spoliation of E-Discovery Evidence?"* by Scott Lefton, (August 31, 2012)

  "*FTK Imager is a preview and imaging tool. You can open the contents of a file folder, physically attached hard-drive, CD/DVD, thumb drive, forensic image, just about anything you can think of. It allows you to open or preview your discovery data and create a forensic image WITHOUT altering any of the source metadata!!!! From within FTK Imager you can then create an .ad1 or .e01 forensic disc image which, guess what- drum roll please……*
  can be directly imported into Summation!!!

  The importance of using forensic disc Images has three main benefits:

  1. It maintains the chain of custody.

  2. It preserves all source metadata.

  3. It can be directly imported/processed in Summation WITHOUT the need for a load file!!!

  4. You can apply compression to the image file to save space. This means you can actually make your evidence files smaller than the original and take up less space on your network.

  5. You can apply encryption and protect images with a password for additional security/protection."

  *For additional information on this resource and how to use it go to http://ediscoveryinsight.com/2012/08/are-you-guilty-of-spoliation-of-e-discovery-evidence

D. Professionalism and Scorched Earth Tactics. We get a sense that describing this litigation as acrimonious may in fact be an understatement. Scorched earth tactics can lead to all kinds of professionalism concerns. Are there any parameters around scorched earth tactics? What are they; and if there aren't, should there be? Do such tactics really benefit the client? Regardless of your position, defend it.

1. **Professionalism and Civility:** Professionalism is demonstrated when lawyers act with decency, dignity, courage and perspective. As an advocate, they can argue more effectively without belittling their opponent and they can question adverse parties and witnesses without personally attacking them. As one commentator observed: "there is no inconsistency between civility and zealous, effective advocacy. In fact, quite the contrary, advocacy which is both civil and professional is by far the most effective." Joseph W. Ryan, Jr., Things Your Mother Should Have Taught You, 23 ABA Litigation News, No. 4 (May 1998). Professionals act with courage by admitting to the court that they don't know the answer instead of bluffing; by representing unpopular clients; and, by refusing to take positions or actions they find repugnant merely because the client insists and is paying them. Professionals have perspective when they do not become personally involved in their clients' causes. Where does it fit into "zealous" representation?

2. **When, if ever, are aggressive litigation tactics acceptable?** Some lawyers believe that aggressive tactics such as intimidation, name-calling, sarcasm, insults, and subterfuge are appropriate tactics to use on adversaries and their counsel. Are these so-called "litigation tactics" ever a good idea?

    a. **West Virginia Standards of Professional Conduct:** While perhaps not a basis for disciplinary action or for civil liability, these Standards do articulate standards of professionalism to which all West Virginia lawyers should aspire. (**See Appendix I**)

    b. **Duty to Represent the Client:** While the word "zealous" remains in the West Virginia Rules, be careful about never letting your position as an advocate become an excuse to cross over the line into behavior that is "abusive, boorish, and disrespectful behavior that obstructs the administration of justice and disserves [t]his profession and the interest of his clients." (Quote from Magistrate Judge Robert B. Kugler of the US District Court for the District of New Jersey in Mruz v. Caring Inc., D.N.J., Civ. No. 97-1468 (SMO), 8/4/00) Lawyers who advocate for a client under the umbrella of "zealous representation" often then try to use it as a defense, or an excuse, or even a crutch, for unethical, uncivil and wholly unprofessional behavior. Where is the line, and how do know when you've crossed it? Just because you can take a particular stance or advocate a particular strategy on behalf of your client either ethically and/or legally, does that always mean you should?

        - **ABA Rule 1.3 Diligence . . .Comment**

            [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable

diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

c. **Fines, Sanctions and Disciplinary Action by the Bar**: **Aggressive "Litigation Tactics" Not a Good Idea.** There can be serious consequences for the lawyer who advocates to aggressively. When a lawyers goes too far it can result in, among other things, public reprimands, an award of attorney's fees, revocation of pro hac vice admission, public admonitions followed by an evaluation for possible anger management counseling or mental health assistance, overturning a jury's medical malpractice award, as well as a six-month stayed suspension. Overly aggressive actions are not acceptable behavior in any facet of litigation from discovery depositions to brief writing to courtroom behavior.

d. **Client Had "Disposable Income And A Zealous Interest In Litigating":** A 2010 bar discipline decision was summarized on the web page of the Massachusetts Board of Bar Overseers:

The Board of Bar Overseers (board) filed an Information recommending that the respondent...be suspended from the practice of law for a term of four months, and that his reinstatement be conditioned on taking and passing the Massachusetts Professional Responsibility Examination. The respondent joins in the board's recommendation….

The board adopted the findings of fact of the hearing committee, which can be summarized by quoting this introductory paragraph from the hearing committee report:

"The credible evidence amounts to this: Representing a [professional woman] with disposable income and a zealous interest in litigating against [two of] her former employers, the respondent allowed the client to dictate a misguided strategy involving excessive and improper discovery requests that did not materially advance the client's cases but did generate large hourly-based fees for the respondent. The respondent should have done far more than he did to restrain the client's overzealous pursuit of discovery with realistic, focused, and independent professional advice. Instead, the respondent voiced only limited objections and then continued to pursue the client's hopelessly excessive and improper discovery requests. Given the misguided strategy, the high fees generated little or no value for the client. While much of the respondent's work in this misdirected pursuit was competent, the cases went nowhere and the work was ultimately wasted. The gravamen of the misconduct here is that the respondent placed his interest in retaining a profitable client ahead of his professional duties as a member of the bar to effectively counsel clients and provide diligent, competent representation. As a result, the client's cases never advanced beyond discovery disputes despite the passage of years and the payment of high fees."

The lawyer billed the client over $700,000 in fees for the excessive services.

e. **Rule 3.1 Meritorious Claims and Contentions***:* Examples like the one above are becoming far too common and courts are responding by ordering sanctions and fees against lawyers and their clients who are found to be creating pleadings, motions, and discovery that is "overzealous." Also, lawyers need to consider **Rule 3.1** under these circumstances.

Is Incivility Becoming the Norm?
What do Judges and Lawyers Blame it On?

