District Court Judges' Benchbook

2016 Edition

Prepared by the
Association of District Court Judges of Virginia

with the assistance of
The Office of the Executive Secretary
Supreme Court of Virginia
Richmond, Virginia

ASSOCIATION OF DISTRICT COURT JUDGES OF VIRGINIA
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2016 EDITION

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TABLE OF CONTENTS

I. DISTRICT COURTS – IN GENERAL

1. Organization of District Court System 1
2. Voluntary Associations of District Court Judges 3
3. Organization of Judicial Districts 5
4. Judicial Conduct 6
5. General Management 9
6. Research Resources for Judges 11
7. Marriages 12
8. Practice Points for Civil Matters Involving Self-Represented Litigants 16

II. GENERAL DISTRICT COURT

A. Contempt

1. Forms of Contempt: Criminal and Civil 23
a. Distinguishing Civil and Criminal Contempt 23
b. Civil Contempt 24
c. Criminal Contempt 28
d. Appeal of Findings of Contempt 44
e. Other Statutory Violations 46

B. Civil Procedure

1. Civil Jurisdiction 53
a. Dollar Amount 53
b. Interest 53
c. Subject Matter 54
d. Venue 56

2. Small Claims Division 57
a. Jurisdiction 57
b. Subject Matters 57
c. How Actions are Commenced (Special Forms Provided to Clerk) 57
d. Special Unauthorized Practice of Law Rules 58
e. Removal 58
f. Rules of Evidence Suspended 58
g. Object of Small Claims Division 58
h. Judgment and Collection 58
i. Appeals (§ 16.1-122.7) 58

3. Process 59
a. Types 59
b. Return Date 59
c. Service of Process 59
d. Trial Date Information 62
e. Actions Brought By and Against Persons Under a Disability (PUD) 62
f. Amendments to Pleadings, Rule 7A:9 62
g. Counsel of Record 63
h. Unauthorized Practice of Law 63

4. Pre-Trial Matters 64
a. Removal, § 16.1-92 64

b. Venue, § 8.01-257 *et seq.* 64
c. Bills of Particulars and Grounds of Defense 66
d. Discovery 67
e. Affidavits in Contract Claims, §§ 16.1-88, 8.01-28 68
f. Statutes of Limitation, § 8.01-228 *et seq.* 68
g. Counterclaims and Cross-Claims §§ 16.1-88.01, -88.02 70
h. Amendments to Pleadings 70

5. Trial 71

a. Guidelines 71
b. Order of Interrogation and Presentation 71
c. Calling and Interrogation of Witnesses by Court 72
d. Exclusion of Witnesses 72
e. Impeachment of Evidence and Witnesses 72
f. Evidence Statutes 73
g. Appearance and Non-Appearance by Parties 78
h. Continuances 79

6. Appeals 82

7. New Trials 85

8. Enforcement of Judgments 87

9. Unlawful Entry and Detainer 89

a. Introduction 89
b. Common Law of Landlord-Tenant Relations in Virginia 89
c. Leasehold Transactions Covered by the Virginia Residential Landlord Tenant Act 100
d. Common Issues in Landlord-Tenant Cases 126
e. Unlawful Detainers and Bankruptcy 131

10. Distress for Rent 136

a. Nature of Action 136
b. Jurisdiction 136
c. Venue, Statute of Limitations, and Priority of Liens 136
d. Filing Suit 136
e. Issuance of Warrant 136
f. Bond 137
g. Notice of Exemptions 137
h. Force in Executing the Warrant 137
i. How Tenant Can Keep Property in Lieu of Seizure 137

11. Detinue 138

a. Nature of Action 138
b. Jurisdiction 139
c. Venue and Statute of Limitations 139
d. Form of Judgment 139
e. Pre-Trial Seizure 141
f. Judgment 142

Appendix to Chapter 11 – Detinue 143

12. Attachments 151

a. Jurisdiction 151
b. Venue 151
c. Parties 151
d. Requirements of Petition for Attachment 151
e. Bonds 153
f. Execution of the Writ 154
g. Notice of Exemptions 154
h. Defendant's Response 154

i. Trial 155
j. Additional References 155

13. Partition of Personality 156

14. Freedom of Information Act 158

APPENDIX A Unauthorized Practice Rules 164
APPENDIX B 1991 OP. VA. ATT'Y GEN. 240 182
APPENDIX C 1999 OP. VA. ATT'Y GEN. 168 184
APPENDIX D 1997 OP. VA. ATT'Y GEN. 16 189

C. Criminal Procedure

1. Jurisdiction 192

a. Subject Matter 192
b. Geographical Area 192
c. Protective Orders 193

2. Initiation of Charges 199

a. Types of Process 199
b. Specificity of Charges 199
c. Identity of Accused 199
d. Form of Warrants and Summons 199
e. Arrest Without a Warrant 200

3. Pre-Trial Matters 204

a. Pre-Trial Motions 204
b. Arraignments and Appointment of Counsel/Public Defender 204
c. Discovery 208
d. Statutes of Limitations 210
e. Bail and Bond 210

4. Venue 218

5. Preliminary Hearings 220

a. Presence of the Defendant 220
b. Rules of Evidence 220
c. Sufficiency of the Evidence 220
d. Judge's Possible Findings 220
e. Discovery 221
f. Certificate of Analysis 221
g. Certification of Misdemeanor Offenses Along with Felony Certification to Circuit Court 222
h. Joint Preliminary Hearings for Multiple Defendants 222
i. Joining Preliminary Hearings with Misdemeanor Trials 223
j. Suppression Motions 224
k. Transcripts 224
l. Waiver 225
m. Discharge of Incarcerated Defendant if not Timely Indicated 225
n. Bond After Certification 225

6. Misdemeanors and Traffic Infractions – Classes and Definitions 226

7. Trial of Misdemeanors and Traffic Infractions 228

a. Arraignment 228
b. Motions Prior to Trial – Continuance, Discovery, Suppression, *Nolle Prosequi* 228
c. Special Provisions Applicable to Traffic Infraction Trials 230
d. Witnesses – Subpoenas, Exclusion, Competency, Privileges, Examination, Impeachment 231
e. Certificates of analysis, court records, DMV transcripts, official reports and records, and other statutory exceptions to hearsay, best evidence, and authentication rules 240
f. Character of Accused, Other Offenses of Accused 248

g. Case Disposition 249
h. Jeopardy, Mistrial, and Collateral Estoppel 252
i. Combined Trial with Codefendants 253
j. Trial of Multiple Charges for One Defendant 253
k. Psychiatric Issues 253

