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Chapter 1 - Overview

Local Practices/Local Rules/Judicial Preferences

To be updated in the future.

Criminal Law

In order to discuss criminal law, it is helpful to begin with a definition of a crime. There are many philosophical and technical definitions of a crime. Professor Jerome Hall defined a crime as "legally proscribed human conduct causative of a given harm which conduct coincides with a blameworthy frame of mind and which is subject to punishment by the State." A less scholarly but more manageable definition of a crime is an offense committed by a person against society and its laws.

An orderly society requires the existence of rules of conduct and enforcement of those rules. Unlike civil law, the purpose of which is to make a wronged person whole again through specific performance or monetary compensation by the wrongdoer, criminal law is intended to deter behavior deemed detrimental to society and to deal fairly with those who misbehave.

Sources of law applicable to criminal procedure in Virginia include federal, state and local law. The United States Constitution, federal statutes, and court cases construing federal law comprise the body of federal law. Virginia criminal law consists of the state constitution, state statutes and court decisions addressing issues of state law. Specific sources of state criminal law are Article I, Section 8 of the Constitution of Virginia and Titles 18.2 and 19.2 of the Code of Virginia. Localities may also enact ordinances which do not conflict with state or federal law.

Court Organization and Jurisdictional Distinctions

Supreme Court of Virginia

The Supreme Court of Virginia is the highest court in the Commonwealth and is frequently referred to as the "court of last resort." It has both original and appellate jurisdiction, but its primary purpose is to review decisions of lower courts from which appeals have been allowed. Va. Const. Article VI, § 1.

All criminal cases, as well as traffic infraction cases, are appealed to the Court of Appeals. The Supreme Court, in its discretion, may hear appeals of decisions of the Court of Appeals in felony cases and misdemeanor cases in which incarceration has been imposed, or in traffic and misdemeanor cases in which the Supreme Court determines that the decision of the Court of Appeals involves a substantial constitutional question or a matter of significant precedential value. Va. Code § 17.1-410. However, in practice, the Supreme

Court seldom hears appeals from decisions of the Court of Appeals in traffic cases.

The Supreme Court may, in its discretion, on motion of the Court of Appeals or on its own motion, certify an appeal which was filed with the Court of Appeals for review by the Supreme Court. Certification is appropriate when the Supreme Court determines that the case is of great public importance or that the docket or status of work of the Court of Appeals warrants transfer of jurisdiction of the case. Va. Code § 17.1-409. For a further discussion of appellate procedure in the Supreme Court, see this manual, "Post Sentencing - Supreme Court of Virginia."

Court of Appeals of Virginia

The Court of Appeals of Virginia provides for intermediate appellate review of all decisions of the circuit court in traffic infraction cases and in criminal cases. Before a criminal or traffic infraction case may be reviewed by the Court of Appeals, a notice of appeal must first be filed through the circuit court. Decisions of the Court of Appeals are final in traffic infraction and misdemeanor cases where no jail or penitentiary sentence has been imposed.

Va. Code § 17.1-406. For a further discussion of appellate procedure in the Court of Appeals, see this manual, "Post Sentencing - Court of Appeals."

Circuit Courts

The circuit court is the trial court of general jurisdiction in Virginia. It is the sole court with the authority to try all types of cases except as specifically provided by statute.

The circuit court has jurisdiction of 1) the trial of all misdemeanors originally charged in circuit court; 2) the trial of all felonies committed by adults, and those felonies committed by juveniles aged fourteen and older whose cases have been certified for trial in the circuit court by the judge of a juvenile and domestic relations district court; and 3) all appeals from the general district court and juvenile and domestic relations district court. Upon certification by the district court of any felony charge and ancillary misdemeanor charge or when an appeal of a conviction of an offense in district court is noted, jurisdiction as to such charges shall vest in the circuit court, unless such case is reopened pursuant to § 16.1-133.1, a final judgment, order, or decree is modified, vacated, or suspended pursuant to Supreme Court of Virginia Rule 1:1, or the appeal has been withdrawn in the district court within 10 days pursuant to § 16.1-133. Va. Code § 17.1-513. Appeals from the district courts are heard "*de novo*" - the cases are tried from the beginning as though there had been no prior trial. Va. Code § 16.1-136. The circuit court is the only trial court of record and is the only court in Virginia wherein a jury is provided for the trial of criminal cases.

District Courts

District courts in Virginia are courts of limited jurisdiction. They have jurisdiction only in cases where jurisdiction is specifically given by statute. Jury trials are not conducted in district courts; all cases are heard by a judge.

Virginia has a unified district court system which consists of general district courts and juvenile and domestic relations district courts. Some general district and juvenile and domestic relations district courts are served jointly by one clerk and are referred to as "combined" district courts. Combined district courts, however, maintain their separateness in terms of case processing. Furthermore, general district court judges hear only general district court cases, and juvenile and domestic relations district court judges hear only juvenile and domestic relations cases, except when they consent to serve as a replacement judge when the regular judge is unable to preside over a case.

Both types of district courts have jurisdiction of adult misdemeanor cases as well as traffic cases. While district courts do not have jurisdiction to try felony cases, they may conduct preliminary hearings in felony cases to determine whether there is enough evidence to "certify" the case to the circuit court for grand jury review and possible trial.

The juvenile and domestic relations district court has exclusive jurisdiction over individuals under the age of eighteen alleged to have committed acts which, if committed by an adult, would constitute a crime. Va. Code § 16.1-241. Such cases are referred to as "delinquency" cases. The juvenile and domestic relations district court has jurisdiction of cases where a juvenile has committed certain actions which, if committed by adults, would not be considered criminal offenses such as truancy or habitually running away from home. Such cases are known either as "CHINS" (child in need of services) cases or "CHINSUP" (child in need of supervision) cases. The juvenile and domestic relations district court also has jurisdiction of all misdemeanor offenses committed by one member of the family against another. Like the general district court, the juvenile and domestic relations district court cannot hear felony cases. It may conduct preliminary hearings in felony cases involving offenses committed by one family member against another.

Felonies and Misdemeanors Distinguished

Criminal offenses are divided into two categories, felonies and misdemeanors, based upon the punishment which may be imposed upon conviction. (**Note:** Traffic infractions are defined as violations of public order are neither felonies nor misdemeanors. Va. Code § 46.2-100.)

Felonies

Felonies are serious offenses generally punishable by imprisonment in a penitentiary for at least one year and sometimes also punishable by a fine. Va. Code § 18.2-8. Examples of felonies are murder, malicious or unlawful wounding (felonious assault), robbery, grand larceny and rape. Title 18.2 of the Code of Virginia categorizes felonies into six classes for purposes of punishment and sentencing. The prescribed range of punishment for each class of felony is listed below:

Class Felony	Punishment Range
1	Imprisonment for life without the possibility of parole, and a fine of not more than $100,000
2	Imprisonment for life or any term not less than twenty (20) years, and a fine of not more than $100,000
3	Imprisonment for not less than five (5) nor more than twenty (20) years, and a fine of not more than $100,000
4	Imprisonment for not less than two (2) nor more than ten (10) years, and a fine of not more than $100,000
5	Imprisonment for not less than one (1) year nor more than ten (10) years, or confinement in jail for not more than twelve (12) months and a fine of not more than $2,500, either or both
6	Imprisonment for not less than one (1) nor more than five (5) years, or confinement in jail for not more than twelve (12) months and a fine of not more than $2,500, either or both.
For any felony offense committed (i) on or after January 1, 1995, the court may, and (ii) on or after July 1, 2000, shall, except in cases in which the court orders a suspended term of confinement of at least six months, impose an additional term of not less than six months nor more than three years, which shall be suspended conditioned upon successful completion of a period of post-release supervision pursuant to Va. Code § 19.2-295.2 and compliance with such other terms as the sentencing court may require. However, such additional term may only be imposed when the sentence includes an active term of incarceration in a correctional facility.	
Note: Except as specifically authorized for Class 5 and 6 felonies the court shall impose either imprisonment and a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine. Va. Code § 18.2-10(g).	

Misdemeanors

Misdemeanors are less serious offenses punishable by a fine of up to $2,500 or a sentence not to exceed twelve months in jail, or a combination of a fine and jail sentence. Examples of misdemeanors are simple assault, public intoxication and petit larceny. Like felonies, misdemeanors are categorized into several classes pursuant to Va. Code § 18.2-11:

Class Misdemeanor	Punishment Range
1	Confinement in jail for not more than twelve (12) months and a fine of not more than $2,500, either or both
2	Confinement in jail for not more than six (6) months and a fine of not more than $1,000, either or both
3	A fine of not more than $500
4	A fine of not more than $250
Other	For a misdemeanor offense prohibiting proximity to children as described in subsection A of § 18.2-370.2, the sentencing court is authorized to impose the punishment set forth in subsection B of that section in addition to any other penalty provided by law.

Other Offenses

In some instances, criminal offenses are not punishable as one of these classes of offenses. Instead, the punishment for an offense may be contained either in the statute that creates or defines the offense or in a separate section which specifically provides a punishment for the offense. Va. Code § 18.2-14. To determine whether an offense is a felony or a misdemeanor, the following criteria should be applied:

- A felony is punishable by at least one year in the state correctional facility;
- A misdemeanor is punishable by not more than twelve months in jail or a $2,500 fine, either or both.
- All offenses which do not clearly constitute felonies are treated as misdemeanors. 1987-88 Rept. Va. Att'y Gen. 288 (1988).

Participants in The Criminal Justice System

Virginia's criminal justice system is composed of a network of courts and tribunals dealing with criminal law and its enforcement. While clerks, judges, attorneys and law enforcement officers are the primary figures in the criminal justice system, many other entities and individuals serve an equally vital function in the criminal justice process. This chapter identifies the major

participants in Virginia's criminal justice system and attempts to provide a greater understanding of their role and importance.

Law Enforcement

Law enforcement is the arm of the criminal justice system with investigatory and arrest authority. Examples of law enforcement include local police, sheriffs and state police. **Note:** Because sheriffs have myriad responsibilities beyond law enforcement, their role is addressed separately in this chapter.) The foregoing entities possess broad powers within a jurisdiction to investigate crimes and arrest those who are in violation of law. In certain instances, individuals who are privately employed may be sworn in by a circuit court judge as special police with law enforcement powers.

Whether a law enforcement official is employed by the government or by a private employer, their role in the criminal justice system is the same: to preserve the peace, to protect the public, to uphold the law, and to provide the information necessary to prosecute those who have violated the law.

Prosecutors

A prosecutor is empowered by law to represent the government's interests in a criminal case. In essence, the prosecutor performs the function of trial attorney for the government.

In this state, the Commonwealth's attorney is charged with representing the Commonwealth of Virginia as plaintiff when a defendant is charged with the commission of a criminal offense. The Commonwealth's attorney is chosen by popular election in each city and county every four years. They are assisted by a staff of assistant Commonwealth's attorneys who serve at the pleasure of the Commonwealth's Attorney.

When a violation of local ordinance is prosecuted, the local government's attorney is charged with representing the interest of the locality as plaintiff. By statute, however, the local government's attorney may contract with the Commonwealth's attorney to act as the local government attorney when a case involves a violation of local law. The local government's attorney is appointed by the local governing body.

Whether the prosecutor is a city, county, or Commonwealth's attorney, their role is to protect the public interest and to attempt to prove the guilt of the defendant beyond a reasonable doubt.

Defense Attorneys

A defense attorney assumes the responsibility for representing the interests of an accused. Their responsibilities entail providing legal advice to the accused, preparing for hearings and for trial, and appearing at all criminal proceedings on behalf of the accused. As defense attorney, he is not required to believe or prove that the defendant is innocent; rather, their role is to guide their client through the criminal process, to represent their client's position, and to ensure that the defendant fully understands the nature and consequences of the charges against them.

An accused may hire any licensed attorney whom he can afford, including an out of state attorney, as long as they are in compliance with Rule of Court 1A:4. For more information on *Pro Hac Vice* attorney, please *see* Civil Manual, Suits-Action Types L-W: *Pro Hac Vice*. If the accused wishes to be represented by counsel but is indigent (unable to afford an attorney) and he is charged with a jailable offense, the judge will appoint an attorney to represent them. Courts in many jurisdictions in Virginia employ public defenders to defend indigent criminal defendants. Alternatively, an accused may waive their right to counsel and represent themselves (proceed pro se). For a discussion of retained and appointed counsel, *see* "Pre-Trial - Right to Counsel" in this manual.

Magistrates

Magistrates and any other personnel in the office of the magistrate shall be appointed by the Executive Secretary of the Supreme Court of Virginia in consultation with the chief judges of the circuit courts having jurisdiction within the region. Each magistrate shall be appointed to serve one or more of the magisterial regions created by the Executive Secretary. Each magisterial region shall be comprised of one or more judicial districts. The Executive Secretary shall have full supervisory authority over the magistrates so appointed. Notwithstanding any other provision of law, the only methods for the selection of magistrates shall be as set out in this section. Va. Code § 19.2-35.

A magistrate has only the powers expressly granted by statute. Va. Code § 19.2-45. While magistrates may take certain legal actions in both criminal and civil matters, this manual will discuss only their criminal functions.

Magistrates conduct hearings to determine whether probable cause exists for arrest. Va. Code § 19.2-45 (1). When a criminal complaint is lodged with the magistrate, he must weigh the facts and determine whether there is a probable cause to believe that the accused committed the offense in question. If he finds probable cause, he must issue a warrant or summons charging the accused with the commission of a criminal offense. The magistrate will not issue a warrant or summons charging the accused with committing a criminal offense if probable cause is not found. The magistrate acts as a "gatekeeper,"

screening from prosecution those cases that appear to lack sufficient evidence or information to support the claim that the accused has committed a crime.

The magistrate is also empowered to issue search warrants. Va. Code § 19.2-45 (2). The magistrate, in reviewing search warrant requests, must balance an individual's constitutional right to be free from unreasonable searches and seizures against society's right to obtain evidence of a crime. For these reasons, there are very strict provisions regulating the issuance of search warrants. The magistrate may suffer serious consequences and be held personally liable if he fails to comply with these provisions. The magistrate must determine that probable cause exists before issuing a warrant. The standard for establishing probable cause to search is the same as the standard for establishing probable cause to arrest. For a thorough discussion of search warrants, see this manual, "Miscellaneous Matters - Search Warrants."

The magistrate performs the task of admitting (or denying) persons to bail and setting the terms of bail. Va. Code § 19.2-45 (3). After an accused has been arrested, the arresting officer will generally bring them before a magistrate. The magistrate will conduct a bail hearing at which he will question the accused and the arresting officer. Based upon the nature and circumstances of the offense, the accused's criminal history, length of residence in the community, whether the accused is employed, and the accused's record of appearance at previous court hearings, the magistrate will decide whether to release the accused or commit them to jail. If the accused is to be released, the magistrate must also set the conditions of release and fix bail appropriately to ensure the accused's appearance in court. Many provisions govern admission to bail, and it is incumbent upon the magistrate to adhere to those guidelines both to preserve the rights of the accused and to protect the public from harm by the accused. For a thorough discussion of bail procedures, see this manual, "Pre-Trial - Bonds."

Grand Juries

The functions of a grand jury are twofold:

- To consider bills of indictment prepared by the attorney for the Commonwealth and to determine whether as to each such bill there is sufficient probable cause to return such indictment "a true bill."
- To investigate and report on any condition that involves or tends to promote criminal activity, either in the community or by any governmental authority, agency or official thereof. These functions may be exercised by either a special grand jury or a regular grand jury as hereinafter provided.

There are three types of grand juries - regular, special, and multi-jurisdictional, each of which is an arm of the circuit court.

Regular Grand Juries

A regular grand jury is convened at each term (session) of court. The court annually selects at least 60 but not more than 120 citizens from the county or city to serve as grand jurors for one year. Not more than twenty days before the beginning of each term of court at which a grand jury is required, the clerk of the circuit court issues a *venire facias* (list of grand jurors to be summoned) to the sheriff commanding them to summon from the grand jury list not less than five (5) nor more than nine (9) persons to serve as grand jurors for that court term. Va. Code § 19.2-194. For a discussion of petit juries and juror summoning, see this manual, "Trial/Post Trial - Jury Trial."

Grand juries consider bills of indictment, hear witnesses and determine whether there is probable cause to believe that an accused committed a crime and should stand trial. Va. Code §§ 19.2-191, 19.2-200. The grand jury does not hear both sides of the case and does not determine the guilt or innocence of the accused. The foregoing is the function of the petit jury if the accused is tried later. The selection of regular grand jurors is done by the circuit court on a yearly basis.

Special Grand Juries

Special grand juries may be impanelled by a circuit court (i) at any time upon its own motion, (ii) upon recommendation of a minority of the members of a regular grand jury that a special grand jury be impanelled, to perform the functions provided for in subdivision (2) of Va. Code § 19.2-191, or (iii) upon request of the attorney for the Commonwealth to investigate and report on any condition that involves or tends to promote criminal activity and consider bills of indictments to determine whether there is sufficient probable cause to return such indictment as a "true bill."

A special grand jury shall be impanelled by a circuit court upon the recommendation of a majority of the members of a regular grand jury if the court finds probable cause to believe that a crime has been committed which should be investigated by a special grand jury impanelled to perform the functions provided for in subdivision (2) of Va. Code § 19.2-191.

At the conclusion of its investigation and deliberation, a special grand jury impanelled by the court on its own motion or on recommendation of a regular grand jury shall file a report of its findings with the court, including therein any recommendations that it may deem appropriate, after which it

shall be discharged. Such report shall be sealed and not open to public inspection, other than by order of the court. Va. Code § 19.2-206.

A majority, but not less than five, of the members of a special grand jury convened upon request of the attorney for the Commonwealth must concur in order to return a "true bill" of indictment. A "true bill" may be returned upon the testimony of, or evidence produced by, any witness who was called by the grand jury, upon evidence presented or sent to it. Va. Code § 19.2-213.

In practice, special grand juries are convened infrequently.

Special grand juries consist of seven to eleven citizens of a city or county, summoned from a list prepared by the circuit court. In order to determine a potential juror's qualifications, the presiding judge shall examine each juror individually and under oath. He shall then certify in writing and not under seal that he has examined the members of the special grand jury and has found that they are qualified and are impartial and disinterested in the subject matter and outcome of the investigation. The examination shall be recorded by a court reporter and conducted pursuant to the requirements of secrecy provided for in this chapter. The court shall appoint one of the members as foreman. Va. Code § 19.2-207.

The responsibility of a special grand jury is ordinarily limited to the investigation of a specific condition believed to exist in the community and to make a full report on that condition. It is not authorized to conduct a "fishing expedition" with respect to other possible illegal activity. If, in the course of its authorized investigation, the special grand jury discovers other conditions warranting investigation, such conditions should be disclosed in its report. If a special grand jury has not filed a report within six months of being impanelled, the circuit court may discharge it. However, if the court, in its discretion, determines that the special grand jury is making progress, the court may direct the body to continue its investigation. Va. Code § 19.2-213.1.

Multi-Jurisdiction Grand Juries

- A multi-jurisdiction grand jury is convened to investigate any condition which involves or tends to promote criminal violations as set out in Va. Code § 19.2-215.9;
- To report evidence of any criminal offense enumerated in subdivision 1 to the attorney for the Commonwealth or United

States attorney of any jurisdiction where such offense could be prosecuted or investigated and, when appropriate, to the Attorney General.

- To consider bills of indictment prepared by a special counsel to determine whether there is sufficient probable cause to return each such indictment as a "true bill." Only bills of indictment which allege an offense enumerated in subdivision 1 may be submitted to a multi-jurisdiction grand jury

Multi-jurisdiction grand juries may be convened upon application to the Supreme Court of Virginia by two or more Commonwealth's attorneys after approval of the application by the Attorney General. Va. Code § 19.2-215.2. If such a grand jury is authorized, the Supreme Court will issue an impaneling order which shall:

- appoint a judge of the circuit court of the jurisdiction where the multi-jurisdiction grand jury shall be convened as the presiding judge, unless all of the judges of that circuit have recused themselves.
- designate the jurisdiction requested on the application as the jurisdiction where the multi-jurisdiction grand jury shall be convened
- designate special counsel to assist the body.

Va. Code § 19.2-215.3. A multi-jurisdiction grand jury is convened for a twelve-month term, but such term may be extended for successive periods of not more than six months upon the petition of a majority of the grand jury.

The body consists of seven to eleven members (at least one member from each jurisdiction for which it is convened) selected by the presiding judge from a list prepared by them. This list is composed of persons on the annual list of grand jurors for the jurisdictions for which the multi-jurisdiction grand jury is convened. Va. Code § 19.2-215.4.

Petit Jury

A petit jury, also known as a regular or trial jury, hears the testimony of witnesses, determines the facts in a case and applies the principles of law pronounced by the judge in written instructions to the jury. The jury determines whether the defendant is guilty or not guilty and upon a finding of guilt, the court shall ascertain the term of confinement in

the state correctional facility or in jail and the amount of fine, if any, when a person is convicted of a criminal offense, unless the accused is tried by a jury and has requested that the jury ascertain punishment. Such request for a jury to ascertain punishment shall be filed as a written pleading with the court at least 30 days prior to trial.. Va. Code § 19.2-295.

Because jurors are not trained in the law, the judge must decide questions of law and what evidence should be admitted. The jury alone, however, decides questions of fact and weighs the credibility (reliability) of physical evidence and witness testimony.

A jury trial is available only at the circuit court level. Rule 3A:13(a). In felony cases, the jury consists of twelve persons selected from a panel of twenty; in misdemeanor cases, it consists of seven persons selected from a panel of thirteen. Va. Code § 19.2-262. Virginia Code §§ 8.01-345 through 8.01-352 govern the selection process of jurors in criminal as well as civil cases. Prospective jurors are randomly selected annually by jury commissioners who select the names from the current list of registered voters and other lists approved by the court. The names are then placed on a master jury list. Throughout the year whenever a jury is needed, the clerk will randomly select the number of jurors needed from the master list. The jurors selected are then summoned to appear on a specified date. For a detailed discussion of the jury selection process, see "Pre-Trial - Jury Selection, Summoning and Orientation."

Judges

The primary responsibility of a judge is to ensure that controversies between private parties or between a private individual and the government are determined fairly. The judge must know the law and apply it to the case before them. If a case is tried without a jury (a bench trial) the judge must determine the facts and apply the law to those facts. In a jury trial, the judge must accept the jury's verdict unless he believes it is the result of prejudice or a misapplication of law to the facts, in which case he may declare a mistrial and the case will be retried.

A judge should maintain order and decorum in proceedings before them. He should be patient and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in their official capacity. A judge should dispose of the business of the court in a timely manner and should follow the law without being swayed by partisan interests, public clamor, or fear of criticism. Canon 3A, Canons of Judicial Conduct.

Sheriffs

A sheriff is chosen by popular election for a four-year term. The sheriff's duties include providing assistance to the courts by serving arrest warrants, witness subpoenas and other

processes, and in summoning juries. They are also in charge of the local jail and is responsible for transporting prisoners from other facilities to appear at trial. In some rural counties, the sheriff is also the chief law enforcement official.

During criminal court proceedings, one or more sheriff's deputies serve as bailiff or court officer charged with keeping order, managing jurors and witnesses, protecting evidence (drugs and valuables), and maintaining courtroom security. The sheriff is also responsible for the custody of prisoners while in court.

Witnesses

A witness is one who testifies in court as to what he knows or has seen, heard or otherwise observed. A witness appearing before a grand jury aids the grand jury in determining whether the accused should stand trial. Likewise, in a criminal trial, the trier of fact may use the testimony of witnesses to prove or disprove the charges against the accused. Witnesses may be summoned by the Commonwealth or the defense.

Court Reporters

A court reporter records testimony in circuit court proceedings by CD, tape, shorthand, or stenography. The testimony must be recorded verbatim and without error. The court reporter may be called upon during the course of the proceeding to read aloud portions of the recorded proceeding to clarify witness testimony. It is vital that the testimony be recorded verbatim and without error. If an appeal is filed necessitating review of the record, the court reporter will prepare an "official transcript" from their record.

Generally, a court reporter is a private vendor under contract to the court who has been approved by a circuit judge to perform reporting services in their court. Va. Code § 19.2-166. In some jurisdictions, the court reporter may be a deputy clerk. In other jurisdictions, court reporters have been replaced by or are used in conjunction with electronic recording devices. Even though court proceedings can be recorded electronically, a court reporter is needed to produce a written transcript.

See Attorney General Opinion to Weckstein dated 4/12/02 (2002, page 156); Court trying felony cases has discretion to establish procedures for choosing and contracting for private court reporting services. Court reporting services associated with criminal litigation proceedings are exempt from Act's competitive process requirements.

Probation and Parole Officers

A probation and parole officer (also known as a "PO") is an officer of the court responsible for the preparation of investigative reports on defendants who have been convicted of a

crime (usually a felony). These presentence reports provide the court with the social, employment and criminal histories of defendants and serve as a sentencing guide to the judge. Va. Code § 19.2-299.

A PO is also charged with supervising those defendants whom the court has placed on probation. In conjunction with this responsibility, the PO is required to arrest or cause to be arrested those probationers who violate the terms and conditions of their probation. Va. Code § 53.1-145. In many jurisdictions, the PO must also ensure that any fines, court costs and restitution owed by the probationer are paid to the court. In some cases, other agencies approved by the Court, may monitor defendants who have been placed on "first offender" status, or may have been placed on probation for a misdemeanor violation.

The judge or judges of the judicial circuit to which an officer is assigned shall authorize the officer to serve as an officer of the court to carry out the power and duties prescribed in Va. Code § 53.1-145 and elsewhere in this article. When the area of a probation and parole district lies in two or more judicial circuits, the probation and parole officers shall be authorized by joint action of the judges of the several circuits. If there are more than two such judges, a majority vote shall control the authorization. Va. Code § 53.1-143

Although a PO is appointed to serve a particular court by the judges of that court, the PO is an employee of the Virginia Department of Corrections. If the PO supervises adult felons released on parole, he is also responsible to the Virginia Parole Board.

Virginia Parole Board

Virginia's Parole Board is a body of up to five (5) members appointed by the governor and subject to confirmation by the General Assembly. At least one member of the Parole Board shall be a representative of a crime victims' organization or a victim of crime as defined in subsection B of Va. Code § 19.2-11.01. Va. Code § 53.1-134. The Board's primary function is to decide whether felony inmates confined in state institutions are conditionally released from prison before completion of their sentences. It is the only entity other than the governor empowered to grant, modify, or revoke parole of prisoners confined in a state institution as a result of a sentence imposed by a state court.

Department of Corrections

The Virginia Department of Corrections is primarily responsible for the supervision, management and security of all state correctional facilities. It is also responsible for the discipline, treatment and rehabilitation of those confined in such facilities and for the supervision of all probation and parole officers. The Department is charged with implementing the objectives of the State Board of Corrections for local and community correctional programs and facilities (for example, CDI). The Department must respond to

and carry out all orders, rules and regulations of the Virginia Parole Board.

Clerks Of Circuit Courts

Throughout the criminal justice process, the court relies heavily on the support of the clerk of court and their staff to process the cases that come before the court. The judge and the clerk form the court's management team. The Code of Virginia provides that "[t]he clerk shall develop, implement and administer procedures necessary for the efficient operation of the clerk's office, keep the docket and accounts of the court, supervise nonjudicial personnel and discharge other duties as may be prescribed by the judge." Va. Code § 16.1-69.40. Pursuant to that section, the clerk should alert the judge as to scheduling and other problems, coordinate responsibilities with the judge, their secretary, and other participants in the judicial system, and ensure that the clerical functions of the court are performed in a timely, efficient, and accurate manner.

A circuit court clerk is a constitutional officer elected by popular vote for a term of eight years. If a vacancy in any elected constitutional office occurs within the 12 months immediately preceding the end of the term of that office, the governing body may petition the circuit court to request that no special election be ordered. Upon receipt of such petition, the court shall grant such request. The highest ranking deputy officer, or in the case of the office of attorney for the Commonwealth, the highest ranking full-time assistant attorney for the Commonwealth, who is qualified to vote for and hold that office, shall be vested with the powers and shall perform all of the duties of the office, and shall be entitled to all the privileges and protections afforded by law to elected or appointed constitutional officers, for the remainder of the unexpired term. Va. Code § 24.2-228.1

The clerk's office is the administrative arm of the court, and consequently, the clerk is the court's chief administrative officer. Many of the functions and duties of the clerk are specified by statute or court rules and are set out by topic in this manual. The clerk's primary responsibilities with respect to criminal cases are as follows:

1. to receive and acknowledge receipt of all case-related documents filed with the court and to properly provide for their security, retention and disposition;
2. to issue legal documents such as arrest warrants, capiases, subpoenas, writs, abstracts and any other documents as authorized by the judge or statute;
3. to prepare and maintain dockets and calendars of cases scheduled to be heard and to notify appropriate parties of upcoming hearings;
4. to commit to jail, penitentiary or other facility;

5. to admit to bail;

6. to prepare and maintain court orders;

7. to take affidavits and administer oaths;

8. to assist the court during courtroom proceedings (by calling cases, swearing witnesses, taking notes, and marking exhibits);

9. to manage juries, when required;

10. to account for all fines, court costs, restitution and other monies owed, remitted, to or disbursed;

11. to provide data regarding disposition of cases and caseload information to a variety of both local and state agencies; and

12. to foster a positive image of court services to the general public.

These responsibilities indicate the important role of the clerk in Virginia's judicial system. As caseloads and the volume of paperwork continue to increase, the responsibility of the clerk and their staff to process cases efficiently and properly through the court will become critical.

Clerks Of District Courts

The Committee on District Courts authorizes all district court clerk positions within the state. District court clerks are appointed by the chief district court judge and serve at their pleasure. Under certain circumstances such as in cases appealed to the circuit court, district court clerks are responsible for transmitting case papers to the circuit court.

Prosecutorial Documents, Arrest Documents and Court Orders

Various prosecutorial and arrest documents (processes) are used in Virginia to formally charge an individual with the commission of a specific offense. Such documents may serve as the basis for taking an individual into custody and for trial. All prosecutorial and arrest documents must clearly state the offenses of which one is accused, with reference to the specific criminal statutes and ordinances alleged to have been violated. If there is no statute or ordinance defining the offense because it is a common law offense, the documents must name the offense and must reference the specific statute which provides for punishment of the offense.

The following subsections discuss the various prosecutorial and arrest documents most often used within the judicial system as well as the function of court orders.

Bill Of Indictment

A bill of indictment is a written document that legally and formally charges an accused with having committed a specified felony or misdemeanor. Va. Code § 19.2-220 requires that the indictment be plainly and concisely written and that it contain the following information: 1) the name of the accused; 2) a description of the offense; 3) the county, city, or town in which the offense was committed; and 4) the date on which the offense was committed.

All bills of indictment must be prepared by the Commonwealth's Attorney. A grand jury uses the indictment and evidence, including testimony from witnesses, to determine whether there is probable cause to believe that the accused committed the offenses charged in the indictment. If probable cause is found, the grand jury will respond to the bill of indictment by returning a "true bill" which permits the government, represented by the Commonwealth's attorney, to proceed to try the accused. If probable cause is not found, the indictment is returned "not a true bill," and the charges against the accused do not advance further. For any returned indictment to be valid, at least four grand jurors must concur in the finding. Va. Code § 19.2-202. The indictment must be signed by the grand jury foreman. Rule 3A:6(c).

A bill of indictment may charge an individual with a single offense or multiple offenses, depending on local practice or in the discretion of the Commonwealth attorney. An indictment containing more than one charge is referred to as a "multiple count indictment."

Upon the return by a grand jury of an indictment for aggravated murder and the arrest of the defendant, the clerk of the circuit court shall forthwith file a certified copy of the indictment with the clerk of the Supreme Court of Virginia and shall be open to public inspection. Va. Code § 19.2-217.1
A "straight" or "direct" indictment is one that has been presented directly to the grand jury by the Commonwealth's attorney with no warrant or summons pending and usually without a preliminary hearing or probable cause hearing having been conducted in the district court. The Commonwealth's attorney may also proceed with a direct indictment if a case is not certified or is nolle prossed at the preliminary hearing in a general district court.

Virginia Code § 19.2-217 permits an accused to waive indictment, in which event he may be tried on a warrant or information, both of which are addressed below. An accused may waive indictment if he wishes to expedite their trial and sentencing.

Presentment

A presentment, like an indictment, is a written accusation of a crime. It is prepared and returned by a grand jury from its own knowledge or observation, without any bill of indictment before it. The term "out-of-pocket indictment," although technically incorrect, is used to describe a presentment signed by a grand jury foreman.

An accused may waive their right to be tried on a presentment, in which case he will be tried on a warrant or information. Va. Code § 19.2-217.

Information

An information is a written accusation of a crime or a complaint for forfeiture of property or money or for imposition of a penalty, prepared and presented by a competent public official upon their oath of office. Va. Code § 19.2-216. In practice, most informations are prepared and signed by the Commonwealth's attorney based upon a complaint in writing, verified by the oath of a competent witness. The contents of the information are the same as required for an indictment. Va. Code § 19.2-220.

An information may be filed in misdemeanor as well as felony cases. When an information is filed charging a felony, there may be no trial on such charge unless an indictment or presentment is first returned by the grand jury, except when the accused provides a written statement to the court waiving such indictment or presentment. In the event of waiver, the accused may be tried on the information or on a warrant. Va. Code § 19.2-217.

Warrant

A warrant is a written accusation of a crime prepared and signed by a magistrate, clerk, or judge based upon a complaint and subsequent finding of probable cause to believe the accused committed a criminal offense. A warrant also provides authorization to take the accused into custody; thus, it is commonly called a warrant of arrest. While Va. Code § 19.2-71 authorizes a magistrate, clerk, or judge to issue a warrant, the vast majority of warrants are issued by magistrates. A warrant issued by the judge while on the bench for a violation of law occurring in the case being tried is often called a "bench warrant." Although several warrants may be issued on the same complaint, no more than one offense should be charged in a single warrant. A summons may be issued in misdemeanor cases in lieu of a warrant when specifically authorized by statute. Va. Code § 19.2-73.

Because the warrant directs a law enforcement officer to make an arrest, the warrant must contain the name of the accused, or if their name is unknown, a description by which he can be identified with reasonable certainty, as well as the nature of the offense. Va.

Code § 19.2-72. The officer executing the warrant must endorse it with the date of execution (the date on which the warrant was served) and return it to a magistrate or other judicial officer having authority to grant bail. Va. Code § 19.2-76.

Summons

A summons, when used as a charging document, is similar to a warrant in that it charges in writing the accused with the commission of a specific offense. (For a discussion of the use of summonses for juries and grand juries, see this manual, "Pre-Trial - Jury Selection, Summoning and Orientation.") A summons contains substantially the same information as required for a warrant except that a summons also commands the accused to appear at a stated time and place for a court hearing. Rule 3A:4(b). Generally, summonses may be issued in misdemeanor cases, traffic infraction cases, and in cases where local ordinances have been violated. Va. Code §§ 19.2-73, 19.2-73.1, 19.2-74, 19.2-76.2 and 19.2-232. In circuit court, a summons is generally issued to compel an accused's appearance before the court upon the filing of a misdemeanor indictment, presentment, or information. Va. Code §§ 19.2-217, 19.2-219 and 19.2-232.

Unlike a warrant which is always executed by arresting the accused, a summons is executed by personally presenting or delivering a copy of the summons to the accused; no attempt is made to take the accused into custody. When a summons is served by the charging law enforcement officer (e.g., for a traffic infraction), the accused must sign the summons, thereby promising to appear in court on the specified date. If the summons is issued in the accused's absence by a magistrate or other judicial officer, the summons is given to a serving officer who personally delivers a copy of the summons to the accused and returns the original to the appropriate court, noting on the summons when and how the accused was served. Va. Code § 19.2-76. This process is called "making a return." Under certain limited circumstances, such as violations of local parking ordinances, a summons may be executed by first-class mail. Va. Code § 19.2-76.2. Summonses issued against a corporation to answer an indictment, presentment, or information are served in the same manner as in a civil case. (Va. Code §§ 19.2-238, 8.01-299 through 8.01-301). For use of subpoenas to compel attendance of witnesses, *see* this manual, "Pre-Trial - Witness Summoning."

Capias

A capias is a warrant of arrest authorized by a judge and prepared and signed by a clerk. A capias may be issued in misdemeanor as well as felony cases. In circuit courts, a capias is most often used to arrest an accused in the following situations:

The return of a felony indictment, presentment, or information (Rule 3A:7; Va. Code § 19.2-232);

Note: If defendant is in custody at the time of indictment, it is not necessary to issue a capias. See Va. Code § 19.2-232.

1. The return of an indictment, presentment, or information charging a misdemeanor for which imprisonment may be imposed (**Note:** If the information, presentment, or indictment charges a misdemeanor for which imprisonment may not be imposed, a summons is issued instead. Va. Code § 19.2-232);

2. Failure of an accused to appear in court in response to a summons;

3. An accused is charged with a violation of probation; or

4. An individual is charged with contempt of court or with failure to abide by conditions of a previously entered court order.

There are two types of capias forms. Form CC-1301, Capias Upon Indictment, Presentment, or Information, directs a law enforcement officer to arrest the accused and bring them before the court to answer a charge contained in an indictment, presentment, or information. Form CC-1356, Capias to Show Cause, directs a law enforcement officer to arrest the accused and bring them before the court to explain why the court should not take action against the individual for failing to abide by the court's previous order or instructions.

When a capias is used to compel an accused's appearance as the result of an indictment, presentment, or information, the form of the capias shall be the same as for a warrant except that it must be signed by the clerk and shall state that an indictment or information has been filed against the accused. Rule 3A:7. The officer serving the capias in such instances must also serve a copy of the indictment, presentment or information. Va. Code § 19.2-232. The arresting officer must endorse the date of execution on the capias and make their return to the issuing court. Rule 3A:7(b)(2).

Rule To Show Cause

A rule to show cause is a written document, authorized by a judge and generally prepared by a court clerk, commanding that an individual appear before the court on a specified date to show cause or explain why the court should not take action against the individual for failing to abide by the court's previous order or instructions.

A rule to show cause is not an arrest warrant. It is served, like a summons, by a sheriff or other law enforcement officer within a specified jurisdiction. Once the rule to show cause is executed, the serving officer must endorse the date of execution on the original document and make their return to the issuing court. A rule to show cause is generally

used as an alternative to the capias in the circuit court when:

1. a probationer is charged with violating the terms of their probation;

2. an individual is charged with failure to adhere to a previously imposed court order; or

3. an individual is charged with contempt of court.

The form of a rule to show cause is not prescribed by statute; as a result, such documents may vary in form from one jurisdiction to another.

Court Orders

The function of a court order is to record what transpired and to memorialize the court's disposition with respect thereto. A circuit court speaks only through its written orders. Hill v. Hill, 227 Va. 569 (1984). Criminal orders are generally prepared by the clerk's office, the judge, court staff or the attorney for the party seeking the order, depending on the type of relief sought and on local practice. Effective January 1, 1997, all final judgment orders shall be entered on a form promulgated by the Supreme Court. Va. Code § 19.2-307. Each order must be submitted to the judge for their signature, after which the clerk microfilms or scans it, assigns a book and page number or instrument number, and indexes and enters the order in an order book or automated system. Va. Code § 17.1-123.

The clerk shall keep order books. The clerk may, with the approval of the chief judge, by order entered of record, divide the order book into two sections, to be known as the civil order book and the criminal order book. All proceedings, orders and judgments of the court in all matters at civil law shall be recorded in the civil order book, and all proceedings, orders and judgments of the court in all matters at criminal law shall be recorded in the criminal order book. Va. Code § 17.1-124.

The common law order book will contain all proceedings, orders and judgments of the court in all matters of common law. The following are examples of orders that are entered in the common law order book:

- Appointment of judges;
- Appointment of jury commissioners;
- Appointment of magistrates;
- Zoning Appeals;
- Appointment of mental health examiner;
- Case continuances; or
- Setting of trial date.

All orders that make up the day's proceedings will be recorded by the clerk in the order book. Orders that make up each day's proceedings that have been recorded in the order book shall be deemed the official record pursuant to Va. Code § 8.01-389 when (i) the judge's signature is shown in the order, (ii) the judge's signature is shown in the order book, or (iii) an order is recorded in the order book on the last day of each term showing the signature of each judge presiding during the term. Va. Code § 17.1-123.

The procedures listed below are typical when an order is prepared by the court:

Step 1 Clerk records information to be included in the court order.

Comments: The clerk of the court may keep a ledger of orders to be used by court personnel when preparing the order. Based on local policy, the court or the attorney for the party seeking the order prepare the order for the judge's approval.

Step 2 Clerk or other court personnel prepares order and obtains judge's signature.

Comments: Order must contain the name of the court, case number, style of the case and the judge present.

Step 3 Clerk stamps court order with book and page or instrument number.

Step 4 Clerk processes/microfilms/scans order and enters and indexes in order book or electronic medium.

Step 5 Clerk provides copies of orders to the Department of Corrections and local agencies based on local custom.

Comments: The Department shall receive from the clerk, via certified mail or electronic transmission, the orders of all persons convicted of a felony and sentenced to the Department or sentenced to confinement in jail for a year or more. Va. Code § 53.1-20.1.

Step 6 Clerk places original in case file.

Rights of Criminal Defendants

Every person charged with the commission of a crime is presumed innocent until proven guilty by competent evidence beyond a reasonable doubt. The evidence against a

defendant must be so completely convincing that there is no reasonable doubt as to the defendant's guilt. This presumption forms the basis for many of the procedural safeguards that have developed over the centuries in dealing with criminal changes.

Many of the procedural safeguards of the United States Constitution have been made applicable to proceedings in state courts by way of the Fourteenth Amendment which provides:

> **nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

While no attempt will be made to provide a comprehensive list of all the rights guaranteed to an accused person under the United States Constitution, several fundamental rights include:

- the right to remain silent (no person shall be compelled in any criminal case to testify against themselves) (Fifth Amendment);
- the right to be released from custody pending appearance in court (Eighth Amendment);
- the right to have the assistance of an attorney for jailable offenses (Sixth Amendment);
- the right to know the nature of the charge (Sixth Amendment);
- the right to confront one's accusers (Sixth Amendment);
- the right to subpoena witnesses in one's favor (Sixth Amendment);
- the right to discovery (Sixth Amendment);
- the right to a speedy and public trial (Sixth Amendment);
- the right to a trial by jury (Sixth Amendment); and
- the right not to be tried more than once for the same offense (double jeopardy) (Fifth Amendment).

Our system of criminal law is based on an adversary system in which each party, the accused or their representative and the government's representative, presents arguments and evidence to an impartial judge or jury which decides the outcome of the case. Rules of procedure and evidence have been incorporated into criminal law to ensure the fair and orderly presentation of the issues.

Double Jeopardy

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. The prohibition against double jeopardy is also recognized by the Virginia

Constitution. Va. Const., Art. I, § 8. When it applies, the double jeopardy clause prohibits the retrial of a defendant who has been convicted or acquitted of the same offense at a previous trial and protects against multiple punishments for the same offense.

While both the failure to commence a trial within the statutory period (speedy trial) and the prohibition against double jeopardy result in the discharge of the defendant from further prosecution for a particular offense, the concepts of speedy trial and double jeopardy are different. The double jeopardy clause does not prevent the retrial of a defendant whose trial has resulted in a mistrial since the defendant was neither convicted nor acquitted.

Virginia recognizes two statutory forms of double jeopardy. Virginia Code § 19.2-294 provides that if the same act constitutes a violation of two or more statutes, conviction under one of such statutes is a bar to a prosecution or proceeding under the other or others. Virginia Code § 19.2-294 serves the same general purpose as the constitutional double jeopardy provisions but is limited to situations involving two or more statutory offenses. Where one act constitutes both a common law offense and a statutory offense, a defendant may be convicted of both. Blythe v. Commonwealth, 222 Va. 722 (1981).

Virginia Code § 19.2-294 also provides that if the same act is a violation of both a state and federal statute, a prosecution under the federal statute is a bar to a prosecution under the state statute. The foregoing statute affords a defendant more protection than the constitutional concept which permits separate sovereigns (two states, or a state and the federal government) to convict a defendant for the same act.

The constitutional prohibition against double jeopardy does not apply until jeopardy "attaches." In a jury trial, jeopardy attaches when the jury is impanelled and sworn. Crist v. Bretz, 437 U.S. 28 (1978). In a bench trial, jeopardy attaches when the Commonwealth begins to introduce evidence. Serfass v. United States, 420 U.S. 377 (1975). When the defendant pleads guilty, jeopardy attaches upon the court's acceptance of the plea. Peterson v. Commonwealth, 5 Va. App. 389 (1987). Pretrial proceedings are irrelevant for purposes of double jeopardy.

Virginia Code § 19.2-265.6 states that no dismissal of any criminal charge by a court shall bar subsequent prosecution of the charge unless jeopardy attached at the earlier proceeding or unless the dismissal order explicitly states that the dismissal is with prejudice.

The test established in Blockburger v. United States, 284 U.S. 299 (1932), is used to determine if two or more acts constitute the same offense for double jeopardy purposes: if one transaction violates two or more criminal statutes, the double jeopardy clause

prohibits multiple convictions or multiple punishments unless each offense requires proof of a fact which the other does not. In Grady v. Corbin, 495 U.S. (1990), the United States Supreme Court held that even if two offenses are separate under the Blockburger test, the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Generally, a defendant must plead double jeopardy as an affirmative defense which, if not raised, is deemed waived. Driver v. Seay, 183 Va. 273 (1944). The defendant must submit a sworn, written plea which sets forth all the facts and circumstances necessary to identify the accused and the offense. Sigmon v. Commonwealth, 200 Va. 258 (1958). All double jeopardy claims are decided by the court and cannot be submitted to the jury. United States v. MacDougall, 790 F.2d 1135 (4th Cir. 1986).

Criminal Case Flow - An Overview

This section provides a description of a typical criminal case being processed through Virginia's Criminal justice system, beginning with a complaint or commission of an offense and ending with sentencing and the right to appeal. There are variations in the processing of felony versus misdemeanor cases and where such variations exist, they are so noted.

It should be kept in mind that this section is not intended to encompass detailed case processing procedures performed by those in the circuit clerk's office. Instead, the narrative is designed to provide a general overview for those not familiar with the criminal justice process. For detailed case processing procedures, see "Case Initiation" chapter.

Complaint/Commission of Offense

There are a number of ways in which a criminal case may be initiated in Virginia's criminal justice system. For example, a criminal case can start with: 1) a complaint filed by a citizen; 2) a law enforcement officer observing an offense in progress; 3) a law enforcement officer having sound reason to believe that one committed a felony not in the officer's presence; or 4) law enforcement officials being given information concerning a criminal offense by an informant or as part of an investigation of another crime.

A citizen complaint may be filed with any of those persons identified under Va. Code § 19.2-71. In practice, however, most complaints are filed either with a magistrate, law enforcement officer (e.g., police or sheriff) or with the Commonwealth's attorney. A citizen complaint filed with a magistrate must consist of sworn statements of facts relating to the commission of the alleged offense. The statements must be made under oath and, if the magistrate so requires, the sworn statements may be reduced to writing and signed (Rule 3A:3). The magistrate, by statutory authority, has the power to issue an arrest process (e.g., a warrant) if he finds probable cause to believe the accused may have

committed the alleged offense.

A police or other law enforcement officer in receipt of a citizen complaint does not have the same authority to issue an arrest process, except in limited situations. Consequently, when a citizen complaint is filed with a law enforcement officer and an arrest process is sought, the officer will generally gather the facts, identify any witnesses, make a report of the facts and present same to the magistrate (sometimes accompanied by the complainant). The magistrate will conduct a probable cause hearing to determine whether an arrest warrant should be issued. If the alleged offense is a misdemeanor, the magistrate may authorize the officer to serve the suspect with a summons in lieu of an arrest warrant. Va. Code § 19.2-74.

As mentioned previously, a citizen complaint may also be filed with the Commonwealth's attorney. Unlike a magistrate, a Commonwealth's attorney is not a judicial officer empowered to issue a criminal arrest process nor does he have the authority to make a probable cause finding. Instead, he can merely hear the complaint and take one of the following actions:

1. Direct the complainant to file the complaint with a judicial officer, usually a magistrate;

2. Request the circuit court judge to impanel a special grand jury to investigate the alleged commission of the offense and report its findings to the judge and Commonwealth's attorney. The Commonwealth's attorney may then use such information to seek a bill of indictment from the regular grand jury;

3. Use the information supplied by the complainant to prepare and file an indictment directly with the regular grand jury; or

4. Refer the complainant to the appropriate law enforcement agency (i.e., local police, sheriff, state police, etc.) for investigation of the merits of the claim and to help assemble facts and evidence to successfully prosecute the case. In this situation, the police and complainant may eventually refer this matter back to the Commonwealth's attorney to seek a bill of indictment or go to a judicial officer (usually a magistrate) to seek a

5. warrant or summons.

Arrest

An arrest occurs when a suspect is taken into custody in a manner authorized by law for the purpose of charging them with a specific criminal offense. The suspect must be

advised that he is under arrest and why he is being arrested. Any empowered law enforcement officer who has observed an offense in progress, who has probable cause to suspect that a felony had been committed, or who has obtained an arrest warrant from a magistrate may make a lawful arrest. A private citizen may also make a lawful arrest in situations where the offender is a "wanted" felon or when the citizen personally observes the offender committing a felony.

In Virginia, an arrest by a law enforcement officer may be made with or without a warrant. When an arrest has been made with a warrant, a law officer has normally conducted an investigation to determine the facts of the case, has concluded that there is reason to believe that the suspect has committed a crime, and requested and obtained an arrest warrant, usually from a magistrate who had conducted a probable cause hearing.

Pursuant to Va. Code § 19.2-81, a law enforcement officer may make an arrest without a warrant only in the following situations:

1. The crime was committed in the officer's presence;

2. There is reason to believe the suspect committed a felony, not in the officer's presence;

3. The suspect is a "wanted" felon;

4. The suspect is believed to have committed a violation of motor vehicle laws, not in the officer's presence;

5. Pursuant to communications from another jurisdiction; or

6. For shoplifting not committed in the officer's presence.

7. When arrest takes place without a warrant, the suspect must be taken "forthwith" before a magistrate who will issue a warrant on the same basis as he would an arrest warrant obtained prior to the arrest. Va. Code § 19.2-82 and Rule 3A:5.

Booking

After the arrest, the law enforcement officer transports the suspect to the police station or sheriff's department where a complete report of the incident is prepared. At this time, if not before, the accused is informed of the specific offense(s) with which he is charged and of their constitutional rights. Fingerprints and photographs of the accused are then taken, copies of which are sent to the FBI and State Police for permanent computer

storage and to ascertain whether the accused is wanted for other crimes elsewhere.

Bail

The purpose of bail is to provide a strong incentive for an accused to appear in court while preventing them from being confined in jail before he has been found guilty. The amount of bail given in a case will depend upon the accused's character, the seriousness of the offense, weight of the evidence and the accused's financial ability to pay bail.

In Virginia, every accused has a right to bail. The right to bail exists unless there is probable cause to believe the accused may flee or pose a danger to the community if released. An accused who is released and fails to appear at trial may have their bail forfeited to the state and be subject to immediate arrest.

Any judicial officer defined in Va. Code § 19.2-119 (e.g. clerk, deputy clerk, judge or magistrate) may admit one to bail; however, in most instances, it is the magistrate who assumes such responsibility. No judicial officer may preset bail on an arrest process prior to the process being executed or carried out. A judicial officer may, however, attach a note citing information which may help the magistrate in determining bail.

When a warrant of arrest is issued prior to arrest, bail is determined when the accused is arrested and subsequently brought before the magistrate. At that time, the magistrate also schedules the date of the accused's first court appearance (always in district court). If an accused is arrested without a warrant having first been issued, the magistrate (after finding probable cause and issuing a warrant) will then proceed to determine bail and schedule the first court appearance.

As stated previously, a magistrate may, at their discretion, issue a summons in lieu of a warrant. If a summons is issued, the accused is released on their written promise to appear on a specific date. If a warrant is issued, the accused is either released on personal recognizance or he is required to post a bond (secured or unsecured). When an accused is unable to meet the requirements for a secured bond, he is committed to jail pending an arraignment hearing (for a misdemeanor) or a preliminary hearing (for a felony) in the district court. The magistrate then forwards all case-related papers to the district court clerk's office for processing.

If a judicial officer denies bail to a person, requires excessive bond, or fixes unreasonable terms of a recognizance, the person may appeal the decision of the judicial officer. Virginia Code § 19.2-124 specifies the court to which the bail decision is appealed.

Crossover Hearings/Bail Hearings

Every person charged with an offense described in Va. Code § 19.2-157, who is not free on bail or otherwise, shall be brought before the judge of a court not of record, unless the circuit court issued process, in which case the person shall be brought before the circuit court, on the first day on which such court sits after the person is charged, at which time the judge shall inform the accused of the amount of their bail and their right to counsel. If the court not of record sits on a day prior to the scheduled sitting of any court which issued process, (including the circuit court) the person shall be brought before the court not of record. The court shall also hear and consider motions by the person or Commonwealth relating to bail or conditions of release. Absent good cause shown, a hearing on bail or conditions of release shall be held as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays, following the making of such motion.

Arraignment Hearing

An arraignment hearing must be conducted in open court in accordance with Va. Code § 19.2-254. The purpose of an arraignment hearing is to: 1) identify the accused as the person charged; 2) notify the accused of the charge(s) against them; and 3) determine how the accused will plead (e.g., guilty, not guilty, or *nolo contendere*). The arraignment hearing may also be used to review bail and to determine whether the accused has the right to be represented by a court appointed attorney. If the accused wishes to have a lawyer to represent them at public expense, the accused must make a written requisition for such appointment and file a financial statement for determining eligibility for a court appointed attorney.

In misdemeanor cases in the district court and in misdemeanor cases initiated in circuit court, arraignment is not necessary when waived by the accused or their lawyer, or when the accused fails to appear in court. Va. Code § 19.2-254. In practice, the accused is arraigned only if he has not already been released on bail or on summons. In district courts, any accused still in jail on the day following their arrest is entitled by Va. Code § 19.2-158 to a "right of counsel" hearing (which is almost always combined with the arraignment hearing). In contrast, there is no statutory requirement that an accused charged with a misdemeanor initiated in circuit court be brought before the judge for arraignment if the accused is in jail. In felony cases, an arraignment hearing is always held in the circuit court, unless the accused has waived their right to arraignment. Only the accused, not their attorney, may waive such hearing. Furthermore, the accused must be personally present in order to waive arraignment. In some circuit courts, the accused is arraigned as soon as possible after indictment. In others, arraignment may take place at any time prior to or on the day of actual trial.

Preliminary Hearing

Preliminary hearings are held in district court in all cases where an accused is arrested on a warrant charging a felony, unless the hearing is waived by the accused. The purpose of the preliminary hearing is to determine if there is probable cause to believe the accused committed the felony for which he is charged. If probable cause is found by the district court judge, the case is certified to the circuit court grand jury. If the district court judge does not find probable cause, the case is dismissed. Sometimes, probable cause is found that a misdemeanor, rather than a felony, has been committed. In such situations, the felony charge may be reduced to a misdemeanor and the case disposed of in district court.

In preliminary hearings for offenses charged under Va. Code §§ 18.2-67.8, 18.2-361, 18.2-366, 18.2-370 or 18.2-370.1, the court may, on its own motion or at the request of the Commonwealth, the complaining witness, the defendant, or their counsel, exclude from the courtroom all persons except officers of the court and persons whose presence, in the judgment of the court, would be supportive of the complaining witness or the defendant and would not impair the conduct of a fair hearing.

Victims and witnesses of certain sexual offenses shall be advised that there may be a closed preliminary hearing in accordance with Va. Code § 18.2-67.8 and, if a victim was fourteen years of age or younger on the date of the offense and is sixteen or under at the time of the trial, or a witness to the offense is fourteen years of age or younger at the time of the trial, that two-way closed-circuit television may be used in the taking of testimony in accordance with Va. Code § 18.2-67.9. Va. Code § 19.2-11.01.

Indictment

When a felony case is certified to the grand jury, the Commonwealth's attorney prepares a bill of indictment, or written accusation of the charge(s), and submits same to the grand jury. The grand jury is a body of five to seven citizens, selected by the circuit court, who generally meet on the first day of each court term. At that time, the grand jury members examine each bill of indictment and associated evidence submitted by the government, represented by the Commonwealth's attorney, in order to determine whether the case before them constitutes a prima facie case (i.e., a case consisting of sufficient evidence to allow the case to go to trial). The defendant has neither the right to be present during the grand jury's deliberations nor the right to present a defense.
If the grand jury determines that there is sufficient evidence or probable cause, a "true bill" of indictment is rendered, allowing the Commonwealth's attorney to proceed to the trial stage. In order to return a true bill, at least four of the grand jurors must concur. (**Note:** A grand jury may return a true bill before a suspect has been arrested. In such cases, the court issues a capias or order for the suspect's arrest). If probable cause is not found, the indictment is returned "not a true bill" and further action against the accused is

prohibited. If, at the later date, the Commonwealth's attorney can furnish additional evidence or testimony from witnesses to further support charges, another bill of indictment may be presented.

- Some variations in the procedure for determining probable cause in felony cases are available. If, for example, an accused waives their right to a grand jury indictment under Va. Code § 19.2-217, he may be tried on either an "information" or a warrant. When the grand jury acts on its own initiative, it issues a "presentment."
- After the grand jury has completed its deliberations, the grand jury foreman signs the bill of indictment and notes whether it is a true bill or not a true bill. The grand jury's findings are then presented in open court. Once a bill of indictment is returned a true bill, this marks the formal commencement of the case in the circuit court.

Pre-Trial Activity

Once a case has been formally initiated in the circuit court, the defense and Commonwealth's attorney engage in a number of activities in preparation for trial. For instance, the defense may make a motion to quash or dismiss the indictment, claiming the indictment or other prosecutorial document are in some way not legally proper. The defense may also make a motion for a change in venue (i.e., place of trial), asserting that the defendant cannot obtain a fair trial in that particular jurisdiction. Another option for the defense is to meet with the Commonwealth's attorney to try to reach a compromise, sometimes called a plea bargain. Pursuant to such a bargain, the defendant may become the state's witness against another defendant or plead guilty in return for a promise from the Commonwealth's attorney to reduce the charges or to recommend a lighter sentence to the judge. The judge is not bound to accept this recommendation, but if he does not accept it, the accused is entitled to withdraw their guilty plea.

Further investigation of the facts should also take place prior to the trail. Attorneys for both sides collect the evidence with which to prepare their cases and may agree to stipulate facts about which there is no dispute. The attorneys will also ask the clerk of the court to issue certain processes for service (e.g., to have witnesses summoned or documents pertinent to the case forwarded to the court).

Trial

All persons accused of a criminal offense have the right to a fair and speedy trial. In Virginia, every person against whom probable cause has been found in a preliminary hearing or grand jury proceeding must be given a trial date within a certain period as set forth in Va. Code §19.2-243 or else that person is forever discharged from prosecution.

If a defendant has pleaded guilty, he will be convicted at trial and sentenced immediately following conviction or at a later date by the court, not a jury. An accused who has pleaded not guilty is, in essence, denying the allegations against them, placing the burden of proof on the prosecution. Consequently, a plea of not guilty sets the trial in motion.

Occasionally, a plea of *nolo contendere*, meaning "I do not wish to contend", is made. A plea of no contendere is similar to a plea of guilty, authorizing conviction and sentencing for the alleged crime. It does not, however, serve as an admission of the truth of any facts alleged by the prosecution.

Once a defendant has pleaded not guilty, he has the right to a fair trial by either a judge or jury. Jury trials are available only in a circuit court. There are twelve (12) jurors utilized in a felony trial and seven (7) jurors in a misdemeanor trial.

During the trial, physical evidence is presented as well as testimony from witnesses for both sides. If the trial is held in circuit court, the testimony is taken verbatim by a court reporter or through electronic means. Since a district court is not a court of record, testimony given during a district court trial is simply heard by the judge, with no permanent record of the testimony being kept.

The goal of the prosecutor during the trial is to prove "beyond a reasonable doubt" that the defendant is guilty. In turn, the defense attorney attempts to demonstrate to the judge or jury that there is reasonable doubt that their client committed the offense. Throughout the process, rules designed to protect the defendant's rights must be strictly observed because the course of the defendant's life is at stake.

If the prosecution fails to meet its burden of proof, the judge or jury will find the defendant not guilty and the defendant will be discharged. When the prosecution succeeds in proving reasonable doubt and the judge or jury finds the defendant guilty, the defendant is convicted.

Sentencing

To sentence a defendant means to impose punishment for a crime committed. Sentencing, which completes the judgment of the trial court, may take place immediately following trial or at a later date.

If there has been a jury trial, Virginia law dictates that the court recommends the sentence, unless the defendant has requested in writing that the jury ascertain punishment, as well as renders the verdict. If the defendant is a juvenile, and upon a finding of guilty of any felony charge, the court shall fix the sentence without the

intervention of a jury. When the judge alone has rendered a verdict, he also decides the punishment. Often, the judge will request a presentence report from the court's probation officer. This report, which contains background information on the defendant, aids the judge in determining fair terms of punishment. Other factors which influence the sentencing decision include the prosecutor's recommendation and the defendant's mitigating circumstances. Both the judge and jury, in determining the sentence, must follow the minimum and maximum sentence allowed by law.

Because punishment is supposed to be tailored to fit the particular circumstances of each crime, there are a number of sentencing alternatives available. In some cases, it might be decided that a suspended sentence would best serve justice. Unlike a pardon, which completely excuses a defendant, a suspended sentence is merely a reprieve. A defendant receiving a suspended sentence is either released on unsupervised probation or placed under the direct supervision of a probation officer. A suspended sentence may also entail the defendant's participation in a specified program (e.g., VASAP, drug treatment, community service, etc.). The granting of such freedom is based upon the defendant's good behavior; therefore, it is within the discretion of the court to subsequently revoke the suspended sentence if the defendant is found guilty, during the period of suspended sentence or probation, to have misbehaved or violated any of the conditions upon which he was released.

If a defendant receives a jail or penitentiary sentence, any time spent in custody awaiting their trial is deducted from their sentence. Sometimes, a defendant is sentenced to the penitentiary with a period of probation to commence upon their release from confinement. Such sentence is commonly referred to as a "split sentence."

It should be mentioned that defendants who are sentenced to a prison term with no probation to follow may be eligible for parole, meaning early release. Although parole is similar to probation, the two should not be confused from a jurisdictional standpoint. If a defendant is released on parole without concurrent probation, the defendant then falls under the jurisdiction of the Virginia Parole Board, not the court. When a defendant is released on parole with concurrent probation, he is answerable to both the court and the Parole Board.

Appeal

Any defendant may file an appeal to a high court, asserting that there were reversible errors committed in the trial or sentencing of their case.

An appeal from a final judgment in the district court is a matter of right pursuant to Va. Code § 16.1-132. Such an appeal may be filed with the circuit court within ten days of the district court's conviction or sentencing date, whichever occurred last. District court

appeals received in the circuit court are heard "*de novo*" (i.e., appeal cases are tried from the beginning as through there had been no prior trial).

An appeal from a final judgment in a circuit court may be made to the Court of Appeals of Virginia. A traffic or criminal appeal from the circuit court is not a matter of right. Consequently, in order for a traffic or criminal appeal to be reviewed by the Court of Appeals or Supreme Court, a petition for appeal must be presented. An initial notice of appeal and the petition must be filed within time frames specified by statute and the Rules of Court. Once the notice and petition are filed, the appellate court examines the petition and determines whether the appeal may be granted.

In practice, only a small percentage of appeals are granted by the Court of Appeals and Supreme Court. An appeal that is granted may result in the case being: 1) upheld or affirmed in whole or in part, or 2) reversed in whole or in part. If the appellate court reverses a case, this may result in a final judgment in the case or in the case being remanded back to the circuit court for a new trial, new sentencing, or other action as ordered by the appellate court.

Chapter 2 - Case Initiation

Case Initiation Activities

This section describes those activities performed by the clerk upon the filing of an adult criminal case in the circuit court. **(Note:** Juvenile appeals and juvenile transfer cases are addressed in a separate volume of the Circuit Court Clerk's Manual).

As discussed in the Overview chapter of this manual, an adult criminal case is generally initiated by the filing of 1) a grand jury indictment or presentment; 2) an information; 3) a warrant; or 4) an appeal from the district court. While case-processing activities performed by the clerk may vary depending upon which type of filing is received, many activities are routinely conducted, regardless of the method by which a case is initiated.

The next four sections of this chapter address those case initiation activities that are routinely conducted for all criminal case filings. These include:

- Acknowledging receipt of case papers
- Case numbering
- Indexing
- Case file preparation

The remaining sections address the activities that pertain to specific filing types. These include processing:

- indictments and presentments
- warrants and informations
- appeals from the district court

For each of the activities enumerated above, specific step-by-step procedures are also provided to guide the clerk in completing the activity. Because local practice and other matters may affect the sequence in which criminal cases are processed, the information provided herein should be viewed only as a guide.

Unlike civil case processing, the circuit court clerks may perform some processing activities in criminal matters before the circuit court formally obtains jurisdiction of the case and the defendant. The clerk may begin case processing activities upon return of an indictment or presentment by the grand jury, upon a warrant with a waiver of indictment, or upon the filing of misdemeanor information. No processing of district court appeals may take place before expiration of the ten-day appeal period. Activities listed are not statutorily required but have been adopted by local practice in an attempt to expedite case processing once the circuit court actually obtains jurisdiction.

In many jurisdictions, it is common practice for the circuit court clerk's office to receive certified cases and copies of bills of indictment in advance of grand jury day. The clerk's staff may conduct certain initial case processing activities in advance, assuming that most bills of indictment will be returned "true bills." This practice is favored in high volume courts since a large number of returns on grand jury day can result in a significant case processing backlog.

Processing cases prior to grand jury action may present some administrative problems. For example, a clerk may assign a case number, prepare a case file, and index a case, only to find later that the bill of indictment was never presented to the grand jury or the defendant was indicted on charges different from those contained in the clerk's advance copy of the bill of indictment. Consequently, some adjustments may be necessary, such as reassigning the case number or changing information on the index.

While local practice and convenience normally dictate when initial case processing activities begin, for purposes of this manual, such activities are deemed to begin after the grand jury has made its returns. For cases appealed from the district court and cases to be tried on an information or warrant, case initiation activities are deemed to begin with the circuit court's receipt of the case papers.

Acknowledging Receipt of Case Papers

One of the primary responsibilities of the circuit court clerk's office is the receipt and maintenance of case-related documents filed with the court. As noted previously, the initiating document filed in a felony case may be an indictment, presentment, information, or warrant. Most misdemeanor cases filed with the circuit court are the result of appeals from the district court. In such cases, a warrant or summons is the usual initiating document. Misdemeanor cases originating at the circuit court level are commenced by an indictment, presentment or information.

In addition to the aforementioned documents, the clerk's office may also receive a variety of other case-related materials upon initiation of a case. Examples of such materials include:

- Forensic laboratory reports;
- Bail papers and bond monies (Conditions of Release, Recognizance and Bond);
- Central Criminal Records Exchange (CCRE) form;
- Copies of search warrants and affidavits for search warrants;
- Notice of Appeal;
- District court case transmittal or cover sheet;
- Exhibits; and
- Other pleadings and evidence.

When receiving case-related documents, the clerk should exercise care to ensure that the materials are not separated or misplaced. Exhibits and evidence that cannot be placed in a case file should be stored together in a secure location after acknowledgment of receipt.

Virginia Code §§ 17.1-258.2 through 17.1-258.5 provide for the electronic filing of authorized documents. It states that a clerk of a circuit court may establish a system for electronic filing of documents with certain limitations. Once program is established, federal state and local governmental entities, or political subdivisions thereof, and quasi-governmental agencies, corporations, and authorities may electronically file papers in criminal actions approved by the Supreme Court of Virginia.

The procedures on the following page are recommended when receiving case papers.

Step 1 Clerk notes or stamps on each document and exhibit, the name of court; the date and time received; obtains signature and title of receiving clerk or deputy clerk; for cases appealed or certified from the district court, obtains signature of receiving clerk on case transmittal sheet and notice of appeal, if furnished.

Comments: A case transmittal sheet is not statutorily required to be submitted by the district court; however, the Office of the Executive Secretary recommends use of this form.

Notices of appeal from general district court are statutorily required by Rule 3A:19. Notices of appeal are recommended by the Office of the Executive Secretary in appeals from juvenile and domestic relations district courts.

Step 2 Clerk issues receipt for any bond monies received from the district court; notes date, amount received, and signature of receiving clerk on receipt and on all copies of the notice of appeal or district court transmittal sheet.

Comments: The original copy of the bond receipt is given to the district court. One copy of the receipt is placed with the case papers; a separate copy is maintained for bookkeeping and auditing purposes.

Step 3 In appeals, clerk forwards copy of notice of appeal to Commonwealth's attorney and to defense counsel (or defendant, if pro se) if the district court has not already done so.

Case Numbering

Case numbers are used to distinguish one case from another. In criminal cases, each incident or offense, rather than defendant, should be assigned a unique case number. Thus, if a defendant is charged with multiple offenses, each offense should receive a different number.

While the format of case numbers may vary from court to court, most courts use a sequential case numbering system, starting with the number 1. The sequential numbering system offers a measure of security in that missing cases are readily obvious. However, after a number of years, case numbers can become large and unwieldy, thus increasing processing time and encouraging transposition errors. The preferred practice in many courts is to incorporate in the case number a year indicator and a case type identifier. Under this system, for example, the first criminal case filed in 2001 would receive the case number "CR01-1," the second case "CR01-2."

NOTE: If the court is using the CAIS Circuit Court Automated Case Management System, the above case numbers would be "CR01000001-00" and "CR01000002-00."

Incorporating the year digits addresses the problem of unwieldy case numbers and provides an instant annual count of cases filed. The case type identifier distinguishes criminal cases from other case types. A case type identifier is particularly useful when color-coded file folders are not used to distinguish case types.

If a defendant is simultaneously charged with multiple offenses, a sequential numeric suffix may be attached to the case number to distinguish one charge from another. Using this method, if the first case filed in 2001 was a two-count indictment, case numbers would be assigned as follows: "CR01-1-1" and "CR01-1-2" (manual courts) or "CR01000001-01" and "CR01000001-02" (automated courts). Alternatively, a court may simply assign sequential case numbers to each count.

Regardless of the numbering system used, it should be remembered that the case number is vital in case processing. While one may argue that use of a defendant name is equally reliable as a case identifier, it should be remembered that there might be multiple defendants with the same name and defendants facing multiple charges. Case numbers, on the other hand, provide uniqueness while offering better case control.

The procedures on the following page are recommended when numbering cases.

Step 1 Clerk stamps or writes next available case number on all papers received and on the case file folder that will house the case papers.

Comments: It is recommended that unassigned case numbers be pre-stamped by a numbering machine on the tabs of new file folders. As

assigned case numbers are taken, the clerk will replenish the supply of pre-numbered case files when it becomes low.

Step 2 Clerk notes the case number on all pleadings and exhibits received.

Comments: All exhibits must be marked with the case number since they are often separated from the case papers and stored elsewhere.

Indexing

Any filing system or collection of records is only as good as the indexing system that provides access to those records. In circuit courts, the Index to Criminal Cases is the key to retrieval of all criminal case records. The index may be maintained in book form with hand-written or typed entries, or the index may be a computer-generated printout, appropriately bound

The index is intended for use by both court personnel and the general public. It should, therefore, be housed in the public record room of the clerk's office for easy access. Because the index serves as the primary "pointer" to all individual case records, a conscientious effort should be made to index cases on the day they are filed.

The clerk may maintain their indexes on computer, word processor, microfilm, microfiche, or other micrographic medium. Va. Code § 17.1-249

The following procedures are recommended for case indexing.

Preparation of Case File

The case file folder is the repository for all documents filed with respect to a particular case. When a defendant has been charged simultaneously with multiple offenses, some clerks elect to create a separate file folder to correspond with each offense. This approach may not be feasible in those offices where file storage space is limited. Consequently, many clerks have chosen to create one file folder for each defendant rather than one for each offense.

Other factors which may influence a clerk's decision to use one rather than several file folders include:

1. The type of case numbering system being used;
2. The expense associated with file folders;
3. The manner in which court orders are prepared (e.g., some clerks prepare an order addressing each charge while others simply prepare one order encompassing all current charges against the defendant); and

4. The time and costs involved in photocopying documents when multiple files for the same defendant are used.

Either of the two methods is acceptable, provided the method chosen is consistently used.

The following procedures are recommended when preparing a case file.

Step 1 Clerk types or writes on tab of case file:

- defendant name (last, first, middle)
- plaintiff name
- case number (unless pre-stamped)
- felony/misdemeanor indicator (optional)

Comments: Only minimal information should be included on the file tab to avoid confusion. Color-coded files distinguishing felony and misdemeanor cases are recommended as an alternative to an "F" or "M" indicator on the tab.

Step 2 Clerk affixes to left side of opened folder a Case Summary Sheet for recording:

- date case filed
- documents filed
- first hearing date and type, and any subsequent hearings
- assigned judge

Comments: Utilization of this optional form permits easy retrieval of case information, particularly when automation support does not exist. As significant events occur in the case, the case summary sheet should be promptly updated.

Step 3 Although not required or necessarily recommended, some clerks insert the CC-1350, Clerk's Notice of Fines and Costs in the case file. Others have a pre-printed "cost sheet" on the file jacket.

Comments: CC Form 1350, Clerk's Notice of Fines and Costs will subsequently record any fine, costs, or restitution ordered paid if the defendant is convicted. The form should be affixed to the left side of the file folder under the case summary sheet.

Step 4 Clerk ensures that all case-related documents are placed in the case file.

Comments: Documents should be securely fastened to the right side of the folder to prevent loss of documents during file handling. As subsequent documents are filed, they should be placed on top of previous documents so that the most recent filing is visible although some judges prefer to have the most recent filings filed last. Local policy will dictate.

Processing Indictments and Presentments

Pursuant to Va. Code § 19.2-217, no person may be tried for a felony unless an indictment or presentment is made or found by the grand jury. However, an individual may waive this right and be tried on a warrant or an information. For a discussion of warrant and information processing, see Chapter 1. An indictment or presentment may occasionally be returned for a misdemeanor. When such a return is made, the misdemeanor case may be certified to the district court for trial. Va. Code § 16.1-126. For a thorough discussion of indictments and presentments, see "Overview" chapter. Generally, the term "indictment" includes presentments unless the context of the Code of Virginia requires a different interpretation.

An indictment (or bill of indictment) is a written document prepared by the Commonwealth's attorney that charges an individual with the commission of a specified crime. The indictment is presented to the grand jury in conjunction with evidence furnished by or on behalf of the Commonwealth. If the grand jury finds probable cause to believe that the individual named in the indictment committed the alleged offense, the grand jury will return a "true bill" and the case proceeds for further processing. If probable cause is not found, the indictment will be returned "not a true bill" and the clerk's office closes the case. For any grand jury return to be valid, the bill must be endorsed as a "true bill" or "not a true bill" and be signed by the grand jury foreman. All indictments of the grand jury must also be returned in open court. Rule 3A:5.

A presentment is an alternative to an indictment. A presentment is a written accusation prepared and returned by the grand jury from its own knowledge or observation, without any bill of indictment before it. The term "indictment" generally includes presentments unless the context requires otherwise.

The procedures on the following page are recommended for processing indictments and presentments returned by the grand jury.

Step 1 Clerk acknowledges receipt of case papers. See step-by-step procedures when receipting case papers in this chapter.

Step 2 Procedure Decision: What type of return was made by the grand jury? If a true bill, GO TO STEP 9; if not a true bill, or no indictment presented, GO TO STEP 3.

Step 3 Clerk arranges for defendant's release from custody, if applicable; clerk

prepares an order of release that is signed by judge or clerk (if authorization has been granted to the clerk by the court pursuant to Va. Code § 17.1-219.1) and forwards to sheriff or jailer for compliance. Form DC-353, Release Order can be used for this purpose.

Caution: Be sure to limit the effect of the release documents to the charges for which the grand jury has returned "not a true bill" since the defendant may be in jail for other charges.

Step 4 Clerk refunds to payor (not necessarily the defendant) any bond monies posted as security for defendant's appearance before court.

Comments: See "Bond." Verify that judge has not authorized a bond forfeiture proceeding due to breach of bail conditions.

Step 5 Clerk assigns case number. See step by step procedures for numbering cases in this chapter.

Step 6 Clerk indexes case. See step-by-step procedures for case indexing in this chapter.

Step 7 Clerk prepares case file.

Comments: See step-by-step procedures for preparing a case file in this chapter. **Exception:** Do not include in file a case summary sheet or Fine, Cost and Restitution Assessment Worksheet.

Step 8 Clerk places all papers associated with case, including returned indictment, in case file; place file with other ended criminal case files. END OF PROCEDURES FOR PROCESSING A RETURN OF "NOT A TRUE BILL."

Step 9 Clerk assigns case number. See step-by-step procedures for numbering cases in this section.

Step 10 Clerk indexes case and prepares the case file. See step-by-step procedures for case indexing and preparing a case file in this section.

Step 11 If return by grand jury of indictment is for aggravated murder and defendant is arrested, the clerk will file a certified copy of the indictment with the clerk of the Supreme Court of Virginia.

Comments: Such indictments filed with the Supreme Court will be accessible by the public upon request. Va. Code § 19.2-217.1.

Step 12 Clerk places all case papers received, including returned indictment, in case file.

Comments: If criminal process is not to be issued, case file may be placed with other pending criminal case files.

Note About Sealed Indictments: Upon *ex parte* motion by the Commonwealth and for good cause shown, the Circuit Court may seal an indictment until such time as the defendant is arrested. Va. Code § 19.2-192.1.

While indictments may be sealed under some circumstances to prevent disclosure, it should be remembered that there are no statutory exceptions with respect to dockets and court orders, and such documents are always open to public inspection.

Processing Informations and Warrants

Unlike true bills of indictment and presentments which are always filed immediately following a grand jury proceeding, warrants and informations may be filed at any time during a term of court. A thorough description of informations and warrants is provided in the "Overview" chapter of this manual.

Step 1 Clerk acknowledges receipt of case papers. See step-by-step procedures when receipting case papers in this chapter.

Step 2 Clerk assigns case number. See step-by-step procedures for numbering cases in this section.

Step 3 Clerk indexes case. See step-by-step procedures for case indexing in this section.

Step 4 Clerk prepares case file. See step-by-step procedures for case preparation in this section.

Step 5 If defendant's trial date has been set, clerk enters case and hearing information on:

- court calendar
- case summary sheet
- docket

Comments: Case scheduling is done on term day or prior to trial by the clerk, Judicial Assistant, or Commonwealth's attorney. For further information on scheduling, see "Overview – Calendaring" in this manual. *Pending criminal case dockets are discussed in "Caseflow Management -

Calendaring" in this manual.

Step 6 Clerk places case file with other pending criminal case files until further action.

Processing Ancillary Misdemeanors

When a district court certifies felony offenses to be tried in a circuit court in a preliminary hearing, the court shall also certify any ancillary misdemeanor offense for trial if the accused and the attorney for the Commonwealth consent to such certification.

Any misdemeanors certified as ancillary will proceed in the same manner as a misdemeanor appeal. Va. Code § 19.2-190.1.

Processing District Court Appeals

All traffic infraction cases and the vast majority of misdemeanor cases before the circuit court are the result of appeals from the district court. Customarily, the same warrant or summons used to initiate and prosecute a misdemeanor or traffic case in the district court is also used to initiate and prosecute same when appealed to the circuit court. Refer to the "Overview" chapter in this manual for information regarding warrants and summonses. Pursuant to Va. Code § 16.1-132, an appeal from the district court is a matter of right. This is actually an automatic grant of a new trial because the circuit court hears the case "de novo" (as if the case had never before been tried). The right to a trial de novo exists even if the defendant pleaded guilty in the district court. Va. Code § 16.1-132. Neither the defendant's plea nor the district court's judgment are admissible evidence at the trial de novo, but the defendant's testimony in the district court is admissible at the circuit court trial. While a defendant who has appealed a case to the circuit court cannot be prosecuted on a charge greater than the one for which he was convicted in the district court, the punishment imposed in the circuit court may be harsher than that imposed in the district court. (Therefore, if a defendant was tried for a reckless driving charge in the district court but was found guilty of failing to obey a highway sign, he cannot be prosecuted on the reckless driving charge in the circuit court. He has appealed their conviction of failing to obey a highway sign and will be tried on this offense.)

Persons convicted of a traffic or misdemeanor offense in the district court may appeal their conviction to circuit court within ten (10) days of the conviction date. Va. Code § 16.1- 132. Because the right of appeal is absolute, no assignment of error is necessary.

Once a defendant has notified the district court of their desire to appeal, the district court will take the following steps to process the appeal:

- Verify that the appeal was noted within the ten days allowed;
- Note the appeal on the summons or warrant, whichever applies (Rule 3A:19);

- Have the defendant execute a, form DC-370, Notice of Appeal - Criminal or other written notice of appeal (required in general district court; optional in J&DR court)
- Require the defendant to enter into bail if ordered by the district court judge (if the defendant was previously released on a DC-330, Recognizance and bail terms are not changed by the district court judge, no further action is needed to continue the bond since the document remains in effect when the case is appealed to circuit court).
- Refund any fine and costs previously paid by or on behalf of the defendant;
- Advise the defendant of the trial date or docket call date in the circuit court; and
- At the end of the ten-day appeal period, send all original case papers to the circuit court with the case transmittal sheet, and keep a photostatic copy of pertinent case papers.

At the end of the ten-day appeal period, the case falls under the jurisdiction of the circuit court. The defendant may withdraw their appeal at any time prior to their circuit court trial date provided he gives written notice of withdrawal to the judge and the Commonwealth's attorney. If the appeal is withdrawn more than ten days after the district court conviction date, the circuit court must enter an order affirming the district court judgment (sentence), collect any fines and restitution, and tax the defendant costs incurred in both the district and circuit court as provided by statute. Va. Code § 16.1-133.

In most circuit courts, the term "misdemeanor appeals" is used to describe all appeals of misdemeanor traffic and criminal cases that come from the district court. The term also includes traffic infraction cases that have been appealed. While a traffic infraction is not a criminal offense, traffic infraction appeals are processed and tried at the circuit court level in the same manner as misdemeanor appeals. No distinction between the two case types is generally drawn.

A defendant is not limited to merely appealing a conviction. Virginia Code § 19.2-124 provides for an appeal, prior to conviction or completion of a preliminary hearing, of the bail decision of a district court judge or magistrate. One may also appeal, prior to conviction, an evidence ruling made by a district court judge. In either instance, the defendant making the appeal may be ultimately charged with a felony rather than a misdemeanor or traffic infraction. Hence, the term "misdemeanor appeal" should be used with caution in describing a district court appeal. The proper court to which a bail decision, bond amount, or term of recognizance should be appealed is determined based on where the initial determination was made and the court in which the charge is pending. Va. Code §19.2-124

The Circuit Court Clerk's Office should accept any appeal and let the court determine jurisdiction or the validity of the appeal.

Procedures for District Court Appeals

Step 1 Clerk determines if the ten-day appeal period has elapsed before accepting the case. Rule 3A:19.

Comments: If the case is an appeal of conviction, it should not be transmitted to the circuit court unless ten days have elapsed since the district court conviction date. **Exception:** The ten-day waiting period does not apply if a pre-conviction bail decision or evidence ruling is being appealed.

Step 2 Clerk acknowledges receipt of case papers; issues receipt for any bond monies received. See step-by-step procedures for receipting case papers in this chapter.

Step 3 Clerk assigns case number. See step-by-step procedures for case numbering in this chapter.

Step 4 Clerk indexes case. See step-by-step procedures for case indexing in this chapter.

Step 5 Clerk prepares case file. See step-by-step procedures for case preparation in this chapter.

Step 6 Clerk forwards copy of notice of appeal to Commonwealth's attorney, if not done so by the district court.

Step 7 If defendant's trial or docket call date was set by the district court, clerk enters case and hearing information on:

- court's calendar
- case summary sheet
- docket

See "Caseflow Management – Calendaring" and term day activities.

Step 8 Procedure Decision: Does defendant withdraw appeal?
If no, GO TO STEP 12; if yes, GO TO STEP 9.

Step 9 Clerk prepares order affirming judgment of district court (Va. Code § 16.1-133); obtains judge's signature; enters microfilmed order in Criminal Order book; places original in case file. See "Overview" chapter on court order preparation.

Step 10 Clerk proceeds to case closing; assesses defendant costs. For case

closing procedures, see "Trial/Post-Trial" chapter.

Step 11 Clerk places case file with other ended criminal case files. END OF PROCEDURES FOR WITHDRAWN APPEAL.

If Appeal Not Withdrawn:

Step 12 Clerk places case file with other pending criminal cases until further action.

Appeals of Refusal to Take Blood or Breath Test

The appeal to a circuit court from a district court of a refusal to take blood or breath test is conducted as a misdemeanor appeal, per Va. Code § 18.2-268.4. The clerk sets the case up on the criminal docket and assesses criminal costs.

The Commonwealth can appeal from a finding of not guilty in a district court because the unlawful refusal charges are administrative and civil in nature for a first offense. Commonwealth v. Rafferty, 241 Va. 319; 402 S.E. 2d 17 (1991) (decided under former Va. Code § 18.2-268). Although civil in nature, the procedure for appeal and trial of a first offense shall be the same as provided by law for misdemeanors.

The Court of Appeals does not have jurisdiction over an appeal from a first conviction of refusal to take blood or breath test. Thomas v. Commonwealth, 22 Va. App. 735, 473 S.E. 2d 87 (1996) and second or subsequent offenses would be classified as misdemeanors and would be appealable to the Court of Appeals. The appeal to the Supreme Court from a judgment of the circuit court is treated as a civil appeal.