- **Over-the-top portrayals of lawyers on TV and in films.**
- **Inexperienced lawyers and a lack of mentoring.**
- **The fuzzy line between aggressive advocacy and rudeness.**
- **The broad platform provided by today's technology, coupled with the ability to act anonymously online.**
- **The country's current, fractious public discourse.**

Source: ABA Journal, You're out of order! Dealing with the Costs of Incivility in the Legal Profession, G.M. Filisko, Jan., 1, 2013

E. Reporting to Your Malpractice Carrier. Would you report this situation to your malpractice carrier? Would there be coverage for sanctions if the court awards any? If the judge decides to issue an instruction to the jury on spoliation of evidence, that could have a negative impact on the client's case. If the client asserts a malpractice claim against the lawyer over how the evidence was handled as a result of the fallout of the jury instruction, would your malpractice policy cover that?

1. **Coverage:** Are the types of damages typically associated with "unprofessional behavior" such as fines, sanctions or an award of attorney's fees covered by your malpractice policy? There generally is not coverage for fines, sanctions, or an award of attorney's fees under the definition of "damages" in a malpractice insurance policy. Check your own malpractice policy to verify the exact wording.

    a. **Damages Defined:** Most malpractice policies define "Damages" as "any monetary judgment, award or settlement. Typically, damages does not include punitive, multiple, or exemplary damages, fines, sanctions, penalties or citations. Nor do most policies cover restitution; reduction; disgorgement; or set-off of any fees, costs, consideration, or expenses paid to or charged by an Insured; or any other funds or property presently or formerly held by an Insured.

    b. **Spoliation Resulting in Inadmissibility or other Adverse Jury Instruction:** Depending on the facts, there may be coverage under the lawyer's malpractice policy if the lawyer made a mistake or error in handling evidence that resulted in an adverse decision impacting the client and evidence admissibility. If the conduct by the lawyers was intentional then there would not be coverage. Or if the damages were only accessed against the lawyer there would not be coverage under the malpractice policy.

Vignette Two: "Where is the Line?"

A. Calling It What it Is, Not What You'd Like It to Be. We saw in the opening scene that Ms. Thomas, a solo attorney, is practicing under the name of Thomas & Thomas, PC. Is this ethical? Under what circumstances? If it is ethical under certain circumstances, how should Ms. Thomas handle her letterhead? What about her statewide advertising campaign. Can a solo attorney advertise statewide, listing local phone numbers that ring back to the only true office? Assume that she has the necessary technology in place to provide the services she claims she can provide on a statewide basis. Does that even matter?

1. **Firm Name and Letterhead:** Except as discussed below, Christine Thomas, a solo practitioner, is not permitted to use the firm name "Thomas & Thomas, PC," because it suggests that she practices with another attorney in a professional corporation, when, in fact, she does not. **Rule 7.5(d)** prohibits a lawyer from stating or implying that he or she practices in a partnership or other organization when that is not the case. However, "Thomas & Thomas, PC" is an acceptable trade name for a law firm if Ms. Thomas's present firm is a bona fide successor to a firm in which another "Thomas" once practiced, but has since retired or died. If Ms. Thomas is permitted to use the firm name as a trade name, she should avoid misleading the public regarding the size, composition, and the identities of members of the firm by using notations on letterhead and other professional notices where the firm members are identified which signify that the "other" Thomas is retired or deceased. See, **Rules 7.1** and **7.5.**

2. **Advertising a Statewide Practice**: Ms. Thomas's statewide advertising campaign includes the use of local telephone numbers from which all calls are forwarded to her single location. A lawyer should not create the false and misleading impression through local telephone numbers that she has a physical presence in regions of the state where no such presence exists. Members of the public are apt to seek attorneys who are known to the local practicing bar and judiciary, and are familiar with the local legal landscape. Thus Ms. Thomas' statewide advertising campaign would likely be deemed a violation of **Rule 7.1's** prohibition against a "false or misleading communication." She is trying to use directory listings and phone numbers for the purpose of inducing prospective clients to believe that she has a local presence when that is not the case. The fact that Ms. Thomas may, in fact, be able to handle client matters on a "virtual" basis has no bearing on whether her means of advertising is deceptive.

B. Social Media, Posting Trial Results, Endorsements and Laudatory Statements. Consider the statements Ms. Thomas posted to her profile page on LinkedIn or perhaps even tweeted out. Is she right? Can she make these kinds of statements or has "the other lawyer" voiced a legitimate concern? Do our advertising rules even apply to this setting? If so, what is the impact of our rules on lawyers participating in the social media space? Consider the likes of Facebook, LinkedIn, Twitter, and blogs. What if clients or "friends" post comments or reply with accolades along the lines of "Chris is the best divorce lawyer in the state" or "Chris delivered on every promise she made. If you want to win, there's really on one choice in this town, it's Chris?"

1. **Do the Ethics Rules Apply:** Without question, electronic communications and social media are subject to regulation by the bar if a lawyer uses them to promote and market her legal services. The ABA amended the Model Rules in 2002 to apply explicitly to all types of electronic communications. The **West Virginia Rules of Professional Conduct**, **Rule 7.1** uses the phrase "communication about the lawyer or the lawyer's services" to embrace broadly all communications including electronic communications. **See also Rule 7.2 (a)**.

   A client or colleague who gushes, "He's the best to be found in Charleston!" may in fact have posted "false or misleading information" as defined by **Rule 7.1** and he may inadvertently "create an unjustified expectation about results the lawyer can achieve." A glowing post, such as "I've never seen her lose a case!" may in fact be an advertisement missing the disclaimer required by **Rule 7.3(c)**. It's important to remember that whether or not such content is created by the lawyer, it is his or her responsibility to monitor and edit online posts to prevent ethical violations. Statements or claims made by others about the lawyer's services are governed by **Rule 7.1** if the lawyer adopts them in his or her communications. See **Rule 8.4(a)** regarding violations of the Rules of Professional Conduct through the agency of another.

   For example, at least one state bar ethics opinion has expressed the view that if a lawyer participates in a site that lists information about the lawyer, like AVVO, the lawyer must ensure that all comments from all sources, including prior comments and, by implication anonymous posts, fully comply with the state's rules. If the lawyer cannot keep up with every individual post, he or she must discontinue participation in the site directory. **South Carolina Ethics Advisory Opinion 09-10**. See http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/107/Ethics-Advisory-Opinion-09-10.aspx.