8. Amendment of Charges 255

9. Sentences and Dispositions 256

a. Plea Bargains 256
b. Disposition without Conviction 256
c. Disposition after Formal Conviction 257
d. Revocation of Probation and Suspended Sentences 258
e. Probation Supervision Resources 259

10. Supervising Recovery of Fines and Costs 261

11. Appeals 262

12. Re-Hearings 263

13. Extradition 264

a. Introduction 264
b. Arrest Before the Governor's Warrant 264
c. Arrest on the Governor's Warrant 266
d. When the Demanding State Fails to Take Custody of the Defendant 267

14. Animal Cruelty and Neglect Cases 268

Introduction 268
Remedies for Abandoned, Neglected or Cruelly Treated Animals 268
Criminal Offenses Committed by Humans Against Animals 269
Dangerous and Vicious Dogs 271
Other "Offenses" Committed by Dogs 275

III. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT

A. General Provisions

1. Jurisdiction and Venue 276

- Original Jurisdiction 276
- Concurrent Jurisdiction 278
- Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") 279
- Uniform Interstate Family Support Act ("UIFSA") 281
- Potential vs. Actual Jurisdiction 281
- Retention of Jurisdiction 282
- Venue 282

2. Service of Process 284

- General Considerations for Issuance of Summonses 284
- Service of Summonses in J&DR District Court and Proof of Service 286
- Service Outside of Virginia 287
- Service by Publication 290
- Returns and Proof of Service Generally 292
- Service of Other Pleadings and Notices Generally 293
- Special Service Provisions for Child Support Enforcement Proceedings 293

3. Contempt Considerations 295

- Contempt Jurisdiction in a Virginia District Court 295
- Forms of Contempt: Criminal or Civil 309
- Types of Contempt: Direct or Indirect 317

- Recusal by the Judge 320
- Appeal of Findings of Contempt 321
- Certificate of Conviction 321
- Appeal Bonds 322

4. Discovery 324

- General Provisions 324
- Criminal Cases 325
- Civil Cases 329

5. Records and Confidentiality 333

6. Closed-Circuit Television Testimony 345

- General Considerations 345
- Criminal Cases 345
- Civil Cases 347
- Obtaining Closed Circuit Equipment 347
- Miscellaneous 348

B. Juvenile Delinquency Proceedings

1. Delinquency Proceedings in General 349

- Definitions 349
- Jurisdiction 349
- Venue 350
- The Role of Intake 350
- Arrest, Detention and Shelter Care 352
- Places of Confinement for Juveniles 353
- The Detention Hearing 354
- Appointment of Counsel 355
- Time Limitations 356
- Social Histories and Victim Impact Statements 356
- Revocation or Modification of Probation or Parole 357
- Appeals 357
- DNA Samples 358

2. Dispositions 359

- General Delinquency 359
- Disposition of Adults for Offenses Committed While a Juvenile 362
- Placement in Secure Local Juvenile Facility 363
- Serious Offenders 364

3. Competency 369

- Raising the Issue 369
- Evaluation and Reports 370
- Competency Hearings 370

4. Certification or Transfer to Circuit Court 373

- Certification 373
- Transfer 374

5. Loss of Driving Privileges 376

C. Non-Delinquency Juvenile Proceedings

1. Child in Need of Services and Supervision, Status Offenders and School Board/Parental Responsibility Petitions 381

- Child In Need of Services 381
- Child in Need of Supervision 383

- Failure of Parent or Child to Comply with the CHINS Order 386
- Failure of Parent to Enroll or Send a Child to School 388
- Status Offenders 389
- School Board-Parental Responsibility Petitions 389

2. Custody and Visitation 390

- Sources of Law 390
- General Principles 391
- Case Initiation 391
- Initial Hearing 393
- Available Tools 395
- Hearing on the Merits 398
- Final Orders 402
- Special Circumstances 403
- Enforcement 406
- Appeals 406

3. Emancipation 407

4. Judicial Authorization of Abortion for Minors 411

5. Abuse and Neglect 416

6. Preliminary Child Protective Orders 428

7. Relief of Custody 433

8. Foster Care 437

9. Termination of Residual Parental Rights 450

10. Parental Placement Adoption 457

11. Psychiatric Treatment of Minors 465

12. Entrustment Agreements 477

13. Driver's License Ceremony 483

D. Adult Proceedings

1. Domestic Violence 487

- Definitions 487
- Protective Orders in Cases of Family Abuse 489
- Title 19.2 Protective Orders in Cases of Acts of Violence, Force or Threat 507
- Adult Criminal Cases Involving Domestic Violence 521
- Factors to Consider in All Domestic Violence Cases 528

2. Child and Spousal Support 529

- Jurisdiction 529
- Child Support Guidelines 530
- Spousal Support Guidelines 538
- Modification of the Award 539
- Incorporation of Parties' Agreement 541
- Miscellaneous 541

3. Parentage 544

- How Parentage Established 544
- Commencement of Proceedings 544
- Genetic Testing 545
- Evidence Relating to Parentage 546
- Support Proceedings Involving Minor Fathers 547
- Evidentiary Considerations 548
- Judgment or Order Establishing Parentage 548

• Disestablishment of Paternity 550
• Hospital Establishment Programs 550
• Administrative Establishment of Paternity 551
• Parentage of Child From Assisted Conception 551

APPENDIX
Rules of Evidence (Part Two of the Rules of the Supreme Court) 553

SECTION I – DISTRICT COURTS

A. IN GENERAL

Chapter 1. Organization of the District Court System

A. Judicial Council of Virginia
Virginia Code §§ 17.1-700, -703.

The Judicial Council of Virginia is charged with making a continuous study of Virginia's judicial system, and is responsible for examining the work accomplished and results produced by the system. An annual report is issued to the General Assembly and the Supreme Court.

Membership includes judges from all levels of the court system, two attorneys and the Chairmen of the Committees for Courts of Justice from the Senate and House of Delegates. The Chief Justice is the presiding officer.

B. Judicial Conference of Virginia for District Court Judges
Virginia Code §§ 16.1-218, -119, -220.

The Judicial Conference of Virginia for District Court Judges was organized to consider means of improving the administration of justice in the district courts. The Conference is required to meet at least once a year for that purpose.

Membership includes all active judges of the general district and juvenile and domestic relations district courts. The Chief Justice serves as President and seven district court judges are elected to the Executive Committee of the Conference. The Conference has a committee structure similar to the Judicial Conference of Virginia.

C. Committee on District Courts
Virginia Code § 16.1-69.33.

The Committee on District Courts was created to assist the Chief Justice in the administrative supervision of Virginia's unified court system. The committee recommends new judgeships and authorizes the number of clerks and magistrates in each district. It establishes policy for court personnel and fixes salary classifications for district clerks and magistrates.

