Friday 1st June, 2012.

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective July 1, 2012.

Add Part Two to read as follows:

PART TWO
VIRGINIA RULES
OF
EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 2:101 TITLE

These Rules shall be known as Virginia Rules of Evidence.

Rule 2:102 SCOPE AND CONSTRUCTION OF THESE RULES

These Rules state the law of evidence in Virginia. They are adopted to implement established principles under the common law and not to change any established case law rendered prior to the adoption of the Rules. Common law case authority, whether decided before or after the effective date of the Rules of Evidence, may be argued to the courts and considered in interpreting and applying the Rules of Evidence. As to matters not covered by these Rules, the existing law remains in effect. Where no rule is set out on a particular topic, adoption of the Rules shall have no effect on current law or practice on that topic.

Rule 2:103 OBJECTIONS AND PROFFERS

(a) *Admission or exclusion of evidence*. Error may not be predicated upon admission or exclusion of evidence, unless:

(1) As to evidence admitted, a contemporaneous objection is stated with reasonable certainty as required in Rule 5:25 and 5A:18 or in any continuing objection on the record to a related series of questions, answers or exhibits if permitted by the trial court in order to avoid the necessity of repetitious objections; or

(2) As to evidence excluded, the substance of the evidence was made known to the court by proffer.

(b) *Hearing of jury*. In jury cases, proceedings shall be conducted so as to prevent inadmissible evidence from being made known to the jury.

Rule 2:104 PRELIMINARY DETERMINATIONS

(a) *Determinations made by the court*. The qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be decided by the court, subject to the provisions of subdivision (b).

(b) *Relevancy conditioned on proof of connecting facts*. Whenever the relevancy of evidence depends upon proof of connecting facts, the court may admit the evidence upon or, in the court's discretion, subject to, the introduction of proof sufficient to support a finding of the connecting facts.

(c) *Hearing of jury***.** Hearings on the admissibility of confessions in all criminal cases shall be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases shall be so conducted whenever a statute, rule, case law or the interests of justice require, or when an accused is a witness and so requests.

(d) *Testimony by accused***.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) *Evidence of weight or credibility***.** This rule does not limit the right of any party to introduce before the jury evidence relevant to weight or credibility.

Rule 2:105 PROOF ADMITTED FOR LIMITED PURPOSES

When evidence is admissible as to one party or for one purpose but not admissible as to another party or for another purpose, the court upon motion shall restrict such evidence to its proper scope and instruct the jury accordingly. The court may give such limiting instructions sua sponte, to which any party may object.

Rule 2:106 REMAINDER OF A WRITING OR RECORDED STATEMENT (Rule 2:106(b) derived from Code § 8.01-417.1)

(a) *Related Portions of a Writing in Civil and Criminal Cases*. When part of a writing or recorded statement is introduced by a party, upon motion by another party the court may require the offering party to introduce any other part of the writing or recorded statement which ought in fairness to be considered contemporaneously with it, unless such additional portions are inadmissible under the Rules of Evidence.

(b) *Lengthy Documents in Civil cases*. To expedite trials in civil cases, upon timely motion, the court may permit the reading to the jury, or the introduction into evidence, of relevant portions of lengthy and complex documents without the necessity of having the jury hear or receive the entire document. The court, in its discretion, may permit the entire document to be received by the jury, or may order the parties to edit from any such document admitted into evidence information that is irrelevant to the proceedings.

ARTICLE II. JUDICIAL NOTICE

Rule 2:201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) *Notice*. A court may take judicial notice of a factual matter not subject to reasonable dispute in that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(b) *Time of taking notice*. Judicial notice may be taken at any stage of the proceeding.

(c) *Opportunity to be heard*. A party is entitled upon timely motion to an opportunity to be heard as to the propriety of taking judicial notice.

Rule 2:202 JUDICIAL NOTICE OF LAW (derived from Code §§ 8.01-386 and 19.2-265.2)

(a) *Notice To Be Taken*. Whenever, in any civil or criminal case it becomes necessary to ascertain what the law, statutory, administrative, or otherwise, of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, or under an applicable treaty or international convention is, or was, at any time, the court shall take judicial notice thereof whether specially pleaded or not.

(b) *Sources of Information*. The court, in taking such notice, shall in a criminal case and may in a civil case consult any book, record, register, journal, or other official document or publication purporting to contain, state, or explain such law, and may consider any evidence or other information or argument that is offered on the subject.

Rule 2:203 JUDICIAL NOTICE OF OFFICIAL PUBLICATIONS (derived from Code § 8.01-388)

The court shall take judicial notice of the contents of all official publications of the Commonwealth and its political subdivisions and agencies required to be published pursuant to the laws thereof, and of all such official publications of other states, of the United States, of other countries, and of the political subdivisions and agencies of each published within those jurisdictions pursuant to the laws thereof.

ARTICLE III. PRESUMPTIONS

Rule 2:301 PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

Unless otherwise provided by Virginia common law or statute, in a civil action a rebuttable presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof, which remains throughout the trial upon the party on whom it originally rested.

Rule 2:302 APPLICABILITY OF FEDERAL LAW IN CIVIL ACTIONS AND PROCEEDINGS

The effect of a presumption is determined by federal law in any civil action or proceeding as to which federal law supplies the rule of decision.

ARTICLE IV. RELEVANCY, POLICY, AND CHARACTER TRAIT PROOF

Rule 2:401 DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence.

Rule 2:402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

(a) *General Principle*. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Virginia, statute, Rules of the Supreme Court of Virginia, or other evidentiary principles. Evidence that is not relevant is not admissible.