Procedures for Appeals of District Court Bond Decisions

Step 1 Clerk receives appeal from General District Court or Juvenile Domestic Relations District Court.
Comments: No filing fees or service fees are assessed.

Note: Pursuant to Va. Code § 19.2-124, a stay on execution of the appeal bond may be granted in order to obtain an expedited hearing. If granted, the order section of the DC-370, Notice of Appeal, or DC-580, Notice of Appeal will reflect a date and time as set by the lower Court. The bond appeal hearing should be set appropriately on your docket.

In a matter not governed by subsection B or C of Va. Code §§ 19.2-120 or § 19.2-120.1, the court granting or denying such bail may, upon appeal thereof, and for good cause shown, stay execution of

such order for so long as reasonably practicable for the party to obtain an expedited hearing before the next higher court. When a district court grants bail over the presumption against bail in a matter that is governed by subsection B or C of Va. Code §§ 19.2-120 or 19.2-120.1, and upon notice by the Commonwealth of its appeal of the court's decision, the court shall stay execution of such order for so long as reasonably practical for the Commonwealth to obtain an expedited hearing before the circuit court, but in no event more than five days, unless the defendant requests a hearing date outside the five-day limit.

Step 2 Enter into Criminal Division of CCMS. (If juvenile, enter into Juvenile division) Commenced by = GAPL or JAPL

Important! Only Use Va. Code §19.2-124.

Comments: Although civil by nature, bond appeals are handled in the criminal division; as their underlying cases are criminal offenses. Clerk will receive statistical credit as a district court appeal.

Step 3 Charge field is populated with Bond Appeal

Comments: Case will not transmit to State Police or DMV

Step 4 F/M field = O (other) Case will print on criminal docket

Step 5 After hearing, update H/D screen as follows:
Hearing result can be either JE or R
Disposition = RES
Conclude Code = OTH
Comments: When sending paperwork to the jail or holding facility, be certain to indicate the next GENERAL DISTRICT COURT hearing date and time on the Circuit Court DC- 355, Order for Continued Custody. Include copies of any GDC DC- 355, Order for Continued Custody, along with an associated copy of warrant(s).

Step 6 Clerk microfilms/scans and indexes order into Criminal Order Book. Transmit certified copy of court order back to district court. Notify appellee or appellee attorney of court's decision.

Comments: It has been determined that a DC-40, List of Allowances submitted only for payment of a bond appeal will NOT be honored.

Animal Violations - Civil Offenses

Several sections of the Code of Virginia relate to the control and care of animals. Although these violations are civil in nature, it is recommended that they be entered into the Criminal Division. Because of concerns with public access, CCMS will automatically preface the charge descriptions field with the word "CIVIL".

In lieu of a local ordinance adopted pursuant to Va. Code § 3.2-6543, an animal violation should be entered as a state charge.

The following code sections are entered into the Criminal Division of CCMS for both adults and juveniles:

Code Section	Charge Description
§ 3.2-6540	Civil; Dangerous Dog
§ 3.2-6450.1B	Civil: Vicious Dog
§ 3.2-6552	Civil; Dogs/Livestock
§ 3.2-6569	Civil; Seize/Impound Animal

Step 1 Enter case into the Criminal Division.

Note: Enter case for both adults and juveniles.

Note: Appeals of Summons for Vicious Dog and Seizure and Impoundment of Animals shall be heard within 30 days of the hearing in district court unless good cause show is determined by the court. Va. Code §§ 3.2-6540.1 and 3.2-6569.

Step 2 COMM BY: GAPL
DEF S: A (Adult) or M(Minor)

Note: M will prevent display of the CCMS data on Internet and public access terminals.

Step 3 F/M = O (Other)
These cases are not reportable to VSP or DMV. These cases are counted on the Criminal monthly caseload report as misdemeanors.

The following code sections are entered into the Criminal Division for adults, but juveniles should be entered in the Juvenile Criminal Appeal Division.

Code Section	Charge Description
§ 3.2-6574	Civil; Animal Sterilization
§ 3.2-6576	Civil, Animal Sterilization
§ 3.2-6577	Civil, Animal Sterilization

Appeals of No Photo ID with Concealed Handgun Permit

Virginia Code § 18.2-308.01 provides that failure to produce, upon demand of a law-enforcement officer, a concealed handgun permit and a government issued photo identification while carrying a concealed handgun is punishable by a $25 civil penalty. Although these violations are civil in nature, it is recommended that they be entered into the Criminal Division. Because of concerns with public access, CCMS will automatically preface the charge description field with the word "CIVIL".

Step 1 Enter case into the Criminal Division of CCMS.

Step 2

COMM BY: = GAPL
DEF S = S (Summons)
F/M = O (Other)
OTN = None required or allowed.
DMV = N
TRAFFIC = N
CODE CITE = 18.2-308.01

Step 3 These cases are not reportable to VSP or DMV. These cases are counted on the Criminal monthly caseload report as misdemeanors, and misdemeanor costs will be assessed, along with the penalty.

Note: It may be possible that this type of case may originate in the Circuit Court. Use Commenced by code of OTH.

Appeals of Notary Advertising Legal Advice

Virginia Code § 47.1-15.1 prohibits a notary public from using terms in a language other than English that indicates that the notary is authorized to provide legal advice or practice law.
Penalties are recovered in a civil action brought by the Attorney General in the name of the Commonwealth and the proceeds are deposited into the Legal Aid Services Fund.

Although these violations are civil in nature, it is recommended that they be entered into the Criminal Division. Because of concerns with public access, CCMS will automatically preface the charge description field with the word "CIVIL".

Step 1 Enter case into the Criminal Division of CCMS.

Step 2

COMM BY = OTH	TRAFFIC = N
DEF S = S (Summons)	DEF STATUS = S
F/M = O (Other)	VCC = UNK
OTN = None	CODE CITE = 47.1-15.1
DMV = N	

Step 3 These cases are not reportable to VSP or DMV. Costs will be assessed, along with the penalty.

Note: Although unlikely, it may be possible that this type of case may originate in the Circuit Court. Use Commenced by code of OTH.

Appeals of Red-Light Photo Monitoring

Va. Code § 15.2-968.1 An operator of a motor vehicle found in violation of an ordinance created to enforce photo-monitoring systems for traffic lights has a right to appeal to the circuit court in a civil proceeding.

Although these violations are civil in nature, it is recommended that they be entered into the Criminal Division.

Step 1 Enter case into the Criminal Division of CCMS.

Step 2

COMM BY = GAPL	TRAFFIC = N
F/M = C (Civil)	DEF STATUS = S
OTN = None	CODE CITE = Local
DMV = N	CCRE = 00000

Step 3 These cases are not reportable to VSP or DMV. Monetary penalty not to exceed $50. No court costs. Not a criminal conviction, not a traffic violation, not a part of driving record, nor is it used for insurance purposes in the provisions of motor vehicle coverage. There are no court costs associated with this case. The court may order the violator to pay the vendor directly, or may order the penalty be paid as restitution.

Appeals of Failure to Obey Order of Fire Marshall

If any person at a fire refuses or neglects to obey any order duly given by the chief or other officer in command, a civil penalty not to exceed $100.00 shall be given.

Although these violations are civil in nature, it is recommended that they be entered into the Criminal Division.

Step 1 Enter case into the Criminal Division of CCMS.

Step 2

COMM BY = GAPL	TRAFFIC = N
F/M = C (Civil)	DEF STATUS = S
OTN = None	CODE CITE = 27-15.1:1
DMV = N	CCRE = 00000

Step 3 These cases are not reportable to VSP or DMV. Monetary penalty not to exceed $100. Court costs would be assessed, along with the penalty.

Processing Juvenile And Domestic Relations District Court Cases And Appeals

For more information regarding these cases refer to the Juvenile and Domestic Relations District Court Case Matrix.

Depending on the severity of the felony offense, a juvenile age fourteen and older may be tried in the Circuit court.

Transferred Pursuant To § 16.1-269.1(A)

In cases other than those set out Va. Code § 16.1-269.1 (B) and (C). for offenses that would have been a felony if committed by an adult, upon motion by the Commonwealth's Attorney, the Court shall conduct a transfer hearing. Notice is required. If the Juvenile court finds probable cause, the juvenile is transferred to the Circuit Court for hearing

Certified Pursuant To § 16.1-269.1(B)

In cases of murder, or aggravated malicious wounding, the Juvenile court shall conduct a preliminary hearing. If probable cause is found, the juvenile is certified to the grand jury. No motion or notice is required to be given by the Commonwealth's Attorney.

Certified Pursuant To § 16.1-269.1(C)

For violations as set forth in the above code section, the Juvenile court shall conduct a preliminary hearing, provided the Commonwealth's Attorney gives written notice of intent to proceed under the subsection. If probable cause is found, the juvenile case is certified to the grand jury.

Opening a transferred case involving a Juvenile Felony

Step 1 Clerk receives case papers, and DC-518, Transfer/Retention Order.

Comments: Orders should be charge specific, indicating which offenses are transferred, and which offense will remain before the J&DR court.

Step 2 The Circuit Court enters an order advising the Commonwealth's Attorney it may seek an indictment.

Comments: The J&DR court is divested of jurisdiction over the case. Va. Code § 16.1-269.6 (C).

Step 3 After case processed, disposition results should be relayed to the J&DR court

Opening a certified case involving a Juvenile Felony

Step 1 Clerk receives case papers, along with any ancillary charges. DC-520, Certification of Juvenile Felony Charge.

Comments: Clerk may also receive DC-521, Waiver of Preliminary Hearing and Certification from the Juvenile Court. If the juvenile is remanded to detention, a DC-538, Placement Order may be entered by the J&DR Court.

Step 2 Commonwealth's Attorney may seek an indictment upon the offense and any ancillary charges without obtaining an Order of the Circuit Court. Va. Code § 16.1-296.6 (B)

Step 3 After case processed, disposition results should be relayed to the J&DR court.

Opening an Appeal of Transfer decision of the J&DR Court

Step 1 Clerk receives DC-580, Notice of Appeal - Criminal, and all papers connected with the case. Va. Code § 16.1-269.6 (A)

Comments: The juvenile may appeal the decision to transfer the charges, or the Commonwealth may appeal the decision to retain the case in J&DR court.

Step 2 The Circuit Court shall, Va. Code § 16.1-269.6 (B), when practicable, within forty-five days after receipt of the case, conduct a hearing, and enter an order either remanding the case to the J&DR court or advising the Commonwealth it may seek an indictment. If indictment is entered, the J&DR court is divested of jurisdiction over the case. Va. Code § 16.1-269.6 (C).

The juvenile shall be placed in a juvenile secure facility unless the Court determines that he is a threat to the security or safety of the other juveniles detained or the staff of the facility, in which case he may be removed to an adult facility. Va. Code §16.1-249.5 and §16.1-269.5 and §16.1-269.6

Step 3 After case processed, disposition results should be relayed to the J&DR court.

Juvenile & Domestic Relations Court Case Matrix

For the most current version of the matrix, please refer to the Quick Reference Materials on the DJS website.

Processing Violations of The Nutrient Trading Act

Several sections of the Code of Virginia relate to regulations of the Nutrient Trading Act. Although a violation is civil in nature, it is recommended that they be entered into the Criminal Division. Because of concerns with public access, CCMS will automatically preface the charge descriptions field with the word "CIVIL"

Step 1 Enter case into the Criminal Division of CCMS.

Comments: If a business is being charged with the violation, it is recommended to use the LAST NAME field only, without punctuation. The AKA field may then be used, with any punctuation necessary.

Step 2

COMM BY: = GAPL
DEF S = S (Summons)
F/M = O (Other)
OTN = None required or allowed.
DMV = N
TRAFFIC = N
CODE CITE = 10.1-603.15:4

Step 3 These cases are not reportable to VSP or DMV. These cases are counted on the Criminal monthly caseload report as misdemeanors, and misdemeanor costs will be assessed, along with any penalty assessed.

Chapter 3 - Caseflow Management

Term Day Activities

Virginia Code § 17.1-517 provides that the chief judge of each circuit shall specify, through a court order, the terms of court for each court within their circuit. A "term of court" is the period of time during which the circuit court is in session. Terms may vary in length among courts, but no court may have less than four terms of court each year. Any change in the terms of court is to be reported by the chief judge of the circuit to the Office of the Executive Secretary by January 1 of each year.

"Term day" refers to the day on which a term of court commences. The times for commencement of terms for each circuit court are set out in Rule 1:15. Term day is also the day on which the docket of pending cases is usually called, as well as the day on which the grand jury convenes. Hence, term day is synonymous with "docket day" and "grand jury day."

This section addresses the activities conducted in connection with term day. Specific topics addressed include:

- Docket Preparation
- Pre-Court Procedures
- Courtroom Procedures
- Post-Term Day Activities
- Issuance of Criminal Processes

Because the grand jury plays such a vital role on term day, a review of "Overview - Grand Juries," which addresses the grand jury's function, is recommended.

Docket Preparation

Virginia Code § 19.2-240 states "before every term of any court in which criminal cases are to be tried the clerk of court shall make out a separate docket of criminal cases then pending . . ."

The criminal docket is the court's formal record of all criminal cases which have been filed and in which a final disposition has not been reached. In most jurisdictions, the criminal docket is read on "term day" or at "docket call" to schedule cases for trial and, if appropriate, to review the status of each pending case.

The form of a criminal docket may vary. In some jurisdictions, a separate docket sheet or page is prepared for each pending case, usually on the day the case is filed. In other jurisdictions, the criminal docket may take the form of a cumulative pending case listing which is either typed or generated by computer on a periodic basis.

Criminal dockets may also vary in terms of content. Some courts include a generous amount of case information while others include only enough information to adequately identify the case and its status. The contents of the docket should be determined by agreement of the clerk and judges.

While any of the foregoing variations to the criminal docket is acceptable, Va. Code § 19.2-240 is specific in terms of the order in which criminal cases are to be docketed: felony cases are to be docketed first, followed by misdemeanor cases, and each type of case is to be docketed in the order in which the court received the indictment, presentment, information, or appeal, whichever is applicable. Traffic cases are to be docketed with misdemeanor cases.

In many jurisdictions, cases are sequenced on the docket in a manner contrary to Va. Code § 19.2-240. For example, some jurisdictions order cases by defendant name, which provides for greater ease in locating cases on the docket. However, until the Code of Virginia is amended, the procedures presented in this manual will be consistent with current statutory requirements.

Many of the procedures listed below are recommended as guidelines in the absence of statutory directives.

Step 1 Clerk dockets all felony cases in the order in which they were filed; includes the following information for each case:

- defendant name
- plaintiff name
- case number
- date case filed
- preliminary hearing date (if no preliminary hearing was held, note the date of return of the true bill, presentment, or district court conviction)
- defense attorney
- attorney for the prosecution
- charge
- judge's name or initials
- defendant's status
- date capias issued and status, if applicable
- date and nature of next hearing

Comments: If defendant faces multiple charges, make a separate docket entry for each charge. All cases must be numbered. Va. Code § 19.2-240. If case was initiated by direct indictment, preliminary hearing date may not apply. Note whether defense attorney is appointed or

retained, or whether defendant is acting pro se. Defendant status may include: custody, bail, or fugitive.

Step 2 Clerk dockets all misdemeanor cases in the order in which they were filed; includes the following information for each case:

- defendant name
- plaintiff name
- case number
- date case filed
- district court hearing date (if an appeal)
- defense attorney name & type
- attorney for the prosecution
- charge
- judge's name or initials
- defendant status
- date capias or summons issued, if applicable, and status
- date and type of next hearing

Comments: *See* Comments to STEP 1.

Step 3 Clerk notes number of felonies, number of misdemeanors, and combined total at end of docket.

Comments: Notation of case type and totals is optional, but it is useful in determining how many cases are actually pending.

Step 4 Clerk distributes copies of docket to judges, Commonwealth's attorneys, and appropriate law enforcement departments.

Step 5 Clerk makes copies of the docket available for attorneys & public as needed; maintains original for clerk's office.

Step 6 Clerk updates docket as necessary.

Comments: Updating the docket as new cases are filed and as new or additional information is obtained on existing cases is a perpetual task.

Pre-Court Procedures

The morning of term day is generally spent by the clerk (or their designee) in attending to the needs of not only the judge who will be presiding over the term day activities, but also the Commonwealth's attorney, grand jury members and certain local law enforcement officials. Case papers must be properly organized, dockets disseminated, and grand jurors assembled and made comfortable. While taking care of such matters, there will also be numerous questions asked by the general public as well as defendants and their attorneys. It is therefore imperative that the clerk be as organized as possible. Every attempt should be made to avoid last minute confusion. This can best be accomplished by attempting to make preparations for term day as much in advance as practical.

Step 1 Clerk prepares or obtains lists of grand jurors who were summoned to be present during the current term.

Comments: The listing of grand jurors who were summoned should be prepared or obtained at least one day in advance of term day. Virginia Code § 19.2-194 requires the clerk to issue a writ of venire facias to the sheriff no more than twenty- days before term day. *See* form CC-1320, Writ of Venire Facias - Grand Jury.

Step 2 Clerk checks the attendance of the grand jurors using the list described above; verifies or obtains names, addresses, telephone numbers, and occupations of the grand jurors; asks jurors about scheduled absences from the area during the term.

Comments: The clerk may answer any questions about the grand jury's function and schedule and should familiarize grand jurors with the facility's layout. **Note:** Virginia Code § 8.01-353.1 requires the Clerk to ensure the identity of each member of the jury by having the juror verify their identity. The statue lists the acceptable forms of identification. While the statute does not reference Grand Jurors, it may be beneficial for the Clerk to ensure the identity of these jurors as well.

Step 3 If more than one grand jury panel is to be used, clerk separates the grand jurors by panel and seats them accordingly.

Comments: If the volume of cases to be reviewed is too great for a single grand jury panel, the court may order additional panels to sit simultaneously or on a different day during the term. Va. Code § 19.2-193.

Step 4 Just before court convenes, even if all grand jurors have not arrived, clerk takes the lists to the presiding judge.

Comments: Once the lists are presented to the judge, the judge will choose a foreman for each panel. Va. Code § 19.2-197. If there is an insufficient number of grand jurors for a panel, the judge may order the deficiency filled from bystanders or alternates. Va. Code § 19.2-196.

Step 5 Clerk should check in any grand jurors who arrive late but before court convenes; clerk should obtain the information noted in STEP 2 and seat the newly arrived jurors; clerk should advise the judge of grand jurors' arrival.

Comments: The Commonwealth's attorney will have such list.

Step 6 Clerk obtains list of witnesses to appear before the grand jury and takes same to court.

Step 7 Clerk ensures that all case files, court documents, and reports are present in the courtroom and are properly organized.

Comments: Documents to be kept on hand include clerk worksheets (or case summary sheets), copies of the court's docket and calendar, and capias forms.

Courtroom Procedures

Term day officially commences with the bailiff or sheriff calling court to order, asking those present to stand, and announcing the entrance of the presiding judge who takes their seat on the bench. The court reporter is sworn (Rule 1:3), after which the judge will ask the Commonwealth's attorney if there are any Bills of Indictment to be presented to the grand jury. If there are, the attendance of the grand jury is formally taken, and the judge designates a member of the grand jury as foreman. Va. Code § 19.2-197.

The eligibility of the members of the grand jury is determined through answers given to questions asked of the panel by the court. If the members are deemed suitable, the grand jury foreman, and then the other grand jurors, are sworn. Va. Code § 19.2-197.

After the grand jurors have been sworn, the judge addresses the grand jury formally, and sets out how it is to perform its duties and responsibilities. This address is called the "charge to the grand jury." Before giving the charge, the judge must ascertain that no petit (trial) juror is present. Va. Code § 19.2-261.

Bills of indictment are then given to the grand jury foreman who is authorized to swear in any witnesses before the grand jury. Va. Code § 19.2-197. The bailiff then escorts the grand jury members to the grand jury room to consider the bills of indictment and to hear witnesses.

While the grand jurors are deliberating, the calling of the docket begins. Whether the criminal or civil docket is called first depends on local practice. In most courts, however, criminal docket call occurs after the grand jury has finished with its deliberations. After the grand jury has concluded its deliberations, it is required to make its report of findings in open court. Rule 3A:5. If necessary, the grand jury will be required to return to the grand jury room for further deliberation, or it will be instructed to return on a day certain for consideration of further indictments. When the grand jury has concluded its deliberations, the judge will inquire whether the grand jury recommends that a special grand jury be impaneled. Va. Code § 19.2-206. If the majority of the grand jurors responds in the affirmative, the court will impanel a special grand jury. If a minority of the grand jurors responds in the affirmative, the judge may, but is not required to, impanel a special grand jury. The judge then dismisses the grand jury. Once indictments have been returned in open court by the grand jury, the business of calling the criminal docket begins or resumes.

The purpose of calling the criminal docket is to:

- determine the status of each case,
- schedule cases that have not yet been set for trial or other hearing,
- allow attorneys for both sides (or defendants) in previously scheduled cases the opportunity to request a continuance to a new hearing date,
- acknowledge new indictments and take action to obtain jurisdiction of those indicted, if not previously done so.

In some jurisdictions, those charged in the new indictments and are present in court are also arraigned. If an indigent defendant who requests an attorney is present, arrangements may also be made to appoint counsel for them.

While most courtroom activities associated with term day have been described above, clerks are responsible, wholly or in part, for certain additional duties. Some of these duties are statutorily required while others are optional. Consequently, many of the duties assumed by a clerk are dictated by local practice and vary from one jurisdiction to the next.

Step 1 Clerk administers oath to court reporter. Rule 1:3.

Step 2 Clerk takes attendance of grand jurors.
Comments: In many jurisdictions, clerk takes attendance twice: once before court convenes to determine who has not arrived and then again after court convenes for the "official record."

Step 3 Clerk calls the individual grand jurors to determine their eligibility to serve; asks the following questions of each:

- "Are you a citizen of the Commonwealth of Virginia and over the age of eighteen?"
- "Have you resided in the Commonwealth for the past year and in the City/County of _____ for the last six months?"

Comments: Va. Code § 8.01-337. The judge or clerk may inquire into the eligibility of the grand jurors.

Step 4 Clerk or judge may administer oath to grand jury foreman. Va. Code § 19.2-197.

Step 5 Clerk or judge may administer oath to the other grand jurors. Va. Code § 19.2-197. Grand jurors may be sworn together or individually depending on the preference of the judge.

Step 6 Clerk calls grand jury witnesses and administer oath to them (Va. Code § 19.2-197); clerk asks if any witness names were not called or if any witness did not answer. If anyone responds affirmatively, clerk administers the oath again.

Comments: The judge, clerk, or grand jury foreman may administer the oath. Witnesses may be sworn together or individually, depending on the preference of the judge. The Commonwealth's attorney generally has a list of the witnesses in the order in which they will be called. He will read out the first few names from the list and give the list to the clerk.

Step 7 Clerk gives list of witnesses to the bailiff who handles the rest of the proceedings until the grand jury is finished.

Step 8 After the grand jury has completed its deliberations, clerk collects and reads the grand jury's findings in open court. Rule 3A:5. Clerk separates true bills from not true bills.

Comments: Depending on local practice, the clerk, judge, or grand jury foreman may read the grand jury's findings on each indictment in open court.

Step 9 Clerk assists with calling cases from the criminal docket as directed by judge; notes trial, hearing, and continuance dates next to case names on the docket; advises judge of available court dates; records on docket and calendar whether jury trial has been requested; records estimated time necessary to try the case.

Comments: Extreme care must be exercised when recording hearing or trial dates and times as well as jury information on the court's docket and calendar.

When both sides are present, the judge will normally suggest a court date. In some instances, the judge may set the case in the absence of the defense attorney and ask the Commonwealth's attorney to notify them of the date. In other cases, the trial date may be set by agreement prior to docket call.

Step 10 If a defense attorney is not present in court when their case is called, clerk locates or telephones the attorney if asked to do so by the judge.

Comments: An attorney who is required to be present for docket call but does not appear may be held in contempt of court. For a discussion of contempt, *see* "Contempt of Court" chapter, this manual.

Step 11 Clerk prepares forms for appointment of counsel for indigent defendants, if necessary. *See* "Pre-Trial - Right to Counsel" chapter in this manual regarding appointed counsel.

Step 12 Clerk makes note of all capiases and summonses to be issued, as directed by judge.

Step 13 Clerk records bail decisions for appropriate cases and processes bail documents as directed. *See* "Pre-Trial – Bond" chapter in this manual regarding bail procedures.

Step 14 Clerk records all motions, proceedings, and decisions for each case called.

Comments: It is imperative that the clerk accurately records every action taken in a case so that court orders may be properly prepared.

Step 15 After each case has been docketed and the judge adjourns court, clerk collects all case and court documents and returns them to the clerk's office for further processing. Refer to "Post-Term Day Activities" (below) regarding miscellaneous post-term day procedures.

Post-Term Day Activities

Upon adjournment of court on term day, certain administrative tasks related to the day's proceedings must be completed. The clerk's office must ensure that all cases and papers are processed and appropriately stored; that all actions taken during court are formally recorded; and that any special instructions given by the judge are carried out promptly. Specific post-term day activities and procedures are set out below:

Step 1 Clerk takes all grand jury returns and separates the true bills from the not true bills; processes in accordance with prescribed case initiation procedures. *See* "Case Initiation" chapter regarding the processing of grand jury indictments.

Step 2 If a bill of indictment was not presented, clerk binds together all papers relating to the case and places with pending criminal cases until further action.

Comments: Normally, bills of indictment, which were not presented, remain with pending criminal cases until the next docket or term day. The clerk should check with the Commonwealth's attorney to determine if he plans to present the indictment during the next term. If not, the case should be closed in accordance with local practice.

Step 3 Clerk notes each case set for a hearing or trial on the court's calendar. *See* "Calendaring" this chapter.

Step 4 Clerk prepares order declaring the opening of the court's term and grand jury findings; obtains judge's signature on order; processes/images order; indexes and enters order in order book.

Step 5 Clerk prepares and issues capias or summons for each defendant indicted as ordered by the judge.

Step 6 Clerk prepares a court order for each case in which any action was taken by the court; obtains judge's signature; processes order.

Comments: The original order is placed in the defendant's case file.

Step 7 Clerk may note any court action taken in individual cases on case summary sheets in respective case files.

Step 8 Clerk arranges for payment of grand jurors. See "Trial/Post Trial – Juror Reimbursement" chapter regarding payment of Grand Jurors.

Issuance of Criminal Process Upon Indictment

This section describes the manner in which criminal processes are issued to secure a defendant's appearance in court after indictment or the filing of an information. The term "process" refers to any means used by the court to acquire or exercise its jurisdiction over a defendant. Process is a means of notifying a defendant of the charges brought against them. The right to notice is guaranteed to all defendants by both the federal and state constitutions.

The clerk will issue a capias or summons as directed by the judge. In some instances, by statute, the court is not required to issue a capias or summons. *See* Va. Code §§ 19.2-217 and 19.2-217. All service of process must be entered in a process book or file (or automated system). Va. Code § 17.1-215.

Because clerk's office personnel must fully understand the differences between these processes, a review of the chapter "Overview - Prosecutorial Documents, Arrest Documents and Court Orders" [capiases and summonses] should be undertaken before proceeding further. Briefly, however, a capias directs that the named defendant be taken into custody immediately while the summons merely directs the defendant to appear in court on a certain date and time. Both the capias and summons are considered high priority orders; as such, they must be prepared and issued by the clerk's office without delay. Once issued by the clerk's office, a sheriff or other authorized officer is responsible for locating the defendant in order to serve the process.

The procedures beginning on the next page address the clerk's duties with regard to both the issuance and return of criminal processes.

Step 1 Clerk prepares an order stating that issuance of process was directed by court; obtains judge's signature on order.

Step 2 Clerk creates process, ensuring that information is complete and accurate; includes clerk's signature; attaches to process a copy of the indictment, presentment, or information. Va. Code § 19.2-232.

Comments: *See* CC-1301, Capias and CC-1302, Summons. The clerk creates the process in triplicate to allow one for the defendant, one for the sheriff to make their return, and one for the court's files. If the defendant is charged with multiple offenses, local practice dictates whether one or several processes are prepared and issued.

Step 3 Clerk directs or delivers the process to the appropriate law officer (local or where the defendant lives) for execution. *See* Va. Code §§ 19.2-233 and 19.2-235 (clerk to mail process to officers in other counties). Also Va. Code §§ 19.2-232, 19.2-390 (B), and 17.1-214.

Step 4 Clerk makes a notation of the type of process issued and the date of issuance on:

- case summary sheet
- criminal docket
- fugitive listing

Step 5 When the serving officer returns process, clerk checks to see if the return indicates:

- the date of execution
- the documents served with the process
- the serving officer's signature

See Va. Code §§ 19.2-233 and 19.2-234.

Step 6 Clerk places returned process in case file; notes on case summary sheets that process was executed; removes case from fugitive listing if defendant was arrested.

Step 7 If defendant was placed in custody on a capias pursuant to Va. Code § 19.2-234, clerk notifies the Commonwealth's attorney so that a hearing may be scheduled to determine the next action necessary in the case.

Comments: In some jurisdictions, the sheriff will notify the Commonwealth's attorney directly. If possible, the sheriff and the magistrate who determines bail should be given available court dates in advance.

Calendaring

General Provisions

"Calendaring" generally refers to the scheduling of court proceedings and related events by the judge, generally after consultation with the Commonwealth's attorney and defense attorney, to determine mutually agreeable hearing dates. Calendaring also refers to the preparation and maintenance of the court's calendar. Ultimately, the setting of trial dates and times is the responsibility of the trial court, even though some courts delegate the duty in some manner. The judge may set different dates than were arranged by agreement between the defense and the Commonwealth, especially when such action is necessary to comport with statutory speedy trial requirements. For a discussion of speedy trial requirements, *see* "Speedy Trial" in this chapter.

While the terms "calendar" and "docket" have been used interchangeably, this manual will refer to calendaring only as the scheduling of hearings and other proceedings. Technically, a calendar is a list of cases scheduled for a hearing, trial, or argument that is arranged by date and time.

A docket, on the other hand, is a comprehensive list on which all pending cases have been entered, regardless of whether a hearing date has been scheduled.

There are two types of dockets:

- a general listing of cases pursuant to Va. Code § 8.01-331
- a docket of all criminal cases pending during the current term of court (Va. Code § 19.2-240)

The term docket (docket of pending criminal cases) is not a calendar because it does not provide for specific hearing dates.

The court's calendar is used on term day during docket call and on a daily basis to determine "open" dates and times at which to schedule hearings. All hearings, motions, and trials must be recorded on the court's calendar to give a complete and accurate picture of the court's schedule. Inaccurate posting of hearings or failure to maintain a current calendar can have a disastrous impact on the court's operation.
The clerk generally prepares and maintains the court's calendar. In some jurisdictions, the responsibility for the calendar rests with or is shared by the Commonwealth's attorney or the Judicial Assistant. In any case, the coordinated effort of all responsible parties is necessary to ensure that the information contained on the calendar is always accurate and current. The entry of new hearings, continuances, judge absences, and other events must be communicated promptly to other parties.

Purpose and Types of Calendars

Calendars may vary in purpose. Essentially, there are three types of calendars: a master calendar, a daily posting calendar and a motions calendar.

Master Calendar

The master calendar serves as a comprehensive planning and scheduling device for court activity on a daily, weekly, monthly or even yearly basis, whichever is necessary. The master calendar is used both at term day during docket call and on a daily basis to schedule and record hearings. It reflects criminal as well as civil hearings. Many courts use only a master calendar.

Daily Posting Calendar

A daily posting calendar lists the cases set for trial on a particular day. This type of calendar is posted outside the clerk's office or the courtroom to advise the public of the cases set for hearing that day and where the hearings are scheduled to be held. Cases are normally listed alphabetically by defendant.

Motions Calendar

A motions calendar is a specialized calendar used for scheduling and recording only motion hearings. Such a calendar will be used only in those courts where specific days or time periods have been set aside exclusively to hear motions.

Calendar Form

A calendar may vary in form from one jurisdiction to another. Some courts utilize a typed or computerized calendar listing cases sequentially by date and time. Others may sequence cases not only by date and time but also by judge. Many courts use a calendar book, such as a "Year-At-A-Glance" calendar to record scheduled hearings. Use of this type of calendar is discouraged since it is not easily copied or distributed. In addition, when utilizing a book, one must make handwritten entries that are often not clearly legible.

Calendars may differ in terms of the data contained thereon. Generally, a calendar book will contain only minimal case information due to limited space. A typed or computerized calendar, on the other hand, may contain a generous amount of case information.

Before addressing the procedures for preparation and maintenance of the court's calendar, it is important to note that some courts are abandoning traditional methods of calendaring or case scheduling. As noted previously in this manual, courts generally schedule their cases on term day during docket call. For a discussion of term day, *see* "Term Day Activities" this chapter for details.

As the number of case filings continue to increase throughout the state, courts are seeking alternatives to the traditional methods of calendaring. One alternative is to use docket call as a means to expedite trials. Another alternative is to pre-set cases appealed from the district court prior to their being filed with the circuit court. Pre-setting a case entails reserving certain days on the circuit court's calendar for the trial of district court appeals. By reserving dates for such cases, the circuit court can ask the district court to notify the appellant and their attorney of a precise trial date in the circuit court. This date is normally obtained from a court-approved list of available dates for trial during the next term of the circuit court. The list is available to the Commonwealth's attorney present at the district court trial or preliminary hearing who allows the appellant and their attorney to choose a suitable date for trial in the circuit court and to allow for the anticipated length of such trial. In the case of a felony, the pre-arranged trial date is contingent upon the grand jury returning a true bill of indictment.

For cases not set in the foregoing manner, the defendant and/or their attorney may contact the Commonwealth's attorney's office to set a mutually acceptable trial date and anticipated length of trial. Upon agreement as to trial date and time, the information is reported to the court, usually by the Commonwealth's attorney. If no agreement can be reached, the trial dates are set at docket call. The latter method is seldom necessary.

Regardless of the type of calendar used by the court or the method by which cases are scheduled for hearings, the procedures relating to the clerk's management of the court's calendar should be unaffected.

The following procedures should be followed by the clerk in preparing and maintaining the court's calendar.

Step 1 For each court date, clerk enters on the appropriate calendar each case to be heard on that date. The following information should be included:

- defendant's name (last, first, middle)
- plaintiff's name (government or locality)
- case number
- case type
- judge's name, if determined
- defendant's attorney

- prosecutor's name, if determined.

Comments: The calendar should list defendant's name as it appears on the indictment. The information included on the calendar depends on the type of calendar used. The posting calendar should show to which courtroom each case has been assigned. The posting calendar should not list the name of the judge who will hear the case. Multiple defendants tried together are listed separately if separate case numbers have been assigned. Double or triple space between each case on calendar to allow space for taking notes or adding new cases. If a defendant has more than one charge or motion to be heard on the same day, make a separate entry for each.

Step 2 Clerk should ensure that the calendar is complete for each court date before taking it into the courtroom.

Comments: Generally, a master calendar and a motions calendar are the only calendars used in the courtroom. Always take the original into the courtroom.

Step 3 Clerk distributes copies of the calendars to appropriate individuals prior to court, posts calendar outside courtroom and clerk's office for public viewing or displays on the Video Docketing System.

Comments: Local practice dictates who is to receive copies of the calendar. For security reasons, the public should be allowed access only to the daily posting calendar that does not include the names of the judges designated to hear specific cases.

Step 4 Clerk keeps all original master calendars (and motions calendars) in a master file by date; updates current calendar as soon as practical to reflect new, continued, and deleted hearings; retypes calendar periodically to include handwritten entries.

Comments: For cases that will last more than one day, add anticipated time necessary to the next day's calendar.

Speedy Trial

The constitutions of the United States and Virginia guarantee the right to a speedy trial to defendants in all criminal prosecutions. U.S. Const. amend. VI; Va. Const. art. I, § 8.

While the United States Supreme Court has not adopted a precise formula for determining when the right to a speedy trial has been violated, the Virginia Code sets out specific time periods within which the accused must be brought to trial. The provisions of the statutes set out below may overlap; consequently, the provisions of each statute should be applied to each case.

Limitations of Prosecution

Virginia Code § 19.2-8 provides that a prosecution for a misdemeanor shall be commenced within one year after there was cause therefor, except that a prosecution for petit larceny may be commenced within five years. Virginia Code § 19.2-8 sets out time limits within which prosecutions for other enumerated offenses must be commenced. The issuance of a warrant commences prosecution within the meaning of the provision that "a prosecution be commenced within one year next after there was cause therefor." Hall v. Commonwealth, 2 Va. App. 159 (1986).

Limitation on Prosecution of Felony Due to Lapse of Time after Finding of Probable Cause

Virginia Code § 19.2-243 sets limits of five and nine months based on the status of an adult defendant and the type of pre-trial proceedings that have taken place. When an accused is held continuously in custody, trial must be held within five months of the date of the preliminary hearing or, if there is no preliminary hearing, within five months of the date of indictment, presentment, or arrest, whichever occurs later. If the accused is not held in custody but has been recognized for their appearance in circuit court, the trial must commence within nine months of the date of the preliminary hearing or, if none is held, within nine months of the date of indictment, presentment, or arrest, whichever occurs later.

Where a case is before a circuit court on appeal from a conviction of a misdemeanor or traffic infraction in a district court, the accused is discharged from prosecution for such offense if the trial de novo in the circuit court is not commenced:

- within five months from the date of the conviction if the accused has been held continuously in custody or
- within nine months of the date of conviction if the accused has been recognized for their appearance in the circuit court. Va. Code § 19.2-243.

The time during the pendency of any appeal in any appellate court does not apply for speedy trial purposes. For the purposes of this section, a trial is deemed commenced at the point when jeopardy would attach or when a plea of guilty or nolo contendere is tendered by the defendant. The lodging of a detainer or its equivalent shall not constitute

an arrest under this section. Va. Code § 19.2-243.

Accused Discharged From Jail If Not Indicted In Time

Virginia Code § 19.2-242 provides that a person incarcerated on a criminal charge shall be discharged from imprisonment if a presentment, indictment, or information is not found or filed against them before the end of the second term of court at which he is held to answer. The foregoing right to a "speedy indictment" is not part of the constitutional right to a speedy trial. Statutory speedy trial considerations, unlike the speedy indictment provision, apply only to the period from arrest or indictment to trial.

Exclusion of Pretrial Appeal Period

Virginia Code § 19.2-409 applies only to pretrial appeals. The provisions of Va. Code § 19.2-243 shall not apply to the period of time commencing when the Commonwealth's notice of pretrial appeal is filed and ending sixty days after the Court of Appeals or Supreme Court issues its mandate disposing of the pretrial appeal.

Chapter 4 - Pre-Trial

Bond

Bail is a means of obtaining the release from jail of a person charged with an offense. It is, more precisely, an agreement between the accused and the state by which the accused guarantees their presence at trial and agrees to abide by certain other terms and conditions by a written promise. That promise may be guaranteed by a bond that may be unsecured or secured by cash or a solvent third party (surety). The terms and conditions of bail are set by a judicial officer before the initial court appearance and thereafter by the judge of the court in which the accused is to appear. Release on bail may be revoked for the breach of any term or condition, but the amount of such bond may be forfeited only if the accused fails to appear. The purpose of bail is to provide a strong incentive for the accused to appear in court and to comply with other conditions of release while obviating the need for confinement in jail pending their trial. An accused may be admitted to (granted) bail at various stages of the criminal process, from shortly after arrest to post-conviction appeal.

In Virginia, any accused arrested and held in custody pending trial or a hearing for an offense, civil or criminal contempt, or otherwise shall be admitted to bail pursuant to Va. Code § 19.2-120. There are only two situations in which it is statutorily proper to deny bail: (1) when there is probable cause to believe that the accused will not appear for trial or hearing or as directed; or (2) when there is probable cause to believe that the accused's liberty will constitute an unreasonable danger to themselves or to the public. Va. Code § 19.2-120.

Virginia Code § 19.2-127 permits the release of a material witness on bail, following a bail hearing pursuant to Va. Code § 19.2-123, when it appears that a subpoena will not secure the presence of the person in court. *See* "Witness Summoning" in this chapter for more information on witness summoning.

The authority to make bail decisions is vested in certain "judicial officers", defined in Va. Code § 19.2-119 as any magistrate within their jurisdiction, any clerk or deputy clerk of any district or circuit court within their respective city or county, any judge of a district court, circuit court, or the Court of Appeals, and any justice of the Supreme Court of Virginia. In practice, most bail decisions are made by magistrates properly trained in bail procedures. Although judges are also familiar with such procedures, they are not as accessible as magistrates and, consequently, make fewer initial bail decisions. Only rarely is a clerk involved in making bail determinations, but a clerk may admit a person to bail upon terms and conditions already set by the judge or magistrate. Because the Code of Virginia authorizes clerks to make bail decisions, including bail determinations and fixing the terms of bail, the clerk must fully understand the bail process. This chapter is designed to enable the clerk to conduct a proper bail hearing, to understand the criteria to be utilized for setting bail, other aspects of bail procedures and to perform administrative functions regarding bail in the clerk's office.

Virginia Statutes on Bail

Listed below are the statutes relating to bail. This section provides only a summary of certain statutes pertaining to bail. The clerk should review the entire statutes as they appear in the Code of Virginia for complete information.

Virginia Code § 19.2-119 sets forth various definitions for terms used throughout the Bail Chapter.

- Bail - means the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer.
- Bond - means the posting by a person or their surety of a written promise to pay a specific sum, secured or unsecured, ordered by an appropriate judicial officer as a condition of bail to assure performance of the terms and conditions contained in the recognizance.
- Criminal History- means records and data collected by criminal justice agencies or persons consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations or other formal charges, and any deposition arising therefrom.
- Judicial Officer- means, unless otherwise indicated, any magistrate within their jurisdiction, any judge of a district court and the clerk or deputy clerk of any district court or circuit court within their respective cities and counties, any judge of a circuit court, any judge of the Court of Appeals and any justice of the Supreme Court of Virginia.
- Recognizance- means a signed commitment by a person to appear in court as directed and to adhere to any other terms ordered by an appropriate judicial officer as a condition of bail.

Virginia Code § 19.2-120 defines the right to bail.

This section states that a judicial officer must admit to bail an accused or juvenile taken into custody for an offense, civil or criminal contempt, or otherwise, unless there is probable cause to believe that:

- the accused will not appear for trial or hearing as directed; or,
- the accused's liberty will constitute an unreasonable danger to the accused or to the public.

A judicial officer who is a magistrate, clerk, or deputy clerk of a district court or circuit court may not admit to bail, that is not set by a judge, any person who is charged with an offense giving rise to a rebuttable presumption against bail as set out in subsection B or C of this statute without the concurrence of an attorney for the Commonwealth. For a person who is charged with an offense giving rise to a rebuttable presumption against bail, any judge may set or admit such person to bail in accordance with this section after notice and an opportunity to be heard has been provided to the attorney for the Commonwealth.

The statute further states that where the accused has appeared and has met conditions of bail, the court may not use the bond secured by cash to satisfy fines and costs unless the person who posted the bond agrees. The DC-330, recognizance however, includes such a consent by the accused that posts their own cash bond.

Virginia Code § 19.2-80 states that in any case in which an officer does not issue a summons, the officer making an arrest under a warrant or capias must bring the arrested person to court of appropriate jurisdiction to try the case or before an official having authority to grant bail. Such court or official must admit them to bail or commit them to jail.

Virginia Code § 8.01-508 states that a commissioner in chancery or a court may issue a capias for the arrest of a person who fails to appear and answer interrogatories or refuses to answer interrogatories. Any person arrested on this capias is entitled to bail pursuant to Va. Code § 19.2-120 if the arresting officer is unable to bring the accused promptly before the commissioner or court.

Virginia Code § 19.2-121 states that when the judicial officer admits an accused or juvenile to bail, the terms of the release, in the judgment of the judicial officer granting or reconsidering bail, reasonably must assure the presence and good behavior of the accused.

In making this determination, the judicial officer must consider:

- The nature and circumstances of the offense;
- The weight of the evidence;
- The financial ability to pay the bond; and,
- The character of the accused.

Virginia Code § 19.2-123 is commonly referred to as the "Bail Reform Act."

This statute states that when any person or juvenile appears before a judicial officer for a bail hearing, the judicial officer must consider releasing

the accused pending trial on the accused's recognizance (written promise to appear) unless the defendant is a juvenile and is taken into custody pursuant to Va. Code § 16.1-246. In determining whether or not to release the accused or juvenile on a recognizance, i.e., written promise to appear, the judicial officer must take into account:

- The nature and circumstances of the offense;
- The accused's family ties;
- Employment;
- Financial resources;
- Length of residence in the community;
- Record of convictions;
- Record of appearance at court proceedings or failure to appear at court proceedings; and,
- Any other relevant information available to the judicial officer.

Should the judicial officer determine that releasing the accused on a recognizance will not reasonably assure the appearance of the accused, the judicial officer must then, as an addition to the release on recognizance, impose any one or any combination of the following conditions of release that will reasonably assure the appearance of the accused at trial:

- Place the person in the custody of a designated person or organization agreeing to supervise the accused;
- Place restrictions on the travel, association or place of abode of the accused during the period of release, and restrict contacts with household members for a period not to exceed seventy-two hours;
- Require the execution of an unsecured bond;
- Require the execution of a secured bond, which at the option of the accused shall be satisfied with sufficient solvent sureties, or the deposit of cash in lieu thereof. In determining solvency the judicial officer may consider only the actual value of any interest in real estate or personal property owned by the proposed surety. Solvency is found if the value of the proposed surety's equity in real estate or personal property equals or exceeds the amount of bond.
- Impose any other condition deemed reasonably necessary to assure appearance and good behavior of the accused pending trial. The judicial officer may require that the accused return to custody after specified hours.

- Paragraph D authorizes the judicial officer to issue a capias or show cause order if the accused violates any condition of release.

Virginia Code § 19.2-124 states that if a judicial officer denies bail to a person, requires excessive bond, or fixes unreasonable terms of a recognizance, the person may appeal the bail decision of the judicial officer.

> The proper court to which a bail decision, bond amount, or term of recognizance should be appealed is determined based on where the initial determination was made and the court in which the charge is pending.
>
> The bail decision of the higher court on such appeal, unless the higher court orders otherwise, shall be remanded to the court in which the case is pending for enforcement and modification. The court in which the case is pending shall not modify the bail decision of the higher court, except upon a change in the circumstances subsequent to the decision of the higher court.

Virginia Code § 19.2-130 states that a person admitted to bail by a judge or clerk of a district court or by a magistrate shall not be required to be admitted to bail in any subsequent proceeding arising out of the initial arrest unless the court having jurisdiction of such subsequent proceeding deems the initial amount of bond or security taken inadequate.

> When the court having jurisdiction of the proceeding believes the amount of bond or security inadequate or excessive, it may change the amount of such bond or security, require new and additional sureties, or set other terms of bail as are appropriate to the case, including, but not limited to, drug and alcohol monitoring. The court in which the case is pending shall not modify the bail decision of the higher court, except upon a change in the circumstances subsequent to the decision of the higher court.

Virginia Code § 19.2-130.1 states that a magistrate who is to set the terms of bail of a person arrested and brought before them pursuant to § 19.2-234 shall, unless circumstances exist that require them to set more restrictive terms, set the terms of bail in accordance with the order of the court that issued the capias, if such an order is affixed to or made a part of the capias by the court.

Virginia Code § 19.2-132 states that although a person has been admitted to bail, if the amount of any bond is subsequently deemed insufficient, or the security taken inadequate, or if it appears that bail should have been denied, the attorney for the Commonwealth of the county or city in which the person is held for trial may, on reasonable notice to the person and to any surety on the bond of such person, move the court, or the appropriate judicial officer to increase the amount of such bond or to revoke bail.

Determining Bail Eligibility and Bail Conditions

In determining eligibility for admission to bail and the terms and conditions thereof, the clerk should follow the procedures listed below. A thorough review of the statutory provisions regarding bail (Va. Code §§ 19.2-76, 19.2-80, 19.2-119 through 19.2-150, 19.2-234 and 19.2-319) is recommended.

Procedures If Admitted to Bail:

Step 1 The accused is arrested on a criminal process and brought before the judicial officer.

Comments: The accused has the right to be brought before a judicial officer for bail determination, regardless of the time of day or night. Va. Code §§ 8.01-508, 19.2-76, 19.2-80, 19.2-82, 19.2-150, 44-41.1, and 19.2-234 direct when a person must be brought before a judicial officer for a bail hearing. There is a basic premise that runs through all of these statutes. Once the law enforcement officer has arrested the accused by executing a warrant or capias, the officer must bring the accused forthwith before a judicial officer who then must conduct a bail hearing. Va. Code §§ 19.2-76 and 19.2-80 set forth procedures for arrests pursuant to existing warrants and capiases.

Step 2 The judicial officer conducts a bail hearing in the presence of the accused and obtains information as to the following:

- the nature and circumstances of the offense
- family ties (accused's marital status, number of dependents, location of relatives)
- employment status (how long employed, previous employer, the reason for unemployment)
- financial resources (property owned, business interests, and other assets)
- length of residence in community and previous residence
- record of convictions, probation or parole status, other pending charges
- record of appearances at court proceedings (as a defendant or witness)
- potential flight to avoid prosecution
- any other information relevant in determining eligibility for bail (judicial officer's personal

knowledge of the accused, information known to the arresting officer).

Comments: The purpose of the bail hearing is to ask the accused questions to determine if they are eligible for bail and to give the accused the opportunity to ask questions. A bail hearing must not be held on the telephone, but may be held using a video conferencing system. Factors and information may not be available at time bail determination is made. Lack of information does not permit delay in conducting the bail hearing.

The magistrate must hold the bail hearing in the presence of the accused to afford them due process under the law by providing an opportunity to ask questions and, of course, to answer those asked by the magistrate. No statute authorizes the magistrate to conduct a bail hearing over the telephone. Virginia Code § 19.2-3.1, however, does permit the magistrate to conduct a bail hearing through the use of a two- way electronic videoconference system. Although not specifically required by statute, the magistrate needs to administer an oath to the defendant and all others presenting testimony prior to conducting a bail hearing. When the magistrate conducts the bail hearing under oath, the defendant is subject to a perjury prosecution for any false statements knowingly made in the hearing. Check with the arresting officer to see if any bus, plane or other such tickets were found on accused when arrested or if there is an outstanding warrant or capias for failure to appear or for a bail violation.

Step 3 After questioning, determine if the accused can be released on a recognizance.

Comments: Virginia Code § 19.2-123 requires the judicial officer to consider release on a recognizance. A recognizance is simply the defendant's written promise to appear and to abide by any terms ordered by the judicial officer as a condition of release. A release on a recognizance is not based on a monetary pledge or secured by cash deposit, real estate, or professional bondsman. The top portion of the DC-330, Recognizance, contains the recognizance.

Step 4 If a recognizance alone cannot reasonably ensure the accused's future appearance, determine if one or more conditions of release should be imposed. Va. Code § 19.2-123.

Comments: The judicial officer may impose any one or more of the

following conditions:

- place the accused in the custody of a designated person or organization agreeing to supervise them (release to an adult family member, friend or other responsible individual or, if in the military, to a superior officer).
- place restrictions on travel, association, or place of abode or restrict contact with household members or complainant.
- require the execution of an unsecured bond. This type of bond is what many courts and magistrates formerly called the "P.R.," "recognized" bond, or "unsecured recognizance" bond.
- In releasing a defendant on an unsecured bond, the magistrate does not accept cash or require the surety to prove equity in any specific real or personal property. If the accused fails to appear in court, the monetary amount, or any part thereof, could be forfeited by the court.
- require the execution of a bail bond with sufficient solvent securities or the deposit of cash. See "Determining Adequacy Of Surety" below for procedures for determining adequate solvency.
- impose any other conditions deemed reasonably necessary to ensure appearance as required and good behavior pending trial, including a condition that the person return to custody after specified hours.

Note: Whether to require a secured bond is the last condition of release to be considered by the judicial officer.

Step 5 Procedure Decision: Is accused to be admitted to bail?
If yes, GO TO STEP 10; if no, GO TO STEP 6.

Step 6 Complete DC-352, Commitment Order. Judge or clerk (if authorization has been granted by court to clerk pursuant to Va. Code § 17.1-219.1) must sign. Include on form a hearing date for the accused (which should be the next day the court is available to review the bond and bail terms).

Comments: Note terms of bail on DC-352, Commitment Order or jail card. The decision to commit the accused to jail should be based on one or more of the following:

- no conditions of release could be imposed that would reasonably ensure the accused's future appearance. Va. Code § 19.2-120 A(1).
- the accused might constitute an unreasonable danger to themself or others. Va. Code § 19.2-120 A(2).
- the accused is currently unable to meet the conditions of bail (e.g., a surety could not be found).

Step 7 Advise accused of their upcoming hearing date and of their right to appeal the bail decision, bond amount, or bond conditions.

Step 8 Place original of DC-352, Commitment Order in case file with the executed criminal process attached.

Comments: If the accused's court hearing is before a district court rather than the circuit court, send the original of the Commitment to Jail order with executed process to the appropriate district court.

Step 9 Arrange to have accused transported to the jail; provide sheriff with DC-352, Commitment Order.

Comments: Transport is usually handled by law enforcement officer who brings the accused before the judicial officer.

Step 10 Determine if defendant can meet conditions of bail.
If yes, GO TO STEP 11; if no, GO TO STEP 6 - Defendant committed to jail.

Comments: *See* form DC-352, Commitment Order. Note terms of bail on jail card.

Step 11 Prepare DC-330, Recognizance, collect and issue receipt for cash deposit, if any, to secure bond; obtain appropriate signatures on bail form; distribute copies to all parties who signed form and retain original (top copy) for case file.

Comments: *See* Form DC-330, Recognizance. If a secured bond is required as a condition of release, go to "Determining Adequacy of Surety" below. If the accused's next appearance is before a district court rather than a circuit court, send original to district court with a check made payable to the district court clerk for any bond monies collected and deposited.

Step 12 Post original in bond book and place copy in case file. Va. Code § 17.1-230.

Determining Adequacy of Surety

As noted in the foregoing section, one of the bail conditions that a judicial officer may impose is the "execution of a bail bond with sufficient solvent sureties or the deposit of cash in lieu thereof." Va. Code § 19.2-123. A surety must be "solvent" - able to meet all of its financial responsibilities and pay all of its debts. Solvency refers to the ability of the surety to pay the bond amount if the accused violates their bail terms.

There is a distinction between a property bail bondsman and a surety bail bondsman. This difference affects how the magistrate handles the bond transaction. The surety bail bondsman is an agent of a guaranty, indemnity, fidelity, or security company registered to do business in Virginia. If the court forfeits the bond on which a surety bail bondsman is obligated, the insurance company is liable for the forfeited bond. The surety bail bondsman receives only a percentage of the fee charged for entering into the bond, since they are acting as an agent of the company.

A property bail bondsman is not an agent of an insurance company. If the court forfeits the bond on which the property bail bondsman is obligated, they are personally liable for the debt. The property bail bondsman, however, may have agents working for them.

At the time a bail bond is being executed, the clerk should obtain from both the property and surety bail bondsman a valid unexpired license issued by the Department of Criminal Justice Services. The surety bail bondsman must also produce a valid unexpired license issued by the State Corporation Commission. The clerk should maintain a copy of these licenses.

The bail bondsman is not required to file reports with the clerk. Each licensed property bail bondsman shall submit to the Department, not later than the fifth day of each month, a list of all outstanding bonds on which he is obligated as of the last day of the preceding month, together with the amount of the penalty of each such bond. Each licensed surety bail bondsman shall report to the Department within 30 days any change in their employment or agency status with a licensed insurance company. If the surety bail bondsman received a new qualifying power of attorney from an insurance company, he shall forward a copy thereof

within 30 days to the Department. Va. Code § 9.1-185.14.

The Department of Criminal Justice Services will notify courts, via email, when a bail bondsman has been revoked or suspended. The clerk may also refer to the DCJS website at www.dcjs.virginia.gov.
The clerk should send a certified copy of any court order denoting bond forfeiture to DCJS. Although not statutorily authorized, if the court revokes bonding authority, the clerk should send a certified copy of the court order to DCJS at the following address:

Department of Criminal Justice Services
P. O. Box 10110
Richmond, VA 23240-9998

Other Sureties

Other sureties as to whom no prior solvency determination has been made must demonstrate their ability to pay off a bond upon a violation of bail terms to the judicial officer. These other sureties may demonstrate their solvency in one of the following ways:

- Solvency By Cash - A tender of cash in the amount of the bond demonstrates solvency. No further evidence of solvency is required.

- Solvency By Ownership Of Real Or Personal Property The pertinent part of Va. Code § 19.2-123 dealing with secured bonds states that the judicial officer may:

"Require the execution of a secure bond which . . .shall be satisfied with sufficient solvent sureties . . . Only the actual value of any interest in real estate or personal property owned by the proposed surety shall be considered in determining solvency and solvency shall be found if the value of the proposed surety's equity in the real estate or personal property equals or exceeds the amount of the bond . . ."

A careful reading of this statute shows that a surety does not actually "post" real or personal property. Similarly, the real or personal property does not secure the bond. The statute merely requires that a surety prove to the satisfaction of the judicial officer that they own real or personal property in which the surety has enough equity to pay the judgment should the court forfeit the bond.

When determining solvency, the judicial officer needs to be assured that the surety or sureties own the real or personal property in question, and the magistrates needs proof of the value of the property. There are no statutory guidelines as to what documentation is required to prove ownership or value. Generally, magistrates require the surety or sureties show a deed and a recent tax assessment for real property. Judicial officers usually require an appraisal if the surety or sureties wish to prove solvency through equity in personal property. To properly document ownership, value, and encumbrances, the judicial officer must require all sureties to complete a DC-332, Affidavit of Surety. Any false statement knowingly made on this form constitutes perjury since the sureties must swear that the information on the affidavit is correct. Regardless of the amount of the secured bond, the judicial officer should always require the DC-332, Affidavit of Surety. It is important to apply bail procedures consistently. Requiring the affidavit in some cases, but not others, invites just criticism from the public.

Determining ownership of real property can be done through an examination of the deed. In the deed, owners of the property are referred to as "Grantees." All parties named as grantees in the deed must sign the DC-330, Recognizance form as sureties. The death of one party listed as a grantee on the deed complicates the issue. If one or more of the grantees in the deed are dead, the judicial officer must determine who now owns the deceased grantee's interest in the real property. If the deed transfers real property to the grantees as tenants by the entirety with right of survivorship, the surviving spouse owns the property outright at the death of the other spouse, regardless of the provisions of the will. In other words, the dead spouse's interest in the property passes through the deed, not through a will or intestate succession. If however, the deed transfers ownership to the grantees as tenants in common, the deceased person's interest in the property passes through the will, or if no will, through the law of intestate succession. Consequently, the judicial officer must then review the will or, if there isn't a will, the intestate laws. If the deed transfers a life estate to one party and the remainder interest to another, both the person who has the life estate and the person who has the remainder interest must sign the DC-330, Recognizance as sureties. The transfer of personal property occurs either through a will or through the laws of intestate succession at the death of the owner.

Should the judicial officer decide that a secured bond is necessary at the end of a bail hearing, they must inform the accused of the manner in which the accused or a surety may meet the secured bond obligations. Judicial officers must understand that Va. Code § 19.2-123 allows sureties the

option of showing solvency through equity in personal property. It is a violation of law for a magistrate to refuse to allow a surety the opportunity to show solvency through personal property. If the surety wishes to show solvency through personal property, the judicial officer does not take possession of the personal property. Rather the property's value is documented on the DC-332, Affidavit of Surety. The surety agrees under the language of the DC-330, Recognizance not to use, encumber, or dispose of property used to show solvency up to the amount of the secured bond. So, for example, the surety may deposit and withdraw funds from a checking account used to show solvency as long as the surety maintains sufficient funds in the account to meet the obligations of the bond.

In discussing the various options available in a secured bond, the judicial officer should stress to the accused that if they choose to use the service of a bondsman, the bondsman's fee is non-refundable. If however, the accused or a surety, posts cash with the judicial officer, the court refunds all of that money at the conclusion of the case. Also, if the surety wishes to prove solvency through real or personal property, the surety also is free to dispose of such property upon final disposition of the case. If a surety has posted cash with the judicial officer and later wishes to substitute a showing of solvency in real or personal property, the surety can do so by seeking approval of the judge having trial authority. If the judicial officer is unable to determine satisfactorily solvency or ownership, the judicial officer should refuse to allow the person to act as a surety. The judicial officer then must inform the person that they may appeal this decision to a judge who will re-examine the evidence.

When the clerk is faced with the responsibility of determining bail terms as well as the solvency of a surety, "Virginia Statutes on Bail" and "Determining Bail Eligibility and Bail Conditions" above should be reviewed carefully. If the clerk is unable to ascertain whether a proposed surety is sufficiently solvent, they should notify the surety and advise the surety that they may go to the appropriate court and request a bail hearing in the appropriate court so that the judge can determine whether the proposed surety is sufficiently solvent.

Procedures for Determining Adequacy Of Surety

The clerk should employ the following procedures in determining the adequacy of a surety:

Step 1 Clerk administers oath to surety using DC-332, Affidavit of Surety

form to document the oath and statements given.

Step 2 PROCEDURE DECISION: How is bond secured? If by cash, GO TO STEP 3; if by surety, GO TO STEP 6.

Step 3 Clerk receives cash and prepares receipt made out to payor for total amount received.

Step 4 Clerk gives copy of receipt to payor.

Step 5 Clerk lists bonds on BOND LEDGER SHEET.

Step 6 PROCEDURE DECISION: Is surety a professional or corporate bondsman? If yes, GO TO STEP 10; if no, GO TO STEP 7

Step 7 Clerk evaluates ownership interest in property.

Comments: Clerk must review documents evidencing proof of ownership and valuation of assets. All of the owners of the asset must sign as sureties on the bond; if they do not, the clerk should not accept the surety. **Note:** If cash is deposited, no evaluation of ownership interest is needed.

Step 8 Clerk determines equity in property (documented valuation less liens for taxes, unpaid amount of mortgage, other liens).

Step 9 Clerk compares equity in property to amount needed for bail bond.

Comments: The amount of equity should be large enough so that assets, if sold at a sheriff's sale, would cover the bond amount.

Step 10 For professional property or surety bail bondsman, clerk must review the following:

- valid, unexpired license issued by the Department of Criminal Justice Services (for both property and surety bail bondsman);
- valid, unexpired license issued by the State Corporation Commission (for surety bail bondsman)

Comments: It is recommended that the clerk maintain a copy of any property or surety bail bondsman license.

Department of Criminal Justice Services (DCJS) will notify the clerk,

via email, when a bondsman has been revoked or suspended. Although not statutorily authorized, should the court revoke bonding authority, the clerk should send a certified copy of that court order to DCJS at the following address:

Department of Criminal Justice Services
P. O. Box 10110
Richmond, VA 23240-9998

Step 11 Have the surety execute a bond for an amount not to exceed the amount authorized.

Step 12 If cash bond is in the amount of $10,000 or more, *see* Circuit Financial Accounting System User's Guide, "Procedures"- Report of Cash Payments, for important IRS reporting procedures.

Report of Cash Payments, for important IRS reporting procedures.

Revocation and Forfeiture

A person who willfully fails to appear before the court is subject to various penalties. An accused charged with a felony that willfully fails to appear is guilty of a Class VI felony. Va. Code § 19.2-128. An accused charged with a misdemeanor who likewise fails to appear is guilty of a Class I misdemeanor. Va. Code § 19.2-128. Alternatively, an accused may be found to be in contempt of court (Va. Code § 18.2-456) but cannot be sentenced for contempt and pursuant to Va. Code § 19.2-128 for the same absence. Va. Code § 19.2-129. Willful failure to appear may also result in the forfeiture of any security given or pledged for the defendant's release. Va. Code § 19.2-128.

The terms "revocation of bail" and "forfeiture of bond" have been frequently misunderstood. Simply stated, a revocation of bail is a cancellation or rescission of the decision to release an accused from custody. A forfeiture of bond is the imposition of a penalty or liability for the payment of a sum of money as a consequence of the accused's failure to abide by the terms and conditions of bail or release.

Bail can be revoked on the same grounds for which it could have been denied initially, or for failure to meet the conditions of bail or release. Bail is most often revoked because of an accused's failure to appear, but it can be revoked if, for example, the Commonwealth's attorney obtains reliable information that the accused may abscond before their trial. A surety does not have to be summoned for or present at a proceeding to revoke bail. Only after a determination that conditions of bail have been breached can bond forfeiture proceedings begin. Forfeiture will be imposed unless the court, in its discretion, determines that forfeiture is not in the interest of justice or a party can show good cause

for the accused's absence. Bond will be forfeited if the accused fails to appear as required.

Unlike a bail revocation proceeding, a bond forfeiture proceeding is a civil, rather than criminal matter. If the court finds that the bond or any part thereof should be forfeited, the judge will enter an order of default. The order of default and notice shall be issued within five days of the breach of the condition of appearance. If the accused is not brought before the court within 150 days, a default will be entered on the record. Va. Code § 19.2-143. At this juncture, the default (or failure) becomes a forfeiture. The necessary steps are then taken to enforce the forfeiture. The court may refund part or all of any bond ordered forfeited if the accused appears or is brought before the court within twenty-four months of the finding of default.

Procedures For Bail Revocation/Bond Forfeiture

The clerk should follow the procedures below during the bail revocation and bond forfeiture process:

Step 1 Hearing is scheduled to determine if bail should be revoked.

Comments: A bail review hearing may be combined with a previously scheduled hearing particularly if accused fails to appear at pre-scheduled hearing.

Note: If the defendant fails to appear, the Court shall enter an order of default against the surety. Va. Code § 19.2-143.

Step 2 Determine what process is to be issued for the defendant, if any. CC-1355, Rule to Show Cause, CC-1356, Capias to Show Cause as ordered by judge. Prepare order for judge's signature and issue process.

Step 3 Hearing is held to determine if the bail should be revoked.

Step 4 PROCEDURE DECISION: Did judge revoke bail? If yes, GO TO STEP 5; if no, GO TO STEP 7. **Or**
Did judge change bail terms? If yes, *See* section "Determining Bail Eligibility And Bail Conditions;" if no, END PROCEDURE.

Step 5 PROCEDURE DECISION: Does court remand accused to jail? If yes, GO TO STEP 6; if no, GO TO STEP 9.

Step 6 Arrange to have accused transported to jail. Prepare DC 352, Commitment Order; provide sheriff or jailor with copy and place original in case file.

Step 7 Prepare court order reflecting court's action; obtain judge's signature; images/process order; index and enter in appropriate order book; place original in case file.

Step 8 Note court's action on case summary sheet in case file.

Step 9 BOND FORFEITURE PROCEEDING - PROCEDURE DECISION: Is default due to accused's failure to appear. If no, END PROCEDURE; if yes: GO TO STEP 10

Comments: Refer to the Circuit Court Clerk's Manual – Civil, "Suits/Action Types – Forfeiture of Bail Bond."

Step 10 The Court enters an Order of Default, Form DC-482, Order and Notice of Bond Forfeiture, or the Court's order, in a case for a defendant who has failed to perform the condition(s) of appearance.

Comment: The requirement to hold a show cause hearing with reasonable notice to all parties was repealed 7/01/2019. It is replaced with a more summary procedure requiring the Court to record a default. Prior to ordering default and forfeiture of the bond, the Court may require service upon the property or surety bail bondsman, or Other Solvent Surety (non-licensed surety offering property as collateral).

Caveat: If the offense date of the Failure to Appear occurred on or before 6/30/2019, a notice is served upon all parties, accused and surety, including the surety company and agent for surety company (if known) to show cause why all or part of a recognizance should not be forfeited.

Step 11 The Court shall issue the Order of Default and Notice, Form DC-482, Order and Notice of Bond Forfeiture, within five days of the breach of the condition of appearance and have the order and notice served upon the surety.
Note: The Court may enter its own order in lieu of Form DC-482, Order and Notice of Bond Forfeiture.

Comments: An executed copy of the order and notice is to be

returned to the court. A copy of the executed order should be placed in the criminal file, the original is to be placed in the civil file.

Step 12 Clerk sets up a reminder on the Court's calendar to re-examine at end of 150-day period.

Step 13 If the defendant is not brought before the court by day 150, and the forfeiture has not been paid, **Go To Step 14**.

If the defendant is brought before the court within 150 days of the findings of default, the court shall order a dismissal of the default upon the filing of a motion by the party in default. Form DC-482, Order and Notice of Bond Forfeiture may be used to file a Motion to Dismiss Default.

The Clerk scans and indexes DC-482, Order and Notice of Bond Forfeiture, or the Court's own order, evidencing the Court's entry of the dismissal of the default.

Step 14 If the defendant is not brought before the court and the forfeited recognizance is not paid by 4:00 p.m. on the last day of the 150-day period from the finding of default, the license of any bail bondsman on the bond shall be suspended in accordance with Va. Code § 9.1-185.8.

At such time, the court shall issue a DC-224, Notice to Pay to any employer of such bail bondsman if a property bondsman. If the forfeiture is not paid within 10 business days of the notice to pay, licenses of the employer of the bail bondsman and agents thereof shall be suspended in accordance with Va. Code § 9.1-185.8.

The Clerk endorses Form DC-482, Order and Notice of Bond Forfeiture, certifying that a Notice to Pay was issued to the employer of the property bail bondsman.

The Clerk scans and indexes Form DC-482, Order and Notice of Bond Forfeiture, evidencing the clerk's action of issuing the notice.

Comment: Form DC-244, Notice to Pay, is sent for the property bail bondsman only. The suspension of license applies to both property bail bondsmen and surety bail bondsmen.

Step 15 The Clerk notifies the Department of Criminal Justice Services in the

event a bond is forfeited and a property bondsman is involved. Notification should be sent to:

Department of Criminal Justice Services
Private Security Services Section
P.O. Box 1300
Richmond, VA 23218

The Clerk notifies the Bureau of Insurance in the event a bond is forfeited and a Surety Bondsman is involved. Notification should be sent to:

Bureau of Insurance
P.O. Box 1157
Richmond, VA 23218

The Clerk dates and endorses Form DC-482, Order and Notice of Bond Forfeiture, certifying that notice was sent to the Department of Criminal Justice Services.

The Clerk scans and indexes Form DC-482, Order and Notice of Bond Forfeiture, evidencing the clerk's action of issuing the notice.

Step 16 Update case summary sheet to reflect order of default.

Step 17 After 150 days of the finding of default, the default shall be recorded and docketed by the clerk as a judgment. Forfeited recognizances from a district court are transmitted as an abstract of judgment to the clerk of the circuit court of the city or county of the district court.

The Clerk shall certify an abstract of judgment to clerk of court of the circuit court of the county or city where the judgment debtor resides or in any city or county where real estate is owned.

Step 18 The Clerk follows the procedures in subsection E., below, to transfer proceeds of the forfeited cash bond, or to set up the receivable account for the forfeited surety bond.

The court shall refund part or all of any bond ordered forfeited if accused appears or is brought before the court within 24 months of the finding.
If it is brought to the attention of the court that a defendant who

has defaulted on their bond is incarcerated in another state or country within 48 months of the finding of default, thereby preventing their delivery or appearance within that period, the court shall remit any bond previously ordered forfeited. Comment: Court should require proof of incarceration.

Note: Refer to subsection F., below, for procedures to request a refund.

Financial Accounting for Processing Bond Forfeitures

Cash Bond Posted by a Third Party

- At 150 days after default and order of judgment, create an FAS Individual Account with an account code of 201 and FAS Account Type "F".
- Send a copy of the order(s) to the State Treasurer or the local Finance Director.
- If the defendant appears on the court date and is convicted, the third-party sureties may agree to allow fines and costs to be deducted from the cash bond. Distribute the bond to fines and costs by journal voucher with reason code "BD". Refund the balance of the bond by disbursement with reason code "X". Do not format journal voucher if a partial bond distribution is made.

Sureties – Defendant and Third-Party Bonds.

- At 150 days after default and order of judgment, create and FAS Individual Account with an account code of 201 and FAS Account Type "F".
- Enter judgment in the Judgment Lien Docket of the Court.

Sureties – Property Bail Bondsman and Surety Bail Bondsman.

- At 150 days after default and order of judgment, create an FAS Individual Account with an account code of 201 and FAS Account Type "F".
- Enter judgment in the Judgment Lien Docket of the Court.

Unsecured Bond (Unsecured Recognizance Bond).

- At 150 days after default and order of judgment, create an FAS Individual Account with an account code of 201 and FAS Account Type "F".
- Enter judgment in the Judgment Lien Docket of the Court.

Bond Refund Requests

Bond refunds can be ordered for the following reasons:

- If the defendant appears or is delivered to the court within 24 months of default. Costs may be deducted as ordered by the court.
- If the defendant is incarcerated in another state or country within 48 months of the finding of default, thereby preventing their delivery or appearance within that period, the court shall remit any bond previously ordered forfeited. If the defendant left the Commonwealth with the permission of the court, the bond shall be remitted without deduction of costs, otherwise, the cost of returning them to the Commonwealth shall be deducted from the bond.
- If evidence is presented that the defendant is incarcerated or subject to court process in another jurisdiction.
- If a medical certificate is presented from a licensed physician that the defendant was physically unable to appear.
- If the defendant was prevented from appearance due to service in the military.

All refunds of forfeited bonds are to be issued by the Treasurer or the Finance Director, depending on who received the proceeds. The Clerk should provide the following to the requestor:

- A letter on court stationary which includes a clear statement of the request, name of the defendant or surety and case number, address of the recipient where the check should be mailed.
- A copy of the receipt or journal voucher where the forfeiture was paid.
- A certified copy of the court order refunding the bond.
- A copy of the BU11, Local Court Remittance, showing the funds transmitted to the State (if available).

Termination of Bail Obligation

The termination of the obligation of bail is called exoneration. Upon exoneration, the surety is relieved of liability to the depositor of bond monies and is entitled to the return

of their deposit. Bail is automatically exonerated when a defendant who has complied with the bail terms is acquitted, when the charges against them are dismissed, when trial and appeals are over and no process has been brought forward to forfeit bond, or when they are found guilty.

If a surety wishes to no longer be a surety for an accused, they may seek to be relieved of further liability on defendant's bond. This can occur at any time during the course of the accused's case. Virginia Code § 19.2-149 provides authority for a surety to arrest their principal and surrender them (the accused) to the court or to the sheriff or jailer and be discharged from future liability.

A capias (DC-331, Surety's Capias and Bailpiece Release) may be issued for the accused at the request of the surety to assist in the process. When the capias is executed by the surety or law enforcement officer and the principal taken into custody, the surety is thereafter discharged from liability. The principal then remains in custody until their trial or upon being released again on bail.

Procedures for Release of a Surety and Surrender of Defendant

Step 1 Surety advises court, clerk or magistrate of their desire to be discharged from liability and to arrest or surrender the accused to obtain such discharge. Clerk may charge a clerk's fee as prescribed in Va. Code § 17.1-275 A (18).

Step 2 Provide surety with DC-331, Surety's Capias and Bailpiece Release for completion and signature.

Comments: The Surety shall state the basis (reason) for which the capias is being requested. Va. Code § 19.2-149.

Step 3 Review the form for accuracy and completion; check record to see if bond has already been discharged; sign capias portion of form and note date and time issued.

Note: The Bondsman shall deposit with the clerk or magistrate 10 percent of the amount of the bond or $50, whichever is greater, at the time the bondsman makes application for a capias (the deposit is receipted in the criminal case using FAS account code 501).The deposit requirement applies only to licensed bondsmen and does not apply to a private citizen who posted cash or real estate to secure the release of a defendant. Va. Code § 19.2-149.

Note: No deposit shall be required of a bondsman if the basis of the request is for the defendant failing to appear in court. Va. Code § 19.2-149

Comments: By signing the form, the clerk (or judge) directs that the accused be arrested and delivered to the sheriff or jailor in the locality named on the form. The surety may make the arrest using the DC-331, Surety's Capias and Bailpiece Release either personally or with the assistance of a law enforcement official.

Step 4 Provide surety or serving officer with original and three copies; retain fourth copy for case file.

Comments: After the capias has been executed, the original should be returned to the court; the remaining three copies should be distributed as follows:

- first copy to sheriff or jailor
- second copy to accused
- third copy to surety

Step 5 **Procedure Decision:** Surety decides whether to arrest principal with or without surety's capias. With: GO TO STEP 1
Without: GO TO STEP 7

Step 6 Note date that capias and bailpiece release was issued in case file and scan and index the Surety's Capias.

Step 7 Accused is arrested and delivered to the designated sheriff or jailor; surety or serving officer signs original form and notes date and time accused was surrendered.

Step 8 Original form is returned to the court; check to see that form has been properly acknowledged (signed) by the surety or serving officer.

Step 9 Replace the copy of the capias with an executed original and scan and index executed Surety's Capias.

Comments: Always destroy copies of any arrest document once the original has been executed and returned.

Step 10 Update CCMS to reflect the accused's arrest date and surety's discharge from liability.

Step 11 Notify Commonwealth's Attorney and court of accused's arrest.

Comments: If a DC-331, Surety's Capias And Bailpiece Release is issued by a magistrate, a copy will be transmitted to the court by the close of the next business day. Va. Code § 19.2-149

The recommendation is to add this information in the CCMS remarks until the executed capias is returned.

Step 12 The bondsman shall petition the court within 15 days from the surrender of the defendant to show cause why the bondsman is entitled to the amount of the deposit by filing Form DC-318 Petition for Return of Surety's Capias Deposit.

Note: When a hearing is required to determine the disbursement of the deposit, the hearing is docketed in the criminal case. If the court finds that there was sufficient cause to surrender the principal, the court shall return the deposited funds to the bondsman. If the court finds that the surrender of the principal by the bondsman was unreasonable, the deposited funds shall be returned to the payer. Remission of funds shall not be issued by the court until the sixteenth day after the finding. Va. Code § 19.2-149.

Right To Counsel

The right to the assistance of counsel in a criminal prosecution is guaranteed by the Sixth Amendment of the United States Constitution. The United States Supreme Court has held that no person may be incarcerated for a criminal offense without having had the assistance of counsel or without having made a knowing and intelligent waiver of that right. Argersinger v. Hamlin, 407 U.S. 25 (1972). Consequently, the right to counsel exists in all cases in which imprisonment could result from a finding of guilt. The right to counsel is not limited to the assistance of counsel at trial but applies to some pre- and post-trial situations as well.

The Code of Virginia recognizes the right to counsel at all court appearances during both the preliminary and later stages of prosecution. This includes preliminary hearings before the district court, appearances to set bail (Va. Code § 19.2-158), and appearances involving revocation of suspension of imposition or execution of sentence or probation (Va. Code § 19.2-157). A defendant is entitled to the assistance of counsel when appealing their case to a higher court. Dodson v. Department of Corrections, 233 Va. 303 (1987). The Code further requires that whenever a defendant who faces possible confinement appears before any court without being represented by counsel, the court must inform them of their right to counsel and afford them a reasonable opportunity to employ counsel or provide for the appointment of counsel if the accused is indigent. Va. Code § 19.2-157.

Virginia Code § 19.2-158 provides that every person charged with an offense described in Va. Code § 19.2-157, who is not free on bail or otherwise, shall be brought before the judge of a court not of record, or the court issuing process commanding the appearance of the person, on the first day on which such court sits after the person is charged, at which time the judge shall inform the accused of the amount of their bail and their right to counsel.

If the court not of record sits on a day prior to the scheduled sitting of the court which issued process, the person shall be brought before the court not of record. The court shall also hear and consider motions by the person or Commonwealth relating to bail or conditions of release. Absent good cause shown, a hearing on bail or conditions of release shall be held as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays, following the making of such motion.

A defendant faced with a criminal prosecution has a number of options available to them with respect to representation by counsel. They can:

- ask the court to appoint counsel for them if they are unable to afford one;
- waive their right to counsel and represent themselves; or
- retain counsel at their own expense.

The following subsections address each of the foregoing options and the duties of the clerk associated with each option.

Court-Appointed Counsel

The right to be represented by a lawyer who is appointed by the court and paid with public funds is restricted to defendants who are indigent and charged with an offense that may be punishable by incarceration. An indigent person is one who, at the time of their request for a court-appointed attorney, is unable to provide for full payment of a lawyer's fee without causing undue financial hardship to themselves or their family. The court is not required to appoint counsel in cases in which the accused is charged with a non-jailable offense, or a jailable offense for which the judge has stated in writing, prior to trial, that no sentence of incarceration will be imposed. Va. Code § 19.2-160.

The Office of the Executive Secretary of the Supreme Court of Virginia has published a Court-Appointed Counsel Procedures & Guidelines Manual, a practical guide for judges and court personnel involved in the appointment of counsel. The manual contains information to assist courts in implementing indigency guidelines set out in the Code of Virginia. It recommends procedures for selection of court-appointed attorneys, payment of attorney fees, and recovery of costs from those defendants who are or become able to pay all or part of the costs. The manual is updated annually to reflect changes in laws and procedures, and it should be reviewed periodically. The following information has been

excerpted from the Court-Appointed Counsel Procedures & Guidelines Manual.

Determination of Indigency

When an accused claims that they are without funds to employ counsel, the court must ascertain by oral examination of the accused and other competent evidence whether they are indigent for purposes of Virginia law. Va. Code § 19.2-159. The Code provides that if an accused is a current recipient of a state or federally funded public assistance program, they are presumed to be eligible for court-appointed counsel, but the presumption may be rebutted. If the accused is not a recipient of public assistance, the court must conduct a thorough examination of the financial resources of the defendant, giving consideration to:

- the net income of the accused;
- the assets of the accused which are convertible into cash within a reasonable period of time; and
- any exceptional expenses of the accused and their family which would prohibit them from employing private counsel. Va. Code § 19.2-159.

If the accused's available funds are equal to or below 125% of the federal poverty income guidelines, the court may appoint counsel for the accused. The court may, in exceptional circumstances, authorize appointed counsel even if the accused's available funds exceed the foregoing guideline if the court states in writing its reason for doing so.

If the court determines that the accused is indigent and entitled to court-appointed counsel, the court must provide the accused with a written form on which the accused requests appointment of counsel. (Use form DC-334, Request for Appointment of a Lawyer to document the request in writing.) The statement is executed (signed) by the accused under oath. The accused must also complete a written financial statement, form DC-333, Financial Statement-Eligibility Determination for Indigent Defense Services to support their claim of indigency which must also be executed by the accused under oath. Upon request by the court, the Commonwealth's attorney must investigate an accused's claim to indigency. Va. Code § 19.2-159.1 (C).

The court must apprise the defendant of the possible penalties for giving false information under oath concerning their financial status. Va. Code § 19.2-161. The court is further obligated to advise the accused that if an attorney is appointed at public expense, the accused is liable for the cost of

the attorney if convicted.

While the determination of indigency clearly rests with the court, the clerk's office provides administrative support to the court in the indigency determination process. The procedures noted below are representative of the clerk's responsibilities in most jurisdictions in Virginia:

Procedures For Determining Indigency

Step 1 Clerk provides defendant with request for appointment of counsel form for completion; clerk witnesses signature of defendant on form if directed by court.

Comments: *See* form DC-334, Request for Appointment of a Lawyer. Either the judge or clerk may witness the defendant's execution of the form.

Step 2 If directed by the court, clerk has defendant prepare and execute a financial statement form; clerk assists defendant in completion of form if necessary.
Comments: *See* form DC-333, Financial Statement- Eligibility Determination for Indigent Defense Services. *See* also the Court-Appointed Counsel Procedures & Guidelines Manual. Check to see if a statement (form DC-333, Financial Statement-Eligibility Determination for Indigent Defense Services) was prepared for use in the district court.

While the clerk is not required to assist the defendant with the form, it is in the best interest of the defendant and the court to do so. Some courts have designated volunteers or others to assist defendants in completing the forms to save court time.

Step 3 Clerk reminds defendant of the penalties for giving false information to obtain court-appointed counsel.

Comments: If the defendant is charged with a felony and gives false information, they are guilty of perjury (a Class 5 felony). If charged with a misdemeanor, they will be guilty of giving false information (a Class 1 misdemeanor). Va. Code § 19.2-161.

Step 4 Clerk advises defendant that if convicted, the costs of appointed counsel will be taxed against them in addition to other costs and

fines. Va. Code § 19.2-163.

Step 5 Once the request for appointed counsel form and the financial eligibility statement have been completed, clerk submits originals to court.
Comments: Both forms become a part of the record. Va. Code § 19.2-159.

Step 6 After the judge has reviewed and signed the forms, clerk places both in the defendant's case file until further action.

Comments: Furnish copies of both forms to the defendant's appointed attorney. *See* "Selection And Appointment Of Court-Appointed Counsel" below if an attorney is to be appointed. If the defendant refuses to sign the forms or refuses to request or waive representation by counsel, *see* "Waiver Of The Right To Counsel" in this chapter.

Selection and Appointment of Court-Appointed Counsel

After the decision has been made to appoint counsel, the court must select an attorney and confirm the appointment. Effective July 1, 2005, all attorneys wishing to represent accused persons qualifying for the appointment of counsel through the courts must be certified and included on the Virginia Indigent Defense Commission's (VAIDC) list of qualified attorneys.

While the accused has a right to be represented by competent counsel, they do not have a right to be represented by a particular attorney. The Code of Virginia provides for appointment of counsel (except in jurisdictions having a public defender system or unless (i) the public defender is unable to represent the defendant by reason of conflict of interest or (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice) by a "fair system of rotation" among members of the bar who regularly represent persons accused of crimes before the court and who have indicated their willingness to accept such appointments. There are several methods the court may use for the selection process:

Individual appointment

The method most frequently used by the courts. An attorney is selected from a rotating list to represent a single defendant. The next defendant qualifying for appointed counsel receives the next attorney on the list.