Membership includes the Chairmen of the Committees for Courts of Justice in the Senate and House of Delegates, two members of each of the Courts of Justice Committees, the Speaker of the House of Delegates, the Majority Leader of the Senate, and one judge from the circuit court, two from the general district court and two from the juvenile and domestic relations district court. The Chief Justice is the Chair of the committee.

The Committee on District Courts appoints a Clerk's Advisory Committee, composed of two clerks from the general district courts and two from the juvenile and domestic relations district courts, and a Magistrate's Advisory Committee, composed of two magistrates. These advisory committees are to make recommendations to the Committee regarding administrative functions of the district courts.

D. Office of the Executive Secretary
Virginia Code §§ 17.1-314, -315.

The Executive Secretary is the court administrator for the Commonwealth. He is appointed by the Supreme Court, holds office at the pleasure of the Court, and, if an attorney, may not engage in the private practice of law during his term of office.

The Office of the Executive Secretary (OES) provides support services to all courts including long range planning, educational programs, and technical assistance. It also assists with personnel matters, research, and computer systems development.

Chapter 2. Voluntary Associations of District Court Judges

A. Association of District Court Judges of Virginia, Inc.

The Association of District Court Judges of Virginia, Inc. (ADCJ), was established to foster a closer association among the district court judges of Virginia. It's purposes include: promoting uniformity of procedure; improving techniques and methods for the more efficient administration of laws; cooperating with the General Assembly of Virginia in the enactment of legislation for the improvement of the District Courts; cooperating with the departments of the Commonwealth of Virginia in all matters coming within the jurisdiction of the District Courts; presenting an educational program at the annual conference; and authoring the District Court Judges' Benchbook, which is revised annually by the Benchbook committee. The ADCJ also hosts a reception for its members at the annual judges' conference. In late 2014, the ADCJ implemented an on-line discussion board, where members could post questions and receive answers. There is a board for all district court judges, and a separate one for the JDR judges, for items of interest specifically to their bench. The link for this site may be accessed at: http://oesshares/Lists/BFJC/AllItems.aspx. The name of the discussion is BFJC or "Blackstone's Forum for Judicial Curiosity".

Membership in the ADCJ includes all active and retired district court judges who pay the Association's annual dues. Members of the board of directors include its elected officers, the immediate past president, members at large, and members chosen from each of ten (10) regions who are elected for two-year terms at the annual meeting held during the mandatory Judicial Conference of District Court Judges of Virginia. The ten (10) regions are composed of the following judicial districts:

Region 1:	23, 27, 28, 29, 30
Region 2:	24, 25, 26
Region 3:	5, 6, 10, 11, 21, 22
Region 4:	16, 20
Region 5:	12, 13, 14
Region 6:	3, 4, 7, 8
Region 7:	1, 2, 2A
Region 8:	9, 15
Region 9:	17, 18, 31
Region 10:	19

Past presidents of the ADCJ have been:

Hon. Henry D. Kashouty
Hon. Joseph E. Hess
Hon. Stewart P. Davis
Hon. John B. Preston
Hon. Dan F. O'Flaherty
Hon. Tristram T. Hyde, IV

Hon. R. Larry Lewis
Hon. Julian H. Raney, Jr.
Hon. William A. Talley, Jr.
Hon. Louis A. Sherman
Hon. D. Eugene Cheek, Sr. (2003-2005)
Hon. William Alan Becker (2005-2007)
Hon. Edward M. Turner, III (2007-2009)
Hon. Ray Dezern (2009-2011)
Hon. Barbara Gaden (2011-2013)
Hon. Colleen Kearns Killilea (2013-2015)

B. The Virginia Council of Juvenile and Domestic Relations District Court Judges

The Virginia Council of Juvenile and Domestic Relations District Court Judges was organized to promote the provisions of Virginia Code § 16.1-227 in the interests of the welfare of children, families and the protection of the community. The Council provides a forum for members to discuss, study and disseminate information to its members and the public that promotes its purpose and is otherwise of interest to the judges of the juvenile and domestic relations district court.

Membership includes all juvenile and domestic relations district court judges who pay the Council's annual dues. The executive committee consists of the past president, officers and five members of the Council at large elected for staggered two-year terms at the annual meeting held during the mandatory Judicial Conference of District Court Judges of Virginia.

Chapter 3. Organization of Judicial Districts

A. Judicial Districts

The Commonwealth of Virginia is divided into thirty-two judicial districts.

B. Chief Judge

Each district has one chief general district judge and one chief juvenile and domestic relations district judge who serve two terms beginning on July 1 of even-numbered years. The chief judge is elected by majority vote of the judges of the district. The powers and responsibilities of the chief judge are set out in Virginia Code §§ 16.1-69.35, 16.1-69.11.

C. Clerk's Office

Each court is supported by a clerk's office, although some are combined with other general district courts or juvenile and domestic relations district courts. The clerks and other employees in the office are appointed by and serve at the pleasure of the chief judge pursuant to Virginia Code § 16.1-69.39.

Chapter 4. Judicial Conduct

A. Canons of Judicial Conduct

The Canons of Judicial Conduct are contained in Volume 11, Part Six, Section III, of the Code of Virginia, as amended. They may also be found online at http://www.courts.state.va.us/agencies/jirc/canons_of_judicial_conduct.pdf. The Canons are intended to establish standards for ethical conduct of judges and are based on the American Bar Association's Model Code of Judicial Conduct. They are designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the Judicial Inquiry and Review Commission. These Canons apply to (1) all active Justices of the Supreme Court of Virginia, and Judges of the Court of Appeals of Virginia, Circuit Courts, General District Courts, Juvenile and Domestic Relations District Courts, Members of the State Corporation Commission and the Virginia Workers' Compensation Commission; (2) retired Judges and Members eligible for recall to judicial service; (3) substitute Judges and Special Justices; and (4) persons selected for a full-time judgeship either by election by both houses of the General Assembly or appointment by the appropriate authority who are not already justices, judges or retired judges, but who have not taken the oath of office as a justice or judge; and (5) Judges pro tempore while acting as a Judge pro tempore.

B. Judicial Inquiry and Review Commission
Virginia Code §§ 17.1-901, -902.

The Judicial Inquiry and Review Commission was established to investigate charges which would be the basis for retirement, censure, or removal of a judge. The members are elected by the General Assembly and include a circuit court judge, a general district court judge, a juvenile and domestic relations district court judge, two lawyers (who shall be active members of the Virginia State Bar who are not judges and who have practiced law in the Commonwealth for 15 or more years immediately preceding their appointment), and two public members who shall not be active or retired judges and shall never have been licensed lawyers.