(b) *Results of Polygraph Examinations*. The results of polygraph examinations are not admissible.

Rule 2:403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, MISLEADING THE JURY, OR NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE

Relevant evidence may be excluded if:

(a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact; or

(b) the evidence is needlessly cumulative.

Rule 2:404 CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) *Character evidence generally*. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character trait of accused. Evidence of a pertinent character trait of the accused offered by the accused, or by the prosecution to rebut the same;

(2) Character trait of victim. Except as provided in Rule 2:412, evidence of a pertinent character trait or acts of violence by the victim of the crime offered by an accused who has adduced evidence of self defense, or by the prosecution (i) to rebut defense evidence, or (ii) in a criminal case when relevant as circumstantial evidence to establish the death of the victim when other evidence is unavailable; or

(3) Character trait of witness. Evidence of the character trait of a witness, as provided in Rules 2:607, 2:608, and 2:609.

(b) *Other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.

Rule 2:405 METHODS OF PROVING CHARACTER TRAITS

(a) *Reputation proof*. Where evidence of a person's character trait is admissible under these Rules, proof may be made by testimony as to reputation; but a witness may not give reputation testimony except upon personal knowledge of the reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. In cases in which a character trait of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct of such person on direct or cross-examination.

Rule 2:406 HABIT AND ROUTINE PRACTICE IN CIVIL CASES (derived from Code § 8.01-397.1)

(a) *Admissibility*. In a civil case, evidence of a person's habit or of an organization's routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion conformed with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice.

(b) *Habit and routine practice defined*. A "habit" is a person's regular response to repeated specific situations. A "routine practice" is a regular course of conduct of a group of persons or an organization in response to repeated specific situations.

Rule 2:407 SUBSEQUENT REMEDIAL MEASURES (derived from Code § 8.01-418.1)

When, after the occurrence of an event, measures are taken which, if taken prior to the event, would have made the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct as a cause of the occurrence of the event; provided that evidence of subsequent measures shall not be required to be excluded when offered for another purpose for which it may be admissible, including, but not limited to, proof of ownership, control, feasibility of precautionary measures if controverted, or for impeachment.

Rule 2:408 COMPROMISE AND OFFERS TO COMPROMISE

Evidence of offers and responses concerning settlement or compromise of any claim which is disputed as to liability or amount is inadmissible regarding such issues. However, an express

admission of liability, or an admission concerning an independent fact pertinent to a question in issue, is admissible even if made during settlement negotiations. Otherwise admissible evidence is not excludable merely because it was presented in the course of compromise negotiations. Nor is it required that evidence of settlement or compromise negotiations be excluded if the evidence is offered for another purpose, such as proving bias or prejudice of a witness or negating a contention of undue delay.

Rule 2:409 EVIDENCE OF ABUSE ADMISSIBLE IN CERTAIN CRIMINAL TRIALS (derived from Code § 19.2-270.6)

In any criminal prosecution alleging personal injury or death, or the attempt to cause personal injury or death, relevant evidence of repeated physical and psychological abuse of the accused by the victim shall be admissible, subject to the general rules of evidence.

Rule 2:410 WITHDRAWN PLEAS, OFFERS TO PLEAD, AND RELATED STATEMENTS

Admission of evidence concerning withdrawn pleas in criminal cases, offers to plead, and related statements shall be governed by Rule 3A:8(c)(5) of the Rules of Supreme Court of Virginia and by applicable provisions of the Code of Virginia.

Rule 2:411 INSURANCE

Evidence that a person was or was not insured is not admissible on the question whether the person acted negligently or otherwise wrongfully, and not admissible on the issue of damages. But exclusion of evidence of insurance is not required when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 2:412 ADMISSIBILITY OF COMPLAINING WITNESS' PRIOR SEXUAL CONDUCT; CRIMINAL SEXUAL ASSAULT CASES; RELEVANCE OF PAST BEHAVIOR (derived from Code § 18.2-67.7)

(a) In prosecutions under Article 7, Chapter 4 of Title 18.2 of the Code of Virginia, under clause (iii) or (iv) of § 18.2-48, or under §§ 18.2-370, 18.2-370.01, or 18.2-370.1, general reputation or opinion evidence of the complaining witness' unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:

1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness' intimate parts; or

2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness' mental incapacity or physical

helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or

3. Evidence offered to rebut evidence of the complaining witness' prior sexual conduct introduced by the prosecution.

(b) Nothing contained in this Rule shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused. If such evidence relates to the past sexual conduct of the complaining witness with a person other than the accused, it shall not be admitted and may not be referred to at any preliminary hearing or trial unless the party offering same files a written notice generally describing the evidence prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs, at the preliminary hearing or trial at which the admission of the evidence may be sought.

(c) Evidence described in subdivisions (a) and (b) of this Rule shall not be admitted and may not be referred to at any preliminary hearing or trial until the court first determines the admissibility of that evidence at an evidentiary hearing to be held before the evidence is introduced at such preliminary hearing or trial. The court shall exclude from the evidentiary hearing all persons except the accused, the complaining witness, other necessary witnesses, and required court personnel. If the court determines that the evidence meets the requirements of subdivisions (a) and (b) of this Rule, it shall be admissible before the judge or jury trying the case in the ordinary course of the preliminary hearing or trial. If the court initially determines that the evidence is inadmissible, but new information is discovered during the course of the preliminary hearing or trial which may make such evidence admissible, the court shall determine in an evidentiary hearing whether such evidence is admissible.

