



#### BOARD OF DIRECTORS

**James M. Campbell\***

President  
Campbell Campbell Edwards & Conroy, PC

**Timothy Pratt\***

President-Elect  
Boston Scientific

**Mike Weston\***

Vice President  
Lederer Weston Craig, PLC

**Mary Massaron\***

Immediate Past President  
Plunkett Cooney PC

**Connie Lewis Lensing\***

Secretary-Treasurer  
FedEx Express

**Tina Barton**

Merck & Co., Inc.

**Tiffany Benjamin**

Eli Lilly and Company

**Julia L. Brickell**

H5

**John Cuttino**

Gallivan, White & Boyd, P.A

**H. Mills Gallivan**

Gallivan, White & Boyd, P.A.

**Markus Green\***

Pfizer Inc.

**John K. Kim**

Johnson & Johnson

**Toyja E. Kelley**

Saul Ewing Arnstein & Lehr LLP

**Andrew Kopon, Jr.**

Kopon Airdo, LLC

**Scott Kreamer**

Baker Sterchi Cowden & Rice LLC

**John Kuppens**

Nelson Mullins, LLP

**Doug Lampe\***

Ford Motor Company

**John T. Lay, Jr.**

Gallivan, White & Boyd, P.A

**Robert L. Levy\***

Exxon Mobil Corporation

**Peter Martin**

State Farm

**Don Myles**

Jones, Skelton & Hochuli, P.L.C

**Mary Novacheck\***

Bowman and Brooke LLP

**John O'Tuel III**

GlaxoSmithKline

**Jonathan M. Palmer\***

Microsoft Corporation

**Craig A. Thompson**

Venable LLP

**Jeanne Walker**

Shell Oil

**Andrea Looney**

Executive Director

\*Member, Executive Committee

February 27, 2018

Majority Leader Thomas K. Norment, Jr.  
district03@senate.virginia.gov  
Pocahontas Building, Room No: E603  
Senate of Virginia  
P. O. Box 396  
Richmond, VA 23218

Speaker M. Kirkland Cox  
DelKCox@house.virginia.gov  
Pocahontas Building  
900 E. Main St,  
Richmond, VA 23218

Dear Senate Majority Leader Norment and Speaker Cox:

The undersigned urge you to reject both the substitute for House Bill No. 1336 approved by the Senate Committee for Courts of Justice and, should it make it to conference, any version of the bill that undermines current law. This legislation will harm businesses, increase litigation costs related to discovery and spur ancillary battles over sanctions. It would have Virginia doing a U-turn away from its current, well-reasoned approach to spoliation.

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Although LCJ's corporate members are often defendants, they are plaintiffs as well. The International Association of Defense Counsel (IADC) has been serving a distinguished membership of corporate and insurance defense attorneys and insurance executives since 1920. Its activities benefit the approximately 2,500 invitation-only, peer reviewed members and their clients, as well as the civil justice system and the legal profession. Moreover, the IADC takes a leadership role in many areas of legal reform.

Current Virginia law on spoliation reflects common sense: A wrongdoer who willfully destroys evidence for the purpose of thwarting the judicial process should not benefit from that act. To enforce this rule, when a piece of evidence becomes

unavailable, courts ask whether someone intentionally destroyed it to keep it out of the hands of an adversary or the court. If the answer is yes, then the judge tells the jury it can infer that the evidence would have been detrimental to the person who got rid of it.

H.B. 1336 would change the simple question—was evidence destroyed to prevent its use in litigation—into an examination of whether enough was done to prevent the destruction of evidence regardless of motive. Instead of determining whether a willful destruction occurred, courts would ask whether a party did everything reasonable to protect the item, and would allow juries to assume that the lost item was detrimental to a party who had no intention of destroying it. By focusing on the process of preservation rather than the end result, H.B. 1336 would turn the doctrine of spoliation upside down and substitute it with a move-the-goal-post process of second guessing.

The case that gave rise to this legislation concerned a furnace that allegedly emitted carbon monoxide into a residence. The furnace was removed from the residence and stored by the landlord in a maintenance bay for more than a year before being disposed of—which happened well before the law suit was filed. Under the rule stated in H.B. 1336, instead of asking if the landlord destroyed the furnace on purpose, the court would allow the jury to penalize the landlord even without any bad intent.

The perverse result contemplated by H.B. 1336 was rejected by the U.S. Supreme Court when it codified the spoliation doctrine into Rule 37(e) of the Federal Rules of Civil Procedure. The Committee Note to that rule explains:

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.

This rule, like current Virginia law, reflects common sense. H.B. 1336 should be rejected.

Sincerely,

/s/

Jim Campbell  
LCJ President

/s/

Andy Kopon  
IADC President

cc: Governor Ralph Northam