Multiple appointments for time segment

The court selects an attorney to take all court appointments during a given period of time (daily, weekly, monthly).

Recidivist appointment

The court appoints the same attorney originally appointed to represent the defendant on repeated charges. The advantage to this type of appointment is that the appointed attorney is already familiar with the accused and their background.

Selective appointment

In certain more serious crimes, the court may desire a more experienced attorney and may bypass the normal rotation sequence in order to select a specific attorney to avoid "ineffective assistance of counsel" claims.

Note: If no attorney who is on the list maintained by the Indigent Defense Commission is reasonably available, the court may appoint as counsel an attorney not on the list who has otherwise demonstrated to the court's satisfaction an appropriate level of training and experience. The court is required to provide notice of the appointment to the Commission. Va. Code §§ 19.2-159 and 19.2-163.01.

The method of selection employed by the court should be documented. A rotation list should be developed which provides for the addition of new attorneys.

Procedures For Selecting Court Appointed Attorney

While the court selects appointed counsel, the clerk may provide assistance in the process in the following manner:

Step 1 After the decision to appoint counsel has been made, the clerk may provide the court with a copy of the rotation list for court-appointed attorneys.

Comments: *See* form DC-51, Rotation List - Court Appointed Attorney. *See* also the Court-Appointed Counsel Procedures &

Guidelines Manual. A master rotation list should be maintained with only the names of the attorneys. This will enable the court to photocopy the list for actual use without having to type a new list each time the list has been fully rotated. Maintain the list until the court's accounts have been audited.

Step 2 Clerk marks the list to show who was last appointed in the rotation.

Step 3 Attorney selected is contacted to notify them of appointment; if attorney cannot serve, the reason is noted on rotation list next to attorney's name; if authorized by judge, clerk selects next name on list.

Comments: An attorney will decline appointment if they have a conflict (attorney is related to or acquainted with defendant or if they represent clients with conflicting interests) or scheduling problems.

Step 4 Clerk prepares court order reflecting:

- defendant's request for court-appointed counsel
- defendant's filing of financial eligibility form
- court's decision to appoint counsel
- name of attorney appointed

Comments: *See* form DC-334, Request for Appointment of a Lawyer. If counsel was appointed when defendant's funds exceeded federal poverty guidelines, note same and include judge's justification for appointment in order, as directed by judge. Va. Code § 19.2-159.

Step 5 Clerk obtains judge's signature on order, and processes order. *See* chapter regarding court order processing.

Step 6 Clerk mails copy of order to appointed attorney with copy of indictment or presentment.

Step 7 Clerk records on case summary sheet:

- date of attorney appointment
- attorney name, address, telephone number
- date of next hearing or trial

Comments: The address and telephone number should be noted for easy retrieval if the attorney needs to be contacted.

Step 8 Clerk updates dockets and calendars to reflect defendant's appointed attorney; notes next hearing or trial date.

Step 9 Clerk places case file with other pending criminal cases until further action.

Payment of Court-Appointed Attorney's Fees And Expenses

Refer to the Court-Appointed Counsel Procedures & Guidelines Manual and the Chart of Allowances for information and the current statutory Court-Appointed Attorney's Fees.

See "DC 40 & 40A/IMC Fees/Interpreters/Court Reporters" appendix for instructions and samples of the DC-40, List of Allowances, and the DC-40(A) Application for Approval/Denial for Waiver of Fee Cap.

See references for using the Electronic Voucher Payment System
EVPS – Clerk's User Guide
EVPS – Clerk Submission Tutorial

Procedures for Processing Attorney Time Sheets

The following procedures are recommended for processing attorney claims for fees and expenses under the criminal fund. *See* also the Court-Appointed Counsel Procedures & Guidelines Manual published by the Office of the Executive Secretary of the Supreme Court of Virginia.

Step 1 Clerk makes attempt to determine if attorney has complied with the IRS regulations regarding the filing of a W-9 form.

Comments: The OES must have an IRS Form W-9 on file in order to comply with IRS regulations. Requests for payment of services will be delayed until a Form W-9 is received by the OES. **Note:** It is important for the attorney to submit a new W-9 form should they change firms or business.

Step 2 Clerk obtains form DC-40, List of Allowances from attorney on day of trial and a bill or statement detailing expenses being claimed. The attorney may also be turning in DC-40(A) Application for Approval/Denial for Waiver of Fee Cap for each charge if seeking a waiver of the statutory fee amount, and must be accompanied with

the DC-40. Pursuant to Va. Code § 19.2-163, the timesheet should be submitted no later than thirty days following trial or preliminary hearing.

Comments: One form DC-40 may be used for multiple defendants. All requests for payment of expenses (i.e., mileage, telephone, lodging) must be accompanied by a bill or statement supporting the claim.

Should the timesheet be submitted after the thirty-day time period, it is recommended that the clerk still forward the timesheet to the judge for consideration. Following the judge's approval, the timesheet should be forwarded to the Supreme Court for payment.

Step 3 If multiple charges for one defendant is listed on a DC 40, clerk can make photocopy to file with each charge.

Comments: Some courts file multiple charges in a single folder; in those instances only one copy is needed per folder.

Step 4 Vendor, not clerk, completes and signs form DC-40 and if seeking fee waivers, the DC-40(A), for submission to Supreme Court of Virginia for payment. Critical items to be remembered when completing the DC-40 include:

- Vendor # of firm or SSN of attorney
- Address (including street, city, state and zip code) of attorney
- Trial Date
- Class code
- Original code section(s) charged
- Code section from Chart of Allowances
- Total amount allowed for allowance
- Total amount certified for payment
- Total time in and out of court

Comments: DC-40's and DC-40(A)'s should be submitted at least monthly to the Supreme Court of Virginia. More frequent submission of the forms is preferred. a) Different defendants represented by the same attorney may be listed on one form. b) Form will not be processed if the complete zip code is not included on form. c) Class code is mandatory. c) Va. Code section must be in Chart of Allowances. d) Clerk should make sure that the amount

allowed for the allowance is within the statutory limit.

Step 5 Presiding judge reviews and signs the DC-40, List of Allowances and if submitted, the DC-40(A) Application for Approval/Denial for Waiver of Fee Cap, if the attorney is seeking the supplemental statutory waiver and delivers to clerk.
If the attorney is seeking the additional waiver, the forms must be sent to the Chief Judge for approval and signature.

Comments: Judge will indicate amount allowed for each case listed and date and sign form. The presiding judge will either approve or deny the supplemental statutory waiver. If the attorney is seeking the additional waiver, the amounts are approved or denied by the Chief Judge.

Step 6 Clerk ensures that the DC-40 and DC-40(A) are dated and signed by the judge and the clerk certifies allowance for payment by dating and signing form and enters the amount certified for payment on bottom of DC-40 and DC-40(A) and mails to the Supreme Court of Virginia.

Comments: Attorney's fees must be added to the defendant's court costs. However, clerk should not assess these costs and expenses until receipt of the DC-40 and DC-40(A). Attorney must submit DC-40 and DC-40(A) within thirty days of trial. Va. Code § 19.2-163.
Note: Even if counsel for the defendant requests a waiver of the limitations of compensation, the court can only assess against the defendant an amount equal to the pre-waiver compensation limit.

Step 7 Clerk files the DC-40, List of Allowances and DC-40(A) Application for Approval/Denial for Waiver of Fee Cap with the case papers.

Withdrawal of Court-Appointed Counsel

Once appointed, counsel must continue to represent the accused, even upon appeal, until relieved or replaced by other counsel. Va. Code § 19.2-159. The accused or counsel may request that counsel be relieved for good cause; however, the fact that the accused is merely incompatible or displeased with counsel does not necessitate appointment of a new counsel.

Procedures for Withdrawal of Counsel

The following procedures are recommended upon withdrawal of counsel:

Step 1 If court approves withdrawal of counsel, clerk prepares court order reflecting same; identifies party who requested withdrawal and indicates next hearing date and type as well as name of new attorney.

Comments: If the request for withdrawal was made by the attorney, the attorney will usually prepare the court order.

Step 2 Clerk obtains judge's signature on order; processes/images order and indexes and enters order in order book; places original order in case file.

Comments: *See* chapter regarding court order processing.

Step 3 Clerk records on case summary sheet:

- date of attorney withdrawal
- name, address, and telephone number of new attorney
- date and type of next hearing.

Step 4 Clerk updates case information on dockets and calendars to reflect withdrawal of counsel, appointment of new counsel, and new hearing date.

Step 5 Clerk places case file with other pending criminal cases until further action.

Recovery of Court-Appointed Counsel Costs from Defendants

If an accused is convicted, the statutory amount allowed by the court to the attorney appointed to defend them is taxed against them as part of the cost of the prosecution. Va. Code § 19.2-163 (2). The same code section further requires that an abstract of such costs shall be docketed in the Judgment Lien Docket in the clerk's office. Docketing unpaid court-appointed attorney costs in the Judgment Lien Docket constitutes a judgment in favor of the Commonwealth. If the costs are not paid at the time they are imposed, an execution may be issued on the judgment in the same manner as upon any other monetary judgment. Va. Code § 19.2-340. The court may also allow the defendant to pay the costs on an installment basis

(weekly, monthly, semi-monthly) or to pay the entire amount in a lump sum within a given time period. Va. Code § 19.2-354. The court may discharge all or part of the costs if the offender successfully performs community service as directed by the court. If an offender defaults on an installment or deferred payment plan or fails to complete a community service program as directed, the court may issue a show cause summons requiring the defendant to show cause why they should not be imprisoned or fined for non-payment. Va. Code § 19.2-358.

Another vehicle for collection is the Set-Off Debt Collection Act that requires the clerk's office to report to the Department of Taxation all unpaid costs and fines owed to the Commonwealth. Any state income tax refund due the offender is attached and applied to satisfy the court's claim. Va. Code § 58.1-520 *et seq*. Claims are certified and finalized via the Integrated Revenue Management System (IRMS).

If the Commonwealth's attorney feels that it would be impractical or uneconomical to institute proceedings for the collection of costs and fines, they may request the Office of the Attorney General to assist in the collection. The Commonwealth's attorney may also contract with attorneys or private collection agencies to collect the costs and fines owed the Commonwealth. Va. Code § 19.2-349

In summary, the procedures for the recovery of criminal fines and costs are generally found in Va. Code § 19.2-339 *et seq*. Specific procedures for the collection of criminal fines, costs, and penalties are set out in "Schedule Of Fees And Costs-Criminal" appendix of this manual.

Waiver of Counsel

An accused may waive their right to representation by an attorney:

- by submitting a written waiver,
- by refusing to answer the court's questions concerning the right to counsel, or
- by refusing to sign either a request for a lawyer or a waiver of the right to counsel.

If the accused expressly waives their right to counsel after being advised by the court of the charges against them and of their right to representation by an attorney even if they cannot afford one, they must sign the waiver. If they refuse either to indicate that they want a court-appointed attorney or that they wish to waive such right, the judge must enter the accused's

refusal into the court's record.

The Code of Virginia has provided for a specific form of waiver in all cases. Va. Code § 19.2-160. The court determines by oral examination whether the accused desires to waive counsel. If the court finds that the accused voluntarily and knowingly desires to waive counsel, the accused must execute the written waiver form provided by the Supreme Court (DC-335, Trial without a Lawyer - Waiver of Right to be Represented by a Lawyer). If the accused refuses to execute either the waiver form or the form requesting the appointment of counsel, such refusal is deemed a waiver of the right to counsel. Va. Code § 19.2-160. As noted previously, counsel need not be appointed in cases in which no term of imprisonment may be imposed due to the nature of the offense or a judge's written statement to that effect. When an accused has made a valid waiver of the right to counsel at one stage of a criminal prosecution, they may not necessarily be bound by that decision in later proceedings.

An accused that knowingly and intelligently waives their right to the assistance of counsel may proceed *pro se* (represent themselves). It is good practice for the trial court to advise the defendant of the disadvantages of self-representation. When an accused elects to represent themselves, they must comply with all rules of procedure and evidence. An accused cannot assert that their self-presented defense amounted to ineffective assistance of counsel. Over the accused's objection, the court may appoint standby counsel to assist the accused if they later desire assistance. A *pro se* defendant cannot be forced, however, to cooperate with counsel. Once trial has commenced with counsel, appointed or retained, granting a request to proceed *pro se* rests within the discretion of the trial court.

The following procedures should be followed when an accused waives their right to counsel or when the defendant elects to proceed *pro se*:

Step 1 If defendant wishes to waive their right to counsel, clerk furnishes judge with written statement of waiver to complete and sign.

Comments: *See* form DC-335, Trial without a Lawyer - Waiver of Right to be Represented by a Lawyer, which must be used. Va. Code § 19.2-160. The waiver may be executed by the defendant.

Step 2 If the defendant refuses to execute either the waiver of counsel or the form requesting appointment of counsel, clerk furnishes judge with certificate of refusal form to complete and sign. *See* form DC-337, Trial Without Counsel (Certificate of Refusal).

Step 3 Clerk collects forms from judge and places them in defendant's case file. The forms become part of the record. Va. Code § 19.2-160.

Step 4 Clerk prepares court order reflecting defendant's waiver of their right to counsel or their refusal to so indicate.

Step 5 Clerk obtains judge's signature on order; process/images order and index and enter order in order book; places original in case file. *See* chapter regarding court order processing.

Step 6 Clerk records on case summary sheet that defendant waived their right to an attorney and notes hearing or trial date.

Step 7 Clerk updates dockets and calendars to reflect that defendant waived their right to an attorney; notes hearing or trial date.

Step 8 Clerk places case file with other pending cases until further action.

Retained Counsel

An accused may choose to retain their own attorney or attorneys to provide for their defense. An accused that retains their own attorney is not bound to that attorney for the duration of the case. While an accused may retain new counsel during a case, the court will usually limit the number of continuances granted for such purpose.

Generally, the court is unaware of the name of a defendant's retained attorney when their case is filed with the circuit court. When the defendant has retained an attorney, most courts require the attorney to send written notification to the court that they have undertaken representation of the defendant in a particular case. Courts are encouraged to develop a uniform policy with respect to notification of representation, if none exists, and to disseminate the policy to the local bar. In some jurisdictions, the statement is filed with the Commonwealth's attorney rather than the court. If current policy provides that the Commonwealth's attorney be notified when an attorney is retained, a system should be developed to ensure that the court and the clerk's office are also promptly advised. Likewise, the court should develop a mechanism for notifying the Commonwealth's attorney when the information goes to the court first.

Because Va. Code § 19.2-157 states only that the accused be allowed a

"reasonable opportunity to employ counsel," some judges require the accused to return to court for a subsequent right-to-counsel proceeding on a specified date unless the clerk's office receives written notification from an attorney retained by the accused. By the subsequent hearing date, the accused must retain counsel, request court-appointed counsel, or waive their right to representation by counsel. This procedure may reduce requests for continuances to retain counsel.

Pursuant to Va. Code § 19.2-190.2, a privately retained counsel in any criminal case may, pursuant to the terms of a written agreement between the attorney and the client, withdraw from representation of a client without leave of court after certification of a charge by a district court by providing written notice of the withdrawal to the client, the attorney for the Commonwealth, and the circuit court within 10 days of the certification of the charge.

The following procedures are recommended to the clerk when an attorney is privately retained:

Step 1 Clerk obtains written documentation from attorney verifying that they have been retained. Alternatively, if the court notes appearance of the attorney in court to represent the defendant, clerk prepares court order reflecting nature and results of proceeding and retained attorney's name.

Comments: Form DC-334, Request for Appointment of a Lawyer can be used to document appearance of retained counsel.

Step 2 Clerk obtains telephone number and address of attorney, if not previously obtained.

Step 3 Clerk obtains judge's signature on court order (if one is prepared); processes/images order and indexes in order book; places original in case file. *See* chapter regarding court order processing.

Step 4 Clerk records on case summary sheet:

- attorney name, address, and telephone number
- date of next hearing or trial

Step 5 Clerk updates dockets and calendars to reflect:

- defendant's retained attorney
- date of next hearing or trial

Step 6 Clerk notifies Commonwealth's attorney of attorney retained by defendant; forwards copy of attorney's letter of verification, if necessary.

Step 7 Insert verification letter from attorney in case file and place case file with other pending criminal cases until further action.

Arraignment, Pleas and Plea Bargaining

Arraignment

An individual accused of a criminal offense has the constitutional and statutory right to be notified of the charges against them. Arraignment is the stage of the criminal process at which the accused is formally notified of the charges against them as they will be prosecuted in the circuit court.

Pursuant to Va. Code § 19.2-254, arraignment must be conducted in open court, preferably outside the presence of a jury, and should accomplish the following:

- Identify the accused;
- Apprise the accused of the charges against them; and
- Determine the accused's plea to the charges.

Technically, arraignment ends upon the entry of a plea by the accused. Although bail and right to counsel determinations have been made prior to arraignment, the arraignment hearing provides an opportunity to reevaluate such determinations. Waiver of trial by jury may be made during arraignment.

In some circuit courts, the accused is arraigned as soon as possible after indictment. In others, arraignment may take place any time prior to or on the day of the trial. Some courts prefer to conduct all arraignments for the term on one day (often referred to as "arraignment day" or "plea day"). The accused will have been notified to appear if they were released on bail, or they will have been brought to court by the sheriff if incarcerated.

Arraignment usually occurs only after the defendant is represented by counsel and has had an opportunity to consult with their attorney, since the defendant's plea will affect their rights. Arraignment may proceed without the defendant being represented by counsel where

- the defendant has waived their right to counsel;

- the defendant has refused to request or waive counsel; or
- in misdemeanor cases in which the judge has stated in writing that no jail sentence will be imposed.

Where the defendant has retained their own attorney or continues to be represented by counsel appointed at their district court hearing, arraignment may likewise proceed.

An accused may waive their right to arraignment under certain conditions. If the accused is charged with a felony, they must be present in person to waive arraignment. Their attorney cannot waive arraignment for them. If the accused is charged with a misdemeanor, arraignment can be waived by the accused or their attorney, or by the accused's failure to appear.

Pleas

As noted above, the entry of a plea is a vital part of the arraignment process. No felony case can be tried unless a plea is entered in person by the accused. Va. Code § 19.2-254. If the accused is charged with a felony and refuses to plead, the court shall enter a plea of "not guilty." Va. Code § 19.2-259. If the accused is charged with a misdemeanor and either refuses to plead or fails to appear, the court must likewise enter a plea of "not guilty." Va. Code § 19.2-258.

An accused charged with either a felony or misdemeanor may enter a plea of "guilty," "not guilty," or "*nolo contendere*" (the accused neither admits nor denies the charge). The court may accept a plea of guilty to a lesser offense. Va. Code § 19.2-254. If the court accepts a plea to a lesser offense, the charge should be amended. *See* "Amendment to the Charge" in this chapter.

With the approval of the court and the consent of the Commonwealth, a defendant may enter a conditional plea of guilty in a misdemeanor or felony case in circuit court, reserving the right, on appeal from the judgment, to a review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw their plea.

When an accused pleads guilty, they waive many important constitutional rights:

- the privilege against self-incrimination;
- the right to trial by jury;
- the right to confront witnesses;
- the right to demand that the prosecution prove its case beyond a reasonable doubt; and

- the right to object to illegally obtained evidence, such as an illegal search or an illegally obtained confession.

Because of the serious implications of a plea of guilty, the court must be certain that the plea was made voluntarily and knowingly. The record must reflect that the accused was aware of the waiver of their constitutional rights, and their understanding of the nature of the charge and the consequences of their plea. Rule 3A:8(b) requires the circuit court to make certain determinations before permitting an accused to plead guilty or *nolo contendere*. If the court is satisfied that the plea was voluntarily entered, the court will hear and determine the case without the intervention of a jury. Va. Code § 19.2- 257.

The court must permit an accused to withdraw their plea and plead again if the indictment is amended or the court rejects a plea agreement. Va. Code § 19.2-231; Rule 3A:8(c)(4). *See* "Amendment To The Charge" in this chapter. An accused may withdraw their plea of guilty or *nolo contendere* by motion made before sentence is imposed or within twenty-one days after entry of a final order if the court deems that withdrawal of the plea should be allowed to correct "manifest injustice." Va. Code § 19.2-296.

Plea Bargaining

Plea bargaining is the process whereby the accused, by counsel, and the Commonwealth's attorney attempt to agree that upon entry by the defendant of a plea of guilty to one or more charged offenses or lesser or related offenses, the Commonwealth's attorney will move for dismissal of other charges, recommend a particular sentence, or agree that a specific sentence is the appropriate disposition of the case. The plea bargaining process is governed by Rule 3A:8(c). In felony cases, any plea agreement must be reduced to writing, signed by the Commonwealth's attorney, the accused, and defense counsel (if the defendant is represented by counsel), and presented to the court. Although the court cannot participate in plea discussions, all plea agreements must be submitted to the court for review. The court may accept or reject the plea agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider a presentence report. Rule 3A:8(c)(2). If a plea agreement is rejected and the parties do not agree that the judge may hear the case, the judge is disqualified pursuant to Va. Code § 19.2-153. For a discussion of procedures regarding judicial disqualification, *see* "Judge Disqualifications and Disabilities" in this chapter.

Upon the court's acceptance of a defendant's plea of guilty to the offense charged or upon a plea agreement, the court finds the defendant guilty, and the Commonwealth is relieved of its burden of proving guilt beyond a reasonable doubt. By pleading not guilty or refusing to enter a plea, the accused denies the allegations against them and the trial phase of the criminal process continues.

Procedures for Arraignment, Pleas Or Plea Bargaining

Step 1 Clerk enters date of accused's arraignment hearing on:

- court calendar
- pending criminal docket
- case summary sheet

See chapter regarding calendaring and docketing.

Step 2 Clerk notifies appropriate support staff of upcoming arraignments.

Comments: The court reporter, sheriff's department (to arrange for bailiff and for transport of the accused from jail), and probation department (if local practice dictates) should be notified.

Step 3 On the day before the arraignment, clerk pulls calendar and each case to be arraigned; clerk makes copies of the calendar as appropriate.

Comments: Case files should be arranged in the order in which they are sequenced on the calendar.

Step 4 On the day of arraignment, clerk takes calendars and case files to the courtroom; distributes copies of the calendar as appropriate, reserving original for the judge.

Step 5 After bailiff opens court, clerk swears court reporter.

Step 6 Clerk reads the indictment, warrant or information to accused, as directed by judge.

Comments: At the conclusion of reading the indictment, warrant or information, the clerk will ask the defendant "How do you plead?" If defendant waives reading of indictment, clerk will ask the defendant – "In case number X, a felony charge of Y, how do you plead?"

Step 7 **Procedure Decision:** Does accused have an attorney?
If no, clerk follows procedures for appointment, retention, or waiver of counsel in "Right to Counsel" in this chapter. If yes, GO TO STEP 8.

Comments: If accused wishes to be represented by counsel, the proceeding must be continued to permit appointment or retention of counsel and to give such counsel the opportunity to advise the accused with respect to their plea.

Step 8 Clerk records attorney's name on calendar, case summary sheet and docket.

Step 9 If accused enters plea, clerk notes on the calendar the plea of each accused; note each plea on case summary sheet and on the docket. If the accused waives arraignment or the court accepts a plea to a lesser offense, record same on docket and case summary sheet.

Step 10 **Procedure Decision:** What plea was entered? If plea of not guilty, GO TO STEP 19; if plea of guilty, GO TO STEP 11; if plea of *nolo contendere*, GO TO STEP 11; if accused refuses to plead, Judge enters plea of guilty. GO TO STEP 19.

Comments: If the offense is a felony and the accused refuses to plead, the judge will have a plea of "not guilty" entered. Va. Code § 19.2-259. If offense is a misdemeanor and the accused refuses to plead or is absent, the judge will have a plea of not guilty entered. Va. Code § 19.2-258. If the court accepts a plea to a lesser offense, *see* "Amendment To The Charge" in this chapter.

Step 11 Clerk swears accused, if directed by the judge.

Step 12 Clerk records on case summary sheet whether plea or plea agreement is accepted or rejected by court.

Comments: If plea agreement is rejected and judge is disqualified, *see* "Judge Disqualifications And Disabilities" in this chapter. The notes recorded on the case summary sheet will be used to prepare the court order.

Step 13 Clerk places written guilty plea and plea agreement in case file after judge's review and handling; notes on case summary sheet that a written plea was entered.

Comments: A written plea of guilty is required only if there is a plea agreement.

Step 14 **Procedure Decision:** Does court proceed to sentence the accused on guilty plea? If no, GO TO STEP 19; if yes, GO TO STEP 15.

Comments: If an accused's plea of guilty is accepted, the court will pronounce them guilty and will sentence them forthwith or continue the case for a presentence investigation.

Step 15 Clerk may note the court's disposition or sentence on case summary sheets, remarks on the case management system or any other method preferred. If sentenced, clerk will close out case on any automated case management system.

Step 16 Clerk prepares order reciting accused's plea, the terms of any plea agreement, and court's sentence; obtains judge's signature; processes order and places original in case file.

Comments: While sample orders are provided for both arraignment and sentencing, they are generally combined into one order in practice. *See* chapter regarding court order processing.

Step 17 Clerk follows procedures for sentencing and case closing in the "Trial/Post-Trial" and "Post Sentencing" chapters in this manual, respectively

Step 18 Clerk places file with other ended criminal cases. IF ACCUSED IS NOT SENTENCED, ENTERS PLEA OF NOT GUILTY, OR REFUSES TO PLEAD (Proceed to Step 19):

Step 19 Clerk enters date set for trial or sentencing, whichever applies, on:

- court calendar
- case summary sheet
- docket

Step 20 Clerk notes on case summary sheet and docket any new decisions regarding bail and right to counsel; arranges for accused's transport to jail, if applicable. *See* bail procedures.

Step 21 Clerk returns case files and court documents to clerk's office; ensures that case papers are appropriately inserted in case files.

Step 22 Clerk prepares court orders for each accused reciting results of arraignment; obtains judge's signature and processes orders; places originals in proper case files. **Note:** Include in court order any bail decisions, any decisions regarding appointment or waiver of counsel, and court's ruling on any pleadings and motions which may have been presented during the arraignment proceeding. *See* chapter regarding court order processing.

Step 23 Clerk places files with other pending criminal cases until further action.

Appointment Of Substitute Commonwealth's Attorney

Pursuant to Va. Code § 19.2-155, if the attorney for the Commonwealth is related to an accused either by blood or marriage, or if the Commonwealth's attorney is so situated with respect to the case as to render it improper, in their opinion, concurred in by judge, for them to act as prosecutor in the case, the judge shall appoint another attorney to act in the Commonwealth's attorney's behalf. Likewise, if the Commonwealth's attorney is unable to act or attend to their official duties due to illness, disability, or other reason of a temporary nature, the judge, upon notice from the Commonwealth's attorney or upon receipt of a certificate from their attending physician or from the clerk of the court, will appoint an attorney to act in their behalf for as long as necessary.

If the attorney for the Commonwealth will be absent for a prolonged period of time, upon notification by such attorney for the Commonwealth or on the court's own motion, the judge of the circuit court shall appoint an attorney to serve as Commonwealth's attorney for such length of time as necessary. Va. Code § 19.2-156.

Whether the attorney for the Commonwealth is disqualified, temporarily disabled, or absent for a prolonged period, the appointment of a substitute Commonwealth's attorney and the reason therefor must be entered on the record. The substitution process must occur in the circuit court even if the disqualification is in connection with a district court case since such process must be "of record."

Procedures for Appointment of Substitute Commonwealth's Attorney

Step 1 Clerk prepares certified statement acknowledging personal knowledge of illness or disability, if applicable. Va. Code § 19.2-155.

Comments: Alternatively, the Commonwealth's attorney or their attending physician may provide the certificate reporting the illness or disability. If the Commonwealth's attorney will be absent for a prolonged period, the Commonwealth's attorney will provide notice or the court will act on its own motion.

Step 2 Judge appoints substitute Commonwealth's attorney.

Step 3 Clerk prepares court order reflecting appointment, reasons for and duration of appointment; obtains judge's signature.

Comments: The order may be prepared by the clerk or the

Commonwealth's attorney's office, depending on local practice.

Step 4 Clerk processes/images certificate and order; indexes and enters in civil order book; places original in case file.

Comments: *See* chapter regarding court order processing. If disqualification is the reason for the appointment, place original copy of the order in the case file. If appointment is due to illness or other disability, place order in a file with other similar orders.

Step 5 If directed by judge, clerk issues certified copies of order to:

- Commonwealth's attorney's office
- the locality responsible for payment of the Commonwealth's attorney's expenses
- the State Compensation Board.

Comments: In many jurisdictions, the Commonwealth's attorney or their staff will submit the order to the locality responsible for payment of the substitute's expenses and to the Compensation Board (which reimburses the locality).

Judge Disqualifications and Disabilities

The process by which a judge is disqualified or disqualifies themselves from hearing a case because of conflict of interest or prejudice is called "recusal."
Canon 3C of the Canons of Judicial Conduct provides that a judge shall disqualify themselves in any proceeding in which their impartiality might be reasonably questioned. Virginia Code § 19.2-153 states that a judge cannot preside over a criminal trial in which he is connected with the accused or party injured; or he has rejected a plea agreement submitted by both the Commonwealth and the defense and the parties do not agree that the judge should hear the case. Virginia Code § 19.2-254 also states that upon rejecting a plea agreement in any criminal matter, a judge shall immediately recuse themselves from any further proceedings on the same matter unless the parties agree otherwise.

In many circuit courts where multiple judges preside, and the court so directs, the clerk, Judicial Assistant, or Commonwealth's attorney may screen cases when filed to prevent assignment of a case to a judge who may have a conflict of interest. For example, if a judge is known to be related to the accused's attorney, the case would be assigned to one of the other judges within the court or circuit. If a judge is unable to complete a criminal case due to death, sickness, or other disability, another judge of that court or a judge designated by the Chief Justice of the Supreme Court of Virginia may finish the trial or may grant and preside at a new trial. Va. Code § 19.2-154. The same applies where a conflict develops after the proceeding has commenced.

A judge disqualified based on a conflict may, instead of withdrawing from the proceeding, disclose on the record the basis of their disqualification. If the accused, their counsel, and the Commonwealth's attorney agree to waive in writing the judge's disqualification, the judge is no longer disqualified and may participate in the proceeding. Canons of Judicial Conduct, Canon 3D.

Occasionally, all judges within a circuit may feel that it would be improper for any of them to preside at trial. When there occurs, a judge from another circuit will be designated by the Chief Justice of the Supreme Court of Virginia to preside at the trial. Frequently, the judge designated to preside is a retired judge from another court of record.

Procedures for Disqualification Process of Judge:

Step 1 **Procedure Decision:** Who is unable to try the case? If individual judge within circuit: GO TO STEP 9; If all judges within circuit: GO TO STEP 2

Comments: Refer to the Judicial Disqualification Policy and Frequently Asked Questions.

Step 2 Prepare court order reciting grounds for disqualification; obtain signatures of all judges in the circuit.

Comments: If it is not practical to obtain the signatures of all the judges, obtain the signature of the chief judge on the order.

Step 3 Process/image order promptly; index and enter in order book.

Step 4 Promptly send certified copy of order to the Chief Justice of the Supreme Court of Virginia, along with Circuit Court Cover Sheet Request for Designation.

Step 5 The Chief Justice designates a judge and forwards designation to the circuit court.

Comments: Notice of the designation will be in the form of a Supreme Court order. Enclosed with the designation will be a clerk's reporting form to be completed by the circuit court clerk after the designated judge has presided over the case. This form merely certifies that the judge actually served and request payment by the Supreme Court at the normal per diem rate. The designated judge may contact the clerk's office regarding parking, access to the case file, and other details.

Step 6 Process/image and enter the Supreme Court order designating the judge in the criminal order book.

Step 7 Complete clerk's reporting form and return to the Supreme Court; make copy of completed form and image.

Comments: *See* comments for STEP 5 above. To expedite the designated judge's reimbursement, send the reporting form to:

Assistant Executive Secretary
Office of the Executive Secretary
100 North 9th Street
Richmond, Virginia 23219

Step 8 Update the following to acknowledge the judge designated in the case:

- calendars
- dockets
- case summary sheet

See chapter regarding calendars, dockets and case summary sheets.

If Individual Judge Disqualification:

Step 9 Prepare order incorporating judge's declaration of conflict and disqualification if the conflict or reason for disqualification is declared in open court during the course of a normal court proceeding. Form CC-1100, Order Of Recusal/Remittal of Disqualification (top portion) should be utilized.

Comments: If a judge disqualifies themselves or is disqualified before presiding over the case, it is not necessary to prepare an order. In such situations, the chief judge simply reassigns the case to another judge of that circuit.

Note: A plea agreement that is rejected by a judge mandates disqualification of that judge. The case will be assigned to another judge within the circuit unless all judges within the circuit are disqualified. *See* procedures starting at STEP 2.

The fact that the plea agreement was rejected and that another judge within the circuit was designated should be certified to the Chief Justice of the Supreme Court. The designation of such Judge shall be entered in the civil order book of the court. Va. Code § 19.2-153.

Step 10 Obtain judge's signature on the order; process and image order in the criminal order book.

Comments: If judge is unable to sign the order due to death or disability, prepare order for the signature of the chief judge of the circuit.

Step 11 **Procedure Decision:** Is judge's disqualification waived? If no, END OF PROCEDURES; if yes, GO TO STEP 12.

Step 12 Obtain written waiver signed by all parties and their attorneys; process/image waiver and place in case file. Use Form CC-1100, Order Of Recusal/Remittal of Disqualification (bottom portion).

Comments: Instead of withdrawing, a judge may disclose on the record the basis of their disqualification. If the parties agree in writing to waive the judge's disqualification, the judge may participate in the proceeding. Canon 3D, Canons of Judicial Conduct.

Change of Venue

Except as otherwise permitted by statute, criminal cases are tried in the county or city in which the offense was committed. "Venue" refers to the city or county in which the case is pending. If it cannot be readily determined where the offense was committed, venue may be had in the county or city where the defendant resides, or if he is not a resident, where he was apprehended in the Commonwealth. Va. Code § 19.2-244 If the offense is a homicide, and circumstances are so that it is unclear where the crime was committed, the homicide and any related offenses shall be prosecuted in the county or city where the body of the victim was found. Va. Code § 19.2-247

Upon motion of the accused or the Commonwealth, the court may transfer a criminal trial to another circuit court if the court is satisfied that there is such prejudice against the accused that they cannot obtain a fair and impartial trial in the city or county in which the case is pending. Va. Code § 19.2-251. The object of a change of venue is to obtain an impartial jury and to provide for the safety of the accused. Another purpose of a change of venue may be for judicial economy and convenience when all parties are in agreement. This may occur when the defendant is facing a series of similar charges committed in several jurisdictions, which may be consolidated for trial in one court.

The court has several alternatives to transferring venue in a criminal proceeding. Sequestration (isolation) of the jurors or granting a continuance may negate local prejudice and hostilities. Likewise, having jurors summoned from another county or city may make a change of venue unnecessary. For a discussion of sequestration and summoning out-of-town jurors, *see*

chapter, "Jury Trials."

When the court grants a motion for change of venue, the clerk of the court in which the proceeding was commenced (the transferring court) is responsible for certifying all papers in the proceeding to the clerk of the court to which the case is transferred (the receiving court). Va. Code § 19.2-253. The clerk of the receiving court must issue a *writ of venire facias* to summon a jury for the case from within the receiving court's jury pool. The prosecution proceeds in the receiving court. The transferring court may admit the accused to bail or commit them to jail. The accused's admission to bail is conditioned upon their appearance in the receiving court. An order committing the accused to jail shall be to the jail of the transferring court, with directions to the jailer to transfer the accused to the jail serving the receiving court. In addition, witnesses must be directed to appear in the receiving court. Va. Code § 19.2-252.

Receiving Case

Step 1 Judge orders change of venue.

Step 2 Clerk acknowledges receipt of case papers. *See* "Case Initiation" chapter for procedures.

Step 3 Clerk assigns case number. *See* "Case Initiation" chapter for procedures.

Step 4 Clerk indexes case. *See* "Case Initiation" chapter for procedures.

Step 5 Clerk prepares case file and inserts case papers. *See* "Case Initiation" chapter for procedures.

Step 6 Clerk notes on case summary sheet in file the following information:

- date of transfer
- name of transferring court
- date of hearing in receiving court

See "Caseflow Management" chapter regarding dockets and calendars.

Step 7 Clerk enters case and hearing date on criminal docket and on court's calendar. *See* "Caseflow Management" chapter regarding dockets and calendars.

Step 8 Clerk processes/images the transfer order received; indexes and enters order in order book; places original in case file. *See* chapter regarding court order processing.

Step 9 Clerk places case file with other pending criminal cases; issues *writ of venire facias* if jury trial is needed. END OF PROCEDURES IF RECEIVING

CASE.

Comments: *See* "Juror Summoning" this chapter. Case processing continues as if case was initially filed in the receiving court.

Transferring the Case

Step 1 Judge orders change of venue.

Step 2 Clerk prepares order of transfer; obtains judge's signature.

Step 3 Clerk prepares the following, as needed:

- if the accused is being released on bail, prepare and execute bail form;
- if accused is incarcerated, prepare and execute custodial transportation order;
- if witnesses have been summoned, prepare and execute witness recognizance, if requested.

Comments: *See* form DC-330, Recognizance. If bail is continued without change except as to location of appearance, the judge need not require new bail documents. *See* form DC-354, Custodial Transportation Order.

Step 4 Clerk strikes case from criminal docket and court's calendar.

Step 5 Clerk processes/images order; indexes and enters in order book; places original in case file. *See* chapter regarding court order processing.

Step 6 Clerk forwards certified copies of all case materials, excluding file jacket, to receiving court; includes check for any bond monies deposited in case.
Comments: Original case materials should be retained by the transferring court pursuant to Va. Code § 19.2-253. Case materials being forwarded should be arranged in chronological order with the order of transfer on top. *See* "Evidence" this chapter.

Step 7 Clerk places case file folder containing original materials with other ended criminal cases.

Amendment to The Charge

Pursuant to Va. Code § 19.2-231, any indictment, presentment, or information may be

amended if there is a defect in its form or if there is a variance between the allegations and the evidence offered in proof thereof. Amendments correcting errors such as the name of the accused, or the location or time of the offense are liberally allowed and are the most common reasons for amendment.

The amendment cannot change the nature or character of the offense charged. If amending the charge would change the nature or character of the offense, the proceeding must be terminated and new charges filed. An indictment which fails to state an offense cannot be corrected by an amendment, nor can an amendment change a misdemeanor to a felony.

An amendment to a written charge may be made at any time before the jury returns a verdict or the court finds the accused guilty or not guilty. After any amendment to the indictment, presentment, or information, the accused must be arraigned on the amended charge and allowed to change their plea, if they desire. The accused may be granted a continuance, upon request, if the amendment operates as a surprise.
Procedures when the charge is amended:

Step 1 The court may permit amendment of the indictment, presentment, or information. Va. Code § 19.2-231.

Comments: Some jurisdictions will change the original indictment, presentment or information and have all parties' initial changes.

Step 2 Clerk follows procedures for arraignment and entry of plea. *See* "Pre-Trial" chapter regarding "Arraignment, Pleas And Plea Bargaining."

Step 3 Clerk records amendment on case summary sheet.

Step 4 Clerk notes change of plea, if applicable, on:

- case summary sheet
- criminal docket
- court's calendar

Step 5 **Procedure Decision:** Does case proceed to trial or is case continued? If case proceeds to trial, *See* "Trial/Post Trial - Bench Trials And Jury Trial," whichever applies; if case is continued, GO TO STEP 6.

Step 6 Clerk notes continuance and next hearing date on the following:

- criminal docket
- court's calendars

- case summary sheet

See "Caseflow Management" chapter regarding dockets, calendars, and case summary sheets.

Step 7 Clerk prepares court order reflecting amendment, who made application for amendment, arraignment, plea, and, if applicable, date to which case was continued; obtains judge's signature on order.

Step 8 Clerk processes/images order; indexes and enters in order book; places original in case file. *See* "Overview" chapter regarding court order processing.

Step 9 Clerk places case file with other pending criminal files until further action.

Interpreters

Note: *See* Serving Non-English Speakers in the Virginia Court System which provides guidelines for policy and best practice. *See* also the general information contained in the Foreign Language Interpreters section of the Department of Judicial Services website.
If an accused is deaf or does not speak English, they are entitled to have an interpreter appointed at state expense, regardless of their financial status. In any criminal case in which the victim or witness is deaf or unable to speak English, an interpreter shall be appointed unless the court finds that they do not require the interpreter's services. The compensation of an interpreter appointed pursuant to Va. Code §§ 19.2-164 or 19.2-164.1 shall be fixed by the court and paid from the general fund of the state treasury. The compensation is not assessed as part of the court costs.

Virginia Code § 19.2-164 provides that in any criminal case in which a non-English-speaking person is the accused, an interpreter for the non-English-speaking person shall be appointed. In any criminal case in which a non-English-speaking person is a victim or witness, an interpreter shall be appointed by the judge of the court in which the case is to be heard unless the court finds that the person does not require the services of a court-appointed interpreter. An English-speaking person fluent in the language of the country of the accused, a victim or a witness shall be appointed by the judge of the court in which the case is to be heard, unless such person obtains an interpreter of their own choosing who is approved by the court as being competent. The compensation of an interpreter appointed by the court pursuant to this section shall be fixed by the court in accordance with guidelines set by the Judicial Council of Virginia and shall be paid from the general fund of the state treasury as part of the expense of trial. Such fee shall not be assessed as part of the costs, unless defendant fails to appear, the interpreter appears in the case and no other case on that date, and the defendant is convicted of failure to appear on the date the interpreter appeared in the case, then the court, in its discretion, may assess those costs. Whenever a person communicates through an interpreter to any person under such circumstances that the communication would be privileged, and such

person could not be compelled to testify as to the communications, this privilege shall also apply to the interpreter. The provisions of this section shall apply in both circuit courts and district courts.

In some courts, there are staff foreign language interpreters who provide direct interpretation to the court and coordinate coverage by contracted vendors. All other foreign language interpreters must be assigned by the court directly. The Office of the Executive Secretary of the Supreme Court of Virginia offers a voluntary program to certify Korean, Spanish, and Vietnamese language interpreters. A list of certified interpreters and details about the 24-hour telephonic interpretation service are provided to all courts. This information is available on the Virginia Judiciary's intranet.

The appointment of an interpreter for a non-English speaking accused, victim or witness is made by the judge. Va. Code § 19.2-164. If the accused, victim or witness elects to obtain their own interpreter, the interpreter must be approved by the court as competent. The Office of the Executive Secretary provides training to foreign language interpreters in all languages, irrespective of language of proficiency. Additional suggested resources for locating interpreters include foreign language departments of colleges and universities, The American Red Cross, professional translation services, Federal courts, or private sector interpreter firms.

The appointment of an interpreter for an accused, victim or witness who is deaf is always made by the judge through the Department for the Deaf and Hard-of-Hearing. Va. Code § 19.2-164.1.

A deaf accused, victim or witness may waive the services of an interpreter for all or a portion of court proceedings. Va. Code § 19.2-164.1. If a deaf person wishes to waive the services of an interpreter, the waiver must be made in person, on the record, and after consultation with legal counsel. A judicial officer, through an interpreter obtained in accordance with Va. Code § 19.2-164.1, must explain to the deaf person the nature and effect of their waiver. Any waiver must be approved in writing by the deaf person's counsel. If the person is not represented by counsel, approval shall be obtained in writing by a judicial officer. The Code is silent with respect to waiver of such services by non-English speaking persons.

A deaf accused, victim or witness who waives their right to an interpreter may hire an interpreter at their own expense. The court, in such a case, does not need to ascertain whether the interpreter is qualified. Va. Code § 19.2-164.1.

Use of Foreign Language Interpreters

> The appointment of a court interpreter is the discretionary duty of a judge. The judge decides who is to receive the services of an interpreter and whether an interpreter is qualified. When a non-English-speaking person appears before the court, the appointment of a qualified court interpreter is critical to ensure the individual's ability to effectively participate in their own trial. The selection of an unqualified court interpreter

could have a profound effect on the rights of everyone involved in either a civil or criminal case. Several important issues should be recognized when courts use foreign language interpreters:

- A bilingual individual is not necessarily qualified to serve as an interpreter in court. Court interpreting requires additional, specific knowledge, a high skill level, and a sophisticated vocabulary.
- The appointment of a bilingual attorney does not necessarily solve a language problem in the courtroom. An attorney should not both represent a client and interpret in the courtroom at the same time.
- There are important differences between a translator and an interpreter. A translator translates a written document in one language into a written document in another language. Translation requires different skills than those used by an interpreter.
- If the court cannot effectively communicate with a potential interpreter in English, that individual should not be considered for appointment as a court interpreter.

Role of A Foreign Language Interpreter

An interpreter conveys the meaning of a word or a group of words from a source language (e.g., Spanish) into the target language (e.g., English). Colloquial expressions, obscene or crude language, slang, and cultured or scholarly language must be conveyed in accordance with the usage of the speaker. A court interpreter's job is not to tone down, expound upon, improve or edit any statements - the interpreter must maintain the same register (level of language spoken) and style of the speaker.

The court interpreter should take an oath in open court before every proceeding to faithfully, accurately and impartially interpret the proceedings using their best skill and judgment. Judges and/or clerks of court may request that interpreters provide a resume and review the Judicial Council of Virginia's Code of Professional Responsibility for Interpreters Serving in Virginia's Courts and request they agree to its provisions in order to be eligible for appointment by the court. All certified Spanish language interpreters have signed an agreement to adhere to the code's provisions as a requirement of certification. This code imposes ethical responsibilities on the interpreter's conduct.

Certified Language Interpreter Appointments

To assist courts in locating qualified interpreters, the Judicial Council of Virginia has developed a process to certify persons serving as Korean, Spanish, and Vietnamese language interpreters because these are the most frequently spoken languages in cases involving non-English-speaking persons in court proceedings in the Commonwealth. Its purpose is to better ensure that these interpreters are competent to perform such

services in a court environment. The end result of each certification process is the inclusion on the Certified Spanish Language Interpreter List for Virginia's Courts detailing contact information for interpreters who have satisfied all certification requirements. This document is available on the judiciary's intranet, and not currently available for the public.

In cases where a judge determines that a foreign language interpreter is necessary, for matters requiring Korean, Spanish, and Vietnamese language interpreters, the first resource is the Certified List. Local state courts may use this list to contact certified interpreters directly and to arrange for their services as needed.
The certification process is voluntary for participants. While the Judicial Council of Virginia encourages all courts to utilize certified interpreters first since they have proven their competency and skill level, there is no requirement that only certified interpreters be used for the provision of language interpretation and translation services in courts.

The requirements for certification are as follows:

- Agree to adhere to the Code of Professional Responsibility for Interpreters Serving in Virginia's Courts as established by the Judicial Council of Virginia.
- Complete training requirements as established by the Council (a two-day orientation training session).
- Complete a 135-question, multiple-choice, written test on basic, general English language vocabulary, ethics, and the legal system. Current requirements stipulate a minimum of 80% correct in order to pass the written test. Also, candidates must earn a "Pass" on 10 translation sentences in order to be eligible for the oral exam.
- Complete the Spanish language interpreter certification oral examination. Current requirements stipulate a minimum of 70% correct on each of three sections in order to pass the oral examination.

The rate of a certified interpreter is $60/hour with a two-hour minimum. If the interpreter is traveling more than 30 miles between the interpreter's address used for tax purposes and the site of the assignment, travel time may be approved at half of the hourly rate and mileage reimbursement at the judicial mileage rate. More detailed payment information is addressed in Chapter 9 of Serving Non-English Speakers in the Virginia Court System.

Use of Non-Certified Foreign Language Interpreters

The judge is the final arbiter of every interpreter's qualifications. In matters where a judge determines that a foreign language interpreter is necessary, for matters requiring Korean, Spanish, and Vietnamese language interpreters, the first resource is the Certified Spanish Language Interpreter List for Virginia's Courts. If no certified interpreter is available, the

24-hour telephone interpreting service may be used. Also, clerks can attempt to secure a qualified interpreter to be present for this case. In so doing, judges and clerks should attempt to assess the qualifications of candidates before appointing them to interpret in court. Please note that Appendix C of Serving Non-English Speakers in the Virginia Court System offers aids to assist judges and clerks in determining the competency and skill level of all language interpreters serving in Virginia courts.

The rate of a non-certified interpreter is $40/hour with a two-hour minimum. In some circumstances, the judge may approve a higher rate, depending on the rarity of the language and the qualifications of the interpreters. If the interpreter is traveling more than 30 miles between the interpreter's address used for tax purposes and the site of the assignment, travel time may be approved at half of the hourly rate and mileage reimbursement at the judicial mileage rate. More detailed payment information is addressed in Chapter 9 of Serving Non-English Speakers in the Virginia Court System.

Spanish Language Interpreter Certifications Accepted by the Judicial Council of Virginia

The Judicial Council of Virginia considers presumptively eligible any person who has successfully completed the requirements for Federal court certification from the U.S. Administrative Office of the Courts or certification from a state that is a member of the State Court Interpreter Certification Consortium administered by the National Center for State Courts. Eligible persons who provide required documentation may be "waived" onto Virginia's list of certified Spanish language interpreters, and their names will be included on the list available to Virginia courts.

Clerk's Role in Securing an Interpreter

The clerk of court may be asked to secure an interpreter for an accused, victim or witness who is deaf or does not speak English. The clerk must ensure that any appointment or waiver of an interpreter is properly noted in the court's records.

Procedures for Appointment or Waiver of an Interpreter

Step 1 Clerk is asked to secure interpreter.

Comments: Clerk verifies that the court has ordered an interpreter.

Step 2 **Procedure Decision:** What type of interpreter is to be secured? If interpreter for deaf, See below; if foreign language interpreter, GO TO STEP 3.

Step 3 Clerk uses list of Certified Foreign Language Interpreters provided by the Office of the Executive Secretary or other language resource to

locate an interpreter.

Step 4 Clerk calls interpreter to confirm that they are an English-speaking person fluent in the language of the accused, victim or witness, able to perform interpretation services, and available when needed; reviews qualifications; confirms arrangements and anticipated rate in writing. If interpreter must be canceled, do so at the earliest possible moment. If within 24 hours, the interpreter may be owed payment. *See* Chapter 9 of Serving Non-English Speakers in the Virginia Court System for interpreter cancellation policies.

Comments: The information to the interpreter should include their agreement to appear and should state the date, time and location of their appearance. It should also state that they will be paid a fee in an amount set by the court. If the interpreter is traveling a distance and/or overnight, they should be advised that all of their travel expenses will be reimbursed pursuant to state travel regulations and only if they maintain all receipts for expenses (meals, lodging, tolls, parking) for submission at the end of the proceeding. Add giving info to interp.

Step 5 After service is rendered, Interpreter prepares form DC-44, List of Allowances - Interpreter and attaches any expense receipts received. Judge approves by signing the DC-44; submits to Office of the Executive Secretary for processing. **Note:** Compensation to interpreters is not taxed as costs, unless defendant fails to appear, the interpreter appears in the case and no other case on that date, and the defendant is convicted of a failure to appear on that date the interpreter appeared in the case, then the court, in its discretion, may assess those costs.

Step 6 Prepare order of court proceedings, incorporating the following information:

- for whom interpreter was secured
- name of interpreter
- reason for interpreter
- who moved for appointment of interpreter
- *See* chapter regarding court order processing.

If Interpreter for Deaf/Hard of Hearing

Step 1 Complete the COURT SIGN LANGUAGE INTERPRETER/CART REQUEST FORM

provided by the Virginia Department for the Deaf and Hard of Hearing (VDDHH) to request an interpreter. Provide the department with specific information as to when and where an interpreter is needed.

Comments: All court-appointed interpreters for the deaf/hard of hearing must be secured through VDDHH. If VDDHH is not able to provide an interpreter, the court may appoint an interpreter, however, the interpreter must first be reviewed and approved by VDDHH prior to the hearing. Va. Code § 19.2-164.1.

Forms may be emailed to isprequests@vddhh.virginia.gov or faxed to 804-662-9718.

Interpreters secured through this department are "certified" and under contract to provide services to the court. The department will contact an interpreter and advise them of when and where to appear. Follow-up written instructions are also provided the interpreter by the department, along with a "court form" to be presented to the clerk for signature upon completion of the court proceeding.

Step 2 Sign court form presented by the interpreter upon completion of services and return form to interpreter.

Comments: By signing this form, the clerk certifies that the interpreter was present for the proceeding. The interpreter takes the form to the Department of Deaf and Hard of Hearing for processing.

The department will submit a voucher (Travel Expense Reimbursement Voucher) for payment of fees to the Office of the Executive Secretary. No costs are taxed in this case.

Note: If the deaf person does not appear for the proceeding but the interpreter does, the clerk should sign the court form and write "NO SHOW" on the form.

Step 3 Prepare order of court proceeding, incorporating the following information:

- waiver of appointed interpreter, if applicable
- name of appointed or privately secured interpreter

- reason for interpreter
- on whose application or motion the interpreter was requested

See chapter regarding court order processing.

Step 4 Obtain judge's signature on order; process/image order and enter in order book; place original in case file. *See* chapter regarding court order processing.

Forms

Procedures for Requesting Accommodations Under the Americans with Disabilities Act
COURT SIGN LANGUAGE INTERPRETER/CART REQUEST FORM
ACCOMMODATIONS FOR PEOPLE WHO ARE DEAF, HARD OF HEARING OR DEAFBLIND
REQUEST FOR ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

Psychiatric Evaluations and Treatment

The Code of Virginia provides for mental evaluation and treatment of an accused under certain circumstances. The object of Va. Code § 19.2-167 *et seq.* is to prevent incarceration of a person who may not have been fully responsible for their actions due to mental illness or mental retardation and to provide treatment for a person who is mentally ill until they are well and capable of standing trial.

Mental Health Defense – Time of Offense

Va. Code § 19.2-271.6 provides that in any criminal case, evidence offered by the defendant concerning the defendant's mental condition at the time of the alleged offense, including expert testimony, if relevant, is not evidence concerning an ultimate issue of fact, and shall be admitted if such evidence (i) tends to show the defendant did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence. To establish the underlying mental condition the defendant must show that their condition existed at the time of the offense and that the condition satisfies the criteria for (i) a mental illness, (ii) a developmental disability or intellectual disability, or (iii) autism spectrum disorder. If the defendant intends to introduce evidence pursuant to this section, he, or their counsel, shall give notice in writing to the attorney for the Commonwealth, at least 60 days prior to their trial in circuit court, or at least 21 days prior to trial in general district court or juvenile and domestic relations district court, or at least 14 days if the trial date is set within 21 days of last court appearance, of their intention to present such evidence. A defendant exercising this defense does not affect the requirements for a defense of insanity pursuant to Va. Code § 19.2-167 et seq. If the court finds the necessity to issue an emergency custody order, § 19.2-271.6 should be indicated on the DC-492, Emergency Custody Order.

Mental evaluation or treatment of an accused is appropriate in the following situations:

Emergency Mental Treatment Prior To Trial

Va. Code § 19.2-169.6

Any inmate of a local correctional facility who is not subject to the provisions of Va. Code § 19.2-169.2 may be hospitalized for psychiatric treatment at a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal charge if:

- The court with jurisdiction over the inmate's case if it is still pending, on the petition of the person having custody over an inmate or on its own motion, holds a hearing at which the inmate is represented by counsel and finds by clear and convincing evidence that (i) the inmate has a mental illness; (ii) there exists a substantial likelihood that, as a result of a mental illness, the inmate will, in the near future, cause serious physical harm to themselves or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any; and (iii) the inmate requires treatment in a hospital rather than the local correctional facility.
- Upon petition by the person having custody over an inmate, a magistrate finds probable cause to believe that (i) inmate has a mental illness; (ii) there exists a substantial likelihood that, as a result of a mental illness, the inmate will, in the near future, cause serious physical harm to themselves or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any; and (iii) the inmate requires treatment in a hospital rather than a local correctional facility, and the magistrate issues a temporary detention order for the inmate. Prior to the filing of the petition, the person having custody shall arrange for an evaluation of the inmate conducted in-person or by means of a two-way electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or designee of the local community services board or behavioral health authority who is skilled in the assessment and treatment of mental illness and who has completed a certification program approved by the Department as provided in § 37.2-809.

The attorney for the defendant shall be notified prior to either type of hearing. When a temporary detention order is issued the trial court, district court judge or a special justice shall hold a hearing within forty-eight hours of execution of the temporary detention order.

An inmate may not be hospitalized longer than thirty days under subsection A of Va. Code § 19.2-169.6 unless the court which has criminal jurisdiction over them or a district court judge or a special justice, holds a hearing and orders the inmate's continued hospitalization in accordance with the provisions of subdivision A 2. If the inmate's

hospitalization is continued under this subsection by a court other than the court which has jurisdiction over their criminal case, the facility at which the inmate is hospitalized shall notify the court with jurisdiction over their criminal case and the inmate's attorney in the criminal case, if the case is still pending.

Any health care provider disclosing records pursuant to this section shall be immune from civil liability for any harm resulting from the disclosure, including any liability under the federal Health Insurance Portability and Accountability Act (42 U.S.C. § 1320d *et seq.*), as amended, unless the person or provider disclosing such records intended the harm or acted in bad faith.

Any order entered where a defendant is the subject of proceedings under this section shall provide for the disclosure of medical records.

Evaluations of Competency and Sanity

Certain reports regarding the defendant's mental state may be requested. These reports may be processed together.

Evaluation Of Accused's Competency To Stand Trial

If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant, whether a juvenile transferred pursuant to Va. Code § 16.1-269.1 or adult, lacks substantial capacity to understand the proceedings against them or to assist their attorney in their own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who (i) has performed forensic evaluations; (ii) has successfully completed forensic evaluation training recognized by the Commissioner of Behavioral Health and Developmental Services; (iii) has demonstrated to the Commissioner competence to perform forensic evaluations; and (iv) is included on a list of approved evaluators maintained by the Commissioner.

The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless the court specifically finds that outpatient evaluation services are unavailable or unless the results of outpatient evaluation indicate that hospitalization of the defendant for evaluation on competency is necessary. If the court finds that hospitalization is necessary, the court, under authority of this subsection, may order the defendant sent

to a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for evaluations of persons under criminal charge. The defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the defendant's competency, but not to exceed 30 days from the date of admission to the hospital.

The court shall require the attorney for the Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) a copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the evaluation request. The court shall require the attorney for the defendant to provide any available psychiatric records and other information that is deemed relevant. The court shall require that information be provided to the evaluator within 96 hours of the issuance of the court order pursuant to this section.

Upon completion of the evaluation, the evaluators shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against him, (ii) the defendant's ability to assist their attorney, (iii) the defendant's need for treatment in the event he is found incompetent but restorable or incompetent for the foreseeable future, and (iv) if the defendant has been charged with a misdemeanor violation of Article 3 (Va. Code § 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of Va. Code §§ 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128, whether the defendant should be evaluated to determine whether he meets the criteria for temporary detention pursuant to Va. Code § 37.2-809 in the event he is found incompetent but restorable or incompetent for the foreseeable future.

If a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient or outpatient treatment (community-based or jail-based) is recommended. Outpatient treatment may occur in a local correctional facility or at a location determined by the appropriate community services board or behavioral health authority. In cases where a defendant is likely to remain incompetent for the foreseeable future due to an ongoing and irreversible medical condition, and where prior medical or educational records are available to support the diagnosis, or if the defendant was previously determined to be unrestorably incompetent in the past two years, the report may recommend that the court find the

defendant unrestorably incompetent to stand trial and the court may proceed with the disposition of the case in accordance with Va. Code § 19.2-169.3. No statements of the defendant relating to the time period of the alleged offense shall be included in the report. The evaluator shall also send a redacted copy of the report removing references to the defendant's name, date of birth, case number, and court of jurisdiction to the Commissioner of Behavioral Health and Developmental Services for the purpose of peer review to establish and maintain the list of approved evaluators described in subsection A.

After receiving the report, the court shall promptly determine whether the defendant is competent to stand trial. A hearing on the defendant's competency is not required unless one is requested by the attorney for the Commonwealth or the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be hospitalized under Va. Code § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right to personally participate in and introduce evidence at the hearing.

Disposition When Defendant Is Found Incompetent

Virginia Code § 19.2-169.2 – "A. Upon finding pursuant to subsection E of § 19.2-169.1 that the defendant, including a juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court shall order that the defendant receive treatment to restore their competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal charge. Notwithstanding the provisions of Va. Code § 19.2-178, if the court orders inpatient hospital treatment, the defendant shall be transferred to and accepted by the hospital designated by the Commissioner as soon as practicable, but no later than 10 days, from the receipt of the court order requiring treatment to restore the defendant's competency. If the 10-day period expires on a Saturday, Sunday, or other legal holiday, the 10 days shall be extended to the next day that is not a Saturday, Sunday, or legal holiday.

Any psychiatric records and other information that have been deemed relevant and submitted by the attorney for the defendant pursuant to subsection C of § 19.2-169.1 and any reports submitted pursuant to

subsection D of § 19.2-169.1 shall be made available to the director of the community services board or behavioral health authority or their designee or to the director of the treating inpatient facility or their designee within 96 hours of the issuance of the court order requiring treatment to restore the defendant's competency. If the 96-hour period expires on a Saturday, Sunday, or other legal holiday, the 96 hours shall be extended to the next day that is not a Saturday, Sunday, or legal holiday.

B. If, at any time after the defendant is ordered to undergo treatment under subsection A of this section, the director of the community services board or behavioral health authority or their designee or the director of the treating inpatient facility or their designee believes the defendant's competency is restored, the director or their designee shall immediately send a report to the court as prescribed in subsection D of § 19.2-169.1. The court shall make a ruling on the defendant's competency according to the procedures specified in subsection E of § 19.2-169.1.

C. Notwithstanding the provisions of subsection A, in cases in which (i) the defendant has been charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128; (ii) the defendant has been found to be incompetent pursuant to subsection E or F of § 19.2-169.1; and (iii) the competency report described in subsection D of § 19.2-169.1 recommends that the defendant be evaluated to determine whether he meets the criteria for temporary detention pursuant to § 37.2-809, the court may order the community services board or behavioral health authority serving the jurisdiction in which the defendant is located to (a) conduct an evaluation of the defendant and (b) if the community services board or behavioral health authority determines that the defendant meets the criteria for temporary detention, file a petition for issuance of an order for temporary detention pursuant to § 37.2-809. The community services board or behavioral health authority shall notify the court, in writing, within 72 hours of the completion of the evaluation and, if appropriate, file a petition for issuance of an order for temporary detention. Upon receipt of such notice, the court may dismiss the charges without prejudice against the defendant. However, the court shall not enter an order or dismiss charges against a defendant pursuant to this subsection if the attorney for the Commonwealth is involved in the prosecution of the case and the attorney for the Commonwealth does not concur in the motion.

D. If a defendant for whom an evaluation has been ordered pursuant to subsection C fails or refuses to appear for the evaluation, the community services board or behavioral health authority shall notify the court and the

court shall issue a mandatory examination order and capias directing the primary law-enforcement agency for the jurisdiction in which the defendant resides to transport the defendant to the location designated by the community services board or behavioral health authority for examination.

E. The clerk of the court shall certify and forward forthwith to the Central Criminal Records Exchange, on a form provided by the Exchange, a copy of an order for treatment issued pursuant to subsection A.

Disposition of The Unrestorably Incompetent Defendant

Virginia Code § 19.2-169.3 – "A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § 19.2-169.2, the director of the community services board or behavioral health authority or their designee or the director of the treating inpatient facility or their designee concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the board, authority, or inpatient facility director's or their designee's opinion, the defendant should be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, committed pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2, or certified pursuant to § 37.2-806 in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection E of § 19.2-169.1. If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be (i) released, (ii) committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or (iii) certified pursuant to § 37.2-806. However, if the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future and the defendant has been charged with a sexually violent offense, as defined in § 37.2-900, he shall be screened pursuant to the procedures set forth in §§ 37.2-903 and 37.2-904. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A of § 19.2-169.2 if the defendant remains incompetent in the opinion of the board, authority, or inpatient facility director or their designee, the director or their designee shall so notify the court and make recommendations concerning disposition of the defendant

as described in subsection A. The court shall hold a hearing according to the procedures specified in subsection E of § 19.2-169.1 and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described in subsection A. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § 19.2-169.2 for additional six-month periods, provided a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. If any defendant has been charged with a misdemeanor in violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or Article 5 (§ 18.2-119 et seq.) of Chapter 5 of Title 18.2, other than a misdemeanor charge pursuant to § 18.2-130 or Article 2 (§ 18.2-415 et seq.) of Chapter 9 of Title 18.2, and is being treated pursuant to subsection A of § 19.2-169.2, and after 45 days has not been restored to competency, the director of the community service board, behavioral health authority, or the director of the treating inpatient facility, or any of their designees, shall send a report indicating the defendant's status to the court. The report shall also indicate whether the defendant should be released or committed pursuant to § 37.2-817 or certified pursuant to § 37.2-806. Upon receipt of the report, if the court determines that the defendant is still incompetent, the court shall order that the defendant be released, committed, or certified, and may dismiss the charges against the defendant.

D. Unless an incompetent defendant is charged with aggravated murder or the charges against an incompetent criminal defendant have been previously dismissed, charges against an unrestorably incompetent defendant shall be dismissed on the date upon which their sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of their arrest for such charges, whichever is sooner.

E. If the court orders an unrestorably incompetent defendant to be screened pursuant to the procedures set forth in §§ 37.2-903 and 37.2-904, it shall order the attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of Behavioral Health and Developmental Services to provide the Director of the Department of Corrections with any information relevant to the review, including, but not limited to: (i) a copy of the warrant or indictment, (ii) a copy of the defendant's criminal record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to § 19.2-169.1, and (v) a copy of the report prepared by the director of the

defendant's community services board, behavioral health authority, or treating inpatient facility or their designee pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Behavioral Health and Developmental Services for secure confinement and treatment until the Commitment Review Committee's and Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice that the Attorney General has declined to file a petition for the commitment of an unrestorably incompetent defendant as a sexually violent predator after conducting a review pursuant to § 37.2-905, the court shall order that the defendant be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or certified pursuant to § 37.2-806.

F. In any case when an incompetent defendant is charged with aggravated murder and has been determined to be unrestorably incompetent, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the aggravated murder case may order that the defendant receive continued treatment under subsection A of § 19.2-169.2 in a secure facility determined by the Commissioner of the Department of Behavioral Health and Developmental Services where the defendant shall remain until further order of the court, provided that (i) a hearing pursuant to subsection E of § 19.2-169.1 is held at yearly intervals for five years and at biennial intervals thereafter, or at any time that the director of the treating facility or their designee submits a competency report to the court in accordance with subsection D of § 19.2-169.1 that the defendant's competency has been restored, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to themselves or others. No unrestorably incompetent defendant charged with aggravated murder shall be released except pursuant to a court order.

G. The attorney for the Commonwealth may bring charges that have been dismissed against the defendant when he is restored to competency."

Evaluation of Sanity at the Time Of The Offense

Virginia Code § 19.2-169.5 – "A. Raising issue of sanity at the time of offense; appointment of evaluators. - If, at any time before trial, the court finds, upon hearing evidence or representations of counsel for the defendant, that there is probable cause to believe that the defendant's sanity will be a significant factor in their defense and that the defendant is financially unable to pay for expert assistance, the court shall appoint one

or more qualified mental health experts to evaluate the defendant's sanity at the time of the offense and, where appropriate, to assist in the development of an insanity defense. Such mental health expert shall be (i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Behavioral Health and Developmental Services and (ii) qualified by specialized training and experience to perform forensic evaluations. The defendant shall not be entitled to a mental health expert of their own choosing or to funds to employ such expert.

B. Location of evaluation. - The evaluation shall be performed on an outpatient basis, at a mental health facility or in jail, unless an outpatient evaluation has been conducted and the outpatient evaluator has concluded that a hospital-based evaluation is needed to reliably reach an opinion, or unless the defendant is in the custody of the Commissioner of Behavioral Health and Developmental Services.

C. Provision of information to evaluator. - The court shall require the party making the motion for the evaluation, and such other parties as the court deems appropriate, to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant and the judge who appointed the expert; (iii) information pertaining to the alleged crime, including statements by the defendant made to the police and transcripts of preliminary hearings, if any; (iv) a summary of the reasons for the evaluation request; (v) any available psychiatric, psychological, medical or social records that are deemed relevant; and (vi) a copy of the defendant's criminal record, to the extent reasonably available.

D. The evaluators shall prepare a full report concerning the defendant's sanity at the time of the offense, including whether he may have had a significant mental disease or defect which rendered them insane at the time of the offense. The report shall be prepared within the time period designated by the court, said period to include the time necessary to obtain and evaluate the information specified in subsection C.

E. Disclosure of evaluation results. - The report described in subsection D shall be sent solely to the attorney for the defendant and shall be deemed to be protected by the lawyer-client privilege. However, the Commonwealth shall be given the report in all felony cases, the results of

any other evaluation of the defendant's sanity at the time of the offense, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation, after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence pursuant to Va. Code § 19.2-168.

F. In any case where the defendant obtains their own expert to evaluate the defendant's sanity at the time of the offense, the provisions of subsections D and E, relating to the disclosure of the evaluation results, shall apply."

Evaluation upon Insanity Defense

- Virginia Code § 19.2-168 – "In any case in which a person charged with a crime intends (i) to put in issue their sanity at the time of the crime charged and (ii) to present testimony of an expert to support their claim on this issue at their trial, he, or their counsel, shall give notice in writing to the attorney for the Commonwealth, at least 60 days prior to their trial, of their intention to present such evidence. However, if the period between indictment and trial is less than 120 days, the person or their counsel shall give such notice no later than 60 days following indictment. In the event that such notice is not given, and the person proffers such evidence at their trial as a defense, then the court may in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243."

- Virginia Code § 19.2-168.1 – "A. If the attorney for the defendant gives notice pursuant to § 19.2-168, and the Commonwealth thereafter seeks an evaluation of the defendant's sanity at the time of the offense, the court shall appoint one or more qualified mental health experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A of § 19.2-169.5. The location of the evaluation shall be governed by subsection B of § 19.2-169.5. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in subsection C of § 19.2-169.5. After performing their evaluation, the

experts shall report their findings and opinions, and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense.

B. If the court finds, after hearing evidence presented by the parties, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, it may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting expert psychiatric or psychological evidence at trial on the issue of their sanity at the time of the offense."

Procedures When A Psychiatric Evaluation Is Ordered

The procedures which the clerk is to follow are essentially the same, regardless of the purpose for which an evaluation is ordered.

Step 1 Judge orders psychiatric evaluation or treatment of the accused.

Note: Whenever a court orders an evaluation pursuant to Va. Code §§ 19.2-168.1, 19.2-169.1, or 19.2-169.5 or orders treatment pursuant to § 19.2-169.2 or 19.2-169.6, the clerk of the court shall provide a copy of the order to the appointed evaluator or to the director of the community services board, behavioral health authority, or hospital named in the order as soon as practicable but no later than the close of business on the next business day following entry of the order. The party requesting the evaluation, the attorney for the Commonwealth, or the petitioner shall be responsible for providing to the court the name, address, and other contact information for the appointed evaluator or the director of the community services board, behavioral health authority, or hospital unless the court or clerk already has this information. The appointed evaluator or the director of the community services board, behavioral health authority, or hospital shall acknowledge receipt of the order to the clerk of the court as practicable but no later than the close of business on the next business day following receipt of the order. *See* DC-343 Tracking Document For Sending Or Receiving Evaluation Or Treatment Order Upon Entry.

Step 2 Clerk prepares order for psychiatric treatment or evaluation; incorporates return date of evaluation report, if applicable.

Note: A copy of every order for evaluation(s) and treatment is required to be sent to the Department of Behavioral Health and Developmental Services. Va. Code 19.2-169.8.

Department of Behavioral Health and Developmental Services
PO Box 1797, Richmond, VA 23218-1797
(804) 786-3921 or Fax (804) 37-6638

Comments: In many jurisdictions, the court will order the moving party to prepare the order or, if emergency hospitalization is required, a district court judge, special justice or magistrate will usually prepare an appropriate Temporary Detention Order pursuant to Va. Code § 19.2-169.6.

Step 3 If judge orders a hospital evaluation, clerk contacts the Department of Behavioral Health and Developmental Services to determine to which facility the accused is to be transported; if judge orders evaluation in jail, contact local evaluators.

Comments: The accused may be treated or evaluated as an outpatient at a mental health facility or in jail or as an inpatient in a hospital. If the court finds that the accused requires inpatient examination and care, the hospital will be designated by the Commissioner of DBHDS.

Note: If the defendant was ordered to an outpatient evaluation and refuses to appear for the evaluation, the community services board or behavioral health authority shall notify the court and the court shall issue a mandatory examination order and capias directing the primary law-enforcement agency for the jurisdiction in which the defendant resides to transport the defendant to the location designated by the community services board or behavioral health authority for examination. Va. Code § 19.2-169.2(D). CC-3026, MANDATORY EXAMINATION ORDER AND CAPIAS TO TRANSPORT INCOMPETENT DEFENDANT.

Each expert appointed by the court to render professional services will be paid a fee determined by the court. Va. Code § 19.2-175. *See* also Chart of Allowances.

Step 4 Clerk prepares separate transportation order, if appropriate.

Step 5 Clerk obtains judge's signature on order for treatment or evaluation

and transportation order; processes/images orders; indexes and enters in order book. *See* chapter regarding court order processing.

Step 6 Clerk notifies sheriff to pick up court documents and to transport accused to treatment facility or hospital; notifies sheriff of any necessary precautions during transport due to the accused's psychological condition.

Step 7 Clerk places original orders in case file; distributes certified copies of orders to:

- hospital or evaluators
- defense attorney, if requested
- Commonwealth's attorney, if requested
- transporting officer, if applicable

Comments: Copies of indictments, names and addresses of attorneys, and copies of other reports are provided to the evaluators by the party seeking the evaluation or other appropriate party. The clerk is not responsible for transmitting these items to the evaluators or the hospital. Va. Code § 19.2-169.5 (C).

Step 8 Clerk notes that psychiatric evaluation or treatment was ordered and notes return date of evaluation report on:

- case summary sheet
- docket

Step 9 If a subsequent hearing has been scheduled, clerk enters hearing on:

- calendar
- docket
- case summary sheet

Step 10 **Procedure Decision:** Has the evaluator or hospital asked the court for additional time to test and evaluate the accused?
If no, GO TO STEP 17; if yes, GO TO STEP 11.

Step 11 Clerk prepares court order authorizing additional time for examination if directed by judge; prepares transportation order if necessary.

Comments: A request for additional time to examine an accused is usually accompanied by a physician's certificate.

Step 12 Clerk obtains judge's signature on orders; processes/images orders; indexes and enters in order book.

Step 13 Clerk places original orders in case file and distributes certified copies to:

- hospital or evaluator
- defense attorney
- Commonwealth's attorney
- transporting officer, if applicable

Step 14 Clerk notifies sheriff to pick up court orders and transport accused, if applicable.

Step 15 Clerk notes whether psychiatric treatment or evaluation has commenced, and notes return date of evaluation report, if applicable, on:

- case summary sheet
- docket

Step 16 If a competency hearing previously set is continued, clerk notes change on court's calendar.

Step 17 Evaluator or hospital sends psychiatric report.

Comments: The court receives copies of all reports except reports regarding defendant's sanity at the time of the offense.

Step 18 Clerk notes receipt of the evaluation on case summary sheet; places report in case file after it has been reviewed by the judge.

Comments: Refer to "Miscellaneous Matters" chapter in this manual for confidentiality considerations.

Step 19 Judge rules on defendant's competency or sanity.

Comments: A hearing on competency is not required unless requested by the attorney for the Commonwealth or the defendant or on motion of the court.

If a hearing is held, the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence that defendant's incompetency.

Step 20 **Procedure Decision:** Did the judge determine that the defendant is competent to stand trial? If yes, GO TO STEP 27; if no, GO TO STEP 21.

Step 21 Clerk prepares court order declaring accused incompetent to stand trial and specifying the treatment ordered to restore competency; if inpatient care is ordered, clerk prepares transportation order; obtains judge's signature on orders and process.

The clerk of court shall certify and forward forthwith to the Central Criminal Records Exchange, on a form provided by the Exchange, a copy of an order for treatment. (SP237)

If the court has ordered involuntary admission to a facility, the clerk shall, as soon as possible, but no later than the close of business on the NEXT FOLLOWING BUSINESS DAY, send a copy of the order to VSP.

If court has ordered mandatory outpatient treatment, the clerk shall prior to the close of THAT BUSINESS DAY, send a copy of the order to VSP.

FAX to (804) 674-2268 and then MAIL this form to:
Department of State Police
Central Criminal Records Exchange
P. O. Box 27472
Richmond, VA 23261-7472

Comments: The court shall order initial treatment on an outpatient basis or require the accused to receive inpatient care at a hospital designated by the Commissioner of BHDS. Va. Code § 19.2-169.2.

If at any time, the director of the treatment facility concludes that the accused is likely to remain incompetent for the foreseeable future, they must report same to the court which then may order that the defendant be released, committed pursuant to Va. Code § 37.2-814 *et seq.*, or certified pursuant to Va. Code § 37.2-806. However, if the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future and the defendant has been charged with a sexually violent offense, as defined in Va. Code § 37.2-900, he shall be reviewed for commitment pursuant to Chapter 9 (§ 37.2-900 *et seq.*) of Title 37.2. If the court finds the

defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of Va. Code § 19.2-169.2.

After the rehearing, at which defendant may be released, recommitted, or certified, clerk follows STEPS 1-21, as applicable.

Step 22 Clerk calls sheriff to arrange for transport of accused to hospital, or arrange for accused's release from custody, whichever applies.

Step 23 Clerk places original orders in case file and distributes certified copies to:

- treatment facility
- defense attorney
- Commonwealth's attorney
- transporting officer, if applicable.

Step 24 Clerk enters on docket and court's calendar a hearing date for review of competency in six months as directed by court; notes same on case summary sheet. **Note:** If any defendant has been charged with a misdemeanor in violation of Article 3 (§ 18.2-95 *et seq.*) of Chapter 5 of Title 18.2 or Article 5 (§ 18.2-119 *et seq.*) of Chapter 5 of Title 18.2, other than a misdemeanor charge pursuant to § 18.2-130 or Article 2 (§ 18.2-415 *et seq.*) of Chapter 9 of Title 18.2, and is being treated pursuant to subsection A of § 19.2-169.2, and after 45 days has not been restored to competency, the director of the facility shall send a report indicating the defendant's status to the court. The report shall also indicate whether the defendant should be released or committed pursuant to § 37.2-817 or certified pursuant to § 37.2-806. Upon receipt of the report, if the court determines that the defendant is still incompetent, the court shall order that the defendant be released, committed, or certified, and may dismiss the charges against the defendant.

Comments: The court must hold a hearing on competency every six months. Va. Code § 19.2-169.3. The charges against an unrestored incompetent must be dismissed five years after their arrest or when the maximum sentence for the alleged crime would expire, whichever is sooner. Va. Code § 19.2-169.3.

Step 25 When reporting the current caseload statistics, clerk should count

the case as having been concluded.

Comments: *See* "Post Sentencing – Case Closing" regarding monthly caseload reporting. While such a case is not technically concluded until the criteria stated in the Comments to STEP 24 are met, the court should not have to report the case as pending indefinitely. Do not report the case as reopened when the six-month competency review hearings are held. Report the case as a reinstatement only if competency is restored and the accused comes to trial.

Step 26 Clerk places file with other pending cases until further action. END OF PROCEDURES IF ACCUSED IS FOUND INCOMPETENT. IF ACCUSED IS FOUND TO BE COMPETENT GO TO STEP 27.

Step 27 Clerk prepares court order declaring accused competent to stand trial; obtains judge's signature and processes order accordingly.

Step 28 Clerk places original order in case file and places file with other pending cases until further action.

Comments: The criminal process will continue as if the accused had originally been competent to stand trial.

Upon disposition of persons acquitted by reason of insanity, the clerk should review Va. Code §§ 19.2-182.2 and 19.2-182.3.

Coordination with DBHDS (Department of Behavioral Health and Developmental Services

Whenever the court has ordered the admission of an inmate into a DBHDS hospital pursuant to Va. Code §§19.2-169.1, 19.2-169.2, 19.2-169.6, or 19.2-168.1 the clerk may be asked to contact the forensic coordinator at the state hospital who routinely provides services to individuals within the court's region. The forensic coordinator will triage the case and determine the most appropriate placement for the individual. For defendants charged with significant offenses (i.e., aggravated murder, murder, malicious wounding, rape) the clerk may be asked to make the referral directly to the maximum security unit at Central State Hospital. For defendants age 65 or older, the clerk may be asked to make the referral to the geriatric state facility that generally provides services to older adults in the court's region. The four geriatric state operated facilities are: Piedmont Geriatric Hospital, Catawba Hospital, Southwestern Virginia Mental Health Institute or Eastern State Hospital – Hancock Geriatric. Finally, if the defendant is under age 18, the clerk may be asked to make the referral to the Commonwealth Center for Children and Adolescents.

Name of Facility	Forensic Coordinator	Phone #
Catawba Hospital	Walton Mitchell, MSW (Acting)	(540) 375-4201
Central State Hospital	Ted Simpson, Psy.D. or Spencer Timberlake, CSWS	(804) 524-7054 (804) 524-7941
Commonwealth Center for Children And Adolescents	Gary Pelton, Ph.D.	(540) 332-2121
Eastern State Hospital	Kristen Hudacek, Psy.D.	(757) 208-7697
Northern Virginia Mental Health Institute	Azure Baron, Psy.D.	(703) 645-4004
Piedmont Geriatric Hospital	Lindsey Slaughter, Psy.D.	(434) 767-4424
Southern Virginia Mental Health Institute	Blanche Williams, Ph.D.	(434) 773-4237
Southwestern Virginia Mental Health Institute	Colin Barrom, Ph.D.	(276) 783-0805
Western State Hospital	Brian Kiernan, Ph.D.	(540) 332-8007

Witness Summoning

A subpoena is the means most often used to compel a witness to appear and give testimony. While the Code does allow for the issuance of a summons instead of a subpoena to compel the appearance of a witness, the issuance of a summons is generally reserved to command the appearance of an accused to answer to a complaint against them.
The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to compel the attendance of witnesses on their behalf. A regular subpoena (subpoena *ad testificandum*) commands the appearance of a witness to testify at a trial, hearing or grand jury proceeding. It may be issued by the court, the clerk or the Commonwealth's attorney. *See* Rule 3A:12(a); Va. Code §§ 19.2-267 and 19.2-269.1. For a discussion of subpoenas *duces tecum*, *see* "Receipt, Maintenance And Storage Of Evidence" this chapter

Requirements and Issuance

The subpoena must:

- be directed to an appropriate officer;
- name the witness to be summoned;
- state the name of the court and the title of the proceeding;
- command the officer to summon the witness to appear at the specified time and place to give testimony; and
- state on whose application the subpoena was issued.

Rule 3A:12

In practice, if a witness subpoena is requested on behalf of a defendant, the clerk will issue the subpoena. Virginia Code § 19.2-267 allows the attorney for the defendant to issue a summons for a witness in a criminal case, and further states that any attorney who issues such a summons shall, at the time of the issuance, file with the clerk of the court the names and addresses of such witnesses. The clerk or the Commonwealth's attorney, depending on local practice, issues a subpoena for a witness for the Commonwealth. Virginia Code § 17.1-617 details the maximum number of witnesses who can be subpoenaed on behalf of the Commonwealth and be paid fees in a criminal case.

No subpoena or subpoena *duces tecum* shall be issued in any criminal case or proceeding, including any proceeding before any grand jury, which subpoena or subpoena *duces tecum* is (i) directed to a member of the bar of this Commonwealth or any other jurisdiction, and (ii) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance, by a judge of the circuit court wherein the subpoena is requested after reasonable notice to the attorney who is the subject of the proposed subpoena. Rule

3A:12(a). Furthermore, Va. Code § 8.01-407, made applicable to criminal matters pursuant to Va. Code § 19.2-267, provides that no witness subpoena shall be issued for the attendance of the Governor, Lieutenant Governor, Attorney General, any judge of any court in this Commonwealth, and certain other officials without first obtaining the court's permission. If any subpoena is served less than five calendar days before appearance is required upon any judicial officer generally incompetent to testify pursuant to Va. Code § 19.2-271, such subpoena shall be without legal force or effect unless the subpoena has been issued by a judge.

NOTE: No fees are assessed for a subpoena *duces tecum* in criminal matters, regardless if the attorney is appointed or retained.

A subpoena may be executed anywhere in the Commonwealth by an officer authorized by law to execute the subpoena in the place where it is executed. Rule 3A:12(c). Most subpoenas are issued to the sheriff of the city or county wherein the witness or the evidence is located. The officer executing a subpoena shall make return to the court named in the subpoena. Rule 3A:12(c). If the person on whom the subpoena was served fails to obey it without adequate excuse, they may be deemed in contempt of court. Rule 3A:12(d). When any subpoena is served less than five calendar days before appearance is required, the court may, after considering all of the circumstances, refuse to enforce the subpoena for lack of adequate notice. Va. Code § 8.01-407.

Incarcerated Witnesses

The Code provides for the summoning of witnesses who are incarcerated. Va. Code § 19.2-269.1. When the Commonwealth or defendant requires the presence of such a witness, the court shall order that the sheriff bring such witness to court to testify. The captioned code allows the court to delegate authority to sign transportation orders to the clerk.