ARTICLE V. PRIVILEGES

Rule 2:501 PRIVILEGED COMMUNICATIONS

Except as otherwise required by the Constitutions of the United States or the Commonwealth of Virginia or provided by statute or these Rules, the privilege of a witness, person, government, State, or political subdivision thereof, shall be governed by the principles of common law as they may be interpreted by the courts of the Commonwealth in the light of reason and experience.

Rule 2:502 ATTORNEY-CLIENT PRIVILEGE

Except as may be provided by statute, the existence and application of the attorney-client privilege in Virginia, and the exceptions thereto, shall be governed by the principles of common law as interpreted by the courts of the Commonwealth in the light of reason and experience.

Rule 2:503 CLERGY AND COMMUNICANT PRIVILEGE (derived from Code §§ 8.01-400 and 19.2-271.3)

A *clergy member* means any regular minister, priest, rabbi, or accredited practitioner over the age of 18 years, of any religious organization or denomination usually referred to as a church. A clergy member shall not be required:

(a) in any civil action, to give testimony as a witness or to disclose in discovery proceedings the contents of notes, records or any written documentation made by the clergy member, where such testimony or disclosure would reveal any information communicated in a confidential manner, properly entrusted to such clergy member in a professional capacity and necessary to enable discharge of the functions of office according to the usual course of the clergy member's practice or discipline, wherein the person so communicating such information about himself or herself, or another, was seeking spiritual counsel and advice relating to and growing out of the information so imparted; and

(b) in any criminal action, in giving testimony as a witness to disclose any information communicated by the accused in a confidential manner, properly entrusted to the clergy member in a professional capacity and necessary to enable discharge of the functions of office according to the usual course of the clergy member's practice or discipline, where the person so communicating such information about himself or herself, or another, was seeking spiritual counsel and advice relating to and growing out of the information so imparted.

Rule 2:504 SPOUSAL TESTIMONY AND MARITAL COMMUNICATIONS PRIVILEGES (Rule 2:504(a) derived from Code § 8.01-398; and Rule 2:504(b) derived from Code § 19.2-271.2)

(a) *Privileged Marital Communications in Civil Cases.*

1. Husband and wife shall be competent witnesses to testify for or against each other in all civil actions.

2. In any civil proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between such person and his or her spouse during their marriage, regardless of whether such person is married to that spouse at the time he or she objects to disclosure. This privilege may not be asserted in any proceeding in which the spouses are adverse parties, or in which either spouse is charged with a crime or tort against the person or property of the other or against the minor child of either spouse. For the purposes of this Rule, "confidential communication" means a communication made privately by a person to his or her spouse that is not intended for disclosure to any other person.

(b) *Testimony of Husband and Wife in Criminal Cases*.

1. In criminal cases husband and wife shall be allowed, and, subject to the Rules of Evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled to be called as a witness against the other, except (i) in the case of a prosecution for an offense committed by one against the other, against a minor child of either, or against the property of either; (ii) in any case where either is charged with forgery of the name of the other or uttering or attempting to utter a writing bearing the allegedly forged signature of the other; or (iii) in any proceeding relating to a violation of the laws pertaining to criminal sexual assault (§§ 18.2-61 through 18.2-67.10), crimes against nature (§ 18.2-361) involving a minor as a victim and provided the defendant and the victim are not married to each other, incest (§ 18.2-366), or abuse of children (§§ 18.2-370 through 18.2-371). The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by any attorney.

2. Except in the prosecution for a criminal offense as set forth in subsections (b)(1)(i), (ii) and (iii) above, in any criminal proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between such person and his or her spouse during their marriage, regardless of whether the person is ried to that spouse at the time the person objects to disclosure. For the purposes of this Rule, "confidential communication" means a communication made privately by a person to his or her spouse that is not intended for disclosure to any other person.

Rule 2:505 HEALING ARTS PRACTITIONER AND PATIENT PRIVILEGE (derived from Code § 8.01-399)

The scope and application of the privilege between a patient and a physician or practitioner of the healing arts in a civil case shall be as set forth in any specific statutory provisions, including Code § 8.01-399, as amended from time to time, which presently provides:

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C. This section shall not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act; (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug; or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.

D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of Supreme Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E. A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of a practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

Rule 2:506 MENTAL HEALTH PROFESSIONAL AND CLIENT PRIVILEGE (derived from Code § 8.01-400.2)

Except at the request of or with the consent of the client, no licensed professional counselor, as defined in Code § 54.1-3500; licensed clinical social worker, as defined in Code § 54.1-3700; licensed psychologist, as defined in Code § 54.1-3600; or licensed marriage and family therapist, as defined in Code § 54.1-3500, shall be required in giving testimony as a witness in any civil action to disclose any information communicated in a confidential manner, properly entrusted to such person in a professional capacity and necessary to enable discharge of professional or occupational services according to the usual course of his or her practice or discipline, wherein the person so communicating such information about himself or herself, or another, is seeking professional counseling or treatment and advice relating to and growing out of the information so

imparted; provided, however, that when the physical or mental condition of the client is at issue in such action, or when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such counseling, treatment or advice shall be privileged, and disclosure may be required. The privileges conferred by this Rule shall not extend to testimony in matters relating to child abuse and neglect nor serve to relieve any person from the reporting requirements set forth in § 63.2-1509.

Rule 2:507 PRIVILEGED COMMUNICATIONS INVOLVING INTERPRETERS (derived from Code §§ 8.01-400.1, 19.2-164, and 19.2-164.1)

Whenever a deaf or non-English-speaking 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, the privilege shall also apply to the interpreter.

