VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of November, 2020.

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, 2021. The purpose of these amendments is to clarify the meaning of the word "shall" formerly appearing in these Rules and not to change existing law. As revised, the Rules implement the mandatory meaning established by the Legislature, and preserve the statutory references in the title of each rule that is derived in whole or in part from the Code of Virginia. In accord with the provisions of Virginia Code § 8.01-3(E), these amendments are being promulgated prior to November 15, 2020, to become effective July 1, 2021, unless modified by the General Assembly.

RULES OF SUPREME COURT OF VIRGINIA

PART TWO

VIRGINIA RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 2:101. TITLE.

These Rules are 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 has no effect on current law or practice on that topic.

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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 is 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 must be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases must 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.

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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 must 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 2:202. 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 may take judicial notice thereof whether specially pleaded or not.

(b) *Sources of Information*. The court, in taking such notice, must 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 must 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.

* * *

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 is not 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 2:409. 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 is 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 is 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 2:412. 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 must not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct may 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 prohibits 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 may 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 may 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 must 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 subdivisions (a) and (b) of this Rule, it is admissible before the judge or jury trying the case in the ordinary course of the preliminary hearing or trial. If the court initially determines of 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 must determine in an evidentiary hearing whether such evidence is admissible.

Rule 2:413. EVIDENCE OF SIMILAR CRIMES IN CHILD SEXUAL OFFENSE CASES (derived from Code § 18.2-67.7:1).

(a) In a criminal case in which the defendant is accused of a felony sexual offense involving a child victim, evidence of the defendant's conviction of another sexual offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) The Commonwealth must provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's qualifying prior criminal convictions. Such notice must include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was obtained, and (iii) each offense of which the defendant was convicted. Prior to commencement of the trial, the Commonwealth must provide to the defendant photocopies of certified copies of the final orders that it intends to introduce.

(c) This Rule must not be construed to limit the admission or consideration of evidence under any other rule of court or statute.

(d) For purposes of this Rule, "sexual offense" means any offense or any attempt or conspiracy to engage in any offense described in Article 7 (§ 18.2-61 et seq.) of Chapter 4 or § 18.2-370, 18.2-370.01, or 18.2-370.1 or any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.

(e) Evidence offered in a criminal case pursuant to the provisions of this Rule is subject to exclusion in accordance with the Virginia Rules of Evidence, including but not limited to Rule 2:403.

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, is 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, are 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 must 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

* * *

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 are 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 must be allowed, and, subject to the Rules of Evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither may 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 (i) 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, creates no presumption against the accused, and may not be the subject of any comment before the court or jury by any attorney.

* * *

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 are 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 is 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 may 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 may 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 must 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 may 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 is admissible at trial.

C. This section will 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 may 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 does 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 is considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein prevents 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, may 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 will be privileged, and disclosure may be required. The privileges conferred by this Rule do 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 also applies to the interpreter.

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Rule 2:603. OATH OR AFFIRMATION.

Before testifying, every witness must 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 must be qualified as competent and must 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 is 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) Except as otherwise provided in this Rule, no clerk of any court, magistrate, or other person having the power to issue warrants, is competent to testify in any criminal or civil proceeding, as to any matter which came before him or her in the course of official duties. Such person may be competent to testify in any criminal proceeding wherein the defendant is charged with perjury or 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, is not 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) precludes otherwise proper testimony by a clerk or deputy clerk concerning documents filed in the official records.

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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).

* * *

(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, must instruct the jury to consider the evidence of such inconsistent statements solely for the purpose of contradicting the witness.

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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).

* * *

(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 must then be shown to the witness, and if the witness admits its genuineness, the witness must 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, may be used to contradict such witness in the case. Nothing in this subdivision may be construed to prohibit the use of any such ex parte affidavit or statement in an action on an insurance based upon a judgment recovered in a personal injury or wrongful death case.

* * *

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 must 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, an attorney alleged in a habeas corpus proceeding to have acted ineffectively, and in an unlawful detainer action filed in general district court, a managing agent as defined in § 55.1-1200 are 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 may 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.

* * *

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 may 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 may 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.

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

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(b) *Criminal cases.* In criminal cases, the facts on which an expert may give an opinion must 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 may 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 specific statements must be designated as literature to be introduced during direct examination and provided to opposing parties 30 days prior to trial unless otherwise ordered by the court. If a statement has been designated by a party in accordance with and satisfies the requirements of this rule, the expert witness called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial.

(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 will be received solely for impeachment purposes with respect to the expert's credibility.

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Rule 2:803. HEARSAY EXCEPTIONS APPLICABLE REGARDLESS OF AVAILABILITY OF THE DECLARANT (Rule 2:803(10)(a) derived from Code § 8.01-390(C); 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:

* * *

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

* * *

(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) affects the admissibility of affidavits in civil cases under subsection (a) of this Rule.

* * *

(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 are admissible in evidence. The circumstances of the preparation of such a report may be shown.

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Rule 2:803.1. Statements by Child Describing Acts Relating to Offense Against Children (Derived from Code § 19.2-268.3).

(a) Proof of an out-of-court statement made by a child who is under 13 years of age at the time of trial or hearing, and who is the alleged victim of an offense against children as provided in Code § 19.2-268.3(A), which statement describes any act directed against the child relating to such alleged offense, may not be excluded as hearsay under Rule 2:802 if both of the following apply:

* * *

(b) At least 14 days prior to the commencement of the proceeding in which a statement will be offered as evidence, the party intending to offer the statement must notify the opposing party, in writing, of the intent to offer the statement and must provide or make available copies of the statement to be introduced.

(c) This provision does not limit the admission of any statement offered under any other hearsay exception or applicable rule of evidence.

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

* * *

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

* * *

(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 may 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 does not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.

For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record may be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint.

* * *

Rule 2:902. SELF-AUTHENTICATION (Rule 2:902(6) derived from Code § 8.01-390.3 and Code § 8.01-391(D)).

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

* * *

(6) Certified Records of a Regularly Conducted Activity.

(a) In any proceeding where a business record is material and otherwise admissible, authentication of the record and the foundation required by subdivision (6) of Rule 2:803 may be laid by (i) witness testimony, (ii) a certification of the authenticity of and foundation for the record made by the custodian of such record or other qualified witness either by affidavit or by declaration pursuant to Code § 8.01-4.3, or (iii) a combination of witness testimony and a certification.

(b) The proponent of a business record must (i) give written notice to all other parties if a certification under this section will be relied upon in whole or in part in authenticating and laying the foundation for admission of such record and (ii) provide a copy of the record and the certification to all other parties, so that all parties have a fair opportunity to challenge the record and certification. The notice and copy of the record and certification must be provided no later than 15 days in advance of the trial or hearing, unless an order of the court specifies a different time. Objections must be made within five days thereafter, unless an order of the court specifies a different time. If any party timely objects to reliance upon the certification, the authentication and foundation required by subdivision (6) of Rule 2:803 must be made by witness testimony unless the objection is withdrawn.

(c) A certified business record that satisfies the requirements of this section is self-authenticating and requires no extrinsic evidence of authenticity.

(d) A copy of a business record may be offered in lieu of an original upon satisfaction of the requirements of Code § 8.01-391(D) by witness testimony, a certification, or a combination of testimony and a certification.

* * *

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., is 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" is presumed to be a substitute check created pursuant to the Act applicable under subdivision (a) of this Rule.

* * *

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:

* * *

(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 is 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 is 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 is 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 are 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 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.

* * *

(g) Copy, as used in these Rules, includes 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 must 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.

* * *

A Copy,
Teste

Clerk