

**PRESIDENT**

**John F. Kuppens**  
Columbia, South Carolina

**VICE PRESIDENT**

**Toya E. Kelley**  
Baltimore, Maryland

**IMMEDIATE PAST PRESIDENT**

**Philip L. Willman**  
Saint Louis, Missouri

**SENIOR COUNSEL**

**Emily G. Coughlin**  
Boston, Massachusetts

**IMMEDIATE PAST PRESIDENT**

**John E. Cuttino**  
Columbia, South Carolina

**SENIOR COUNSEL**

**Douglas K. Burrell**  
Atlanta, Georgia

**SENIOR COUNSEL**

**David M. Axelrad**  
Burbank, California

**Pamela W. Carter**  
New Orleans, Louisiana

**Joseph D. Cohen**  
Houston, Texas

**Armand J. Della Porta, Jr.**  
Wilmington, Delaware

**June J. Essis**  
Philadelphia, Pennsylvania

**Theodore Freeman**  
Atlanta, Georgia

**H. Mills Gallivan**  
Greenville, South Carolina

**Bryan C. Garcia**  
Albuquerque, New Mexico

**Daniel W. Gerber**  
Buffalo, New York

**Gary L. Grubler**  
Columbus, Ohio

**Alex J. Hagan**  
Raleigh, North Carolina

**James D. Holland**  
Jackson, Mississippi

**Thomas J. Hurney, Jr.**  
Charleston, West Virginia

**Lloyd R. Jones**  
Salt Lake City, Utah

**Andrew Kopon, Jr.**  
Chicago, Illinois

**James Scott Kreamer**  
Kansas City, Missouri

**John T. Lay, Jr.**  
Columbia, South Carolina

**R. Jeffrey Lowe**  
New Albany, Indiana

**Donald P. Moloney II**  
Lexington, Kentucky

**Donald L. Myles, Jr.**  
Phoenix, Arizona

**Lana A. Olson**  
Birmingham, Alabama

**John R. Owen**  
Baltimore, Maryland

**Fred D. Raschke**  
Dallas, Texas

**Melissa K. Roeder**  
Seattle, Washington

**Heather A. Sanderson**  
Calgary, Alberta, Canada

**Ninos Saroukhanioff**  
Woodland Hills, California

**Audrey A. Seeley**  
Westfield, New York

**Patrick J. Sweeney**  
Hillsdale, Pennsylvania

**Anne M. Talcott**  
Portland, Oregon

**Craig A. Thompson**  
Baltimore, Maryland

**J. Carter Thompson, Jr.**  
Jackson, Mississippi

**Richard D. Tucker**  
Bangor, Maine

**Matthew E. Yde**  
Washington, D.C.

**John R. Kouris**

February 28, 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  
DelK Cox@house.virginia.gov  
Pocahontas Building  
900 East Main Street  
Richmond, Virginia 23218

Dear Senate Majority Leader Norment and Speaker Cox:

DRI is an international organization of lawyers who defend civil litigation. We are proud that two hundred, ninety (290) members of our organization are from Virginia. On behalf of our organization, I urge you to reject the substitute version of House Bill No. 1336, passed by the Senate Committee for Courts of Justice. This legislation will harm businesses, increase litigation costs related to discovery and spur ancillary battles over sanctions. If enacted, this law would see Virginia making a complete reversal from its current, well-reasoned approach to spoliation.

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. This view is consistent with DRI's position nationally and within other state organizations. 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 destroyed 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, which would allow juries to assume that the lost item was detrimental to a party who had no intention of destroying it. By focusing

February 28, 2018

Page Two

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,

A handwritten signature in black ink, appearing to read "John F. Kuppens". The signature is fluid and cursive, with a large initial "J" and "K".

John F. Kuppens  
DRI President