ARTICLE VI. WITNESS EXAMINATION

Rule 2:601 GENERAL RULE OF COMPETENCY

(a) *Generally*. Every person is competent to be a witness except as otherwise provided in other evidentiary principles, Rules of Court, Virginia statutes, or common law.

(b) *Rulings*. A court may declare a person incompetent to testify if the court finds that the person does not have sufficient physical or mental capacity to testify truthfully, accurately, or understandably.

Rule 2:602 LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This Rule does not bar testimony admissible under Rules 2:701, 2-702 and 2:703.

Rule 2:603 OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience and impress the mind of the witness with the duty to do so.

Rule 2:604 INTERPRETERS (derived from Code § 8.01-406)

An interpreter shall be qualified as competent and shall be placed under oath or affirmation to make a true translation.

Rule 2:605 COMPETENCY OF COURT PERSONNEL AS WITNESSES (derived from Code § 19.2-271)]

(a) No judge shall be competent to testify in any criminal or civil proceeding as to any matter which came before the judge in the course of official duties.

(b) No clerk of any court, magistrate, or other person having the power to issue warrants, shall be competent to testify in any criminal or civil proceeding, except proceedings wherein the defendant is charged with perjury, as to any matter which came before him or her in the course of official duties. Such person shall be competent to testify in any criminal proceeding wherein the defendant is charged pursuant to the provisions of § 18.2-460 or in any proceeding authorized pursuant to § 19.2-353.3. Notwithstanding any other provision of this section, any judge, clerk of any court, magistrate, or other person having the power to issue warrants, who is the victim of a crime, shall not be incompetent solely because of his or her office to testify in any criminal or civil proceeding arising out of the crime. Nothing in this subpart (b) shall preclude otherwise proper testimony by a clerk or deputy clerk concerning documents filed in the official records.

Rule 2:606 COMPETENCY OF JUROR AS WITNESS

Upon inquiry regarding the validity of a verdict or indictment, a juror is precluded from testifying as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing any juror to assent to or dissent from the verdict or indictment or concerning any juror's mental processes in connection therewith.

A juror may testify only as to questions regarding extraneous prejudicial information improperly brought to the jury's attention as a result of conduct outside the jury room, or whether any improper influence was brought to bear upon any juror from a source outside the jury room.

Rule 2:607 IMPEACHMENT OF WITNESSES (Rule 2:607(b) derived from Code § 8.01-401(A); and Rule 2:607(c) derived from Code § 8.01-403)

(a) *In general*. Subject to the provisions of Rule 2:403, the credibility of a witness may be impeached by any party other than the one calling the witness, with any proof that is relevant to the witness's credibility. Impeachment may be undertaken, among other means, by:

(i) introduction of evidence of the witness's bad general reputation for the traits of truth and veracity, as provided in Rule 2:608(a) and (b);

(ii) evidence of prior conviction, as provided in Rule 2:609;

(iii) evidence of prior unadjudicated perjury, as provided in Rule 2:608(d);

(iv) evidence of prior false accusations of sexual misconduct, as provided in Rule 2:608(e);

(v) evidence of bias as provided in Rule 2:610;

(vi) prior inconsistent statements as provided in 2:613;

(vii) contradiction by other evidence; and

(viii) any other evidence which is probative on the issue of credibility because of a logical tendency to convince the trier of fact that the witness's perception, memory, or narration is defective or impaired, or that the sincerity or veracity of the witness is questionable.

Impeachment pursuant to subdivisions (a)(i) and (ii) of this Rule may not be undertaken by a party who has called an adverse witness.

(b) *Witness with adverse interest*. A witness having an adverse interest may be examined with leading questions by the party calling the witness. After such an adverse direct examination, the witness is subject to cross-examination.

(c) *Witness proving adverse*.

(i) If a witness proves adverse, the party who called the witness may, subject to the discretion of the court, prove that the witness has made at other times a statement inconsistent with the present testimony as provided in Rule 2:613.

(ii) In a jury case, if impeachment has been conducted pursuant to this subdivision (c), the court, on motion by either party, shall instruct the jury to consider the evidence of such inconsistent statements solely for the purpose of contradicting the witness.

Rule 2:608 IMPEACHMENT BY EVIDENCE OF REPUTATION FOR TRUTHTELLING AND CONDUCT OF WITNESS

(a) *Reputation evidence of the character trait for truthfulness or untruthfulness*. The credibility of a witness may be attacked or supported by evidence in the form of reputation, subject to these limitations: (1) the evidence may relate only to character trait for truthfulness or untruthfulness; (2) evidence of truthful character is admissible only after the character trait of the witness for truthfulness has been attacked by reputation evidence or otherwise; and (3) evidence is introduced that the person testifying has sufficient familiarity with the reputation to make the testimony probative.

(b) *Specific instances of conduct; extrinsic proof*. Except as otherwise provided in this Rule, by other principles of evidence, or by statute, (1) specific instances of the conduct of a witness may not be used to attack or support credibility; and (2) specific instances of the conduct of a witness may not be proved by extrinsic evidence.

(c) *Cross-examination of character witness*. Specific instances of conduct may, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of a character witness concerning the character trait for truthfulness or untruthfulness of another witness as to whose character trait the witness being cross-examined has testified.

(d) *Unadjudicated perjury*. If the trial judge makes a threshold determination that a reasonable probability of falsity exists, any witness may be questioned about prior specific instances of unadjudicated perjury. Extrinsic proof of the unadjudicated perjury may not be shown.

(e) *Prior false accusations in sexual assault cases*. Except as otherwise provided by other evidentiary principles, statutes or Rules of Court, a complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct.