After the initial appointments, the term of office of each member shall be four (4) years commencing on July 1. No member of the Commission may serve more than two (2) consecutive terms.

C. Judicial Ethics Advisory Committee (JEAC)

The Judicial Ethics Advisory Committee was established by the Virginia Supreme Court in 1999, to render advisory opinions concerning applications of the Canons of Judicial Conduct. On October 20, 2015, Chief Justice Donald Lemons entered an Order vacating the 1999 Order and reestablishing the Judicial Ethics Advisory Committee. http://www.courts.state.va.us/programs/jeac/resources/order.pdf

Membership on that Committee is as follows:

- The Committee shall have eleven members appointed by the Chief Justice of the Supreme Court of Virginia. Members of the Judicial Inquiry and Review Commission may not serve simultaneously on the Committee.

- Six members shall be active or retired judges. One judge member shall be appointed from the Circuit, General District and Juvenile and Domestic Relations Courts and from the Court of Appeals. No current member of the Supreme Court of Virginia may be appointed to the Committee. A Senior Justice or retired Justice may serve.

- Four members shall be attorneys admitted to the practice of law in Virginia for at least ten years, who shall not be judges at the time of appointment.

Any judge or person whose conduct is subject to the Canons of Judicial Conduct may request an opinion. Opinions are advisory only and not binding on the Judicial Inquiry and Review Commission or the Supreme Court. However, both may, in their discretion, consider evidence suggesting compliance with an advisory opinion. Advisory opinions may be found online at this link: http://www.courts.state.va.us/programs/jeac/opinions/home_archive.html (1999 – 2008) and http://www.courts.state.va.us/programs/jeac/opinions/home.html (2016 – present).

D. State and Local Government Conflict of Interests Act and General Assembly Conflicts of Interests Act; Virginia Conflict of Interest and Ethics Advisory Council.

The ethics reform bills passed in 2014 established the Virginia Conflict of Interest and Ethics Advisory Council composed of 15 members: four appointments each by the Speaker of the House of Delegates, Senate Committee on Rules, and Governor; one designee of the Attorney General; one representative of the Virginia Association of Counties; and one representative of the Virginia Municipal League. The Council is to review and post online the disclosure forms filed by lobbyists and persons subject to the Conflict of Interest Acts, and provide formal opinions and informal advice, education, and training. The Attorney General maintains his current role as a source for formal opinions and education and training assistance.

As relevant to the judicial branch, Virginia Code §§ 2.2-3114 and 2.2-3117 are amended by these bills. The amendments to those statutes follow this bill description. Virginia Code § 2.2-3114 formerly required "Justices of the Supreme Court, judges of the Court of Appeals, judges of any circuit court, judges and substitute judges of any district court," to file a disclosure statement of their personal interests and other information before assuming office and annually thereafter. Virginia Code § 2.2-3117 provides the form by which disclosure is made. The applicability of these provisions has not changed, but the disclosure frequency and substance has.

The 2014 amendments require the filing of the disclosure forms **twice a year**. The amendments also clarify the distinction between gifts and other things of value received, reduce a number of disclosure provision thresholds from $10,000 to $5,000, and require the disclosure of gifts to immediate family members.

Disclosure statements are now filed semiannually with the newly created Council, by December 15 for the preceding six-month period through the last day of October and by June 15 for the preceding six-month period complete through the last day of April. Effective January 1, 2016, there is a $250.00 fine for failing to timely file the required disclosure forms.

Effective July 1, 2016, except as otherwise provided in Virginia Code § 2.2-3115, all completed forms shall be filed electronically with the Council in accordance with the standards approved by it pursuant to Virginia Code § 30-356. Any person who knowingly and intentionally makes a false statement of a material fact on the Statement of Economic Interests is guilty of a Class 5 felony.

The orientation and continuing education requirements of Virginia Code § 2.2-3130 are unchanged by this legislation. State filers are still required to attend an orientation course on the Conflicts of Interest Act at least once every two years.

Chapter 5. General Management

A. Security
Virginia Code § 53.1-120.

The chief judge of each court is responsible for coordinating with the sheriff of the jurisdiction the designation of courtroom security deputies. In the event of a disagreement regarding the number, type, and working schedules of deputies, the matter shall be referred to the Compensation Board for resolution in accordance with existing budgeted funds and personnel. The editor's note following the statute restates language from the Appropriations Act that "unless a judge provides the sheriff with a written order stating that a substantial security risk exists in a particular case, no courtroom security deputies may be ordered for civil cases [and] not more than one deputy may be ordered for criminal cases in a district court . . ."

Security Assessments by Virginia State Police (Crime Prevention Unit)

A judge may obtain a courthouse security assessment from the Virginia State Police by making a written request to the local sheriff. The judge should receive the assessment within thirty to sixty days from the date of the request.

A judge may obtain a home security assessment on his or her home by a certified crime prevention specialist by making a written request to local law enforcement. The judge will receive a confidential report from the Virginia State Police.

B. Witnesses

A judge should be courteous to all witnesses. Canon 3 A. (3), Vol. 11, Va. Code.

(1) Witnesses who do not appear and have been served with a summons may be proceeded against for contempt by the issuance of a show cause rule for failure to appear. Virginia Code §§ 8.01-407, 18.2-456, 19.2-267.1, 46.2-939.

(2) A witness who refuses to testify without lawful reason may be cited for contempt. See CONTEMPT section of this volume, Section One (8).

C. Sanctions for Improper Pleadings or Motions
Virginia Code § 8.01-271.1.

The sanctions statute requires that pleadings be filed or motions made in good faith and upon reasonable inquiry. When the statute is violated, the court may impose appropriate sanctions either upon a party's motion or upon the court's own initiative. Sanctions may include awarding the opposing party reasonable expenses.

An Attorney General's opinion dated August 30, 2010, opines that a district court may impose a pre-filing review requirement if such a sanction is appropriate pursuant to

Virginia Code § 8.01-271.1. The opinion further states that a district court has the inherent authority to limit or prevent an attorney or litigant from practicing before it if the court determines, after a hearing, that they attorney or litigant has engaged in the unauthorized practice of law or otherwise has engaged in unprofessional or unethical conduct.

The threat of sanctions should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case. *Gilmore v. Finn*, 259 Va. 448, 2000. This statute may not be limited to civil actions. Many of the statutes in Title 8.01 that are not specifically limited to civil actions have been applied in criminal proceedings. It is unclear whether an objection to evidence is an "oral motion" and thus covered by the statute.