Out-Of-State Witnesses and Proceedings

The Code also provides for the summoning of witnesses in other states to testify in criminal proceedings in the Commonwealth, and for compelling the attendance of witnesses located within the Commonwealth at out-of-state proceedings.

When the judge of a court of another state certifies that a person within the Commonwealth is a material witness in a criminal prosecution or grand jury investigation, upon presentation of such certificate to any circuit court judge in the county or city in which such person is, such judge must set a hearing and direct the witness to attend. Va. Code § 19.2-273. If the judge determines that the witness is material and that it will not cause them undue hardship to attend and testify, the judge will issue a summons directing the witness to attend and testify at the out-of-state proceeding. Va. Code § 19.2-274.

Alternatively, the judge may, after a hearing, direct that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure their attendance in the requesting state. In this situation, a capias to show cause (*See* Form CC-1356, Capias to Show Cause), rather than a summons, is used. Va. Code § 19.2-275.

Likewise, if a person outside the Commonwealth is a material witness in a criminal prosecution or grand jury investigation in the Commonwealth, the judge of the court in which the prosecution or investigation will commence or has commenced may issue a certificate stating the foregoing facts and specifying the number of days the witness will be required. Va. Code § 19.2-277. A material witness is one who can give testimony that no one else or few others can give. Black's Law Dictionary 881 (5th ed. 1979).

Procedures for Summoning Witnesses

When a witness subpoena or order of appearance of a convict is to be issued, the following procedures should be followed:

Step 1 The Commonwealth or the accused requests that the clerk issue a subpoena. If the witness is a convict, an order of appearance is issued.

NOTE: No fees are assessed for a witness subpoena in criminal matters, regardless if the attorney is appointed or retained.

Comments: The request should be in writing and should indicate:

- the officer who is to serve the subpoena
- the name of the witness to be summoned
- the name of the court and title of the proceeding
- time and place at which the witness is to appear
- on whose application the subpoena was issued.

Step 2 Clerk prepares subpoena and signs or obtains appropriate signature.

Comments: *See* form CC-1342, Subpoena. The subpoena may be prepared in triplicate or two copies of the signed original may be produced. The latter is recommended.

If the witness is a convict, the court issues an order of appearance. If authorized by the court, the clerk may issue the order of appearance on behalf of the court. Clerk prepares order of appearance and custodial transportation order, and signs or obtains appropriate signature. *See* form DC-354, Custodial Transportation Order.

Step 3 Clerk issues signed original and one copy of subpoena or order to sheriff or serving officer; places second copy in case file with request for subpoena.

Step 4 Clerk enters the following information in the court's process book, automated case management system or file:

- plaintiff name
- defendant name
- type of process issued
- date prepared
- date of issuance
- signature of issuing clerk or of sheriff who will serve process.

Comments: The clerk must enter every service of process in a process book or file (or automated system) pursuant to Va. Code § 17.1-215. The preferred practice in most jurisdictions is to place every process to be served locally in the process book or file to be picked up daily by the local sheriff or serving officer. The sheriff or serving officer signs for the processes in the process book when collecting them for service. A subpoena directed to another city or county in Virginia is mailed by the clerk's office to the sheriff or serving officer of that jurisdiction. The date of mailing should be noted on the process book.

Step 5 The sheriff or serving officer executes the subpoena or order and makes their return to the issuing court.

Comments: Execution of a subpoena is effected by leaving a copy of the subpoena with the intended party or posting the subpoena on the door of their home. The original subpoena is returned to the court, showing the date and method of service. If the party could not be located, the copy is marked "not found" and returned with the original to the court.

An order of appearance for a witness who is a convict is directed to the Director of the Department of Corrections.

Step 6 Clerk checks returned original to verify that the serving officer has entered the following:

- date of execution
- type of service
- serving officer's signature

Step 7 Clerk enters in process book, automated case management system or file the date the subpoena or order was returned to the court.

Step 8 Clerk places returned subpoena or order in case file; places file with other pending cases until further action.
Comments: If evidence is deposited in the clerk's office prior to trial as the result of a subpoena *duces tecum*, *see* "Receipt, Maintenance And Storage Of Evidence" this chapter.

Jury Selection, Summoning, And Orientation

Creation of the Master Jury List/It's Use In Jury Management

The method used to create the master jury list must not result in the exclusion or avoidable under-representation of any social, economic or racial group. Similarly, the opportunity for citizens to serve as jurors cannot be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in the jurisdiction.

Who Liable to Serve As Jurors

Any person over the age of eighteen who has resided in Virginia for one year and in their county, city or town for six months is eligible to serve on a jury. United States military personnel stationed in Virginia are not considered residents solely by reason of their being stationed in Virginia. Va. Code § 8.01-337.

Who Cannot Serve as Jurors:

- Any person who has been adjudicated mentally incompetent. Va. Code § 8.01-338.
- Any person convicted of treason or a felony. Va. Code § 8.01-338.
- Any person who solicits or requests a jury commissioner to designate them as a juror, or who has another person solicit or request a jury commissioner to designate them as a juror. Va. Code § 8.01-339.
- Any person who is a party to any case that has been or is expected to be tried by a jury during the same term of court. Va. Code § 8.01-340
- Any person under the age of eighteen. Va. Code § 8.01-337.
- Any person under a disability as defined in Va. Code § 8.01-2. Va. Code § 8.01-338.
- Any person has been called for and reported for jury duty within the last three years. Va. Code § 8.01-342.

Who Are Automatically Exempt from Jury Service

The Code exempts certain individuals and permits others to claim exemption from jury service. The following individuals are automatically exempt from jury service pursuant to Va. Code § 8.01-341:

- The President and Vice-President of the United States,
- The Governor, Lieutenant Governor, and Attorney General of the Commonwealth,
- The members of both houses of Congress,
- The members of the General Assembly, while in session or during a period when the member would be entitled to a legislative continuance as a matter of right under Va. Code § 30-5,
- Licensed practicing attorneys,
- The judge of any court, members of the State Corporation Commission, members of the Workers' Compensation Commission (formerly the Industrial Commission), and magistrates,
- Sheriffs, deputy sheriffs, state police, and police in counties, cities, and towns,
- The superintendent of the penitentiary and their assistants and the persons composing the guard; and
- Superintendents and jail officers, as defined in Va. Code § 53.1-1, of regional jails.

Who May Claim Exemptions/Not Automatically Exempt

Pursuant to Va. Code § 8.01-341.1, the following individuals are not automatically exempt but may claim exemptions from jury service:

- Mariners actually employed in maritime service,
- A person who has legal custody of and is necessarily and personally responsible for a child or children sixteen years of age or younger requiring continuous care by them during normal court hours, or any mother who is breast-feeding a child,
- A person who is necessarily and personally responsible for a person having a physical or mental impairment requiring continuous care by them during normal court hours,
- Any person over seventy (70) years of age,
- Any person whose spouse is summoned to serve on the same jury panel,
- Any person who is the only person performing services for a business, commercial or agricultural enterprise and whose services are so essential to the operation of the business, commercial or agricultural enterprise that such enterprise must close or cease to function if such person is required to perform jury duty, and

- Any person who is the only person performing services for a political subdivision as a firefighter, as defined in Va. Code § 65.2-102, and whose services are so essential to the operations of the political subdivision that such political subdivision will suffer an undue hardship in carrying out such services if such person is required to perform jury duty.

Who May Ask To Be Excused During Specific Calendar Periods

The following individuals are not exempt, but may be excused during specific calendar periods under Va. Code § 8.01-341.1.

- Any person employed by the Office of the Clerk of the House of Delegates, the Office of the Clerk of the Senate, the Division of Legislative Services, and the Division of Legislative Automated Systems, however, this exemption shall apply only to jury service starting (i) during the period beginning 60 days prior to the day any regular session commences and ending 30 days after the day of adjournment of such session and (ii) during the period beginning seven days prior to the day any reconvened or special session commences and ending seven days after the day of adjournment of such session.
- Any general registrar, member of a local electoral board, or person appointed or employed by either the general registrar or the local electoral board, except officers of election appointed pursuant to Article 5 (§ 24.2-115 *et seq.*) of Chapter 1 of Title 24.2; however, this exemption shall apply only to jury service starting (i) during the period beginning 90 days prior to any election and continuing through election day, (ii) during the period to ascertain the results of the election and continuing for 10 days after the local electoral board certifies the results of the election under § 24.2-671 or the State Board of Elections certifies the results of the election under § 24.2-679, or (iii) during the period of an election recount or contested election pursuant to Chapter 8 (§ 24.2-800 *et seq.*) of Title 24.2. Any officer of election shall be exempt from jury service only on Election Day and during the periods set forth in clauses (ii) and (iii).
- Any member of the armed services of the United States or the diplomatic service of the United States appointed under the Foreign Service Act (22 U.S.C. § 3901 *et seq.*) who will be serving outside of the United States at the time of such jury service.

The foregoing code sections should be consulted regularly to check for amendments.

Instead of completely discharging an individual who claims that serving on a jury would interfere with their work responsibilities, the judge (or a court official designated by the judge) may defer or limit their jury service for a reasonable period of time. Va. Code § 8.01-341.2. In such instances, the person is often excused from service until the next term

of court. This also includes a full-time student at an accredited public or private institution of higher education and who is attending classes at such institution during such term.

Appointment of Jury Commissioners

Each circuit court shall appoint two (2) to fifteen (15) persons by July 1 of every year to serve as jury commissioners. The judge of the circuit court of a county having the urban county executive form of government may appoint jury commissioners at any time prior to the first day of November of each year. Jury Commissioners may be allowed a fee not exceeding $50 per day that they are actually engaged in such work as the court directs. Va. Code § 8.01-343. The order of appointment shall be certified by the judge to the clerk of the court who shall enter the same on the civil order book of such court. A jury commissioner shall be eligible for reappointment. The jury commissioners prepare a master list of persons eligible to serve as jurors. Va. Code §§ 8.01-343, 8.01-344, and 8.01-345. The size of such list is specified by the particular court for which it is compiled. The commissioners, using random selection techniques, either manual, mechanical, or electronic, select persons for the master jury list from the list of current voters, telephone directories, the list of licensed drivers, and any other list approved by the chief judge of the circuit. Va. Code § 8.01-345

After such master list has been compiled, the commissioners must delete the names of those who are exempt and those who are statutorily accepted from jury service. The master list is then used for the selection of jurors for a twelve-month period beginning on the first day of the first term of court in the calendar year next succeeding December 1.

The Supreme Court of Virginia will provide to each locality, upon request, a list of the names and addresses of its residents who are listed as currently registered voters or as holders of drivers' licenses. A request for this merged list should be directed to the Supreme Court by June 1 of the year for which the list is needed. Contact the Office of the Executive Secretary, Supreme Court of Virginia, (804) 786-6455, for more information.

For courts not using automated processes for selecting potential jurors, each name on the master jury list is written on a separate ballot that is folded or rolled up so that the names are not visible. The ballots, with the master jury list, are then placed by the commissioners in a jury box that is locked and secured by the clerk of the court. Va. Code § 8.01-347.

Master Jury List

The Master Jury List is not a public record. The court, where good cause is shown, may permit an examination of the list, under the watchful eye of the court. Copying of this list is not permitted. The proper administration of justice requires that the jury list be kept secret until the jurors are drawn for service, unless good cause is shown. Archer and

Johnson v. Mayes, 213 Va. 633, 194 S.E. 2d 707 (1973).

For many years, Jury Commissioners have obtained additional information on potential juror candidates, including information to disqualify or exempt them from service, by use of a pre-formatted Jury Questionnaire, usually mailed to all candidates. These questionnaires are a portion of the working papers of the Jury Commission.

Similar nondisclosure protection is extended to jury commissioner's questionnaires. *See* Opinion of the Attorney General to Ronald B. Hall, September 17, 1997, (1997 Va. AG 27). *Circuit court clerk may not release information contained on master jury list or jury commissioner's questionnaires regarding potential jurors to law enforcement or Department of Motor Vehicles authorities without circuit court judge having determined that good cause has been shown by such authorities for obtaining such information*.

When completed, the Master Jury List shall be delivered to the clerk to be safely kept by him. Va. Code § 8.01-346.

Step by Step Procedures for Preparing A Master Jury List

Step 1 Is master list to be created manually or by automation? If manually: GO TO STEP 3; If by automation: GO TO STEP 2

Step 2 Clerk coordinates development and implementation of computer programming with local government MIS/computer operations personnel, or with another third-party automated jury services system.

Step 3 Clerk obtains supplies (capsules, ballot box), if needed for manual selection process.

Step 4 Clerk obtains, in the appropriate form (printed, computer tape or electronic download), the current voter registration list, driver's license list, and any other court-approved source list for use by the commissioners in selecting juror names.

Comments: To obtain printed lists or lists on computer tape contact:

- Voter Registration List - Secretary, State Board of Elections
- Licensed Driver List - Secretary, Department of Motor Vehicles
- To participate in the automated Jury Services System (JSS), and to obtain a list of the residents of a locality whose names appear on the voter

registration list or the list of licensed drivers, or a merged list contact the Department of Judicial Services at 804-371-2424.

While these lists are not needed by the clerk until after July 1, the clerk or Jury Administrator must notify DJS through the JSS each year which list they need.

Step 5 Clerk receives a tape or list, or electronic data download for use by the jury commissioners.

Comments: If the master jury list is to be created by automation, clerk follows procedures discussed in STEP 2.

If the master jury list is to be created manually, clerk holds printed list for delivery to the jury commissioners.

Step 6 Judge makes annual appointment of jury commissioners.

Comments: Commissioner appointments must be made prior to July 1 of each year. **Note:** The judge of the circuit court of a county having the urban county executive form of government may appoint jury commissioners at any time prior to the first day of November of each year. Va. Code § 8.01-343.

Step 7 Clerk prepares order of appointment; obtains judge's signature. Va. Code § 8.01-343.

Comments: The order must specify the number of persons the commissioners are to select for the master list for jury service for a twelve-month period. Va. Code § 8.01-345.

Step 8 Clerk images/scans order; indexes and enters in the Civil Order Book.

Comments: *See* the section in this chapter for court order processing.

Step 9 Clerk immediately notifies commissioners of their appointment; directs them to appear in the clerk's office at a specific date and time for their swearing in. Va. Code § 8.01-344.

Step 10 Clerk administers oath to commissioners.

Comments: *See* Va. Code § 8.01-344 for language of the oath.

Step 11 Clerk provides jury questionnaires or access to automated programming to jury commissioners.

Step 12 Commissioners select the names to be put on the master jury list and submit the list.

Comments: The master list must be compiled by December 1 of each year. The initial random selection of a pool of potential juror candidates for the Jury Commissioners to consider is accomplished by the Court, which decides the random selection techniques and selection pools to be used, and the initial number of names to be drawn. From the initial list of potential candidates, jury commissioners are required to exclude the names of deceased persons, unqualified persons, and apply statutory exemptions to the names so selected. A Master Jury List of potential jurors who are not disqualified or otherwise exempt will be prepared by the jury commissioners. Va. Code § 8.01-345.

Step 13 During the year, as directed by the judge, clerk amends the master jury list by deleting the names of those who are disqualified or exempt.

Comments: The judge may order the jury commissioners to add to the list as needed and to strike the names of persons who become disqualified or are exempt must be stricken from the list. Va. Code § 8.01-346.

Step 14 If the Master Jury List is not stored electronically as provided in Va. Code§ 8.01-350.1, the Clerk provides jury box to commissioners.

If names of jurors are to be placed in a jury box, as provided in Va. Code§ 8.01-347, the Commissioners prepare a separate ballot or paper for each name listed on the master jury list; the master jury list and ballots are placed in the jury box which is locked and returned to the clerk for safekeeping. Va. Code §§ 8.01-346, 8.01-347.

Comments: Each ballot or paper must be folded or rolled so that the name written on each is not visible.
Once the jury box is returned to the clerk, it must be placed in a secured area. The contents of the box are not open to public inspection and the box is to remain locked until the court instructs otherwise.

Term Jury List

Prior to or during any term of court at which a jury may be necessary, the clerk or deputy clerk, in the presence of the judge or a commissioner in chancery appointed by the judge, will draw from the box the number of ballots necessary for the trial of all civil and criminal cases during the term or the number of ballots requested by the judge. Va. Code §§ 8.01-348 and 8.01-355. Whenever the court feels that a particular trial of a criminal or civil case is likely to be protracted, the court may direct the selection of additional jurors from the same source as the regular jurors. Va. Code § 8.01-360. In automated courts, the computer randomly selects the potential jurors. Va. Code § 8.01-350.1. The clerk then prepares a list from the names on the ballots drawn or obtains a computer-generated list. A *writ of venire facias*, containing the names and addresses of potential jurors and notice to appear is prepared by the clerk and delivered to the sheriff. The sheriff then notifies the jurors of their selection by way of a summons, which may be served or mailed. Pursuant to Va. Code § 8.01-354, mailing is equivalent to summoning such juror in execution of a *writ of venire facias*.

The Term Jury List, showing the name, age, address, occupation and employer of each juror, shall be available in the clerk's office for inspection **only** by counsel, unless otherwise ordered by the court, in any case to be tried by a jury during the term. Va. Code § 8.01-351.

See Attorney General Opinion to Small, dated 6/3/16; *Counsel of record has the right to view a term jury list. Copying of the list by counsel is permitted only by leave of court upon showing of good cause*.

Preparing A Term Jury List

Step 1 Is term list selected by random selection techniques, either mechanically or electronically? Va. Code § 8.01-350.1. If mechanically: GO TO STEP 2 ; If electronically: GO TO STEP 5

Step 2 The clerk, as directed by the court, draws from the jury box a specified number of ballots for the current or upcoming term of court. Va. Code 8.01-348

Comments: The number of names to be drawn is based upon the number of jury trials scheduled for the term. Va. Code § 8.01-355.

Step 3 The clerk thoroughly mixes the ballots and draws the number of names specified.

Comments: The drawing of names for the term list shall be done by the clerk or deputy clerk in the presence of judge or a court-appointed

commissioner in chancery who has no interest in any of the trials for which the names are being drawn. Va. Code § 8.01-348.

Step 4 If a person whose name is drawn is known to be deceased, a non-resident, exempt or disqualified by law, clerk notes the fact on the ballot next to their name on the master jury list; places the ballot with other such ballots in an envelope marked "Ineligible Jurors." Va. Code § 8.01-349.

Comments: For procedures regarding updates to the master jury list, *See* Master Jury List, this chapter.

Step 5 For all other names drawn, clerk writes "drawn" and the date drawn next to the name on both the ballot and master jury list; places such ballots in an envelope marked "Eligible Jurors." Va. Code § 8.01-349.

Comments: If during the term, additional jurors are needed, names previously drawn may be drawn again. Va. Code § 8.01-349.

Step 6 Clerk has computer randomly select the necessary number of potential jurors.

Comments: Clerk deletes names of persons known to be deceased, non-residents, disqualified, or exempt.

Step 7 Clerk prepares an alphabetical list of the names drawn; enters the following information next to each name on the list:

- address
- age
- occupation
- employer

Step 8 Clerk signs the list and obtains the judge's signature or that of the commissioner in chancery. Va. Code § 8.01-351.

Step 9 Depending upon how juror names are stored by the Clerk (mechanically or electronically), jurors are randomly selected for individual jury trials, using similar techniques as described above for a Term Jury List.

Comments: When the Petit Jury List is prepared, form CC-1327 Venireman (Jury Panel Information List) may be used. The *venire facias*

summons directs prospective jurors to appear at the court on a particular date and time.

Step 10 Upon request, the clerk or sheriff or other officer responsible for notifying jurors to appear in court for the trial of a case shall make available to all counsel of record in that case, a copy of the jury panel to be used for the trial of the case at least three full business days before the trial. Such copy of the jury panel shall show the name, age, address, occupation and employer of each person on the panel. (Va. Code § 8.01-353)

Petit Jury

From the Term Jury List, individual jurors are selected to appear in court on such day as the court may direct. Referred to as a "Petit Jury", the court directs the clerk to notify a predetermined number of jurors from the Term Jury List for the trial of a civil or criminal action. The clerk normally prepares this list, and submits it to the sheriff, who notifies each juror of the time and date of the trial.

Upon request, the clerk or other officer responsible for notifying jurors to appear in court for the trial of a case shall make available to all counsel of record in that case, a copy of the jury panel to be used for the trial of the case at least three full business days before the trial. Va. Code § 8.01-353.

Pursuant to Va. Code § 19.2-263.3, the court may, upon motion of either party or its own motion, and for good cause shown, issue an order regulating the disclosure of the name and home address of a juror who has been impaneled in a criminal trial to any person, other than to counsel for either party or a *pro se* defendant. An order regulating the disclosure of information may be modified, and the names and home addresses of the jurors in a criminal case may be disseminated to a person having a legitimate interest or need for the information, with restrictions upon its use and further dissemination as may be deemed appropriate by the court.

Additional personal information of a juror who has been impaneled in a criminal case shall be released only to the counsel for the defendant, a *pro se* defendant, and the attorney for the Commonwealth. The court may, upon motion of either party or its own motion, and for good cause shown, issue an order authorizing the disclosure of any additional personal information of a juror to any other person. Such order may be modified and may place restrictions on the use and further dissemination of such disclosed information.

Note: Additional personal information means any information other than name and home address collected by the court, clerk, or jury commissioner at any time about a person who is selected to sit on a criminal jury and includes, but is not limited to, a juror's age,

occupation, business address, telephone numbers, email addresses, and any other identifying information that would assist another in locating or contacting the juror.

Preparing a Petit Jury List

Step 1 A petit jury list or jury panel is usually prepared employing the same software and server hardware and random selection method used to produce the Term Jury List, or is otherwise prepared as authorized by the court.

Step 2 Once created, the petit jury list, containing the name, age, address, occupation and employer of each person on the panel, shall be made available to all counsel of record in that case, and if requested, make available a copy of the jury panel to be used for the trial of the case at least three full business days before the trial.

Comment: Request to view Jury Questionnaires - Jury questionnaires are the work product of the Jury Commission, and are not a public record. This request should be referred to the judge for consideration. *See* Attorney General Opinion to Hall, dated 9/17/97, (1997 Va. AG 27): *Circuit court clerk may not release information contained on master jury list or jury commissioner's questionnaires regarding potential jurors to law enforcement or Department of Motor Vehicles authorities without circuit court judge having determined that good cause has been shown by such authorities for obtaining such information.*

Step 3 Jurors selected for call are notified by the sheriff in accord with Va. Code § 8.01-298. *Writ of venire facias* requirements are satisfied by any procedure followed in Va. Code § 8.01-354.

Comments: *See* Form CC-1321, *Writ of venire facias* – Petit Jury.

Grand Jurors

The judge or judges regularly presiding in the circuit court of each county and city shall annually, in the month of June, July, or August, select from citizens of the county or city at least 60 persons and not more than 120 persons eighteen years of age or over, of honesty, intelligence, impartiality and good demeanor and suitable in all respects to serve as grand jurors, who, except as hereinafter provided, shall be the grand jurors for the county or city from which they are selected for the next twelve months. The judge or judges making the selection shall at once furnish to the clerk of the circuit court a list of those selected for that county or city. Va. Code § 19.2-194.

Not more than twenty days before the beginning of each term of court at which a grand jury is required, the clerk of the circuit court issues a *venire facias* (list of grand jurors to be summoned - Form CC-1320, *Writ of Venire Facias* - Grand Jury) to the sheriff commanding them to summon from the grand jury list not less than five nor more than nine persons to serve as grand jurors for that court term. Va. Code § 19.2-194.

The function of a regular grand jury is to consider bills of indictment prepared by the Commonwealth attorney and to determine whether as to each bill there is sufficient probable cause to return the indictment as a "true bill." There will be a regular grand jury at each term of court, unless the court, on the motion of the Commonwealth attorney or with their concurrence, finds that it is unnecessary or impractical to impanel a grand jury for the particular term and will enter an order to that effect. Va. Code § 19.2-193.

A special grand jury may be impaneled by the court on its own motion or by a minority of the members of the regular grand jury or upon request of the Commonwealth's Attorney to investigate and report any condition which tends to involve or promote criminal activity. Va. Code § 19.2-206. A special grand jury will consist of seven to eleven citizens of the county or city.

Jury Orientation

Courts should provide some form of orientation to persons called for jury service. Orientation programs increase jurors' understanding of the judicial system and prepare them to serve competently as jurors. Orientation may be effected by an oral presentation, written materials, audio-visual means, or through a combination of all three. The program should be presented in a consistent and efficient manner.

In some jurisdictions, a formal orientation program for all jurors is conducted at the commencement of each term. In others, the judge meets briefly with the jurors on their first day of service (at the beginning of the trial). Since jurors are paid for each day of service, the court should conduct orientation on a day on which jury trials are scheduled. The orientation should be completed before the first jury panel is needed.

The judge or someone designated by them will normally acquaint jurors with the following:

- the names of court personnel (clerk, Commonwealth's attorney, sheriff, bailiff)
- how they were selected
- their obligation for subsequent service
- the length of their term of jury service and the division of caseload among the jurors

- the types of cases to be heard by them and the number of jurors needed for each case
- "The Answer Book For Jury Service" published by the Office of the Executive Secretary (Some courts have adopted a policy of having this pamphlet distributed to jurors with the summons.)
- the daily procedures (time for opening, luncheon recess)
- the layout of the court facility (location of parking area, restrooms)
- the civic and patriotic obligation of citizens to serve on juries
- how and when they will be compensated for their services
- Jury orientation provides jurors an opportunity to state why they should not serve and to present exemption claims if not previously addressed. Jurors not excused by the court proceed to the next phase of the jury trial process, *Voir Dire*.

Juror Orientation Procedures

Step 1 Clerk checks attendance of jurors and advises judge of those who are not present so that appropriate action may be taken. *See* "Trial/Post Trial- Contempt." Va. Code § 8.01-356.

Step 2 Person taking jury attendance shall ensure the identity of jurors. Each juror shall provide any of the following forms of identification: their Commonwealth of Virginia voter registration card; their social security card; their valid Virginia driver's license or any other identification card issued by a government agency of the Commonwealth; or any valid employee identification card containing a photograph of the juror and issued by an employer of the juror in the ordinary course of the employer's business. If the juror is unable to present one of these forms of identification, he shall sign a statement affirming, under penalty of perjury, that he is the named juror. **Note:** If person taking jury attendance is unable to give an oath, the clerk or deputy clerk should do so. Va. Code § 8.01-353.1

Step 3 Clerk ensures the comfort of the jurors whenever possible.

Comments: Some jurors, especially those serving for the first time, may be nervous, and every effort should be made to make them feel at ease.

Step 4 Clerk distributes copies of " The Answer Book for Jury Service" if not provided to the jurors with the summons.

Comments: These handbooks may be ordered through:

Purchasing Department
Office of the Executive Secretary
100 North 9th Street, 3rd Floor
Richmond, VA 23219

Step 5 Clerk notes the names of all jurors who are excused from jury duty or who are exempt or disqualified as determined by the judge. *See* procedures for jury selection.

Step 6 Clerk conducts orientation program.

Comments: Depending on local practice, the presentation may be conducted by the clerk's office, the sheriff's department, or others. A "Juror Orientation Video" is available from the Office of the Executive Secretary.

Step 7 For jurors temporarily excused from service until a subsequent term, ensure that their names are placed on the jury list for that term.

Step 8 Upon completion of orientation, jurors proceed to *Voir Dire*. *See* "*Voir Dire*."

Voir Dire

The right of an accused to be tried by an impartial jury is guaranteed by the state and federal constitutions and reinforced by legislative mandate and rules of the Virginia Supreme Court. "*Voir Dire*" denotes the examination of prospective jurors (also called veniremen) to determine whether they are free from partiality and prejudice, and to assure that they are "indifferent in the cause" (impartial). Va. Code § 8.01-358. On the day on which jurors have been notified to appear, jurors not excused by the court shall be called in such a manner as the judge may direct to be sworn on the *Voir Dire* until a panel free from exception shall be obtained. Va. Code § 8.01-357.

Receipt, Maintenance and Storage Of Evidence

Subpoenas *duces tecum*

While a regular subpoena (subpoena *ad testificandum*) commands the appearance of a witness to testify at a trial, hearing or grand jury proceeding, a subpoena *duces tecum* commands that the person to whom it is addressed appear in person with or deliver to the court certain documentary evidence or tangible objects pertinent to the proceedings. Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the

possession of a person not a party to the action, the judge or the clerk may issue a subpoena *duces tecum* for the production of writings or objects described in the subpoena. Such subpoena shall command either (1) that the person to whom it is addressed shall appear with the items described either before the court or the clerk or (2) that such person shall deliver the items described to the clerk. The subpoena may direct that the writing or object be produced at a time before the trial or before the time when it is to be offered in evidence.

In any criminal case a subpoena duces tecum may be issued by the attorney of record who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. Form DC-3000, Subpoena duces Tecum (Criminal) – Attorney Issued, shall be signed by the attorney of record as if a pleading, and shall include the attorney's address. A copy of the signed subpoena duces tecum, together with the attorney's certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the adverse party and to the clerk's office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas duces tecum issued pursuant to Rule 3A:12(b) shall apply. A sheriff shall not be required to serve an attorney-issued subpoena duces tecum that is not issued at least five business days prior to the date production of evidence is desired. Va. Code § 19.2-10.4

Any subpoenaed writings and objects, regardless by who requested, shall be available for examination and review by all parties and counsel. Subpoenaed writings or objects shall be received by the clerk and shall not be open for examination and review except by the parties and counsel unless otherwise directed by the court. The clerk shall adopt procedures to ensure compliance with this paragraph.

Where subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including limiting disclosure, removal and copying.

When a criminal subpoena *duces tecum* has been served on a person who is not a party to the action requiring the production of information that is stored in an electronic format, the subpoenaed person shall produce a tangible copy of the information. If a tangible copy cannot be produced, the subpoenaed person shall permit the parties to review the information on a computer or by electronic means during normal business hours, provided that the information can be accessed and isolated. If a tangible copy cannot reasonably be produced and the information is commingled with information other than that requested in the subpoena and cannot reasonably be isolated, the person to whom the subpoena is addressed may file a motion for a protective order or a motion to quash. Va. Code § 19.2-267.2.

No subpoena *duces tecum* may be issued in a criminal case or grand jury proceeding which

is (1) directed to a member of the bar of this Commonwealth or any other jurisdiction or compels production or (2) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance of its issuance, by a judge of the circuit court in which the subpoena is requested and after reasonable notice to the attorney who is the subject of the proposed subpoena. Rule 3A:12(a).

A subpoena *duces tecum* may be executed (served) anywhere within the Commonwealth of Virginia by an authorized officer. Rule 3A:12(c). Most subpoenas are issued to the sheriff of the city or county wherein the witness or the evidence is located. Once the officer has executed the subpoena, they must make their return to the court named in the subpoena. Rule 3A:12(c). If the person on whom the subpoena was served fails to obey it without adequate excuse, they may be deemed in contempt of court. Rule 3A:12(d). **Note:** No fees are assessed for a subpoena *duces tecum* in criminal matters, regardless if the attorney is appointed or retained.

Subpoena *duces tecum* of Analysis Evidence

No subpoena *duces tecum* shall issue for the production of writings or documents used to reach the conclusion contained in a certificate of analysis prepared pursuant to Va. Code § 19.2-187 except upon affidavit that the requested writings or documents are material. Upon a showing by the Commonwealth that the production of such writings and documents would place an undue burden on the Department of Forensic Science, the court may order that the subpoena *duces tecum* be satisfied by making the writings and documents available for inspection by the requesting party at the laboratory site where the analysis was performed or at the laboratory operated by the Department of Forensic Science which is closest to the court in which the case is pending. Va. Code § 19.2-187.2.

Subpoena *duces tecum*

When a subpoena *duces tecum* is to be issued, the clerk should follow the procedures:

Step 1 The Commonwealth or the accused requests that the clerk issue a subpoena *duces tecum*.

NOTE: No fees are assessed for a subpoena *duces tecum* in criminal matters, regardless if the attorney is appointed or retained.

Comments: The request should be in writing and should indicate:

- the officer who is to serve the subpoena
- the writings or objects to be produced or delivered
- whether the person on whom the subpoena is

served is required to appear with the objects to be produced
- the name of the court and title of the proceeding
- time and place at which the witness is to appear or deliver the items
- on whose application the subpoena was issued.

Note: The attorney for the defendant may issue an attorney issued subpoena duces tecum. The subpoena is delivered to local law enforcement, or private process server, for service and a copy is provided to the clerk.

Step 2 If a subpoena *duces tecum* is requested, clerk checks to see if affidavit is attached.

Comments: The affidavit should state that the items requested are material and in the possession of a person not a party, and that notice has been given to the adverse party. Rule 3A:12(b).

Step 3 Clerk prepares subpoena *duces tecum* and signs or obtains appropriate signature.

Comments: *See* form CC-1337, Subpoena *Duces tecum*. The subpoena may be prepared in triplicate or two copies of the signed original may be produced. The latter is recommended.

Step 4 Clerk issues signed original and one copy of subpoena *duces tecum* to sheriff or serving officer; places second copy in case file with request for subpoena and affidavit.

Step 5 Clerk enters the following information in the court's process book or file:

- plaintiff name
- defendant name
- type of process issued
- date prepared
- date of issuance
- signature of issuing clerk or of sheriff who will serve process.

Comments: Every service of process must be entered in a process book or file (or automated system) pursuant to Va. Code § 17.1-215.

The preferred practice in most jurisdictions is to place every process to be served locally in the process book or file to be picked up daily by the local sheriff or serving officer. The sheriff or serving officer signs for the processes in the process book when collecting them for service. A subpoena directed to another city or county in Virginia is mailed by the clerk's office to the sheriff or serving officer of that jurisdiction. The date of mailing should be noted on the process book.

Step 6 The sheriff or serving officer executes the subpoena *duces tecum* and makes their return to the issuing court.

Comments: Execution is effected by leaving a copy of the subpoena with the intended party or posting the subpoena on the door of their home. The original is returned to the court, showing the date and method of service. If the party could not be located, the copy is marked "not found" and returned with the original to the court.

Step 7 Clerk checks returned original to verify that the serving officer has entered the following:

- date of execution
- type of service
- serving officer's signature

Step 8 Clerk enters in process book or file the date the subpoena was returned to the court.

Step 9 Clerk receives and labels tangible evidence.

Comments: The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to Va. Code § 19.2-187 or Va. Code § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine them in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth. However, if the accused calls the person performing such analysis or examination as a witness and is found guilty of the charge or charges for which such witness is summoned, $50 for expenses related to that witness's appearance at hearing or trial shall be charged to the accused as court costs. Va. Code § 19.2-187.1

Step 10 After trial, clerk follows procedures for disposition of evidence.

Subpoena *duces tecum* for Financial Records

A financial institution, money transmitter, or commercial business providing credit history reports shall disclose a record or other information pertaining to a customer, to a law enforcement officer pursuant to Va. Code § 19.2-10.1.

Step 1 A law enforcement official shall provide a statement of the facts documenting the reasons that the records or other related information are relevant to the inquiry to the Commonwealth Attorney. The Commonwealth Attorney will file a motion with the Court requesting the issuance of the subpoena *duces tecum*.

Step 2 A court will issue a subpoena *duces tecum* only if it believes there is probable cause that a crime is being committed, and the records or information sought are relevant to the inquiry.

Comments: The court may issue a subpoena *duces tecum* regardless of whether any criminal charges have been filed.

Step 3 Clerk prepares CC-1336, Subpoena *Duces tecum* Financial Records, for the Judge's signature.

Comments: The Commonwealth or law enforcement officer may provide an affidavit and an Order to be entered by the Judge, rather than filing a motion. If so, use form CC-1337, Subpoena *Duces tecum*. The Clerk or a deputy Clerk may sign this form.
Note: No fees apply to the issuance of the CC-1336, Subpoena *duces tecum* Financial Records or the CC-1337, Subpoena *duces tecum*.

Step 4 The signed original is filed and two copies are prepared and given to the law enforcement officers. One copy is to be served on the institution and one copy is to be returned to the court.

Comments: Every service of process must be entered in a process book or file (or automated system) pursuant to Va. Code § 17.1-215. The preferred practice in most jurisdictions is to place every process to be served locally in the process book or file to be picked up daily by the local sheriff or serving officer. The sheriff or serving officer signs for the processes in the process book when collecting them for service.

Step 5 Upon motion made promptly by the financial institution or credit card issuer, or enterprise that the information or records requests are

unusually voluminous in nature, or that compliance with the subpoena *duces tecum* would cause an undue burden on the provider: the court may quash or modify the subpoena *duces tecum*.

Step 6 Upon application by the Commonwealth Attorney in an ex-parte hearing, the court may order that the statement be temporarily sealed.

Step 7 Any records received by law enforcement officials shall be used only for a reasonable amount of time and for legitimate law enforcement purposes. Once the investigation is complete, the records are to be submitted to the court by the attorney for the Commonwealth, along with a proposed order that the records are to be sealed.

Certificate of Analysis

The court can admit as evidence properly certified certificates of analysis of any examination or analysis performed by certain testing facilities without requiring the person performing the test or analysis to appear and testify. Va. Code § 19.2-187. These testing facilities are:

- Laboratories operated by the Division of Consolidated Laboratories Services or authorized by such Division to conduct such examinations or analyses;
- Federal Bureau of Investigation;
- Federal Postal Inspection Service;
- Federal Bureau of Alcohol, Tobacco, Firearms and Explosives;
- Naval Criminal Investigative Service;
- Federal Drug Enforcement Administration;
- National Fish and Wildlife Forensics Lab; and
- United States Secret Service Laboratory

Before such certificates of analysis may be admitted as evidence pursuant to Va. Code § 19.2-187, the following events must occur:

- The certificate must be received and filed at least seven (7) days prior to the hearing or trial date. "Filed" should be stamped or written on the certificate of analysis, along with the name of the court and date and time of filing. The person who received and dated the certificate of analysis should then authenticate the date stamp by entering the term "TESTE," signing, inserting their title, and dating the authentication.

- If requested by counsel of record for the defendant, the clerk or Commonwealth's Attorney must mail or deliver at no charge a copy of the certificate to such attorney at least seven days prior to the hearing or trial date. The request to the clerk shall be on a form prescribed by the Supreme Court (form DC-302, Request for Copy of Certificate of Analysis) and filed with the clerk's office at least ten days prior to trial. Va. Code § 19.2-187.

Request for Certificate of Analysis

The request to the clerk shall be on a form prescribed by the Supreme Court form DC-302, Request for Copy of Certificate of Analysis and filed with the clerk's office at least ten days prior to trial. In the event that a request for a copy of a certificate is filed with the clerk with respect to a case that is not yet before the court, the clerk shall advise the requester than he must resubmit the request at such time as the case is properly before the court in order for such request to be effective. Va. Code § 19.2-187.

Note: Notice requesting copy of certificate must be made to both the Clerk and Commonwealth's Attorney. Va. Code § 19.2-187.

If the case is before the court, and the request is received, but there is no certificate of analysis filed, it is suggested that the clerk maintain the request, and comply when the certificate is filed.

Retention of Evidence

Virginia Code § 19.2-270.4:1 provides for the storage, preservation and retention of human biological evidence in felony cases and states:

"A. Notwithstanding any provision of law or rule of court, upon motion of a person convicted of a felony or their attorney of record to the circuit court that entered the judgment for the offense, the court shall order the storage, preservation, and retention of specifically identified human biological evidence or representative samples collected or obtained in the case for a period of up to 15 years from the time of conviction, unless the court determines, in its discretion, that the evidence should be retained for a longer period of time. Upon the filing of such a motion, the defendant may request a hearing for the limited purpose of identifying the human biological evidence or representative samples that are to be stored in accordance with the provisions of this section. Upon the granting of the motion, the court shall order the clerk of the circuit court to transfer all such evidence to the Department of Forensic Science. The Department of Forensic Science shall store, preserve, and retain such evidence. If the evidence is not within the custody of the clerk at the time the order is entered, the court shall order the governmental entity having custody of the evidence to transfer such evidence to the Department of Forensic Science. Upon the entry of an order under this subsection, the court may upon motion or

upon good cause shown, with notice to the convicted person, their attorney of record and the attorney for the Commonwealth, modify the original storage order, as it relates to time of storage of the evidence or samples, for a period of time greater than or less than that specified in the original order.

B. Pursuant to standards and guidelines established by the Department of Forensic Science, the order shall state the method of custody, transfer and return of any evidence to insure and protect the Commonwealth's interest in the integrity of the evidence. Pursuant to standards and guidelines established by the Department of Forensic Science, the Department of Forensic Science, local law-enforcement agency or other custodian of the evidence shall take all necessary steps to preserve, store, and retain the evidence and its chain of custody for the period of time specified.

C. In any proceeding under this section, the court, upon a finding that the physical evidence is of such a nature, size or quantity that storage, preservation or retention of all of the evidence is impractical, may order the storage of only representative samples of the evidence. The Department of Forensic Science shall take representative samples, cuttings or swabbings and retain them. The remaining evidence shall be handled according to § 19.2-270.4 or as otherwise provided for in the Code.

D. An action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees or agents of the Commonwealth or its political subdivisions."

Motions

A motion is a request to the judge by a party seeking a rule or order from the judge. Motions may be made at all stages of the criminal process. Motions made before trial must be in writing, unless the court for good cause shown permits an oral motion. Rule 3A:9(c). If a motion is made orally, the content of the motion must be incorporated into the written order, if one is prepared. Hence, many clerks take notes as to the type of motion, who made it, and the court's disposition.

Many rules of court govern motions; however, most provisions do not affect the clerk's duties. The clerk generally has no discretion with respect to accepting written motions.

Pre-Trial Motions

The following motions are labeled pre-trial motions since they are usually made prior to trial. Many of them, however, may also be raised during trial. The list below is just a small sample of type types of motions that will be received in the clerk's office.

Motion to Change Venue

A motion to change venue requests that a proceeding be transferred to another circuit court for trial. A motion for change of venue must be made at least seven days before the day fixed for trial. Either the Commonwealth or the accused may move for a change of venue. Va. Code § 19.2-251. For a discussion of change of venue procedures, *see* "Change of Venue" this chapter.

Motion to Sever - Offenses

A motion to sever is a request that an accused charged with more than one offense be tried for each offense separately rather than being tried for all offenses in one proceeding. The court will normally direct that an accused be tried on all charges then pending against them where the offenses arise out of the same act or transaction or are parts of a common scheme or where the accused and the Commonwealth's attorney consent thereto. Even when these conditions are met, the court may order separate trials "when justice so requires." Rule 3A:10(b). A motion for separate trials must be made before trial begins or it is deemed waived.

Motion to Sever - Parties

Virginia Code §§ 19.2-183.1 (preliminary hearings) and 19.2-262.1 (joinder of defendants) provide that upon motion of the Commonwealth's attorney, persons who are jointly indicted for a felony may be heard jointly in a preliminary hearing or tried together unless the court finds that such joint trial would constitute a prejudice to either defendant.

Motion to Suppress

A motion to suppress is a device used to prevent the introduction at trial of evidence illegally obtained in violation of the provisions of state or federal constitutions or statutes. A motion to suppress evidence on the aforementioned grounds must be made in writing, not later than seven days before trial. Va. Code § 19.2-399.

Motion to Quash/Amend Indictment

The defendant may move to quash/amend an indictment. The court would reject or accept the order based on a notice and/or a hearing in which the Attorney for the Commonwealth objected or consented to the motion.

Motion to Modify Bail

The Commonwealth or the accused may move to modify a bail determination made by a judicial officer. Alternatively, the accused may appeal a bail determination. Virginia Code § 19.2-124 specifies the court to which a bail decision is appealed. For a thorough discussion of bail procedures, *see* "Bail."

Motion to Compel Discovery

In felony prosecutions in circuit court, the defendant and the prosecution may examine certain evidence held by the other prior to trial pursuant to Rule 3A:11. Upon written motion of an accused, the court shall order the Commonwealth's attorney to permit the accused to inspect and copy certain relevant evidence. Rule 3A:11(b). If the court grants the relief sought by the accused, it must, upon motion of the Commonwealth, permit the Commonwealth to examine certain evidence. Generally, the judge will hear the motions to compel discovery brought by the accused and prosecution in the same hearing.

A discovery motion by the accused must be made at least ten days before the day fixed for trial. Rule 3A:11(d). A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice. Rule 3A:11(d).

Motion for Psychiatric Evaluation of the Defendant

Sanity at the Time of the Offense

The court may order a psychiatric evaluation of the defendant to determine sanity at the time of the offense upon motion of defense counsel or the Commonwealth's attorney. Va. Code § 19.2-169.5. The motion for such an evaluation must be made before trial. Procedures regarding such evaluations are fully discussed in "Psychiatric Evaluations and Treatment", this chapter.

Competency to Stand Trial

A motion for psychiatric evaluation of the defendant's competency to stand trial may be made at any time after the appointment of counsel and before the end of trial. Va. Code § 19.2-169.1. For a

thorough discussion of the procedures relevant to a competency evaluation, *see* "Psychiatric Evaluations and Treatment."

Motion in Limine

A motion in limine is a written motion made before or during a jury trial for an order prohibiting the injection into trial of prejudicial or irrelevant matters.

Motion for Bill of Particulars

A bill of particulars is a request by the defendant for clarification of the basis upon which a charge is brought so that they may prepare their case more effectively. *See* Va. Code § 19.2-230. A motion for a bill of particulars must be made before a plea is entered and at least seven days before the day fixed for trial.

Motion to Dismiss for Lack of Speedy Trial

A motion to dismiss for lack of a speedy trial alleges that the defendant was not brought to trial within the time periods set by statute. The motion may be made at any time before entry of the verdict. For a discussion of constitutional and statutory speedy trial requirements, *see* "Caseflow Management – Speedy Trial," this manual.

Motion to Amend the Indictment

The Commonwealth or the accused may move to amend the charge against the accused at any time before verdict. If the motion for an amendment is granted, the accused must be arraigned on the amended charge and allowed to replead. If the amendment operates as a surprise to the defendant, the court may grant a continuance (discussed below). Va. Code § 19.2-231. For a thorough discussion of procedures, *see* "Amendment to the Charge."

Motion for Nolle Prosequi

A request for a nolle prosequi is a request by the Commonwealth's attorney that they be allowed to discontinue prosecution of the case. Nolle prosequi is entered only in the discretion of the court, upon motion of the Commonwealth's Attorney with good cause shown. Va. Code § 19.2-265.3. The entry of a nolle prosequi constitutes a dismissal of the case with

respect to the person against whom it is taken.

Motion for a Continuance

A motion for a continuance may be made at any time by the Commonwealth or the accused. A continuance requests that a scheduled proceeding occur at a later time and may be made in conjunction with other motions.

Motions During Trial

Motion to Exclude Witnesses

The court may, upon its own motion, and must, upon motion of any accused or the Commonwealth's attorney, require the exclusion from the courtroom of every witness to be called. Va. Code § 19.2-265.1. The bailiff is responsible for executing the order to exclude witnesses.

The defendant, although they may testify, has the right to remain in the courtroom. Va. Code § 19.2-265.1. If the defendant is a corporation or association, an officer or agent has the right to remain present. *See* "Trial/Post Trial – Bench Trial" and "Trial/Post Trial – Jury Trial" in this manual.

Motion to Strike the Evidence

After the Commonwealth has rested its case or at the conclusion of all the evidence, the accused may move to strike the evidence on grounds that it is insufficient, as a matter of law, to sustain a conviction. Rule 3A:15(a). If the court sustains the motion to strike, the court may discharge the jury and enter a judgment of acquittal. If the court overrules the motion to strike the evidence and there is a hung jury, the defendant may renew the motion immediately after the discharge of the jury. Rules 3A:15(a) and 1:11. *See* "Trial/Post Trial – Jury Trial" in this manual.

Motion to Poll the Jury

When a verdict is returned, the jury will be polled individually at the request of any party or upon the court's own motion. Rule 3A:17. If, upon the poll, all jurors do not agree, the jury may be directed to retire for further deliberations or may be discharged. Rule 3A:17. For a fuller discussion of polling and jury verdicts, *see* "Trial/Post Trial – Jury Trial" in this manual.

Motion to Set Aside the Verdict

A motion to set aside the verdict on grounds of insufficient evidence or error committed during trial can be made up to twenty-one days after the entry of a final order. Rule 3A:15(b). If the court sets aside the verdict because of insufficient evidence, the court must enter a judgment of acquittal. Rule 3A:15(c). If the court sets aside the verdict because of error committed during trial, it must grant a new trial. Rule 3A:15(c).

Motion for Presentence Report

When a person is convicted of a felony, the court may, or on the motion of the defendant shall, before imposing sentence direct a probation officer to investigate and report upon the history of the accused and all other relevant facts to enable the court to determine the appropriate sentence. Va. Code § 19.2-299. The clerk must seal the presentence report upon entry of the sentencing order by the court and shall be sealed and thereafter made available, with certain exceptions, only upon court order. For a discussion of sentencing procedures, *see* "Trial/Post Trial - Sentencing."

Motion for New Trial Based on Newly-Discovered Evidence

Within twenty-one days after entry of a final order, the defendant may move for a new trial on the ground of newly discovered evidence.

Victim Confidentiality

Crime victims have the right to request that law enforcement agencies, the Department of Corrections, the Commonwealth's Attorney and the court not disclose, except among themselves, the residential address, telephone number, or place of employment of the victim or a member of the victim's family. Va. Code § 19.2-11.2. There are exceptions to this right of non-disclosure when the disclosure is (i) of the crime site, (ii) required by law or the Rules of the Supreme Court of Virginia, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause. *See* Va. Code §§ 2.2-511 and 19.2-11.01 regarding crime victim and witness rights.

Note: The Governor's office has set up a Crime Victim Assistance Program "hot line" for victims of crime who may obtain information on services and assistance available. This number is provided in the event a court wishes to pass this information to a victim of crime or to share with the Commonwealth's Attorney Victim-Witness Coordinator. The number is: 1-888-887-3418.

Victims and witnesses of certain sexual offenses shall be advised that there may be a closed preliminary hearing in accordance with Va. Code § 18.2-67.8 and, if a victim was fourteen years of age or younger on the date of the offense and is sixteen or under at the time of the trial, or a

witness to the offense is fourteen years of age or younger at the time of the trial, that two-way closed-circuit television may be used in the taking of testimony in accordance with Va. Code § 18.2-67.9. Va. Code § 19.2-11.01.

District Court form DC-301, Request for Confidentiality by Crime Victim, may be filed by a crime victim with either the magistrate or the clerk. If filed with the magistrate, the magistrate records the time/date filed, attaches form DC-301 to the unexecuted warrant or summons to be delivered to the clerk when executed. If form DC-301 is filed with the court, the clerk attaches it to the case papers and updates the Case Management System to indicate filing of this form.

It is suggested that the clerks and the chief magistrates implement the following routine procedures in all cases:

- Magistrate should not list residential address, telephone number, or place of employment of any victim on the Warrant of Arrest, Summons, or Criminal Complaint.
- When a warrant or summons is issued, the Magistrate should request that the complainant complete (1) form DC-325, Request for Witness Subpoena for the victim and any family member witnesses and (2) a separate form DC-325, Request for Witness Subpoena, (District Court use only) for all other witnesses.
- All requests for witness subpoena forms should be attached to the unexecuted warrant or summons and delivered to the clerk after the warrant or summons has been served on the defendant.
- Circuit Court Clerks should issue separate form CC-1342, Subpoena processes for victim/family members and non-victim/non-family member witnesses.

  The clerk should place any court paper containing protected information regarding the crime victim or a member of the victim's family in an envelope.
  The clerk should stamp the front of the envelope with a notation similar the following:

  Confidential
  "Pursuant to Virginia Code § 19.2-11.2, the information contained herein is not subject to disclosure and you are therefore forbidden to inspect the contents contained herein."

  Date/Time/Signature

  The clerk should ensure that all sealed documents that are imaged are sealed and not available for inspection.

- Individual(s) Requesting Access to Sealed Documents

  Once a Request for Confidentiality has been filed with the clerk, any person requesting

access to documents containing protected information may file a Petition for Disclosure with the clerk of the court who acted upon the request and sealed the documents. A person who is not a party to the case may file a petition pursuant to Va. Code § 2.2-3704 with the General District Court or Circuit Court.

Testing For Sexually Transmitted Infections

As soon as practicable following arrest, the attorney for the Commonwealth may request after consultation with a complaining witness, or shall request upon the request of the complaining witness, that any person charged with (i) any crime involving sexual assault, (ii) any offense against children as prohibited by §§ 18.2-361, 18.2-366, 18.2-370, and 18.2-370.1, or (iii) any assault and battery, and where the complaining witness was exposed to body fluids of the person so charged in a manner that may, according to the then-current guidelines of the Centers for Disease Control and Prevention, transmit a sexually transmitted infection, be requested to submit to diagnostic testing for sexually transmitted infections and any follow-up testing as may be medically appropriate. The person so charged shall be counseled about the meaning of the tests and about the transmission, treatment, and prevention of sexually transmitted infections.

If the person so charged refuses to submit to testing or the competency of the person to consent to testing is at issue, the court with jurisdiction of the case shall hold a hearing in a manner as provided by § 19.2-183, as soon as practicable, to determine whether there is probable cause that the individual has committed the crime with which he is charged and that the complaining witness was exposed to body fluids of the person so charged in a manner that may, according to the then-current guidelines of the Centers for Disease Control and Prevention, transmit a sexually transmitted infection. If the court finds probable cause, the court shall order the person so charged to undergo testing for sexually transmitted infections. The court may enter such an order in the absence of the person so charged if the person so charged is represented at the hearing by counsel or a guardian ad litem. The court's finding shall be without prejudice to either the Commonwealth or the person charged and shall not be evidence in any proceeding, civil or criminal. At any hearing before the court, the person so charged, or their counsel, may appear.

Any hearing conducted pursuant to this subsection shall be held **in camera** as soon as practicable. The record shall be **sealed**. The order of the circuit court shall be final and nonappealable.

Confirmatory tests shall be conducted before any test result shall be determined to be positive. The results of the tests shall be confidential as provided in § 32.1-127.1:03, however, the entity that performed the test shall also disclose the results to any victim and offer appropriate counseling.

The cost of such tests shall be paid by the Commonwealth and taxed as part of the cost of such criminal proceedings.

Procedures

Step 1 Clerk receives DC-3010, REQUEST FOR SEXUALLY TRANSMITTED INFECTION TESTING.

Step 2 The request shall be heard as soon as possible and is heard *in camera*.

Note: Hearing type BTH is used to mask the hearing.

Step 3 The record shall be sealed. The results of the tests shall be confidential.

Step 4 The Clerk records and indexes orders in the Criminal Order Book **under seal** unless otherwise provided by law.

Comments: Recording may be accomplished by microphotographic or electronic recording process per Va. Code § 17.1-240. Indexing may be maintained on computer, microfilm or microfiche per Va. Code § 17.1-249.

Form(s)

DC-3010, Request for Sexually Transmitted Infection Testing
CC-1390, Order for Testing

Reference(s)

Va. Code § 18.2-61.1
Va. Code § 32.1-127.1:03

Preparation for Trial

The primary responsibility of the clerk is to provide the court the assistance necessary to ensure the smooth and professional management of trials. To that end, the clerk must always be organized and prepared for trial. This is often difficult in light of frequent scheduling and other changes. Knowledge and understanding of the trial process is vital to the efficient operation of the court.

No single event universally marks the commencement of a trial. A trial may begin with

arraignment, with the swearing of the jury, or in a bench trial, with the introduction of evidence. The duties described in this section must all be performed before the actual trial can begin. The time periods set forth below are estimates: the judge may direct, or the circumstances in a particular case or in the clerk's office may warrant, the clerk's performance of a procedure sooner or later than is indicated below.

Procedures/Preparation - To Be Done Upon Setting of the Trial Date

Step 1 Clerk verifies that the accused's trial date is accurately reflected on:

- case summary sheet
- criminal docket
- court's calendar

Step 2 Clerk arranges for interpreter, if directed by judge. *See* the appendix, "DC 40 & 40A/Interpreters/Court Reporters" and the section, "Interpreters," in this chapter.

Step 3 If all judges within the circuit are disqualified from hearing the case, clerk arranges for a judge designate through the Office of the Executive Secretary of the Supreme Court of Virginia, if not done previously. *See* "Judge Disabilities and Disqualifications" in this chapter.

Step 4 Clerk arranges for jurors to be summoned, if case is to be tried by a jury. *See* "Juror Selection, Summoning, and Orientation" in this chapter.

Step 5 Clerk issues witness subpoenas and subpoenas *duces tecum*, if not done so previously. *See* "Witness Summoning" and "Evidence" in this chapter, for procedures regarding witness subpoenas and subpoenas *duces tecum*, respectively.

Note: No fees are assessed for a subpoena duces tecum in criminal matters, regardless if the attorney is appointed or retained.

Step 6 Clerk arranges for a court reporter, if directed by judge.

Comments: All felony proceedings must be recorded. Va. Code § 19.2-165. The code is silent with respect to recording misdemeanor proceedings; unless a party specifically requests a court reporter, local practice normally dictates. For information on court reporters, *see* Participants in the Criminal Justice System.

Step 7 Clerk notifies sheriff of trial date when evidence is held by sheriff or local police department.

Step 8 Clerk arranges for the transport of the accused from jail or other facility; clerk, Judicial Assistant, Commonwealth's Attorney, or attorney prepares transportation order which is signed by judge or clerk (if court has authorized the clerk to sign orders pursuant to Va. Code § 17.1-219.1); processes/images order; provides sheriff with a certified copy of order.

Comments: If the accused is in the local jail, *see* form DC-355, Order for Continued Custody. If the accused is in a state correctional or other facility, prepare custodial transportation order, form DC-354, Custodial Transportation Order. *See* also court order processing.

Step 9 Clerk notifies local probation department of defendant's trial.

Comments: Some probation officers elect to be present during felony trials to familiarize themselves with the case if it is later referred for a background investigation.

Procedures/Preparation - At Least Seven Days before Trial

If asked by counsel, clerk provides copy of any test results at least seven days prior to trial. Va. Code § 19.2-187.

Procedures/Preparation - At Least 3 Full Business Days before Trial

If asked, clerk provides counsel of record with a copy of the jury panel to be used for trial. This information must be available to counsel at least three full business days before trial. Va. Code § 8.01-353. For further details *see* "Jury Trials."

Procedures/Preparation - To Be Done by the day Before Trial

Step 1 Before trial, clerk prepares the following:

- referral slip to probation office
- jail card

Step 2 Clerk pulls and inspects paper case file to see that all case papers are in proper order and securely fastened, or if "paper-less" court, review to ensure all pleadings, orders, services and correspondence have been imaged.

Procedures/Preparation - To Be Done by Morning of Trial Date

Clerk distributes copies of docket and court's calendar to appropriate parties in

accordance with local practice; places daily posting calendar outside courtroom or clerk's office prior to trial. *See* dockets and calendars.

Procedures/Preparation - To Be Done Immediately Prior to Trial

Step 1 Clerk provides assistance to and facilities for persons with disabilities, including, but not limited to, witnesses, jurors, parties, and attorneys.

Step 2 Clerk ensures that any necessary documents, materials or evidence (not available electronically) are taken to the courtroom just before trial.

Comments: Materials include:

- case files (for courts not using case imaging solely)
- physical evidence (never leave unattended)
- exhibit labels
- any blank forms used by the Court that are not available through CAISFORM.

Chapter 5 - Trial/Post Trial

Bench Trial

A trial conducted by the judge without a jury is called a "bench trial." A defendant, who voluntarily pleads guilty to a criminal offense, thereby waiving their right to a jury trial, will be tried by the judge without a jury. However, a defendant who pleads not guilty and waives their right to a trial by jury cannot unilaterally obtain a bench trial. The defendant may have a bench trial only if the court and the Commonwealth's attorney concur in their request to be tried by a judge. Hence, the Commonwealth has the option to try its case before a jury even if the defendant has waived trial by jury. Va. Code § 19.2-257.

The judge is required to determine before trial that the accused's waiver of trial by jury was voluntarily and intelligently given. Rule 3A:13. *See* this manual, "Pre-Trial – Arraignment, Pleas and Plea Bargaining" regarding arraignment procedures. The defendant may withdraw their waiver of trial by jury at any time prior to the commencement of their trial and obtain a jury trial so long as the withdrawal was not for the purpose of delay, and granting the motion does not result in unreasonable delay of the trial that impedes justice. A bench trial follows the same sequence as a trial by jury. The primary difference is that the judge rather than a jury hears and determines the case.

A bench trial in which the defendant has pleaded not guilty begins with the calling of the case and the hearing of motions, including a motion to exclude witnesses from the courtroom. Witnesses excluded are to remain outside the courtroom except when testifying. Va. Code § 19.2-265.1. *See* this manual, "Pre-Trial - Motion to Exclude Witnesses," and "Pre-Trial – Motions." The attorneys then make their opening statements, beginning with the attorney for the Commonwealth. Va. Code § 19.2-265. The Commonwealth presents its case after which defense counsel may move to strike the Commonwealth's evidence. The court will grant the motion if the evidence presented by the Commonwealth is insufficient as a matter of law to sustain a conviction. Rule 3A:15. If the motion is denied, the trial continues and the defendant presents its evidence. When the defense rests, the Commonwealth has the opportunity to refute any new evidence introduced by the defendant and may present rebuttal evidence. After the Commonwealth rests, both sides present closing arguments. The court renders a decision in the case as to whether the defendant is guilty or not guilty. This process is called adjudication. The court's decision may also include the defendant's sentence; however, particularly in felony cases, a separate hearing will be held for that purpose. *See* "Sentencing And Deferred Adjudication Dispositions" this chapter. The sentencing phase is also called disposition. For a more detailed discussion of the trial process, *See* "Jury Trials."

If the accused is found not guilty, they are permanently discharged from further prosecution for the same offense. An accused that is incarcerated should be released immediately unless there are other charges pending on which they are being held.

A defendant who has pleaded guilty in a bench trial will present little or no evidence. The Commonwealth, however, still has the burden of proving the defendant's guilt, and it will call witnesses and present evidence to prove its case or submit a stipulation of facts to the court. Similarly, a defendant who has entered into a plea bargain will offer little or no evidence, and the court will determine whether to accept the plea bargain. In all other respects, bench trials on a plea of guilty or a plea bargain are handled the same as those on a plea of not guilty as to the disposition (sentencing) phase.

The procedures listed below are representative of those followed in most courts:

Step 1 The bailiff opens court.

Step 2 Clerk calls the case; court reporter is sworn by clerk, depending on local practice. Va. Code §§ 19.2-165, 19.2-166, and Rule 1:3.

Comments: All felony proceedings must be recorded. Va. Code § 19.2-165. The code is silent with respect to recording misdemeanor proceedings; consequently, unless a party specifically requests a court reporter, local practice normally dictates.

Step 3 Judge asks counsel if they are ready to proceed and if there are any motions to be heard.

Comments: In most instances, the decision whether to have a jury trial or bench trial will have already been made. If not, it is made at this stage. If case is to be tried by a jury, *See* "Jury Trials."

Step 4 Clerk listens to motions and takes notes.

Comments: The clerk's notes will be used to prepare a court order of the proceeding (a trial order). The nature of the motion and the court's ruling on it will be included in the trial order. *See* this manual, "Pre-Trial - Motions."

Step 5 Accused is arraigned, if not arraigned previously, and enters plea.

Comments: *See* "Pre-Trial" chapter regarding arraignment procedures and pleas. In misdemeanor cases, arraignment is not necessary when waived by the accused or counsel or when the accused fails to appear.

Step 6 Clerk swears witnesses, if directed by court.

Comments: Depending on the judge's preference, the witnesses are either

sworn all at one time or each one is sworn prior to giving their testimony. If sworn all at once, it is helpful to make a note of the relevant attributes about each witness as a memory device.

Step 7 **Procedure Decision**: Does the court order the witnesses excluded from the courtroom? If no, GO TO STEP 10; if yes: GO TO STEP 8.

Comments: Upon its own motion, the court may, and upon motion of the defendant or Commonwealth's attorney the court must order the witnesses excluded. Va. Code § 19.2-265.1.

Step 8 Clerk notes the motion to exclude witnesses, if granted and any other motions and whether granted or denied for inclusion in the trial order.

Comments: Clerk must be sure to note the nature of the motion and on whose motion the witnesses were excluded (the court, Commonwealth's attorney or defense counsel). *See* this manual, "Pre-Trial – Motions, Motion to Exclude Witnesses."

Step 9 The bailiff takes the witnesses to the witness room or other place outside the courtroom and escorts them into the courtroom when they are required to testify.

Comments: The judge will instruct the witnesses prior to their leaving the courtroom to remain in the witness room or other location outside the courtroom until called and not to discuss the case or their testimony with each other or any other party during the trial.

Step 10 Opening statements are made by the Commonwealth's attorney and defense counsel, respectively. Va. Code § 19.2-265.1.

Comments: Either side may waive the right to an opening statement.

Step 11 Beginning with the Commonwealth's attorney, each side presents its case by calling witnesses and introducing evidence.

Step 12 Clerk maintains custody of and is responsible for all exhibits introduced; clerk marks each exhibit introduced with the following information:

- exhibit number or letter (always number or letter exhibits sequentially beginning with A or 1)
- case number
- style of case

- party presenting exhibit
- date exhibit introduced
- type and quantity of substance if exhibit is a drug.
- "ID" or "ADM" indicator

Comments: The clerk must know the location of the exhibits since the attorneys refer to and display the exhibits frequently.

An exhibit may be marked for identification (ID). A party may later move the court to admit the exhibit into evidence. If the motion is granted, the exhibit becomes admitted (ADM). If the court rejects an exhibit, the clerk should note that fact and file as part of the record.

NEVER LEAVE ANY EXHIBIT UNATTENDED. Extreme care should be taken with dangerous or valuable exhibits. When not needed, these exhibits should be stored securely in the clerk's office. *See* this manual, "Pre-Trial – Receipt, Maintenance And Storage Of Evidence."

Drugs and certain weapons may be stored by the local police or sheriff's department prior to trial pursuant to a court order. Va. Code § 19.2-386.25 and "Pre-Trial –Receipt, Maintenance And Storage Of Evidence." When such evidence is introduced, the police officer that delivers them will need a receipt to take the evidence back to the Property Room of the police department. The officer will generally give the clerk a card or document that the clerk should fill out promptly with the name and description of the item, including specific amounts of any drugs.

Step 13 Clerk obtains judge's initials on the label of each documentary exhibit and on the tag of each non-documentary exhibit, regardless of whether the exhibit is admitted or rejected.

Comments: This procedure comports with Rule 5:10 so that if the case is appealed, the exhibits need not be relabeled.

Step 14 Clerk records exhibit information on a master list that becomes part of the case record.

Comments: *See* form CC-1338, List of Exhibits. Accuracy of the master exhibit list is critical because it is the official and usually only list in existence. Additionally, if the case is appealed, the clerk of the appellate court depends upon this list for reference.

Step 15 **Procedure Decision:** Has the court granted a motion to strike, a motion for mistrial, or a motion for *nolle prosequi*? If no, GO TO STEP 17; if yes, GO TO STEP 16.

Comments: *See* this manual, "Pre-Trial – Motions" for a detailed discussion of these and other motions.

Step 16 Clerk follows post-trial and case closing procedures, respectively.

Comments: *See* "Post Trial Activities", this chapter and chapter on "Post Sentencing" for procedures.

Step 17 Counsel for each side conducts closing arguments.

Comments: Closing arguments provide each party the opportunity to present its interpretation of the case in summary form and to state why the judge should find the defendant guilty or not guilty and what sentence should be imposed if the defendant is found guilty. The Commonwealth's attorney argues first and has an opportunity for a rebuttal statement after defense counsel's closing argument. The Commonwealth's attorney may waive their right to argue first.

Step 18 Judge renders a judgment in the case.

Step 19 **Procedure Decision:** Is defendant convicted?
If yes, GO TO STEP 21; if no, GO TO STEP 20.

Step 20 Case is concluded; clerk gathers all case-related and other pertinent materials and returns to clerk's office. Clerk proceeds to case closing procedures. END OF PROCEDURES WHEN DEFENDANT IS FOUND NOT GUILTY. IF CONVICTED/FOUND GUILTY GO TO STEP 21.

Comments: *See* this manual, "Post Sentencing – Case Closing."

Step 21 Judge hears and rules on any motions (motion to revoke bond, to set aside verdict, or to refer case for presentence investigation) or arguments on the sentence; judge may grant a continuance for consideration of a presentence report.

Comments: *See* this manual, "Pre-Trial – Motions" for a detailed discussion of motions.

Step 22 Judge pronounces the defendant's sentence or continues the case for a

separate sentencing hearing.

Comments: Sentencing may occur later if a presentence report is ordered.

- If felony offense 1/1/2000 or later – Drug assessment is required. Va. Code § 18.2-251.01.
- If convicted of a disqualifying offense – Upon such conviction that court shall revoke the person's permit for a concealed handgun and promptly notify the issuing circuit court. Va. Code § 18.2-308 (J1).

Step 23 Clerk follows sentencing and case closing procedures, respectively.

Comments: *See* "Sentencing and Deferred Adjudication Dispositions" this chapter and chapter "Post Sentencing - Case Closing." **Note:** If the defendant is sentenced immediately following trial, clerk follows sentencing procedures, then post-trial and case closing procedures.

Jury Trial

Prior to trial, certain activities occur regarding the use of juries in trials. Some of these procedures apply to the court's entire jury process; some apply only to the trial of a particular case. Procedures that apply to individual criminal jury trials are discussed herein. Procedures relating to the jury process as a whole are discussed in this manual, "Pre-Trial - Jury Selection, Summoning, and Orientation."

A jury trial is one in which a jury makes finding of fact from the evidence presented to it and applies the law, as stated by the judge, to those facts, and makes a determination as to whether the defendant is guilty or not guilty. Va. Code § 19.2-295. In adult cases, the court makes the determination of sentence unless the defendant has made a request in writing for the jury to decide punishment. In juvenile cases, the jury cannot sentence the defendant. Va. Code § 16.1-272. *See* also Roper v. Simmons, 543 U.S. 551 (2005)

Right to Trial by Jury

The **right** to a trial by jury is guaranteed in the following cases:

- All criminal cases including felonies and misdemeanors, regardless of the possible sentence. Va. Const. art. I, § 8.
- All traffic infraction cases. Va. Code § 19.2-258.1.
- All contempt cases arising from misbehavior in the presence of the court and in which the possible sentence exceeds certain limits. Va. Code §§ 18.2-456 and 18.2-457.

Most trials are conducted by the judge without a jury ("bench trials"); jury trials comprise only a small portion of all trials conducted. For a discussion of bench trials, *See* "Bench Trials."

A defendant who voluntarily pleads guilty to a criminal offense, thereby waiving their right to a jury trial, will be tried by the judge without a jury. However, a defendant who pleads not guilty and waives their right to a trial by jury cannot unilaterally obtain a bench trial. The defendant may have a bench trial only if the court and the Commonwealth's attorney concur in their request to be tried by a judge. Hence, the Commonwealth has the option to try its case before a jury even where the defendant has waived trial by jury. Va. Code § 19.2-257.

In most jury trials, the jury determines whether the defendant is guilty or not guilty, and if it finds the defendant guilty, it also may determine the defendant's punishment during the same deliberation. A separate deliberation, by the same jury, is required if requested by the defendant, in traffic cases (Va. Code § 46.2-943). When a motion for reduction of the jury sentence has been made, the judge may grant a continuance to permit consideration of a presentence report.

Jury trials are generally more time consuming and more complicated than bench trials. Consequently, jury trials generate compounded responsibilities for the court, attorneys, and clerk's office staff. The subsections that follow address the procedures involved in the trial by jury of a particular case. Those aspects of jury trials that are common to all jury trials are discussed in "Pre-Trial - Juror Selection, Summoning, and Orientation."

Eligibility for and Exemption from Jury Service

See Chapter on Creation of the Master Jury List, this manual.

Selection of Trial Jurors

Because some of the potential jurors will be removed for cause and because alternate jurors may be needed, the clerk or sheriff may be requested to summon more potential jurors than will be needed to create the jury panel for each jury trial. In felony trials, twelve jurors are chosen from a panel of twenty; for misdemeanors, seven jurors are chosen from a panel of thirteen. Va. Code § 19.2-262. Upon request, the clerk, sheriff, or other officer responsible for summoning jurors to appear shall make available to all counsel of record a copy of the jury panel to be used for the trial of a particular case at least 3 full business days before the trial. Va. Code § 8.01-353. The copy of the jury panel shall show the name, age, address, occupation and employer of each person on the panel.

In any case in which qualified jurors cannot be conveniently found in the county or city in

which the trial is to be held, the court may cause so many jurors as may be necessary to be summoned from any other city or county by the sheriff from a master jury list furnished by the locality from which the jurors are to be summoned. Va. Code § 8.01-363.

Procedures for Jury Trial

The following procedures should be employed by the clerk in the preparing for a jury trial:

Step 1 Determination is made to have a jury trial.

Comments: The determination is usually made prior to the day of trial. If the request is made on the day of trial, the judge may order a continuance, or if sufficient jurors are available, the case may proceed to *Voir Dire*. *See* this manual, "Pre-Trial - Jury Selection, Summoning, and Orientation - *Voir Dire*."

Step 2 If a person who is indicted jointly with others for a felony is to be tried separately, the clerk will summon a separate panel for the trial of the others. Va. Code § 19.2-262.1.

Step 3 Clerk prepares jury list. **Note:** Jury information may be confidential. Va. Code § 19.2-263.3

The court may, upon motion of either party or its own motion, and for good cause shown, issue an order regulating the disclosure of the personal information of a juror who has been impaneled in a criminal trial to any person, other than to counsel for either party.

"Personal information" means any information collected by the court, clerk, or jury commissioner at any time about a person who is selected to sit on a criminal jury and includes, but is not limited to, a juror's name, age, occupation, home and business addresses, telephone numbers, email addresses, and any other identifying information that would assist another in locating or contacting the juror.

Comments: Upon request, the clerk or sheriff or other officer responsible for notifying jurors shall make available to all counsel of record a copy of the jury panel to be used for the trial of the case at least three full business days before the trial. Va. Code § 8.01-353.

Note: Jury list is a confidential document and should not be disclosed to the public. Virginia Code § 8.01-353.1 requires the person taking jury attendance to ensure the identity of jurors and specifies the acceptable

forms of identification.

Note: The jury panel list, or "strike list", that contains only the names or assigned juror numbers of persons summoned to appear for trial may be made available to the public provided the juror's address, or any other personal identifying information, is not included.

Step 4 The bailiff opens court.

Step 5 Clerk calls the case; court reporter is sworn by clerk, depending on local practice. Va. Code §§ 19.2-165 , 19.2-166; and Rule 1:3.

Comments: All felony proceedings must be recorded. Va. Code § 19.2-165. The code is silent with respect to recording misdemeanor proceedings; consequently, unless a party specifically requests a court reporter, local practice normally dictates....

Step 6 Judge asks counsel if they are ready to proceed and if there are any motions to be heard.

Step 7 Clerk listens to motions and takes notes.

Comments: The clerk's notes will be used to prepare a court order of the proceeding (a trial order). The nature of the motion and the court's ruling on it will be included in the trial order. *See* "Pre-Trial - Motions."

Step 8 Accused is arraigned, if not arraigned previously, and enters a plea.

Comments: *See* "Pre-Trial" chapter regarding arraignment procedures and pleas. In misdemeanor cases, arraignment is not necessary when waived by the accused or counsel or when the accused fails to appear.

Step 9 Clerk follows procedures for *Voir Dire*.

Comments: *See* this manual, "Pre-Trial - Juror Selection, Summoning, and Orientation - *Voir Dire*."

Conduct of Jury Trial

A jury trial begins with the calling of the case and the hearing of motions. The court may, upon its own motion, or must, upon motion of the Commonwealth's attorney or defense counsel, order the exclusion of all witnesses. The defendant, although they may be a witness, has the right to remain. If the defendant is a corporation or association, one

officer or agent may remain in the courtroom. Va. Code § 19.2-265.1

Before the witnesses leave the courtroom, the judge will instruct them not to discuss their testimony with other witnesses, spectators or any other party during the course of the trial.

After the judge has given the jury its preliminary instructions, the attorneys make their opening statements, beginning with the attorney for the Commonwealth. Va. Code § 19.2-265. The Commonwealth presents its case after which defense counsel may move to strike the Commonwealth's evidence. The court will grant the motion if the evidence presented by the Commonwealth is insufficient as a matter of law to sustain a conviction. Rule 3A:15. If the motion is denied, the trial continues, and the defendant presents its evidence. When the defense rests, the Commonwealth has the opportunity to refute any new evidence introduced by the defendant and may present rebuttal evidence.

The defendant may, at any time before the jury renders its verdict, enter a plea of guilty or enter into a plea agreement. *See* this manual, "Pre-Trial - Arraignment, Pleas, and Plea Bargaining." If the court permits the defendant to amend their plea or approves a plea agreement, the jury will be dismissed, and the case will be tried solely before the judge. *See* "Bench Trials."

Counsel will, from time to time, request that the court remove the jury from the courtroom temporarily or request a conference with the judge on the bench or in their chambers. On such occasions, matters of law and evidence are discussed out of the hearing of the jury so that the jury will hear and consider only those matters relevant to reaching its verdict.

Sometimes the jury may hear testimony that the judge subsequently orders stricken from the record and not to be considered by the jury. If the judge, after considering the grounds for an objection to evidence, concludes that the jury should not have heard the testimony, the jury should consider the case as if such testimony had not been given.

With the permission of the judge, jurors may ask questions of the witnesses. Such questions may be asked only for clarification purposes.

A juror may realize after a trial has begun that they know some fact about the case. When this occurs, the juror may bring this matter to the clerk's attention. The clerk should tell the juror not to mention the fact to the other members of the jury and should inform the judge immediately so that the judge can take appropriate action.

At the conclusion of the testimony, the judge and attorneys, outside the presence of the jury, meet to consider instructions to be given the jury relating to the law of the case. Instructions are proposed in writing by each side, and the judge will adopt the instructions

which they believe properly state the law applicable to the case and reject the other proposed instructions. Rule 3A:16. The judge reads the instructions adopted by the court to the jury. The jurors must accept and to follow the law as stated by the judge even though they may have a different idea of what the law is or ought to be.

After the judge instructs the jury, the attorneys make their closing arguments. The purpose of closing arguments is to summarize the evidence and to state, in light of the judge's instructions, the reasons why the jury should find the defendant guilty or not guilty. The Commonwealth's attorney makes their closing argument first, followed by defense counsel. The Commonwealth's attorney may reserve time for a rebuttal argument. If the Commonwealth's attorney waives their right to argue first, they are limited to a rebuttal of the argument made by the defense.

When the case has been submitted to the jury, the jury is taken by the bailiff to the jury room. The jurors may take the written instructions to the jury room for guidance in their deliberations. They may, by leave of court, also take any exhibits admitted into evidence into the jury room.

Before the jurors begin their deliberations, they must select one of their members to serve as foreman. The foreman presides over the deliberations and writes and signs the jury's verdict. The foreman otherwise participates in the deliberations and votes on the issues presented to the jury for decision as a regular juror. The jury may ask the judge to clarify the instructions. Any questions are conveyed in written form to the court by the bailiff.

If the jury finds the accused guilty, the court will determine punishment for the offense unless the defendant requested punishment be decided by the jury.

Note: Beginning 7/1/21, deliberations of the jury shall be confined to a determination of the guilt or innocence of the accused, except that when the ascertainment of punishment by the jury has been requested by the accused. Such request for a jury to ascertain punishment shall be filed as a written pleading with the court at least 30 days prior to trial.

While awaiting the jury's verdict, the clerk may leave the courtroom as directed by the judge. The judge may retire to chambers.

The jury's verdict must be unanimous, in writing and signed by the jury foreman, and returned in open court. Rule 3A:17(a) . Verdict forms are commonly used to record jury verdicts. The court may submit alternate forms of verdicts to the jury. Rule 3A:16(d). The jury must return a separate verdict on each count of an indictment or presentment. Rule 3A:16(d). The judge generally reviews the verdict form before it is read by the foreman to check for errors. The court may not make substantive changes to the verdict; they may only correct errors of form. For example, if the name of a juror is accidentally omitted from the verdict form, the judge may make the correction without invalidating the verdict.

After the jury foremen renders the jury's verdict in open court, the jury may be polled upon request of any party or upon the court's own motion. Rule 3A:17(d). If polled, each juror is asked individually if the verdict read in court reflects their vote. Polling cannot be used to inquire into how or why a juror reached the verdict. If the verdict is found not to be unanimous, the judge may direct the jury to retire for further deliberations or they may declare a mistrial and discharge the jury. In some courts, the judge asks both attorneys on the record if they are satisfied that the verdict is unanimous and has their response entered on the record. In other courts, the judge simply states for the record that they find that the verdict is unanimous.

After the jury has returned its verdict, the court dismisses the jurors after thanking them for their service. If there is a likelihood of media coverage, the court may also advise the jurors with respect to discussing their verdict with the media. Jurors are also encouraged to advise the court of any threats or harassment made in regard to their jury service in the case.

Pursuant to Rule 3A:15(b), the accused may move to set aside a verdict of guilty based upon error committed during the trial or on insufficient evidence. A motion to set aside the verdict must be filed within twenty-one days of entry of a final order after verdict in the trial court. Rule 3A:15(b). If the court grants the foregoing motion upon finding the evidence insufficient as a matter of law to sustain a conviction, it must enter a judgment of acquittal. Rule 3A:15(c). The court must grant a new trial if it sets aside the verdict for any other reason. Rule 3A:15(c).

Sometimes a jury is unable to reach a unanimous verdict. Such a jury is said to be "hung" or "deadlocked." The judge may attempt to break the deadlock by sending the jury back to deliberate further and by giving an "Allen charge." The Allen charge encourages the jurors in the minority to consider the majority position and ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by the majority. This should not be construed as an attempt by the court to coerce a verdict from the jury. If a verdict is still not reached, the court will declare a mistrial and the case may be tried again before another jury. Alternatively, the case may be dismissed.
If the accused is found not guilty, they are permanently discharged from further prosecution for the same offense. An accused that is incarcerated should be released immediately unless there are other charges pending on which they are being held.

In the event the accused is found guilty, the sentencing phase commences. *See* this manual, "Trial/Post Trial - Sentencing."

The clerk's role during the trial of a case by jury may vary from one jurisdiction to the next, depending on local practice. The procedures listed below are representative of those followed in most courts:

Procedures During Trial by Jury

Step 1 Clerk swears witnesses, if directed by the court.

Comments: Depending on the judge's preference, the witnesses are either sworn all at one time or each one is sworn prior to giving their testimony. If sworn all at once, it is helpful to make a note of the relevant attributes of each witness as a memory device.

Step 2 **Procedure Decision:** Does the court order the witnesses excluded from the courtroom? If no, GO TO STEP 6; if yes, GO TO STEP 3.

Comments: Upon its own motion, the court may, and upon motion of the defendant or Commonwealth's attorney, the court must order the witnesses excluded. Va. Code § 19.2-265.1.

Step 3 Clerk notes the motion to exclude witnesses and any other motions and whether granted or denied for inclusion in the trial order.

Comments: Clerk must be sure to note the nature of the motion and on whose motion the witnesses were excluded (the court, Commonwealth's attorney, or defense counsel). *See* this manual, "Pre-Trial -Motions."

Step 4 The bailiff takes the witnesses to the witness room or other place outside the courtroom and escorts them into the courtroom when they are required to testify.

Comments: The judge will instruct the witnesses to remain in the witness room or other location outside the courtroom until called and not to discuss the case or their testimony with each other or any other party during the trial.

Step 5 Jury is given preliminary instructions by the court.

Step 6 Opening statements are made by the Commonwealth's Attorney and defense counsel, respectively. Va. Code § 19.2-265.

Comments: Either side may waive its right to an opening statement.

Step 7 Beginning with the Commonwealth's attorney, each side presents its case by calling witnesses and introducing evidence.

Step 8 The clerk shall receive the evidence at the time of admission of such evidence by the court and shall maintain control over such evidence until the time such evidence is transferred on appeal, or destroyed or returned in accordance with law. Va. Code § 19.2-165

The clerk marks each exhibit introduced with the following information:

- exhibit number (always number exhibits sequentially beginning with A or 1)
- case number
- style of case
- party presenting exhibit
- date exhibit introduced
- type and quantity of substance if exhibit is a drug
- ID or ADM indicator

Comments: The clerk must know the location of the exhibits since the attorneys refer to and display these items frequently. Initially, an exhibit is marked for identification (ID). A party may later move the court to admit the exhibit into evidence. If the motion is granted, the exhibit becomes admitted (ADM). If the court rejects an exhibit, the clerk should note that fact and file as part of the record. It is important to keep exhibits not admitted separate from those admitted since jurors may only take exhibits which have been admitted into evidence into the jury room. An exhibit marked for identification only which is inadvertently given to the jury can be grounds for mistrial.

NEVER LEAVE ANY EXHIBIT UNATTENDED. Extreme care should be taken with dangerous or valuable exhibits. When not needed, these exhibits should be stored securely in the clerk's office.

Drugs and certain weapons may be stored by the local police or sheriff's department prior to trial pursuant to a court order. *See* Va. Code § 19.2-386.25. and this manual, "Pre-Trial – Receipt, Maintenance and Storage of Evidence." When such evidence is introduced, the police officer that delivers the evidence will need a receipt to take the evidence back to the Property Room of the police department. The officer will generally give the clerk a card or document that the clerk should fill out promptly with the name and description of the item, including specific amounts of any drugs.