Rule 2:609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME (derived from Code § 19.2-269)

Evidence that a witness has been convicted of a crime may be admitted to impeach the credibility of that witness subject to the following limitations:

(a) *Party in a civil case or criminal defendant.*

(i) The fact that a party in a civil case or an accused who testifies has previously been convicted of a felony, or a misdemeanor involving moral turpitude, and the number of such convictions may be elicited during examination of the party or accused.

(ii) If a conviction raised under subdivision (a)(i) is denied, it may be proved by extrinsic evidence.

(iii) In any examination pursuant to this subdivision (a), the name or nature of any crime of which the party or accused was convicted, except for perjury, may not be shown, nor may the details of prior convictions be elicited, unless offered to rebut other evidence concerning prior convictions.

(b) *Other witnesses.* The fact that any other witness has previously been convicted of a felony, or a misdemeanor involving moral turpitude, the number, and the name and nature, but not the details, of such convictions may be elicited during examination of the witness or, if denied, proved by extrinsic evidence.

(c) *Juvenile adjudications*. Juvenile adjudications may not be used for impeachment of a witness on the subject of general credibility, but may be used to show bias of the witness if constitutionally required.

(d) *Adverse Witnesses*. A party who calls an adverse witness may not impeach that adverse witness with a prior conviction**.**

Rule 2:610 BIAS OR PREJUDICE OF A WITNESS

A witness may be impeached by a showing that the witness is biased for or prejudiced against a party. Extrinsic evidence of such bias or prejudice may be admitted.

Rule 2:611 MODE AND ORDER OF INTERROGATION AND PRESENTATION (Rule 2:611(c) derived from Code § 8.01-401(A))

(a) *Presentation of evidence*. The mode and order of interrogating witnesses and presenting evidence may be determined by the court so as to (1) facilitate the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination*.

(i) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(ii) In a criminal case, if a defendant testifies on his or her own behalf and denies guilt as to an offense charged, cross-examination of the defendant may be permitted in the discretion of the court into any matter relevant to the issue of guilt or innocence.

(c) *Leading questions*. Leading questions should not be used on the direct examination of a witness except as may be permitted by the court in its discretion to allow a party to develop the testimony. Leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, a witness having an adverse interest, or a witness proving adverse, interrogation may be by leading questions.

Rule 2:612 WRITING OR OBJECT USED TO REFRESH MEMORY

If while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

Rule 2:613 PRIOR STATEMENTS OF WITNESS (Rule 2:613(a)(i) derived from Code § 8.01-403; Rule 2:613(b)(i) derived from Code §§ 8.01-404 and 19.2-268.1; and Rule 2:613(b)(ii) derived from Code § 8.01-404)

(a) *Examining witness concerning prior oral statement*.

(i) Prior oral statements of witnesses. In examining a witness in any civil or criminal case concerning a prior oral statement, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and the witness must be asked whether the statement was made.

(ii) Extrinsic evidence of prior inconsistent oral statement of witness. Extrinsic evidence of a prior inconsistent oral statement by a witness is not admissible unless the witness is first given an opportunity to explain or deny the statement and the opposing party is given an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party opponent.

Extrinsic evidence of a witness' prior inconsistent statement is not admissible unless the witness denies or does not remember the prior inconsistent statement. Extrinsic evidence of collateral statements is not admissible.

(b) *Contradiction by prior inconsistent writing*.

(i) General rule. In any civil or criminal case, a witness may be cross-examined as to previous statements made by the witness in writing or reduced to writing, relating to the subject matter of the action, without such writing being shown to the witness; but if the intent is to contradict such witness by the writing, his or her attention must, before such contradictory proof can be given, be called to the particular occasion on which the writing is supposed to have been made; the witness may be asked whether he or she made a writing of the purport of the one to be offered, and if the witness denies making it, or does not admit its execution, it shall then be shown to the witness, and if the witness admits its genuineness, the witness shall be allowed to make an explanation of it; but the court may, at any time during the trial, require the production of the writing for its inspection, and the court may then make such use of it for the purpose of the trial as it may think best.

(ii) Personal Injury or Wrongful Death Cases. Notwithstanding the general principles stated in this subpart (b), in an action to recover for personal injury or wrongful death, no ex parte affidavit or statement in writing other than a deposition, after due notice, of a witness and no extrajudicial recording made at any time other than simultaneously with the wrongful act or negligence at issue of the voice of such witness, or reproduction or transcript thereof, as to the facts or circumstances attending the wrongful act or neglect complained of, shall be used to contradict such witness in the case. Nothing in this subdivision shall be construed to prohibit the use of any such ex parte affidavit or statement in an action on an insurance policy based upon a judgment recovered in a personal injury or wrongful death case.

Rule 2:614 CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) *Calling by the court in civil cases*. The court, on motion of a party or on its own motion, may call witnesses, and all parties are entitled to cross-examine. The calling of a witness by the court is a matter resting in the trial judge's sound discretion and should be exercised with great care.

(b) *Interrogation by the court*. In a civil or criminal case, the court may question witnesses, whether called by itself or a party, subject to the applicable Rules of Evidence.

Rule 2:615 EXCLUSION OF WITNESSES (Rule 2:615(a) derived from Code §§ 8.01-375, 19.2-184, and 19.2-265.1; Rule 2:615(b) derived from Code § 8.01-375; and Rule 2:615(c) derived from Code § 19.2-265.1)

(a) The court, in a civil or criminal case, may on its own motion and shall on the motion of any party, require the exclusion of every witness including, but not limited to, police officers or other investigators. The court may also order that each excluded witness be kept separate from all other witnesses. But each named party who is an individual, one officer or agent of each party which is a corporation, limited liability entity or association, and an attorney alleged in a habeas corpus proceeding to have acted ineffectively shall be exempt from the exclusion as a matter of right.