D. Court Rules
Virginia Code § 8.01-4.

District courts may prescribe rules for their districts designed to promote proper order, decorum, and the efficient and safe use of courthouse facilities and clerks' offices. No rules shall be inconsistent with any other statutes or rules, or abridge any substantive rights of parties before the court. Courts may also prescribe certain docket control procedures that do not prejudice the rights of parties due to unfamiliarity with such procedures.

Effective July 1, 2014, Virginia Code § 8.01-4 is amended to include the following language:

> *No civil matter shall be dismissed with prejudice by any district or circuit court for failure to comply with any rule created under this section.*

Please see the Collins v. Shepherd case, decided by the Supreme Court on September 14, 2007, for a discussion on this issue.

http://www.courts.state.va.us/opinions/opnscvwp/1061728.pdf

Chapter 6. Research Resources for Judges

A. Department of Legal Research of the Office of the Executive Secretary

The Department of Legal Research provides staff support and direct assistance to the Office of the Executive Secretary and the judiciary. Their primary functions include performing legal research for Virginia trial court judges and for the Executive Secretary, providing assistance with legislative matters affecting court procedures, developing and maintaining court forms, producing instructional manuals for the court system, participating in educational conferences, and providing staff support for committees of the judiciary. The Department of Legal Research of the Office of the Executive Secretary does not provide legal advice or legal assistance to members of the public.

B. Code of Virginia and Virginia Reports

One set of the Code and the reports for the Virginia Supreme Court and the Court of Appeals are provided to each court. If others are needed, they must be acquired with local funds.

C. Rules of Court

The Rules of Court are contained in Volume 11 of the Code of Virginia and are updated by the Supreme Court of Virginia when new rules are adopted.

D. Attorney General Opinions

Attorney General Opinions may be found online at the following link: http://www.oag.state.va.us/citizen-resources/opinions/official-opinions. Any judge may request an opinion of the Attorney General.

E. DISTRICT COURT MANUAL

Each judge and clerk is provided with a DISTRICT COURT MANUAL. It is comprehensive and contains a copy of every form available in the district court system. It has information on the handling and processing of any matter that can be brought before a district court. The Department of Legal Research revises this manual with assistance from the Department of Judicial Services. Any corrections or revisions to this manual are welcome.
http://www.courts.state.va.us/courts/gd/resources/manuals/gdman/gd_manual.pdf.

F. Committee on District Courts Policy Statements

Policy statements adopted by the Committee on District Courts affect both the judges and clerks. They are contained in the PERSONNEL MANUAL.

Chapter 7. Marriages

A. Requirements

(1) Any judge or justice of a court of record, any judge of a district court or any retired judge or justice of the Commonwealth or any active, senior or retired federal judge or justice who is a resident of the Commonwealth may celebrate the rites of marriage anywhere in the Commonwealth without the necessity of bond or order of authorization. Virginia Code § 20-25.

(2) The marriage license is valid for 60 days from the date of issuance, after which it expires. The judge is not required to verify its validity. Virginia Code § 20-14.1.

(3) The certificate indicating performance of the marriage must be completed and returned to the officer who issued the marriage license within 5 days of the ceremony. Virginia Code § 32.1-267(C).

(4) A judge is prohibited from receiving a fee or gratuity for performing a marriage unless it is submitted to the State Treasurer pursuant to Virginia Code § 16.1-69.48. *See* PERSONNEL MANUAL.

B. Sample Marriage Ceremony

Sample I

We are gathered here together to witness the marriage of _____ and _____. Marriage is an honorable institution. It is the foundation of our homes, our families and our society.

We are here to acknowledge and celebrate the love that has drawn you together and that will help you through all the changing experiences of life. May this love continue to grow and enrich your lives, making you happier and better individuals while bringing peace and inspiration to one another. May you meet with courage and strength those difficulties that may arise to challenge you and may the happiness, understanding and love you give to one another continue to make your marriage one that is rich in meaning and fulfillment.

_____ and _____ , as you pledge to each other your love, remember that no other ties are more tender, no other vows more sacred than those you now assume. The promises you make today you must

renew and reinforce tomorrow, the next day, and every day of the life you share together.

Is it your intention to love and honor one another as husband and wife, to share the joys and sorrows that come to each other and to make each other's life complete?

Having stated your intentions, you will now proclaim your consent for all present to hear.

(To the man): Do you _____, take _____, to be your wife, to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish, forsaking all others, so long as you both shall live? If so, answer, "I do."

(To the woman): Do you _____, take _____, to be your husband, to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish, forsaking all others, so long as you both shall live? If so, answer "I do."

(To the man): Will you place the ring on _____ finger, and repeat after me:

"This ring I give you -- in token and in pledge -- of our constant faith -- and abiding love."

(To the woman): Will you place the ring on _____ finger, and repeat after me:

"This ring I give you -- in token and in pledge -- of our constant faith -- and abiding love."

And now, as _____ and _____ have consented to be married and the same having been witnessed by those present and in this ceremony have pledged their faith to each other and having declared the same, by the authority vested in me by the Commonwealth of Virginia, I hereby pronounce you husband and wife.

Sample II.

We are gathered here, in the presence of this company to join _____, and _____ in marriage.

This is a solemn occasion, since the vows that are exchanged and the commitments that are acknowledged must be granted and accepted thoughtfully and deliberately. But even more important, this is a joyous occasion because the lives of two people will be enriched by their joining together. We have the honor to share this day with them.

Marriage between a man and a woman is not created by the ceremony, but instead is born in their hearts and mind. It is founded upon their mutual love, trust, and respect. Our purpose, then, is to celebrate the commitments which _____ and _____ have already made inwardly to each other. This ceremony is the open and visible sign of these commitments, and further represents their desire and intent to grow with one another, and to ensure that their struggles will be less severe and their triumphs will be greater because they will be together. You, who are the dearest of family and friends, are an invaluable part of today's celebration, the happiest occasion in the lives of these two people.

_____, do you take _____ to be your wedded wife, to live together in the holy state of matrimony, to love her, comfort her, honor and keep her, in sickness and in health, and forsaking all others, be faithful unto her as long as you both shall live?

(Response: I DO)

_____, do you take _____ to be your wedded husband, to live together in the holy state of matrimony, to love him, comfort him, honor and keep him, in sickness and in health, and forsaking all others, be faithful unto him as long as you both shall live?

(Response: I DO)

_____, please repeat after me:

I, _____, take you _____, to be my wedded wife, to have and to hold from this day forward, for better or worse, for richer

or poorer, in sickness and in health, to love and to honor, as long as we both shall live.