   - **LinkedIn Endorsements**: In many jurisdictions, the Advertising Rules regulate endorsements or testimonials about the lawyer's services. LinkedIn allows users to request and give "recommendations" and short laudatory statements about another user or his work that can then be posted on that user's page in the form of a referral. But these comments may be considered "endorsements" subject to the Rules.

     "Endorsements" as opposed to "recommendations" on LinkedIn are distinguishable. An endorsement by a colleague on LinkedIn seems only to imply that the subject lawyer has knowledge or experience in a particular area or field. It is not a specialization claim, nor a comparative statement, and as long as the lawyer can factually substantiate that she has knowledge or experience in that particular field, it should not be viewed as misleading under **Rule 7.4**.

2. **Blogging It Out**: A Lawyer maintains a blog on his web site entitled "This Week in Richmond Criminal Defense." This Week in Richmond Criminal Defense consists of articles written by the Lawyer and involves topics relevant to the criminal justice system and, on their face, is news and commentary. In additional to topics of general interest, the Lawyer also regularly blogs on cases he has successfully handled. A couple of examples: "In one such post, [the Lawyer] identified his client by first initial and last name, reported the name

of the high school where the client taught, and noted that the client's charge for assaulting a fellow teacher after a verbal altercation on school grounds was ultimately dismissed, naming himself and the law firm as having argued the case. And in another post cited by the Committee, [the Lawyer] recited his client's full name, that she was charged with cocaine possession, and that he argued the matter. Giving the prosecution's evidence, [the Lawyer] noted that she was arrested "in a motel room along with three other individuals" in which there were "three smoking devices," and disclosed that her blood tested positive for cocaine. He announced that she was found not guilty, despite these inculpatory facts, on the ground that there was insufficient evidence that she had actually possessed the cocaine."

Factual information quoted from the brief: *Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter submitted to the Supreme Court of the United states of Virginia*, pg 7 (June 21st, 2013). http://www.cocklelegalbriefs.com/wp-content/uploads/2013/06/28286-pdf-Taylor.pdf

A Disciplinary Complaint was brought asserting that the lawyer's actions of blogging about his cases without client consent and without a disclaimer about outcomes and guarantees constituted a violation of the ethics rules.

- **Analysis:** On June 5th, the Virginia Supreme Court ruled that the lawyer did not violate ethical rules when he wrote about his cases on his blog without client consent. The Lawyer had drawn his descriptions of cases he had won from the public record. The panel's ruling overturned a disciplinary committee's finding of misconduct under **Rule 1.6**, which deals with confidentiality.

  However, the panel upheld the committee's finding that failing to include a disclaimer that results could vary depending on the facts did violate **Rules 7.1** and **7.2** which deal with communications about a lawyer's services and attorney advertising. The court held that the disclaimer requirement applies when lawyer's blog about their cases to boost their practice.

  The panel upheld a public admonition for those violations and ordered a disclaimer in compliance with Rule 7.2(a)(3)be posted. *Hunter v. Virginia State Bar*, 285 Va. 485, 29 Law. Man. Prof. Conduct 161 (Va. 2013). The U.S. Supreme Court denied a writ.

C. Confidentiality, E-mail and Encryption, What's the Standard? There are several email issues raised in this vignette. The first concerns the sending of draft documents that contain personally identifying information that could be useful to an identity thief should that information fall into the wrong hands. What are our ethical obligations when it comes to the sending of attachments that contain client confidences via email? Should the attachment ever be encrypted? Does the fact that the intended recipient is a judge on the state Supreme Court make any difference? To further compound the problem, Ms. Thomas is planning on sending this email from the airport apparently using an open unsecure public Wi-Fi network. Is this ethically permissible? Let's assume that Ms. Thomas has not discussed these issues with her client, the judge. Should she have? After all, whose confidences are they? Asked another way, do we need informed consent before emailing client confidences in an insecure manner? Thinking about the

email sent to the wrong address, what now? What steps would you advise she take or is this misdirected email a non-issue?

1. **Analysis:** Attorneys have ethical and legal duties under **Rule 1.6** to protect information relating to clients. Encryption is an important consideration in addressing these duties. Attorneys should understand encryption and use it in appropriate situations. All attorneys should use encryption on laptops, portable storage media, smartphones, and tablets that contain information relating to clients. They should make sure that transmissions over wireless networks are secure. Attorneys should have encryption available for e-mail or secure file transfer and use it when appropriate. In the vignette, the lawyer needed to be aware of the necessity of having to encrypt her laptop and using a VPN if she was on a public Wi-Fi. Finally, she should carefully consider whether to transmit confidential client information in an e-mail that is not encrypted.

2. **Encryption: What is it and when should a lawyer use it?** Encryption uses a formula to transform readable data into unreadable data. The formula is an algorithm (called a cipher), the readable data is called plaintext, and the unreadable data is called ciphertext. Decryption is the reverse process that uses a key to transform the encrypted data back to readable data. As long as the decryption key is protected, the data is unreadable and secure. Encryption can be used to protect data at rest (on desktops, laptops, servers, or portable media) and data in motion (over wired or wireless networks and the Internet). Anyone who has access to encrypted data cannot read or use it without access to the decryption key.

3. **Laptops and Portable Media:** Laptops and portable media can be ripe for a security disaster if they are not properly protected. One survey reported that 70 percent of data breaches resulted from the loss or theft of off-network equipment (laptops, portable drives, PDAs, and USB drives). Strong security is a must. Encryption is now a standard security measure for protecting laptops and portable devices. Lawyers should be using it.

    a. **Encryption Basics:** There are two basic approaches to encrypting data on hard drives: full disk encryption and limited encryption. As its name suggests, full disk encryption protects the entire hard drive. It automatically encrypts everything and provides decrypted access when an authorized user properly logs in. Limited encryption protects only specified files or folders or a part of the drive. With limited encryption, the user has to elect to encrypt the specific data.

    There are also three kinds of encryption for protecting laptops and portable devices: hardware encryption, encryption in operating systems (such as Windows and Apple OS X), and encryption software.