(b) Where expert witnesses are to testify in the case, the court may, at the request of all parties, allow one expert witness for each party to remain in the courtroom; however, in cases pertaining to the distribution of marital property pursuant to § 20-107.3 or the determination of child or spousal support pursuant to § 20-108.1, the court may, upon motion of any party, allow one expert witness for each party to remain in the courtroom throughout the hearing.

(c) Any victim as defined in Code § 19.2-11.01 who is to be called as a witness may remain in the courtroom and shall not be excluded unless pursuant to Code § 19.2-265.01 the court determines, in its discretion, that the presence of the victim would impair the conduct of a fair trial.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 2:701 OPINION TESTIMONY BY LAY WITNESSES (derived from Code § 8.01-401.3(B))

Opinion testimony by a lay witness is admissible if it is reasonably based upon the personal experience or observations of the witness and will aid the trier of fact in understanding the witness' perceptions. Lay opinion may relate to any matter, such as – but not limited to – sanity, capacity, physical condition or disability, speed of a vehicle, the value of property, identity, causation, time, the meaning of words, similarity of objects, handwriting, visibility or the general physical situation at a particular location. However, lay witness testimony that amounts only to an opinion of law is inadmissible.

Rule 2:702 TESTIMONY BY EXPERTS (Rule 2:702(a)(i) derived from Code § 8.01-401.3(A).

(a) *Use of Expert Testimony*.

(i) In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(ii) In a criminal proceeding, expert testimony is admissible if the standards set forth in subdivision (a)(i) of this Rule are met and, in addition, the court finds that the subject matter is beyond the knowledge and experience of ordinary persons, such that the jury needs expert opinion in order to comprehend the subject matter, form an intelligent opinion, and draw its conclusions.

(b) *Form of opinion*. Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.

Rule 2:703 BASIS OF EXPERT TESTIMONY (Rule 2:703(a) derived from Code § 8.01-401.1)

(a) *Civil cases*. In a civil action an expert witness may give testimony and render an opinion or draw inferences from facts, circumstances, or data made known to or perceived by such witness at or before the hearing or trial during which the witness is called upon to testify. The facts, circumstances, or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

(b) *Criminal cases*. In criminal cases, the opinion of an expert is generally admissible if it is based upon facts personally known or observed by the expert, or based upon facts in evidence.

Rule 2:704 OPINION ON ULTIMATE ISSUE (Rule 2:704(a) derived from Code § 8.01-401.3(B) and (C))

(a) Civil cases. In civil cases, no expert or lay witness shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. But in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law. Any other exceptions to the "ultimate fact in issue" rule recognized in the Commonwealth remain in full force.

(b) *Criminal cases*. In criminal proceedings, opinion testimony on the ultimate issues of fact is not admissible. This Rule does not require exclusion of otherwise proper expert testimony concerning a witness' or the defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness' or the defendant's situation.

Rule 2:705 FACTS OR DATA USED IN TESTIMONY (Rule 2:705(a) derived from Code § 8.01-401.1)

(a) *Civil cases*. In civil cases, an expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(b) *Criminal cases*. In criminal cases, the facts on which an expert may give an opinion shall be disclosed in the expert's testimony, or set forth in a hypothetical question.

Rule 2:706 USE OF LEARNED TREATISES WITH EXPERTS (Rule 2:706(a) derived from Code § 8.01-401.1)

(a) *Civil cases*. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the statements shall be provided to opposing parties thirty days prior to trial unless otherwise ordered by the court.

(b) *Criminal cases*. Where an expert witness acknowledges on cross-examination that a published work is a standard authority in the field, an opposing party may ask whether the witness agrees or disagrees with statements in the work acknowledged. Such proof shall be received solely for impeachment purposes with respect to the expert's credibility.

ARTICLE VIII. HEARSAY

Rule 2:801 DEFINITIONS

The following definitions apply under this article:

(a) *Statement*. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended as an assertion.

(b) *Declarant*. A "declarant" is a person who makes a statement.

(c) *Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 2:802 HEARSAY RULE

Hearsay is not admissible except as provided by these Rules, other Rules of the Supreme Court of Virginia, or by Virginia statutes or case law.

Rule 2:803 HEARSAY EXCEPTIONS APPLICABLE REGARDLESS OF AVAILABILITY OF THE DECLARANT

(Rule 2:803(10)(a) derived from Code § 8.01-390(B); Rule 2:803(10)(b) derived from Code § 19.2-188.3; Rule 2:803(17) derived from Code § 8.2-724; and Rule 2:803(23) is derived from Code § 19.2-268.2)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(0) *Admission by party-opponent.* A statement offered against a party that is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or employee, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(1) *Present sense impression*. A spontaneous statement describing or explaining an event or condition made contemporaneously with, or while, the declarant was perceiving the event or condition.

(2) *Excited utterance*. A spontaneous or impulsive statement prompted by a startling event or condition and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation.

(3) *Then existing mental, emotional, or physical condition*. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

(4) *Statements for purposes of medical treatment*. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or

sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection*. Except as provided by statute, a memorandum or record concerning a matter about which a witness once had firsthand knowledge made or adopted by the witness at or near the time of the event and while the witness had a clear and accurate memory of it, if the witness lacks a present recollection of the event, and the witness vouches for the accuracy of the written memorandum. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Business records*. A memorandum, report, record, or data compilation, in any form, of acts, events, calculations or conditions, made at or near the time by, or from information transmitted by, a person with knowledge in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, organization, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Reserved*.