_____, please repeat after me:

I, _____ take you _____, to be my wedded husband, to have and to hold from this day forward, for better or worse, for richer or poorer, in sickness and in health, to love and to honor, as long as we both shall live.

_____, will you now place the ring on _____'s finger, and repeat after me:

I give this ring to you as a symbol of my love. As I place it on your finger, I give you all that I am and ever hope to be. In token and pledge of my constant faith and love, with this ring, I thee wed.

_____, will you now place the ring on _____'s finger, and repeat after me:

I give this ring to you as a symbol of my love. As I place it on your finger, I give you all that I am and ever hope to be. In token and pledge of my constant faith and love, with this ring, I thee wed.

Since _____ and _____ have consented together in marriage, and have witnessed the same before this company, and have pledged their love to each other, and have declared the same by giving and receiving a ring, and by joining hands, therefore, by the virtue of the authority vested in my by the laws of the Commonwealth of Virginia, I now pronounce you husband and wife.

You may kiss the bride.

(Bride and Groom turn to face the congregation)

I would like to present to you for the first time, Mr. and Mrs. _____.

Chapter 8. Practice Points for Civil Matters Involving Self-Represented Litigants

The practice points are designed to provide guidance to judges in matters involving self-represented litigants in civil matters. The practice points with the exception of those referenced in the Canons of Judicial Conduct for the Commonwealth of Virginia, Code of Virginia or the Rules of the Virginia Supreme Court are not required and as such are mere suggestions that may be followed solely in the discretion of the judge.

Judicial Canon 4(B) Commentary:

A judge may promote broader access to justice by encouraging lawyers to participate in pro bono public or legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing a list of available programs, training lawyers to do pro bono public service or legal work, and participating in events recognizing lawyers who have done pro bono public work.

A. General

Actively manage and schedule cases involving self-represented litigants. After a general description of the docket, consider calling some cases with attorneys before some cases with self-represented parties to allow the self-represented litigant to observe the processes.

B. Pre-Hearing

1. Verify that the self-represented litigant is not an attorney. Confirm that the self-represented litigant understands that he/she may be represented by an attorney.

   Judicial Canon 3(B)(3) Commentary:

   In performing the duties of his or her judicial office, a judge may explain the judicial process, while maintaining impartiality.

2. Explain that as the judge you cannot and will not act as an advocate for either side. Explain that the other party's attorney cannot provide legal advice or assistance.

   Judicial Canon 3(B)(3) Commentary:

   In performing the duties of his or her judicial office, a judge may explain the judicial process, while maintaining impartiality.

3. Explain that as the judge you may ask questions if necessary to make sure you understand the testimony and have the information necessary to make a decision.

4. Explain to self-represented litigants that they are expected to familiarize themselves with the applicable laws and rules of procedure. Note availability of the Virginia Supreme Court website and other court approved resources.

5. Remember existing pamphlets and resources, either local or produced by the Office of the Executive Secretary, which clerks can make available to would-be litigants.

   § 16.1-69.40: Powers and duties of clerks; civil liability.
   The clerk may also issue to interested persons informational brochures authorized by a judge of such court explaining the legal rights of such persons. No clerk or deputy clerk shall be civilly liable for providing information or assistance that is within the scope of his duties.

6. Explain that the party bringing the action has the burden to present evidence in support of the relief sought.

7. Consider giving a basic introduction to courtroom protocol and procedure such as the sequence of opening statements, direct examinations, cross-examinations, and closing statements.

8. Explain that the judge determines what evidence will be considered and that some evidence may be excluded because of the *Rules of Evidence*. Explain either side may object to evidence.

9. Ask the parties if they understand the process and procedures.

10. Explain the prohibition on ex parte communication (judges cannot talk to one side without the other side being present and litigants cannot file any papers with the court that are not served on the other side).

    Judicial Canon 3(B)(7)
    A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
    (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
    (i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
    (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
    (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the

parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
(c) A judge may consult with law clerks whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

11. When entering pre-trial orders consider explaining to the self-represented litigant that there may be consequences if he/she fails to comply with any order of the court. When ordering pleadings such as Bill of Particulars or Grounds of Defense consider explaining the general purpose of these pleadings.

C. A Courteous Courtroom

1. Explain to self-represented litigants that the rude conduct sometimes displayed on television shows is not acceptable in a real courtroom, either from them or directed to them.

   Judicial Canon 3(B)(3)
   A judge shall require order, decorum, and civility in proceedings before the judge.

2. Treat self-represented litigants with patience, dignity, and courtesy (required toward all participants in all court proceedings). Address self-represented litigants with titles comparable to those used for counsel. Avoid over-familiar conduct toward attorneys. Require court staff and attorneys to treat self-represented litigants (and everyone else) with patience, dignity, and courtesy.

   Judicial Canon 3(B)(4)
   A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

D. Pleadings

1. Consider construing pleadings broadly according to common-sense meanings. Look behind the labels of a document filed in a case by a self-represented litigant and give effect to substance, rather than the mere form or technical terminology utilized.

2. Take note of the following statutes regarding procedural defects and their purpose of promoting substantial justice: *§16.1-93 and §16.1-227*.

§ 16.1-93. Principles applicable to trial of cases. (Courts not of record)

Every action or other proceeding in a court not of record shall be tried according to the principles of law and equity, and when the same conflict the principles of equity shall prevail. No warrant, motion or other pleading shall be dismissed by reason of a mere defect, irregularity or omission in the proceedings or in the form of the pleadings when the same may be corrected by an order of the court. The court may direct such proceedings and enter such orders as may be necessary to correct any such defects, irregularities and omissions, and to bring about a trial of the merits of the controversy and promote substantial justice to all parties. The court may make such provisions as to costs and continuances as may be just.

§ 16.1-227. Purpose and intent.

This law shall be construed liberally and as remedial in character, and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this law that in all proceedings the welfare of the child and the family, the safety of the community and the protection of the rights of victims are the paramount concerns of the Commonwealth and to the end that these purposes may be attained, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

This law shall be interpreted and construed so as to effectuate the following purposes:

1. To divert from or within the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;
2. To provide judicial procedures through which the provisions of this law are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other rights are recognized and enforced;
3. To separate a child from such child's parents, guardian, legal custodian or other person standing in loco parentis only when the child's welfare is endangered or it is in the interest of public safety and then only after consideration of alternatives to out-of-home placement which afford effective protection to the child, his family, and the community; and
4. To protect the community against those acts of its citizens, both juveniles and adults, which are harmful to others and to reduce the incidence of delinquent behavior and to hold offenders accountable for their behavior.