    Hardware Full Disk Encryption: All hard drive manufacturers now offer drives with hardware full disk encryption built in. The major laptop manufacturers all offer models with these drives. Hardware encryption is generally easier to use and administer than encryption software. Some examples are Seagate Secure (www.seagate.com) and Hitachi Self-Encrypting Drives (www.hgst.com). Secure use simply requires enabling encryption and setting a strong password or pass phrase. The contents of the drive are automatically decrypted when an authorized user logs

in. It is automatically encrypted when the user logs off or the laptop is turned off. In order for full disk encryption to be effective the user must use a strong password and automatic logoff feature.

Encryption in operating systems. Current business versions of Windows and current versions of Apple OS X have built-in encryption capability.

i. **Windows Vista Enterprise and Ultimate, Windows 7 Enterprise and Ultimate, Windows 8 Pro and Enterprise, and Windows Server 2008 and 2012 include an encryption feature called BitLocker.** BitLocker works below the operating system and encrypts an entire volume on the hard drive. BitLocker requires either a computer that is equipped with a Trusted Platform Module (TPM) chip on the motherboard or use of an external USB drive to hold the decryption key. If an intruder gains access to a USB key, the encryption can be defeated.

ii. **The business versions of Windows also include an encryption function called Encrypting File System (EFS)**. It allows encryption of files and folders. An authorized user who is logged in has access to decrypted data. It is encrypted and unreadable to anyone else (unless they can defeat the login process). EFS is considered a fairly weak encryption method that is easily cracked using forensic tools. You are better off using BitLocker or one of the other third-party encryption products discussed below.

    Setup of both EFS and BitLocker is fairly technical. For most attorneys, it will be necessary to obtain technical assistance to implement them.

iii. **OS X has built-in file encryption in FileVault**. Newer versions have full disk encryption available in FileVault 2. Follow Apple's instructions for turning it on. After a password is set, it just requires turning on the FileVault button in System Preferences. Recent advances have attacked Apple's encryption scheme, and the Passware software suite claims to be able to defeat FileVault 2 in less than an hour.

Third-party encryption software: Some commonly used third-party encryption software products for hard drives include those offered by Symantec (PGP and Endpoint; www.symantec.com), McAfee (Endpoint Encryption; www.mcafee.com), Check Point (ZoneAlarm DataLock; www.zonealarm.com), WinMagic (SecureDoc; www.winmagic.com), and Sophos (SafeGuard; www.sophos.com). A common open-source encryption program that is free and relatively easy to use (after setup) is TrueCrypt (www.truecrypt.org).

b. **Smartphones and Tablets:** Smartphones and tablets are basically small computers, with substantial computing power and high storage capacity. Like laptops and other mobile devices, they can be easily lost or stolen and should be protected with encryption.

For iPhones and iPads (www.apple.com), hardware encryption was implemented in iOS 4. All files are automatically encrypted when a lock code is set and decrypted when the device is unlocked. It provides little protection unless Simple Passcode is turned off, Require Passcode is turned on, and a strong pass code is selected. Require Passcode should be set for a short time and Erase Data should be turned on. iOS also includes a feature called Data Protection. It secures e-mails and attachments stored on the device and data in other apps that are designed to work with it.

Android OS (www.android.com) has included encryption for tablets (starting with Honeycomb) and for phones (starting with Ice Cream Sandwich). Earlier versions require third-party apps for encryption, such as WhisperCore (whispersys.com), Droid Crypt (tinyurl.com/9m3d598), or AnDisk Encryption (tinyurl.com/8no7qsh). Also, Motorola (www.motorola.com) and Samsung (www.samsung.com) market enterprise phones with built-in encryption capability. Follow the device manufacturer's instructions for turning on encryption. It generally requires touching the Encrypt or Encrypt Tablet button in Settings. A strong PIN or password and automatic logoff after a set time are also important to keep the data encrypted.

Note: It is important to follow the manufacturer's instructions when setting up encryption. Get help if you need it. First-time encryption takes some time when a device has already been in use, so make sure that the battery is fully charged before starting. Weaknesses have been reported in the encryption for both iOS and Android, so it is important to consider multiple levels of security. Despite some limitations, smartphones and tablets are more secure with encryption, and attorneys should be using it.

A Special note about Drop Box: It is also important to make sure that secure methods are used for getting files on and off smartphones and tablets and for sharing files. There is substantial concern about the security of could-based services such as Dropbox (www.dropbox.com) and iCloud (www.icloud.com). Their terms of use provide limited protection, they control the encryption so their employees can get access, and protection from unauthorized third parties depends on how well they protect the decryption keys. Use of alternatives such as Box (www.box.com) or SpiderOak (https://spideroak.com) or using add-on encryption such as BoxCryptor (https://www.boxcryptor.com) or Vivvo (www.viivo.com) with Dropbox or another vendor provides stronger security because the end user controls the decryption keys.

4. **Wireless Networks:** Communication via wireless connections must be secured in order to protect the transmission. Encrypting the wireless network will protect the data from being intercepted and viewed. There are several commonly available types of encryption schemes for a wireless network. The preferred method for securing the wireless network is WPA2 because the other two, WEP and WPA, have been cracked. As with other forms of password management, the WPA2 passphrase should be long and complex.

   Wireless Public Networks: Many security professionals and US-CERT have recommended that public networks not be used for the transfer of confidential communications. If public networks must be used, the lawyer should only do so using a virtual private network which

will encrypt the data stream. A recent ethics opinion concluded that a lawyer has an ethical duty to evaluate the security of a wireless network, home or public, before it is used for client communications and to take appropriate precautions in using it. **California Formal Opinion No. 2010-179**.