Step 9 Clerk obtains judge's initials on each documentary exhibit and on the tag or label of each non-documentary exhibit, regardless of whether the exhibit is admitted or rejected.

Comments: This procedure comports with Rule 5:10 so that if the case is appealed, the exhibits need not be relabeled.

Step 10 Clerk records exhibit information on a master list that will become part of the case record.

Comments: *See* form CC-1338, List of Exhibits. Accuracy of the master list is critical since it is the official and usually only list in existence. Additionally, if the case is appealed, the clerk of the appellate court depends upon this list for reference.

Step 11 **Procedure Decision:** Has the court granted a motion to strike, a motion for a mistrial, or a motion for a *nolle prosequi*? If no, GO TO STEP 13, if yes, GO TO STEP 12.

Comments: *See* this manual, "Pre-Trial - Motions" for a detailed discussion of these and other motions.

Step 12 Clerk follows post-trial and case closing procedures, respectively.

Comments: *See* this manual, "Post Trial Procedures" and "Trial/Post Trial" for procedures.

Step 13 Court rules on proposed jury instructions.

Comments: The instructions are the laws to be applied to the facts of the case. The proposed instructions are submitted in writing to the court by each attorney. Rule 3A:16. Counsel must provide the court with the original and give a copy to the other attorney. Clerk must code the instructions submitted as to which side offered each and number each instruction separately. If there are multiple defendants, the label should reflect which defendant offered the instruction.

Each proposed instruction that is not withdrawn is marked "given" or "refused" and initialed by the judge. Rule 5:10(a)(2). Some courts also mark and initial withdrawn instructions. Withdrawn instructions should be clearly marked, returned to counsel, or otherwise disposed of as directed by the court. All other instructions are part of the record and must be retained.

Step 14 Judge reads instructions to the jury.

Step 15 Counsel for each side conducts closing arguments.

Comments: Closing arguments provide each party the opportunity to present its interpretation of the case in a summary form and to state why the jury should find the defendant guilty or not guilty and what sentence should be imposed if the defendant is found guilty. The Commonwealth's attorney argues first and has an opportunity for a rebuttal statement after defense counsel's closing argument. The Commonwealth's attorney may waive their right to argue first.

Step 16 Jurors retire to the jury room for deliberations, taking with them all instructions that have been granted, the verdict forms, and by leave of court, all instructions that have been admitted.

Step 17 Clerk notes any questions submitted by the jury during their deliberations.

Comments: If the jurors have any questions during deliberation, the questions are written down and handed to the bailiff who gives them to the judge. The judge discusses the questions with counsel and a written answer is sent to the jury or the jury is returned to the courtroom to hear an answer. It is important to note the questions submitted since all questions become part of the permanent record and must be placed in the case file when the case is ended.

Step 18 When the jury has reached a verdict, the foreman advises bailiff, and jury returns to courtroom.

Step 19 Clerk receives verdict forms from the foreman.

Step 20 Clerk shows the verdict forms to the judge, if so directed.

Comments: It is common practice for the judge to review the verdict to check for errors before it is read. The verdict must be unanimous, in writing, and signed by the foreman. Rule 3A:17. If the verdict has been improperly executed, the judge will instruct the jury again and send them back to the jury room for further deliberation.

Step 21 If the verdict is in proper form, the clerk or judge asks whether the jury has reached its verdict.

Comments: If the foreman answers in the affirmative, the clerk or judge asks if the jury's verdict is unanimous.

Step 22 Clerk (or foreman) reads the verdict verbatim.

Step 23 Clerk shows the verdict form to counsel, if directed by the court.

Step 24 If directed, the clerk polls the individual jurors by calling each name from the jury list and asking each juror if the verdict read accurately reflects their verdict.

Comments: The purpose of the poll is to ascertain each juror's assent to the verdict. If the verdict is found not to be unanimous, the judge may direct the jurors to retire for further deliberation, or they may discharge the jury and declare a mistrial. Rule 3A:17(d).

Step 25 If the defendant is found guilty, the judge pronounces the sentence or continues the case to a later date for sentencing.

Comments: Upon a finding of guilty, the judge must pronounce sentence or announce their decision to suspend the imposition of sentence. Va. Code § 19.2-298. *See* "Sentencing."

Step 26 The jury is discharged.

Comments: Prior to the jurors leaving, the bailiff or clerk should collect all juror badges.

Step 27 **Procedure Decision:** Is defendant convicted? If yes, GO TO STEP 29; if no, GO TO STEP 28

Step 28 Clerk follows post-court and case closing procedures, respectively. END OF PROCEDURES IF DEFENDANT IS FOUND NOT GUILTY.

Step 29 If Convicted (Found Guilty)

Judge hears and rules on any motions (motion to revoke bond, to set aside verdict, or to refer case for presentence investigation, or arguments on the sentence; judge may grant a continuance for consideration of a presentence report. *See* this manual, "Pre-Trial" for a detailed discussion of motions.

Step 30 Clerk follows sentencing and case closing procedures, respectively.
Note: If the defendant is sentenced immediately following trial, clerk follows sentencing procedures, then post-trial and case closing procedures.

If convicted of a disqualifying offense: Upon such conviction that court shall revoke the person's permit for a concealed handgun and promptly notify the issuing circuit court. Va. Code § 18.2-308 (J1).

Juror Reimbursement

Every person summoned as a juror in a criminal case shall be entitled to $50.00 for each day of attendance. Jurors summoned from another city or county for reason of obtaining an impartial jury may be allowed by the court, in addition to the $50.00, their actual expenses. Va. Code § 17.1-618.

The following procedures are recommended to the clerk when requesting payment for grand jurors and petit jurors:

Procedures For Payment Of Grand Jurors And Petit Jurors

Step 1 **Procedure Decision:** Is payment requested for petit jurors, special grand jurors, multi-jurisdiction grand jurors or regular grand jurors?
If for petit jurors, special grand jurors or multi-jurisdiction grand jurors, GO TO STEP 2; if for regular grand jurors, GO TO STEP 5.

Comments: Petit jurors and special grand jurors are paid by the Commonwealth. Only expenses are paid by the Commonwealth for multi-jurisdiction grand jurors. Regular grand jurors and multi-jurisdiction grand jurors are paid by the county or locality.

Step 2 Clerk prepares DC-43, List of Allowances for Jurors, detailing the petit juror's, special or multi-jurisdiction grand juror's full name and address including the number of days juror was present and the total amount due each juror.

Comments: Compensation and allowances of jurors in felony cases are paid by the Commonwealth. Misdemeanor cases will be paid by the Commonwealth unless the charge is written on a local warrant or summons, in which case the jurors shall be paid by the political subdivision in which the summons is issued. Va. Code § 17.1-619. *See* DC-43, List of Allowances for Jurors.

Step 3 Clerk signs DC-43, List of Allowances for Jurors and obtains judges signature for approval.

Step 4 Clerk retains third copy for record and forwards completed DC-43, List of Allowances for Jurors to the Office of the Treasurer of their local jurisdiction.

Comments: Local Treasurer will issue check to pay jurors, retains fourth copy of the DC-43, List of Allowance for Jurors and forwards to the Supreme Court of Virginia for reimbursement.

If Requesting Payment For Regular Grand Jurors:

Clerk prepares invoice to be sent to local Treasurer listing regular grand juror's complete name, address and total amount due. Court will either send copy of original court order listing grand jurors selected for term or an invoice detailing same information. Local Treasurer will issue check to pay grand jurors.

Note: Clerks should note that because of the Set-Off Debt Collection Act, some jurors funds may be taken and applied to delinquent taxes. Jurors should receive a receipt or a copy of their tax bill with the amount earned as jurors deducted from total bill.

Contempt of Court

Any act which is calculated to embarrass, hinder, or obstruct the court in the administration of justice or which is calculated to lessen its authority or dignity may be punishable as contempt of court. Black's Law Dictionary. Contempt matters often prove to be complex, especially from a case-processing standpoint. First, contempt is not a classified offense: a finding of contempt does not constitute either a felony or misdemeanor. Second, many offenses that constitute contempt may also constitute a specific violation of statutes. The clerk must determine whether the offense is prosecuted as contempt or as a violation of statute. However, it is often unclear upon the commencement of a contempt proceeding how the matter will be tried, or how punishment may be imposed. Finally, contempt proceedings may arise in the course of another proceeding, either criminal or civil, and the offender may be tried immediately or at a later date after notice has been given.

This section will attempt to explain the different types of contempt and to assist the clerk in determining how the contempt matter should be processed.

Classification

Contempt can be divided into two categories:

1. Civil contempt, in which the court may impose punishment to coerce compliance with an order or the court;

2. Criminal contempt, in which punishment is imposed to preserve the power and vindicate the dignity of the court.

Civil contempt consists of the failure to do something which the party has been ordered by the court to do for the benefit or advantage of another party before the court. A civil contempt is not an offense against the dignity of the court but against the party on whose behalf the court order was issued. On a finding of civil contempt, the defendant may be imprisoned for an indefinite time or fined, or both. If the defendant is imprisoned, they will be released upon compliance with the court order; if the defendant has been fined, they can purge the contempt by paying the fine. A civil contemnor is thus able to purge their contempt by doing an act within their power.

Criminal contempt are acts done in disrespect of the court or its process or which obstruct the administration of justice. A fine or definite term of imprisonment or both may be imposed for criminal contempt. The offender cannot purge themselves of the contempt since the fine and imprisonment are intended as punishment, rather than as coercive measures.

Criminal contempt is a crime that is considered to be a Class 1 misdemeanor. *See* Attorney General Opinion to Stump, dated 2/26/88 (1987-88, page 288); A misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor

Civil contempt is not limited to civil cases, nor is criminal contempt limited to criminal proceedings. A court may utilize civil contempt in a criminal proceeding to force compliance with a subpoena *duces tecum* or to compel a witness to testify. Similarly, criminal contempt may arise in a civil proceeding when a party deliberately disobeys a court order.

A contemnor cannot purge themselves of criminal contempt since the punishment is fixed at the time of sentencing. They may, however, purge themselves of civil contempt by complying with the court's order. The purpose of the contemplated punishment rather than the nature of the contemptuous act determines whether a contempt proceeding is criminal or civil.

Adjudication of Contempt

The first determination to be made by the court is whether to proceed with the case as

civil or criminal contempt. Although such determination is not generally made until the conclusion of the case, the judge or moving party may determine in advance to proceed as criminal or civil contempt.

Criminal contempt proceedings are initiated and conducted in the name of the Commonwealth. The offender is presumed innocent and the contemptuous act must be proven beyond a reasonable doubt. In plenary proceedings, the right to counsel, including court-appointed counsel for indigent contemnors, applies if incarceration may be part of the punishment. The offender is entitled to call witnesses and cannot be compelled to testify against themselves. In summary proceedings conducted immediately following the allegedly contemptuous act, where prompt punishment is necessary to restore the dignity and authority of the court, the court may incarcerate a contemnor without providing them an opportunity to obtain counsel. Greene v. Tucker, 375 F. Supp. 892 (E.D. Va. 1974).

Virginia Code § 18.2-457 provides that a circuit court may not impose a fine in excess of $250 or imprisonment for more than ten days when the court acts without a jury and the contemptuous act is misbehavior in the court's presence. There are no statutory limitations on punishment if the court impanels a jury or if the type of contempt is other than that described in Va. Code § 18.2-456 (1). In the foregoing situations the punishment is within the sound discretion of the trial court. A writ of error lies from the Court of Appeals to a judgment for criminal contempt of court. Va. Code § 19.2-318.

Civil contempt proceedings are initiated by the party in whose favor a court order has been entered. Unlike criminal contempt, civil contempt proceedings do not require proof beyond a reasonable doubt. Generally, the moving party shows by a preponderance of the evidence that the order was not obeyed. The burden shifts to the offender to explain or justify their conduct. The offender is entitled to call witnesses and has a limited right to counsel (*See* discussion above). A judgment for civil contempt may be appealed to the Court of Appeals of Virginia. Va. Code § 19.2-318.

Whether an offender is entitled to certain procedural safeguards with respect to a contempt action depends on whether the offense constitutes direct or indirect contempt. Direct contempt is committed in the court's presence or near enough thereto as to interfere with the administration of justice. The use of insulting or disrespectful language in addressing the judge constitutes direct contempt. Because direct contempt is committed in the presence of the court, the court may punish the offender based on its own knowledge of the facts without further notice to the contemnor or a hearing.

Indirect contempt is committed outside the presence of the court, and proof of the act is required. An example of indirect contempt is the failure of a witness to appear after being personally served with a subpoena.

Once the court has classified the offense as direct or indirect contempt, it must then

determine whether the matter will be tried summarily or in a plenary proceeding. If an offense has been classified as indirect contempt, it will always be handled in a plenary proceeding: the offender will be brought before the court by a rule to show cause or other process which provides notice of the charge and the date of the hearing. The offender must be given a reasonable opportunity to prepare for the hearing and to offer evidence in their defense.

Virginia Code § 18.2-456 provides that a court may punish contempt summarily (immediately) only in the following situations:

- misbehavior in the presence of the court, or so near thereto as to interrupt the administration of justice;
- violence or threats of violence to a judge, officer of the court, juror, witness, or party;
- vile or insulting language addressed to or published of a judge;
- misbehavior of an officer of the court in their official character; and
- disobedience or resistance of an officer of the court, juror, witness, or other person to any lawful process, judgment, decree, or order of the court.

Pursuant to foregoing statute, all other instances of contempt, whether direct or indirect, must be handled in a plenary proceeding.

"Summarily" does not refer to the time in which the adjudication of contempt must be made but to the form of the procedure that dispenses with the need for further proof of the contemptuous act and the need for a formal hearing. Higginbotham v. Commonwealth, 206 Va. 291 (1965). Summary proceedings are generally conducted immediately following the allegedly contemptuous act, and the court will impose punishment forthwith. A short delay does not necessarily deprive the court of the power to punish contempt summarily. Higginbotham v. Commonwealth, 206 Va. 291 (1965) (permitting summary punishment 5 days after act). In some cases, direct contempt will be handled in a plenary proceeding even though it could have been handled summarily, thus entitling the defendant to notice and a hearing.

Clerk's Responsibility in Contempt Cases

The clerk's responsibilities with respect to contempt cases will vary, depending on whether the court treats the matter as civil or criminal contempt and whether the contempt matter is tried summarily or as a plenary proceeding.

For purposes of this manual, only criminal contempt cases will be discussed. For procedures relating to the processing of civil contempt cases, refer to the Circuit Court

Clerk's Manual – Civil, "Suits/Action Types."

As stated above, criminal contempt may arise out of a criminal or civil proceeding. The clerk should always treat a criminal contempt matter as a separate case for the following reasons:

- to ensure proper indexing of both the contempt case and the resulting court order, especially in cases where the contemnor is not the defendant in the underlying action or a party in a civil matter;
- to ensure proper assessment and collection of fines, costs and interest;
- for tracking jail time imposed;
- for consistency in the processing of all criminal cases.

In essence, a criminal contempt case should be handled in the same manner as any other criminal case. The major difference between criminal contempt cases and other criminal cases lies in the sequence and timing of case processing activities, and the manner of initiation. In cases of direct contempt that the court tries summarily, the clerk must conduct certain case processing activities (assign a case number, index the case, prepare a case file) after the fact. Furthermore, direct contempt cases are commenced by oral order of the judge; hence, there is no initiating document or process. The final order constitutes both the notice of the charge and the court's finding.

Conversely, contempt cases tried in plenary fashion are handled like any other criminal case. A formal hearing or trial is held and all typical pre-trial, trial, and sentencing activities apply. The initiating process in a contempt hearing is a rule to show cause or a capias. In addition, the right to trial by a jury is more limited in contempt cases.

Many offenses that constitute contempt may also be a specific violation of statute. It is, therefore, critical that the order accurately reflect whether the act was held to be contemptuous or a violation of statute. For example, failure to appear in court may be punishable as contempt under Va. Code § 18.2-456 (5) or as a violation of Va. Code §§ 8.01- 356, 8.01-407, 19.2-128 or 46.2-938. If there is any doubt as to whether the court held that the offense was contemptuous or constituted a violation of statute, the clerk should promptly obtain clarification from the court if the defendant fails to appear.

Whether an offender is found in violation of statute or of being in criminal contempt, the offense may be reportable to the Central Criminal Records Exchange (CCRE) pursuant to Va. Code § 19.2-390 and must be reported to the Office of the Executive Secretary (OES) on the Monthly Criminal Caseload Report. Because a finding of civil contempt does not constitute either a felony or misdemeanor, such finding would not be reported to either CCRE or OES.

The procedures that follow reflect the steps to be taken by the clerk in criminal contempt cases tried in either summary or plenary fashion.

Procedures for Contempt Cases

Step 1 **Procedure Decision:** Is contempt to be handled in a summary or plenary proceeding?
If summary, GO TO STEP 10; if plenary, GO TO STEP 2.

Comments: A summary proceeding is one held immediately following the contemptuous act. It is always initiated by the judge in court without any initiating paperwork.

A plenary proceeding is held at a later date after giving the offender written notice of the charge and the opportunity to prepare for the hearing. A plenary proceeding may be initiated by the judge, the prosecuting attorney, a probation officer or by counsel, or by a party in an existing case. Unless the judge states that a case is to be heard in plenary fashion, the clerk will receive some type of initiating document (a motion, petition, probation violation report). For additional information on probation violations, *See* "Trial/Post Trial - Revocation of Probation" this manual.

Step 2 Clerk receives and acknowledges any initiating case papers.

Comments: *See* this manual, "Case Initiation" regarding acknowledgement of receipt of case papers. If the judge orally calls for a plenary proceeding and there is no initiating paperwork, the clerk should make a note for the file of the date and content of the judge's directive.

Step 3 Clerk ascertains from initial pleadings and the judge whether the offense constitutes contempt or a violation of statute.

Comments: Many offenses that constitute contempt may also constitute a specific violation of statute. If there is any doubt as to whether the case is prosecuted as contempt pursuant to Va. Code § 18.2-246 or as a violation of statute, the clerk should promptly obtain clarification from the judge.

Step 4 Clerk ascertains from initial pleadings and the judge whether the case will be tried as criminal or civil contempt.

Comments: It is good practice to ascertain whether a matter will be handled as civil or criminal contempt for purposes of indexing, docketing, case numbering and setting up the case file.

Generally, the initial pleadings will reflect whether the moving party is *See*king a criminal or civil contempt finding. If this cannot be determined from the pleadings, consult the judge. If the judge cannot make a determination, treat the case as criminal contempt and continue with the following procedures. If the judge advises that the case will be handled as civil contempt, refer to the procedures set out in the Circuit Court Clerk's Manual – Civil, "Suits/Action Types."

Step 5 Clerk assigns case number, indexes the case and prepares the case file. *See* this manual, "Case Initiation" for procedures.

Step 6 Hearing date is scheduled in accordance with local practice.

Step 7 Clerk enters case on court's calendar and on pending criminal docket. *See* "Caseflow Management – Calendaring" and "Caseflow Management - Term Day Activities."

Step 8 Clerk issues rule to show cause or capias, as directed by judge. *See* CC-1355, Rule to Show Cause or CC-1356, Capias to Show Cause. *See* also "Overview" chapter for information relating to the issuance and return of criminal processes.

Step 9 Clerk proceeds with normal criminal case processing activities. END OF PROCEDURES FOR PLENARY PROCEEDING.

If Contempt Is Handled In Summary Proceeding

Step 1 Judge makes finding as to contempt and pronounces sentence.

Step 2 Clerk notes judge's finding AND sentence; clerk notes the judge's rulings on any motions.

Comments: The clerk must take care to ensure that the judge's findings and sentence are clearly and accurately recorded for subsequent inclusion in the court order.

Step 3 Clerk prepares commitment order giving the sheriff the authority to take the offender into custody, if applicable. *See* form DC-352,

Commitment Order.

Step 4 Upon adjournment, clerk gathers all case materials and returns to clerk's office.

Step 5 Clerk assigns case number, prepares case file and indexes case. *See* "Case Initiation" chapter for respective procedures.

Step 6 Clerk computes the offender's fine and court costs and advises offender of same, if not done previously in court; clerk records any fine and costs imposed in Judgment Lien Docket. Va. Code § 8.01-466. Offender will sign a CC-1351, Clerk's Notice of Fines and Costs or CC-1379, Acknowledgment of Suspension or Revocation of Driving License/Order and Notice of Deferred Payment or Installment Payments.

Comments: The amount of the fine and court costs are generally recorded directly on the case file folder or on a printed costs sheet which is maintained in the case file.

See form CC-1350, Fines/Penalties/Fees/Costs Assessment Sheet. *See* also "Post Sentencing - Case Closing," appendix "Schedule of Fees & Costs – Criminal" and appendix "Fee Schedule," this manual.

Step 7 Clerk prepares court order reflecting the charge and the judge's finding and sentence; clerk obtains judge's signature on order.

Step 8 Clerk images order and indexes and enters order in order book; clerk places original order in case file. Recording may be by electronic process. Va. Code § 17.1-240.

Step 9 Clerk transmits certified copy of court order to the offender, and a copy to the sheriff if the offender is sentenced to confinement.

Comments: Although a certified copy of the order is not required to be given the offender, it is suggested that they be furnished same, particularly when there is summary contempt.

Step 10 Clerk securely fastens all case documents in proper sequence in the case file and places file with other ended criminal cases.

Sentencing and Deferred Adjudication Dispositions

Sentencing

Sentencing refers to the post-conviction stage of the criminal process in which the defendant appears before the court for imposition of an appropriate punishment. Sentencing is performed by either the trial judge or a jury as described below. Virginia is only one of a few states that provides for jury sentencing. The defendant's right to have the jury impose sentence exists only in cases where the defendant pleads not guilty and exercises their right to a trial by jury on the issue of guilt. If the defendant pleads guilty, or waives trial by jury and elects a bench trial (one in which a judge rather than a jury decides factual issues), a jury cannot be impaneled solely for the purpose of sentencing. If the defendant is convicted in a bench trial, the judge generally sentences them at a later hearing to permit preparation of a presentence report unless specifically waived by the defendant. Va. Code § 19.2-299. In a jury trial, following determination of sentence by a jury, the judge may let the jury sentence stand or, usually after a post-sentence investigation, may reduce any provision of the jury sentence (often at a subsequent hearing after consideration of a presentence report). If the judge modifies the jury sentence, a written explanation of the modification is filed with the court records. The judge can never impose a sentence more severe than that imposed by the jury. Any sentence or punishment imposed, whether by a judge or jury, must be within limits prescribed by law. Va. Code § 19.2-295. If the jury cannot agree on a punishment the court shall impanel a different jury to ascertain punishment, unless the defendant, the attorney for the Commonwealth, and the court agree, in the manner provided in Va. Code § 19.2-257, that the court shall fix punishment. Va. Code § 19.2-295.1

Virginia Code § 19.2-295.1 provides that in cases of trial by jury, upon a finding that the defendant is guilty of a felony or a Class 1 misdemeanor, or upon a finding in the trial de novo of an appealed misdemeanor conviction that the defendant is guilty of a Class 1 misdemeanor, a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury when ascertainment of punishment by jury has been requested by the accused as provided in subsection A of § 19.2-295. At such proceeding, the Commonwealth may present any victim impact testimony pursuant to § 19.2-295.3 and shall present the defendant's prior criminal history, including prior convictions and the punishments imposed, by certified, attested, or exemplified copies of the final order, including adult convictions and juvenile convictions and adjudications of delinquency. Prior convictions shall include convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories. The Commonwealth shall provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's prior criminal history, including prior convictions and punishments imposed. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had, (iii) each offense of which he was convicted, and (iv) the punishment imposed. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce at sentencing. After the Commonwealth has introduced in its case-in-chief of the sentencing phase such evidence of prior convictions or victim impact testimony, or both, or if no such evidence is introduced, the defendant may introduce relevant, admissible evidence related to punishment. Nothing in this section shall prevent the Commonwealth or the defendant from introducing relevant, admissible evidence in rebuttal.

If the jury cannot agree on a punishment, the court shall fix punishment.

If the sentence imposed pursuant to this section is subsequently set aside or found invalid solely due to an error in the sentencing proceeding, the court shall impanel a different jury to ascertain punishment, unless the defendant, the attorney for the Commonwealth and the court agree, in the manner provided in § 19.2-257, that the court shall fix punishment.

After a defendant has been convicted, whether they were tried by a judge or jury, the judge must either impose sentence or announce their decision to suspend sentence without unreasonable delay. Va. Code § 19.2-298. Alternatively, the judge may, or on motion of the defense attorney must, continue the case and direct a probation officer to investigate the social and criminal background of the defendant and to prepare a written presentence report. Such a report aids the court in imposing an appropriate sentence. Unless the defendant or the attorney for the Commonwealth objects, the court may order that the report contain no more than the defendant's criminal history, any history of substance abuse, any physical or health-related problems as may be pertinent, and any applicable sentencing guideline worksheets. Va. Code § 19.2-299. A Victim Impact

Statement may also be ordered and included as part of the presentence report in certain cases upon motion of the Commonwealth attorney in manslaughter cases and in cases involving death or injury resulting from driving under the influence in violation of Va. Code § 18.2-266 with the consent of the victim. If the court does not order a presentence investigation and report, the attorney for the Commonwealth shall, at the request of the victim, submit a Victim Impact Statement. In any event, a victim shall be advised by the local crime victim and witness assistance program that he may submit in their own words a written Victim Impact Statement prepared by the victim or someone the victim designates in writing. Va. Code § 19.2-299.1.

A copy of both the presentence report and Victim Impact Statement must be furnished to defense counsel at least five days prior to the sentencing hearing. At that hearing, the defense attorney may cross-examine the probation officer concerning the contents of the presentence report and present any additional facts relevant to sentencing. Both the Commonwealth and the defense may introduce psychiatric evidence. Va. Code §§ 19.2-300 and 19.2-301. The court will generally pronounce the sentence at the end of this proceeding.

Note: in certain traffic cases, the defendant may have a bifurcated trial upon request. Va. Code § 46.2-943.

Whether by trial or upon a plea of guilty, upon a finding that the defendant is guilty of a felony, the court shall permit the victim, as defined in § 19.2-11.01, upon motion of the attorney for the Commonwealth, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of § 19.2-299.1. In the case of trial by jury and when the accused has requested the jury to ascertain punishment as provided in subsection A of § 19.2-295, the court shall permit the victim to testify at the sentencing hearing conducted pursuant to § 19.2-295.1. In all other cases of trial by jury, the case of trial by the court, or the case of a guilty plea, the court shall permit the victim to testify before the court prior to the imposition of the sentence by the presiding judge. Va. Code §19.2-295.3. Employers are required to allow an employee who is a victim of a crime to leave work, without compensation, to be present at a criminal proceeding relating to the crime, if it does not create an undue hardship on the employer. Employers are prohibited from dismissing or otherwise discriminating against an employee who is a victim of a crime because they exercise the right to leave work to attend the court proceedings. Va. Code § 40.1-28.7:2

Not all cases are referred for a presentence investigation and report. In misdemeanor and traffic cases, sentence is usually imposed on the day of trial. The defendant in a misdemeanor case does not have a right to a presentence investigation and report, but the court, on its own motion, may direct that such investigation and report be made. When a defendant is referred to the probation officer following a misdemeanor

conviction, the same procedures are followed as in a felony case. If a presentence report is not ordered in a felony case, the court may direct that a Victim Impact Statement be prepared by the Commonwealth's attorney to aid the court in determining the appropriate sentence.

Before pronouncing sentence on a defendant, and after any sentencing motions, the court must ask the defendant if they desire to make a statement or give any reason why judgment should not be pronounced. The defendant's opportunity to speak on their own behalf after being found guilty but before the judge pronounces sentence is called "allocution." The court may also advise the defendant of their right to appeal. The defendant is then taken into custody or released in accordance with the sentence imposed.

The judgment order entered by the court and prepared by the clerk must set forth the plea, the verdict or findings, and the adjudication and sentence, whether or not the case was tried by a jury, and if not, whether the consent of the accused was concurred in by the court and the Commonwealth's attorney. If the accused is found not guilty or is otherwise entitled to be discharged, the judgment shall be entered accordingly. If an accused is tried at one time for multiple offenses, the court may enter one judgment order for all such offenses. Va. Code § 19.2-307.

Virginia courts have several options with respect to a defendant's sentence or punishment. Subject to mandatory sentencing requirements imposed by statute, the trial court may, in its discretion,

- suspend imposition of the sentence;
- suspend execution of the sentence in whole or in part;
- place the accused on probation

Suspension of the imposition or execution of sentence is generally conditioned upon good behavior alone, whereas a defendant on probation is under the supervision of and must report to a probation officer. Suspension of sentence or probation is conditioned on the defendant's good behavior and, in the case of property damage or loss, that the defendant makes at least partial restitution. Va. Code § 19.2-303. The court may also require the defendant to submit to drug or alcohol testing and treatment; to be fingerprinted; to perform community service; to pay fines and costs; or to support those for whom they are legally responsible, or be placed on monitoring by a GPS (Global Positioning System) tracking device, or other similar device. Va. Code §§ 19.2-303 and 19.2-305. In traffic cases, the court may also impose suspension or restriction of driving privileges where permitted by statute. *See* Va. Code § 18.2-271.1. Any special conditions of a suspended sentence or probation may be set forth in the sentencing order.

Every person convicted of a felony on or after July 1, 1990, and every person convicted of a felony offense under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 who was incarcerated on July 1, 1989, shall have a sample of their blood, saliva or tissue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. Prior to or upon sentencing, the clerk, if access to Department of Forensic Science DNA Data Bank Sample Tracking System (DBSATS) is available in the courtroom, will determine if a DNA sample has previously been submitted. To determine if an offense requires a DNA sample, reference the DNA Sample Tracking Login page. If a sample has been previously taken from the person as indicated by the DBSATS, no additional sample shall be taken, and the clerk should make a notation on the file regarding this determination. If access is not available, or no determination can be made, the court shall order the defendant to appear within thirty days to allow a sample to be taken by the sheriff or probation officer. Use CC-1390, Order For DNA or HIV and Hepatitis B, C Viruses Testing and/or for Preparation of Reports to Central Criminal Records Exchange to order defendant to testing, even if defendant is being sent to Department of Corrections. A fee of $53 shall be charged for the withdrawal of this sample. The fee shall be taxed as part of the costs of the criminal case resulting in the felony conviction and one-half of the fee shall be paid into the general fund of the locality where the sample was taken and one-half of the fee shall be paid into the general fund of the state treasury. Va. Code § 19.2-310.2. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the Department of Forensic Science in a DNA data bank and shall be made available only as provided in Va. Code § 19.2-310.5.

Note: As of July 1, 2022, the DNA data bank will no longer be maintained by the Virginia Compensation Board and will be maintained by the Department of Forensic Science. To obtain access to the system and for questions on new procedures, email the Department of Forensic Science at dnadatabank@dfs.virginia.gov.

When preparing the sentencing order, the clerk must determine whether the judge intends sentences for two or more offenses to run concurrently or consecutively. As a general rule, when a defendant is convicted of two or more offenses and sentenced to confinement, the sentences will run consecutively (successively) unless the court expressly orders the sentences to run concurrently (simultaneously). Va. Code § 19.2-308. Virginia Code § 19.2-308 applies to cases involving sentences of confinement in jail or a state prison; it does not apply to suspended sentences or probation. Vick v. Commonwealth, 201 Va. 474 (1960).

The court has authority to suspend or modify a defendant's sentence after the sentence has been imposed and pronounced. In accordance with Rule 1:1, final judgments and orders remain under the control of the trial court and may be modified, vacated, or suspended within twenty-one days after the date of entry of the final judgment or order. The court may, in certain circumstances, modify, vacate, or suspend a sentence after the twenty-one-day period.

Pursuant to Va. Code § 19.2-303 the court may modify a sentence under the following circumstances:

- If a defendant is convicted of either a felony or misdemeanor and sentenced to confinement in a local jail, the court may suspend the unserved portion of the sentence and place the defendant on probation at any time before the sentence is completely served, or otherwise modify the sentence imposed.
- If a person has been sentenced for a felony to the Department of Corrections (the Department), the court that heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may, at any time before the person is transferred to the Department, or within 60 days of such transfer, suspend or otherwise modify the unserved portion of such a sentence. The court may place the person on probation in accordance with the provisions of this section. Va. Code § 19.2-303.

Sentencing alternatives considered by the courts in appropriate cases are described below:

Work/Education/Rehabilitation Release

Va. Code § 53.1-131

Under a work release arrangement, an offender is allowed to leave the institution or facility in which they are confined to pursue employment, educational training, or rehabilitation during the day but is required to return to the facility at night and on weekends. The wages earned by a person participating in a work release program may be applied to the cost of their keep, their travel expenses to and from work, any class or treatment in which they are enrolled, the support of dependents, and any fines, restitution and costs.

Referral to Virginia Alcohol Safety Action Program (VASAP)

Va. Code §§ 18.2-271.1 and 29.1-738.5

Persons convicted of driving a motor vehicle, engine, train, motorboat, or watercraft while under the influence of alcohol or drugs may with leave of court or upon court order enter into an alcohol safety action program. Upon conviction, the court must impose the sentence and license revocation authorized by the Code. If the court determines that the person convicted is eligible for participation in VASAP, the court may provide that

the offender be issued a restricted driver's license or be permitted to operate a boat, conditioned upon entry into and completion of VASAP. Va. Code §§ 18.2-271.1 (E), 29.1-738.5.

Commitment to Mental Health Facility for Drug Abuse

Va. Code § 18.2-254 (A)

A person convicted of certain drug offenses or any other criminal offense, the commission of which was motivated by or closely related to the use of drugs, is eligible for commitment to a mental health facility. When the Commissioner, Department of Behavioral and Developmental Services certifies in writing that the confined person has successfully responded to treatment, the court may order the release of the defendant and suspend the remainder of the term upon such conditions as the court may prescribe.

Commitment to Mental Health Facility for Alcoholism

Va. Code § 18.2-254 (B)

A person convicted of any offense related to their habitual use of alcohol may be committed to a facility for the treatment of alcoholics. Upon presentation of a certified statement from the director of the treatment facility to the effect that the confined person has successfully responded to treatment, the court may release such confined person prior to the termination of the period of time for which such person was confined and may suspend the remainder of the term upon such conditions as the court may prescribe.

Local Community-Based Probation Programs

Va. Code § 9.1-173. seq.

It is the purpose of this article to enable any city, county or combination thereof to develop, establish and maintain local community-based probation programs to provide the judicial system with sentencing alternatives for certain misdemeanants or persons convicted of felonies that are not felony acts of violence, as defined in Va. Code § 19.2-297.1 and sentenced pursuant to Va. Code§ 19.2-303.3, for whom the court imposes a sentence of twelve months or less and who may require less than institutional custody.

The article shall be interpreted and construed so as to:

- Allow individual cities, counties, or combinations thereof greater flexibility and involvement in responding to the problem of crime in their communities;
- Provide more effective protection of society and to promote efficiency and economy in the delivery of correctional services;
- Provide increased opportunities for offenders to make restitution to victims of crimes through financial reimbursement or community service;
- Permit cities, counties or combinations thereof to operate and utilize local community-based probation programs and services specifically designed to meet the rehabilitative needs of selected offenders; and
- Provide appropriate post-sentencing alternatives in localities for certain offenders with the goal of reducing the incidence of repeat offenders.
-

Commitment under the Youthful Offender Act

Va. Code § 19.2-311

The judge, after a finding of guilt, may, in their discretion, in lieu of imposing any other penalty provided by law and, with consent of the person convicted, commit such person for a period of four years, which commitment shall be indeterminate in character. In addition, the court shall impose a period of confinement that shall be suspended. Such persons shall be committed to the Department of Corrections for confinement in a state facility for youthful offenders established pursuant to Va. Code § 53.1-63. Such confinement shall be followed by at least one and one-half years of supervisory parole, conditioned on good behavior.

The provisions of subsection of this section shall be applicable to first convictions in which the person convicted:

- Committed the offense of which convicted before becoming twenty-one years of age;
- Was convicted of a felony offense other than any of the following: murder in the first degree or murder in the second degree or a violation of Va. Code §§ 18.2-61, 18.2-67.1, 18.2-67.2 or subdivision A 1 of Va. Code § 18.2-67.3; and

- Is considered by the judge to be capable of returning to society as a productive citizen following a reasonable amount of rehabilitation.

The Department of Corrections and the Parole Board must determine that the commitment is in the best interest of the Commonwealth and that there are facilities available for confinement of the offender. The court may impose the sentence initially set, reduce the sentence, or commit the offender to the Department of Corrections or to a local detention facility to an indeterminate sentence.

Home Electronic Incarceration Program - Va. Code § 53.1-131.2

A defendant who has been convicted and sentenced to jail may, if the court determines that they are a suitable candidate, be assigned to a home/electronic incarceration program. Such programs are supervised by the sheriff's office, the administrator of a local or regional jail, or a probation and parole office. The court retains authority to remove the offender from the program.

Deferred Adjudication Dispositions

The court may pursue other avenues with respect to a defendant who has not been convicted but has pleaded guilty or who is awaiting disposition of a sentence. These programs do not constitute sentences since they do not follow convictions; however, the procedures for handling deferred adjudication dispositions are similar to those for the sentences described above. Costs are assessed pursuant to statute or as ordered by the court. For a discussion of a defendant's discharge of fines and costs through community service, payment of fines and costs on a deferred installment basis, and driver's license suspension, *See* this manual, "Post Sentencing - Case Closing." Va. Code § 19.2-303.4 prescribes the offenses that are eligible for deferred disposition. Ultimately, costs should be assessed as directed by the court.

Deferral of sentencing for first drug-related offense

Va. Code § 18.2-251

With the consent of the accused, the court may defer sentencing upon entry of a guilty plea and place a first-time drug offender on probation. As a condition of probation, the court may require the defendant to enter an appropriate screening, evaluation, or education program and shall require the defendant to remain drug free during the probation period. The accused must submit to periodic drug tests during the probation period,

and if they violate the conditions of the deferred sentence, the court may enter an adjudication of guilt and impose sentence. If the accused fulfills the terms and conditions of probation, the court shall discharge them and dismiss the proceedings against them.

Deferral in a criminal case

Va. Code § 19.2-298.02

Upon agreement of the defendant and the Commonwealth, after any plea or trial, with or without a determination, finding, or pronouncement of guilt, and notwithstanding the entry of a conviction order, upon consideration of the facts and circumstances of the case, including (i) mitigating factors relating to the defendant or the offense, (ii) the request of the victim, or (iii) any other appropriate factors, defer proceedings, defer entry of a conviction order, if none, or defer entry of a final order, and continue the case for final disposition, on such reasonable terms and conditions as may be agreed upon by the parties and placed on the record, or if there is no agreement, as may be imposed by the court. Final disposition may include (a) conviction of the original charge, (b) conviction of an alternative charge, or (c) dismissal of the proceedings.

By consenting to and receiving a deferral of proceedings or a deferral of entry of a final order of guilt and fulfilling the conditions as specified by the court as provided, the defendant waives their right to appeal such entry of a final order of guilt.

Prior to granting a deferral of proceedings, a deferral of entry of a conviction order, if none, or a deferral of a final order, the court shall notify the defendant that he would be waiving their rights to appeal any final order of guilt if such deferral is granted.

Deferral of sentencing for first property-related offense

Va. Code § 19.2-303.2

When any person who has not previously been convicted of any felony pleads guilty to or enters a plea of not guilty to any crime against property constituting a misdemeanor, the court may, without entering a judgment of guilt and with the consent of the accused, without entering a judgment of guilt, defer further proceedings and place the defendant on probation.

As a condition of probation, the court may require the defendant to make restitution for losses caused. Upon violation of a term or condition of probation, the court may enter an adjudication of guilt and impose sentence. If the accused fulfills the terms and conditions of probation, the court shall discharge them and dismiss the proceedings against them.

Referral to Traffic School/Driver Improvement Clinic

Va. Code §§ 46.2-505 and 17.1-275 A(12)

In lieu of finding the defendant guilty of any traffic offense, the defendant may be ordered to attend a school for the rehabilitation of problem drivers. Upon entry of an order of referral to the program, the court will assess fees and costs against the defendant as if they had been convicted.

Deferral of sentencing for first offense assault and battery against a family or household member

Va. Code § 18.2-57.3

When a person is charged with a violation of Va. Code § 18.2-57.2, the court may defer the proceedings against such person, without a finding of guilt, and place them on probation.

The court shall order the person to be of good behavior for a total period of not less than two years following the deferral of proceedings, including the period of supervised probation.

The court shall, unless done at arrest, order the person to report to the original arresting law-enforcement agency to submit to fingerprinting.

Deferral of sentencing for persons with autism or intellectual disabilities

Va. Code § 19.2-303.6

In any criminal case an act of violence as defined in § 19.2-297.1, or any crime for which a deferred disposition is provided for by statute, upon a plea of guilty, or after a plea of not guilty, and the facts found by the court would justify a finding of guilt, the court may, if the defendant has been diagnosed by a psychiatrist or clinical psychologist with (i) an autism spectrum disorder or (ii) an intellectual disability as defined in § 37.2-100 and the court finds by clear and convincing evidence that the criminal

conduct was caused by or had a direct and substantial relationship to the person's disorder or disability, may defer proceedings and place the accused on probation subject to terms and conditions set by the court. Upon violation of a term or condition of probation, the court may enter an adjudication of guilt and impose sentence. If the accused fulfills the terms and conditions of probation, the court shall discharge them and dismiss the proceedings against them.

Deferred disposition shall be available to the defendant without limit even though he has previously been convicted of a criminal offense, been adjudicated delinquent as a juvenile, or had proceedings deferred and dismissed under this section or under any other provision of law, unless, after having considered the position of the attorney for the Commonwealth, the views of the victims, and any evidence offered by the defendant, the court finds that deferred disposition is inconsistent with the interests of justice.

The court shall, unless done at arrest, order the person to report to the original arresting law-enforcement agency to submit to fingerprinting.

Procedures for Sentencing/Deferred Disposition

Sentencing and deferred adjudicative dispositions are critical and often complex phases of a criminal trial. The clerk's office personnel should be knowledgeable of the sentencing and deferred adjudicative disposition process. While some procedures may vary among jurisdictions, depending on the preference of the judge and local practice, the procedures listed below are recommended:

Step 1 **Procedure Decision:** Is sentence imposed by the judge on the same day as adjudication? If yes, GO TO STEP 21; if no, GO TO STEP 2.

Comments: For purposes of these procedures, adjudication refers to the date of the finding of guilty or deferred adjudication. The term "sentencing" hereinafter includes deferred adjudication unless otherwise stated.

Step 2 Date is scheduled for sentencing hearing.

Comments: Clerk should try to schedule the sentencing hearing for a date certain immediately following conviction and prior to the parties' departure from the courtroom with notice to such parties to avoid docket control and delivery of notice problems.

Step 3 Clerk records date of sentencing hearing on:

- court's calendar
- criminal docket
- case summary sheet

Step 4 If a presentence investigation report, including Victim Impact Statement or a psychosexual evaluation pursuant to Va. Code § 19.2-301, is ordered, clerk prepares and sends notice of referral as directed.

Comments: *See* form CC-1375, Notice of Referral to Probation Officer. In many jurisdictions, defense counsel will take the referral notice and the defendant to the probation office if the defendant is allowed to remain on bail until sentencing. Otherwise, the notice of referral should be mailed to the probation office if an officer is not present to accept it.

Step 5 If defendant is remanded to jail, clerk notes same on case summary sheet and prepares commitment order which is given to sheriff.

Comments: *See* form DC-352, Commitment Order. The commitment order gives authority to the sheriff to take the defendant into custody.

Step 6 If defendant is allowed to remain out on bail until the sentencing hearing, clerk notes same on case summary sheet; unless bail is continued unchanged, clerk admits defendant to bail, as directed by the judge.

Comments: *See* Form DC-355, Order for Continued Custody. If judge releases the defendant on bail, *See* "Pre-Trial – Bond."

Step 7 Upon adjournment of court, clerk gathers all case materials and returns to clerk's office; clerk takes appropriate steps to ensure the safety of the evidence.

Comments: *See* this manual, "Pre-Trial – Receipt, Maintenance and Storage of Evidence."

Step 8 Clerk prepares conviction (trial) order, incorporating any rulings on motions and date of sentencing hearing.

Comments: For a discussion of computation of fines, costs, and restitution, *See* this manual, "Post Sentencing - Case Closing."

Step 9 Clerk obtains judge's signature on order; clerk processes/images order and enters and indexes order in order book; clerk places original order in case file.

Comments: Counsel must endorse the order unless the judge otherwise directs. Rule 1:13.

Step 10 Upon request of, and receipt of all necessary information from, the attorney for the Commonwealth or counsel for the defendant, the court shall issue all necessary transportation orders for the transport of any defendant incarcerated in a state or local correctional facility to the court. If authorized by the court and upon receipt of all necessary information from the attorney for the Commonwealth or counsel for the defendant, the clerk or deputy clerk may issue these orders on behalf of the court. *See* form DC-354, Custodial Transportation Order.

Step 11 Clerk issues any witness subpoenas or subpoenas *duces tecum*. *See* this manual, "Overview" regarding issuance of witness subpoenas; and of subpoenas *duces tecum*.

Step 12 Clerk arranges for interpreter at sentencing hearing, if applicable. *See* "Pre-Trial" chapter regarding use of interpreters.

Step 13 Clerk arranges to have court reporter present at sentencing hearing, if directed by the judge.

Step 14 Clerk receives presentence report, and any Victim Impact Statement, psychosexual evaluation, or psychiatric evaluation report; clerk notes receipt of reports on case summary sheet and provides judge with reports.

Comments: The probation officer (not the clerk) is required to furnish defense counsel with a copy of the presentence report at least five days before the sentencing hearing. Va. Code § 19.2-299. The original is filed with the court.

The report is to be kept confidential by each recipient (Va. Code §§ 19.2-299, 19.2-301), and the report is not sealed until entry of the final order.

If the presentence report has been delayed, clerk may have to reschedule procedures set out in STEPS 10-13.

Step 15 Clerk ensures that all pertinent court documents and case materials are taken to the courtroom before the sentencing hearing; clerk verifies that defendant, if in custody, will be available for sentencing hearing.

Step 16 Sentencing hearing commences with bailiff opening court.

Step 17 Clerk swears probation officer and any other witnesses, as directed by the court.

Step 18 Clerk maintains custody of and is responsible for all exhibits introduced; clerk marks each exhibit introduced with the following information:

- exhibit number or letter (always number or letter exhibits sequentially beginning with A or 1)
- case number
- style of case
- party presenting exhibit - date exhibit introduced
- type and quantity of substance if exhibit is a drug
- "ID" or "ADM" indicator

Comments: While generally few exhibits are introduced during a sentencing hearing, the clerk must know the location of the exhibits since the attorneys refer to and display the exhibits frequently. Exhibits should be marked before the sentencing hearing if possible. Initially, an exhibit is marked for identification only (ID). A party may move the court to admit the exhibit into evidence. If the motion is granted, the exhibit becomes admitted (ADM).

Step 19 Clerk obtains judge's initials on the tag or label of each exhibit, regardless of whether the exhibit is admitted or rejected.

Comments: This procedure comports with Rule 5:10 so that if the case is appealed, the exhibits need not be relabeled.

Step 20 Clerk records information regarding exhibits on a master list that becomes part of the case record.

Comments: *See* form CC-1338, List of Exhibits. Accuracy of the master exhibit list is critical since it is the official and usually only list in existence. Additionally, if the case is appealed, the clerk of the

appellate court depends on the list for reference.

Step 21 Judge pronounces the defendant's sentence.

Step 22 Clerk records sentence, including any special conditions of a suspended sentence or probation or referral for evaluation for special programs; clerk also records rulings on any motions.

Comments: The clerk must take care to ensure that the sentence is clearly and accurately recorded for subsequent inclusion in the court order and for reporting the disposition to other agencies. The sentence may be recorded on the case summary sheet or directly on the case file folder.

Step 23 Clerk prepares sentencing order incorporating referral to special sentencing program and, if applicable, referral to probation officer. *See* Comments at STEP 22.

Step 24 Clerk obtains judge's signature on order; processes/images order; enters and indexes in order book; clerk places original in case file.

Step 25 **Procedure Decision:** Is defendant remanded to jail?
If no, GO TO STEP 33; if yes, GO TO STEP 26.

Step 26 If defendant is remanded to jail, clerk notes same on case summary sheet and prepares commitment order which is given to sheriff.

Comments: *See* form DC-352, Commitment Order and DC-355, Order For Continued Custody. The commitment order gives the sheriff the authority to take the defendant into custody.

Step 27 If supervised probation has been ordered, clerk prepares and gives notice of referral to probation officer.

Comments: *See* form CC-1375, Notice of Referral to Probation Officer. A court may sentence a defendant to both confinement and supervised probation. Generally, the court will order the probation period to commence upon the defendant's release from confinement. Such a sentence is referred to as a "split sentence." In such cases, the probation officer may need to meet with the defendant in the local jail as soon after sentencing as possible and before transfer to another facility so that the defendant can review and sign the conditions of probation. The probation office should be promptly notified of the

probation imposed pursuant to the notice of referral. *See* STEP 38.

Step 28 **Procedure Decision:** Is defendant referred for evaluation for special sentencing programs?
If no, GO TO STEP 29; if yes, GO TO STEP 34.

Comments: Special sentencing programs include:

- Youthful Offender Act
- Boot Camp Incarceration

Step 29 Clerk collects and judge signs court-appointed attorney's list of allowances and payment vouchers to authorize payment.

Comments: *See* this manual, "Pre-Trial - Right To Counsel" regarding payment of court-appointed attorney's fees and expenses. Court-appointed counsel should be required to present DC-40, List of Allowances at the close of the sentencing proceeding. This allows the clerk to quickly compute and advise the defendant of court costs as well as expedite reimbursement to the attorney.

Step 30 Clerk computes the defendant's court costs as ordered by the court. Defendant is advised of costs, fines, and restitution obligations by the court or clerk. Costs are assessed pursuant to statute or as ordered by the court. Va. Code § 19.2-303.4 prescribes the offenses that are eligible for deferred disposition. Ultimately, costs should be assessed as directed by the court.

At the time of sentencing, the court shall enter the amount of restitution to be repaid by the defendant, the date by which all restitution is to be paid, and the terms and conditions of such repayment. If the attorney for the Commonwealth participated in the prosecution of the defendant, the attorney for the Commonwealth or their designee shall complete, to the extent possible, all portions of the form excluding the amount of restitution to be repaid by the defendant and the terms and conditions of such repayment. If the attorney for the Commonwealth did not participate in the prosecution of the defendant, the court or the clerk shall complete the form. A copy of the form, excluding contact information for the victim, shall be provided to the defendant at sentencing. A copy of the form shall be provided to the attorney for the Commonwealth and to the victim, their agent, or their estate upon request and free of charge. *See* form DC-317, Order For Restitution and DC-317-S1 and DC-317-S2, Supplement Sheets.

Step 31 Upon adjournment of court, clerk gathers all case materials and returns to clerk's office; clerk takes appropriate steps to ensure the safety of evidence. *See* this manual, "Pre-Trial – Receipt, Maintenance And Storage Of Evidence."

Step 32 Clerk proceeds to case closing procedures. *See* this manual, "Post Sentencing - Case Closing." END OF SENTENCING PROCEDURES IF NO POST-SENTENCE HEARING IS ORDERED.

Step 33 If defendant is released from custody, clerk prepares order of release and gives to sheriff.

Comments: This order gives the sheriff authority to release the defendant from custody. Such an order is prepared only if the defendant were in custody prior to being sentenced.

Procedures for Post-Sentence Hearing on Special Sentencing Programs

Step 1 Judge schedules date of hearing to rule on placement into special sentencing program.

Step 2 Clerk notes hearing date on

- case summary sheet
- docket
- court calendar

Step 3 Clerk prepares commitment or release order, whichever is applicable. *See* procedures in STEP 25.

Step 4 Clerk notifies local special sentencing program of referral.

Comments: Referrals to the Department of Corrections may be made by copy of court order or other notification. The court may permit a person confined in jail pending disposition of or serving a sentence imposed for commission of a felony or misdemeanor to work on state, city or county property on a voluntary basis with the consent of the state, city or county. Persons performing such work receive credit on their sentences for the work done, whether such sentences are imposed before or after the work is done, as the court may prescribe in its order. Va. Code § 53.1-128.

Step 5 Clerk notifies probation officer of referral. *See* form CC-1375, Notice

of Referral to Probation Officer.

Step 6 Upon adjournment, clerk gathers all case materials and returns to clerk's office; clerk takes appropriate steps to ensure safety of the evidence. *See* this manual, "Pre-Trial – Receipt, Maintenance And Storage Of Evidence."

Step 7 Clerk receives report from special sentencing program; clerk notes receipt of report on case summary sheet and provides judge with report.

Step 8 Clerk prepares for hearing on placement in special sentencing program.

Comments: Follow STEPS 10-20 regarding procedures for the original sentencing hearing. The hearing for referral to the special sentencing program is, in effect, a second sentencing hearing.

Step 9 At the special sentencing program hearing, clerk records judge's ruling on program placement, including any special conditions of a suspended sentence or probation.

Step 10 Upon adjournment of court, clerk gathers all case materials and returns to clerk's office.

Step 11 Clerk proceeds to case closing procedures. *See* this manual, "Post Sentencing – Case Closing."

Revocation of Probation

The court may, for sufficient cause occurring at any time during the probation period or, if none, within the period of suspension fixed by the court or, if neither, within the maximum period for which the defendant might originally have been sentenced, revoke the suspension of sentence and any probation. Va. Code § 19.2-306.

A proceeding to revoke probation is not a prosecution for a criminal offense and the right to jury trial does not apply.

Proof beyond a reasonable doubt is not required in probation revocation proceedings. However, fundamental fairness requires a judicial hearing of a summary nature before a court can revoke a suspended sentence and deprive a probationer of their liberty.
The United States Supreme Court has held that due process requires not only a hearing but written notice of the claimed violations of probation; disclosure of inculpatory evidence; an

opportunity to be heard in person; an opportunity to present witnesses and documentary evidence and to confront and cross-examine witnesses; and to receive a written statement by the court of the reasons for revoking probation. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

A probationer has the right to counsel at a revocation hearing. Va. Code § 19.2-157. For a discussion of appointment or retention of counsel and related procedures, *See* "Pre-Trial - Right To Counsel."

If the defendant is alleged to have violated any of the terms of probation or any of the conditions set forth by the court for entering a program such as VASAP (*See* "Sentencing and Deferred Adjudication Dispositions" in this chapter), the court may issue a rule to show cause or capias. Alternatively, for probation violations, the revocation proceeding may commence with the filing by a probation officer of a Form PB-15 which serves as an arrest document.

If the defendant has violated a term of probation, the court may cause the defendant to be arrested and brought before the court for a hearing where the court may revoke the suspension of sentence and probation, or a portion thereof. If the imposition of sentence has been suspended, the court may pronounce the sentence originally imposed. Alternatively, if the execution of sentence has been suspended, the original sentence shall be in force. Va. Code § 19.2-306. Also see Va. Code § 19.2-306.1 for limitations on sentence upon revocation of suspension of sentence.

The Court would assess one set (regardless of number of cases/charges in original action) of costs, plus any additional fees enumerated in Va. Code § 17.1-275.5), other than a revocation of failure to pay court costs, when suspension of sentence and probation is partially or fully revoked upon hearing held pursuant to Va. Code § 19.2-306.

Note: Attorney fee will be paid for ONE case only. It does not matter if the defendant had more than one original charge.

If the court finds that the defendant has violated a condition of a special sentencing program, the court shall dispose of the case as if no program had been entered and the defendant is sentenced accordingly. *See* Va. Code §§ 18.2-271.1 and 29.1-738.5.

In any case in which the court orders the defendant to pay restitution and places the defendant on probation that includes a period of active supervision, the probation agency supervising the defendant shall notify the court and the attorney for the Commonwealth of the amount of any restitution that remains unsatisfied and the last known address for the defendant (i) 60 days prior to the defendant's release from supervision pursuant to the terms of the sentencing order or (ii) if the agency requests that the defendant be released from supervision, at the time the agency submits its request to the court. If any amount of restitution remains unsatisfied, the court shall conduct a hearing prior to the defendant's release from supervision. The court shall also docket the restitution order as a civil judgment pursuant to Va. Code § 19.2-305.2 unless

such order has previously been docketed.

In any case in which the court orders the defendant to pay restitution and places the defendant on probation that does not include a period of active supervision, the court shall include in the order a date, not to exceed two years from the date of the entry of the order or, if the court has sentenced the defendant to an active term of incarceration, from the date of the defendant's release from incarceration, on which the defendant's compliance with the restitution order shall be reviewed and the court shall schedule a hearing for such date. The court shall also docket the restitution order as a civil judgment pursuant to Va. Code § 19.2-305.2 unless such order has previously been docketed.

If any amount of restitution remains unsatisfied at the time of the hearing the court shall continue to schedule hearings to review the defendant's compliance with the restitution order until the amount of restitution has been satisfied. The court may, on its own motion, cancel any such hearing if the amount of restitution has been satisfied. The court shall review compliance with a restitution order by a defendant (a) until the amount of restitution has been satisfied or (b) if any amount of restitution remains unsatisfied, for the longer of 10 years from the date of the hearings, or the period of probation ordered by the court.

The clerk should follow the steps below in probation revocation cases:

Step 1 **Procedure Decision:** Is case initiated by a written complaint or PB-15? If by written complaint, GO TO STEP 2; if by PB-15, GO TO STEP 5.

Step 2 Clerk receives written complaint regarding a probation violation and clerk brings same to judge's attention.

Note: If the court receives notice of a violation of postrelease supervision from the Department of Corrections, the court will issue a capias for the arrest and return of the defendant to the correctional facility the defendant was released, or to any other correctional facility that may be designated by the circuit court. In any case in which the defendant serving a period of postrelease supervision is charged with the violation of any law, the violation of which caused the issuance of such warrant, upon request of the defendant or their attorney, the circuit court of the sentencing jurisdiction shall as soon as practicable consider all the circumstances surrounding the allegations of such violation, including the probability of conviction thereof, and may, after such consideration, release the felon, pending adjudication of the violation charged. Va. Code § 53.1-161. CC-1306, CAPIAS AND RECOMMITMENT ORDER FOR POSTRELEASE SUPERVISION VIOLATION.

Note: The CC-1306 shall be signed by the court, and a copy of this capias shall be promptly provided to the attorney for the Commonwealth, the

Department of Corrections, and the Parole Board (PRSemail@vpb.virginia.gov).

Step 3 **PROCEDURE DECISION:** Does judge issue order for capias for probation violation? If no, END OF PROCEDURES; if yes, GO TO STEP 4.

Step 4 Clerk issues rule to show cause or capias. Many courts use Va. Code § 19.2-306 as code section for violation of probation.

Comments: It is recommended that the court open up only one case, using the base case number and –01 prefix if this is the first-time case is being brought back before the Court. COMM BY: REIN (Use -02, -03, etc., on subsequent revocations.)

Note: Update the original -00 case with Hearing Type: PREP, Hearing Result: C with the date the show case was issued. Next hearing Type: RR (Review Restitution) is the date of the revocation. At revocation and depending on local procedure there should be a next hearing date to determine compliance with any restitution order, and the hearing result for the RR will be C (Continued). The next date should be entered with the Hearing Type of RR.

When defendant has complied with the restitution order, or at any time the court makes the determination to terminate the review of restitution hearings, the hearing result will then be RRX (Review Restitution Terminated).

Step 5 Probation department issues a PB-15; defendant is forthwith arrested. A capias may be requested in lieu of a PB-15.

Comments: If the defendant is arrested on a PB-15, there are no statutory provisions for admitting the defendant to bail between the time of arrest and the first hearing. Va. Code § 53.1-145 (4).

Step 6 Clerk issues witness subpoenas and subpoenas *duces tecum*, if directed by the judge.

Comments: Defendant has a right to counsel and may be appointed by the judge.

Step 7 Upon request of, and receipt of all necessary information from, the attorney for the Commonwealth or counsel for the defendant, the court shall issue all necessary transportation orders for the transport of any defendant

incarcerated in a state or local correctional facility to the court. If authorized by the court and upon receipt of all necessary information from the attorney for the Commonwealth or counsel for the defendant, the clerk or deputy clerk may issue these orders on behalf of the court, clerk processes/ images order; provides sheriff with a certified copy of the order.

Comments: If the accused is in the local jail. *See* form DC-355, Continuance Order. *See* this manual, "Overview – Prosecutorial Documents, Arrest Documents And Court Orders" regarding court order processing.

Step 8 Clerk arranges for recording of testimony at hearing. If a court reporter is utilized, administer oath to court reporter prior to hearing.

Step 9 Clerk swears court reporter, if directed by the judge.

Step 10 Judge conducts probation revocation hearing.

Step 11 **Procedure Decision:** Does judge find a probation violation?
If yes, GO TO STEP 12; if no, Clerk follows case closing procedures.

Note: If time is revoked on more than one case, the clerk should open, sentence and close each case that received a revocation.

Comments: Only one FAS account is setup for revocation costs, regardless of number of cases revoked. *See* chapter on "Post Sentencing" this chapter.

Step 12 Clerk prepares order and obtains judge's signature; clerk prepares jail card, and bail documents, if bail permitted on appeal, and assesses appropriate fees and costs.

Comments: *See* "Sentencing" this chapter. A copy of the Final Order, original sentencing revocation report, any probation violation guideline worksheets and any departure explanation should be sent to the Virginia Crime Sentencing Commission within 30 days of hearing.

Post-Trial Activities

Upon adjournment, the clerk must execute several administrative tasks immediately upon the conclusion of a bench or jury trial. The clerk performs the following duties For Post Trial Activities:

Step 1 Clerk gathers all documents relating to the case and secures in case file; returns file to office.

Step 2 Clerk places any drugs, weapons or large exhibits which cannot be kept in the case file in the evidence vault; checks to ensure that the case name and number are properly attached to or marked on the exhibits.

The clerk is to maintain control over such evidence until the time such evidence is transferred on appeal, or destroyed or returned in accordance with law.

Comments: Upon request of the clerk, a judge may order a law-enforcement agency to maintain custody of controlled substances used in a criminal prosecution. Va. Code § 19.2-286.25

Step 3 If ordered by the court, clerk prepares and issues process against the defendant, and any witnesses or jurors for failure to appear or for contempt.

Comments: *See* this chapter regarding issuance of process and contempt of court. If the defendant was on recognizance and bail was revoked for failure to appear, or if the court orders commencement of bond forfeiture proceedings.

Step 4 **Procedure Decision:** Was the case tried by a jury? If no, GO TO STEP 8; if yes; GO TO STEP 5.

Step 5 Clerk records jury verdict and sentence on jury list with the dates served by each of the jurors served and notes foreman's name on the list.

Step 6 Clerk copies jury list and places in clerk's jury box; clerk places original list in case file.

Comments: Many courts utilize the jury lists placed in the jury box to account for every case that goes to a jury and to compile monthly statistics.

Step 7 Clerk sends certified copy of the jury list to the locality for payment of the jurors, unless done so at the end of the term of court. *See* "Payment of Jurors" this chapter.

Step 8 Clerk notes results of trial and any subsequent hearings scheduled in the case on the following:

- case summary sheet
- criminal docket

- court calendar

Step 9 **Procedure Decision:** Was defendant convicted and sentenced on the same day? If no: GO TO STEP 12; If yes: GO TO STEP 10

Step 10 Clerk proceeds to sentencing. END OF PROCEDURES IF DEFENDANT IS CONVICTED AND SENTENCED ON THE DAY OF TRIAL. *See* "Sentencing" this chapter.

If Sentencing Occurs Other Than On The Day Of Trial

Step 1 Clerk gathers all case materials upon adjournment and returns to clerk's office.

Step 2 Clerk prepares trial order; obtains judge's signature; processes/images order; enters and indexes in order book and places original in case file.

Comments: *See* "Overview" in this manual regarding court order processing. The order need not be prepared on the day of trial but should be prepared as soon thereafter as possible.

Step 3 If applicable, clerk prepares and sends referral notice to probation department requesting a presentence investigation (bench trial) or post-sentence investigation (jury trial), or a referral for a psychosexual evaluation, makes a copy of the referral notice and notes the date of issuance on the case summary sheet.

Comments: *See* also "Sentencing" this chapter and "Post Sentencing - Case Closing," respectively. If the defendant was convicted of numerous offenses, the clerk should consider preparing a separate referral notice or copy of court order for each charge. A copy of each indictment or other charging document should be attached to each notice.

In many courts, it is common practice to give the referral notice or certified copy of court order to the defendant (if on bail), with instructions for them to report immediately to the probation office. This may not be feasible when the probation office is located outside the court complex or if defendant's counsel does not be accompany the defendant to the office.

Step 4 Clerk records for future reference the date on which the presentence or post-sentence report is to be filed with the clerk's office; contacts the probation office if the report is not submitted by the due date.

Comments: Some type of tickler system should be implemented to keep

track of outstanding reports.

The investigating probation officer is required to furnish a copy of the presentence report at least five days in advance of the sentencing hearing to the court, Commonwealth's attorney, and defense counsel. Va. Code § 19.2-299. In many jurisdictions, the probation officer delivers all copies of the report to the clerk's office to be picked up by defense counsel and the Commonwealth's attorney. If such a practice is adopted, the probation officer, not the clerk, should be responsible for notifying counsel that the report has been filed. The probation officer, not the clerk, is responsible for distributing the report.

Step 5 Clerk places case file with other pending cases until further action.

Failure To Surrender

When any person willfully and knowingly fails to surrender or submit to the custody of a sheriff as ordered by a court, any law enforcement officer, with or without a warrant, may arrest such person anywhere in the Commonwealth. If the arrest is made in the county or city in which the person was ordered to surrender, or in an adjoining county or city, the officer may forthwith return the accused before the proper court. If the arrest is made beyond the foregoing limits, the officer shall proceed according to the provisions of Va. Code § 19.2-76, and if such arrest is made without a warrant, the officer shall procure a warrant from the magistrate serving the county or city wherein the arrest was made, charging the accused with contempt of court.

Motions

Post-Conviction Motions

Motion to Modify Sentence

After conviction, whether with or without a jury, the court or either party, may move to suspend imposition of sentence or suspend the execution of sentence in whole or part and may place the accused on probation or require the accused to make restitution to the aggrieved party. Va. Code § 19.2-303.

After conviction, and upon motion of the attorney for the Commonwealth, the sentencing court may reduce the defendant's sentence if the defendant, provided substantial assistance in investigating or prosecuting another person for various offenses. The motion may also be made one year after entry of the final judgment order under certain circumstances. Va. Code § 19.2-303.01

Procedures For Processing Motions

The duties of the clerk with respect to processing motions will vary depending on the type of motion, when it is made, and whether it is presented orally or in writing. The following procedures are intended as a general guide for processing motions. Detailed information on particular motions may be obtained by referring to pertinent sections of this Manual.

Step 1 **Procedure Decision:** Is motion presented orally or in writing?
If oral motion, GO TO STEP 5; if written motion, GO TO STEP 2.

Step 2 Clerk records on written motion the date and time received; includes signature of receiving clerk or deputy clerk.

Step 3 Clerk notes on case summary sheet in case file the date the motion was filed and the nature of the motion.

Step 4 Clerk secures original motion in case file; if appropriate, forwards copy of motion to judge for review.

Comments: Rule 3A:9(c) requires that a copy of the motion be mailed, at the time of filing, to the judge. Frequently, the attorney making the motion will present a copy to the clerk with the original instead of mailing the copy to the judge.

For internal tracking purposes, the clerk should keep a log of any documents or files checked out to the judge, Commonwealth's attorney, or other party. The log should reflect the time and date of return. *See* this manual, "Caseflow Management" regarding document and case file tracking.

Step 5 Unless motion is heard when filed or made before the judge, clerk schedules a date for a hearing on the motion, if appropriate. Clerk enters hearing date and time and type of motion on the following:

- court calendar
- docket
- case summary sheet

See this manual, "Caseflow Management" regarding calendaring procedures and dockets.

Step 6 Motion is heard orally by the judge.

Comments: The clerk should have the case file in the courtroom or judge's chambers and should take appropriate notes regarding disposition of the motion. *See* this manual, "Pre-Trial" regarding pre-court activities.

Step 7 During hearing, clerk notes for the record the nature of the motion, the movant, and the judge's ruling on the motion.

Comments: The motion presented and the judge's ruling on the motion should be recorded on the case summary sheet that can later be used as a guide to preparing the court order. Some courts use pre-printed "clerk's sheets" to record courtroom procedures.

Step 8 Clerk prepares court order of proceeding if directed by judge.

Step 9 Clerk obtains judge's signature on final draft of order, if counsel has not already done so; images/processes order and indexes and enters in order book; places original in case file.

Comments: In many jurisdictions, the judge will ask the moving party to reduce its motion to writing if presented orally and direct the prevailing party to prepare the order memorializing the court's disposition. (The judge may modify orders drafted by others before they become final orders.) Such a practice relieves the clerk's office of the task of preparing the orders.

To ensure timely preparation, criminal trial orders should be prepared by the clerk's office or the Judicial Assistant, depending on local practice, unless otherwise directed by the judge.

Step 10 **Procedure Decision:** Did motion result in dismissal of case?
If no, GO TO STEP 15; if yes, GO TO STEP 11

Step 11 Clerk arranges for defendant's release from custody unless being held on other charges; prepares order of release; obtains judge's signature on order and provides copy to sheriff or jailer for compliance. *See* form DC-353, Release Order. *See* this manual, "Pre-Trial – Bond."

Step 12 Clerk refunds to payor any bail bond monies posted as security for defendant's appearance unless allegations of breach of bail bond are pending or have been decided against the accused or payor. *See* this manual, "Pre-Trial – Bond."

Step 13 Clerk removes from the following any scheduled hearings which are no longer necessary:

- calendar
- docket

- case summary sheet

Step 14 Clerk places all papers associated with case in case file; places file with other ended criminal case files. END OF PROCEDURES WHEN CASE IS DISMISSED ON MOTION.

If Case Was Not Dismissed

Clerk places case file with other pending criminal case files until further action.

Motion for Retention of Evidence

Motion and Order to Retain Evidence - Felony Convictions

Upon motion of a person convicted of a felony but not sentenced to death (prior to July 1, 2021), or upon the motion of their attorney of record, the circuit court that entered the judgment for the offense shall order the storage, preservation and retention of specifically identified human biological evidence or representative samples collected or obtained in the case for a period of up to fifteen years from the time of conviction, or longer, if the court determines it should be kept for a longer period of time. Upon filing of such a motion, the defendant may request a hearing for the limited purpose of identifying the human biological evidence or representative samples that are to be stored in accordance with the provisions of this section.

Upon granting of the motion, the court shall order the clerk of the circuit court to transfer all such evidence to Department of Forensic Science (DFS), which shall store, preserve and retain such evidence. If the evidence is not within the custody of the clerk at the time the order is entered, the court shall order the governmental entity having custody of the evidence to transfer such evidence to DFS. Upon entry of an order under this subsection, the court may upon motion or upon good cause shown, with notice to all parties including the Commonwealth's Attorney, modify the original storage order, as it relates to time of storage of the evidence or samples, for a period of time greater than or less than specified in the original order.

Order to Retain Evidence – Death Sentence Imposed (Sentenced Prior to July 1, 2021)

In the case of a person sentenced to death, the court that entered the judgment shall, in all cases, order any human biological evidence or representative samples to be transferred by the governmental entity having custody to DFS. DFS shall store, preserve, and retain such evidence until the judgment is executed. If the person under a death sentence has their sentence commuted, then such evidence shall be transferred from DFS to the original investigating law enforcement agency for storage, as provided in this section.

Contents of Order

Pursuant to established standards and guidelines, the order shall state the method of custody, transfer and return of any evidence to insure and protect the Commonwealth ' s interest in the integrity of the evidence. Pursuant to the standards and guidelines, DFS, the local law enforcement agency or other custodian shall take all necessary steps to preserve, store and retain the evidence and its chain of custody for the period of time specified.

Impractical to Retain All Evidence

In any proceeding under this section, the court, upon a finding that the physical evidence is of such a nature, size or quantity that storage, preservation or retention of all the evidence is impractical, may order the storage of only representative samples of the evidence. DFS shall take representative samples, cuttings, swabbings and retain them.

In action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees, or agents of the Commonwealth or its political subdivisions.

Motion by convicted felon for scientific analysis of newly discovered or previously untested scientific evidence Va. Code 19.2-327.1

Why Filed:

Any person convicted of a felony may move the circuit court that entered their original conviction for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction if:

- the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at DFS at the time the conviction became final in the circuit court;
- the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way;
- the testing sought is materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence;
- the testing requested involves a scientific method employed by DFS; and
- the convicted person has not "unreasonably delayed" their motion after the evidence or the test for the evidence became available at DFS.

Elements Required for New Scientific Investigation:

The petitioner must assert categorically and with specificity, under oath, facts sufficient to meet the criteria of subsection A. This assertion must also aver:

- the crime for which the person was convicted;
- the reason or reasons the evidence was not known or tested by the time the conviction became final in circuit court; and
- the reason or reasons that the newly discovered or untested evidence may prove the factual innocence of the person convicted.

The motion shall contain all relevant allegations and facts that are

known to the petitioner at the time of filing. Further, it must recite and "include" all previous records, applications, petitions, appeals and their dispositions.

Petitioner's Responsibility Regarding Notice:

The petitioner shall serve a copy of the motion upon the attorney for the Commonwealth. The Commonwealth shall file its response to the motion within 30 days of the receipt of service. The court shall, no sooner than 30 and no later than 90 days after such motion is filed, hear the motion. Va. Code Section 19.2-327.1(C)

Court's Responsibility:

After the hearing, the court shall set forth its findings specifically as to each of the items enumerated in subsections A and B. The court will either (i) dismiss the motion for failure to comply with the requirements of this subsection or (ii) dismiss the motion for failure to state a claim upon which relief can be granted or (iii) order that the testing be done by DFS based on a finding of clear and convincing evidence that the requirements of subsection A have been met.

Court Order to Department of Forensic Science:

The court orders the tests to be performed by the Department of Forensic Science and prescribes in its order (1) the method of custody, (2) transfer, and (3) return of evidence submitted for scientific investigation, so that the Commonwealth's interest in the integrity of the evidence is protected and insured. The results of any such testing are furnished simultaneously to the court, the petitioner and their attorney of record and the attorney for the Commonwealth. They may form the basis for a petition for writ of actual innocence based on biological evidence. Va. Code § 19.2-327.2

It is suggested that this procedure should be handled as a subsequent procedure in the petitioner's criminal file as the results of any tests performed and hearings held become a part of record. Va. Code § 19.2-327.1(E) The clerk will necessarily be involved in packing the specific biological evidence and shipping it to the Department of Forensic Science. A chain of custody record should

be preserved.

Comment: Amy Curtis, Department Counsel, Virginia Department of Forensic Science, Telephone (804) 786-2281, Fax (804) 786-6857, Amy.Curtis@dfs.virginia.gov, can provide template orders to aid the Court in preparing its order to store and test the evidence.

Setting an Execution Date:

Nothing in this section shall constitute grounds to delay setting an execution date pursuant to Va. Code § 53.1-232 or to grant a stay of execution that has been set pursuant to Va. Code §53.1-232.1 (iii) or (iv).

Setting cannot be Basis of Habeas Corpus or Appellate Proceeding:

An action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees, or agents of the Commonwealth or its political subdivisions.

Defendant is Entitled to Representation by Counsel:

In any petition filed pursuant to this chapter, the defendant is entitled to representation by counsel, subject to the provisions of Va. Code §§ 19.2-157 through 19.2-163.

Guidelines For The Method Of Custody, Transfer And Return Of Evidence

Va. Code § 19.2-270.4:1

- Notwithstanding any provision of law or rule of court, upon motion of a person convicted of a felony or their attorney of record to the circuit court that entered the judgment for the offense, the court shall order the storage, preservation, and retention of specifically identified human biological evidence or representative samples collected or obtained in the case for a period of up to 15 years from the time of conviction, unless the court determines, in its discretion, that the evidence should be retained for a longer period of time. Upon the filing of such a motion, the defendant may request a hearing for the limited purpose of identifying the human biological evidence or representative samples that are to be stored in

accordance with the provisions of this section. Upon the granting of the motion, the court shall order the clerk of the circuit court to transfer all such evidence to the Department of Forensic Science. The Department of Forensic Science shall store, preserve, and retain such evidence. If the evidence is not within the custody of the clerk at the time the order is entered, the court shall order the governmental entity having custody of the evidence to transfer such evidence to the Department of Forensic Science. Upon the entry of an order under this subsection, the court may upon motion or upon good cause shown, with notice to the convicted person, their attorney of record and the attorney for the Commonwealth, modify the original storage order, as it relates to time of storage of the evidence or samples, for a period of time greater than or less than that specified in the original order.

- The court order should state the defendant's name and include the forensic science laboratory number and a listing of those items of evidence to be included in the storage order. The court order should also state the date until which the evidence will be stored.
- The court order will 1) direct the clerk of the court, in coordination with the appropriate law enforcement agency, to determine the items and condition of the evidence and conduct an inventory of the evidence in the custody of the Court and transfer that evidence to the law enforcement agency to complete the inventory of the evidence, and 2) direct the appropriate law enforcement agency to package and seal said evidence and either hand deliver said evidence and any other associated human biological evidence listed in the court order which may be in the possession of the law enforcement agency to any laboratory operated by the DFS or send said evidence by certified mail directly to:

  Department of Forensic Science
  700 North Fifth Street
  Richmond, VA 23219
  Attn: Evidence Custodian
- The Clerk of the Court and the law enforcement personnel handling evidence for determining condition and inventory purposes should wear disposable gloves for personal protection.
- A copy of the court order and a properly completed Request for Laboratory Examination (RFLE) must accompany the evidence.

Instructions for Completion of RFLE for Evidence Storage:

The RFLE should be completed by the investigating/submitting officer prior to being hand-carried or mailed to the laboratory with the evidence accompanied by a copy of the court order.

Investigating Officer	Enter the full name, title, telephone number of the officer responsible for the inventory and the name and address of the submitting agency.
Agency Case Number	Enter the case number assigned to this specific

	investigation by your agency.
Previous FS #	If evidence in this case has been previously submitted to the laboratory, enter the FS#.
Name of Victim	(Optional) Enter victim's name
Name of Suspect	Enter name of convicted person
Date and Type of Offense	N/A
Examinations Requested	Enter "NONE, STORAGE ONLY"

Jurisdiction of Offense	Enter Court Ordering Storage
Brief Statement of Fact	N/A
Specify Manner of Return of Evidence	N/A
Evidence Submitted	List Inventory of Items of Evidence Being Submitted for Storage. The description of all items must be specific. For example, a bag of clothing must be listed to include a description of each piece of clothing in the bag.

- A container is properly sealed if its contents cannot readily escape and only if entering the container results in obvious damage/alternation to the container or its seal. Proper seals include:
    - Containers which are secured with any generic tamper-resistant seals or tape,
    - Lock sealed envelopes,
    - Any container secured with any form of adhesive or tape in such a manner that the contents cannot escape.
- In all cases, the date, initials/mark of the person sealing the evidence must be placed on, across or under the seal itself.
- The DFS will acknowledge receipt of the sealed evidence as listed on the inventory on the RFLE; when submitted by certified mail, the signed green card returned to the sender will constitute acknowledgement of receipt by the DFS. In the case of personal delivery, the chain of custody portion of the RFLE will be completed and a copy provided to the submitting officer.
- At the time of submission, large or bulky objects may be sub-sampled by appropriate DFS staff for storage purposes and the original item returned to the submitting agency for final disposition.

Upon expiration of the court order, the evidence shall be transferred from the DFS to the appropriate law enforcement agency for final disposition.

Writ Of Actual Innocence

Biological Evidence

Va. Code § 19.2-327.2

The Supreme Court shall have the authority to issue writs of actual innocence. The writ shall lie to the circuit court that entered the felony conviction; the trial court shall have the authority to conduct hearings, as provided for in Va. Code § 19.2-327.5, on such a petition as directed by order from the Supreme Court. *See* also Va. §§ 19.2-327.4, 19.2-327.5, and 19.2-327.6, and Rule 5:7B, 5:20, and Form 11 "Petition for a Writ of Actual Innocence" of the Appendix of Forms, Supreme Court of Virginia.

The petition is filed with the Supreme Court of Virginia. The Supreme Court may, when the case has been before a trial or appellate court, inspect the record of any trial or appellate court action, and the Court may, in any case, award a *writ of certiorari* to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record.

The record, if/when requested, should be prepared and sent in the same manner as any case appealed to the Supreme Court.

If the Court determines an evidentiary hearing is necessary, the Court may order the trial circuit court to conduct a hearing within 90 days to certify findings of fact on issues as the Court directs. The record and certified findings of fact of the circuit court shall be filed with the clerk of the Court within 30 days after the hearing is concluded.

Relief under the writ of actual innocence is prescribed in Va. Code § 19.2-327.5.

Note: If the Petitioner contacts the circuit court, requesting copies to *prepare* for filing a Petition for a Writ of Actual Innocence with the Supreme Court, be aware of the requirements of Va. Code § 8.01-691. Persons who are incarcerated are not automatically presumed to be indigent. It is suggested the clerk's office and court have a uniform policy of addressing requests for free copies of court records.

Nonbiological Evidence

Va. Code § 19.2-327.10

The Court of Appeals shall have the authority to issue writs of actual innocence. The writ shall lie to the circuit court that entered the felony conviction; the trial court shall have the authority to conduct hearings, as provided for in Va. Code § 19.2-327.12, on such a petition as directed by order from the Court of Appeals. *See* also Va. Code §§ 19.2-327.11

through 19.2-327.14, Rule 5A:5, and Form 10 "Petition for a Writ of Actual Innocence Based on Nonbiological Evidence", of the Appendix of Forms, The Court of Appeals.

The Petition is filed with the Court of Appeals. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court may, in any case, award a *writ of certiorari* to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record.

The record, if/when requested, should be prepared and sent in the same manner as any case appealed to the Court of Appeals.

If the Court determines an evidentiary hearing is necessary, the Court may order the circuit court that entered the conviction or adjudication of delinquency to conduct a hearing within 90 days to certify factual findings pursuant to Va. Code § 19.2-327.12. The record and certified findings of fact of the circuit court shall be filed with the clerk of the Court within 30 days after the hearing is concluded.

Relief under the writ of actual innocence is prescribed in Va. Code § 19.2-327.13.

Note: If the Petitioner contacts the circuit court, requesting copies to *prepare* for filing a Petition for a Writ of Actual Innocence with the Court of Appeals, be aware of the requirements of Va. Code § 8.01-691. Persons who are incarcerated are not automatically presumed to be indigent. It is suggested the clerk's office and court have a uniform policy of addressing requests for free copies of court records.

Bail Hearings – Writs of Actual Innocence

The Attorney General may join in a petition for a writ of actual innocence made pursuant to Va. Code §§ 19.2-327.2, 19.2-327.10:1. When such petition is so joined, the petitioner may file a copy of the petition and attachments thereto and the Attorney General's answer with the circuit court that entered the felony conviction and move the court for a hearing to consider release of the person on bail. Upon hearing and for good cause shown, the court may order the person released from custody subject to the terms and conditions of bail so established, pending a ruling by the Supreme Court on the writ.

Writ Of Coram Nobis/Writ Of Coram Vobis

A *writ of co*ram nobis is an order by an appeals court to a lower court to consider facts not on the trial record that might have changed the outcome of the lower court case if known at the time of trial. Coram nobis is a Latin term meaning the "error before us".

In deciding whether to grant the writ, courts have used a three-part test: a petitioner must explain their failure to seek relief from judgment earlier, demonstrate continuing collateral

consequences from the conviction, and prove that the error is fundamental to the validity of the judgment.

An example of when it might be used includes prosecutorial misconduct hiding exculpatory evidence from the defendant. A *writ of coram nobis* is issued once the petitioner is no longer in custody. Its legal effect is to vacate the underlying conviction. A petition for a writ of error *coram nobis* is brought to the court that convicted and sentenced the defendant. *Coram nobis* is limited to cases in which a "fundamental error" or "manifest injustice" has been committed. A high burden of proof is required. It cannot be used to reopen and reargue points of law the courts have decided, but only to raise errors of fact that were knowingly withheld by the prosecutor from judges and defendants. A writ of error *coram nobis* is an extraordinarily rare remedy, known more for its denial than its approval. It is distinguished from a writ of error *coram vobis* that brings before the court certain mistakes of fact not put in issue or passed upon, such as the death of a party, coverture, infancy, error in process, or mistake of the clerk.

Although the Federal Rules of Civil Procedure expressly abolished the use of *coram nobis* in civil cases in the United States, *See* Fed. R. Crim. P. 60(b), the issue of the writ's availability to correct fundamental errors in criminal cases remained uncertain for many years. In United States v. Morgan, the Supreme Court resolved this question, holding that *coram nobis* was still available in federal court for criminal cases. *See* 346 U.S. 502, 512 (1954).

Virginia Code § 19.2-303 (the authority of the Court to modify its own orders), must be considered in light of the filing of either of these types of writs.

It is recommended that a *Writ of coram nobis* or a Writ of *Coram vobis* be filed in the Civil Division, with a full set of fees, including service fees, as it does appear that the Commonwealth Attorney needs to be served. If the defendant were granted indigent status, no fees would be collected.

Protective Orders In Criminal Cases

Criminal convictions of stalking pursuant to Va. Code § 18.2-60.3 REQUIRE the court to issue an order prohibiting contact between the defendant and the victim or the victim's family or household member. Most convictions under the statute will be classified as Class 1 misdemeanors; however, a third or subsequent conviction occurring within five years of a conviction for an offense under this section shall be a Class 6 felony. Consequently, it is possible that Circuit Courts will need to issue protective orders not only for felony and/or misdemeanor convictions entered by their judge but also in appeal situations. This will include Violation of Protective Orders, where the penalty also includes the issuance of a new Protective Order, pursuant to either Va. Code §§ 16.1-253.2 or 18.2-60.4.