(8) *Public records and reports*. In addition to categories of government records made admissible by statute, records, reports, statements, or data compilations, in any form, prepared by public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed within the scope of the office or agency's duties, as to which the source of the recorded information could testify if called as a witness; generally excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel when offered against a criminal defendant.

(9) *Records of vital statistics*. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report was made to a public office pursuant to requirements of law.

(10) *Absence of entries in public records and reports*.

(a) Civil Cases. An affidavit signed by an officer, or the deputy thereof, deemed to have custody of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, stating that after a diligent search, no record or entry of such record is found to exist among the records in such office is admissible as evidence that the office has no such record or entry.

(b) Criminal Cases. In any criminal hearing or trial, an affidavit signed by a government official who is competent to testify, deemed to have custody of an official record, or signed by such official's designee, stating that after a diligent search, no record or entry of such record is found to exist among the records in such official's custody, is admissible as evidence that the office has no such record or entry, provided that if the hearing or trial is a proceeding other than a preliminary hearing the procedures set forth in subsection G of § 18.2-472.1 for admission of an affidavit have been satisfied, mutatis mutandis, and the accused has not objected to the admission of the affidavit pursuant to the procedures set forth

in subsection H of § 18.2-472.1, mutatis mutandis. Nothing in this subsection (b) shall be construed to affect the admissibility of affidavits in civil cases under subsection (a) of this Rule.

(11) *Records of religious organizations*. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates*. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records*. Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property*. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution, and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property*. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents*. Statements generally acted upon as true by persons having an interest in the matter, and contained in a document in existence 30 years or more, the authenticity of which is established.

(17) *Market quotations*. Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown.

(18) *Learned treatises*. *See* Rule 2:706.

(19) *Reputation concerning boundaries*. Reputation in a community, arising before the controversy, as to boundaries of lands in the community, where the reputation refers to monuments or other delineations on the ground and some evidence of title exists.

(20) *Reputation as to a character trait*. Reputation of a person's character trait among his or her associates or in the community.

(21) *Judgment as to personal, family, or general history, or boundaries*. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(22) *Statement of identification by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person.

(23) *Recent complaint of sexual assault*. In any prosecution for criminal sexual assault under Article 7 (§ 18.2-61 *et seq.*) of Chapter 4 of Title 18.2, a violation of §§ 18.2-361, 18.2-366, 18.2-370 or § 18.2-370.1, the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness.

(24) *Price of goods*. In shoplifting cases, price tags regularly affixed to items of personalty offered for sale, or testimony concerning the amounts shown on such tags.

Rule 2:804 HEARSAY EXCEPTIONS APPLICABLE WHERE THE DECLARANT IS UNAVAILABLE (Rule 2:804(b)(5) derived from Code § 8.01-397)

(a) *Applicability*. The hearsay exceptions set forth in subpart (b) hereof are applicable where the declarant is dead or otherwise unavailable as a witness.

(b) *Hearsay exceptions*. The following are not excluded by the hearsay rule:

(1) Former testimony. Testimony given under oath or otherwise subject to penalties for perjury at a prior hearing, or in a deposition, if it is offered in reasonably accurate form and, if given in a different proceeding, the party against whom the evidence is now offered, or in a civil case a privy, was a party in that proceeding who examined the witness by direct examination or had the opportunity to cross-examine the witness, and the issue on which the testimony is offered is substantially the same in the two cases.

(2) Statement under belief of impending death. In a prosecution for homicide, a statement made by a declarant who believed when the statement was made that death was imminent and who had given up all hope of survival, concerning the cause or circumstances of declarant's impending death.

(3) Statement against interest. (A) A statement which the declarant knew at the time of its making to be contrary to the declarant's pecuniary or proprietary interest, or to tend to subject the declarant to civil liability. (B) A statement which the declarant knew at the time of its making would tend to subject the declarant to criminal liability, if the statement is shown to be reliable.

(4) Statement of personal or family history. If no better evidence is available, a statement made before the existence of the controversy, concerning family relationships or pedigree of a person, made by a member of the family or relative.

(5) Statement by party incapable of testifying. Code § 8.01-397, entitled "Corroboration required and evidence receivable when one party incapable of testifying," presently provides:

> In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries,

memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.

Rule 2:805 HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.

Rule 2:806 ATTACKING AND SUPPORTING CREDIBILITY OF HEARSAY DECLARANT

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.

ARTICLE IX. AUTHENTICATION

Rule 2:901 REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the thing in question is what its proponent claims.

Rule 2:902 SELF-AUTHENTICATION

Additional proof of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public records offered in compliance with statute*. Public records authenticated or certified as provided under a statute of the Commonwealth.

(2) *Foreign public documents*. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (a) of the executing or attesting person, or (b) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certification of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively

authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(3) *Presumptions created by law*. Any signature, document, or other matter declared by any law of the United States or of this Commonwealth, to be presumptively or prima facie genuine or authentic.

(4) *Medical records and medical bills in particular actions*. Where authorized by statute, medical records and medical bills, offered upon the forms of authentication specified in the Code of Virginia.

(5) *Specific certificates of analysis and reports*. Certificates of analysis and official reports prepared by designated persons or facilities, when authenticated in accordance with applicable statute.

Rule 2:903 SUBSCRIBING WITNESS TESTIMONY NOT NECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. BEST EVIDENCE

Rule 2:1001 DEFINITIONS

For purposes of this Article, the following definitions are applicable.

(1) *Writings*. "Writings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation or preservation.