5. **E-mail and Encryption:** Particularly important to attorneys is the confidentiality and integrity of e-mails. One current ethics opinion, **California Formal Opinion No. 2010-179** states "encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous." Encryption is increasingly required in areas such as banking and health care and by new state data protection laws. As these requirements continue to increase, it will become more and more difficult for attorneys to justify their avoidance of encryption.

    a. **Encryption Keys: How they Work.** Encryption is a process that translates a message into a protected electronic code. The recipient (or anyone intercepting the message) must have a key to decrypt it and make it readable. Although it still takes some technical knowledge to set up, e-mail encryption is now easier to use than it once was. Encryption generally uses a pair of keys to encrypt the e-mail. The sender uses the recipient's public key to encrypt the e-mail and any attachments. Because the public key only encrypts the e-mail, it does not matter that it is available to the public or to various senders. The recipient then uses his or her private key to decrypt the e-mail. This private key needs to be properly safeguarded because anyone who has access to it can use it for decryption. The process is easy to use once the keys are set up in an e-mail program such as Outlook (www.microsoft.com). The most difficult process is getting the keys (digital IDs) and making the public key available to senders. Once it is set up in Outlook, the sender just has to click on the Message tab in the Options group and click the Encrypt Message Contents and Attachments button. At the recipient's end, the message will automatically be decrypted if his or her private key has been installed.

    b. **Easier Than Encryption Keys: Managed Messaging Service Providers.** Secure e-mail is also available from managed messaging service providers such as Zixcorp (www.zixcorp.com), Mimecast (www.mimecast.com), and DataMotion (www.datamotion.com). They provide e-mail encryption without the complexity of setting up and exchanging keys. Instead both sender and recipient are accessing encrypted e-mail with passwords they have set up when the clients account is set up at the beginning of the representation.

    c. **Secure File Sharing:** As an alternative to e-mail, confidential information can be exchanged by using secure file sharing and transfer options such Biscom (www.biscom.com) or Accellion (www.accellion.com) or by using add-on encryption (e.g., BoxCryptor with Dropbox or another cloud vendor).

    d. **Password Protected Attachment:** Another alternative to encryption of e-mail is to give confidential information a basic level of protection by putting it in a password-

protected attachment rather than in the body of the e-mail. File password protection in some software, such as current versions of Microsoft Office, Adobe Acrobat (www.adobe.com), and WinZip (www.winzip.com), uses encryption to protect security. It encrypts only the document and not the e-mail, so the confidential information should be limited to the attachment. It is generally easier to use than complete encryption of e-mail and attachments. However, the protection can be limited by the use of weak passwords that are easy to break or "crack." In addition, it should be obvious not to include the password for the attachment in the body of the e-mail message.

*The information in section **C.** of the outline on Encryption was taken with permission from the article: *Encryption Made Simple for Lawyers*, by David G. Ries, Esq. and John W. Simek (2012). The full text can be found at http://www.senseient.com/news-press-articles/2012/12/4/2012-encryption-made-simple-for-lawyers.html

D. Accepting Credit Cards for Payment of Legal Fees. How are lawyers to properly handle credit card chargebacks? Can one simply move money from another account to cover the shortfall? What if money isn't available to cover the shortfall? Can the associated fees of a chargeback be passed along to the client? How about the transaction fees that you incur, may these be passed along to your clients? May a lawyer advertise that the firm accepts credit cards? If so, may a lawyer go even further and encourage a client to use their credit card as the preferred method of payment? How are unearned fees placed on a credit card to be handled? If unearned fees charged to a credit card must be refunded, how is this properly handled?

1. **Handling Credit Card "Chargebacks":** "Chargeback" refers to a card issuer's debit of the lawyer's account when the client disputes a given charge which has been previously credited to the lawyer's account. If the chargeback is against the attorney's trust account, it will result in her being "out of trust" if the amount of the chargeback exceeds the sum on deposit and in trust for the client who occasioned the chargeback. In such an event, the lawyer's other clients' funds held in trust would be included in chargeback.

2. **Credit Card Transaction Fees:** There is no state or federal law that prohibits a lawyer from passing through credit card transaction fees to her client. However, caution is in order because in order to comport with federal regulations, the transaction fees must be disclosed before the client commits to the transaction since the transaction fees fall within the definition of a "finance charge." Specifically, the lawyer must disclose the amount of the finance charge prior to the time of honoring the client's credit card and before the client becomes obligated for the lawyer's services. <u>All lawyers would be well advised to not place a charge against her client's credit card without express authority from the client to do so. Thus, even if the lawyer's engagement agreement contains the client's consent to place future charges against the client's credit card as legal services are rendered, the lawyer should nonetheless first present the client with a statement of charges so that the client knows the dollar amount which the attorney intends to charge against the client's credit card, and has an opportunity to address any discrepancies with the attorney before the charge is placed</u>.

As with all fees charged by a lawyer to a client, fees related to the client's use of a credit card must be both reasonable and adequately explained to the client, and note that with the exception of matters where the lawyer has regularly represented the client, the explanation of all fees and costs must always be in writing. See, **Rule 1.5(a)** and **(b)**.

3. **Lawyer Advertising Related to Credit Cards and Encouraging a Client to Use Them:** While West Virginia has no ethics opinion that directly addresses the issue, Utah has issued an opinion that may provide a little guidance. Utah EAO No. 97-06 states that "Rule 7.2 does not prohibit attorneys from being included in a directory of firms and businesses that accept credit cards. This would not be substantially different from an attorney's being included in (or actually advertising in) a directory of firms and businesses that have a telephone and accept telephone calls." This opinion also goes on to state that "An attorney may suggest that a client use a credit card to pay attorneys' fees or costs" as well as "An attorney may place a notice on bills sent to clients stating that the attorney accepts credit card payments."

   As to whether a lawyer should encourage clients to charge fees and costs on a credit card, **EAO No. 97-06** provides one caution. "However, Rule 2.1, Advisor, provides: 'In representing a client, an attorney shall exercise independent professional judgment and render candid advice. In rendering advice, an attorney may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.' Therefore, economic factors of a client's situation could require an attorney to advise that a client not use a credit card to pay the attorney's fees and services."

4. **Refunds of Unearned Fees Charged to the Client's Credit Card**: Again, while there is no West Virgina ethics opinion expressly on point, a **D. C. Ethics Op. 348 (2009)** provides useful guidance: "[T]he law governing credit card transactions is contractual in nature, and the details of merchant agreements vary depending on the credit card company. . . . [M]any agreements include [a r]equirement that reimbursement of unused fees must be credited to the user's card and not paid by cash or check[.]"

   West Virginia Rule 1.16(d) requires that unearned fees be refunded to clients. This Rule does not prohibit a lawyer from making a refund to a client by crediting the client's credit card account. However, at least arguably, an attorney's duty of communication with a client under **Rule 1.4** and her duty to explain fees under **Rule 1.5** require that the client be advised at the inception of the representation that the lawyer is contractually bound to make any refunds by crediting the client's credit card account. Such a disclosure might affect a given client's decision to use a particular credit card, or whether to use a credit card at all for payment of legal fees and expenses.