3. Leave to amend should be liberally granted in furtherance of the ends of justice.

Rule 1:8. Amendments.

No amendment shall be made to any pleading after it is filed with the clerk, except by leave of court. Leave to amend shall be liberally granted in furtherance of the ends of justice. Unless otherwise provided by order of the court in a particular case, any written motion for leave to file an amended pleading shall be accompanied by a properly executed proposed amended pleading, in a form suitable for filing. If the motion is granted, the amended pleading accompanying the motion shall be deemed filed in the clerk's office as of the date of the court's order permitting such amendment. If the motion is granted in part, the court may provide for filing an amended pleading as the court may deem reasonable and proper. Where leave to amend is granted other than upon a written motion, whether on demurrer or oral motion or otherwise, the amended pleading shall be filed within 21 days after leave to amend, the court may make such provision for notice thereof and opportunity to make response as the court may deem reasonable and proper.

Rule 7A:9. Amendments. (Courts not of record)

No amendment shall be made to any pleading after it is filed with the clerk, except by leave of court. Leave to amend shall be liberally granted in furtherance of the ends of justice. In granting leave to amend, the court may make such provisions for notice thereof and opportunity to make response as the court may deem reasonable.

Rule 8:8(c). Pleadings and Filing; Amendment of Written Pleading.

Except as hereinafter provided, or as provided pursuant to §§ 16.1-129.2, 16.1-93 and 16.1-259, no amendment shall be made to any pleading after it is filed with the clerk, except by leave of court. Leave to amend a pleading shall be liberally granted in furtherance of the ends of justice. In granting leave to amend, the court may make such provisions for notice thereof and opportunity to make response as the court may deem reasonable and proper.

In delinquency, child in need of services, child in need of supervision, and status offense proceedings, the court may permit amendment of the written pleading at any time before adjudication, provided that the amendment does not change the nature or character of the matter alleged. If the amendment is made after the respondent pleads or is made after any evidence is heard, the amended pleading shall be read to him and he shall be allowed to change his plea. If the court finds that the amendment operates as a surprise to the respondent, it shall upon request grant a continuance for a reasonable time.

4. Consider explaining that you have considered all admissible evidence before making a ruling.

5. Provide a clear explanation and/or rationale for a decision.

6. If possible, after each court appearance, provide all litigants with clear (preferably) written or oral notice of further proceedings.

E. Settlement

1. At a pre-trial or status conference, if not otherwise statutorily required, consider mentioning the use of mediators as provided through the Office of the Executive Secretary without charge to resolve matters.

2. Explain to self-represented litigants that they are expected to familiarize themselves with applicable procedures to accomplish particular goals. Note the availability of resources such as manuals and forms on the Virginia Judicial System website and other court approved resources to assist them.

3. If the parties appear before the court to present a proposed agreement that would settle the case, determine if the agreement was entered into voluntarily and that the self-represented litigant fully understands the terms and conditions of the proposed agreement. Explain that if an agreement is approved as an order, it becomes a fully enforceable order of the court.

F. Hearing

1. Ensure that oral or written notice of hearing unambiguously describes in a way a self-represented litigant can understand that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.

2. Question any witness for clarification. Take care that your language and tone when asking questions does not indicate your attitude towards the merits or the credibility of the witness.

3. If you relax a rule for self-represented litigants, relax it for a represented party as well.

4. Require self-represented litigants and attorneys to explain the basis for objections.

G. The Decision

1. When possible announce and explain your decision immediately from the bench with both parties present. Give the rationale for the decision. Avoid use of legal jargon, abbreviations, acronyms, shorthand or slang.

Canon 3(B)(8)
A judge shall dispose promptly of the business of the court.

2. If you decide to take a matter under advisement, inform the parties that you wish to consider their evidence and arguments and will issue a decision shortly. If possible announce a date or time frame by which a decision should be reached.

   Canon 3(B)(1)
   A judge shall hear and decide promptly matters assigned to the judge except those in which disqualification is required.

   Canon 3(B)(8)
   A judge shall dispose promptly of the business of the court.

3. If asked about reconsideration or appeal, refer the litigant to the clerk's office for information and to resources available on the Virginia Supreme Court's website.

4. If asked about the enforcement of an order or collection of a judgment, refer the litigant to the clerk's office for information and to resources available on the Virginia Supreme Court's website.

SECTION II – GENERAL DISTRICT COURT

A. CONTEMPT

Chapter 1. Forms of Contempt: Criminal and Civil

A. Distinguishing Civil and Criminal Contempt

(1) Civil Contempt

In a civil contempt proceeding, a court can order imprisonment (or payment of a fine) until a defendant complies with a court order when a defendant has refused to do an affirmative act required by the provisions of a court order. *Int'l Longshoremen's Ass'n v. Commonwealth ex. rel. Va. Ferry Corp.*, 193 Va. 773 (1952); *Epperly v. Montgomery*, 46 Va. App. 546, 620 S.E.2d 125 (2005). Imprisonment is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he refuses to do. *Id.* The court orders the defendant to stand committed unless and until he performs the affirmative act required by the court's order. When the defendant in a civil contempt proceeding complies with his obligations under the court order, the contempt is purged, and he is released from imprisonment or relieved of any conditional fine. *Leisge v. Leisge*, 224 Va. 303, 296 S.E.2d 538 (1982).

(2) Criminal Contempt

On the other hand, criminal contempt is "any act which is calculated to embarrass, hinder, or obstruct the court in the administration of justice…." *Potts v. Commonwealth*, 184 Va. 855, 859, 36 S.E.2d 529, 530 (1946); *Carter v. Commonwealth*, 2 Va. App. 392, 396, 345 S.E.2d 5, 7-8 (1986). Criminal contempt is "an act in disrespect of the court, or its processes, or which obstructs the administration of justice, or tends to bring the court into disrepute." *Henderson v. Commonwealth*, No. 2382-09-1, 2010 Va. App. LEXIS 451 (Nov. 16, 2010) (unpublished) citing *Carter v. Commonwealth*, 96 Va. 791 (1899).

Criminal contempt proceedings are punitive and prosecuted to preserve the power and vindicate the dignity of the court. *United Steelworkers v. Newport News Shipbuilding*, 220 Va. 547, 549-50, 260 S.E.2d 222, 224 (1979). If the purpose is punitive and the sentence is to be fixed and imposed retrospectively for a completed act of disobedience, then it is criminal.