Virginia Code § 19.2-152.10 states that the court may issue a protective order to protect the health and safety of the petitioner and family or household members of a petitioner upon a

conviction of, any criminal offense resulting from the commission of an act of violence, force, or threat or (ii) a hearing held pursuant to subsection D of § 19.2-152.9.

Upon conviction for an act of violence as defined in § 19.2-297.1, and upon the request of the victim or of the attorney for the Commonwealth on behalf of the victim, the court may issue a protective order to protect the health and safety of the victim. The protective order may be issued for any reasonable period of time, including up to the lifetime of the defendant, that the court deems necessary to protect the health and safety of the victim.

Upon the issuance of a protective order, the clerk of court shall make available to the petitioner information published by the Department of Criminal Justice Services for victims of domestic violence or for petitioners in protective order cases.

Procedures for Issuance of Protective Orders In Criminal Cases:

Step 1 Qualifying conviction is entered by Court issued following acts of violence or stalking. It is imperative that the terms of the protective order be entered on form DC-385, Protective Order. It is recommended to use the case number from the underlying criminal case.

CC-1395, Protective Order Act of Violence Conviction is issued upon request of the victim, or the attorney for the Commonwealth on behalf of the victim, for a conviction of an act of violence as defined in § 19.2-297.1.

Law enforcement should serve a copy on the defendant and victim immediately.

Comments: DC-385, Protective Order and CC-1395, Protective Order Act of Violence Conviction contains certain warnings and notices to the Respondent and is in a standard format that may be more recognizable to law enforcement officers than the courts own order format.
No filing costs or service fees are assessed for the protective order. Va. Code §§ 19.2-152.10 and 17.1-272 (B).

Step 2 The protective order will not contain personal information about the alleged victim. Form DC 621, Non-Disclosure Addendum is used to record this sensitive data, and may be copied for service purposes and then destroyed by the serving officer. The court will keep the original under seal unless disclosure is allowed under one of the conditions described in the comments column.

Comments: The ease of completion of the form order should enable the

Court to enter the order and have it served on the parties before they leave the day of court.

Caution: Neither a law-enforcement agency, the attorney for the Commonwealth, a court nor the clerk's office, nor any employee of them, may disclose, except among themselves, the residential address, telephone number, or place of employment of the person protected by the order or that of the family of such person except as required by law or the Rules of the Supreme Court, as necessary for law-enforcement purposes, or by order for good cause shown.

Step 3 The court shall forthwith, but in all cases no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court and shall forthwith forward the attested copy of the protective order containing any such identifying information to the primary law-enforcement agency responsible for service and entry of protective orders.

Comments: *See* Circuit Case Management Manual, "Protective Order/Department of State Police Interface Appendix" for information on entering in protective orders into the CCMS.

As is the procedure in the lower court, a protective order arising out a criminal conviction becomes part of the criminal file. It is not possible to appeal only the protective order entered in this situation without appealing the underlying criminal conviction.

Step 4 Once a PO is served, the respondent has 24 hours to surrender, transfer or sell any firearms in their possession. The respondent is required to file Form DC-649, Protective Order Firearm Certification or CC-1395(A), Protective Order– Act of Violence Firearm Certification, with the issuing court within 48 hours of being served with the PO that they are no longer in possession of any firearms. Forms DC-649 and CC-1395(A) are served with the protective order. Va. Code § 18.2-308.1:4

Note: The willful failure to file the firearm certification constitutes contempt of court. A process should be implemented to ensure the certification is filed in a timely manner. For certifications not filed, go to **Step 9.**

Step 5 If the subject of the protective order has a concealed handgun permit, the permit shall be surrendered to the court that issued the protective order. Va.

Code § 18.2-308.1:4.

Note: The permit is not revoked based on the issuance of a protective order. The permit is simply surrendered to the court issuing the protective order for the duration of the protective order. Thereafter, upon the holder's request, the permit may be returned so long as the holder has not been convicted of a disqualifying offense.

Step 6 Either party may at any time file a written motion requesting a hearing to dissolve or modify the order. Proceedings to dissolve or modify a protective order shall be given precedence on the docket.

Note: The petitioner may file an *ex parte* motion to dissolve a PO and the court may grant or deny such motion with or without hearing. If the court grants a motion to dissolve a PO, and the dissolution order is issued *ex parte*, DC- 652, Order Dissolving Protective Order should be utilized and served on the respondent. Va. Code §§ 16.1-279.1, 19.2-152.10

Comments: If the case has been concluded at the time a written motion is received, the file should be reinstated on the court's docket as a subsequent action with the appropriate case number suffix. Notice is given parties of hearing date. No fees shall be charged for filing or service.

Special Note: Department Of Corrections, sheriff or regional jail director shall give notice prior to the release from incarceration of any person upon a stalking conviction pursuant to this section, to any victim of the offense who, in writing, requests notice, or to any person designated in writing by the victim. Va. Code § 18.2-60.3 (E).

Step 7 Petitioner, who has obtained a protective order under Va. Code §§ 16.1-279.1 or 19.2-152.10, may obtain an extension of such order for a period of no more than two years if the respondent continues to pose a threat to the health or safety of the petitioner, the petitioner's family and household members. There is no limit to the number of extensions that may be requested. Proceedings to extend a protective order shall be given precedence on the docket.

Comments: Written motion must be received prior to the expiration of the current protective order. Va. Code §§ 16.1-279.1 or 19.2-152.10.

Step 8 If a modification or extension is granted, a new protective order should be entered.

Note: Information contained in extended protective orders will be entered into the Virginia Criminal Information Network by the law enforcement agency and will not be entered by the clerk. The extended protective order should contain the same case number as noted on the underlying, expired protective order with "Extension of Protective Order" marked.

Step 9 If the respondent fails to file Form DC-649, Protective Order Firearm Certification or CC-1395(A), Protective Order– Act of Violence Firearm Certification, a Rule to Show Cause will be issued for contempt. *See* Protective Order Firearm Certification Contempt in this chapter.

Protective Order Extensions

If a preliminary protective order is required pending a hearing for an extension of a protective order, *See* Civil Manual Chapter 10, Protective Order Extensions.

If no preliminary protective order is required, see STEPS 7 and 8 in procedures above.

Hope Card Program

§ 19.2-152.10:1. Hope Card Program for persons protected by protective orders.

The Office of the Executive Secretary of the Supreme Court of Virginia shall develop and all district courts and circuit courts shall implement the Hope Card Program (the Program) for the issuance of a Hope Card to any person who has been issued a protective order pursuant to §§ 19.2-152.10 or 16.1-279.1 by any district court or circuit court. A Hope Card issued pursuant to the Program shall be a durable, plastic, wallet-sized card containing, to the extent possible, essential information about the protective order, such as the identifying information and characteristics of the person subject to the protective order, the issuance and expiration date of the protective order, the terms of the protective order, and the names of any other persons protected by the protective order.

Procedures

Step 1 May be requested in person or by mail by any protected party or the respondent by filing an application with the clerk of court. The applications may be made available to interested parties by the clerk or court, or may be completed online for submission to the clerk on the Virginia's Judicial System website - Domestic Violence Programs and Services (vacourts.gov)

Note: Hope Cards are only available for final protective orders that are in effect for 12 months or longer.

Comment: If a Hope Card application was submitted to a district court, the protected parties, or the respondent, will be required to submit an application to the circuit court for a Hope Card if a protective order was subsequently entered by a circuit court judge.

Step 2 Upon receipt of an application, the clerk will email the application and a copy of the order by encrypted email, to the Hope Card Coordinator at hopecard@vacourts.gov.

Note: All emails sent via a vacourts.gov email address will automatically be encrypted. For information regarding encrypting emails sent via all other email providers, contact Jaime Clemmer at jclemmer@vacourts.gov.

Once processed, the card(s) will be mailed directly to the applicant by the Hope Card Coordinator.

Fees/Taxes/Other Monies Assessed

None.

Form(s)

HOPE CARD REQUEST FORM

Reference(s)

Va. Code § 19.2-152.10:1

Protective Order Firearm Certification Contempt

Upon issuance of a protective order pursuant to Va. Code § 19.2-152.10, the person who is subject to the protective order, within 24 hours after being served, shall surrender any firearm in their possession to a designated local law-enforcement agency, sell or transfer any firearm possessed by such person to a dealer, or sell or transfer any firearm to any person who is not otherwise prohibited by law from possessing such firearm. Within 48 hours after being served with a protective order, the respondent shall certify in writing that they do not possess any firearms, or that all firearms have been surrendered, sold, or transferred, and shall file such

certification with the clerk of the court that entered the protective order. The willful failure of any person to file the certification shall constitute contempt of court.

1. Document Type

   DC-649 - Protective Order Firearms Certification
   CC-1395(A) - Protective Order – Act of Violence Firearm Certification

2. Filing Type

   OTH

3. Procedures

   Step 1 Clerk sets up case file, assigns a subsequent criminal case number and dockets case. The Clerk issues a Rule to Show Cause and serves upon defendant.

   Comments: Court will sign the section of Form DC-649, Protective Order Firearm Certification or CC-1395(A), Protective Order– Act of Violence Firearm Certification, ordering a show cause summons for contempt of court be issued for the respondent's failure to file the required certification form with the clerk. This order will be the initiating document for the file.

   Step 2 Hearing held.

   Step 3 Clerk records and indexes orders in the Criminal Order Book unless otherwise provided by law. Recording may be accomplished by microphotographic or electronic recording process per Va. Code § 17.1-240. Indexing may be maintained on computer, microfilm or microfiche per Va. Code § 17.1-249.

4. Fees/Taxes/Other Monies Assessed

   None

5. Form(s)

   DC-649, Protective Order Firearm Certification
   CC-1395(A), Protective Order– Act of Violence Firearm

6. Reference(s)

Va. Code § 18.2-60.4
Va. Code §§ 18.2-308.1:4, 18.2-308.2:1
Va. Code § 19.2-152.10

Chapter 6 - Post Sentencing

Overview

Upon being found guilty in circuit court, a defendant may seek relief and judicial review of their conviction. They may present a motion to set aside the verdict to the trial court and, if sufficient cause is demonstrated, the court may acquit the defendant or grant them a new trial. Alternatively, the defendant may file a petition for *habeas corpus* in the state and federal courts. A writ of *habeas corpus* challenges the legality of the restraint under which a person is held. For a thorough discussion of *habeas corpus*, *see* "*Habeas corpus*." In addition, a defendant may appeal their case to the Virginia Court of Appeals or, in certain cases, to the Supreme Court of Virginia.

Rule 1:1(a) of the Rules of the Supreme Court of Virginia provides all final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date it is signed by the judge either on paper or by electronic means in accord with Rule 1:17.

No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, or within any specified extension thereof granted by the Supreme Court or Court of Appeals, counsel files with the clerk of the circuit court a notice of appeal, and at the same time mails or delivers a copy of such notice to all opposing counsel. A notice of appeal filed after the court announces a decision or ruling – but before the entry of such judgment order – is treated as filed on the date of and after the entry. A party filing a notice of an appeal of right to the Court of Appeals shall simultaneously file in the trial court an appeal bond in compliance with Va. Code § 8.01-676.1. (Rule 5:9(a) and 5A:6(a)) Notwithstanding the time limits established by the rules of court, the clerk of the circuit court shall, whether or not so requested, transmit the record in the case in time for delivery to the clerk of the Court of Appeals or the Supreme Court of Virginia within 90 days after entry of the judgment appealed from. (Rule 5:13(c) and 5A:10(c))

When a defendant sentenced by the circuit court to confinement in a state correctional facility indicates an intention to appeal, the circuit court is required to postpone the execution of the sentence for such time as it may deem proper. The court may, or in the case of a misdemeanor, shall, set bail in such penalty and for appearance at such time as the nature of the case requires. In any case in which the court denied bail, the reason for the denial must be stated in the record. A writ of error shall lie to any judgment refusing bail or requiring excessive

bail. The circuit court may, upon a defendant's expressed intention to appeal, postpone the execution (judicial collection) of any judgment for fines, costs, restitution or other monetary penalties for such time as the judge deems proper. The postponement of execution of such monetary judgment usually results in the posting of a bond Va. Code § 19.2-322.1.
In a felony case, a pretrial appeal may be taken by the Commonwealth from the following:

- An order of a circuit court dismissing a warrant, information or indictment, or any count or charge thereof on the ground that:
    - the defendant was deprived of a speedy trial, or
    - the defendant would be twice placed in jeopardy
- An order of a circuit court prohibiting the use of certain evidence at trial on the grounds that such evidence was obtained in violation of the Amendments of the Constitution of the United States prohibiting illegal searches and seizures and protecting rights against self-incrimination, provided the Commonwealth certifies that the appeal is not taken for the purpose of delay and that the evidence is substantial proof of a fact material in the proceeding.

A petition for appeal may be taken by the Commonwealth in a felony case from any order of release on conditions pursuant to Article 1, Chapter 9 (Va. Code § 19.2-119 et seq.)

A petition for appeal may be taken by the Commonwealth in a felony case after conviction where the sentence imposed by the circuit court is contrary to mandatory sentencing or restitution terms required by statute.

A pretrial appeal may be taken in any criminal case from an order of a circuit court dismissing a warrant, information or indictment, or any count or charge thereof on the ground that a statute or local ordinance on which the order is based is unconstitutional.

"Perfecting an appeal" refers to the legal process by which an appeal is taken to a higher court. The procedures relating to appeals to the Supreme Court and Court of Appeals are set out in Parts 5 and 5A, respectively, of the Rules of Supreme Court of Virginia. An appeal in a criminal case is deemed perfected, and is considered mature for purposes of further proceedings, upon certification by the clerk of the appellate court to counsel for the appellant, counsel for the appellee, and the tribunal from which the appeal is taken that a petition for appeal has been granted. Rules 5:23 and 5A:16 of the Rules of Supreme Court.

In processing appeals, one of the most important considerations is the proper computation of the time limits for filing and transmitting required notices and documents. Most time limits are specified in the Rules; others are provided by statute. Because the defendant initiates the vast majority of criminal appeals from the circuit court, the following procedures apply to appeals by the defendant. Cases in which the Commonwealth is the appellant (the party initiating the

appeal) and the defendant is the appellee (the party against whom the appeal is taken) are governed by Va. Code §§ 19.2-398 through 19.2-409.

After the Commonwealth's attorney has prepared the brief in opposition to the granting of an appeal (Rule 5A:13 and 5:18 of the Rules of Supreme Court), the Attorney General's Office assumes all further responsibility for the case if the appeal is granted.

The nature of the case dictates to which appellate court an appeal from a circuit court may lie. The following subsections address the jurisdiction of and the procedures involved in filing a criminal appeal from circuit court to the Court of Appeals or from the circuit court to the Supreme Court. For a discussion of procedures relating to appeals from the district court to the circuit court, see this manual, "Case Initiation."

Case Closing

Whether a defendant is convicted or their case dismissed, certain administrative and legal actions must be taken to ensure that the case is properly recorded and disposed of. Such tasks are primarily the responsibility of the clerk's office.

Duties upon Final Judgment

Once the final decision has been rendered in a case, one of the most important tasks to be completed is the preparation and entry of the court's final order. Pursuant to Va. Code § 19.2-310, in cases in which the defendant has been sentenced to confinement, a certified copy of the final order must be furnished within thirty days to the Department of Corrections. A disposition should be sent to the local jail, treatment center, or other facility in which the defendant will be detained. When the defendant is to be released from confinement, the clerk must make arrangements to secure the defendant's prompt release. Release of a defendant is affected through the preparation of a release order which is normally given to the sheriff's deputy, in court or immediately after court adjourns. The clerk is also responsible for refunding any bond monies paid if the defendant has satisfied the terms and conditions of bail and an order releasing such funds has been entered.

In addition to sending copies of conviction and sentencing orders to local jail, treatment center, or other facilities, many Boards and agencies also require notification when persons licensed by such Board or agency are convicted. For example, Va. Code § 19.2-291.1 requires reporting to the Superintendent of Public Instruction and the division safety official designated pursuant to Va. Code § 22.1-279.8 of any employing school division the conviction of any person, known by the clerk to be employed by such local school division as soon as practicable but no later than seven days, for any felony involving the sexual molestation, physical or sexual abuse, or rape of a child, or a conviction involving drugs. For a more complete list of agency reporting, *see Miscellaneous Manual*, "Other Agency Reporting-Orders/Notices."

Collection of Fines, Court Costs and Other Monies

Where the defendant has been ordered to pay penalties, fines, court costs or other monies to the Commonwealth, the clerk must promptly docket (record) such monies as a judgment in the Judgment Lien Docket. Va. Code §§ 8.01-446, 19.2-336, and 19.2-341. By docketing these monies as a judgment, the clerk provides official notice to the public of the existence of a lien against the property of the defendant. The judgment should be docketed even if the defendant expresses an intention to appeal. Restitution shall be docketed in the name of the Commonwealth, or a locality if applicable, on behalf of the victim, as provided in Va. Code § 8.01-446 when ordered by the court, unless the victim named in the order of restitution requests in writing that the order be docketed in the name of the victim. Va. Code § 19.2-305.2. Also, a civil restitution judgment shall be docketed at the time of a restitution review hearing pursuant to Va. Code § 19.2-305.1 (F)(1) unless previously docketed. Interest is imposed on these judgments at the rates set out below.

Costs imposed by Statute

In addition to docketing fines, penalties, court costs and restitution, the clerk is also involved in the collection of and accounting for such monies. While fines, penalties and restitution may or may not be ordered in a case, costs (including clerk's fees) are automatically imposed by statute:

- Upon conviction;
- Upon dismissal of a case under Va. Code § 19.2-151 (satisfaction and discharge)
- Pursuant to Va. Code § 18.2-57.3 (assault and battery – family), Va. Code § 18.2-251 (first-time drug offense), Va. Code § 19.2-298.02 (deferral for a criminal offense), Va. Code § 19.2-303.2 (first-time property offense), and Va. Code § 19.2-303.6 (intellectual disability) ; or
- Dismissal on referral to traffic school. Va. Code § 17.1-275A(12).

Methods of Payment

Defendants may satisfy their debts to the court by paying by cash, check or credit card, if accepted. Va. Code § 19.2-353.3. Many courts accept payments via an online method such as Virginia Judiciary Online Payment System.

Costs from District Court

The imposition of costs may not be suspended nor the amount reduced (except pursuant to Va. Code §§ 19.2-358 and 19.2-364) since costs

reimburse the public treasury for the expenses of prosecution and are not part of the penalty. While the circuit court clerk is responsible for collecting monies owed in cases originating in their own court, they are also responsible for collecting fines, costs, and other monies imposed in cases which originated in the district court and have been appealed to the circuit court. If an appeal is withdrawn more than ten days from the date of conviction in the district court, the judgment is affirmed in the circuit court as a circuit court judgment. Consequently, the circuit clerk is responsible for collecting any fines and costs imposed in such cases for both courts.

Costs Due Upon Sentencing. Collection Methods

Generally, the court requires a convicted defendant to pay their fine, penalty, court costs and restitution immediately after sentencing. In many cases, however, the court may permit the defendant to satisfy their obligation pursuant to a deferred payment plan under which the full amount is due by a certain date. Alternatively, the court or clerk may allow the defendant to fulfill their obligation under an installment payment plan pursuant to which the defendant pays a portion of the total costs periodically (weekly, monthly) until the total amount is paid. The court assessing the fine, restitution, forfeiture, or penalty and costs may authorize the clerk to establish and approve individual deferred or installment payment agreements. Any payment agreement authorized under this section shall be consistent with the provisions of Va. Code 19.2-354.1, including any required minimum payments or other required conditions. The requirements established by the provisions of Va. Code 19.2-354.1 shall be posted in the clerk's office and on the court's website, if a website is available. Va. Code § 19.2-354.

Any fines, costs, penalties, and court-ordered restitution of a sum certain that remain unpaid are to be reported by the clerk to the judge, the Department of Taxation, the State Compensation Board and Commonwealth's attorney on a monthly basis. Va. Code § 19.2-349.

Unpaid criminal fines and costs may be recovered by employing a civil enforcement procedure such as a lien on the defendant's property. The Commonwealth's attorney handles such procedures and may contract with the Department of Taxation, a private attorney, the county or city treasurer, a collection agency, or provide the services "in-house" to collect such unpaid fines and costs pursuant to guidelines developed by the Department of Taxation and the State Compensation Board. Va. Code § 19.2-349. *See* Attorney General Opinion to Francis, dated 4/27/17; *The limitation period for civil enforcement of court fines and costs imposed by a*

circuit court in a traffic or criminal case is twenty years, commencing on the date of the offense or delinquency. It is not tolled during incarceration. For civil enforcement of restitution ordered in any such case, the limitation period is twenty years, beginning when the restitution order is docketed. It is extendable in twenty-year increments upon motion and court approval. It is not tolled during incarceration unless the court so orders.

Note: Effective July 1, 2018, judgment for restitution is enforceable for a period of 60 years, Va. Code § 19.2-341. If a restitution judgment is docketed in the name of the victim it will then no longer be subject to any statute of limitations, Va. Code § 19.2-305.2.

Another means of collecting monies owed the court is the Set-off Debt Collection Act. Under the Act, the court reports any unpaid monies due the court to the Virginia Department of Taxation. Any refund due the defendant from state income taxes is attached and applied to satisfy the court's claim. Va. Code §§ 58.1-520 through 58.1-535.

Bad Check/Credit Card

Whenever a person provides for payment of fines, costs, forfeiture, restitution or penalty other than by cash and such provision for payment fails, the clerk of court that convicted the person shall send to the person written notice of the failure and of the suspension of their license or privilege to drive in Virginia. The license suspension shall be effective ten days from the date of the notice. The notice shall be effective notice of the suspension and of the person's ability to avoid the suspension by paying the full amount owed by cash, cashier's check or certified check prior to the effective date of the suspension if the notice is mailed by first class mail to the address provided by the person to the court pursuant to subsection C of Va. Code § 46.2-395 or Va. Code § 19.2-354. Upon such a failure of payment and notice, the fine, costs, forfeiture, restitution or penalty due shall be paid only in cash, cashier's check or by certified check, unless otherwise ordered by the court, for good cause shown.

Note: Clerks will use form DC-215, Notice of Dishonored Check or Credit Card Charge.

Distribution of Cash Bonds

Another method for recovering unpaid fines and costs is the distribution of cash bonds. The amount needed to satisfy the fines and costs are deducted from the bond monies paid and any remaining amount is refunded to the payor of the bond. Cash bonds cannot be applied to fines and costs

without the consent of the person who posted the cash bond except in the following circumstances:

- the defendant posted the cash bond and was tried and convicted in their absence. Va. Code § 19.2-143.
- the defendant posted the cash bond and was convicted, even if they have complied with bail terms, where the bail bond forms (DC-330, Recognizance) contain pre-printed "consents" to the application of a cash bond posted by the defendant to fines and costs upon conviction.

Caveat: Cash bonds should be disbursed upon formal sentencing of the defendant or at disposition of a deferred finding or disposition of a case that was taken under advisement.

Virginia Code §§ 53.1-60 and 53.1-131 provide additional means of collecting fines and costs from defendants participating in work release programs. The statutes require that the earnings of persons in work release programs be turned over to the jailer who must withhold an amount equal to any fine and costs owed by the defendant.

Community Service

The court shall establish a program and may provide an option to any person upon whom a fine and costs have been imposed to discharge all or part of the fine or costs by earning credits for the performance of community service work before or after imprisonment, or during imprisonment. The program shall specify the rate at which credits are earned and provide for the manner of applying earned credits against the fine or costs. The court assessing the fine or costs against a person shall inform such person of the availability of earning credit toward discharge of the fine or costs through the performance of community service work under this program and provide such person with written notice of terms and conditions of this program. The court shall have such other authority as is reasonably necessary for or incidental to carrying out this program. Va. Code § 19.2-354

List of Allowances

In addition to the foregoing duties, the circuit court clerk must also prepare and submit a "List of Allowances" to the Commonwealth for payment of fees and expenses to jurors, witnesses, experts, vendors, and government officials as a result of their service in connection with the prosecution of a criminal case and in the investigation of a case or criminal suspect. Specific forms are used to prepare the list of allowances. Each list must be

acknowledged in writing by the circuit court clerk, and the expenses and fees listed thereon must be authorized by the judge. The lists are submitted "forthwith" to the Office of the Executive Secretary of the Supreme Court of Virginia for processing. The fees and expenses allowed by statute are paid out of the "Criminal Fund," a special account consisting of monies appropriated by the General Assembly and administered by the Supreme Court. The fees and expenses allowed are outlined on a Chart of Allowances which is published annually by the Office of the Executive Secretary and distributed to all courts.

Preparation of Reports

Upon disposition of a criminal case, the circuit court clerk is responsible for preparing notices and reports to various entities to notify them of the outcome of the case and, if applicable, to request the appropriate service (treatment, evaluation, counseling, transportation) from the entity. The primary reports are discussed below:

Central Criminal Records Exchange (CCRE) Report

The Central Criminal Records Exchange (CCRE) Report is submitted to the Virginia Department of State Police and contains disposition and case status information in all felonies and certain misdemeanor cases, including cases of criminal non-support (Va. Code § 20-61) and violation of protective orders (Va. Code § 16.1-253.2) as provided for in Va. Code § 19.2-390 (A). For every defendant charged with an offense which is required to be reported, the arresting authority must prepare a CCRE form and then transmit it to the clerk's office for completion. The clerk of the circuit court is required to apprise CCRE of any dismissal, *nolle prosequi*, acquittal, acquittal by reason of insanity, or conviction of any person charged with a reportable offense. The clerk must also report the failure of a grand jury to return a true bill on a person charged with a reportable offense as well as any reversal of or amendment to a prior conviction or sentence reported to CCRE. Such reports are to be filed with the Department of State Police no later than thirty days, with certain expedited exceptions noted below, after occurrence of the disposition; any correction, deletion or revision of information previously submitted must be reported promptly.

For cases involving acquittal by reason of insanity, orders for the involuntary commitment to a mental health facility, etc., the Order should be accompanied by the SP-237.

The Virginia Child Protection Accountability System requires that circuit courts be among the list of entities that report information regarding

convictions of rape, abduction, sexual crimes, indecent liberties, child pornography, indecent exposure, etc. Va. Code § 63.2-1530.

If a juvenile of any age (i) is convicted of a felony, (ii) is adjudicated delinquent of an offense that would be a felony if committed by an adult, (iii) has a case involving an offense, which would be a felony if committed by an adult, that is dismissed pursuant to the deferred disposition provisions of Va. Code § 16.1-278.8, or (iv) is convicted or adjudicated delinquent of any other offense for which a report to the Central Criminal Records Exchange is required by subsection C of Va. Code § 19.2-390 if the offense were committed by an adult, copies of their fingerprints and a report of the disposition shall be forwarded to the Central Criminal Records Exchange and to the jurisdiction making the arrest by the clerk of the court which heard the case. Va. Code § 16.1-299

Clerks using the Circuit Case Management System (CCMS) provided by the Office of the Executive Secretary have CCRE information electronically transmitted to the Virginia State Police via the "State Police Interface". The use of this interface also satisfies the requirements of Va. Code § 19.2-310.2:1 to notify the Department of Forensic Science of the final disposition of criminal proceedings. 6 VAC 40-40-110

Adjudications of Incapacity

If an order is entered adjudicating a person incapacitated or restoring such person to capacity the clerk will certify and forward forthwith a copy of such order to the Exchange. Va. Code § 37.2-1014

Sex Offender Registry

Every person convicted on or after July 1, 1994, including juveniles tried and convicted in the circuit court pursuant to Va. Code § 16.1-269.1, whether sentenced as an adult or juvenile, of an offense set forth in Va. Code § 19.1-902 and every juvenile found delinquent of an offense for which registration is required under subsection G of § 9.1-902 shall register and reregister with the Department of State Police. Every person found not guilty by reason of insanity on or after July 1, 2007, of an offense set forth in Va. Code § 9.1-902 shall register and reregister as required. Every person serving a sentence of confinement on or after July 1, 1994, for a conviction of an offense set forth in Va. Code § 9.1-902 shall register and reregister as required. Every person under community supervision as defined by § 53.1-1 or any similar form of supervision under the laws of the United States or any political subdivision thereof, on or after July 1, 1994, resulting from a conviction of an offense set forth in § 9.1-902 shall register and reregister

as required.

Every person found not guilty by reason of insanity on or after July 1, 2007, of an offense set forth in Va. Code § 9.1-902 shall register and reregister as required.

Every person in the custody of the Commissioner of the Virginia Department of Behavioral and Developmental Services, or on conditional release on or after July 1, 2007, because of a finding of not guilty by reason of insanity of an offense set forth in § 9.1-902 shall register and reregister as required.

Unless a specific effective date is otherwise provided, all provisions of the Sex Offender and Crimes Against Minors Registry Act shall apply retroactively.

The court shall order the person to provide to the local law-enforcement agency of the county or city all information required by the State Police for inclusion in the Registry.

The court is required to immediately remand persons convicted of these offenses to the custody of the local law enforcement agency for the purpose of obtaining the person's fingerprints and photographs. *See* form CC-1391, Order of Remand - Sex Offender and Crimes Against Minors Registry. The court shall remand the person to the custody of the local law-enforcement agency for the purpose of obtaining the person's fingerprints and photographs of a type and kind specified by the State Police for inclusion in the Registry. The local law-enforcement agency shall forward to the State Police all the necessary registration information within seven days of the date of sentencing.

Clerks are to make the report of conviction and the offense on the CCRE report to the registry within seven days of sentencing. Va. Code § 19.2-390 (C).

Abstract of Conviction

The clerk must prepare an abstract of the record to the Commissioner of the Department of Motor Vehicles within eighteen days after conviction or final judgment when:

- a person is convicted of a charge described in subdivision 1 or 2 of Va. Code §§ 46.2-382 or 46.2-382.1, or

- a person forfeits bail or collateral or other deposit to secure the defendant's appearance on the charges, unless the conviction has been set aside or the forfeiture vacated, or
- a court assigns a defendant to a driver education program or alcohol treatment or rehabilitation program, or both such programs, as authorized by Va. Code § 18.2-271.1, or
- compliance with the court's probation order is accepted by the court in lieu of a conviction under Va. Code § 18.2-266 or the requirements specified in Va. Code § 18.2-271 as provided in Va. Code § 18.2-271.1, or
- there is rendered a judgment for damages against a person as described in § 46.2-382, every district court or clerk of a circuit court shall forward an abstract of the record to the Commissioner within 18 days after such conviction, failure or refusal to pay, forfeiture, assignment, or acceptance, and in the case of civil judgments, on the request of the judgment creditor or their attorney, within 30 days after judgment has become final. No abstract of the record in a district court shall be forwarded to the Commissioner unless the period allowed for an appeal has elapsed and no appeal has been perfected. On or after July 1, 2013, in the event that a conviction or adjudication has been nullified by separate order of the court, the clerk shall forward to the Commissioner an abstract of that record.

Clerks using the Circuit Case Management System (CCMS) provided by the Office of the Executive Secretary have the abstracts of conviction information transmitted electronically to the Division of Motor Vehicles via the "DMV Interface". Va. Code § 46.2-383.

The information which must be included in the abstract of conviction is set out in Va. Code § 46.2-386.

An amended abstract of conviction should be prepared and sent to DMV to report:

- correction of errors in the original abstracts;
- the court's verdict on rehearing a case after the original abstract has been sent, including any changes in the sentence or revocation of a suspended sentence; and
- On or after July 1, 2013, a conviction or adjudication has been nullified by separate order of the court, the clerk shall forward to the Commissioner an abstract of that record.

Entry into Virginia Alcohol Safety Action Program (Form DC-265, Restricted Drivers' License Order and Entry Into Alcohol Safety Action Program)

This order is prepared by the clerk in all cases in which the defendant has been convicted of driving while intoxicated pursuant to Va. Code § 18.2-266 (motor vehicles) and the court, as part of the case disposition, has ordered the defendant to enroll in the Virginia Alcohol Safety Action Program (VASAP).

The form consists of two orders:

1. An order for the defendant to enroll in VASAP; and
2. An order restricting the defendant's operator's license setting out the terms and conditions of the restrictions.

- Va. Code §18.2-271. Consecutive Suspension of License Privilege. Any suspension of driving privilege for driving while intoxicated shall run consecutively with any other court-ordered period of suspension for driving while intoxicated or for underage driving with a blood alcohol concentration of 0.02 percent or more. DMV shall advise defendant regarding suspension dates and if necessary, advise the defendant regarding the need for an amended restricted operator's license. If ROL dates are invalid, DMV will provide a detailed letter including the recalculated dates of restriction. The defendant will need to return to the 2nd convicting court for an amended ROL.
- Va. Code §46.2-398.1. Issuance of restricted driver's privilege to out-of-state licensees. When the operator of any motor vehicle who is not licensed to drive in Virginia, but who has a valid driver's license from another jurisdiction, is convicted in Virginia of any violation for which license suspension and issuance of a restricted driving privilege in Virginia upon the same conditions as if the person held a valid Virginia license. The court order, and any writing or communication setting forth the person's restricted

privilege, shall include clear language indicating that the person is not a licensed Virginia driver.

After the form has been prepared by the clerk and signed by the judge, a copy of the form order is issued to the defendant and to the clerk who sends a copy to VASAP. The clerk also sends a copy to DMV and retains the original for the court's records. The terms and conditions contained in the form order should be the same as those contained in the court's sentencing order. The form order is designed to implement the court's sentencing order since the defendant must carry the form order when driving.

Entry into Alcohol Rehabilitation Program (Boat) (Form DC-358, Entry Into Alcohol Rehabilitation Program (Boat))

This form order is prepared by the clerk in all cases in which the defendant has been convicted of operating a motorboat or watercraft while intoxicated pursuant to Va. Code § 29.1-738 and the court has ordered the defendant to enroll in VASAP. The form is similar to Form DC-265, Restricted Drivers' License Order and Entry Into Alcohol Safety Action Program for motor vehicles. After the clerk has prepared the form order and the judge has signed it, the clerk distributes the original to the defendant, a copy to VASAP and the Department of Wildlife Resources, and retains one copy for court records. The terms and conditions contained in this form order should be the same as those contained in the court' sentencing order. The form order is designed to implement the court's sentencing order since the defendant must carry the form order when operating the watercraft.

Acknowledgment of Suspension or Revocation of Driver's License(Form CC-1379, ACKNOWLEDGMENT OF SUSPENSION OR REVOCATION OF DRIVER'S LICENSE/ORDER AND NOTICE OF DEFERRED PAYMENT OR INSTALLMENT PAYMENTS)

This form should be prepared in all traffic cases in which the defendant's operator's or chauffeur's license is suspended or revoked by the court. While submission of the form to the Department of Motor Vehicles (DMV) is not required by statute, doing so is an excellent means of notifying DMV that the defendant has acknowledged revocation or suspension of their license and to document the defendant's receipt of the notice of suspension (a necessary element of the offense of driving with a suspended or revoked license). A copy of the form should be accompanied by the Abstract of Conviction. The original acknowledgement form should be retained by the court.

Operator's License Reinstatement Form (Form DC-30, COMMONWEALTH OF VIRGINIA DRIVER'S LICENSE REINSTATEMENT FORM)

This form documents payment of fines and costs after an out-of-state defendant's driving privileges have been suspended by the court (or by DMV as an administrative action) for refusal or failure to pay any fines, costs, restitution, or other monetary penalties. While the form is intended for use by DMV, it is completed and mailed or delivered by the clerk to the defendant, with the receipt for payment of fines and costs. The defendant then presents the form and receipt to DMV to obtain reinstatement of their license if all other conditions for reinstatement have been met.

Note: As of July 1, 2019, a DC-30 is no longer required for defendants residing within the Commonwealth of Virginia. As of July 1, 2021, DMV lifted driver's license suspensions for non-payment of fines/costs for non-residents.

Notice of Conviction to State Board of Health Professions

When any person licensed, certified or registered by a board within the Virginia Department of Health Professions is convicted of any felony or has been adjudged incapacitated, the clerk is required to promptly report such conviction or adjudication to the Department when the clerk is aware that the individual is a licensed health professional. Va. Code § 54.1-2409. Notice may be provided by sending a certified copy of the order of conviction with a brief cover letter.

Occupations regulated by boards within the Virginia Department of Health Professions are listed in Title 54.1, Subtitle III (§ 54.1-2400, et seq).

Notice of Hunting/Trapping License Revocation to Department of Wildlife Resources

When any person having a hunting or trapping license is convicted of recklessly handling a firearm in hunting, trapping or pursuing game and the court, as part of the disposition, revokes such license or the privilege to hunt or trap, the clerk must send the revoked license or notice of the revocation of such person's privilege and the length of the revocation imposed to the Department of Wildlife Resources. Va. Code § 18.2-56.1(C). Such notice may be provided by sending a certified copy of the court's order with the license or notice and a brief cover letter.

Notice to Board of Dentistry

Upon the entry of an order convicting a person of any felony or any crime involving moral turpitude, and known by such clerk to be licensed under Chapter 27 of 54.1, the clerk of the court shall cause a copy of such order to

be forwarded to the Virginia Board of Dentistry. Va. Code § 54.1-2706.

Notice to Board of Medicine

Upon the entry of an order convicting a person of any felony or any misdemeanor involving a controlled substance, substance abuse or an act of moral turpitude, the clerk is required to report such conviction to the Department when the clerk is aware that the individual is a licensed health professional. Va. Code § 54.1-2909 (G). The clerk of the court shall cause a copy of such order to be forwarded to the Virginia Board of Medicine.

Notice of Juvenile Disposition Va. Code § 16.1-305.1

Upon a court's disposition of a proceeding where a juvenile is charged with a crime listed in subsection G of Va. Code § 16.1-260 in which a juvenile is adjudicated delinquent, convicted, found not guilty or the charges are reduced, the clerk of the court in which the disposition is entered shall, within fifteen days of the expiration of the appeal period, if there has been no notice of an appeal, provide written notice of the disposition ordered by the court, including the nature of the offense upon which the disposition was based, to the superintendent of the school division in which the child is enrolled at the time of the disposition or, if he is not then enrolled in school, the division in which he was enrolled at the time of the offense.

If the court defers disposition, or the charges are *nolle prosequi*, withdrawn, or dismissed the clerk shall, within fifteen days of such action, provide written notice of such action to the superintendent of the school division in which the child is enrolled at such time or, if he is not then enrolled in school, the division in which he was enrolled at the time of the offense.

If charges are withdrawn in intake or handled informally without a court disposition, the intake officer shall, within fifteen days of such action, provide written notification of the action to the superintendent of the school division in which the child is enrolled at that time or, if he is not then enrolled in school, the division in which he was enrolled at the time of the offense.

Notice of Juvenile Disposition Va. Code § 16.1-309.1

A clerk of the court shall report to the Bureau of Immigration and Customs Enforcement of the U.S. Department of Homeland Security a juvenile who has been detained in a secure facility but only upon an adjudication of delinquency or finding of guilt for a violent juvenile felony and when there is evidence established by the court that the juvenile is in the United States illegally. *See* Other Agency Reporting – Miscellaneous Manual

Monthly Caseload Report of Criminal Cases

Statistical information on court activity is submitted monthly to the Office of the Executive Secretary (OES) of the Supreme Court of Virginia. Courts using the Case Management System have their reports transmitted automatically and electronically. Courts not on the CMS system use output from their systems to transmit this information. Va. Code §§ 17.1-221 and 17.1-222.

The report captures information relating to:

- methods of commencement and disposition of criminal cases;
- the use of juries;
- the age of cases exiting the system; and
- the number of defendants whose cases were initiated.

Such statistics are used to assist in the determination of the need for additional judgeships, changes to judicial circuit and district boundaries, and the filling of vacancies within courts. They are also used to determine the impact of pending legislation. The report must be submitted within fifteen days from the end of each calendar month. Failure to file a report may result in a fine not to exceed $ 50. The reports are currently being automatically submitted to OES through the Case Management System. Amended reports should clearly marked AMENDED and forwarded to the Department of Judicial Planning.

Disposal of Evidence

At the conclusion of a criminal case, the court may wish to dispose of items filed or deposited with the clerk's office in connection with the case such as drugs, drug paraphernalia, and weapons. Many clerks' offices are not adequately equipped to store dangerous substances and weapons safely and securely. The clerk should advise the judge of the existence of items stored by the clerk's office and request instruction as to appropriate disposal measures after the time for filing an appeal from the final judgment in a case has expired, or after the parties have exhausted all appellate remedies.

Upon request of the clerk, a judge may order a law-enforcement agency to take custody of or maintain custody of controlled substances and related paraphernalia used or to be used in a criminal prosecution. Va. Code § 19.2-386.25.

Virginia Code § 19.2-270.4 sets out the general provisions relating to destruction or return of exhibits received into evidence during the course of the trial. Under that section, the court may order the destruction of evidentiary exhibits unless an objection with sufficient cause is raised. In some instances, notice of intent to destruct is required. The order authorizing destruction of the evidence may require that photographs be made of all exhibits subject to destruction and that the photographs be labeled for future identification. The court may also order the return of any exhibits to their rightful owners, after notice to the attorneys for the Commonwealth and defense. The owner must acknowledge in a sworn affidavit, to be filed with the case records, that they have taken possession of the exhibits. In all cases concluded prior to July 1, 2005, the notice requirement in this section shall not apply.

Virginia Code § 19.2-270.4 (D) provides for the donation of exhibits used in criminal prosecutions to non-profit organizations. The non-profit organization may petition the court for the donation of exhibits at any point after the expiration of the filing of an appeal from the final judgment of the court if no appeal taken or if appeal taken, at any time after exhaustion of all appellate remedies and prior to the destruction of such exhibits.

Notice to the defendant of destruction or donation is not required of certain exhibits used at trial, such as drugs, weapons, or exhibits deemed contraband or paraphernalia. Depending on the type of item that has been deposited with the clerk's office, other statutory provisions for disposal, destruction, or return may apply. The applicable code section should be consulted for details regarding the disposition of such items.

Virginia Code § 19.2-270.4 allows the court to order the immediate destruction, donation, or return of evidence where a defendant is found not guilty.

Virginia Code § 19.2-270.4:1 provides for the storage, preservation and retention of human biological evidence in felony cases and states:

> "Notwithstanding any provision of law or rule of court, upon motion of a person convicted of a felony or their attorney of record to the circuit court that entered the judgment for the offense, the court shall order the storage, preservation, and retention of specifically identified human biological evidence or representative samples collected or obtained in the case for a period of up to 15 years from the time of conviction, unless the court determines, in its discretion, that the evidence should be retained for a longer period of time. . ."

For a thorough discussion of disposition of evidence received before, during, or after trial, *see* "Pre-Trial - Receipt, Maintenance And Storage Of Evidence".

Storage of Case Records

The circuit court clerk is responsible for ensuring that the case file and the documents contained therein are in proper order and that the file is stored in accordance with sound record management practices. Records are generally open to public inspection; however, the clerk should require that such inspection take place in the clerk's office under the supervision of court staff.

In preparing the case file for storage with other ended cases, the clerk must ensure that special provisions for limiting access to certain portions of case files are followed. Records which must be sealed include presentence reports, post-sentence reports, and victim impact statements. Va. Code §§ 19.2-299 (A) and 19.2-299.1.

Procedures to Record and Dispose of Case

The procedures listed below should serve as a quick reference and checklist to ensure that the clerk has accomplished all of the tasks necessary to properly record and dispose of a case:

Step 1 Judge issues order to release bond if the defendant has no bail violations. If defendant posted a cash bond, the court may apply to fine and costs only if defendant agreed in writing to apply such bonds to fines and costs.

Comments: If a cash bond was posted and the defendant met the terms and conditions of bail, the clerk refunds the bond, if so ordered, by check made payable to the actual payor of the bond. This may be the defendant or another party. The recipient of the refund should be required to present (in person) their receipt verifying payment of the bond and at least one form of identification, preferably a driver's license. If the payor does not come forward to claim a refund, the clerk retains the bond money for twelve months from the final disposition date and then transmits the money to the Division of Unclaimed Property.

Step 2 Clerk or Judicial Assistant prepares final orders, Sentencing Guideline Worksheet (prepared by probation officer), and any departure from sentencing guidelines explanation, obtains judge's signature.

Comments: Sentencing Guideline Worksheets become part of the court record and are not to be sealed unless ordered by the court . Va. Code § 19.2-298.01.

Step 3 Clerk processes/images order and enters and indexes in order book; clerk places original in case file.

Step 4 Clerk provides certified copy of final order to the following, if appropriate:

- defendant or their attorney
- Department of Corrections
- local jail facility
- mental health facility

Clerk also provides certified copy of final order, original copy of the discretionary sentencing guidelines worksheet, and any departure explanation and forwards, within five days to: Va. Criminal Sentencing Commission.

Comments: The facility in which the defendant is to be confined should be furnished a certified copy of the order without delay. For information concerning special sentencing programs, *see* "Trial/Post-Trial – Sentencing and Deferred Adjudication Dispositions."

Step 5 Clerk computes fines, penalties, fees, costs, and restitution imposed and, if directed by the court, advises defendant of same; clerk records amounts to be taxed against defendant.

Comments: The judge should advise the defendant of their financial obligations immediately after sentencing and before the defendant leaves the courtroom. Interest must be assessed on unpaid fines and costs beginning on the 181st day after final judgment, except where the accused is making full and timely payments on a deferred or installment plan pursuant to an order of the court or while the defendant is incarcerated. The defendant may also move for waiver of interest owed during a period of incarceration. Va. Code § 19.2-353.5.

Fines, penalties, fees, costs and restitution to be taxed against the defendant are generally recorded directly on the case file folder or on a printed costs sheet maintained in the defendant's file. For a sample of the printed costs sheet, *see* Form CC-1350, Fines/Penalties/Fees/Costs Assessment Sheet. *See* also "Schedule of Fees and Costs" appendix in this manual which outlines what can be taxed against a criminal defendant.

Procedure Decision: Does the defendant petition the court to make payment on a deferred or installment basis? If no, GO TO STEP 9; If yes, GO TO STEP 7.

Comments: The judge, or the clerk (if allowed by court), sets the terms of payment (payment amount, whether paid weekly, monthly). Payment terms must be set out in the court order.

Step 7 Clerk obtains defendant's social security number, if not previously provided.

Comment: The social security number should be obtained in all cases if it becomes necessary to use the Set-Off Debt Collection Act to recover monies owed the court.

Step 8 Clerk may assist the accused in preparing the petition for deferred or

installment payment; clerk provides form to judge for completion of the order portion of the form; clerk distributes copies of executed form to defense counsel and other appropriate parties and places original in case file; if partial payment is made on the day of the proceeding, clerk proceeds to STEP 9; otherwise, clerk proceeds to STEP 10.

Comments: *See* Form CC-1378, Petition for Deferred or Installment Payment of Fine and Costs. Since this form is to be completed and signed by the defendant, their attorney, and the judge, the form should be prepared and executed by all parties immediately after sentencing and before leaving the courtroom.

Step 9 Clerk collects any fine, costs and restitution owed by the defendant; clerk issues receipt for monies collected and marks "paid" on costs sheet or on file cover in accordance with local practice.

Comments: If fines and costs are not paid in a traffic case, and no payment order is entered, *see* STEP 11 regarding suspension or revocation of defendant's driver's license.

Step 10 Clerk enters in the Judgment Lien Docket Book any fine, costs, and restitution imposed. Va. Code §§ 8.01-446; 19.2-340; *see* Attorney General Opinion to Wilson, dated 7/19/77 (1977-78, page 64); *Required By Statute To Docket In Judgment Lien Book All Fines Imposed By Circuit Court.*

Comments: Restitution shall be docketed in the name of the Commonwealth, or a locality if applicable, on behalf of the victim, as provided in Va. Code § 8.01-446 when ordered by the court unless the victim named in the order of restitution requests, in writing, that the order be docketed in the name of the victim. An order of restitution docketed in the name of the victim shall be enforced by the victim as a civil judgment. The clerk shall record and disburse restitution payments as provided in subsection D of § 19.2-305.1 and subsection A of § 19.2-354 in accordance with orders of restitution or judgments for restitution docketed in the name of the Commonwealth or a locality. At any time before a judgment for restitution docketed in the name of the Commonwealth or a locality is satisfied, the court shall, at the written request of the victim, order the circuit court clerk to execute and docket an assignment of the judgment to the victim. The circuit court clerk shall remove from its automated financial system the amount of unpaid restitution upon docketing the assignment. A district court may order the circuit court clerk to execute and docket an assignment of the judgment to

the victim, and the district court clerk shall remove from its automated financial system the amount of unpaid restitution upon sending the order to the circuit court clerk. If the victim requests that the order of restitution be docketed in the name of the victim or that a judgment for restitution previously docketed in the name of the Commonwealth or a locality be assigned to the victim, the victim shall provide to the court an address where the defendant can mail payment for the amount due and such address shall not be confidential. When a judgment for restitution previously docketed in the name of the Commonwealth or a locality is ordered to be assigned to the victim, the court shall provide notice of such order to the defendant at the defendant's last known address and shall include the mailing address provided by the victim. Va. Code § 19.2-305.2

Note: If restitution is ordered to be paid by the defendant to a victim of crime who can no longer be identified, the clerk shall deposit any such restitution to the Criminal injuries Compensation Fund for the benefit of victims. Va. Code § 19.2-305.1.

A defendant who has been sentenced to confinement or granted time to pay, or who has noted an appeal is still considered to be a judgment debtor. Monies owed by such defendant should therefore be recorded as such in the Judgment Lien Docket Book.

Costs associated with cases dismissed pursuant to Va. Code § 19.2-151 (satisfaction and discharge), Va. Code § 19.2-303.2 (first-time property offense), Va. Code § 18.2-251 (first-time drug offense), and dismissal on referral to traffic school should also be docketed.

See also Attorney General Opinion to Davila, dated 11/23/77 (1977-78, page 95); COSTS - May Be Assessed Against Defendant When Deferred Judgment Matters Are Dismissed After Conforming To § 18.2-251.

Fines, costs, and restitution should be docketed after completion of the reports in STEP 11 for which defendant's signature or a receipt is required.

Step 11 Clerk prepares and submits the following forms where applicable:

- CCRE report to Virginia Department of State Police; clerk retains copy for case file.
- Abstract of Conviction/Amended Abstract of Conviction to DMV; clerk retains copy for case file.

- Report of convictions under Va. Code §§ 18.2-57.2 and 18.2-57.3. Assault and battery of spouse or partner by military personnel.
- Entry into VASAP form to defendant; copies to VASAP and DMV; clerk retains copy for case file.
- Entry into Alcohol Rehabilitation (Boat) form to defendant; copies to VASAP and Department of Wildlife Resources; clerk retains copy for case file.
- Ignition Interlock system. Mandatory as condition of RDL for a conviction of Va. Code §§ 18.2-51.4 or 18.2-266. The court may also impose the condition of remote alcohol monitoring in addition to an ignition interlock system. Va. Code § 18.2-270.1.
- Acknowledgement of Suspension or Revocation of Driver's License form copies to DMV and defendant; clerk retains original for case file.
- Notice of conviction to Virginia Department of Health Professions, Board of Medicine or Board of Dentistry; clerk retains copy of cover letter for case file.
- Notice of revocation of hunting or trapping license to Department of Wildlife Resources; clerk retains copy of cover letter.

Comments: *See* Form SP-180 - CENTRAL CRIMINAL RECORDS EXCHANGE for a sample of the CCRE report and instruction for completion.

Clerk may also use CCRE Interface. *See* Form ABSTRACT OF CONVICTION for a sample of the abstract of conviction and instructions for completion.

Clerk may also use DMV Interface. *See* CMS report CR41. Clerk will forward to U.S. Armed Forces family advocacy representative. Va. Code § 18.2-57.4. See Form DC-265, Entry Into Alcohol Safety Action Program. *See* Form DC-358, Entry Into Alcohol Rehabilitation Program (Boat). *See* Form CC-1379, Acknowledgement Of Suspension Or Revocation Of Driver's License And Order.

If operator's license is reinstated, clerk provides reinstatement form to defendant; clerk retains copy for case file.

A certified copy of the court's order with a brief cover letter constitutes notice.

A certified copy of the court's order with a brief cover letter is sufficient notice. If applicable, attach license.

Step 12 Clerk seals presentence and post-sentence reports and victim impact statement, if applicable. Va. Code §§ 19.2-299 (A) and 19.2-299.1.

Note: Sentencing guideline worksheets are not to be sealed unless ordered by court. Va. Code § 19.2-298.01.

Comments: Any investigation report, including a presentence report, shall be made available by court order and shall be sealed upon final order of the Court. Virginia Code §§ 9.1-177.1 and 19.2-299 identifies who has access upon request.

For procedures regarding sealing, *see* applicable procedures in this chapter, Expungement.

Step 13 Clerk certifies DC-40, Lists of Allowances after obtaining judge's signature on same and submits to the Office of the Executive Secretary; clerk retains copy for administrative purposes.

Comments: The Office of the Executive Secretary provides a Chart of Allowances to each clerk's office in January or July, as needed. The lists of allowances are prepared from the information contained therein.

Once the judge signs or certifies the list of allowances, the list must be submitted to the Office of the Executive Secretary forthwith after certification; however, it should be submitted as soon as the judge certifies the lists to expedite claims processing and prevent backlogs.

Step 14 Clerk reports case as concluded on the Monthly Caseload Report of Criminal Cases; if submitting manually, preparer and clerk sign and date report; clerk submits report to Office of the Executive Secretary; clerk retains copy of report for administrative purposes.

Comments: *See* form DC-861, Monthly Caseload Report. *See* also Circuit Case Management System User's Guide published by the Office of the Executive Secretary.

Step 15 Clerk notifies judge of stored evidence or exhibits associated with the

case and requests instructions as to disposal.

Comments: For some items, the court may order disposal or storage immediately; other items may be ordered destroyed or otherwise disposed of after a period of time. The clerk should set up a tickler system to note the specific date.

The clerk and trial judge should establish a schedule and procedures for disposal of routine items based on the type of evidence and the nature of the case.
See "Pre-Trial - Receipt, Maintenance And Storage Of Evidence."

Court of Appeals of Virginia (Part Five A)

The Court of Appeals of Virginia is the intermediate appellate court.

Jurisdiction

1. Any final conviction in a circuit court in criminal and traffic matters. Va. Code § 17.1-406

   Exceptions
   - Any final decision on an application for a concealed weapons permit,
   - Any final order involving involuntary treatment of prisoners pursuant to Va. Code § 53.1-40.1,
   - Any final order for declaratory or injunctive relief under Va. Code § 57-2.02.

2. Civil and criminal contempt matters (Va. Code § 19.2-318);
3. Pre-trial and post-trial bail matters (Va. Code §§ 19.2-124 and 19.2-319, respectively); and
4. Certain preliminary rulings in felony cases when requested by the Commonwealth (Va. Code § 19.2-398)

A defendant is not entitled to appeal a criminal or traffic infraction to the Court of Appeals simply by asking for it (appeal as a matter of right); while any defendant may file a petition for appeal, the Court of Appeals has discretion to deny or grant the petition. Va. Code § 17.1-406

Discretionary Appeals

For the purposes of this manual, the Court of Appeals has the discretion to grant an appeal from any final order involving involuntary treatment of prisoners pursuant to Va. Code § 53.1-40.1.

When an appeal to the Court of Appeals is a discretionary one, the aggrieved party must file a petition of appeal with the clerk of the Court of Appeals. The petition must be filed not more that forty days after the filing of the record with the Court of Appeals. At the time the petition is filed, a copy shall be mailed or delivered to opposing counsel. (Rule 5A:12).
The petition shall contain the questions presented. At the end thereof, appellant shall include a certificate stating the date of mailing or delivery of a copy to opposing counsel and whether or not he desires to state orally the reasons their petition should be granted.

Appellee may file a brief in opposition to granting the appeal with the clerk of the Court of Appeals. It must be filed within twenty-one days after the petition for appeal is served on appellee's counsel. A reply brief may be filed by appellant in lieu of oral argument. (Rule 5A:13).

Security for the Appeal

Rule 5A:17 and Va. Code § 8.01-676.1

Form of Bond

All security for appeal required under Va. Code § 8.01-676.1 shall substantially conform to the forms set forth in the Appendix of Part Five A.

Amount of Bond

A party filing a notice of an appeal of right to the Court of Appeals shall simultaneously file an appeal bond or irrevocable letter of credit in the penalty of $500, or such sum as the trial court may require, conditioned upon paying all costs and fees incurred in the Court of Appeals and the Supreme Court if it takes cognizance of the claim. If the appellant wishes suspension of execution, the security shall also be conditioned and shall be in such sum as the trial court may require. Va. Code § 8.01-676.1

Filing the Appeal Bond

An appellant whose petition for appeal is granted by the Court of Appeals or the Supreme Court shall (if he has not done so) within 15 days from the date of the Certificate of Appeal file an appeal bond or irrevocable letter of credit in the same penalty as provided in subsection A, conditioned on the

payment of all damages, costs, and fees incurred in the Court of Appeals and in the Supreme Court.

Security for suspension of execution

An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall, file an appeal bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and execution shall be suspended upon the filing of such security and the timely prosecution of such appeal.

By whom executed

Each bond filed shall be executed by a party or another on their behalf, and by surety approved by the clerk of the court from which appeal is sought, or by the clerk of the Supreme Court or the clerk of the Court of Appeals if the bond is ordered by such Court. Any letter of credit posted as security for an appeal shall be in a form acceptable to the clerk of the court from which appeal is sought, or by the clerk of the Supreme Court or the Court of Appeals if the security is ordered by such court. The letter of credit shall be from a bank incorporated or authorized to conduct banking business under the laws of this Commonwealth or authorized to do business in this Commonwealth under the banking laws of the United States, or a federally insured savings institution located in this Commonwealth.

Indigents

No person who is an indigent shall be required to post security for an appeal bond.

Procedures for Processing an Appeal to Court of Appeals

The procedures that follow are intended to provide the circuit court clerk with a reference for processing a criminal defendant's appeal to the Court of Appeals. These procedures should be followed in conjunction with the applicable Rules of Court and statutory provisions governing the appellate process.

Step 1 Written notice of appeal is filed with the circuit court clerk. The notice of appeal shall contain a statement whether any transcript or statement of facts, testimony, and other incidents of the case will be filed. The notice of appeal must also contain a certificate stating:

- The names and addresses of all appellants and appellees, the name, Virginia State Bar number, mailing address, telephone

number (and extension), facsimile number, and e-mail address of counsel for each party, and the same information for any party not represented by counsel;

- that a copy of the notice has been delivered or mailed to all opposing counsel;
- in a criminal case, a statement whether counsel for defendant has been appointed or privately retained; and
- that if a transcript is to be filed, a copy has been ordered from the court reporter. Rule 5A:6(d).

Note: Upon request, the Clerk is required to cause a transcript to be prepared of the trial and any other court proceedings by the person authorized by the court to prepare transcripts. Va. Code §§ 17.1-408

Comments: Notice of intent to appeal is often given orally at the close of the defendant's sentencing hearing; however, written notice of appeal must be filed with the circuit court clerk within thirty days after the entry of final judgment or other appealable order or decree, or within any specified extension thereof granted by the Court. A notice of appeal field after the court announces a decision or ruling-but before the entry of such judgment or order-is treated as filed on the date of and after the entry. Rule 5A:6.

Note: If oral intention to appeal is given prior to the filing of the written notice of appeal, the clerk may proceed to STEPS 3, 4, 5, 6 and 7, as appropriate.

Step 2 Clerk notes on written notice of appeal the date of filing.

Comments: The circuit court clerk is not authorized to reject a written notice of appeal on the grounds that it was not filed in a timely manner. Such decision rests with the appellate court.

The $50 filing fee required by Rule 5A:6(c) for the clerk of the Court of Appeals is mailed directly to the clerk of the appellate Court by the defendant with a copy of the notice of appeal. If check is received by the clerk of the trial court, it should be submitted to the clerk of the Court of Appeals. Failure to pay the filing fee will subject the appeal to dismissal. Matters of indigence are determined by the trial court.

Step 3 Circuit court judge postpones execution of sentence and, if applicable, sets bail, postpones execution of the judgment and orders a suspending bond.
Note: If bail denied at trial court level, the Court of Appeals may review the

decision by the trial court to deny bail and overruled such denial. The appellate court shall either set bail or remand the matter to circuit court for such further action regarding bail as the appellate court directs.

Clerk will receive Order from appellate court and may set a Bond Hearing.

Comments: The judge may postpone execution of the sentence in accordance with Va. Code § 19.2-319. The defendant may be released from custody if the judge sets bail and the defendant must meet the terms of such bail. While the judge is required to set bail in misdemeanor cases, they have discretion to set bail in all other cases. If bail is denied, the reason therefor must be stated in the record. Va. Code § 19.2-319.

Collection of the judgment (fines, costs or other monetary penalties) may be postponed at the judge's discretion. Va. Code § 19.2-319. However, such action is rarely necessary since there is generally no effort to execute on a judgment during the pendency of an appeal. If the trial judge elects to postpone execution of the judgment, they may do so at any time prior to the transmission of the case record to the appellate court.

Clerk would enter appealed status in FMS. There must be a stay of execution in the order to halt execution and suspension of license by DMV *See* Circuit Case Management System and Financial Accounting System User's Guides for further information.

Step 4 Clerk notes on the case summary sheet in the case file, when applicable:

- the date execution of the sentence was postponed
- the amount and terms of bail set by the judge, or
- if bail was denied, the reasons therefor
- the date execution of the judgment was postponed
- and the amount of the suspending bond as established by the judge

Comments: If bail previously posted continues without change, no new bail documents need to be executed. If a change in bail is ordered, *see* this manual, "Pre-Trial – Bond." A suspending bond would only be set when the judge postpones execution of a monetary judgment; however, such bonds are rarely instituted in criminal cases.

Step 5 Clerk prepares court order reflecting actions taken by the judge as documented in STEP 4. Order may be a separate order or part of the sentencing order.

Step 6 Clerk obtains judge's signature on order; clerk images order and indexes and enters order in Criminal Order Book; clerk places original order in case file.

Step 7 Clerk processes bail or suspending bond, if executed; clerk issues a receipt to the payor if a cash bond is posted; clerk images/scans bond into the Bond Book and files original bond in the case file; clerk provides copy of executed bond to payor or surety, unless bond was prepared by the defendant's counsel or surety.

Comments: *See* form DC-330, Recognizance. For a suspending bond form, clerk uses Bond Form 2 in the Appendix to Parts 5 of the Rules of Court. *See* also Va. Code § 8.01-676.1 (C),(F) and (I).

If the defendant or a third party posts a cash bond, clerk receipts the bond money under revenue code 502.

An irrevocable letter of credit may be posted as security. Such letter of credit is prepared by a financial institution, not the clerk. The clerk should not make a copy of the letter of credit but should note in the file that the letter of credit has been placed in the court safe. The original letter of credit is not placed in the bond book or case file since the original is needed if collection becomes necessary.

If the bond is to be secured other than by cash, *see* "Pre-Trial – Bond" for instructions on determining adequacy of surety. While these instructions pertain to bail bonds, the same procedures would apply to suspending bonds as well.

Step 8 Clerk assembles the record on appeal; pursuant to Rules 5A:7 and 5A:10

Comments: The clerk should begin preparing the record as soon as possible following receipt of the written notice of appeal

An abbreviated record may be prepared only in appeals to the Court of Appeals. Such record is prepared by counsel and filed with the circuit court clerk after being signed by all counsel and the trial judge. Rule 5A:10(c).

Step 9 Clerk records the Transcript or Statement of Facts. Rule 5A:8.

Comments: The parties have up to sixty days in which to file a transcript

and fifty-five days in which to file a written statement of facts. The deadline may be extended by the Court of Appeals. Rule 5A:8(a) Such documents are often the last to be incorporated in the record on appeal, and the clerk should not wait for such documents to be filed before compiling the record

The transcript of any proceeding is part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of the final judgment. Counsel for the appellant shall give written notice to all other counsel of the date the transcript was filed and file a copy of the notice with the trial court. A certificate shall be appended to the notice stating that a copy has been mailed to or service was accepted by all other counsel. The Court of Appeals has authority to extend the time for filing transcripts.

In lieu of a transcript, a party may file a written statement of facts, testimony, and other incidents of the case which becomes a part of the record when filed in the circuit court clerk's office within fifty-five days from the date of entry of the final judgment. Rule 5A:8(c)(1). The Court of Appeals has authority to extend the time for filing written statements.

A copy of the statement is mailed by counsel to opposing counsel, with a notice that the statement will be presented to the trial judge no earlier than 15 nor later than 20 days after the filing. The clerk shall give prompt notice to the trial judge of the filing of any objections to the statement. Rule 5A:8(c) and (d).

The statement is signed by the trial judge and filed in the office of the clerk of the trial court. Other "incidents of the case" includes motions, proffers, objections, and rulings of the trial court on any issue a party intends to assign as error or otherwise address on appeal.

Step 10 Once a notice of appeal has been filed, the circuit court clerk is responsible for preparing the record on appeal and transmitting it to the Court of Appeals. For making up, certifying and transmitting the original record pursuant to the Rules of the Supreme Court, the circuit court clerk does not receive a fee for preparing the record in a criminal case if one of the "fixed fees" is assessed. Va. Code § 17.1-275(A)(32).

Contents of the Record:

- original papers and exhibits;
- each jury instruction marked "given" or "refused", initialed by the judge;

- each exhibit offered into evidence, whether admitted or not, initialed by the trial judge; (or any photograph thereof as authorized by § 19.2-70.4(A)&(C). (All non-documentary exhibits shall be tagged or labeled in the trial court and the tag or label initialed by the judge.);
- original draft or copy of each order entered by the trial court;
- opinion or memorandum decision rendered by the trial judge;
- any deposition or discovery material offered into evidence, whether admitted or rejected;
- Exhibits other than those filed with pleadings may be included in a separate volume or envelope, certified by the clerk of the trial court, including a descriptive list of exhibits contained therein. Any exhibit that cannot be placed in a volume or envelope should be identified by a tag.
- the transcript of written statement of facts, and other incidents of the case, the official videotape of any proceeding; and
- the notice of appeal.

Omitted exhibits shall be noted on the descriptive list of exhibits.

Rule 5A:10
The clerk of the trial court shall prepare the record as soon as possible after notice of appeal is filed. In the event of multiple appeals in the same case or in cases tried together, only one record need be prepared and transmitted. Order of record:

- front cover setting forth the name of the court and the short style of the case;
- a table of contents listing each paper included in the record and the page on which it begins;
- each paper constituting a part of the record in chronological order; and
- the certificate of the clerk of the trial court that the foregoing constitutes the true and complete record, except omitted exhibits.
- Each page is numbered at the bottom.

Transcripts, depositions and reports may be included in separate volumes

identified by the clerk of the trial court if referred to in the table of contents and at the appropriate place in the record.
Exhibits other than those filed with pleadings may be included in a separate volume or envelope certified by the clerk of the trial court, including on its cover or inside a descriptive list of exhibits contained therein. Any exhibit that cannot placed in a volume or envelope shall be identified by a tag.
The omitted exhibits shall be noted on the descriptive list of exhibits. Upon motion of counsel the appellate Court may order the trial court to transmit any prohibited exhibits.

Any transcript or statement of facts that the clerk of the trial court deems not a part of the record because of untimely filing shall be certified as such and transmitted with the record.

An abbreviated record, consisting of only the pleadings, facts, testimony and other incidents of the case essential to the issues on appeal, may be prepared by all counsel with the approval of the trial court. The Court of Appeals may consider other parts of the record as it deems necessary. Rule 5A:10(c).
Comments: The Clerk shall not transmit the following types of exhibits unless requested by the appellate court:

- drugs
- guns and other weapons
- ammunition
- blood vials and other bio-hazard type materials
- money
- jewelry
- articles of clothing
- bulky items such as large graphs and maps

Rule 5A:10

Step 11 Transmitting the record:
The clerk retains the record for 21 days after the notice of appeal has been filed.

If the notice states a transcript will be filed, retain the record for 21 days after the filing of the transcript or the statement.

If objections are made to the transcript or writing, retain the record 5 days after the objection is acted upon by the trial judge.

If requested in writing by counsel for all parties, transmit the record sooner

Comments: Whether requested or not, the clerk shall transmit the record to the appellate court within 90 days after entry of judgment or appealable order. Failure to transmit the record shall not be a ground for dismissal of the appeal by the appellate court. Rule 5A:10

Step 12 When the mandate is issued by the appellate Court, the clerk of the Court shall return the record to the clerk of the trial court.

Subsequent Events: Decision, Costs and Mandate

Not all cases that are appealed to the Court of Appeals are granted a hearing. In cases in which an appeal is denied and the appellant does not petition the court for a rehearing, the clerk of the Court of Appeals, within 35 days after entry of the order of denial, will transmit the case record, with the original order of denial of the petition for appeal, to the circuit court clerk. The order is then entered by the circuit court clerk in the Criminal Order Book.

In cases in which the petition for rehearing is granted, the Court of Appeals will retain the case record but promptly transmit the original order granting the petition for appeal to the circuit court clerk for entry in the Criminal Order Book. A certificate of appeal is attached to the order granting the appeal.

Cases that are granted an appeal will process through the Court of Appeals, and ultimately be heard by the appellate Court.

The final decision from an appealed case is called a "mandate." The mandate may affirm or reverse the ruling of the trial court, or it may dismiss the appeal. An appeal of a conviction or sentence in which the trial court's decision is reversed results in dismissal of the charges, a new trial, or re-sentencing. The Clerk of the Court of Appeals forwards its mandate to the clerk of the circuit court from which the appeal proceeded. If the judgment order is supported by an opinion, a certified copy of the opinion is sent with the mandate.

The clerk should carefully review the mandate to determine their duties with respect to the case. The clerk should also consult with the Commonwealth's Attorney and trial judge as to any further action necessary in the case.

Dismissal

The vast majority of appeals end in dismissal or with the trial court's ruling being affirmed. In either case, the circuit court clerk's remaining responsibilities in the case are essentially limited to recording the appellate court's final order or mandate, merging the case record returned by the appellate court into the circuit court case file and proceeding with normal case closing procedures. *See* Case Closing, this chapter.

Appeal Granted

Where an appeal ends in reversal of the trial court's decision, the circuit court clerk's administrative responsibilities will vary.

- Nullifying Conviction – In cases where the appellate court reverses and enters final judgment as to a conviction (its mandate nullifies the defendant's conviction and orders their release), the case ends, and the circuit court clerk may proceed with normal case closing procedures. Appropriate parties such as attorneys of record, probation officers, etc., should be notified of the dismissal of the case, and the CCMS should be updated appropriately. If the defendant is incarcerated, DOC should be notified immediately, and if the conviction had been of such a nature that the defendant was required to register as a sex offender, that agency should be notified as well.
- Remand for New Trial – If the appellate court reverses and remands the case for a new trial, the circuit court clerk's administrative responsibilities in the case will be similar to those associated with a new case, unless the Commonwealth elects not to proceed with further prosecution and moves for dismissal.
- Remand for Rehearing, etc. – Where the appellate court has remanded a case for re-sentencing or rehearing (redetermination of bail or other pre-trial or trial matter), the clerk's responsibilities in the case will likewise continue.

Procedures for Cost Assessment – Court of Appeals

In the interest of uniformity, effective 07/01/02, the Attorney General's Office will no longer offer criminal appellants the choice of paying their appellate costs to the Attorney General's Office or the Circuit Court. All appellants will be advised to pay appellate costs to the Circuit Court.

Step 1 Review all orders, mandates, DC-40's, AND, itemized statements of costs (if any) from the appellate courts for assessment of court

appointed counsel fees and their expenses, other attorney costs (Attorney General), printing costs, and damages.

COURT OF APPEALS

Items typically received include:

- ***Order*** ("red-stamped") authorizing payment of attorney fees prior to issuance of final mandate;
- ***Itemized Statement of Costs*** – lists ONLY requested reimbursement of Commonwealth costs by Attorney General; and
- ***Final Mandate*** – May include Damages, COA fees and approval of sum uncertain costs and/or expenses.

From Court Appointed Counsel:

- DC-40 with attachments as specified in Step 8.

Note: Separate DC-40's may be submitted at different times.

SUPREME COURT

Items typically received include:

- ***Final Mandat***e – May include Damages, COA fees and approval of sum uncertain costs and/or expenses. Processed copy of DC-40 for brief printing submitted to S.C. during pendency of appeal.
- ***Itemized Statement of Costs*** – lists ONLY requested reimbursement of Commonwealth costs by Attorney General.

From Court Appointed Counsel:

- DC-40 with attachments as specified in Step 8.

Note: Separate DC-40's may be submitted at different times.

Comments:

- Some assessments are listed in the order with others on a statement of costs or DC-40.
- Some are written out using numeric characters while others are written out in alpha characters.
- Examine the date of each order to avoid assessing the same fee twice.
- Assess fees twice when ordered by different courts or on

different days. (Example # 1: $30 damages may be assessed by the Court of Appeals and again by the Supreme Court. The total damages entered into FAS would be $60. Example # 2: It is common to have multiple allowances for court appointed counsel. Check for different order dates.)

- Court appointed counsel may seek reimbursement on a DC-40 for certain expenses whose dollar amount is not specified by order or statement of costs. Be sure to add these expenses to the FMS account.

Va. Code §19.2-326 In any felony or misdemeanor case wherein the judge of the circuit court, from the affidavit of the defendant or any other evidence certifies that the defendant is financially unable to pay their attorneys' fees, costs and expenses incident to an appeal, the court to which an appeal is taken shall order the payment of such attorneys' fees in an amount not less than $300, costs or necessary expenses of such attorneys in an amount deemed reasonable by the court, by the Commonwealth out of the appropriation for criminal charges. If the conviction is upheld on appeal, the attorney's fees, costs and necessary expenses of such attorney paid by the Commonwealth under the provisions hereof shall be assessed against the defendant.

Step 2 Add any additional TRIAL costs that had not been received by the circuit court at the time the original FAS account was established. The following account codes should be used in FAS:

- 120--Court appointed counsel/expenses
- 13J--Transcripts (part of trial costs rather than appeal costs since preparation/payment ordered by circuit court)

Processing DC-40's and docketing/amending judgment related to additional TRIAL costs should also be performed at this time.

Comments: Bills for court appointed attorney fees for the trial in circuit court as well as for preparing the appeal transcript are often received after the initial case set up in FAS. These should be added in FAS upon receipt.

DO NOT post interest to the account prior to adding these additional TRIAL costs. **Note:** Va. Code § 19.2-353.5 says "No interest shall accrue on any fine or costs imposed in a criminal case or in a case involving a traffic infraction (i) for a period of 180 days following the date of the final judgment imposing such fine or costs; (ii) during any period the defendant is incarcerated; and (iii) for a period of 180 days following

the date of the defendant's release from incarceration if the sentence includes an active term of incarceration." For TRIAL COSTS, the date of final judgment is the circuit court trial date and not from the time the cost is incurred.

- **DO NOT** change the interest date in FAS. Confinement periods are entered in the "Interest" tab of FAS for proper calculation of interest accrual. If no incarceration period, the 180-day calculation will be based on the trial date. Any changes to due-on date should be made in accordance with the respective policy of each court.

Step 3 Wait until all additional charges and expenses are received from the appellate court(s) and perform one FAS update for all APPELLATE costs/damages. The following account codes should be used in FAS:

- 120—Court appointed counsel/expenses

- 162—Other attorney charges (Atty. Gen.) (Rule 5:37 & Rule 5A:30)
- 13J—Briefs
- 110—Damages

Special Note on Free Copies: An indigent defendant is entitled to a free copy of their trial transcript to perfect an appeal. An indigent defendant, however, is not entitled to a copy of a trial transcript at public expense, even though the transcript is already in existence, for the purpose of combing the record in the hope of discovering some error. Circuit court, and not clerk, must make specific finding that indigent defendant has demonstrated particularized need for free copy of their trial transcript. Funds expended for preparation of transcript for indigent defendant may be reimbursed pursuant to circuit court order specifically providing for such payment. Indigent defendant previously provided with copy of arrest warrant, indictments and conviction orders is not entitled to additional copies. Circuit court clerk may not waive fees for copying document previously furnished to indigent defendant at no charge. *See* Attorney General Opinion to Worthington dated 10/30/01 (2001, page 115); *Circuit court, and not clerk, must make specific finding that indigent defendant has demonstrated particularized need for free copy of their trial transcript. Funds expended for preparation of transcript for indigent defendant may be reimbursed pursuant to circuit court order specifically providing for such payment. Indigent defendant previously provided with copy of arrest warrant, indictments and conviction orders is not entitled to additional copies. Circuit court clerk may not waive fees for copying document previously furnished to indigent defendant at no charge.*

Comments: Costs in an unsuccessful appeal become add-on trial costs. No statute or rule directs courts to treat trial and appellate costs as two different obligations of the defendant. During the pendency of the appeal, the court may use the additional information screen to list various fees which will be added to the FAS account once the appeal is denied or the trial court judgment is affirmed.
If you are unsure if you have received notification of all appellate costs, you may want to wait until the appellate court has returned the record to the trial court and examine the record. Appellate costs should be entered in FAS after receiving the order denying the appeal or affirming the circuit court's decision:

POST INTEREST to the account PRIOR to adding APPELLATE costs **if**

account is subject to interest. (Do not calculate interest when defendant is incarcerated or where a stay was ordered or where a defendant is complying with a payment agreement.)

Note: Va. Code § 19.2-353.5 states costs accrue interest 180 days "from the date of the final judgment imposing such fines or costs."

For APPEAL COSTS, the date of final judgment is the date of the final order from the appellate court and not from the time the cost is incurred. *See* Circuit Financial Accounting System User's Guide, "Procedures"

Delete APL from the FAS action code, if applicable.

Step 4 No additional notice of costs is due the defendant if the court has had the defendant sign CC-1351,Clerk's Notice of Fines and Costs or CC-1379, Acknowledgment of Suspension or Revocation of Driver's License/Order and Notice of Deferred Payment or Installment Payments at the time of their original conviction or mailed a DC-225, Notice to Pay to the defendant within two business days of original conviction.

Comments: There is no statutory duty to inform the defendant of the amount of trial costs owed, or to inform the defendant when additional costs are later added. The notice provided by forms CC-1351, CC-1379, and DC-225 are required to inform the defendant of what will happen if he fails to pay. **While there is no prohibition from providing notice of added costs, this is left up to the discretion of the particular court, as well as any decision to require a new partial payment plan.** Va. Code §§ 46.2-395 (C) and 19.2-354 (D).

Step 5 Docket the judgment for the additional costs and record the order(s) and/or mandate(s) in the Criminal Order Book. Va. Code § 8.01-685.

Comments: There is no requirement to docket appellate costs arising from the Court of Appeals separately from those appellate costs arising from the Supreme Court.

Step 6 Examine the FAS account and file documents for evidence of the posting of CASH BONDS.

Comments: Security that is acceptable to the clerk of the court from which appeal is sought, or the clerk of the appellate court, if the bond

is set by the Court of Appeals or Supreme Court, may include personal or corporate surety or letter of credit rather than cash.

Most appellate bonds will not involve payment of cash to the clerk of the trial court. Pursuant to Va. Code § 8.01-676.1 (N), " no person who is an indigent shall be required to post security for an appeal bond."

There are 3 types of bonds the court may be holding:

- COST BOND FOR APPEAL-A bond conditioned upon paying all costs and fees incurred in the Court of Appeals or Supreme Court. In matters where the appeal is a matter of right, the $500 bond is posted simultaneously with the notice of appeal. In matters where the appeal is by petition, the bond must be posted within fifteen days after the date of certificate of awarded appeal.
- SUSPENSION BOND FOR APPEAL-A bond given to secure suspension of execution of the court's judgment conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension. The bond is posted with the trial court when ordered by the trial court.
- BAIL BOND FOR APPEAL-A bond that permits release pending appeal and is set by the trial court.

Step 7 Determine the types and amounts of any cash bonds being held by the court and what action should be taken.

BAIL BOND: Refund unless person posting it has given written approval to apply to costs or court has ordered it forfeited under the provisions of Va. Code § 19.2-143.

In instances where bail is applied to costs, it is suggested that the court enter an order showing the disposition of these funds. Send a copy of the court's order to the defendant and their surety, if applicable. (The order can also address matters such as the issuance of a capias or establishing a date for the defendant to report to jail, if applicable.)

COST BOND: Do NOT refund until all APPEAL COSTS including damages, printing costs of briefs, Attorney General's fee, expenses (noted on DC-40's) of court appointed counsel, and appointed counsel fee allowed by the Court of Appeals and/or Supreme Court order or mandate are paid in full.
In instances where a cost bond is applied to costs, a court order is

needed to establish the disposition of the bond. Send a copy of the court's order to the defendant and their surety, if applicable. (The order can also address matters like the issuance of a capias or establishing a date for the defendant to report to jail, if applicable.)

SUSPENDING BOND: Do NOT refund the bond until there is "satisfaction of the judgment and payment of all damages incurred in consequence of the suspension." In instances where a suspending bond is applied to costs, a court order is needed to establish the disposition of the bond. Send a copy of the court's order to the defendant and their surety, if applicable. (The order can also address matters like the issuance of a capias or establishing a date for the defendant to report to jail, if applicable.) **Refer to the comments on this step pertaining to processing COST bonds.**

Process DC-40's related to appeal. **DC-40's for appeals must be signed by counsel and the clerk. Documentation such as invoices, proof of payment, and copies of the court order or certificate of award must be attached.**

Comments: If the defendant abides by the conditions of their bail, the BAIL BOND must be refunded to the person who posted it unless the person who posted it gives approval to apply the money to costs. Va. Code § 19.2-121. Refer to the back of the DC-330, Recognizance for a place for the surety to give consent to apply the bail bond to costs. **If bond to be refunded**, *see* FAS Procedure for Refunding Bond. If permission is given to keep the bond, *see* FAS Procedure for Applying a Bond to Costs. Both procedures are found in the *Circuit Accounting Management System User's Guide*, "Procedures."

It is suggested that the clerk contact the person who posted the bond and seek their approval in writing to apply the bond to the costs of appeal. If attempts are unsuccessful in securing approval, ask the court to consider if the bond should be applied to appellate costs or disposed of in some other manner.

Note: Virginia Code § 8.01-676.1 prescribes the conditions of COST BONDS and SUSPENDING BONDS. The bond forms which are found in the Rules of Court 5 and 5A Appendix of Forms specify that upon payment of the obligation described in each bond type that the obligation shall be void, otherwise to remain in full force and virtue. There are no procedures prescribed by the code for defaulting these types of bonds, so disposition of such bonds are within the discretion

of the court.

Effective 4/15/02, court appointed attorneys will prepare their own DC-40's to request their fee and expenses such as mileage, postage, phone calls, and brief printing (if initially paid by counsel.)

Step 8 Upon completion, send DC-40s to the Accounts Payable Department for processing.

These DC-40s may contain allowances for expenses which are allowed by appellate court order but whose amount has not been established by court order. Be sure to add these expenses with other costs itemized by order to the unsuccessful appellant's account.

Comments: If counsel has not advanced the costs of brief printing and wishes payment to be made directly to the printing company at the conclusion of the case, a separate DC-40 should be completed and signed by the attorney and clerk and submitted at the same time as any DC-40 requesting attorney fee.

SUPREME COURT NOTES: Effective 4/15/02, if reimbursement for printing expenses is sought while a case is still pending in the Supreme Court, the attorney shall submit DC-40 for printing expenses only directly to the Supreme Court.

Copies of DC-40's processed by the Supreme Court will be attached to the final order in the case to notify the Circuit Court that reimbursement has been made and as a means to notify the Circuit Court of brief printing costs that should be added to the defendant's account.

After a case is concluded by the Supreme Court, reimbursement for printing will be handled by the Circuit Court.

COURT OF APPEALS NOTES: Effective 04/15/02, at the same time that the Court of Appeals mails the Circuit Court the red stamped order that authorizes the payment of court appointed attorney fees, the Court of Appeals will also send an award certificate to the attorney with instructions to prepare a DC-40 and submit it to the Circuit Court for processing. (This process is only utilized in Court of Appeals cases.) The DC-40 must be signed the attorney and the clerk.

The Court of Appeals will not process any DC-40's for brief-printing,

whether a case is pending before that court or not.

Supreme Court of Virginia

The Supreme Court of Virginia is the highest court in the Commonwealth and is frequently referred to as the state court of last resort.

Jurisdiction

1. Felony cases on appeal from the Court of Appeals. (Va. Code §17.1-411)

2. Misdemeanor cases on appeal from the Court of Appeals in which incarceration has been imposed. (Va. Code §17.1-411)

3. Bail matters on appeal from the Court of Appeals. (Va. Code §19.2-124)

4. Any decision from the Court of Appeals involving a substantial constitutional question or matter of significant precedential value (Va. Code §17.1-410(B))

5. Selected cases certified due to imperative public importance or heavy caseload in the Court of Appeals. (Va. Code §17.1-409)

6. A final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus. (Va. Code §17.1-310)

7. Jurisdiction to issue writs of mandamus and prohibition to circuit and district courts and to the State Corporation Commission. (Va. Code §17.1-309)

Security for the Appeal

In discretionary criminal appeals in which the defendant is not indigent, the Supreme Court will order a costs bond with security, generally in the amount of $500, upon awarding the appeal. Va. Code § 8.01-676.1 (B).

Any bond ordered by the Supreme Court must be filed and processed in the circuit court clerk's office.

All bonds required pursuant to Va. Code § 8.01-676.1 must conform to the bond forms set forth in the Appendix to Part 5 of the Rules of Court. Rule 5:24(a).