5. **An Important Practice Management Consideration:** Any firm that is accepting credit cards needs to be aware of the Payment Card Industry Data Security Standard (PCI DSS) The PCI DSS is a set of requirements designed to **ensure that ALL companies that process, store or transmit credit card information maintain a secure environment**. These requirements essentially apply to any merchant that has a Merchant ID (MID). It is overseen by the major credit card companies, American Express, Discover, JCB, MasterCard, and Visa.

The Standards can be found on the PCI SSC's Website:
https://www.pcisecuritystandards.org/security_standards/pci_dss.shtml

E. Handling Beneficiaries Who May See Themselves as Clients. Who is Ms. Thomas's client in the Phillips matter? What additional information would you want to know that would help you to decide? Might the children be right about the presence of a conflict? If you see no conflict, support your position. If you see a conflict, again, support your position. To those of you who feel that a conflict does exist here, would this conflict be waivable? If so, how might Ms. Thomas have gone about having the conflict waived? If not, why not? What steps could Ms. Thomas have taken to prevent this whole situation from ever evolving?

1. **Who is Ms. Thomas' client in the Phillips matter?** Her paralegal, Suzanne, says Christine "drafted an estate plan for 'the Phillips' years ago…and when 'Mr. Phillips' got really sick you had several conversations with the children…" This suggests that "the Phillips" may have been a couple that Christine Thomas represented for estate planning and "Mr. Phillips" may have been the husband of the couple. If that is the case, the "clients" would be "the Phillips" / "Mr. Phillips." Even though Christine may have spoken with the children several times when Mr. Phillips was ill, that does not, per se, make the children her clients. That said, one should look at the lawyer's (Christine's) course of conduct to determine who was/was not a "client" or who thought/were led to believe they were.

   While the children would not become clients just because of conversations with Christine, depending on the substance and nature of the conversations and the circumstances under which they occurred, the children could have developed an impression that they were "clients." If Christine was not clear in establishing the limits of her representation and/or if she provided the children with legal advice/guidance, if she responded to specific legal questions/issues that they raised that were personal to them, even if related to their father's matters, they could have (mistakenly) believed she was their lawyer and they were her clients. As Suzanne tells Christine: "They say all those conversations you had with them when their father was dying created an attorney/client relationship…"

   The children are now raising the issue by seeking to disqualify Christine from representing "Williamson," the representative of Mr. Phillips' estate, against whom the children have brought suit. Christine argues to Suzanne that because she billed the estate for her services and never billed the children there was no attorney-client relationship and that the children "knew I was their father's attorney, not theirs!" Billing alone is not dispositive of an attorney-client relationship. Again, one must look at the lawyer's course of conduct. Ultimately this will be a legal issue for the court to decide. In any situation where there are others involved associated with a client, like this situation with family members or with members / employees of an organization when the organization is the client, the lawyer must take care to be absolutely clear as to who is or, more importantly, who is not the client and clearly advise everyone involved as to those limits. See **Rules 1.2** and **1.4** of the West Virginia Rules of Professional Conduct. Then, the lawyer must operate within those limits and not attempt to provide legal services or legal advice to anyone who is not or is not intended to be a client.

2. **If there was legal advice provided to the Children**. There is not enough information in the vignette to determine definitively whether there was an attorney-client relationship between the children and Christine or not. If the discussions were substantive and Christine was providing legal advice, services, etc. and the children were sharing significant information with Christine because they saw her as "their" lawyer and this information could now be used against the children as Christine represents Williamson against the children, then that could be a conflict. **Rule 1.6** would prohibit disclosure of confidential information gained in the course of a representation**. Rule 1.9** prohibits representation of an adverse party against a former client in the same or substantially related matters and the use or disclosure of confidential information of a former client to the client's detriment.

3. **Who is the client when a lawyer represents an estate?** Lawyers hired by executors are not always clear to whom they owe duties of loyalty and confidentiality. Both the executor and beneficiaries may interact with the lawyer as if he/she represents the interests of everyone involved. However, when a lawyer is hired by the executor, she represents that person in that role. She does not represent the beneficiaries. Nonetheless, beneficiaries are not always knowledgeable on that point and may look to the lawyer for advice and share personal information with the attorney. A lawyer always has a duty to clarify his role whenever dealing with an unrepresented person when that person is confused on the point. **Rule 4.3**. Accordingly, where a beneficiary is under the impression that the lawyer is protecting that beneficiary's individual interest, the lawyer has an affirmative duty to clarify the matter. Also, while the executor's lawyer does not represent the beneficiary personally, she must, nonetheless, maintain awareness of the executor's fiduciary duty to the beneficiaries and never assist in a breach of that duty.

F. Handling Your Cyber Liability Exposure. The final issue raised in this vignette really focuses on cyber liability. Start with the basic issue of taking steps to prevent someone from hacking into your network in some fashion. Is there an ethical obligation to take steps to prevent theft of data? If a lawyer purchases a laptop, a tablet, a smartphone, or wants to use Wi-Fi or Dropbox does this decision mandate the lawyer have some basic understanding as to how to responsibly use the device or service? We learn that a firm has suffered a breach. If you were in Don's shoes, how would you handle the situation? What are your obligations and responsibilities? In terms of prevention, is Chris right? Can she relax knowing that her IT consultant has taken of things?

1. **Ethical Concerns:** The portability of electronic devices (susceptible to loss or theft) and the possibilities of interception or misdirection of electronic communications (intentional or otherwise) raise risks today that lawyers thirty years ago never imagined. The practical questions for lawyers today are what we must know about those risks, what we must do to educate our clients about them before using a particular technology for communication purposes, and whether some means of communicating are too insecure to satisfy the lawyer's ethical duties to the client.