(2) *Original*. An "original" of a writing is the writing itself or any other writing intended to have the same effect by a person executing or issuing it.

Rule 2:1002 REQUIREMENT OF PRODUCTION OF ORIGINAL

To prove the content of a writing, the original writing is required, except as otherwise provided in these Rules, other Rules of the Supreme Court of Virginia, or in a Virginia statute.

Rule 2:1003 USE OF SUBSTITUTE CHECKS (derived from Code § 8.01-391.1(A) and (B))

(a) *Admissibility generally*. A substitute check created pursuant to the federal Check Clearing for the 21st Century Evidence Act, 12 U.S.C. § 5001 et seq., shall be admissible in evidence in any Virginia legal proceeding, civil or criminal, to the same extent the original check would be.

(b) *Presumption from designation and legend*. A document received from a banking institution that is designated as a "substitute check" and that bears the legend "This is a legal copy of your check. You can use it the same way you would use the original check" shall be presumed to be a substitute check created pursuant to the Act applicable under subdivision (a) of this Rule.

Rule 2:1004 ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing is admissible if:

(a) *Originals lost or destroyed*. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(b) *Original not obtainable*. No original can be obtained by any available judicial process or procedure, unless the proponent acted in bad faith to render the original unavailable; or

(c) *Original in possession of opponent*. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(d) *Collateral matters*. The writing is not closely related to a controlling issue.

Rule 2:1005 ADMISSIBILITY OF COPIES (derived from Code § 8.01-391)

In addition to admissibility of copies of documents as provided in Rules 2:1002 and 2:1004, and by statute, copies may be used in lieu of original documents as follows:

(a) Whenever the original of any official publication or other record has been filed in an action or introduced as evidence, the court may order the original to be returned to its custodian, retaining in its stead a copy thereof. The court may make any order to prevent the improper use of the original.

(b) If any department, division, institution, agency, board, or commission of this Commonwealth, of another state or country, or of the United States, or of any political subdivision or agency of the same, acting pursuant to the law of the respective jurisdiction or other proper authority, has copied any record made in the performance of its official duties, such copy shall be as admissible into evidence as the original, whether the original is in existence or not, provided that such copy is authenticated as a true copy either by the custodian of said record or by the person to whom said custodian reports, if they are different, and is accompanied by a certificate that such person does in fact have the custody.

(c) If any court or clerk's office of a court of this Commonwealth, of another state or country, or of the United States, or of any political subdivision or agency of the same, has copied any record made in the performance of its official duties, such copy shall be admissible into evidence as the original, whether the original is in existence or not, provided that such copy is authenticated as a true copy by a clerk or deputy clerk of such court.

(d) If any business or member of a profession or calling in the regular course of business or activity has made any record or received or transmitted any document, and again in the regular course of business has caused any or all of such record or document to be copied, the copy shall be as admissible in evidence as the original, whether the original exists or not, provided that such copy is satisfactorily identified and authenticated as a true copy by a custodian of such record or by the person to whom said custodian reports, if they be different, and is accompanied by a certificate that said person does in fact have the custody. Copies in the regular course of business shall be deemed to include reproduction at a later time, if done in good faith and without intent to defraud. Copies in the regular course of business shall include items such as checks which are

regularly copied before transmission to another person or bank, or records which are acted upon without receipt of the original when the original is retained by another party.

(e) The original of which a copy has been made may be destroyed unless its preservation is required by law, or its validity has been questioned.

(f) The introduction in an action of a copy under this Rule precludes neither the introduction or admission of the original nor the introduction of a copy or the original in another action.

(g) Copy, as used in these Rules, shall include photographs, microphotographs, photostats, microfilm, microcard, printouts or other reproductions of electronically stored data, or copies from optical disks, electronically transmitted facsimiles, or any other reproduction of an original from a process which forms a durable medium for its recording, storing, and reproducing.

Rule 2:1006 SUMMARIES

The contents of voluminous writings that, although admissible, cannot conveniently be examined in court may be represented in the form of a chart, summary, or calculation. Reasonably in advance of the offer of such chart, summary, or calculation, the originals or duplicates shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Rule 2:1007 TESTIMONY OR WRITTEN ADMISSION OF A PARTY

Contents of writings may be proved by the admission of the party against whom offered without accounting for the nonproduction of the original.

Rule 2:1008 FUNCTIONS OF COURT AND JURY

Whenever the admissibility of other evidence of contents or writings under these provisions depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine. However, when an issue is raised whether (1) the asserted writing ever existed, or (2) another writing produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine.

ARTICLE XI. APPLICABILITY

Rule 2:1101 APPLICABILITY OF EVIDENTIARY RULES

(a) *Proceedings to which applicable generally*. Evidentiary rules apply generally to (1) all civil actions and (2) proceedings in a criminal case (including preliminary hearings in criminal cases), and to contempt proceedings (except contempt proceedings in which the court may act summarily), in the Supreme Court of Virginia, the Court of Appeals of Virginia, the State Corporation Commission (when acting as a court of record), the circuit courts, the general district courts (except when acting as a small claims court as provided by statute), and the juvenile and domestic relations district courts.

(b) *Law of privilege*. The law with respect to privileges applies at all stages of all actions, cases, and proceedings.

(c) *Permissive application*. Except as otherwise provided by statute or rule, adherence to the Rules of Evidence (other than with respect to privileges) is permissive, not mandatory, in the following situations:

(1) Criminal proceedings other than (i) trial, (ii) preliminary hearings, (iii) sentencing proceedings before a jury, and (iv) capital murder sentencing hearings.

(2) Administrative proceedings.

A Copy,

Teste:

Clerk