Procedures for Processing an Appeal to Supreme Court of Virginia

The procedures that follow are intended to provide the circuit court clerk with a reference for processing a criminal defendant's appeal to the Supreme Court of Virginia. These procedures should be followed in conjunction with the applicable Rules of Court and statutory provisions governing the appellate process.

Step 1 Written notice of appeal is filed with the circuit court clerk. The notice of appeal shall contain a statement whether any transcript or statement of facts, testimony, and other incidents of the case will be filed. The notice of appeal must also contain a certificate stating:

- The names and addresses of all appellants and appellees, the name, Virginia State Bar number, mailing address, telephone number (and extension), facsimile number, and e-mail address of counsel for each party, and the same information for any party not represented by counsel;
- that a copy of the notice has been delivered or mailed to all opposing counsel;
- in a criminal case, a statement whether counsel for defendant has been appointed or privately retained; and
- that if a transcript is to be filed, a copy has been ordered from the court reporter. Rule 5:9(b)

Note: Upon request, the Clerk is required to cause a transcript to be prepared of the trial and any other court proceedings by the person authorized by the court to prepare transcripts. Va. Code §§ 17.1-408

Whenever two or more cases were tried together in the trial court, one notice of appeal and one record may be used to bring all such cases before the Supreme Court even though such cases were not consolidated by formal order Rule 5:9(c)

Comments: Notice of intent to appeal is often given orally at the close of the defendant's sentencing hearing; however, written notice of appeal must be filed with the circuit court clerk within thirty days after the entry of final judgment or other appealable order or decree, or within any specified extension thereof granted by the Court. A notice of appeal field after the court announces a decision or ruling-but before the entry of such judgment or order-is treated as filed on the date of and after the entry. Rule 5:9(a). **Note:** If oral intention to appeal is given prior to the filing of the written notice of appeal, the clerk may proceed to STEPS 3, 4, 5, 6 and 7, as appropriate.

Step 2 Clerk notes on written notice of appeal the date of filing.

Comments: The circuit court clerk is not authorized to reject a written notice of appeal on the grounds that it was not filed in a timely manner. Such decision rests with the appellate court.

Step 3 Circuit court judge postpones execution of sentence and, if applicable, sets bail, postpones execution of the judgment and orders a suspending bond. **Note:** If bail denied at trial court level, the Court of Appeals may review the decision by the trial court to deny bail and overruled such denial. The appellate court shall either set bail or remand the matter to circuit court for such further action regarding bail as the appellate court directs.

Clerk will receive Order from appellate court and may set a Bond Hearing.

Comments: The judge may postpone execution of the sentence in accordance with Va. Code § 19.2-319. The defendant may be released from custody if the judge sets bail and the defendant must meet the terms of such bail. While the judge is required to set bail in misdemeanor cases, they have discretion to set bail in all other cases. If bail is denied, the reason therefor must be stated in the record. Va. Code § 19.2-319.

Collection of the judgment (fines, costs or other monetary penalties) may be postponed at the judge's discretion. Va. Code § 19.2-319. However, such action is rarely necessary since there is generally no effort to execute on a judgment during the pendency of an appeal. If the trial judge elects to postpone execution of the judgment, they may do so at any time prior to the transmission of the case record to the appellate court.

Clerk would enter appealed status in FAS. There must be a stay of execution in the order to halt execution and suspension of license by DMV. *See* Circuit Case Management System and Financial Accounting System User's Guides for further information.

Step 4 Clerk notes on the case summary sheet in the case file, when applicable:

- the date execution of the sentence was postponed
- the amount and terms of bail set by the judge, or

- if bail was denied, the reasons therefor
- the date execution of the judgment was postponed

and the amount of the suspending bond as established by the judge

Comments: If bail previously posted continues without change, no new bail documents need to be executed. If a change in bail is ordered, *see* this manual, "Pre-Trial – Bond."

A suspending bond would only be set when the judge postpones execution of a monetary judgment; however, such bonds are rarely instituted in criminal cases.

Step 5 Clerk prepares court order reflecting actions taken by the judge as documented in STEP 4. Order may be a separate order or part of the sentencing order.

Step 6 Clerk obtains judge's signature on order; clerk scans order and indexes and enters order in Criminal Order Book; clerk places original order in case file.

Step 7 Clerk processes bail or suspending bond, if executed; clerk issues a receipt to the payor if a cash bond is posted; clerk images/scans bond into the Bond Book and files original bond in the case file; clerk provides copy of executed bond to payor or surety, unless bond was prepared by the defendant's counsel or surety.

Comments: *See* form DC-330, Recognizance. For a suspending bond form, clerk uses Bond Form 2 in the Appendix to Part 5 of the Rules of Court. *See* also Va. Code § 8.01-676.1.

If the defendant or a third party posts a cash bond, clerk receipts the bond money under revenue code 502.

An irrevocable letter of credit may be posted as security. Such letter of credit is prepared by a financial institution, not the clerk. The clerk should not make a copy of the letter of credit but should note in the file that the letter of credit has been placed in the court safe. The original letter of credit is not placed in the bond book or case file since the original is needed if collection becomes necessary.

If the bond is to be secured other than by cash, *see* "Pre-Trial – Bond" for instructions on determining adequacy of surety. While these

instructions pertain to bail bonds, the same procedures would apply to suspending bonds as well.

Step 8 Clerk assembles the record on appeal; pursuant to Rule 5:10.

For making up, certifying and transmitting the original record pursuant to the Rules of the Supreme Court, the circuit court clerk does not receive a fee for preparing the record in a criminal case if one of the "fixed fees" is assessed. Va. Code § 17.1-275(A)(32).

Comments: The clerk should begin preparing the record as soon as possible following receipt of the written notice of appeal.
An abbreviated record may be prepared only in appeals to the Court of Appeals. Such record is prepared by counsel and filed with the circuit court clerk after being signed by all counsel and the trial judge.

Step 9 Clerk records the Transcript or Statement of Facts.

Comments: The parties have up to sixty days in which to file a transcript and fifty-five days in which to file a written statement of facts. Such documents are often the last to be incorporated in the record on appeal, and the clerk should not wait for such documents to be filed before compiling the record.

Step 10 Exhibits other than those filed with pleadings may be included in a separate volume or envelope, certified by the clerk of the trial court, including a descriptive list of exhibits contained therein. Any exhibit that cannot be placed in a volume or envelope should be identified by a tag. Contents of the Record:

- original papers and exhibits;
- each instruction marked "given" or "refused", initialed by the judge;
- each exhibit offered into evidence, whether admitted or not, initialed by the trial judge; (or any photograph thereof as authorized by § 19.2-70.4(A)&(C). (All non-documentary exhibits shall be tagged or labeled in the trial court and the tag or label initialed by the judge.);
- original draft or copy of each order entered by the trial court;
- opinion or memorandum decision rendered by the trial judge;

- any deposition or discovery material offered into evidence, whether admitted or rejected;
- the transcript of any proceeding or a written statement of facts, testimony, and other incidents of the case when made a part of the record, or the official videotape recording of any proceeding
- the notice of appeal

Omitted exhibits shall be noted on the descriptive list of exhibits.
Order of record:

- front cover setting forth the name of the court and the short style of the case;
- a table of contents listing each paper included in the record and the page on which it begins;
- each paper constituting a part of the record in chronological order; and
- the certificate of the clerk of the trial court that the foregoing constitutes the true and complete record, except omitted exhibits.
- Each page is numbered at the bottom.

Transcripts, depositions and reports may be included in separate volumes identified by the clerk of the trial court if referred to in the table of contents and at the appropriate place in the record.
Any transcript or statement of facts that the clerk of the trial court deems not a part of the record because of untimely filing shall be certified as such and transmitted with the record.

Comments: The Clerk shall not transmit the following types of exhibits unless requested by the appellate court:

- drugs
- guns and other weapons
- ammunition
- blood vials and other bio-hazard type materials
- money
- jewelry
- articles of clothing
- bulky items such as large graphs and maps

Step 11 Transmitting the record:

- The clerk retains the record for 21 days after the notice of appeal has been filed.
- If the notice states a transcript will be filed, retain the record for 21 days after the filing of the transcript or the statement.
- If objections are made to the transcript or writing, retain the record 5 days after the objection is acted upon by the trial judge.
- If requested in writing by counsel for all parties, transmit the record sooner.

Comments: Whether requested or not, the clerk shall transmit the record to the appellate court within 90 days after entry of judgment or appealable order. Failure to transmit the record shall not be a ground for dismissal of the appeal by the appellate court.

Step 12 When the mandate is issued by the appellate Court, the clerk of the Court shall return the record to the clerk of the trial court.

Subsequent Events: Decision, Costs and Mandate

See Subsequent Events: Decision, Costs and Mandate – Court of Appeals, this chapter.

Procedures For Cost Assessment

See Procedures for Cost Assessment – Court of Appeals, this chapter

Habeas Corpus

Habeas corpus is a Latin phrase meaning "you have the body." Black's Law Dictionary 638 (5th ed. 1979). A *habeas corpus* action is a civil suit brought to challenge the legality of the restraint under which a person is held. While *habeas corpus* is a civil, rather than a criminal, proceeding, it is discussed in this manual because it is closely linked to a number of criminal proceedings. A petition for a writ of *habeas corpus* is not a substitute for a direct appeal and concerns only the legality of confinement, not the prisoner's guilt or innocence.

A writ of *habeas corpus* is available only to a person who is in custody. For purposes of *habeas corpus*, a person is deemed to be in custody when they are currently incarcerated or when they have been released subject to the control of the parole board, probation officer, or the court which imposed a suspended sentence. See Jones v. Cunningham, 371 U.S. 236 (1973).
To obtain a writ of *habeas corpus*, the person allegedly unlawfully imprisoned must file a

petition for writ of *habeas corpus*. The petition and the related transactions are handled as a civil proceedings, except as noted below. The form of the petition is provided by Va. Code § 8.01-655, and it must be filed in the court where the original conviction was entered. Va. Code § 8.01-654 (B)(1).

Not all petitions will result in a court hearing. If the court finds that the petition for *habeas corpus* is frivolous on its face, or if the court can make a decision on the merits by referring to records of previous judicial proceedings, the court may rule on the petition without a full evidentiary hearing. Arey v. Peyton, 209 Va. 370 (1968). *See* also Va. Code § 8.01-654 (B)(4). If a hearing is held, the petitioner and the Commonwealth have an opportunity to present evidence. Prisoners may be subpoenaed to appear pursuant to a writ of *habeas corpus ad testificandum*. *See* this manual, "Pre-Trial - Witness Summoning."

Court-appointed counsel should be provided to indigent petitioners who request counsel in *habeas corpus* proceedings. For a discussion of appointment of counsel for indigent defendants, *see* this manual, "Pre-Trial - Right to Counsel."

If the court denies the petition, before or after a hearing, the petitioner will be remanded to custody. If the court grants the petition and issues a writ of *habeas corpus*, the petitioner will be discharged from custody, but the court may suspend execution of its order to allow the Commonwealth to appeal, or to institute a new trial within a specified period of time. If a new trial is ordered, the original criminal case is reopened, and the clerk must put it back on the criminal docket. The court also has authority to admit the petitioner to bail, pending the Commonwealth's appeal or initiation of a new trial. Va. Code § 8.01-662.

The trial court's ruling on a petition for *habeas corpus* is appealable to the Supreme Court of Virginia. Va. Code § 17.1-406. A petition for *habeas corpus* may also be filed in a federal court. Circuit clerks may be required to provide copies of documents to federal courts.

Because *habeas corpus* actions are civil and not criminal in nature, the circuit court clerk, upon receipt of a petition for *habeas corpus*, should consult the procedures contained in the Circuit Court Clerk's Manual - Civil.

Expungement of Criminal Cases

The Virginia General Assembly has determined that arrest, police, and court records of citizens who are acquitted, or pardoned for unjust convictions can hinder an innocent citizen's ability to obtain employment, an education, and credit. Va. Code § 19.2-392.1. Hence, the Code of Virginia provides for the expungement of such records under certain circumstances.

If a person who is charged with the commission of a crime or any offense defined in Title 18.2 is (i) acquitted; or when (ii) a *nolle prosequi* is taken, they may file a petition with the circuit court requesting expungement. Va. Code § 19.2-392.2 (A). When a person has been granted an

absolute pardon for the commission of a crime that he did not commit, the Secretary of the Commonwealth shall forward a copy of the absolute pardon to the circuit court for the county or city the person was convicted. Upon receiving a copy of the absolute pardon, the court shall enter an order requiring expungement of the police and court records, including electronic records, relating to the charge and conviction. The order of expungement shall contain a statement that the expungement is a result of an absolute pardon. Va. Code § 19.2-392.2(I). A person whose name or other identification has been used without authorization by another person who has been charged or arrested under that name or identification may also petition the circuit court for expungement. Va. Code § 19.2-392.2 (B). When a charge is dismissed because the court finds that the person arrested or charged is not the person named in the summons, warrant, indictment, or presentment, the court dismissing the charge shall, upon motion of the person improperly arrested or charged, enter an order requiring expungement of the police and court records relating to the charge. Va. Code § 19.2-392.2 (A).

Any person whose name or other identification has been used without their consent or authorization by another person who has been charged or arrested using such name or identification may file a petition with the court for relief pursuant to Va. Code § 19.2-392.2. A person who has petitioned the court pursuant to Va. Code § 19.2-392.2 as a result of a violation of Va. Code § 18.2-186.3, may submit to the Attorney General a certified copy of a court order obtained pursuant to Va. Code § 19.2-392.2. The Office of the Attorney General, in cooperation with the State Police, may issue an "Identity Theft Passport" stating that such an order has been submitted. The Office of the Attorney General may provide access to identity theft information to criminal justice agencies and individuals who have submitted a court order pursuant to this section. Va. Code § 18.2-186.5

The petition requesting expungement must be filed in the circuit court of the city or county in which the case was disposed of. Va. Code § 19.2-392.2 (C). Costs shall be as provided by Va. Code § 17.1-275, but shall not be recoverable against the Commonwealth. If the court enters an order of expungement, the clerk of the court shall refund to the petitioner such costs paid by the petitioner.

A copy of the petition shall be served on the attorney for the Commonwealth of the city or county in which the petition is filed. The attorney for the Commonwealth may file an objection or answer to the petition or may give written notice to the court that he does not object to the petition within 21 days after it is served on him. Va. Code § 19.2-392.2 (D).

If an order of expungement is entered, the clerk shall forward a copy of the order to the State Police which will direct the manner in which the records are to be removed or expunged.

Any party aggrieved by the decision of the court may file an appeal as provided in civil cases. Va. Code § 19.2-392.2 (F).

Unauthorized disclosure of expunged records constitutes a Class 1 misdemeanor. Va. Code § 19.2-392.3.

Upon receiving a copy of a writ vacating a conviction pursuant to Va. Code §§ 19.2-327.5 or 19.2-327.13, the court shall enter an order requiring expungement of the police and court records relating to the charge and conviction. Such order shall contain a statement that the dismissal and expungement are ordered pursuant to Va. Code § 19.2-392.2.

Order of expungement is voidable within three years of entry upon failure to comply with expungement procedures, or if entered contrary to law.

Expunging Criminal Records

Step 1 Expungement may be initiated by an appellate court that grants writ of actual innocence, by an absolute pardon from the Governor, or by filing of a petition for Expungement by a defendant. These are civil procedures. *See* Circuit Court Clerk's Manual – Civil for how to process the various petitions or orders that will come before the court. Court orders expungement of records. **Note:** When petition is filed, petitioner provides copy of petition to a law enforcement agency to obtain fingerprint card to be submitted to CCRE. CCRE will then forward, under seal, petitioner's criminal history, copy of source documents, and the set of fingerprints. Va. Code § 19.2-392.2 (E).

Note: Fingerprinting and criminal history record information is not required for an expungement based upon an absolute pardon.

Step 2 Clerk forwards copy (Va. Code § 19.2-392.2 (I))of order of expungement, petition, other supporting documents to:

Virginia State Police
P.O. Box 27472
Richmond, VA 23261-7472
ATTN: Virginia Gunn

Step 3 Print CMS screens to facilitate re-entry of information into CMS in the event expungement is voided. Place in sealed envelope with record.

Step 4 If the Department of Criminal Justice Services directs that the court records be sealed, clerk places all records pertaining to expunged information in an envelope bearing the case number and seals envelope; clerk labels envelope "EXPUNGED RECORD TO BE UNSEALED ONLY BY COURT ORDER."

Comments: The petition and order of expungement, as well as related court documents ordered expunged should be placed in the sealed file.

If the information to be expunged is included among other information that has not been expunged on the same form or piece of paper, the clerk must obliterate the expunged information on the original, or retype the original, omitting the expunged information.

Step 5 Clerk deletes information to be expunged from index to criminal warrants and other indexes. Clerk places criminal warrants in sealed file.

Step 6 If the expunged information is on a CCRE form, the clerk destroys the criminal history record information pursuant to Va. Code § 19.2-392.12 (E). Court will return fingerprint card at the conclusion of the hearing.

Step 7 If the information to be expunged is maintained in an automated system, the clerk copies the automated record onto an off-line medium (tape, disk, or hard copy). The clerk files the expunged record, in whatever form, as described in STEP 3.

Comments: No notification that expunged data exists should be left in normally accessed files.

Step 8 The clerk files the sealed envelope in a secure location apart from normally accessed files. Note date of expungement order on face of envelope.

Comments: The file shall be properly indexed for later retrieval, if required by court order.

Step 9 After clerk has expunged records as directed, clerk notifies State Police within 60 days of receipt of the request for expungement.
Comments: Virginia State Police
P.O. Box 27472
Richmond, VA 23261-7472

Expungement Is Voided

Step 1 Upon receipt of court order voiding the expungement, unseal the record. Using the printed screens from CMS, re-enter case with same information as initially entered.

Comments: CMS will not re-transmit criminal case data to State Police as a new charge.

Step 2 Note in remarks field of the Hearing/Disposition screen the date of expungement and date the expungement was voided.

Step 3 Re-scan/re-index all court orders.

Step 4 Send certified copy of order voiding expungement to:

Virginia State Police
P.O. Box 27472
Richmond, VA 23261-7472

Disposition of Case Papers in Ended Cases

Destroy after 10 years, Discretion of Clerk

The circuit court clerk is responsible for the maintenance and eventual destruction of case files. The following cases, ending on or after January 1, 1913 shall be retained for 10 years after conclusion: Va. Code § 17.1-213.

- conditional sales contracts;
- Concealed handgun permit applications;
- Minister appointments;
- Petitions for appointment of trustee;
- Name changes;
- *Nolle prosequi* cases;
- Civil actions voluntarily dismissed, including nonsuits, dismissed as settled, dismissed with or without prejudice, discontinued or dismissed under Va. Code § 8.01-335 and district court appeals dismissed under Va. Code § 16.1-133 prior to 1988;
- Misdemeanor and traffic cases; except those as set out below, including those which were commenced on a felony charge but concluded as misdemeanor
- Suits to enforce a lien;
- Garnishments;
- Executions except those covered in Va. Code § 8.01-484; and
- Miscellaneous oaths and qualifications, but only if the order or oath or qualification is recorded in the appropriate order book.
- Civil cases pertaining to declarations of habitual offender status and full restoration of driving privileges.

Destroy at Discretion of Clerk/Guidelines

All other records or cases ending on or after January 1, 1913 shall be retained subject to the following guidelines: Va. Code § 17.1-213.

- All civil (not related to real estate) cases files which are not considered by the clerk to have a historical or genealogical significance shall be retained twenty years from the court order date;
- All criminal cases dismissed, including those not a true bill, acquittals, and not guilty verdicts shall be retained ten years from the court order date;
- Criminal case files involving a felony conviction and all criminal case files involving a misdemeanor conviction under Va. Code §§ 16.1-253.2, 18.2-57.2, or 18.2-60.4 shall be retained (i) 20 years from the sentencing date or (ii) until the sentence term ends, whichever comes later. Case files involving a conviction for a sexually violent offense as defined in Va. Code § 37.2-900, a violent felony as defined in §17.1-805, or an act of violence as defined in Va. Code § 19.2-297.1 shall be retained (a) 50 years from the sentencing date or (b) until the sentence term ends, whichever comes later.

Clerks should also refer to General Schedule No. 12 provided by the Library of Virginia.

Except as provided in subsection A, the clerk of a circuit court may cause (i) any or all papers or documents pertaining to civil and criminal cases; (ii) any unexecuted search warrants and affidavits for unexecuted search warrants, provided at least three years have passed since issued; (iii) any abstracts of judgments; and (iv) original wills, to be destroyed if such records, papers, documents, or wills no longer have administrative, fiscal, historical, or legal value to warrant continued retention, provided such records, papers, or documents have been imaged or converted to an electronic format. Such imaging and microphotographic processes and equipment shall meet state archival microfilm standards pursuant to Va. Code § 42.1-82, or such electronic format shall follow state electronic records guidelines, and such records, papers, or documents so converted shall be placed in conveniently accessible files and provisions made for examining and using same. The clerk shall further provide security negative copies of any such microfilmed materials for storage in The Library of Virginia.

Each agency shall ensure that records created after July 1, 2006 and authorized to be destroyed or discarded are destroyed or discarded in a timely manner…provided, however, such records that contain identifying information as defined in clauses (iii) through (ix), or clause (xii) of subsection C Va. Code § 18.2-186.3, shall be destroyed within six months of the expiration of the records retention period. Va. Code § 42.1-86.1.

Chapter 7 - Miscellaneous Matters

Search Warrants

The Code of Virginia provides for the issuance of search warrants upon a sworn complaint supported by an affidavit. A search warrant may be issued by any judge, magistrate, or other person having authority to issue criminal warrants if the complaint and affidavit show probable cause for the issuance of such search warrant. Va. Code § 19.2-52. Although clerks are authorized to issue search warrants, the clerk should not do so without having had thorough training in making probable cause determinations and in issuing search warrants. Magistrates issue almost all search warrants in Virginia.

Every search warrant shall be directed to (i) the sheriff, sergeant, or any policeman of the county, city or town in which the place to be searched is located, (ii) any law-enforcement officer or agent employed by the Commonwealth and vested with the powers of sheriffs and police, or (iii) jointly to any such sheriff, sergeant, policeman or law-enforcement officer or agent and an agent, special agent or officer of the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives of the United States Treasury, the United States Naval Criminal Investigative Service, the United States Department of Homeland Security, any inspector, law-enforcement official or police personnel of the United States Postal Inspection Service, or the Drug Enforcement Administration. The warrant shall (i) name the affiant, (ii) recite the offense in relation to which the search is to be made, (iii) name or describe the place to be searched, (iv) describe the property or person to be searched for, and (v) recite that the magistrate has found probable cause to believe that the property or person constitutes evidence of a crime (identified in the warrant) or tends to show that a person (named or described therein) has committed or is committing a crime or that the person to be arrested for whom a warrant or process for arrest has been issued is located at the place to be searched.

Search warrants authorized for the search of any place of abode shall be executed by initial entry of the abode only in the daytime hours between 8:00 a.m. and 5:00 p.m. unless (i) a judge or a magistrate, if a judge is not available, authorizes the execution of such search warrant at another time for good cause shown by particularized facts in an affidavit or (ii) prior to the issuance of the search warrant, law-enforcement officers lawfully entered and secured the place to be searched and remained at such place continuously.

A law-enforcement officer shall make reasonable efforts to locate a judge before seeking authorization to execute the warrant after 5 p.m., unless circumstances require the issuance of the warrant after 5 p.m., in which case the law-enforcement officer may seek such authorization from a magistrate without first making reasonable efforts to locate a judge. Such reasonable efforts shall be documented in an affidavit and submitted to a magistrate when seeking such authorization. Va. Code § 19.2-56.

The clerk's role with respect to processing search warrants is generally to serve as a repository for documents related to search warrants. Specific duties are set out below:

Step 1 Clerk maintains a file for receiving affidavits for search warrants . The affidavit upon which a search warrant may be issued is not placed in a case file.

Note: If the search warrant is sought for a search between the hours of 5:01 p.m. and 7:59 a.m., the officer must first request permission of the court. If the court is unavailable the request may be made to the magistrate. DC-3005, Affidavit and Authorization for Nighttime Search of a Place of Abode.

Comments: An affidavit may be made by voice or videotape recording. Va. Code § 19.2-56. Such affidavits are open to inspection by the public after the warrant that is the subject of the affidavit has been executed or 15 days after issuance of the warrant, whichever is earlier. Any affidavit, warrant, return, and any order sealing the affidavit, warrant, or return, may be temporarily sealed for a specific period of time. Va. Code § 19.2-54.

Step 2 Clerk maintains an index for the affidavits that is kept separate from other indexes.

Comments: The same index is used for executed search warrants that are filed with the affidavits on which they are based. Va. Code § 19.2-54.

Step 3 The affidavit is filed by a judicial officer authorized to issue search warrants. It may be delivered in person or mailed by certified mail, return receipt requested or delivered by electronically transmitted facsimile process, or by use of filing and security procedures for transmitting signed documents, to the clerk's office of the county or city wherein the search is made.

Comments: Affidavits may be filed by a judicial officer other than the judicial officer who issued the search warrant.

Note: The copy of the affidavit is to be filed by the judicial officer as well.

Step 4 The officer, or their designee or agent, may file the warrant, inventory, and accompanying affidavit by delivering them in person, or by mailing them certified mail, return receipt requested, or delivering them by electronically transmitted facsimile process, to the city/county where the search was conducted.

Comments: The officer who seizes property pursuant to a warrant must

make an inventory of the items seized under oath. An inventory of any seized property shall be produced before the circuit court of the county or city where the search was conducted. Va. Code § 19.2-57.

Step 5 The clerk stores property seized pursuant to warrant only if directed by the judge. Va. Code § 19.2-58.

Comments: *See* "Pre-Trial - Receipt, Maintenance And Storage Of Evidence" regarding the storage of property brought into the clerk's office. **Note:** *See* "Post Sentencing" chapter (Va. Code § 17.1-213) regarding destruction of unexecuted search warrants and affidavits for unexecuted search warrants.

Note: Virginia Code § 19.2-70.3 allows an investigative or law-enforcement officer to obtain real-time location data without a warrant in certain circumstances. No later than three business days after seeking disclosure of real-time location data pursuant to this subsection, the investigative or law-enforcement officer seeking the information shall file with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as to why the person whose real-time location data was sought is believed to be important in addressing the emergency.

This written statement of facts may or may not be followed up by a search warrant. Consideration should be given as to withholding the statement for the 15 days as required for an affidavit, or until a search warrant is received.

Search Warrants for a Tracking Device

A law-enforcement officer may apply for a search warrant from a judicial officer to permit the use of a tracking device. Each application for a search warrant authorizing the use of a tracking device shall be made in writing, upon oath or affirmation, to a judicial officer for the circuit in which the tracking device is to be installed, or where there is probable cause to believe the offense for which the tracking device is sought has been committed, is being committed, or will be committed.

The affidavit shall be certified by the judicial officer who issues the search warrant and shall be delivered to and preserved as a record by the clerk of the circuit court of the county or city where there is probable cause to believe the offense for which the tracking device has been sought has been committed, is being committed, or will be committed. The affidavit shall be delivered by the judicial officer in person; mailed by certified mail, return receipt requested; or delivered by electronically transmitted facsimile process or by use of filing and security procedures as defined in the Uniform Electronic Transactions Act (§ 59.1-479 et seq.) for transmitting signed documents.

By operation of law, the affidavit, search warrant, return, and any other related materials or

pleadings shall be sealed. Upon motion of the Commonwealth or the owner or possessor of the vehicle, container, item, or object that was tracked, the circuit court may unseal such documents if it appears that the unsealing is consistent with the ends of justice or is necessary to reasonably inform such person of the nature of the evidence to be presented against them or to adequately prepare for their defense.

The circuit court may, for good cause shown, grant one or more extensions, not to exceed 30 days each.

Within 10 days after the use of the tracking device has ended, the executed search warrant shall be returned to the circuit court of the county or city where there is probable cause to believe the offense for which the tracking device has been sought has been committed, is being committed, or will be committed, as designated in the search warrant, where it shall be preserved as a record by the clerk of the circuit court.

The disclosure or publication, without authorization of a circuit court, by a court officer, law-enforcement officer, or other person responsible for the administration of this section of the existence of a search warrant issued pursuant to this section, application for such search warrant, any affidavit filed in support of such warrant, or any return or data obtained as a result of such search warrant that is sealed by operation of law is punishable as a Class 1 misdemeanor.

The affidavit, search warrant, return and other related materials or pleadings shall be sealed. It is recommended that these documents should not be indexed the Circuit Case Management System, nor should they be imaged. A separate log should be maintained, and staff access to the log and documents should be limited.

Pen Register/Wire Trap

"Pen register" means a device which records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached. Installation or use of a pen register or a trap and trace device requires a court order under Va. Code § 19.2-70.2 with certain exceptions. Any person who knowingly violates this section shall be guilty of a Class 1 misdemeanor (*see* Va. Code § 18.2-11 for punishment). A court order is not needed however for any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of the provider's or customer's business.

Court orders authorizing the installation and use of a pen register or a trap and trace device will be valid for a period not to exceed sixty days. Once the sixty days has expired, the applicant may apply to the court for an extension. All extensions granted by the court shall not exceed

sixty days.

The clerk should note that it is not required to set up a separate case; however a separate filing area should be maintained. The procedures that follow are applicable for an initial order or an extension of a previous order authorizing the pen register/wire trap:

Procedures For Pen Register/Wire Trap

Step 1 Clerk may receive application from appropriate authority (and order) for an order authorizing or approving the installation and use of a pen register or a trap and trace device. If clerk does not receive application, GO TO STEP 5

Comments: Application will be in writing under oath or equivalent affirmation.

Application may request information, facilities and technical assistance necessary to accomplish installation.

Application must include:

- identity of the officer making the application and the identity of the law-enforcement agency conducting the investigation; and
- certification by the applicant the information likely to be obtained is relevant to an on-going criminal investigation being conducted by that agency.

Va. Code § 19.2-70.2

Step 2 Clerk gives application and order to judge for review.

Comments: An application for an *ex parte* order authorizing the installation and use of a pen register or trap and trace device may be filed in the jurisdiction where the ongoing criminal investigation is being conducted; where there is probable cause to believe that an offense was committed, is being committed, or will be committed; or where the person or persons who subscribe to the wire or electronic communication system live, work, or maintain an address or a post office box. Such installation shall be deemed to occur in the jurisdiction where the order is entered, regardless of the physical location or the method by which the information is captured or routed to the law-enforcement officer that made the application. Upon application, the court shall enter an *ex parte* order authorizing the installation and use of a pen register or a trap and trace device if the court finds that the investigative or law-enforcement officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

Step 3 Court enters an *ex parte* order authorizing the request.

Comments: Court Order must include:

- Identity, if known, of the person in whose name the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied is listed or to whom the line or other facility is leased;
- Identity, if known, of the person who is the subject of the criminal investigation;
- The attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied; and
- Statement of the offense to which the information likely to be obtained by the device relates.

Court Order may order provider of communication service to provide technical assistance in the installation of such device.

Step 4 Application/order is sealed by judge.

Comments: Applicants made and orders granted or denied shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Va. Code § 19.2-68 (F) (2).

Step 5 Clerk receives DC-40 , List of Allowances if request for payment is received for services rendered by the communication provider. *See* Form DC-40, List of Allowances.

Extradition

Extradition is the surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territory of the other, which being competent to try and punish him, demands the surrender. Black's Law Dictionary 526 (5th ed. 1979).

The United States Constitution provides that [a] Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. U.S. Const. art. II, § 2.

Virginia has adopted the Uniform Criminal Extradition Act, Va. Code § 19.2-85 et seq. The Act provides for the return to Virginia of a person who is charged with a crime in the state but has fled to another state. It also provides for the release to the custody of another state of a

defendant found in Virginia who is charged with an offense in the other state.

A person arrested in Virginia upon a Governor's warrant for extradition (Va. Code §§ 19.2-92, 19.2-93), a fugitive warrant from another state (Va. Code § 19.2-99), or by a peace officer or private person without a warrant (Va. Code § 19.2-100) must be taken before a judge of a circuit or general district court, who will inform them (1) of the demand made for their surrender; (2) of the crime with which he is charged; (3) that he has the right to demand and procure legal counsel; and (4) that he may test the legality of their extradition by a writ of habeas corpus. Va. Code § 19.2-95. The accused may then either file a written waiver of extradition proceedings and consent to return to the demanding state, Va. Code § 19.2-114, or challenge the extradition by writ of habeas corpus. For a discussion of habeas corpus proceedings, *see* "Post Sentencing - Habeas Corpus" in this manual. The habeas corpus hearing cannot be used to determine if there was probable cause to charge the accused with a crime. It is limited to an examination of whether the extradition documents are in order; whether the accused has been charged with a crime in the demanding state; whether the petitioner is the person named in the extradition documents; and whether the accused is a fugitive. Michigan v. Doran, 446 U.S. 1307 (1980).

In all extradition cases, the defendant is brought before a judge for an arraignment hearing, even if the defendant wishes to waive the extradition proceedings. If the defendant wishes to waive the extradition proceedings as provided in Va. Code § 19.2-114, he must be advised by the district court judge prior to execution of the waiver that he has the right to the issuance and service of a Governor's Warrant of Extradition and a right to challenge extradition through a writ of habeas corpus. If the defendant still wishes to waive the extradition proceedings, then the waiver and consent to extradition a DC-375, Waiver of Extradition Proceedings are executed before the judge, after which a copy of the waiver and consent to extradition is sent to the Governor, and the defendant is held for delivery to an authorized agent of the demanding state.

Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, any judicial officer may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned upon their appearance before a judge at a time specified in such bond and upon their surrender for arrest. Va. Code § 19.2-102. For a discussion of bail, *see* "Pre-Trial – Bond."

Procedures For Extradition Of The Accused

Step 1 Procedure Decision: Is defendant wanted in Virginia or in another state? If wanted in Virginia, GO TO STEP 2; if wanted in another state, GO TO STEP 4.

Step 2 Clerk sends copy of indictment, information, affidavit made before a

magistrate, or judgment of conviction to Commonwealth's attorney or governor's office.

Comments: There are no charges for the copies pursuant to Va. Code § 17.1-266. Expenses incident to extradition are paid out of the state treasury upon presentation of vouchers signed by the Governor or their designee. They are assessed against the defendant however. *See* Va. Code § 17.1-275.5 (3).

Step 3 Upon return of the defendant to Virginia, clerk resumes normal case processing procedures. END OF PROCEDURES IF DEFENDANT IS WANTED IN VIRGINIA. IF DEFENDANT IS WANTED IN ANOTHER STATE, GO TO STEP 4.

Step 4 Extradition request is filed in the clerk's office.

Step 5 Clerk or other judicial officer issues fugitive warrant in Virginia; alternatively, governor's warrant is issued by governor's office of other state. Any electronically transmitted facsimile of a governor's warrant shall be treated as an original document, provided the original is received within four days of receipt of the facsimile. Va. Code § 19.2-92. *See* form DC-374, Warrant of Arrest for Extradition.

Step 6 Court may commit the accused to jail or release them on bail; clerk prepares bail documents if defendant was taken before a magistrate pending hearing.

Step 7 Clerk follows the same case initiation procedures as for a regular criminal case.

Comments: *See* "Case Initiation – Case Initiation Activities" this manual. In extradition proceedings, the hearing, as ordered by judge, clerk records hearing date on:

- calendar
- docket
- case summary sheet

Step 8 Clerk prepares forms for appointment of counsel, and waiver of extradition. *See* forms DC-334, Request for Appointment of a Lawyer and DC-375, Waiver of Extradition Proceedings.

Comments: Virginia Code § 19.2-95 states that no person arrested on an extradition warrant may be delivered over to the authority demanding them unless he is taken forthwith before a judge.

Step 9 Extradition hearing is held; judge, clerk records issuance

Step 10 Procedure Decision: Does the defendant waive extradition?
If yes, GO TO STEP 11; if no, GO TO STEP 12.

Step 11 If the defendant waives extradition, he must execute a written waiver; clerk

sends original to governor's office; clerk provides a copy to the officer with custody of the defendant and a copy to the court.

Step 12 Judge determines whether the defendant is to be extradited.

Comments: The judge may admit the defendant to bail pending the extradition hearing. *See* form DC-330, Recognizance. For a discussion of bail procedures, *see* "Pre-Trial – Bond."

Step 13 If defendant is to be extradited, clerk prepares order of extradition, as directed by the judge; obtains judge's signature; processes/ images order; indexes and enters in order book.

Comments: If defendant seeks a writ of habeas corpus, *see* this manual, "Post Sentencing - Habeas Corpus."

Records Management

Statutory Recordkeeping Duties

Duty to Preserve Papers in The Clerk's Office

Statute: "Except for case files for cases ended prior to January 1, 1913,… the clerk of a circuit court may cause (i) any or all papers or documents pertaining to civil and criminal cases; (ii) any unexecuted search warrants and affidavits for unexecuted search warrants, provided at least three years have passed since issued; (iii) any abstracts of judgments; and (iv) original wills, to be destroyed if such records, papers, documents, or wills no longer have administrative, fiscal, historical, or legal value to warrant continued retention, provided such records, papers, or documents have been imaged or converted to an electronic format. Such records, papers, or documents so converted shall be placed in conveniently accessible files and provisions made for examining and using same. The clerk shall further provide security negative copies of any such microfilmed materials for storage in The Library of Virginia." Va. Code § 17.1-213,

"The circuit court clerks shall have custody of and shall keep all court records, including books, evidence, records, maps, and papers, deposited in their offices or at such location otherwise designated by the clerk, as well as records stored in electronic format whether the storage media for such electronic records are on premises or elsewhere." Va. Code §17.1-242.

"Except as otherwise provided herein, each circuit court clerk shall keep

order books or, in lieu thereof, an automated system recording all proceedings, orders and judgments of the court in all matters, all decrees, and decretal orders of such court … and all proceedings, orders and judgments of the court in all matters at criminal law shall be recorded in the criminal order book.

The clerk shall ensure that these order books have been image or converted to or created in an electronic format. Such microfilm and microphotographic processes and equipment shall meet state microfilm standards, and such electronic format shall follow state electronic records guidelines, pursuant to Va. Code § 42.1-82. The clerk shall further provide the master reel of any such microfilm for storage in the Library of Virginia and shall provide for the secured, off-site back up of any electronic copies of such records." Va. Code § 17.1-124.

Removal of Records by the Clerk or Other Persons - Va. Code § 17.1-210

Statute: The clerk may not remove or allow others to remove, any records or papers of a circuit court, out of the county or city where the clerk's office is kept, except:

- by order of the court;
- by an attorney of record in a pending case to any location within the Commonwealth, unless prohibited by the court;
- on occasion of invasion or insurrection if the records or papers would be endangered; and
- in other cases specifically provided for by law.

Records Open To Public Inspection And Copying

Statute: The records and papers of circuit court are open to inspection by any person. "The clerk shall, when required, furnish copies thereof." Refer to Va. Code § 17.1-208.

Comment: Records not open to public inspection are confidential documents, documents sealed by court order, and papers that are not public records.

Statute: Persons may make copies of records and papers in the clerk's office. However, no person may use the clerk's office for making copies of records in such manner or to such extent as will interfere with the business of the office or with its reasonable use by the general public. Refer to Va. Code § 17.1-208.

Statute: "Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records….The custodian of such records shall take all necessary precaution for their preservation and safekeeping." Va. Code § 2.2-3704(A).

Preserving Records That Have Become Damaged Or Illegible

Statute: Records that are becoming illegible or are wearing out may be copied, photographed or otherwise duplicated. The copies shall be certified as true copies, and the originals shall be carefully preserved. Refer to Va. Code § 17.1-212.

Statute: Any books or records in the clerk's office may be rebound, transcribed, imaged or digitally reproduced. The same faith and credit shall be given the reproductions from images as the book or record transcribed would have been entitled to. Refer to Va. Code § 17.1-244.

Statute: Any book may be taken from the clerk's office to be bound, rebound, imaged or digitally reproduced. All necessary precautions shall be taken, by requiring bonds or otherwise, to ensure preservation and return of the record and to prevent the mutilation thereof. Refer to Va. Code § 17.1-245.

Creating A Records Management Program

The Library of Virginia

The clerk of circuit court is the designated records manager for the office. The State Library Board is given authority under Va. Code § 42.1-82 to regulate the creation, preservation, storage, filing management and disposition of all records, including electronic records. Under Va. Code § 42.1-85, each locality is required to cooperate with the Librarian of Virginia in conducting surveys and in establishing and maintaining an active, continuing program for the economical and efficient management of public records.

The Library of Virginia has provided clerks with a copy of the Virginia Public Records Management Manual. The Manual provides a guide to the best practices for managing public records and information. Additional information for records management may be located on the Library of Virginia Records Management website page.

Each clerk's office should also have a copy of the General Records Retention and Disposition Schedule for Local Government in Virginia. The schedules list specific record series and provide instructions for - how long to retain them, how to maintain them, and (if applicable) how to dispose of them. The records retention and disposition schedule for circuit court records is General Schedule No. 12.

Appointing A Records Officer

Virginia Code § 42.1-85 requires each agency and locality to designate a records officer, who serves as a liaison to the Library of Virginia and supervises the local record management plan. Complete form RM-25, Records Officer Designation and Responsibilities.

Components Of A Records Management Plan

Guidelines for creating a records management plan are set out in Chapter 1 of the Virginia Public Records Management Manual.

Briefly, any records management plan requires the records officer to:

- Conduct a Survey or inventory of the records (in all formats).
- Establish and follow a retention schedule (approved by the Library of Virginia).
- Identify and use appropriate technology to create, store and retrieve materials.
- Destroy obsolete records and document their destruction.
- Store inactive records in a secure location.
- Preserve vital records essential to conducting continuous business operations.
- Preserve archival (historic, permanent) records. This may be done on-site, or by transferring them to the Library of Virginia.
- Create a disaster preparedness plan to protect and recover records.
- Implement efficient filing and indexing systems for the records.
- Develop forms to document records management activities.

Library of Virginia Records Management Forms

Library Of Virginia Records Management Forms are located at http://www.lva.virginia.gov/agencies/records/forms.asp unless otherwise linked below.

- Records Survey (RM-19)

- Certificate of Records Destruction (RM-3)
- Records Transfer List and Receipt (RM-17)
- Records Center Retrieval Request (RM-18)
- Archives Reference Services/Archives Records Request Forms
- Order Form for Publications and Locality General Schedules

Circuit Court Records Preservation Program

The 3 initiatives of this program are:

- Records preservation grants, education and consultation for the clerks;
- Processing court records that have been transferred to the Library of Virginia;
- Converting the Library of Virginia's paper index and inventory of circuit court microfilm to electronic format.

Refer to the CCRPP Program Description and Grant Guidelines.

Disaster Planning For Records Managers

dPlan is The Online Disaster-Planning Tool for Cultural and Civic Institutions and provides information to aid with creating a plan for preventing/minimizing damage to records and the recovery of records in the event of a disaster.

Library of Virginia Newsletters

The Library of Virginia publishes two newsletters, The Commonwealth Records Manager, and Recordatur (a newsletter for circuit courts). Circuit courts receive a free copy by mail as they are published. Online versions are available.

Dealing With Electronic Records

If permanent records are kept solely in an electronic format, the Library of Virginia states that it is the responsibility of the clerk to migrate the permanent electronic records from generation to generation and to ensure no information is lost between migrations.

The Library of Virginia issued a document titled "Electronic Records Guidelines" in 2009. This publication provides guidelines for best practices and principles in managing electronic records, information on standards for maintaining and long-term preservation of electronic records.

The General Records Retention and Disposition Schedule for localities is General Schedule No. 101

Refer to Chapter 6 of the Virginia Public Records Management Manual for a broader discussion of electronic records.

Destroying Circuit Court Records

Clerks' offices are constantly faced with problems involving the protection and preservation of physical office records. Va. Code § 42.1-87 requires the clerk, as custodian of archival public records, to "…keep them in fire-resistant, environmentally controlled, physically secure rooms designed to ensure proper preservation and in such arrangement as to be easily accessible…. Record books should be copied or repaired, renovated or rebound if worn, mutilated, damaged or difficult to read."

Circuit court clerks must comply with Va. Code § 17.1-213, which provides for retention and disposition of papers in ended cases. This statute generally provides that:

- All pre-1913 case files, any case files having historical, genealogical or sensation significance, and all cases in which title to real estate is established, conveyed or condemned, must be retained permanently.
- Other cases or matters specifically set out shall be retained for a twenty-year, ten-year or three-year retention period.
- Criminal case files involving a felony conviction and all criminal case files involving a misdemeanor conviction under Va. Code §§ 16.1-253.2, 18.2-57.2, or 18.2-60.4 shall be retained (i) 20 years from the sentencing date or (ii) until the sentence term ends, whichever comes later. Case files involving a conviction for a sexually violent offense as defined in Va. Code § 37.2-900, a violent felony as defined in §17.1-805, or an act of violence as defined in Va. Code § 19.2-297.1 shall be retained (a) 50 years from the sentencing date or (b) until the sentence term ends, whichever comes later.

Do not destroy pre-1913 records. No agency shall destroy any public record created before 1912 without first offering it to the Library of Virginia .

Unless otherwise indicated in Va. Code § 17.1-213, the clerk of a circuit court may cause (i) any or all papers or documents pertaining to civil and criminal cases; (ii) any unexecuted search warrants and affidavits for unexecuted search warrants, provided at least three years have passed since issued; (iii) any abstracts of judgments; and (iv) original wills, to be destroyed if such records, papers, documents, or wills no longer have administrative, fiscal, historical, or legal value to warrant continued retention, provided such records, papers, or documents have been imaged or converted to an electronic format.

The Library of Virginia **strongly urges the retention of permanent records** on either alkaline paper or on microfilm.

Further, the clerk by Va. Code § 17.1-211 is r**equired to retain all receipt books, cancelled checks and bank statements for three years** after having been audited.

The records retention and disposition schedule, General Schedule No. 12, mentioned above,

prescribes the conditions of records management that apply specifically to circuit court records.

Record storage, retention and destruction guidelines for **financial records generated by the CAIS Financial Management System** are found in the Financial Management User's Guide.

Generally

"No agency shall sell or give away public records. No agency shall destroy or discard a public record unless (i) the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 and the record's retention period has expired; (ii) a certificate of records destruction, as designated by the Librarian of Virginia, has been properly completed and approved by the agency's designated records officer; and (iii) there is no litigation, audit, investigation, request for records pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), or renegotiation of the relevant records retention and disposition schedule pending at the expiration of the retention period for the applicable records series. . . ." Va. Code § 42.1-86.1

Each agency shall ensure that records created after July 1, 2006 and authorized to be destroyed or discarded in accordance with subsection A, are destroyed or discarded in a timely manner in accordance with the provisions of this chapter; provided, however, such records that contain identifying information as defined in clauses (iii) through (ix), or clause (xii) of subsection C Va. Code § 18.2-186.3, shall be destroyed within six months of the expiration of the records retention period. Va. Code § 42.1-86.1.

The procedures to be followed by a records officer have been sufficiently explained in earlier sections of this document. The balance of this document will provide specific guidance for removing the clutter from files, file and storage cabinets, shelves, etc.

Disposition Of Ended Case Files, Exhibits, And Discovery Materials

A procedure is supplied by the Virginia Public Records Management Manual, Chapter 6, in "Maintenance", which directs: "Records should be purged of duplicates and non-records prior to being released to the file room."

Generally, exhibits are retained in accordance "with appropriate case file retention period or statute, case law or decision governing evidence and forfeiture". Refer to General Schedule No. 12, ""Exhibits". Disposition of Exhibits filed in criminal cases, prior to complete destruction of the entire case file, is controlled by, Va. Code § 19.2-270.4. The court may dispose of unwanted exhibits (such as drugs, weapons and bulky exhibits that take up lots of space) by entering an order such as the samples appearing in Attachment H. The court may order the immediate destruction, donation, or return of evidence where a defendant is found not guilty and cases concluded prior to July 1, 2005. For civil cases, the clerk of court may, after sixty days have elapsed from the entry of judgment or after

all appeal time periods are exhausted, dispose of or donate any exhibits filed in the case, after notification of the owner, in accordance with Va. Code § 8.01-452.1.

Rule 4:14 allows the clerk to purge discovery materials in civil cases. There is no corresponding Rule of court or statute that applies to criminal cases. Therefore, all discovery materials filed in criminal cases should be retained pending the disposition of the case file.

Before considering disposal of ANY case files, the records officer should be thoroughly familiar with General Schedule No. 12 (GS-12) and Va. Code § 17.1-213. In GS-12, look at all references to "Cases." Regarding Va. Code § 17.1-213, it is again important to note: that except for (1) pre-1913 case files, (2) case files that have historical value, genealogical or sensational significance, and (3) all cases in which title to real estate is established, conveyed or condemned, all other case files may be destroyed after the particular retention period has expired.

Trial Transcripts. Court Reporter Records

Definitions: Court Reporter records are the verbatim recording of the evidence and incidents of trial either by a court reporter or by mechanical or electronic devices approved by the court. A Transcript is a copy of the trial record certified by either the court reporter or other designated to report and record the trial. Refer to Va. Code §§ 17.1-128 and 19.2-165.
Applying the above statutes, General Schedule No. 12 (GS-12) provides the retention periods for (i) court reporter records: (a) 5 years for civil cases, (b) 5 years for felony criminal cases, if an appeal is taken and a transcript was prepared, and (c) 10 years in a felony criminal case if no appeal was taken; and for (ii) transcripts: retain in case file and dispose of it when the case can be disposed of.

Refer to copies of the RM-3 form Certificate of Records Destruction for an example of how to dispose of this record.

Special Grand Jury Report

That documents from a Special Grand Jury shall be retained by the court for three years from the date of the report, and thereafter be subject to destruction, pursuant to Va. Code § 19.2-212.

Special Grand Jury Court Reporter Records

If no prosecution for perjury is instituted within three years from the date of the report of the special grand jury, the court shall cause the sealed container of notes, tapes and transcriptions of the court reporter to be destroyed.

However, on motion of the attorney for the Commonwealth, the court may extend the time period for destruction if the grand jury was impaneled at the request of the attorney for the Commonwealth. Va. Code § 19.2-212.

Multi-Jurisdictional Grand Jury

The clerk is responsible for maintaining the safety of all notes, tapes, transcriptions and other evidence generated from a multi-jurisdictional grand jury. Va. Code § 19.2-215.9.

Upon motion of special counsel, the presiding judge may order that such notes, tapes, and transcriptions be destroyed at the direction of special counsel by any means the presiding judge deems sufficient, provided that at least seven years have passed from the date of the multi-jurisdiction grand jury proceeding where such notes, tapes, and transcriptions were made.

Upon motion to the presiding judge, special counsel or the attorney for the Commonwealth or United States attorney of any jurisdiction where the offense could be prosecuted or investigated shall be permitted to review any of the evidence which was presented to the multi-jurisdiction grand jury and shall be permitted to make notes and to duplicate portions of the evidence as he deems necessary for use in a criminal investigation or proceeding. Special counsel, the attorney for the Commonwealth, or the United States attorney shall maintain the secrecy of all information obtained from a review or duplication of the evidence presented to the multi-jurisdiction grand jury, except that this information may be disclosed pursuant to the provisions of subdivision 2 of Va. Code § 19.2-215.1. A United States attorney satisfies their duty to maintain secrecy of information obtained from a review or duplication of evidence presented to the multi-jurisdiction grand jury if such information is maintained in accordance with the Federal Rules of Criminal Procedure. Upon motion to the presiding judge by a person indicted by a multi-jurisdiction grand jury or by a person being prosecuted with evidence presented to a multi-jurisdiction grand jury, similar permission to review, notes, or duplicate evidence shall be extended.

Election Records

Election records are retained by the clerk's office. According to General Schedule No. 12 (GS-12), election records prior to 1913 must be retained permanently.

Election records after 1912 are retained pursuant to General Schedule No. 1 (GS-1). Post-1912 election records may be destroyed after a few years, according to retention periods set out in GS-12.

Judgment Abstracts. Executions

According to General Schedule No. 12 (GS-12), pre-1913 judgment abstracts and executions (fieri facias or fifa) must be retained permanently.

Virginia Code § 17.1-213 (E) provides that judgment abstracts can be destroyed once they are imaged in accordance with existing requirements. Fifas that have been successfully served must be retained for ten years, and unserved fifas must be retained for two years. Virginia Code § 8.01-484

Lists Of Jurors

The Master Jury List of the Jury Commission, and any materials used in the preparation of it, including jury questionnaires, is the work product of the Jury Commission, and is not a public record. The Library of Virginia cannot regulate its retention, but has listed Lists of Jurors in the GS-12. The Library suggests the List of Jurors be retained for three years, then destroyed.

Virginia Code § 8.01-346 indicates that the Master Jury List is to be delivered to the clerk, who holds it for at least twelve months while the court is drawing jurors from it. Virginia Code § 8.01-351 indicates that each jury list drawn for a term of court (from the Master Jury List) is available in the clerk's office for inspection by counsel in any case to be tried by a jury during the term.

District Court Papers

See General Schedule No. 12 (GS-12) that includes retention of district court cases. Generally, unless the papers are pre-1913 or have historical, genealogical, or sensational significance, criminal case papers can be destroyed after ten years, and civil case papers can be destroyed after twenty years.

Va. Code § 16.1-69.55 allows the chief judge of a district court to direct the clerk of that court to cause any or all papers or documents pertaining to civil and criminal cases that have been ended to be destroyed if such records, papers, or documents will no longer have administrative, fiscal, historical, or legal value to warrant continued retention, provided such records, papers, or documents have been microfilmed or converted to an electronic format. Such processes and equipment shall meet state archival microfilm standards or such electronic format shall follow state electronic records guidelines, and such records, papers, or documents so converted shall be placed in conveniently accessible files and provisions made for examining and using the same. The provisions of this subsection shall not apply to the documents for certain misdemeanor cases.

Appendix

Appendix A - DC-40 & DC-40A/Interpreters/Court Reporters

DC-40, List Of Allowances

Refer to the DC-40, LIST OF ALLOWANCE INSTRUCTIONS.

DC-40(A), Application For And Approval/Denial For Wavier Of Fee Cap

Refer to the DC-40(A), APPLICATION FOR AND APPROVAL/DENIAL FOR WAVIER OF FEE CAP INSTRUCTIONS.

Chart Of Allowances

Refer to the Chart of Allowances.

Interpreters

Refer to the Guidelines For Policy And Best Practice – Serving Non-English Speakers In The Virginia Court System.

Court Reporter Services

Refer to the Procurement of Court Reporting Services in the Circuit Courts.

Appendix B - Criminal Fees and Costs Schedule

Fees and Costs (A-C)

Abandoned Vehicle Costs

Costs assessed for recovering expenses to remove or store an abandoned vehicle.

Revenue Code	Amount Assessed	Reference(s)
13S (113) 202*	Actual expenses	§ 46.2-1209 Chart of Allowances
*Use only if locality paid for services and locality is to be reimbursed by the Commonwealth		

When/How Collected:
Where it is shown that the vehicle was abandoned by the owner or is stolen or illegally used by a person other than the owner, the costs for removal/storage is taxed against the convicted defendant/owner. In this instance, the Commonwealth is not responsible for the cost of towing/storage.

If the identity of the owner cannot be determined or the owner was not the violator or if the owner/defendant is found not guilty, the cost for removal/storage is paid by the Commonwealth. In this instance, the Commonwealth's attorney presents the clerk with a bill from the vendor (towing company). The clerk then prepares and submits a DC-40, List of Allowances along with the original bill, to the Office of the Executive Secretary for further processing. The vendor is subsequently reimbursed by the Commonwealth (State Treasurer).

Add-On Fees/Costs

Fees/Costs authorized to be added to amounts assessed for Fixed Felony or Misdemeanor Fees, pursuant to Va. Code § 17.1-275.5.

Type	Revenue Code	Amount Assessed	Reference(s)
Court Appointed Counsel	120 state 217 local	As authorized by DC-40; waiver amount not assessed	19.2-163
Transcripts	13J (113)		§ 17.1-275.5(A)2
Extradition	13G		§ 17.1-275.5(A)3

Psychiatric Evaluation Costs	13A		§ 17.1-275.5(A)4
Appellant Costs	120 & 110		Rule 5A:30
Bad Check/ Credit Card Fee	135	A fee of $50 or 10% of the amount to be paid, whichever is greater	§ 17.1-275(A)28
Jury Costs	181 210	$50.00/day/juror Commonwealth pays felonies & all misdemeanors unless local warrant or summons. Grand jurors paid by locality. Multi-jurisdictional paid by Commonwealth	§17.1-618 §17.1-619 §19.2-205 §19.2-215.4
Drug Offender Fee	107	$150 for each felony conviction/disposition	§ 17.1-275 (A) 10
Drug Offender Fee	107	$25 civil penalty for misdemeanor possession of marijuana	§§ 4.1-1100, 18.2-251.02
Blood Withdrawal Fee-DUI	133	Not to exceed $25	§ 18.2-268.8; § 46.2-341.26:8
Ignition Interlock Device Costs	13C	$20	§ 18.2-270.1
Remote Alcohol Monitoring Device Costs	13K (113)	$20	§ 18.2-270.1
Investigator Fees – Approved for Court Appointed Counsel or Public Defender	13L (113)	Varies	§ 19.2-332
HIV Blood Test	133	Analysis by Consolidated Labs- amount for testing conducted varies. Amount varies for blood withdrawal	§ 18.2-62, § 18.2-346.1
Jail Admission Fee	234	Not to exceed $25	§ 15.2-1613.1
Courthouse Security Fee	244	Not to exceed $20	§ 53.1-120
DNA Sample Fee	13D	$53	§19.2-310.2

	233	Fee is split between state and locality	
Reimbursement of Medical Fees	13Q (113)	Varies	§ 19.2-165.1
Local Criminal Justice Training Academy Fee	243	Amount Set by Local Ordinance	§ 9.1-106
Driving Under the Influence Fee	13B	$100	§ 16.1-69.48:1.01 § 17.1-275.11
Certificate of Analysis Fee	13M (113)	$50 for appearance of analyst at trial or hearing, if demanded by defendant	§ 19.2-187.1
Electronic Summons Fee	241	Not to Exceed $5.00 set by local ordinance	§ 17.1-279.1

When/How Collected:
Assessed in addition to the fixed fees provided for by §§ 17.1-275.1 through 17.1-275.4, 17.1-275.7, through 17.1-275.11, 17.1-275.11:1 or 17.1-275.12.

Appellant Costs

Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant, if a judgment is affirmed, costs shall be taxed against the appellant; if a judgment is reversed, costs shall be taxed against the appellee; if a judgment is affirmed in part or reversed in part, or is vacated, costs shall be allowed as ordered by the Court of Appeals.

Revenue Code	Amount Assessed	Reference(s)
120 & 110	Varies, as mandated by court order	Rule 5A:30

When/How Collected
Assessed as directed by mandated by court order from the Court of Appeals.

ASAP - Alcohol Safety Action Program Fee

Fee for entrance into a driver alcohol rehabilitation program as ordered by the court for violation of Va. Code §§ 29.1-738, 18.2-266, 29.1-738.5, 46.2-341.24 and 46.2-341.4 or any local ordinance similar thereto.

No less than $250 but no more than $300. Upon a positive finding that the defendant is indigent, the court may reduce or waive the fee. In addition to the costs of the

proceeding, fees as may reasonably be required of defendants referred for intervention under any such program may be charged. § 18.2-271.1 (B), § 29.1-738.5 (B).

When/How Collected
ASAP fees are assessed but not collected by the court and are not added to the defendant's costs. The defendant remits payment directly to the local program.

Bad Check/Credit Card Fee

Fee charged when a defendant tenders a check for payment of fines and/or costs and the check is returned unpaid by the banking institution upon which it is drawn or pays with a credit card which is disallowed.

When/How Collected
Taxed against the defendant as additional costs.

Blood Test Fee

Alcohol and Drugs (DUI Cases)

Fees associated with chemical test(s) to determine the alcohol and/or drug content of blood when a defendant is charged with a violation of Va. Code § 18.2-266 (Driving under the Influence) or of a similar ordinance of any city, county or town. These fees are generally assessed as costs in the district court. Analysis of the blood sample is conducted by the Virginia Division of Consolidated Laboratories. A second blood sample analysis may be conducted by an independent (private) laboratory upon request of the defendant. (Any costs associated with this private laboratory testing should be billed to the defendant or the defendant's counsel.)

Note: The number of drugs tested cannot exceed the number authorized by the Division of Consolidated Laboratories as a result of their analysis of the first sample (vial).

Revenue Code	Amount Assessed	Reference(s)
133 233*	**Alcohol Only:** Not to exceed $25 Consolidated Lab analysis (1st vial) - $25 Private lab analysis (2nd vial) requested by defendant-Not to exceed $50 **Drug or Drug & Alcohol:** Not to exceed $25 State Lab Analysis (1st vial) - $25 Private lab analysis (2nd vial) requested by defendant-Not to exceed $50	§ 17.1-275.5(9); 18.2-268.8; 46.2-341.26:8; Chart of Allowances
*Use this code only if the locality pays for blood withdrawal and the court reimburses the locality.		

When/How Collected

Assessed against defendant upon conviction.

When analysis is conducted by a private lab (2nd vial), the bill is to be paid by the defendant or the defendant's attorney. Documentation for testing fee amounts and receipt for payment is required to be attached to the DC-40, List of Allowances submitted by the attorney when claiming expenses for these testing fees. The clerk's office should not receive an invoice directly from the laboratories for payment of analysis for a 2nd vial of blood.

DNA Analysis

Fee associated with DNA (deoxyribonucleic acid) analysis and blood typing, Every person convicted of a felony on or after July 1, 1990, every person convicted of a felony offense under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 who was incarcerated on July 1, 1989, and every person convicted of a violation of (i) § 18.2-67.4, (ii) § 18.2-67.4:2, (iii) subsection C of § 18.2-67.5, (iv) § 18.2-130 or (v) § 18.2-370.6 shall have a sample of their blood, saliva or tissue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The identification characteristics resulting from the analysis are maintained in a DNA data bank. The DNA analysis and blood typing must be performed by the Virginia Division of Forensic Science.

Blood samples from persons sentenced to incarceration shall be withdrawn by the receiving unit or such other place as designated by the Department of Corrections. The required sample from persons who are not sentenced to incarceration shall be withdrawn at a time and place specified by the sentencing court.*

Revenue Code	Amount Assessed	Reference(s)
13D (Common-wealth) 233 (Locality)	• The fee is $53 with $38 going to the Commonwealth and the remaining $15 to the locality. • The fee applies only to felonies and certain misdemeanors as defined above. It is not contained within the fixed fees so it must be added on ONE time per sentencing event rather than on each case or count tried on a particular day. • If a sample has been previously taken from the person as indicated by the Local Inmate Data System (LIDS), no additional sample shall be taken.	§§ 17.1-275.5(14); 19.2-310.2, 19.2-310.2:1, 19.2-310.3, 19.2-332
Suggestion: DO NOT charge the fee if it is determined that a DNA sample has been previously taken prior to the offense you are assessing costs for. If a sample exists in the DNA database another sample is not required.		

When/How Collected

Taxed against and collected from defendant upon conviction.

When the court is authorized to designate the agency/facility to perform the blood withdrawal, a governmental facility such as a local jail, local Department of Corrections facility, or local health department should be used whenever feasible. If such resources are not available, blood withdrawal may be performed by a private medical professional authorized to withdraw blood pursuant to § 19.2-310.3. To receive reimbursement for blood withdrawal services performed by a private medical provider (e.g. local health dept.), the service provider must submit a bill or statement of expenses to the court. The clerk then forwards to the Office of the Executive Secretary the original bill, a completed DC-40, List of Allowances, and a copy of the CC-1390, Order for Withdrawal of Blood Samples.

Note: In those cases where a felon is placed in the custody of the sheriff to serve a term of imprisonment, the costs associated with blood withdrawal for DNA analysis are absorbed by the sheriff. The Office of the Executive Secretary will provide reimbursement for blood withdrawal services only in the following circumstances:

- When a convicted felon is not sentenced to a period of confinement (i.e., the felon received a suspended sentence or was

placed on probation with no time to serve); or

- When a convicted felon receives a suspended sentence as noted in #1 but is remanded to the custody of the sheriff solely for the purpose of blood withdrawal; and
- When blood withdrawal services are performed by a private physician, nurse or non-state-funded entity (e.g., by one other than personnel salaried by the sheriff or the Department of Corrections).

HIV & Hepatitis B or C Testing

Fee associated with chemical testing of blood to determine if a defendant is infected with HIV (human immunodeficiency virus) or Hepatitis B or C. Such testing, which is conducted by the Virginia Division of Consolidated Laboratories, may occur in the following situations:

- When, following arrest, and upon request of the Commonwealth's attorney, the defendant is charged with sexual assault in violation of Article 7 of Chapter 4 of Title 18.2, or any offense against children prohibited by Va. Code §§ 18.2-361, 18.2-366, 18.2-370 and 18.2-370.1. The defendant may object to such testing in which event the circuit court will conduct a probable cause hearing to determine if the defendant has committed the crime for which he is charged. If probable cause is found, the court shall order the test pursuant to Va. Code § 18.2-62 (A).
- When the defendant is convicted of any offense listed above and upon request of the Commonwealth's attorney, the court shall order the test pursuant to Va. Code § 18.2-62 (B).
- When the defendant is convicted of prostitution as prohibited by Va. Code § 18.2-346 or any crime against nature as prohibited by Va. Code § 18.2-361. Upon conviction, the court shall order the test pursuant to Va. Code §18.2-346.1.

Revenue Code	Amount Assessed	Reference(s)
133	Amount varies	§§ 17.1-275.5 (11); 18.2-62, 18.2-346.1; Chart of Allowances
* While there are no restrictions under §§ 18.2-62 and 18.2-346.1 on who may withdraw blood for HIV testing, blood withdrawal should be conducted by public health or local sheriff's department personnel who are familiar with HIV confidentiality and reporting provisions. Expense claims received from the local health department for reimbursement should be submitted to		

the Office of the Executive Secretary, along with a DC-40, List of Allowances and a copy of the CC-1390, Order for Withdrawal of Blood Samples. In cases where sheriff's department personnel perform blood withdrawal services, the sheriff's department absorbs such costs.

When/How Collected

Taxed against and collected from defendant upon conviction.

HLA (Paternity Cases)

Fees associated with chemical test(s) to determine paternity. The court before whom the trial of any matter in which the question of paternity arises may direct and order the alleged father, the mother and child to submit to such blood grouping test. These costs would be assessed in a circuit court criminal case primarily when a criminal non support case is appealed from the Juvenile and Domestic Relations District (J&DR) Court or in a rape case. Any duly qualified lab or expert, either within or outside the Commonwealth, may conduct blood testing for paternity.

Revenue Code	Amount Assessed	Reference(s)
133	Varies	§ 20-49.3; Chart of Allowances

When/How Collected

Generally, such costs will be assessed in the J&DR court's order and collected from the defendant upon conviction for criminal non support in circuit court. Added to defendant costs only if assessed in the District Court.

The court shall require the party requesting such test to pay the costs. However, if such person is indigent, the Commonwealth shall pay for the test. In order for the expert to be paid for the costs of the test when the requesting party is indigent, the expert must submit a bill to the clerk. The clerk then submits the bill with a DC-40, List of Allowances to the Office of the Executive Secretary for further processing. The expert is subsequently reimbursed by the Commonwealth (State Treasurer).

Boating Education Civil Penalty

Civil penalty assessed on anyone who operates a motorboat with a motor of 10 horsepower or greater without having successfully completed an approved boating safety education course.

Revenue Code	Amount Assessed	Reference(s)
030	$100	§ 29.1-735.2(H)

When/How Collected
District court assesses this penalty as costs on the summons. If the case is appealed and the defendant is convicted in circuit court, the circuit court taxes and collects the penalty from the defendant, along with other applicable costs and fees as a result of the appeal.

Bond Forfeiture

Money/property that was previously posted as security for a bail bond and later forfeited as a result of the defendant's failure to meet the terms and conditions of their bail and recognizance.

Revenue Codes 110 (Commonwealth) and 201 (Local) are not applicable. § 19.2-143 et seq.

When/How Collected
A rule to show cause is issued to the defendant, the surety (if any) and the trustee and owner of property (if a deed of trust has been recorded to secure the bond), giving notice of the impending forfeiture action and allowing such parties to show cause why the bond should not be forfeited.

If the court thereafter makes a finding of default, on bonds posted prior to July 1, 2011, the clerk remits the bond monies or proceeds from the sale of property, whichever applies, to the locality if local offense or to the State Treasurer. The clerk will make a journal voucher to transfer the amount from revenue code 502 to 110 or 201. If the bond was posted between July 1, 2011, and June 30, 2012, the bond monies are remitted to the Treasurer or Finance Director of the locality where the bond was written. If the bond was posted on July 1, 2012 or later, the bond monies are remitted to the Treasurer or Finance Director of the locality where the case was prosecuted.

Certificate of Analysis Fee

A defendant may demand the testimony of an analyst who prepared lab reports in court.

If convicted the defendant must pay $50 court costs for expenses related to that appearance.

Revenue Code	Amount Assessed	Reference(s)
13M (113)	$50	§19.2-187.1

When/How Collected
Fee assessed upon conviction, in addition to fixed fees. If the defendant demands the appearance of the analyst multiple times during the course of the trial, the fee would be assessed for each appearance.

Child Safety Restraint Device Penalty

Penalty assessed upon conviction for failure to properly restrain a child in a safety device while operating a motor vehicle.

Revenue Code	Amount Assessed	Reference(s)
114	$50 for violation of Va. Code § 46.2-1095 or $20 penalty for failure to carry a statement of exemption in violation of Va. Code § 46.2-1096. For a 2nd or subsequent violation a penalty of up to $500.	§§ 46.2-1095, 46.2-1096, 46.2-1097, 46.2-1098

When/How Collected

No court costs are assessed for a violation of Va. Code § 46.2-1095, pursuant to Va. Code § 46.2-1098.

Cigarettes: Tax-Paid Contraband Cigarettes

A civil penalty imposed for possession with intent to distribute tax-paid, contraband cigarettes. The civil penalties shall be assessed and collected by the Department as other taxes are collected.

Revenue Code	Amount Assessed	Reference(s)
520	$2.50 up to $5,000 per pack for 1st offense, $5 up to $10,000 per pack for 2nd offense within a 36-month period, and $10 up to $50,000 per pack for 3rd or subsequent offense within a 36-month period	§ 58.1-1017.1

NOTE: The civil penalty may be collected directly by the Department of Taxation or if ordered payable to the court, receipt these funds as restitution (revenue account code 520) and subsequently disburse to the Department of Taxation.

When/How Collected
If ordered by Court, collect as restitution and payments are disbursed to:

Department of Taxation
Tobacco Unit
PO Box 715
Richmond, VA 23218
(804) 371-0730

No court costs are assessed for a violation of § 58.1-1017.1.

Clerk's Processing Fee (District Court Clerk)

Processing fee assessed in misdemeanor and traffic violation cases heard in district court.

Revenue Code	Amount Assessed	Reference(s)
460 (Traffic Infraction)	$51 per charge	§ 16.1-69.48:1 § 19.2-335 Attorney General Opinion to Foreman dated 8/30/90 (1990)
461 (Misdemeanor – Criminal & Traffic Misdemeanor)	$61 per charge	
462 (Misdemeanor Drug)	$136 per charge	

When/How Collected
The district court clerk assesses these fees on the summons or misdemeanor warrant in addition to any other costs specifically provided by statute. Va. Code § 16.1-69.48:1 (A). If a case is appealed, the circuit court clerk collects these costs (in addition to circuit clerk's fees) from the defendant upon conviction in circuit court.

Notes:

- District court will combine these costs for multiple charges arising from the same incident.
- District assessment on appealed cases may show difference between fixed fee amount on multiple charges arising from the same incident if one is prepaid and

then there is a conviction on other case where higher fixed fee should have been assessed.

- Infraction and Misdemeanor: 132 set at $6; 140 set at $4
- Infraction and Drug case: 107 set at $75; 132 set at $6; 113 set at $4
- Misdemeanor and Drug case: 107 set at $75

Computer Analysis Fee

Upon a finding of guilty of any charge or charges in which any computer forensic analysis revealed evidence used at trial of a defendant, the defendant may be assessed costs for each computer analyzed by any state or local law-enforcement agency.

Revenue Code	Amount Assessed	Reference(s)
520	Not to exceed $100 for each computer analyzed.	§17.1-275.11:1

When/How Collected
Assessed upon a finding of guilty. Upon motion to the court of an affidavit by the law-enforcement agency, the Court will determine the amount to be assessed, and may order such amount paid to the law-enforcement agency.

Concealed Handgun Permit

Civil Penalty for not carrying a government issued photo identification with concealed handgun permit.

Revenue Code	Amount Assessed	Reference(s)
110	$25	§18.2-308.01

When/How Collected
Taxed against the defendant upon conviction.

Confiscated Monies/Property

Money/property confiscated at arrest and, upon conviction of the defendant, ordered to be forfeited to the Commonwealth or other agency.

Revenue Code	Amount Assessed	Reference(s)
111 (Non-drug related	N/A	§§ 4.1-336, 4.1-338 illegal alcohol § 4.1-339 contraband § 19.2-386.2 enforcement by information

Revenue Code	Amount Assessed	Reference(s)
forfeiture of money) 509*		§§ 19.2-386.1 through 19.2-386.31 drugs § 19.2-386.16 automobiles § 19.2-386.22 property used in connection with drug offenses §§ 19.2-386.23, 19.2-386.24, 19.2-386.25 substances § 19.2-386.29 weapons § 19.2-386.30 gambling Chapter 22.1, Title 19 forfeitures in drug cases Chapter 22.2, Title 19 miscellaneous forfeiture provisions
*Use only if court directs that the proceeds of seized property be remitted to another agency, e.g. local law enforcement.		

When/How Collected

Costs of sale of seized property are collected directly by the sheriff or law enforcement agency. Any remaining money is forwarded to the clerk who remits it to the Commonwealth.

Court Appointed Attorney Costs

Costs of attorney appointed by the court to represent an indigent defendant. These costs cover the attorney's time and allowable expenses and materials.

Revenue Code	Amount Assessed	Reference(s)
120 (State Charges) 217 (Local Charges) 261, 266, 271, 276, 281, 286, 291 (Town Charges)	See Chart of Allowances and Court Appointed Counsel Guidelines & Procedures Manual.	§§16.1-267; 17.1-275.5(1); 19.2-163, 19.2-182(A), 19.2-326; Chart of Allowances; Court Appointed Counsel Guidelines & Procedures Manual

Note: When Court Appointed Counsel represents an indigent charged with repeated violations of the same section of the Code of Virginia, with each violation arising out of the same incident, occurrence, or transaction, counsel shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding.

When/How Collected
Taxed against the defendant upon conviction. The court appointed attorney, to receive reimbursement, must submit a DC-40, List of Allowance and, if seeking a waiver to the statutory caps, a DC-40(a) to the court for State charges and local form for local charges, preferably at the time of sentencing. Pursuant to Va. Code § 19.2-163, the court-appointed attorney must make a written request for payment of fees within 30 days of trial.

Note: The circuit or district court shall direct that the foregoing payments shall be paid out by the Commonwealth, if the defendant is charged with a violation of a statute, or by the county, city or town, if the defendant is charged with a violation of a county, city or town ordinance, to the attorney so appointed to defend such person as compensation for such defense. Va. Code § 19.2-163.

The procedures listed below would then be followed. Any statement submitted by an attorney for payment due them for indigent representation or representation of a child pursuant to Va. Code § 16.1-266 shall, after submission of the statement, be forwarded forthwith by the clerk to the Commonwealth, county, city or town, as the case may be, responsible for payment. Va. Code § 19.2-163.

If the defendant had three (3) charges against them and was convicted on only two (2),and if the attorney is allowed compensation by the Court for all three cases, the amount allowed by the Court would be apportioned between/among cases of conviction up to maximum amount allowed per case.

Note: the defendant would only be responsible for reimbursing/paying the fee assessed on the two cases for which he was convicted.

Example: Defendant convicted of two class 4 felonies and one charge was nolle prosequi. Attorney requests $925 for all three cases and is approved by the judge. Allocate as follows:

- Convicted Felony Charge 1 - $445 (statutory maximum)
- Convicted Felony Charge 2 - $445 (statutory maximum)
- The remaining amount for the Nolle Prosequi Charge is uncollectible because of allowed fee.

Suggestion: Attempt to recapture as much of the court-appointed attorney fee as possible within the maximum allowances allowed each case by Va. Code § 19.2-163.

Note: Only the amount allowed per statute, plus reasonable expenses, should be

applied per case: If attorney is granted a waiver for the fee caps, only the pre-waiver amount is allowed to be charged as costs to the defendant.

- the statutory maximum for defending any jailable misdemeanor is $158;
- the statutory limit for defending a felony punishable by confinement in the state correctional facility for a period of more than 20 years is a sum not to exceed $1,235
- the statutory limit to defend any other felony, a sum not to exceed $445. Va. Code § 19.2-163; and
- there is no statutory limit for defending a felony charge that may be punishable by death.

Probation Revocations

Example: Defendant had five (5) original charges and convicted on three (3).

The attorney would be allowed payment for the maximum amount assessed on ONE (1) of the original charges. The DC-40 should contain only one case number indicating that it was a probation violation under Va. Code § 19.2-306 and should state the original Code section charged that they are claiming payment.

1. If the offense is a local violation and the defendant pays the costs at sentencing, the clerk receipts the defendant's payment under revenue code 217. The clerk may then write a check payable to the attorney, drawing from revenue code 217 or follow the procedures in #4.

2. If the offense is a local violation and the defendant does not pay costs at the time of sentencing, the clerk bills the locality for the cost of the court appointed attorney. The locality then pays the attorney directly. When the defendant subsequently remits payment(s) for attorney costs to the court, the clerk receipts payment(s) under revenue code 217 and transmits such payments to the locality at month's end.

3. If the offense was a state violation and the defendant pays the costs at sentencing, the clerk receipts the defendant's payment under revenue code 120. The clerk may then write a check payable to the attorney, drawing from revenue code 120 or follow the procedures in #6.
4. If the offense is a state violation and the defendant does not pay the attorney costs at sentencing, the clerk submits a List of Allowances (Form DC-40) to the Office of the Executive Secretary for further

processing. The attorney is later reimbursed by the Commonwealth (State Treasurer). When the defendant subsequently remits their costs to the court, the clerk receipts the payment(s) under revenue code 120 and transmits the money to the State Treasurer.

Courthouse Construction Fee (CHCF)

Fee assessed in criminal and traffic cases and used by the local governing body solely for the construction, reconstruction, renovation of, or adaptive use of a structure for a courthouse. The assessment of this fee requires letter of non-compliance from DGS. The assessment provided for herein shall be in addition to any other fees prescribed by law. The assessment shall be required in each felony, misdemeanor, or traffic infraction case, regardless of the existence of a local ordinance requiring its payment. (This fee is also assessed in certain civil cases, as well.)

Revenue Code	Amount Assessed	Reference(s)
228 (Local)	Not to exceed $3	§ 17.1-281

When/How Collected
Taxed against and collected from defendant upon conviction.

Courthouse Maintenance Fund Fee (CHMF)

Fee assessed as part of fixed fees/costs in misdemeanor and traffic cases and used by the local governing body for the construction, renovation or maintenance of the courthouse, jail and/or other court-related facility and to defray increases in the cost of heating, cooling, electricity and ordinary maintenance. The assessment provided for herein shall be in addition to any other fees prescribed by law. The assessment shall be required in each felony, misdemeanor, or traffic infraction case, regardless of the existence of a local ordinance requiring its payment.

Revenue Code	Amount Assessed	Reference(s)
229(Local) 263, 268, 273, 278, 283, 288, 293 (Cities)	Included in the Circuit Court fixed fees and in District court fixed fees. Fee would therefore be collected in both courts as part of their fixed fees.	§§ 16.1-69.48:1; 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.7, 17.1-275.8, 17.1-275.9; 17.1-281

When/How Collected
Taxed against and collected from defendant upon conviction.

Courthouse Security Fund (CHSF)

Fee assessed as part of costs in felony, misdemeanor, and traffic cases and used by the local governing body subject to appropriation by the governing body to the sheriff's office solely for the funding of courthouse security personnel and equipment used in connection with courthouse security. If a town provides court facilities for a county, the governing body of the county (not the clerk's office) shall return to the town a portion of the assessments collected based on the number of criminal and traffic cases originating and heard in the town. The imposition of such assessment must be by ordinance of the local governing body.

Revenue Code	Amount Assessed	Reference(s)
244	An amount as determined by each local governing body but not in excess of $20 per case shall be added on in addition to any fixed fee.	§ 17.1-275.5 (13); 53.1-120 (D) Local Ordinance

When/How Collected

- Taxed against and collected from the defendant upon conviction.
- Assessed on each case where the court enters a conviction.
- Assessed only one time per case. When this fee has been charged by a District Court and the case is appealed, it may not be charged again by the Circuit Court.

Special Note: For localities that adopt this fee, it is not included in any fixed fee and must be added on.

Court Reporter Costs

Costs of privately retained reporter or court employee responsible for recording proceedings and, if necessary, preparing transcript(s).

Revenue Code	Amount Assessed	Reference(s)
13F Transcripts Only	Amount having been established through a schedule of fees approved by the judge for preparation of transcripts.	§§ 19.2-165, 19.2-166; Chart of Allowances
NOTE: The per diem costs charged by the court reporter are not taxed and assessed against the defendant. Fees are distributed to the court reporter fund as set forth in Va. Code §§ 17.1-275.1, 17.1-275.2, 17.1-275.3, and 17.1-275.8.		

When/How Collected

The costs of the transcripts from the court reporter are taxed against the defendant. The court reporter, to receive reimbursement for recording and preparing the transcripts, provides the clerk or a LIST OF ALLOWANCES (Form DC-40). The clerk then submits the DC-40, List of Allowances to the Office of the Executive Secretary for further processing. The reporter is subsequently reimbursed by the Commonwealth (State Treasurer).

Notes:

- The Commonwealth will not reimburse court reporting costs in misdemeanor cases. Such costs are the responsibility of the defendant requesting the reporter.
- *See* also Recording Equipment Costs, this section of this manual, for allocation from the fixed fees to Account Code 410.

Criminal Injury Compensation Fund Fee (CICF)

Fee assessed as part of fixed costs upon conviction of a felony or misdemeanor and collected for deposit in CICF. Such monies are available to victims of certain crimes to cover their losses.

Revenue Code	Amount Assessed	Reference(s)
132	Included in the Circuit court fixed fees as provided in Va. Code §§ 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9. Also included in District court fixed fees. Fee would therefore be collected in both courts as part of their fixed fees.	§§ 16.1-69.48:1; 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9, § 17.1-281; 19.2-368.18 (B) Attorney General Opinion to Barry, dated 1/23/85 (1984-85, pg. 85) Attorney General Opinion to Sandie, dated 8/10/76 (1976-77, pg. 61) Attorney General Opinion to Foreman dated 8/3/90 (1990, pg. 68)

When/How Collected

Taxed against and collected from defendant upon conviction.

Criminal Justice Training Academy Fund

Local

A locality who does not participate in a regional criminal justice training academy and if the locality was operating a certified independent criminal justice academy as of July 1, 2012, may charge a fee similar to the Regional Training Justice Academy fee. Any and all funds from such local fee shall support the local academy. The court should have a copy of the local ordinance on file.

Revenue Code	Amount Assessed	Reference(s)
243	Varies per Local Ordinance	§ 9.1-106

When/How Collected
Taxed against and collected from defendant upon conviction. It is charged in addition to the appropriate fixed fees. Fee would be collected from both courts.

Regional

Fee assessed upon conviction for felony and misdemeanor cases in the circuit court and misdemeanor and traffic cases in the district court.

Revenue Code	Amount Assessed	Reference(s)
143	Included in the Circuit court fixed fees. Also included in District court fixed fees. Fee would therefore be collected in both courts as part of their fixed fees.	§§ 9.1-106; 16.1-69.48:1; 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9

When/How Collected
Taxed against and collected from defendant upon conviction.

Fees and Costs (D-J)

DNA Analysis Fee

Defendants convicted of certain violations are required to have DNA samples taken by local law enforcement and then tested, stored and maintained by the Department of Forensic Science.

Revenue Code	Amount Assessed	Reference(s)
13D	$53 – $38 (13D) + 15 (233)	§ 19.2-310.2

233	Fee is split between Commonwealth & Locality	

When/How Collected
The fee is assessed once convicted upon sentencing. To determine if an offense requires a sample check the DNA Sample Tracking Login Page.

Note: The fee is assessed one time per defendant, rather than on each case tried. If a sample has been previously taken from the person as indicated by the Local Inmate Date System (LIDS), no additional sample should be taken.

Driver Improvement Clinic Fee

Fee for entrance into a driver improvement education and training program designed to assist problem drivers. Fee varies depending on program. §§ 46.2-502, 46.2-505; 17.1-275(A)(12)

When/How Collected
These fees should not be collected by the court but rather paid directly by the defendant to the local driver improvement clinic/traffic school. **Note:** The court may require a defendant to successfully complete a driver improvement clinic or traffic school in lieu of a finding of guilty. Should this be the case, the defendant would still be taxed all other fees and costs as if he were convicted.

Drug Analysis (Forensic Lab) Costs

Costs of forensic analysis of drugs seized as evidence in a case.