2. **Electronic Security as an Ethical Requirement: Evolving standards are raising the bar.**

   Rule 1.1 Competency states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation." As electronic data has become an overwhelming part of clients' communication and stored information – recent statistics have claimed that "more than 90% of all corporate information is electronic," while "less than 1% of all communication will ever appear in paper form" – the duty of competence increasingly requires attorneys to stay abreast of technological advances as those advances affect communications with clients. Appropriately, the ABA recently commented on its website that "[c]competence in using a technology can be a requirement of practicing law." See http://www.abanet.org/tech/ltrc/research/ethics/competence.html

3. **Clear Standard:** The ABA has amended ABA Model Rule 1.6 to include a new paragraph (c):

   (c): [a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

   In addition the ABA added **Comment [18]**:

   Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

   Comment [18] also provides a "safe harbor:"

   The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

4. **Confidentiality:** Additionally, ABA Model **Rule 1.6 (a)** on confidentiality provides:

   A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

   In the context of securing legal data and communications, none of the exceptions in ABA Model Rule 1.6(b) apply to inadvertent disclosures by a lawyer of confidential information due to the lawyer's failure to understand or to attend to matters of electronic security.

5. **Cyber Liability Exposure:** In addition to the ethical issues of confidentiality, injury can result by misuse or theft of client information and new statutes in many jurisdictions regarding protecting and securing client information require security breaches to be

reported. Current notification laws by state can be checked at the National Conference of State Legislatures, NCSL, at http://www.ncsl.org/issues-research/telecom/security-breach-notification-laws.aspx.

a. **Personally Identifying Information (PII):** A new body of law is emerging as states have begun to impose confidentiality obligations directly on all persons who maintain personal data on portable electronic devices. As of this writing 46 states, and three territories (Washington DC, Puerto Rico, and the USVI) all have enacted laws that require those who maintain "personal identifiable information" of others to not only protect that information, but to notify the owners of the information if and when a data breach occurs. (The states that have yet to enact such a law are Alabama, Kentucky, New Mexico, and South Dakota.) West Virginia has enacted breach notification statutes that can be found at **W.V. Code §§ 46A-2A-101 et seq.** The bottom-line is that if you maintain (un-redacted) social security numbers, drivers' identification numbers, credit card or financial account information of employees and/or clients these laws apply. Most importantly, in the event of a breach, these statutes require that state governments and those impacted (for example clients or employees) by the breach be timely notified. Also be aware that these notice requirements are not based upon where the holder of the information is located but based upon where those impacted reside. Thus, a breach could result in an obligation to notify multiple state governments and comply with their various statutes.

6. **Cyber Liability Coverage**: Intertwined with the concept of cloud computing services and the increased risk of hackings is the question of "how do we protect ourselves and our clients?" Like all small to mid-size companies, law firms of all sizes need to realize there is a significant likelihood that their networks, Web sites and databases will get hacked. There is no such thing as perfect security, and many believe that breaches are a matter of when, not if. The only real question is just how bad it will be. What type of expenses and liabilities could you face if your computer network is breached? This is a double whammy. There is the actual initial damage caused by the hacker to include the costs of investigation and cleanup, and to provide notice and credit monitoring if personal information is involved. Then there are the secondary liability costs and defense expenses associated with actions that may be brought by vendors, credit card payment processors, customers and regulators.

   Cyber liability insurance coverage products have become more widely available to small business over the last couple of years. The providers that have been in the market for some time include ACE, Beazley, Chartis, Chubb and Hiscox. If you are looking at whether you need this coverage or not there are two important things to remember. First, most insurance carriers that offer commercial general liability policies and traditional property policies take the position those policies do not cover data breaches (this is an issue in dispute in some recent court cases) and many of these policies now specifically exclude coverage for security breaches and the resulting damage. Second, when working with a third party such as a web host or cloud provider, the responsibility for damages caused by a breach revert back to the lawyer or firm with no indemnification responsibilities by the service provider.

Addressing Your Cyber Risks: How to tackle the problem.

- Identify and Understand the Risks
- Educate Your Staff
- Work Regularly with a Knowledgeable IT Consultant to control Risks
- Be Aware of Your Ethical and Statutory Responsibilities
- Create a Data Breach Response Plan
- If a Breach is Suspected Investigate and Respond Immediately
- Consider Purchasing Cyber Coverage

Appendix I

West Virginia Standards of Professional Conduct

Preamble

Society at this time seems to be accepting a fundamental loss of common courtesy as a trend that accompanies the fast-paced existence most Americans now live. Perhaps instant communication, in which more information needs to be assimilated more rapidly, has rendered thoughtfulness nearly impossible. Perhaps it is simply the cynicism inherent in a society that values winning at all costs.

It is appropriate for judges and lawyers to revive valuable traditions that may be lost. Civility is particularly important in the courtroom where emotions are close to the surface because of the normal conflicts that arise in the search for the truth. These standards address and respond to concerns, not only in the State of West Virginia, but through the nation, over deteriorating professionalism.

Lawyers' conduct should be characterized at all times by personal courtesy and professional integrity. In fulfilling their duty as lawyers to represent a client vigorously, they should be mindful of their obligations to the administration of justice. Lawyers owe to opposing counsel, the parties, the courts and the court's staff a duty of courtesy, candor, honesty, diligence, fairness and cooperation.

Judges' conduct should be characterized at all times by courtesy and patience toward all participants. Judges owe to all participants in a legal proceeding courtesy, attentiveness, respect, diligence, punctuality, protection against unjust and improper criticism or attack, and a dedication to the proper administration of the courts.

Conduct characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently, and tends to delay and often to deny justice.

The following standards are designed to encourage lawyers and judges to meet their obligations to each other, to litigants and to the system of justice, and, thereby, to achieve the goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

Lawyers and judges should make a mutual and firm resolution to these standards. Voluntary adherence will promote the commitment by all participants to improve the administration of justice throughout the State of West Virginia.

These standards shall not be used as a basis for a cause of action nor shall they form a presumption that a legal duty has been breached. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer or judicial misconduct or negligence may be determined.

These standards should be reviewed and followed by all West Virginia judges as that term is defined in Canon 6 of the Code of Judicial Conduct and by all lawyers licensed to practice in this State or who are admitted *pro hac vice.* Copies may be made available to clients to reinforce the obligation to maintain and foster these standards.

Lawyers' Duties to Other Counsel and the Courts.