Revenue Code	Amount Assessed	Reference(s)
13H	Included in the Circuit court fixed drug misdemeanor fee.	§ 17.1-275.8 Attorney General Opinion to Davila, dated 11/23/77 (1977-78, pg. 95)

When/How Collected
Taxed against and collected from defendant upon conviction of each and any misdemeanor charge, whether or not originally charged as a felony, for a violation of any provision of Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2, or upon a deferred disposition of proceedings in the case of any and each misdemeanor charge, whether or not originally charged as a felony, deferred pursuant to the terms and conditions of Va. Code § 18.2-251.
A certificate of analysis must be filed in order to collect these costs from the defendant.

Note: The costs for forensic laboratory analyses are neither billed to the circuit court nor processed for reimbursement by the Office of the Executive Secretary. Instead, such costs, when recovered from the defendant, are paid into the state's general fund via receipting the payment under revenue code 13H.

Drug Enforcement Jurisdiction Fund (DEJF) Fee

Fee assessed upon conviction of a misdemeanor or traffic infraction case. Such monies are subsequently deposited in a special non-reverting fund administered by the Department of Criminal Justice Services. The fund is intended to provide additional resources to supplement the efforts of local officials in the apprehension and prosecution of persons engaged in drug-trafficking activities.

Revenue Code	Amount Assessed	Reference(s)
140	Included in the Circuit court fixed fees. Also included in District court fixed fees. Fee would therefore be collected in both courts as part of their fixed fees.	§§ 9.1-105; 16.1-69.48:1; 17.1-275 (D); 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9

When/How Collected
Taxed against and collected from defendant upon conviction.

Drug Offender Assessment Fund (DOAF)

Fee assessed upon a conviction of any felony drug offense under Article 1 (§ 18.2-247 et. seq.) of Chapter 7 of Title 18.2, Subtitle II (§ 4.1-1100 et. seq.) of Chapter 11 of Title 4.1, in first offender drug cases disposed under Va. Code § 18.2-251 and as a civil penalty for misdemeanor possession of marijuana convictions The clerk shall pay the fees collected to the state treasury.

Revenue Code	Amount Assessed	Reference(s)
107	$150 for each felony drug conviction/disposition.	§§ 16.1-69.48:3; 17.1-275(A)(11), 17.1-275.5(8); 18.2-251.02
107	$25 civil penalty for misdemeanor possession of marijuana (no costs assessed)	§§ 4.1-1100, 18.2-251.02
NOTE: Fee is included in the Fixed Misdemeanor Drug fee		

When/How Collected
Taxed against and collected from the defendant upon conviction or upon disposition under Va. Code § 18.2-251.

DUI Fee

Additional fee charged on convictions of DUI related offenses.

Revenue Code	Amount Assessed	Reference(s)
13B (113)	$100	§17.1-275.11

When/How Collected
Taxed against and collected from the defendant upon conviction of any and each charge of a violation of §§ 18.2-36.1, 18.2-51.4, 18.2-266, 18.2-266.1, 18.2-268.3, 46.2-341.24 or § 46.2-341.26:3, or any similar local ordinance.

Electronic Summons (E-Citation)

Fee to be used for the implementation and maintenance of an electronic summons system. The imposition of such assessment must be by ordinance of the local governing body. The court should have a copy of the local ordinance on file.

Revenue Code	Amount Assessed	Reference(s)
241	Not to exceed $5.00	§§ 17.1-275.5(19); 17.1-279.1

When/How Collected
Taxed against and collected from defendant upon conviction in each criminal or traffic case. If a case is appealed, the circuit court clerk collects both the amounts assessed in district and circuit court.

Electronic Summons (Virginia State Police)

A fee of $5 shall be assessed as court costs in each criminal or traffic case in which the Virginia State Police issued the summons, ticket, or citation. All fees collected pursuant to this section shall be deposited into the state treasury and credited to the Virginia State Police Electronic Summons System Fund.

Revenue Code	Amount Assessed	Reference(s)
165	Not to exceed $5.00	§ 17.1-275.14

When/How Collected
Taxed against and collected from defendant upon conviction in each criminal or traffic case if the Virginia State Police was the issuing agency. If a case is appealed, the circuit court clerk collects both the amounts assessed in district and circuit court.

Extradition Costs

Costs and expenses associated with the transport of any defendant who is charged with an offense in Virginia but who is located in another state.

Revenue Code	Amount Assessed	Reference(s)
*13G (If applicable)	Actual costs and expenses	§§ 17.1-275.5(3); 19.2-112; 19.2-335, 19.2-336; Chart of Allowances

When/How Collected
Commonwealth of Virginia shall pay all extradition expenses and costs. The local law enforcement agency that transported the defendant generally submits a voucher for expenses directly to the Office of the Executive Secretary for processing.

Extradition costs are added to court costs as an add-on pursuant to Va. Code § 17.1-275.5. Should the defendant pay the costs for extradition, the clerk should receipt such payments under revenue code 13G. If ordered by the court, costs may be set up as restitution under account code 520.

Failure to Appear Fee

Processing fee charged by the district court for non-appearance case

Revenue Code	Amount Assessed	Reference(s)
121	$35	§ 16.1-69.48:1(A)

When/How Collected
District court, not Circuit court assesses this fee on the summons or warrant. If the case is appealed and the defendant is convicted, the fee is taxed against and collected from the defendant by the circuit court.

Failure to Pay Fare

Persons who board or ride a transit operation and fail or refuse to pay the applicable fare or refuse to produce valid proof of payment of the fare are subject to a civil penalty.

Revenue Code	Amount Assessed	Reference(s)
201	Not more than $100	§ 18.2-160.3

When/How Collected
Assessed on conviction. This is a civil action in the district court and appealed to circuit court. Civil in nature, handled in criminal division in circuit. No costs are assessed in district court; however, circuit court costs do apply.

Highway Litter

Fine assessed when defendant is convicted of littering, a class 1 misdemeanor.

Revenue Code	Amount Assessed	Reference(s)
128 (littering) 201(city or county) 260, 265, 270, 275, 280, 285, 290, 295 (town) 110 (state)	No less than $250 or more than $2500 as ordered by court*	§§ 33.1-346, 10.1-1418, 10.1-1419, 10.1-1424

When/How Collected
District court assesses this fine on the summons. If the case is appealed and the defendant is convicted in the circuit court, the circuit court taxes and collects the fine from the defendant, along with other applicable costs and fees as a result of the appeal. * If the fine revenue is remitted to the State Treasurer for the construction and maintenance of state highways.

If "clean up" costs are also ordered to be paid, see Va. Code § 10.1-1424. Such costs, if to be paid to a party other than the Commonwealth, should be receipted and disbursed under revenue code 509 - Collection for Others.

Forfeitures: Other than Bond

See Circuit Court Clerk's Manual – Civil

Game Replacement

Defendants convicted of certain game violations are required to pay the replacement cost of the animals, birds or fish illegally taken.

Revenue Code	Amount Assessed	Reference(s)
134	Based on approximate replacement value of animal, bird or fish taken illegally.	§ 29.1-551

When/How Collected
Assessed against and collected from defendant upon conviction of a violation of Va. Code §§ 29.1-523, 29.1-525.1, 29.1-530.2, 29.1-548, 29.1-550, or 29.1-552. The Comptroller shall credit such payments to the game protection fund.

Global Positioning System (GPS)

A subject may be required to be placed on a GPS tracking device, or other similar device when on secured bond, or as a condition of probation or suspended sentence. The defendant may be ordered by the court to pay the cost of such device.

Revenue Code	Amount Assessed	Reference(s)
520	As determined and ordered by the Court.	§ 19.2-123, -303

When/How Collected
Taxed against and collected from the defendant upon conviction. A court may order this to be paid directly to the party that places the device on the defendant.

Habeas Corpus

See Circuit Court Clerk's Manual - Civil

HIV, Hepatitis B or C Blood Test

Fees associated with chemical testing of blood to determine if a defendant is infected with HIV (human immunodeficiency virus) or Hepatitis B or C.

Revenue Code	Amount Assessed	Reference(s)
133	Amounts for testing and blood withdrawal varies. Assess amounts	§§ 18.2-62 18.2-346.1

	charged.	

When/How Collected
Taxed against and collected from defendant upon conviction when testing is ordered by the court.

Ignition Interlock Fee/Remote Alcohol Monitoring Device

In addition to any penalties provided by law for convictions under Va. Code §§ 18.2-51.4 or 18.2-266 or a substantially similar ordinances of any county, city or town, any court of proper jurisdiction shall, as a condition of a restricted licenses, require an ignition interlock system or an ignition interlock system with a remote alcohol monitoring device for certain periods of time during the time of license suspension and restriction.

Note: The Department of Motor Vehicles shall publish a list of certified ignition interlock systems and shall ensure that such systems are available throughout the Commonwealth.

Revenue Code	Amount Assessed	Reference(s)
13C	$20	§ 17.1-275.5 (10); 18.2-270.1 (B)(E)

When/How Collected
It is assessed on each conviction where an ignition interlock device or an ignition interlock system with a remote alcohol monitoring device is ordered. If both ignition interlock system and remote alcohol monitoring device are ordered, the $20 fee is assessed for both.

The fee is charged only one time per case. When this fee has been charged by a District Court and the case is appealed, it may not be charged again by the Circuit Court.

Increase Rate Fee

Increase the amounts owed and collected to reflect the costs associated with employing or contracting with agencies or individuals to collect delinquent accounts.

Revenue Code	Amount Assessed	Reference(s)
499	17% on delinquent debt referred to collection agents on or after July 1, 2013.	2013 Appropriations Act § 19.2-349

When/How Collected

The increase rate fee is automatically added at month end by the BU51 Report Listings of Unpaid Fines, Costs and Restitution. It is not subject to the accrual of judgment interest.

Interest on Judgments

Interest accrued on the unpaid balance of fines, costs and restitution.

Revenue Code	Amount Assessed	Reference(s)
109 (Commonwealth) 242 (city or county) 250, 251, 252, 253, 254, 255, 256, 257 (town)	6% from 7/1/04 to present 9% from 7/1/91 to 6/30/04 8% from 7/1/87 to 6/30/91 12% from 1/1/85 to 6/30/87 10% from 7/1/81 to 6/30/83 8% from 10/1/77 to 6/30/81	§ 6.2-302; 8.01-382; 19.2-305.4, 19.2-340, 19.2-353.5, 19.2-354; Attorney General Opinion to Davis, dated 3/23/89 (1989, pg. 194) Attorney General Opinion to Marshall, dated 2/14/86 (1985-86, pg. 190) Attorney General Opinion to Zepkin, dated 10/15/85 (1985-86, pg. 136) Attorney General Opinion to Parrish, dated 10/16/86 (1986-87, pg. 187)

When/How Collected

Interest is to be assessed on the unpaid balance when 180 days have passed since final judgment or the defendant's release from incarceration. Interest is not accrued during the defendant's incarceration or when the court has ordered, or a defendant has requested, a deferred payment and the defendant is making regular installment payments. Defendant may move for a waiver of interest owed during any period of incarceration.

The court, when ordering restitution pursuant to Va. Code §§ 19.2-305 or 19.2-305.1, may provide in the order for interest on the amount so ordered from the date of the loss or damage at the rate specified in Va. Code § 6.1-330.54.

If interest is specified, but no date is given, interest will be figured from the date of sentencing.

Internet Crimes against Children Fee

Fee charged on every felony and misdemeanor conviction. Monies in the fund are disbursed to designated entities to support the investigation and prosecution of Internet crimes against children.

Revenue Code	Amount Assessed	Reference(s)
001	$15 on each felony and misdemeanor conviction.	§ 17.1-275.12

When/How Collected
Taxed against and collected from defendant upon conviction. It is charged in addition to the appropriate fixed fees.

Interpreter Fee

Fee charged by an interpreter for appearance on behalf of a non-English speaking or deaf/mute defendant, victim and/or witness.

Revenue Code	Amount Assessed	Reference(s)
13O (113)*		§ 8.01-384.1; 19.2-164, 19-1-64.1; Chart of Allowances
*Interpreter fees are not assessed as costs against the defendant; however, the court may assess as part of the costs if the defendant fails to appear for trial and is convicted of a failure to appear, if the interpreter appeared in the case but no other case on the date the defendant is convicted.		

When/How Collected
The fees for interpreters for the deaf are set by the Virginia Department for the Deaf and Hard of Hearing. The interpreter for the deaf presents a certificate for the clerk to sign, verifying the interpreter's appearance in court. The interpreter then submits the signed certificate to the Virginia Department for the Deaf and Hard of Hearing for payment. (The circuit court should not bill the Office of the Executive Secretary for fees associated with interpreters for the deaf.)

The court shall fix the compensation of qualified interpreters, appointed by the court in civil and criminal cases for non-English speaking parties or witnesses, in accordance with guidelines set by the Judicial Council. To receive reimbursement, the interpreter submits a DC-40, List of Allowances to the clerk. The clerk then submits the DC-40 to the Office of the Executive Secretary for further processing. The interpreter is subsequently reimbursed by the Commonwealth (State Treasurer).

Investigator Fee

Fee assessed when an investigator is requested by a court appointed attorney or Public Defender and approved by the court.

Revenue Code	Amount Assessed	Reference(s)
13L (113)	Varies	§ 19.2-332

When/How Collected
Taxed against and collected from defendant upon conviction. It is charged in addition to the appropriate fixed fees.

Jail Admission Fee

This add-on fee is assessed as part of costs in felony, misdemeanor, and traffic cases where a defendant is admitted to a county, city, or regional jail following conviction. After collection by the clerk, the fee is paid to the local treasurer and shall be used by the local sheriff's office and regional jails to defray the costs of processing arrested persons into local or regional jails. The imposition of such assessment must be by ordinance of the local governing body. Each court should obtain a copy of the ordinance before the fee is assessed.

Revenue Code	Amount Assessed	Reference(s)
234	An amount as determined by each local governing body but not in excess of $25 on any individual. This fee applies to situations where the defendant is sentenced to local confinement or admittance to jail while awaiting transfer to the Department of Corrections. The fee does not apply to persons who are remanded to custody for the sole purpose of finger printing and/or DNA sampling. The fee applies to felony, misdemeanor, and traffic cases and should be assessed ONE time per sentencing event rather than on each case or count tried on a particular day.	§§ 15.2-1613.1; § 17.1-275.5(12); Local Ordinance(s)

When/How Collected
Taxed against and collected from defendant upon conviction

When this fee has been charged by a District Court and the case is appealed, it may not be charged again by the Circuit Court. If the Circuit Court convicts the defendant on the

appeal but imposes no jail time, the fee should not be assessed against the defendant at all.

Special Note: For localities who adopt this fee, it is not included in any fixed fee and must be added on.

Jury Costs

Costs of petit jurors summoned and present for a jury trial.

Revenue Code	Amount Assessed	Reference(s)
181 210 (city/county) 261, 266, 271, 276, 281, 286, 291 (town)	$50 per diem per juror summoned and present, plus reasonable (determined by judge) per diem for board and lodging, if applicable.	§§ 17.1-275.5(7), §§ 17.1-618 through 622; 19.2-336 (when not assessed); Attorney General Opinion to Foreman, dated 5/27/82 (1981- 82, pg. 100) Attorney General Opinion to Mitchell, dated 7/16/79 (1979, pg. 120) Attorney General Opinion to King, dated 11/9/78 (1978-79, pg. 63) Attorney General Opinion to Prievr, dated 1/10/55 (1954-55, pg. 70) Attorney General Opinion to Huffman, dated 10/13/53 (1953-54, pg. 41) Chart of Allowances

When/How Collected
Taxed against and collected from defendant upon conviction unless, at least 10 days prior to trial, the defendant waives jury trial (even if the Commonwealth or trial court refuses to waive). In cases of mistrial, hung jury or continuance, jury costs are assessed only when the trial is finally held and a conviction is returned. The costs of juries for both trials are to be assessed if the defendant is convicted at the second (or subsequent) trial. If a second jury is impaneled pursuant to Va. Code § 19.2-295.1, the costs of both juries are to be assessed.

Note: If defendant waives jury but Commonwealth does not, jury costs are not taxed against the defendant.

When a jury trial is held for violation of a state offense, the clerk submits a DC-43, List of Allowances and, if necessary, a DC-43C, Juror Continuation Sheet for Jurors to the local treasurer. The treasurer provides a check to each juror and submits the List of Allowances with check numbers included to the Office of Executive Secretary for further processing. The locality is subsequently reimbursed by the Commonwealth (State Treasurer). When

the defendant remits payment for these costs, the clerk receipts the payment under revenue code 181.

When a jury trial is held for violation of a local offense, the clerk prepares a statement of expenses for each juror and submits same to the locality. The locality, in turn, reimburses the jurors. When the defendant remits payment for these costs, the clerk receipts the payment under revenue code 210. NOTE: Local jury costs are not to be billed to the Office of the Executive Secretary

Fees and Costs (L-Z)

Legal Aid Services Fund

A notary public who violates Va. Code § 47.1-15.1 is subject to a civil penalty to be paid into the Legal Aid Services Fund.

Revenue Code	Amount Assessed	Reference(s)
123	Not to exceed $500 for 1st violation Not to exceed $1,000 for 2nd or subsequent violation	§ 47.1-15.1

When/How Collected
A civil action is brought by the Attorney General in the name of the Commonwealth and may be first in the district court and appealed to circuit court. Civil in nature, handled in criminal division in circuit. No costs are assessed in district court; however, circuit court costs do apply.

Liquidated Damages/Overweight Violations

Money assessed when a vehicle (truck) is found to exceed statutory weight limits. If the case is received via a local criminal/traffic summons or warrant the case should be handled in circuit court as an appealed traffic infraction.

Revenue Code	Amount Assessed	Reference(s)
232 (local)	Liquidated damage amounts are set by statute and ordered by the judge*	§ 46.2-1131, 46.2-1133, 46.2-1134, 46.2-1135, 46.2-1138.1
* The following fees/costs may be collected in conjunction with a liquidated damages case:		
110 or 201	Fine, if applicable	

Revenue Code	Amount Assessed	Reference(s)
112	District court fee	
13R (113)	Weighing costs, if applicable	
125	$2 Weighing Fee	
305	Circuit court clerk's fee (if ordered by Court)	

When/How Collected

Note: Most overweight violations are state versus local violations and are handled as civil administrative matters by the Department of Motor Vehicles. An appeal from the DMV action is handled by the general district court as a civil suit that may be appealed to the circuit court. The circuit court does not collect this civil judgment since the defendant pays such monies to DMV.

If the case comes to the circuit court as a local traffic infraction appeal, the liquidated damages ordered to be paid are collected by the clerk, receipted under revenue Code 232 and transmitted to the locality at month's end.

Medical Costs for Gathering Evidence

Costs of medical examination of victim to obtain physical evidence where the victim has been sexually abused or assaulted.

Revenue Code	Amount Assessed	Reference(s)
13P (113)	Varies – the Commonwealth Attorney submits invoice with appropriate supporting documentation to the Supreme Court of Virginia for payment.	§ 17.1-275.5(15); 19.2-165.1, 19.2-336; Chart of Allowances

When/How Collected
Costs taxed against the defendant by request of Commonwealth's attorney. By statute, the Commonwealth's attorney must provide arrangements for this service. Commonwealth's attorney requests reimbursement from the Commonwealth for payment. To assess against the defendant, the court must receive a request to add to the defendant's court costs from the Commonwealth's attorney

Methamphetamine Site Cleanup

Costs associated with the cleanup of a methamphetamine site can be assessed against the defendant, when the defendant is the property owner. The Court will assess either the estimated or actual expense or $10,000 if expenses cannot be determined. (If innocent

property owner or locality/law enforcement agency is awarded the expense, it is considered restitution.)

Revenue Code	Amount Assessed	Reference(s)
151	Court will award estimated/actual expense, or $10,00 if it cannot determine expenses	§18.2-248

When/How Collected
Fee assessed as directed by the Court, upon conviction.

Out-Of-State Prisoner Costs (Agreement on Detainers)

Costs (expenses) associated with transporting an out-of-state prisoner to Virginia for trial or to serve as a witness

Not applicable. §§ 53.1-209, 53.1-210; Chart of Allowances.

When/How Collected
These costs are not taxed against the defendant but are submitted to the circuit court clerk by the transporting agency (e.g., local sheriff) or Commonwealth's attorney, along with receipts for expenses and Form VI - Evidence of Agent's Authority to Act for Receiving State. The transporting agency then prepares and submits a DC-40, List of Allowances with the receipts and Form VI to the court that would then submit to the Office of the Executive Secretary for processing. The transporting agency is subsequently reimbursed by the Commonwealth (State Treasurer).

Pen Register, Wire Trap or Tracing Device Costs

Costs associated with court-ordered installation and use of electronic or wire communication devices/services (e.g., phone tap) during the investigation of criminal activity.

Not applicable. Amount Varies, no clerk fee applies. §§ 19.2-68, 19.2-70.1, 19.2-70.2(G); Chart of Allowances.

When/How Collected
These costs are not taxed against the defendant/suspect if subsequently convicted.

The service provider, to receive reimbursement for expenses, must submit a bill to the court. The clerk then prepares a DC-40, List of Allowances and submits this, along with the bill, to the Office of the Executive Secretary for further processing. The service provider is

subsequently reimbursed by the Commonwealth (State Treasurer).

Psychiatric Evaluation Costs

Costs of psychiatric evaluation of defendant in the following circumstances:

- to determine competency to stand trial
- to determine mental status at the time of the offense
- to determine mental status at the time of the offense and competency to stand trial
- for presentence evaluation
- to determine sexual abnormality prior to sentencing
- for court appearance of examiner/expert witness(es), plus expenses
- for hearing on release from incarceration when defendant is acquitted due to insanity

Revenue Code	Amount Assessed	Reference(s)
13A	See Chart of Allowances	§§ 17.1-275.5(4); 19.2-167 through 19.2-176; 19.2-300, 19.2-301, https://law.lis.virginia.gov/vacode/19.2-33219.2-335, 19.2-336; Chart of Allowances

When/How Collected
The costs are taxed against the defendant upon conviction. The examining physician/facility, in order to receive reimbursement, must submit to the clerk a DC-40, List of Allowances identifying the type of services rendered. The clerk then submits the DC-40 to the Office of the Executive Secretary for further processing. The examining physician/facility is subsequently reimbursed by the Commonwealth (State Treasurer). When the defendant subsequently remits payment for these costs, the payment is receipted under revenue code 13A.

Public Defender Costs

Costs of legal services provided a defendant by the local public defender's office.
NOTE: Public Defenders are salaried Commonwealth employees.

Revenue Code	Amount Assessed	Reference(s)
120 (State) 217 or 261 (Local)	See Court Appointed Counsel Guidelines & Procedures Manual	§§ 17.1-275(A)(11), 17.1-275.5(1); Court Appointed Counsel Guidelines & Procedures Manual

When/How Collected

These costs are taxed against and collected from the defendant upon conviction. The public defender, while salaried by the Virginia Indigent Defense Commission, should submit a DC-52, Public Defender Timesheet that would be retained in the file as record of costs to be assessed and paid by the defendant upon conviction.

Note: Public Defender costs are not submitted to the Office of the Executive Secretary for reimbursement. The clerk should follow one of the following set of procedures:

If the offense was a local violation, the clerk bills the locality for the public defender costs. The locality then remits payment to the court. The clerk, in turn, receipts the locality's payment under revenue code 120 and transmits same to the State Treasurer. When the defendant subsequently makes payment on these costs, the clerk receipts the payment under revenue code 217 and transmits the money to the locality at month's end.

If the offense is a state violation, any payments from the defendant would be receipted under revenue code 120 and transmitted to the State Treasurer.

Restitution

Money ordered by the court to be paid by the defendant to reimburse the victim for loss caused by the defendant, victim or estate. The Court may order the payment of interest payable at the judgment rate of interest starting from the date of the loss or sentencing.

Notwithstanding any other provision of law, any person who, on or after July 1, 1995, commits, and is convicted of, a crime in violation of any provision in Title 18.2 shall make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses or expenses directly related to funeral or burial incurred by the victim or their estate as a result of the crime, may be compelled to perform community services and, if the court so orders, shall submit a plan for doing that which appears to be feasible to the court under the circumstances. Va. Code § 19.2-305.1.

Revenue Code	Amount Assessed	Reference(s)

520 (Restitution)	Determined by judge	§§ 8.01-427; 19.2-305.1, 19.2-305.2
NOTE: Interest will not accrue unless specified in the Court's order.		

When/How Collected
Taxed against defendant upon conviction. If restitution is ordered to be paid by the defendant to the victim of a crime and that victim can no longer be located or identified, the clerk shall deposit any such restitution collected to the Criminal Injury Compensation Fund for the benefit of the victim.

Note: As of July 1, 2021, if the victim requests, in writing, to have restitution docketed in their name, restitution is not assessed against the defendant in addition to fines/costs but is only docketed as a judgment.

Sentencing (Supervision) Fee

Fee for payment towards the cost of defendant's confinement, supervision or participation in a home/electronic incarceration program as a condition of their sentence.

Revenue Code	Amount Assessed	Reference(s)
13N (113)	Included in the Circuit court fixed fees. Also included in District court fixed fees. Fee would therefore be collected in both courts as part of their fixed fees	§ 53.1-150; 17.1-275.1, 17.1-275.2, 17.1-275.7, 17.1-275.8

When/How Collected
Fee paid to the sentencing court. The fee should be charged at the time of sentencing for persons convicted and is included in the fixed fees.

Suppression Costs

Costs assessed in a civil proceeding to cover the expense of fire suppression. *See* Schedule in Civil Manual.

Transcript/Brief Fees

The fee paid for an official copy of the record of proceedings in a trial or hearing, or a brief. Word-for-word typing of everything that was said "on the record" during the trial. The stenographer (court reporter) types this transcription which is paid for by the parties requesting it.

Revenue Code	Amount Assessed	Reference(s)
13J	Varies	§ 17.1-275.5(A)(2) Rule 5A:30

When/How Collected
Added as costs if transcripts requested and prepared, or a brief is prepared.

Note: As of January 1, 2022, the costs for the preparation of the transcript of the evidence for an appeal, whether the appeal is noted prior to or upon entry of final judgment, shall be paid by the Commonwealth out of the appropriation for criminal charges and shall not be assessed against the defendant. Va. Code §§ 19.2-165, 17.1-408.

Toll Roads Penalties – Failure to Pay Toll/HOT Lane Violations

Provides a civil penalty for a violation of Va. Code §§ 46.2-819.1 and 46.2-819.3 when vehicle is found to have used a toll facility without payment of the required toll.

Revenue Code	Amount Assessed	Reference(s)
	In addition to the unpaid toll, all accrued administrative fees, and applicable court costs in each case, a civil penalty may be assessed.	§§ 46.2-819.1, 46.2-819.3
161	For VDOT cases charged under §46.2-819.1	
194	For VDOT cases charged under §46.2-819.3	
422	Non-VDOT cases Private toll road facility (court assigns account code number for each separate private facility)	

When/How Collected
Penalty is added to court costs upon order of the court.

Transportation Trust Fund

Provides a civil penalty for a violation of Va. Code § 46.2-341.20:5 when a person driving a commercial motor vehicle is found guilty of driving while texting or using a handheld mobile telephone. In addition, Va. Code § 46.2-341.20:6 provides a civil penalty against a motor carrier allowing or requiring its drivers to use a handheld mobile telephone or to text while driving a commercial motor vehicle.

Revenue Code	Amount Assessed	Reference(s)
164	Civil penalty not to exceed $2,750 against the driver. Civil penalty not to exceed $11,000 against the motor carrier	§ 46.2-341.20:5§ 46.2-341.20:6

When/How Collected
Penalty is added to court costs upon order of the court.

Trauma Center Fund

Fees paid into the Trauma Center Fund are for the purpose of defraying the costs of providing emergency medical care to victims of automobile accidents attributable to alcohol or drug use.

Revenue Code	Amount Assessed	Reference(s)
192	$50	§ 18.2-270.01 (A)

When/How Collected
By court order upon conviction of violations of certain alcohol related offenses: (Va. Code §§ 18.2-36.1; 18.2-51.4; 18.2-266; 18.2-266.1; 46.2-341.24), who has been previously convicted within ten years of the date of the current offense.

Virginia Crime Victim Witness Fund (CVWF)

Fee assessed upon conviction of a felony, misdemeanor or traffic infraction case. Such monies are subsequently deposited in a special fund to support victim witness services programs prescribed under Va. Code § 19.2-11.1.

Revenue Code	Amount Assessed	Reference(s)
140	Included in the Circuit court fixed fees. Also included in District court fixed fees. Fee would therefore be collected in both courts as part of their fixed fees.	§ 16.1-69.48:1; 19.2-11.1, 19.2-11.3, 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8

When/How Collected
Fee paid to sentencing court. Charged as part of the fixed fees.

Virginia Stormwater Management Fund

Penalty assessed upon conviction of a violation of the Nutrient Trading Act. Such penalty is paid into the state treasury and deposited into the Virginia Stormwater Management Fund.

Revenue Code	Amount Assessed	Reference(s)
163	Up to $10,000 as directed by the Court.	§ 10.1-603.15:4

When/How Collected
Penalty assessed upon conviction, and paid to sentencing court.

Weighing Costs

Costs and fees assessed to recover monies expended for towing and/or reloading a vehicle detained for weighing.

Revenue Code	Amount Assessed	Reference(s)
13R (113)	Expenses incurred	§ 46.2-1137

See also "Liquidated Damages" and "Weighing Costs"

When/How Collected
These costs are assessed in district court. If the case is appealed and the defendant is convicted in circuit court, the circuit court clerk taxes the costs against the defendant and remits any costs paid by the defendant to the Commonwealth.

Weighing Fee

Fee assessed when the driver of an overloaded vehicle is convicted, forfeits bail or purchases an increased license as a result of the vehicle being weighed. The fee is collected from the owner or operator of the vehicle.

Revenue Code	Amount Assessed	Reference(s)
125	$2	§ 46.2-1137

See also "Liquidated Damages" and "Weighing Costs"

When/How Collected
The fee is assessed in district court. If the case is appealed and the defendant is convicted

in the circuit court, the circuit court clerk taxes the fee against the defendant and remits the fee paid by the defendant to the Commonwealth.

Witness Fees

Fees and/or expenses paid to certain witnesses summoned by the Commonwealth or locality to appear in a criminal proceeding.

Revenue Code	Amount Assessed	Reference(s)
13L (113) (Common wealth)	Included in the Circuit court fixed fees.	§§ 2.2-2823, 2.2-2825, 53.1-209, 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-611 through 17.1-623, 19.2-168, 19.2-175, 19.2-278, 19.2-329 through 19.2-335; Chart of Allowances

When/How Collected
Included in the fixed fees.

In order for witnesses in a case to be reimbursed, follow the procedures listed below:

For witnesses summoned on behalf of the Commonwealth, the clerk prepares a DC-40, List of Allowances (or DC-42, depending on the type of witness; i.e., expert, out-of-state, etc. and the Code section under which payment is being requested.) For witnesses falling under § 17.1-611, the clerk forwards the List of Allowances, along with receipts for expenses, to the local treasurer who remits payment to the witnesses. The local treasurer then submits the List of Allowances and receipts to the Office of the Executive Secretary for further processing. The locality is subsequently reimbursed by the Commonwealth (State Treasurer). For all other Commonwealth witnesses, the clerk prepares and forwards the DC-40, List of Allowances and any receipts directly to the Office of the Executive Secretary. Such witnesses are then paid by the Commonwealth.

Note: Refer to Va. Code § 17.1-617 for details on the maximum number of witnesses that will be paid out of the state treasury for criminal cases.

For witnesses summoned on behalf of the locality, the clerk prepares a statement/bill of expenses and, with receipts attached, forwards same to the locality. The locality then provides direct payment to the witnesses.

Note: Local witness fees are not billed to the Office of the Executive Secretary.

Appendix C - **Fee Schedule**

https://www.vacourts.gov/courts/circuit/resources/manuals/appendixc.pdf

Appendix D - **Records Retention and Disposition Schedule**

Source: Library of Virginia
Printed with approval of Archives and Records Division

Reader may obtain latest copy of Retention Schedule No. 12 at the following website:

https://www.lva.virginia.gov/agencies/records/sched_local/GS-12.pdf

Appendix E - **Manual Updates**

Date	Chapter	Section	Description
July 2023		Various	Updated: Juror Pay Increase to $50 – Legislative
July 2023	Pre-Trial	Interpreters	Added: Requirement of Court-appointed Interpreters for the Deaf/Hard of Hearing to be Approved by VDDHHS – Legislative
July 2023	Pre-Trial	Evaluations of Competency and Sanity	Updated: Code Language for §§ 19.2-169.1, 19.2-169.2 – Legislative
July 2023	Pre-Trial	Evaluations of Competency and Sanity	Added: Code Language for §§ 19.2-169.1, 19.2-169.2 – Legislative
July 2023	Trial/Post-Trial	Revocation of Probation	Added: Requirement Upon the Court's Notification of a Violation of Postrelease Supervision to Issue a Capias of Recommitment – Legislative
July 2023	Pre-Trial	Psychiatric Evaluations and Treatment	Added: Requirement to Send Orders to DBHDS - Legislative
July 2023	Pre-Trial	Jury Selection, Summoning and Orientation	Added: Opinion to Small to Term Jury List – Non-Legislative
July 2023	Trial/Post Trial	Jury Trial	Added: Jury Panel List – Education Committee
Feb 2024	Pre-Trial	Various	Added: No fees for issuance of subpoena or subpoena duces tecum – Non-Legislative

Appendix F – Evidence Room/Records Management

Sealed Records

"Sealed" records are not open to anyone and are made available only by court order. The sealed records, if feasible, should physically remain in the court file. Some records are ordered to be sealed by the Court and others are required by statute.

Certain records and documents, both criminal and civil in nature, are required by statute to be sealed when filed in the clerk's office or upon the performance of a specified act. The Court may order other documents, records, exhibits, etc. to be sealed during the pendency of a case or during the course of a hearing or trial. While the Code of Virginia specifies numerous instances where the court or the clerk is required to seal a particular record, it does not provide procedures for accomplishing that act.

There is a difference between "sealed" records and "confidential" records. Sealed records are placed in an envelope that is sealed making the envelope unable to be opened except by court order. Confidential records do not have to be physically sealed but may be simply placed in an envelope and made unavailable for inspection. Certain confidential records, such as juvenile appeals, are unavailable for inspection except to certain parties as designated by statute. See below for further information on confidentiality.

Unlike an expunged record, most "sealed" records remain a part of the file and, if feasible, should physically remain in the court file. After placing the record(s) in a plain envelope, the envelope should be sealed by tape or other adhesive and the following statement should be typed in a visible location on the outside of the envelope, "Sealed record to be opened only upon order of the Circuit Court of _____". The style of the case should also be typed on the envelope, particularly if the sealed record is too large to be placed in the court file. It is possible that one file may contain numerous sealed records, one or more of which may be ordered to be opened at a later date. To assist in locating a specific sealed record, a general description of the contents or some identifying number should also be written on the outside of the envelope, i.e., "separation agreement", "presentence report", "psychological evaluation", etc. If the court has ordered the record sealed, attach a copy of such order to the outside of the envelope. Original of such order is placed in the file.

Note: Form CC-1075, SEALED DOCUMENTS ENVELOPE may also be used.

In all cases, access to sealed records is available only through Court order. https://law.lis.virginia.gov/vacodepopularnames/virginia-freedom-of-information-act/ states that all official records shall be open to inspection "except as otherwise specifically provided by law..." [Va. Code § 2.2-3704 (A)] and

https://law.lis.virginia.gov/vacodepopularnames/virginia-public-records-act/ specifies "no provision of [that Act] shall be construed to authorize or require the opening of any records ordered to be sealed by a Court" (Va. Code § 42.1-78). Virginia Code §§ 9.1-177.1 and 19.2-299 identifies who has access to certain sealed records without a court order.

The Code specifies that the following records either must be sealed when they are filed with the Court or may be sealed by Order of the Court.

Note: some of the following involve matters sealed by the court in certain cases.

Change of Name - Va. Code § 8.01-217

If the applicant shall show cause to believe that in the event their change of name should become a public record, a serious threat to the health or safety of the applicant or their immediate family would exist, the chief judge of the circuit court may waive the requirement that the application be under oath or the court may order the record sealed and direct the clerk not to spread and index any orders entered in the cause, and shall not transmit a certified copy to the State Registrar of Vital Records or the Central Criminal Records Exchange.

Divorce - Va. Code § 20-124

Upon motion of either party, the court may order the entire record or any agreement of the parties to be sealed. Thereafter, it is to be opened only to the parties, their attorneys or any person the court, in its discretion, decides has a proper interest in the case.

Uniform Child Custody Jurisdiction and Enforcement Act - Information to be submitted to the Court - Va. Code § 20-146.20

In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the past five years, and the names and present addresses of the persons with whom the child has lived during that period.

If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information shall be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child.

Records of Judicial Officers – Rule 11:3

Records of judicial officers are not publicly accessible and include, but are not limited to (i) memoranda, notes, or drafts prepared by or under the direction of any judicial officer that relate to the adjudication, resolution, or disposition of any past, present, or future case, controversy, or legal issue, (ii) legal research and analysis prepared or circulated by judicial officers or court personnel, (iii) written communications or discussions relating to procedural, administrative, or legal issues that have or may come before any judicial officer, (iv) information entered into and maintained in an electronic system used to create and issue judicial process, (v) subject to applicable state and federal laws and policies, personnel information concerning identifiable individuals, (vi) telephone numbers, telephone records and email addresses for justices and judges, (vii) documents or information that would compromise the safety of judicial officers, court personnel, jurors, or the public, or jeopardize the integrity of judicial facilities or any information technology or recordkeeping systems, (viii) communications among court personnel and judicial officers, and communications among judicial officers, (ix) legal documents created or received by magistrates that have not been filed with the appropriate clerk of court, and (x) records, documents, information, data or other items that are sealed, confidential, privileged, or otherwise protected by federal or state law, common law, court rule, or court order.

Criminal History Records - Va. Code § 9.1-134

The Criminal Justice Services Board is authorized to "adopt procedures reasonably designed (i) to insure prompt sealing or purging of criminal history record information when required by state or federal statute, regulation or court order, and (ii) to permit opening of sealed information under conditions authorized by law."

Exhibits

See Attorney General opinion to Judge Sweeny dated 11/13/87 (1987-88, page 255; *"…if exhibits are offered into evidence, even though the court may deny their admission into evidence, they become a part of the court's record and are "public records" generally subject to disclosure under § 17-43." "if the exhibits are not offered into evidence but are merely offered for identification purposes, they do not become public records subject to disclosure under § 17-43."*

Expungements - Va. Code § 19.2-392.3

It shall be unlawful for any person having or acquiring access to an

expunged court or police record to open or review it or to disclose to another person any information from it without an order from the court which ordered the record expunged. For step-by-step procedures for handling expungements, *see Criminal Manual*, "Post Sentencing" chapter.

Presentence Reports - Va. Code § 19.2-299 (A)

Reports filed by the probation officer are to be sealed upon entry of the final order and made available only by court order. These reports are also exempt from the Virginia Freedom of Information Act. Va. Code § 9.1-177.1.

The defense attorney is provided with a copy of the report five days before sentencing to give counsel the opportunity to review it with the defendant and to prepare a response, if needed, to items contained in the report.

Counsel representing a person who has been convicted of a crime for which a presentence report was prepared by a probation officer may be provided a copy of the report, without a court order, when the convicted person is pursuing a post-conviction remedy. Va. Code §§ 9.1-177.1 and 19.2-299.

Presentence Mental Evaluation of Sex Offenders - Va. Code § 19.2-301

The examiner's report shall be confidential, except as needed for the prosecution or defense of an offense or for assessment by the Attorney General for civil commitment. It shall be sealed once the sentencing order is entered. The defendant is required to return to the court their copy of the report at the conclusion of sentencing.

Pretrial and Community-based Probation Records - Va. Code §§ 9.1-177.1, 19.2-299

Any investigation report prepared by a local probation officer is confidential and is exempt from the https://law.lis.virginia.gov/vacodepopularnames/virginia-freedom-of-information-act/ . Such reports shall be filed as a part of the case record. Such reports shall be made available only by court order and shall be sealed upon final order by the court; except that such reports shall be available upon request to (i) any criminal justice agency, as defined in Va. Code § 9.1-101, of this or any other state or of the United States; (ii) any agency where the accused is referred for assessment or treatment; or (iii) counsel for the person who is the subject of the report.

Counsel representing a person who has been convicted of a crime for which a presentence report was prepared by a probation officer may be provided

a copy of the report, without a court order, when the convicted person is pursuing a post-conviction remedy.

Mental, Psychological and/or Psychiatric Documents - Va. Code § 2.2-3704 (A)

Any evaluation or report of this type should be placed in an envelope with attached notice on the outside of the envelope.

A competency evaluation report ordered by and submitted to a court, pursuant to Va. Code § 19.21-169.1, which is not sealed by court order, is open to inspection under Va. Code § 17.1-208. *See* Attorney General Opinion to Schaefer, dated 2/25/09 (2009, page S-14); Competency evaluation report that was ordered by and submitted to court as part of court's record is open to inspection, provided such report is not sealed by court order.

Victim Impact Statement - Va. Code § 19.2-299.1

This statement, like a presentence report, is confidential and shall be sealed upon entry of the sentencing order. It is not admissible in any civil proceeding for damages arising out of acts upon which the conviction was based but may be used by the Virginia Workers' Compensation Commission when making a determination on claims by victims of crimes pursuant to Va. Code § 19.2-368.1 et seq.

Request of Confidentiality of Victim - Va. Code § 19.2-11.2 (Form DC-301, REQUEST FOR CONFIDENTIALITY)

Upon request of any crime victim, neither a law-enforcement agency, the Commonwealth's attorney, a court nor the Department of Corrections, nor any employee of them, may disclose, except among themselves, the residential address, telephone number, or place of employment of the victim or a member of the victim's family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause.

Except with the written consent of the victim, a law-enforcement agency may not disclose to the public information which directly or indirectly identifies the victim of a crime involving any sexual assault or abuse, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause.

Special Grand Jury - Va. Code § 19.2-212

The foreman of the special grand jury shall seal all the notes, tapes and transcripts of the special grand jury proceedings at the conclusion of the investigation. The records are to be placed in a sealed container, dated and delivered to the court for safekeeping. The Court, on motion of the Attorney for the Commonwealth or a witness subsequently prosecuted for perjury, shall grant access to both of them to the testimony given before the special grand jury by that defendant. If no prosecution for perjury is initiated within three years from the special grand jury's report, the sealed container shall be destroyed.

Special Grand Jury Report - Va. Code § 19.2-213

The report of the special grand jury filed with the court at the conclusion of its investigation and deliberations shall be sealed and opened only by order of the court.

Election Material - Va. Code § 24.2-668

After ascertaining the results and before adjourning, the electoral officers shall put the pollbooks, the duplicate statements of results, and any printed inspection and return sheets in the envelopes provided by the State Board. The officers shall seal the envelopes and direct them to the clerk of the circuit court for the county or city, by noon on the day following the election. The local electoral board may direct that the officers of election, in lieu of conveying the materials to the clerk of the circuit court, shall convey the materials to the principal office of the general registrar on the night of the election or the morning following the election as the board directs, and the registrar shall secure and retain the materials in their office and shall convey to the clerk of the circuit court by noon of the day following the ascertainment of the results of the election, and the general registrar shall retain for public inspection on copy of the statement of results.

The clerk shall retain custody of the pollbooks, paper ballots, and other electronic materials until the time has expired for initiating a recount, contest or other proceedings in which the materials may be needed as evidence. The clerk shall (i) secure all pollbooks, paper ballots and other election materials in sealed boxes; (ii) place all of the sealed boxes in a vault or room not open to the public or to anyone other than the clerk and their staff; (iii) cause such vault or room to be securely locked except when access is necessary for the clerk and their staff; and (iv) upon the initiation of a recount, certify that these security measures have been taken in whatever form is deemed appropriate by the chief judge.

After that time, the clerk shall deliver the pollbooks to the general registrar. The clerk shall retain the statement of results and any printed inspection and return sheets for two years and may then destroy them.

Voting Machine Keys - Va. Code § 24.2-659

The keys to each voting machine/device are to be placed in a certified and sealed envelope by the officers of election and delivered to the clerk by noon on the day following the election. They are to be opened only by court order or request of the State Board of Elections or electoral board. The sealed envelopes are to be returned to the electoral board fifteen days after the ascertainment of the results of the election or at a designated time after a recount.

Affidavit for Search Warrant - Va. Code § 19.2-54

An affidavit preliminary to issuance of search warrant shall be certified by the officer who issues such warrant and delivered by such officer or other officer authorized to certify such warrants to the clerk of the circuit court of the county or city wherein the search is made within seven days after the issuance of such warrant and shall by such clerk be preserved as a record and shall at all times be subject to inspection by the public after the warrant that is the subject of the affidavit has been executed or 15 days after issuance of the warrant, whichever is earlier; however such affidavit, any warrant issued pursuant thereto, any return made thereon, and any order sealing the affidavit, warrant, or return may be temporarily sealed for a specific period of time by the appropriate court upon application of the attorney for the Commonwealth for good cause shown in an ex parte hearing.

Search Warrant for Tracking Device - Va. Code § 19.2-56.2

All affidavits, search warrants and inventories filed pursuant to this code section shall be sealed. Only a court order can authorize the unsealing of these documents.

Wiretaps, Intercepted Communications - Va. Code § 19.2-68 (F)

Applications made for wiretaps or interceptions and the orders granting or denying those applications shall be sealed. Custody of those documents shall be wherever the judge directs. They must be held for ten years and can be destroyed after that period only upon order of the court.

The recording or resume stemming from the court order granting interception is to be turned over to the court and sealed immediately upon expiration of-the period outlined in the order. The court retains custody of the recordings or resume for a period of ten years from the date of the order and they may be destroyed after that date upon order of the court.

Pen Register or Trap and Trace Device - Va. Code § 19.2-70.2 (D)(1)

An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that the order and application be sealed until otherwise ordered by the court.

Health Records - Va. Code § 32.1-127.1:03

Any party filing a request for a subpoena duces tecum or causing such a subpoena to be issued for an individual's medical records shall include a Notice to Providers in the same part of the request where the provider is directed where and when to return the records. The notice is to indicate that the records are to be delivered in a sealed envelope. Attached to the sealed envelope will be a cover letter to the clerk of court which states that confidential health care records are enclosed and are to be held under seal pending the court's ruling on the motion to quash the subpoena. The sealed envelope and the cover letter shall be placed in an outer envelope or package for transmittal to the court.

Health care providers shall provide a copy of all records as required by a subpoena duces tecum or court order for such medical records. If the health care entity has actual receipt of notice that a motion to quash the subpoena has been filed or if the health care entity files a motion to quash the subpoena for health records, then the health care entity shall produce the health records, in a securely sealed envelope, to the clerk of the court or administrative agency issuing the subpoena or in whose court or administrative agency the action is pending. The court or administrative agency shall place the health records under seal until a determination is made regarding the motion to quash. The securely sealed envelope shall only be opened on order of the judge or administrative agency. In the event the court or administrative agency grants the motion to quash, the health records shall be returned to the health care entity in the same sealed envelope in which they were delivered to the court or administrative agency. In the event that a judge or administrative agency orders the sealed envelope to be opened to review the health records in camera, a copy of the order shall accompany any health records returned to the

health care entity. The health records returned to the health care entity shall be in a securely sealed envelope.

Discovery from a Subpoena Duces Tecum - Rule 3A:12

The press and public do not have the right to access any documents that have been produced through a subpoena duces tecum in a criminal case which have not been entered into evidence. If the documents are introduced into evidence during a pretrial hearing or during trial, then they become "judicial records" and the right of access is created. Such documents are open to counsel of record for viewing at any stage of the case unless otherwise prohibited by court order.

If an order is entered quashing or limiting access to documents from a subpoena duces tecum, place the original order in the criminal case file, and place a copy of such order on the outside of the envelope containing the documents.

Public Safety Employees; Testing for blood-borne pathogens - Va. Code § 32.1-45.2 (E)

If the court finds by a preponderance of the evidence that an exposure prone incident has occurred, it shall order testing for hepatitis B or C virus and human immunodeficiency virus and disclosure of the test results. The hearing shall be held in camera as soon as practicable after the petition is filed. The record shall be sealed.

Disciplinary proceedings against attorney - Va. Code § 54.1-3936

Papers filed with the Court pursuant to an ex parte application by Bar Counsel or the chairman of a district committee of the Virginia State Bar against an attorney who is suspected of engaging in any activity which is unlawful or in violation of the Virginia Code of Professional Responsibility and which will result in loss of property of one or more of their clients or any other person shall be sealed.
A complaint, and all other related papers, filed with the Court seeking an injunction prohibiting the withdrawal of an attorney's deposits or the appointment of a receiver for funds under the control of an attorney who is suspected of engaging in an unlawful activity shall be sealed until such time as the Court acts.

Statement of Facts - Subpoena Duces Tecum for Financial Records - Va. Code §§ 18.2-246.2 and 19.2-10.1

The statement of facts documenting the reasons the records or information are sought will be sealed upon issuance of the subpoena duces tecum upon motion of the Commonwealth's Attorney, and the use of such records or information is limited to the investigation and legitimate law-enforcement purposes. At the end of the investigation the records or information may be sealed.

Confidentiality Considerations

The vast majority of records filed in the clerk's office are not confidential and are accessible to the public. Virginia courts are not bound by many of the restrictions imposed on governmental agencies, including the Government Data Collections and Dissemination Practices Act (Va. Code § 2.2-3802), and court personnel should be conscious of the public's right to gain access to most records and documents on file in the clerk's office.

However, while the provisions of the https://law.lis.virginia.gov/vacodepopularnames/virginia-freedom-of-information-act/ do apply to circuit court clerks' offices, there are certain documents, records and, in fact, entire cases that are statutorily classified as confidential and exempt from disclosure. The Code of Virginia specifies that some confidential records are to be sealed at certain stages during the proceedings of a case and remain a part of the file (presentence reports, victim impact statements, etc.), however most "confidential" records are not physically sealed but simply removed from public access and made unavailable for inspection.

The following records are considered confidential and not accessible to the public:

Addendums in Divorce Cases - Va. Code § 20-121.03

Any petition, pleading, motion, order, or decree, including any agreements of the parties or transcripts, shall not contain the social security number of any party or of any minor child of any party, or any financial information of any party that provides identifying account numbers for specific assets, liabilities, accounts, or credit cards. Such information if required by law to be provided to a governmental agency or required to be recorded for the benefit or convenience of the parties, shall be contained in a separate addendum filed by the attorney or party which shall be incorporated by reference into the petition, pleading, motion, agreement, order or decree. Such separate addendum shall be used to distribute the information only as required by law. Such addendum shall otherwise be made available only to the parties, their attorneys, and to such other persons as the court in its discretion may allow. Form CC-1426, ADDENDUM FOR PROTECTED IDENTIFYING INFORMATION – CONFIDENTIAL, should be utilized.

Adoptions - Va. Code § 63.2-1246

Nonidentifying information from an adoption file "shall not be open to inspection, or to be copied, by anyone other than the adopted person, if eighteen years of age or over, or licensed or authorized child-placing agencies providing services to the child or the adoptive parents, except upon order of a circuit court entered upon good cause shown." If either of the adoptive parents is living when the adult adopted person applies to inspect the file, the home study of the adoptive parents shall not be made available for inspection unless the adoptive parent or parents give written permission for disclosure. The exceptions to the prohibition of disclosure are enumerated in subsections C, D and E of Va. Code § 63.2-1247 (a physician states that critical medical, psychological or genetic information must be conveyed to the parties; at least one adoptive parent and one biological parent agree to allow the exchange of nonidentifying information and pictures and; in certain parental placement adoptions executed on or after July 1, 1994.)

No identifying information from such adoption file shall be disclosed, open to inspection or made available to be copied except as provided in subsection A, B and E of Va. Code § 63.2-1247 or upon application of the adopted person, if eighteen years of age or over, to the Commissioner of the Department of Social Services, who shall designate the person or agency which made the investigation required by Va. Code §§ 63.2-1221, 63.2-1208, 63.2-1238 or 63.2-1212 to attempt to locate and advise the biological family of the application.

The attorney for the Commonwealth and the probation officer shall have direct access to the defendant's juvenile court delinquency records maintained in an electronic format by the court for the strictly limited purposes of preparing a presentence report, preparing discretionary sentencing guidelines or preparing for any transfer or sentencing hearing. Va. Code § 16.1-305.

Adoptions (foreign) - Issuance of birth certificates for children adopted in the Commonwealth and from foreign countries - Va. Code § 63.2-1220

Adoptive parents who are residents of the Commonwealth may petition the circuit court in the city or county where they reside for a report of adoption when the adoptive parents are seeking a Virginia certificate of birth for a child adopted in a foreign country that has post-adoption reporting requirements and with whom the United States has diplomatic relations.

No identifying information from such adoption file shall be disclosed, open

to inspection or made available to be copied except as provided in Va. Code § 63.2-1247

Judicial Complaints - Va. Code § 17.1-107

Complaints made to the Chief Justice of the Supreme Court regarding a circuit court judge who may be holding any matter, claim, motion, issue, or case under advisement for an unreasonable length of time, "shall be absolutely privileged, and the name of the complaint shall not be disclosed without their [her] consent."

Note: This Code Section does not contemplate any such petition to the circuit court. Inquiry would be made to the Supreme Court of Virginia.

Judicial Inquiry and Review Commission - Va. Code §§ 17.1-913, 2.2-3705.7

All papers filed with and proceedings before the Judicial Inquiry and Review Commission are confidential. However, a judge under investigation "or any person authorized by him, may divulge information pertaining to a complaint filed against such judge as may be necessary for the judge to investigate the allegations in the complaint." Ethical advice given to a judge by an attorney employed by the Commission and any attendant records shall remain confidential. However, the Commission may share such advice, without identifying the judge, with the judicial ethics advisory committee established by the Supreme Court.

Virginia Code § 2.2-3705.7 exempts the Commission from the Freedom of Information Act.

Juvenile court records - Title 16.1, Chapter 11, Article 12

Virginia Code § 16.1-307 states that in the circuit court proceedings on appeals from the Juvenile and Domestic Relations Court, "the clerk of the court shall preserve all records connected with the proceedings in files separate from other files and records of the court as provided in § 16.1-302", i.e., separate dockets, files, indices and order books which are not accessible to the public. The exceptions to this rule (Va. Code § 16.1-302 (B)) are (1) cases involving support pursuant to Va. Code § 20-61; (2) cases involving criminal offenses committed by adults which are commenced on a warrant charging an offense described in Title 19.2; and (3) cases involving civil commitments of adults pursuant to Title 37.2.

a. Child or Spousal Support

In any child or spousal support case appealed to the circuit court, the

case files shall be open for inspection only as provided by Va. Code § 16.1-305.01.

All child support and spousal support case files, whether physical or digital, shall be open for inspection only to the following:

- The judge, court officials, and clerk or deputy clerk assigned to serve the court in which the case is pending or to which the case is transferred pursuant to court order;
- Any party to the case;
- Attorney of record to the case; and
- The Department of Social Services and the Division of Child Support Enforcement.

Any other person, agency, or institution having a legitimate interest in such case files or the work of the court, by order of the court, may inspect the case files.

b. Children in Need of Services, Children in Need of Supervision, Neglected and Abused Children, Delinquent Children
Any person, agency, or institution that may inspect juvenile case files pursuant to subdivisions A1 through A4 of Va. Code § 16.1-305 shall be authorized to have copies made of such records, subject to any restrictions, conditions, or prohibitions that the court may impose.

c. Appeal of denial of petition filed by juvenile authorizing a physician to perform an abortion without notice

The clerk should treat this as a matter of deep confidentiality. Va. Code § 16.1-241 (W). *See* "Suits/Action Types A-B" this manual for detailed procedures in processing these appeals.

d. Certified cases from J&DR (Juvenile charged with a felony)

In cases where a juvenile is charged with committing a felony and the J&DR court judge has certified the case to the circuit court for the juvenile to be tried as an adult pursuant to Va. Code § 16.1-269.1, the clerk should treat the case as a juvenile appeal (confidential file, index, etc.) until an Indictment is returned by the Grand Jury. At that point the confidential nature of the case ceases and the case assumes the status of any other circuit court criminal case. The juvenile case number previously assigned to that case should be deleted and the case should be assigned a criminal case number and it should be filed and indexed as any other adult criminal case. If the juvenile is

subsequently convicted, the clerk should send a copy of the conviction order to the J&DR clerk.

Information on Protective Orders - Va. Code §§ 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-279.1, 17.1-272

The residential address, telephone number and place of employment of a person protected by a protective order shall not be disclosed, unless it is required by law or is necessary for law-enforcement purposes. In addition, no fee shall be charged for filing or serving a protective order. Finally, law enforcement agencies shall enter certain information regarding the protective order, upon receipt, into the Virginia Criminal Information Network System (VCIN). Currently, that information is to be entered "as soon as practicable."

Note: Protective orders have had the sensitive information removed from the order and placed on a non-disclosure addendum (DC-621, NON-DISCLOSURE ADDENDUM) that will be used for service purposes but otherwise maintained in a confidential area.

Probate Tax Return - Va. Code § 58.1-1714

At the time a will is offered for probate or the grant of administration is sought, and when the value of the estate exceeds $15,000, a return must be made by the proponent of the will or the person requesting the grant of administration and filed with the clerk stating the estimated value of real estate and personal property owned solely by the decedent at the time of death.

The information contained on the probate tax return is "entitled" to the privilege accorded by Va. Code § 58.1-3 even though a detailed listing of the estate is to be subsequently recorded on the estate inventory, which is not a confidential document.

Wills Lodged for Safekeeping - Va. Code § 64.2-409

The clerk shall carefully preserve the envelope containing the will unopened until it is returned to the testator or their nominee in their lifetime upon their request in writing therefor or until the death of the testator. Should such will be returned in the testator's lifetime as herein before provided and later returned to the clerk it shall be considered as a separate lodging under the provisions of this section.

Photographs/X-Rays in child abuse cases - Va. Code § 63.2-1520

The court, in its discretion, may impose confidentiality restrictions on

photographs and x-rays of children introduced as evidence in suspected child abuse cases.

Military Discharge Certificates and Reports of Separation - Va. Code § 17.1-265

Discharge certificates and reports of separation from active military duty which are recorded with the clerk of circuit court shall be open for inspection and copying only by

- The subject of the record;
- The duly qualified conservator or guardian of the subject of the record;
- The duly qualified executor or administrator of the estate of the subject of the record, if deceased, or, in the event no executor or administrator has qualified, the next of kin of the deceased subject;
- An attorney, attorney-in-fact, or other agent or representative of any of the persons described in subdivision 1, 2 or 3, acting pursuant to a written power of attorney or other written authorization; or
- A duly authorized representative of an agency or instrumentality of federal, state, or local government seeking the record in the ordinary course of performing its official duties.

Under the circumstances in which time is of the essence, including but not limited to, requests for copies of records attendant to the making of funeral arrangements or arrangements for medical care, the clerk, in ascertaining whether a person seeking access to discharge certificates or reports of separation from active duty is qualified to do so pursuant to this section, may rely upon the sworn statement of the requestor made in person before the clerk or their deputy.
The clerk may permit access to discharge certificates or reports of separation from active duty of deceased persons for bona fide genealogical or other research purposes.

Note:

- Sworn statements of requestors should be placed in a file for this purpose. It is also suggested that copies of authorizing documents be kept to document the reason the court allowed the record to be copied.
- Induction records are not mentioned in this Code section.

Marriage License and Register - Va. Code § 32.1-267

Applications for marriage licenses filed on and after July 1, 1997, and marriage registers recording such applications, which have not been configured to prevent disclosure of the social security number or control number required pursuant to the provisions of subsection B of this section shall not be available for general public inspection in the offices of clerks of the circuit courts. The clerk shall make such applications and registers available for inspection only (i) upon the order of the circuit court within which such application was made or register is maintained, (ii) pursuant to a lawful subpoena duces tecum issued to the clerk, (iii) upon the written authorization of either of the applicants, or (iv) upon the request of a law-enforcement officer or duly authorized representative of the DCSE in the course of performing their official duties. Nothing in this subsection shall be construed to restrict public access to marriage licenses or to prohibit the clerk from making available to the public applications for marriage licenses and marriage registers stored in any electronic medium or other format that permits the blocking of the field containing the social security or control number required pursuant to the provisions of subsection B of this section, so long as access to such number is blocked.

See Attorney General opinion to Carol Black, dated 3/25/02 (2002, page 182); which states that although the Office of the Attorney General is *"unable to comment on the practicability of devising a method by which marriage licenses processed and imaged since 1997 may be changed to comply with the nondisclosure requirements" the General Assembly "intends that social security numbers required for a person to obtain a marriage license not be disclosed to the general public, and that this applies retroactively to all marriage licenses filed on and after July 1, 1997."*

Money Under Control of Court; held by Clerk - Va. Code § 8.01-600 and General Receiver - Va. Code § 8.01-582

Orders creating funds pursuant to these sections shall include information necessary to make prudent investment and disbursement decisions. The orders shall include, except when it is unreasonable, the proposed dates of periodic and final disbursements. Prior to the entry of the order, the beneficiary or their representative shall file an affidavit with the court providing the beneficiary's name, date of birth, address and social security number. The affidavit shall be maintained under seal by the clerk unless otherwise ordered by the court, and the information therein shall be used solely for the purposes of financial management and reporting.

Set-Off Debt Collection - Va. Code § 58.1-533

The information obtained from the Department of Taxation pursuant to

collection efforts in the Set-Off Debt Collection program shall be used only for debt collection purposes and "any person employed by, or formerly employed by, a claimant agency who discloses such information for any other purpose" shall be penalized pursuant to the provisions of Va. Code § 58.1-3.

Victim Impact Statement - Va. Code § 19.2-299.1

Like the presentence report, a victim impact statement "shall be kept confidential and shall be sealed upon entry of the sentencing order." *See* additional information under "Sealed Records."

Restitution Victim Contact Information Va. Code § 19.2-305.1

At the time of sentencing, the court shall enter the amount of restitution to be repaid by the defendant, the date by which all restitution is to be paid, the terms and conditions of such repayment, and the victim's name and contact information, including the victim's home address, telephone number, and email address, on a form prescribed by the Office of the Executive Secretary of the Supreme Court of Virginia. A copy of the form, excluding contact information for the victim, shall be provided to the defendant at sentencing. A copy of the form shall be provided to the attorney for the Commonwealth and to the victim, their agent, or their estate upon request and free of charge. Except as provided in this section or otherwise required by law, the victim's contact information shall be confidential, and the clerk shall not disclose such confidential information to any person.

Master Jury and Jury Trial List (Archer and Johnson v. Mayes, 213 Va. 633 and Prieto v. Commonwealth, 283 Va. 142)

The Virginia Supreme Court ruled in the 1973 case of Archer and Johnson v. Mayes, that the master "jury list is not an 'official record' within the intent and meaning of the provisions of the Freedom of Information Act. Thus the right of access to official records allowed under the Freedom of Information Act does not include jury lists."

The appellants asserted that the jury list was a "state document" that all citizens should be permitted to view and examine. The Court disagreed stating that a judge could, in their discretion, permit examination of the list, but it could not be inferred that the jury list was open for inspection to members of the bar or private citizens without "assigning good and sufficient reasons therefor." The Court further stated "the proper administration of justice requires that the jury list be kept secret until the jurors are drawn for service, unless good cause can be shown. The jury list

is in no sense a public record to be exposed to the general public. Exposure of the list to the public could lead to tampering or harassment of potential jurors and seriously affect their impartiality and the proper administration of justice."

In the 2012 case of Prieto v. Commonwealth, the Virginia Supreme Court upheld and cited its prior decision about the confidentiality of the jury list, going on to include that the good cause standard is appropriate for the release of both a current and expired jury list.

Jury questionnaires are also not a public record. *See* Juror Lists for further information

Note: Even when good cause is shown, the inspection of the list shall be permitted only under the 'watchful eye' of the court and copying or photo stating the list is not to be permitted.

Exception: Upon request, the clerk or sheriff shall make available to all counsel of record in that case, a copy of the jury panel to be used for the trial of the case 3 full business days before the trial. Va. Code § 8.01-353.

The court may, upon motion of either party or its own motion, and for good cause shown, issue an order regulating the disclosure of the name and home address of a juror who has been impaneled in a **criminal** trial to any person, other than to counsel for either party or a pro se defendant. Additional personal information of a juror who has been impaneled in a criminal case shall be released only to the counsel for the defendant, a pro se defendant, and the attorney for the Commonwealth. The court may, upon motion of either party or its own motion, and for good cause shown, issue an order authorizing the disclosure of any additional personal information of a juror to any other person.

Additional "personal information" means any information other than name and home address collected by the court, clerk, or jury commissioner at any time about a person who is selected to sit on a criminal jury and includes, but is not limited to, a juror's age, occupation, business address, telephone numbers, email addresses, and any other identifying information that would assist another in locating or contacting the juror. Va. Code §19.2-263.3.

See Attorney General Opinion to Hall, dated 9/17/97, (1997,page 27); Circuit court clerk may not release information contained on master jury list

or jury commissioner's questionnaires regarding potential jurors to law enforcement or Department of Motor Vehicles authorities without circuit court judge having determined that good cause has been shown by such authorities for obtaining such information.
See Attorney General Opinion to Small, dated 6/3/16; *Counsel of record has the right to view a term jury list. Copying of the list by counsel is permitted only by leave of court upon showing of good cause.*

Jury Panel List

The jury panel list, or "strike list", is a list that contains only the names or assigned juror numbers of persons summoned to appear on a specific date for a trial and is used to strike or excuse jurors during the process of impaneling. The list is maintained in the case file and may be made available to the public provided the juror's address, or any other personal identifying information, is not included.

Grand Jury List

Virginia Code §19.2-194 requires that the Judge or Judges are to make a list of potential grand jurors, and deliver this list to the clerk of the circuit court. The Clerk holds this list, until time the judge directs names to be selected for service. The list is not a public record, and not subject to inspection and copying under Va. Code §17.2-208. When the names are selected from the list and reproduced on a writ of venire facias, this creates a record of the court that could be subject to Va. Code §17.1-208. This writ, however, is subject to amendment up to the day of court service, depending on the present availability or ability of the grand juror to serve. Although there are no statutory requirements for the grand jury list to be confidential, it is recommended that the Judge make a determination to release the names. At the very least, the identity of grand jurors should not be released until they have served, to protect jurors from outside influences that may rise to the level of jury tampering.

Term Jury List

Virginia Code § 8.01-351 directs the clerk to make and list of the names of each potential juror for a term of court and have it available for inspection by counsel in any case to be tried by a jury during the term. This list is not available for copying unless a court finds good cause to permit it. It is not available for inspection or copying by the public at all. *See* Attorney General Opinion to Small, dated 6/3/16. *Only counsel of record has the right to view a term jury list. Copying of the list by counsel is permitted only by leave of court upon a showing of good cause.*

Passport Information (Passport Agent's Reference Guide - Passport Services)

The Privacy Act of 1974 protects information obtained from or in a connection with a passport application. Clerks should not give such information to anyone except the applicant (or, in the case of a minor, the parent or guardian). Other persons or organizations requesting information about a passport applicant should contact: Passport Services.

Medical Examiners Reports - Va. Code § 32.1-283

Reports and findings of the Medical Examiner shall be confidential and shall not under any circumstances be disclosed or made available for discovery pursuant to a court subpoena or otherwise, except as provided in Va. Code § 32.1-283. Nothing shall prohibit the Chief Medical Examiner from releasing the cause or manner of death, or prohibit disclosure of reports or findings to the parties in a criminal case.

Index

Glossary

A

ABSOLUTE OR UNCONDITIONAL PARDON	A pardon which frees the criminal without any condition whatever from reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates in legal contemplation of the offense itself. It restores the accused to their civil rights and remits the penalty imposed for the particular offense of which he was convicted in so far as it remains unpaid or unserved.
ACQUITTAL	A deliverance or setting free of a person from a criminal charge.
ADJUDICATE	To decide judicially.
AFFIDAVIT	A written, printed, or videotaped declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.
AFFIRMATIVE DEFENSE	A defense to a charge of criminal activity, which places the burden of proof on the defendant. Examples of Affirmative Defenses include insanity, self-defense and intoxication.
ALLOCUTION	Presentence step in which the judge asks the defendant whether he has any legal cause to show why judgment should not be pronounced against him, or whether he would like to make statement on their behalf and present any information in mitigation of sentence. It permits defendants to speak in their own behalf in criminal cases prior to sentencing and to present any information in mitigation of punishment procedure.
APPELLANT	The party who appeals a case from a court to another court having appellant jurisdiction over the case being appealed.
APPELLATE JURISDICTION	The power vested in an appellate court to review and revise the judicial action of an inferior court, evidenced by an appellate order or an appealable judgment rendered by such court. Limits of appellate jurisdiction are governed by statutes or constitutions. For example, the Court of Appeals has appellate jurisdiction over criminal cases (except capital murder cases) tried in circuit courts.
APPELLEE	The party in a cause against whom an appeal is taken. Sometimes also called the "respondent."
ARRAIGN	Arraignment of an accused consists of calling upon them by name, reading to them the charges in the arrest documents, demanding of them whether he pleads guilty or not guilty or, in misdemeanors, nolo contendere, and entering their plea. This hearing may be combined with right to counsel hearing.

ATTORNEY-IN-FACT	A person, not necessarily a lawyer, to whom authority is given by another to act in their place. The authority to act as an Attorney-In-Fact is given by a document containing a power or letter of attorney.

B

BAIL	The release of a person from legal custody by a written agreement (recognizance) that he shall appear at the time and place designated and submit themselves to the jurisdiction of the court and observe the requirements set forth in the recognizance.
BAILIFF	A court officer or attendant who has charge of a court session in the matter of keeping order, custody of the jury, and custody of prisoners while in the court.
BENCH TRIAL	The deposition of a criminal or civil case solely by a judge without the use of a jury.
BILL OF COST	A certified, itemized statement of the amount of costs in an action or suit.
BILL OF INDICTMENT	A formal written document accusing a person or persons named of having committed a felony or misdemeanor, lawfully presented by the prosecuting attorney for their action upon it.
BOND	A certificate or evidence of a debt with a sum fixed as a penalty, which contains a written agreement binding the parties to pay the penalties. It contains a condition, however, that the payment of the penalty may be avoided by the performance by some one or more of the parties of certain acts.

C

CALENDAR	The court schedule of the list of pending cases.
CAPIAS	A type of arrest document issued by the court charging the offender with a violation of a court order or court process or contempt of court.
CHALLENGE FOR CAUSE	A request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons which would legally justify such person not being allowed to serve as a juror in the case.

COMMISSIONER IN CHANCERY	An officer of the court appointed to be a finder of fact in an equity suit. The Commissioner of Chancery will make a report to the Court, and the Court may follow the recommendation of the Commissioner or make a ruling on its own.
COMMON LAW	In general, it is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments. The "common law" also includes all the statutory and case law background of England and the American colonies before the American Revolution.
COMMON LAW OFFENSE	An offense, which is defined by common law rather than by statute.
CONCURRENT SENTENCE	A sentence imposed which is to be served at the same time as another sentence imposed earlier or at the same time.
CONSECUTIVE SENTENCE	Separate sentences (each additional to the others) imposed upon a defendant who has been convicted for several distinct offenses; one of such sentences being made to begin at the expiration of another.
CONTEMPT	Any act which is calculated to embarrass, hinder, or obstruct the court in administration of justice, or which is calculated to lessen its authority or its dignity.
CONTINUANCE	The adjournment or postponement of a session, hearing, trial, or other proceeding to a subsequent day or time; usually on the request or motion of one of the parties. Also the entry of a continuance made upon the record of the court, for the purpose of formally evidencing the postponement.
COSTS	(1) A pecuniary allowance, made to the successful party (and recoverable from the losing party), for their expenses in prosecuting or defending an action or a distinct proceeding within an action. Generally, "costs" do not include attorney fees unless such fees are by a statute classified as costs or are by statue allowed to be recovered as costs in the case. (2) Fees and charges required by law to be paid to the courts or some of their officers, the amount of which is fixed by statute; e.g. filing and service fees.
CUSTODY	The detainment of a person by virtue of lawful process or authority; actual imprisonment.

D

DEPOSITION	The testimony of a witness taken upon oral examination, after notice to the adverse party, not in open court, but in pursuance of a notice to take testimony issued by the parties wanting the deposition. The adverse party has the right to attend and cross-examine. Testimony is reduced to writing and duly authorized, and intended to be used in connection with the trial of an action in court.
DISCOVERY	Procedures by which one party to a lawsuit may obtain information relevant to the case which is held or know by the other party.
DISMISSAL	An order disposing of an action, suit, etc., without trial.
DOCKET	A record of all cases and actions scheduled to be heard in court, whether or not the matter is actually heard in a court on a particular day.
DOUBLE JEOPARDY	A second prosecution for the same offense and multiple punishments for the same offense. Double jeopardy is prohibited by the Fifth Amendment to the Constitution of the United State, which provided that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."
DUE PROCESS	Law in its regular course of administration through courts of justice as now used, the term refers to the rights if an individual to a fair trial and to be free from certain forms of government intrusion. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individuals rights as those maxims prescribe for the class of case to which the one in question belongs. A course of legal proceedings according to those rules and principals which have been established in our systems of jurisprudence for the enforcement and protection of private rights. Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

E

ENCUMBRANCE TO PROPERTY	Binding claim or liability attached to real property. Encumbrances are generally liens which affect the title to the property or restrictions which affect the physical use of property, such as easements or encroachments.

EXHIBITS	An item of physical/tangible evidence which is to be or has been offered to the court for inspection.
EXPUNGEMENT OF RECORD	Process by which record of criminal conviction is destroyed or sealed after court order to do so as permitted by statute.
EXTRADITION	The surrender by one state to another state of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other state, which, being competent to try and punish him, demands the surrender.

F

FELONY	A crime punishable by death or confinement in the penitentiary. See Va Code § 18.2-10 for classification of felonies and the punishment for each classification.
FINAL ORDER	One which either terminates the action itself, or finally decides some matter litigated by the parties, or operates to divest some right; or one which completely disposes of the subject-matter and the rights of the parties.
FOREMAN	The presiding member of a grand or petit jury, who speaks or answers for the jury.

G

GRAND JURY	A jury of inquiry who are summoned and returned by the sheriff and whose duty is to receive complaints and accusations in criminal cases, hear the evidence adduced on the part of the state, and determine whether probable cause exists that a crime has been committed and whether an indictment (true bill) should be returned against one for such a crime. If the grand jury determines that probable cause does not exist, it returns a "no bill." It is an accusatory body and its function does not include a determination of guilt.

H

HABEAS CORPUS	A writ commanding the person holding a prisoner in custody to bring the prisoner before the court for a determination of whether the prisoner is restrained of their liberty by due process. It is not used to determine the guilt or innocence of the prisoner. It is a separate civil proceeding in Virginia.

I

INDICTMENT	Technically called "A Bill of Indictment." It is an accusation in writing presented to a grand jury. To the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which by law is a public offense, punishable on indictment. An indictment is merely a charge which must be proved at trial beyond a reasonable doubt before defendant may be convicted.
INDIGENT	In a general sense, one who is needy and poor, or one who has insufficient property to furnish them a living nor anyone able to support their or to whom he is entitled to look for support.
INFORMATION	An accusation exhibited against a person for some offense, without an indictment. An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on their oath of office, instead of a grand jury on their oath. A written accusation made by a public prosecutor, without the intervention of a grand jury.

J

JUDGMENT LIEN DOCKET	A list or docket of the judgments entered in a given court, methodically kept by the clerk or other proper officer, open to the public inspection, and intended to afford official notice to interested parties of the existence or lien of judgment.
JURISDICTION	The authority of a court or other governmental agency to adjudicate controversies brought before it. CAUTION: It is sometimes used to mean the county, city or town where something occurred, especially in describing venue.
JURY TRIAL	Trial of matter or cause before jury as opposed to trail before judge. In a jury trial, the jury decides issues of facts, but issues of law are decided by a judge.

L

LESSER INCLUDED OFFENSE	One which is composed of some, but not all elements of a greater offense and which does not have any element not included in greater offense so that it is impossible to commit greater offense without necessarily committing the lesser offense.

M

MAGISTRATE	A judicial officer having by statute some, but not all, of the powers of a judge. These powers include the power to issue arrest process and to admit a defendant to bail.

MANDATE	A precept or order issued upon the decision of an appeal or writ of error, directing action to be taken or disposition to be made of case, by inferior court. Official mode of communicating judgment of appellate court to lower court, directing action to be taken or disposition to be made of cause by trial court.
MATERIAL WITNESS	In criminal trial, a witness whose testimony is crucial to either the defense or prosecution, he may be required to furnish bond for their appearance and, for want of surety, he may be confined until he testifies.
MISDEMEANANT	A person guilty of a misdemeanor, one sentenced to punishment upon conviction of a misdemeanor.
MISDEMEANOR	Offenses punishable by fine not exceeding $2,500 or being jailed for a term not exceeding 12 months or a combination of fine and jail within these limits.
MISTRIAL	An erroneous, invalid, or nugatory trial. A trial of an action which cannot stand in law because of disregard of some fundamental requisite before or during trial. A device used to halt trial proceedings when error is so prejudicial and fundamental that expenditure of further time and expense would be wasteful if not futile.
MOTION (generally)	A request made to the judge by a litigant or other person connected with the case for a ruling or order.

N

NOLLE PROSEQUI	A formal entry by the prosecuting officer in a criminal action, by which he declares that he "will no further prosecute" the case. It is the equivalent of a motion to dismiss without prejudice, permitting the prosecutor to refile the case at a later time.
NOLO CONTENDERE	"I will not contest it." The name of a plea in a criminal action, having the same legal effect as a plea of guilty, so far as regards all proceedings in the case, and on which the defendant may be sentenced, but which does not contain an admission of guilt.

	1. Knowledge of facts which would naturally lead an honest and prudent person to make inquiry, and does not necessarily mean knowledge of all the facts. 2. Information, and advise, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which their interests are involved, or informing them of some fact which it is their right to know and the duty of the notifying party to communicate.
NOTICE	A person has notice of a fact if he knows the fact, has reason to know it, should know, or has been given notification of it. Notice may be either (1) statutory, i.e., made so by legislative enactment; (2) actual, which brings the knowledge of fact directly home to the party; or (3) constructive. Constructive notice may be subdivided into: (a) Where there exists actual notice of matter, to which equity has added constructive notice of facts, which inquiry after such matter would have elicited; and (b) where there has been a designed abstinence from inquiry for the very purpose of escaping notice.
NOTICE OF APPEAL	A document giving notice of an intention to appeal.

O

ORDINANCE	The enactments of the legislative body of a local government.
ORIGINAL JURISDICTION	Jurisdiction in the first instance; jurisdiction to take cognizance of a cause at its inception, try it, and pass upon the law and facts.

P

PEACE OFFICER	In general, any person who has been given authority to make arrests. Generally, a "peace officer" is a person designated by public authority to keep the peace and arrest persons guilty or suspected of crime and he is a conservator of the peace, which term is synonymous with the term "peace officer." This term includes sheriffs and their deputies, member of the police force of cities, and other officers whose duty is to preserve the public peace.
PEREMPTORY CHALLENGE	The right to challenge a juror without assigning or being required to assign, a reason for the challenge. Each party to an action, both civil or criminal, has a specified number of such challenges.
PETIT JURY	The ordinary jury for the trial of a civil or criminal action; so called to distinguish it from, the grand jury.

PETITION	A formal written application to a court requesting judicial action in a certain matter.
PLEA	Statement made by the defendant either as to their guilt or innocence to the charge made against him.
PLEA BARGAINING	The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.
POWER OF ATTORNEY	An instrument in writing whereby one person, as principal, appoints another as their agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal. An instrument authorizing another to act as one's agent or attorney. The agent is attorney in fact and their power is revoked on the death of the principal by operation of law. Such power may be either general (full) or special (limited).
PRELIMINARY HEARING	The hearing given to an accused which is held by a judge, to ascertain whether there is sufficient evidence (probable cause) to warrant the binding over of the accused on the felony charge to the circuit court for further proceedings.
PRESENTENCE REPORT	The report prepared from the presentence investigation, which is designed to assist the judge in passing sentence on a convicted defendant.
PRESENTMENT	The written notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government. A presentment is an accusation, initiated by the grand jury itself. A written accusation of crime made and returned by the grand jury upon its own initiative in the exercise of its lawful inquisitorial powers, is in the form of a bill of indictment.
PROBABLE CAUSE	A reasonable ground for belief in the existence of facts warranting the proceedings complained (e.g., probable cause to believe that a crime has been committed and the person accused may have committed it).
PROBATION	In modern criminal administration, allowing a person convicted of some offense to remain free under a suspension of a jail sentence during good behavior and generally under the supervision or guardianship of probation officer together with other restrictions as the court may impose.

PROCESS	Any means used by a court such as a "Capias to Show Cause" or "Witness Subpoena" to acquire or exercise its jurisdiction over a person or over specific property. Means whereby court compels appearance of defendant or property before it or a compliance with its demands which is completed with a notice served on an individual.

R

RECORD	A written account of some act, court proceeding, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates. The act or fact of recording or being recorded; reduction to writing as evidence, also, the writing so made.
RECUSAL	The process by which a judge is disqualified on objection of either party (disqualifies themselves) from hearing a lawsuit because of self-interest, bias, or prejudice.
RESTITUTION	The act of making good or giving equivalent for any loss, damage or injury.
RULE OF SHOW CAUSE	A court ruling directing the recipient to appear and present to the court such reasons and considerations as one has to offer why the recipient should not be punished for violating a court order or legal process or for contempt of court.

S

SATISFACTION	The discharge of an obligation by paying a party what is due to them or what is awarded to him, by the judgment of a court or otherwise.
SEARCH WARRANT	An order in writing, issued by a judicial officer, in the name of the state, directed to a sheriff, or other officer commanding them to conduct a search to aid an official investigation.
SERVICE	The exhibition or delivery of a writ, summons and complaint, criminal summons, notice, order, etc., by an authorized person, to a person who thereby officially notified of some action or proceeding in which he is concerned, and is thereby advised or warned of some action or step which he is commanded to take or to forbear.

SERVICE OF PROCESS	The service of writs, complaints, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and when they are so delivered, they are then said to have been served.
SET-OFF DEBT COLLECTION ACT	Allows a governmental agency as judgment creditor to set-off a judgment against a debtor's tax refund to satisfy the outstanding judgment or other debt.
SPEEDY TRIAL	A trial had as soon as prosecution, with reasonable diligence, can prepare for it; a trail according to fixed rules, free from capricious and oppressive delays, but the time within which it must be had to satisfy the constitutional guaranty depends on the circumstances and the time within which it must be had to satisfy the statutory limits are contained in the applicable statutes.
SPLIT SENTENCING	One where penalty of fine and imprisonment, as provided by statue, is imposed and imprisonment part is suspended and fine part enforced. It is also exemplified in a sentence by which the defendant serves some time and the balance of the sentence is suspended.
SUBPOENA	A process to cause a witness to appear and give testimony commanding them to appear before the court therein names at a time therein mentioned to testify for the party named under a penalty therein mentioned.
SUBPOENA DUCES TECUM	A process by which the court, at the instances of a party to an action, commands a person who has in their possession or control controversy, to produce it at or before the trial.
SUMMONS	A document notifying defendant that an action has been instituted against them and that he is required to answer to it at time and placed named. It is delivered to him. It does not cause the defendant to be arrested prior to trial.
SURETY	One who undertakes to pay money or to do any other act in the event that their principal fails to perform as promised. In criminal cases, the accused is the principal.
SUSPENDED SENTENCE	The court decision postponing the imposition of sentence upon a convicted person or postponing the execution of a sentence that has been imposed, by the court. When the court suspends a sentence, it retain jurisdiction over the person, and may later set or execute a penalty. When a sentence is suspended the person is usually placed on probation. A violation of the conditions of probation may lead to revocation of probation and return to court for re-sentencing.

T

TERM DAY	The first day of the period of time prescribed by law during which a court holds session. The docket is set on this day for the session of not set at some other time(s).
TRANSCRIPT	An official copy of the record of proceedings in a trial or hearing. Word-for-word typing of everything that was said "on the record" during the trial. The stenographer (court reporter) types this transcription which is paid for by the parties requesting it.
TRIAL DE NOVO	A new trial conducted in an appellate court in which the whole case is retired as if no trial whatever had been had in the court below.
TRUE BILL	The endorsement made by a grand jury upon a bill of indictment, when they find it sustained by the evidence laid before them, and are satisfied of the truth of the accusation. The endorsement made by a grand jury when they find sufficient evidence to warrant a criminal charge. An indictment.

V

VENIREMAN	A member of a panel of jurors; a prospective juror. Before becoming a juror a person must pass voir dire examination.
VENUE	"Venue" designates the particular county or city within which a court with jurisdiction may hear and determine a case. CAUTION: the term "jurisdiction" is used to designate a particular locality for venue purposes.
VOIR DIRE	(French-to see and speak). Questioning of potential jury members by the court, lawyers or parties themselves if not represented by counsel. Voir Dire is intended to determine the suitability of prospective jurors to hear a particular case.

W

WARRANT OF ARREST	A written order issued and signed by a judicial officer directed to a law enforcement officer or some other person specially named and commanding them to arrest the body of a person named in it who is accused of an offense.
WRIT OF CERTIORARI	An order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court. If the writ is denied the court refuses to hear the appeal and, in effect, the judgment bellow stands unchanged. If the writ is granted, then it has the effect of ordering the lower court to certify the record and send it up to the higher court which has used its discretion to hear the appeal.

WRIT OF HABEAS CORPUS AND TESTIFICANDUM	The writ, meaning "you have the body to testify", used to bring up a prisoner detained in a jail or prison to give evidence before the court.