A. Civility and Courtesy

1. A lawyer should treat all counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications. A lawyer should not, even when called upon by a client to do so, abuse or indulge in offensive conduct, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

2. A lawyer should not encourage or knowingly authorize any person under the lawyer's control to engage in conduct that would be improper if the lawyer were to engage in such conduct.

3. A lawyer should not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

4. Court sanctions should not be sought without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect the client's lawful interests.

5. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or written, and should adhere in good faith to all agreements implied by the circumstances or local customs. Where practical, such agreements should be reduced to writing.

6. A lawyer should endeavor to confer early with other counsel to assess settlement possibilities, but should not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.

7. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

8. Unless specifically permitted or invited by the court, a lawyer should not send copies of correspondence between counsel to the court. Counsel may copy the court when the correspondence does not contain material which would infer that counsel or witnesses have conducted themselves inappropriately.

B. Conduct as to Discovery and Other legal Matters.

1. In civil actions, a lawyer should stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

2. A lawyer should not use any form of discovery or discovery scheduling as a means of harassment or to increase litigation expenses. Depositions should only be used when actually needed to ascertain facts or information or to perpetuate testimony.

3. A lawyer should make good faith efforts to resolve by agreement objections to matters contained in pleading and discovery requests prior to submission to the court for resolution.

4. A lawyer should not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

5. Requests for an extension of time should not be made solely for the purpose of unjustified delay or to obtain a tactical advantage.

6. Other counsel should be promptly contacted regarding scheduling matters in a good faith effort to avoid scheduling conflicts and endeavor to accommodate previously scheduled dates for hearings, depositions, meetings or conferences.

7. A lawyer should notify other counsel and, if appropriate, the court and other interested persons, at the earliest possible time when hearings, depositions, meetings or conferences have to be canceled or postponed. When a trial is vacated by reason of settlement, or otherwise, counsel should notify all interested parties promptly.

8. A lawyer should agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided the clients' legitimate rights will not be materially or adversely affected.

9. A lawyer should not cause any default or dismissal to be entered without first notifying opposing counsel, when the identity of such counsel is known.

10. A lawyer should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge. This includes asking only those questions that are reasonably necessary for the prosecution or defense of an action and not obstructing or objecting to deposition questions unless necessary to preserve an objection or privilege for resolution by the court.

11. A lawyer should carefully craft a document production requests so they are limited to those documents reasonably believed to be necessary for the prosecution or defense of an action. Production requests should not place an undue burden or expense on a party.

12. A lawyer should respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. Documents should not be produced in a manner designed to hide or obscure the existence of particular documents.

13. A lawyer should carefully craft interrogatories so they are limited to those matters reasonably believed to be necessary for the prosecution or defense of an action. Interrogatories should not be designed to place an undue burden or expense on a party.

14. A lawyer should respond to interrogatories promptly and reasonably and not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and no-privileged information.

15. A lawyer should base any discovery objections on a good faith belief in their merit and should not object solely for the purpose of withholding or delaying the disclosure of relevant information.

16. When a draft order is to be prepared by counsel to embody a court's ruling, the draft should accurately and completely reflect the court's ruling. The draft order should be promptly prepared and submitted to other counsel. Objections to the draft order should be made promptly. A diligent attempt to reconcile any differences should be made before the draft order is presented to the court.

C. Lawyers' Duties to the Court

1. A lawyer will speak and write civilly and respectfully in all communications with the court. A lawyer should not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court. Moreover, a lawyer should not write letters to the court in connection with a pending action, unless invited or permitted by the court. Whenever communication with the court is mandated, copies of the correspondence should be provided to all counsel.

2. A lawyer should be punctual and prepared for all court appearances so that all hearings, conferences and trials may commence on time. If delayed, a lawyer should notify the court and, if possible, opposing counsel.

3. A lawyer should be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice, and should act and speak civilly to the court and all of its personnel with an awareness that they, too, are an integral part of the judicial system.

4. A lawyer should not engage in any conduct that brings disorder or disruption to the courtroom. Clients and witnesses appearing in court should be advised of the proper conduct expected and required. To the best of the lawyer's ability, clients and witnesses should be prevented from creating disorder or disruption. If the lawyer anticipates a disorder or disruption problem with a client, the lawyer may wish to notify the court or its bailiff prior to the proceeding. If a lawyer anticipates a disorder or disruption problem with a witness, the lawyer should notify the court or bailiff prior to the proceeding; and should also do so if a client intends to commit serious bodily injury or damage to another's property, as provided under Rule 1.6(b)(1) R.P.C.

5. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, the lawyer will verify the availability of necessary participants and witnesses. The lawyer shall promptly notify the court of any problems involving attendance of such participants and witnesses.

D. Lawyers' Duties to the Client

1. Lawyer's primary responsibility is to the client. However, a lawyer is an officer of the court and has an independent duty to the judicial system which serves both the lawyer and the client.

2. A lawyer's conduct is governed by the West Virginia Rules of Professional Conduct and by the rules of the courts before which the lawyer practices. A lawyer's conduct is governed by the highest standards of courtesy, integrity, human decency and respect for the judicial system the lawyer serves. A client has no right to demand or expect the lawyer to violate those rules and standards.

3. A lawyer is obligated to provide competent representation to a client.

4. A lawyer is obligated to exercise diligence in the pursuit of the client's interest.

5. A lawyer is obligated to be punctual in fulfilling all professional commitments.

6. A lawyer is obligated to be courteous, respectful and civil to parties, witnesses and other lawyers, to the court, and to the court's staff.

7. A lawyer is obligated to demonstrate good faith in adhering to promises and agreements to other counsel and to cooperate with the court in the furtherance of the judicial process.

8. A lawyer is obligated to refrain from abusive, hostile, demeaning or offensive conduct toward others even if a client requests it.

9. A lawyer is obligated to remain uninfluenced by any ill feeling which may exist between litigants.

10. A lawyer has the ultimate responsibility to determine accommodations to be granted opposing counsel and is not obligated to accede to a client's demands that the lawyer act in an uncooperative manner toward opposing counsel.

E. Lawyers' Responsibility in Advertising.

A lawyer must be aware of what is appropriate and what is inappropriate in regard to advertising. A lawyer who chooses to advertise must assure that such advertising complies with both the letter and the spirit of the applicable Rules of Professional Conduct and these standards.