(3) Clarify Whether Proceeding is Civil or Criminal

The same act or omission may constitute both civil and criminal contempt. Thus, the court should clarify at the outset of the hearing whether proceedings are criminal or

civil.[1] Criminal contempt sanctions cannot be imposed in a civil contempt proceeding. *Leisge*, 224 Va. at 303, 296 S.E.2d at 538. On the other hand, in a criminal contempt case, any later compliance will not end confinement. *Commonwealth v. Shook*, 83 Va. Cir. 85, 87, 2011 Va. Cir. LEXIS 70, *4 (Va. Cir. Ct. 2011) (unpublished).

B. Civil Contempt

(1) Articulate the Civil Nature of the Proceeding

Civil contempt proceedings are for the purpose of preserving and enforcing the rights of private parties, and the punishment is remedial and for the benefit of the complainant. *Powell v. Ward*, 15 Va. App. 553, 560, 425 S.E.2d 539 (1993) citing *United Steelworkers v. Newport News Ship Building and Dry Dock Co.*, 220 Va. 547, 549, 260 S.E.2d 222, 224 (1979). When the civil contemner complies with his obligations under the court order, the contempt is purged and the court releases the contemner from imprisonment or relieves him/her of any conditional fine.

(2) Issue Process to Provide Notice

A civil contemner is entitled to notice and an opportunity to be heard. *UMW v. Bagwell*, 512 U.S. 821, 114 S. Ct. 2552 (1994). Thus, the court authorizes and issues a civil rule to show cause (or capias, where appropriate), which is to be served. Service of contempt proceedings papers on a contemner's attorney without personal service on the defendant is insufficient to meet the actual notice requirements for contempt. *Steinberg v. Steinberg*, 21 Va. App. 42, 461 S.E.2d 421 (1995), *writ of cert. denied*, 517 U.S. 1173 (1996).

(3) Ensure Underlying Order Expressed Clear Duties

Before a person may be held in contempt for violating a court order, the underlying order must be clear and definite as to the duties imposed on the person, and the command must be expressed rather than implied. *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307, 309 (1977).

(4) Do Not Enforce a Void Order

If a court did not have jurisdiction originally, the violation of its order will not support a judgment for contempt. *Kogon v. Ulerick*, 12 Va. App. 595, 599, 405 S.E.2d 441, 443 (1991).

[1] An inmate is entitled to good conduct credits under Va. Code Ann. § 53.1-116 if the inmate is serving time for *criminal* contempt. 2004 Va. Op. Atty. Gen. 173. This provision is not applicable in cases of *civil* contempt.

(5) Scrutinize Non-Party Contempt Allegations

In order to find a non-party to an injunction amenable to its terms, the non-party must have had actual knowledge of an injunction and the evidence must show that the non-party violated the terms of the injunction while acting as an agent or in concert with one or more of the named parties in the original injunction. *Powell v. Ward*, 15 Va. App. 553, 425 S.E.2d 539 (1992).

In *Glanz v. Mendelson*, 34 Va. App. 141, 538 S.E.2d 348 (2000), the court held that an attorney for a party, who was not identified as one made subject to the courts directives, cannot be held in contempt. *See also Mardula v. Mendelson*, 34 Va. App. 120, 538 S.E.2d 338 (2000); *Leisge*, 224 Va. 303, 296 S.E.2d 538.

(6) Counsel in Civil Contempt Cases

Juvenile and domestic relations district courts have the discretion to appoint counsel for a respondent in civil contempt proceedings for failure to pay child support (or in the context of other civil juvenile and domestic relations court proceedings) under Virginia Code Section 16.1-266. *See* Va. Code Ann. § 16.1-266 (details regarding appointment of counsel).[2]

In the general district courts, there is generally no right to appointed counsel in *civil* contempt cases. The Court of Appeals of Virginia has ruled that, at least with regard to an appeal from circuit court, a defendant in a civil contempt proceeding does *not* have such a right to counsel. *Krieger v. Commonwealth*, 38 Va. App. 569, 585, 567 S.E.2d 557, 565 (2002). *See Krieger* for a thorough analysis.

(7) Ensure Bail is Determined

A person arrested on a civil contempt capias is entitled to a bail determination. The arresting officer must take the defendant forthwith to a magistrate for a bond decision. The defendant then has a right to appeal this decision to the district court. Va. Code Ann. § 19.2-124. The district court must inform the alleged contemner of his right to appeal from the district court order denying or fixing the terms of bond. Va. Code Ann. § 19.2-120.

(8) Provide Due Process

A defendant in a civil contempt case is entitled to due process, including an opportunity to be heard and present evidence in his defense. The Fourteenth Amendment requires that alleged contemners "have a reasonable opportunity to meet the charge of contempt by way of defense or explanation." *Street v. Street*, 24 Va. App. 14, 20, 480 S.E.2d 118,

[2] The United States Supreme Court in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), ruled that, although a parent facing jail time for back child support does have minimal due process rights, the state does not have to provide counsel at civil contempt proceedings for a parent owing child support. In Virginia, however, judges normally do appoint lawyers for indigent parents facing jail for nonsupport.

121 (1997) (citing *Cooke v. United States*, 267 U.S. 517, 537 (1927)). This due process right "includes the right to testify, to examine the opposing party, and to call witnesses in defense of the alleged contempt." *Id.* (citing 270 C.J.S. *Divorce* 456 (1986)). In *Street*, the Court of Appeals held that the trial court erred when it refused to allow a party to present evidence to show his inability to pay support, which is a defense to contempt. *Id.* at 622.

(9) Ensure the Failure to Abide by the Order was Voluntary

The defendant's failure to obey the underlying court order must be shown to have been voluntary. *Street*, 24 Va. App. at 22, 480 S.E.2d at 122 (holding that husband's income reduction when he sold his carpet business to work for someone else was not contumacious in failure to pay support case). On the other hand, the "absence of willfulness does not necessarily relieve one from civil contempt." *Leisge*, 224 Va. at 309, 296 S.E.2d at 541 (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)). The Supreme Court of Virginia articulated in *Leisge* that "[c]ivil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance…. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited acts." *Id.*

(10) Burden of Proof

The moving party has the burden of proof and must prove a failure to comply with a court order. *Alexander v. Alexander*, 12 Va. App. 691, 696, 406 S.E.2d 666, 669 (1991). The defending party then has the burden of proving justification for the failure to comply. *Id.* The court then determines whether it was willful. *Id.*

The Court of Appeals of Virginia has held that the standard of proof required in a civil contempt case is <u>not</u> guilt beyond a reasonable doubt as in criminal cases." *Int'l Union United Workers of America v. Covenant Coal Corp.*, 12 Va. App. 135, 147 (1991). Instead, "[c]ivil contempt cases must be established by clear and convincing evidence…." *Allstar Lodging, Inc. v. Rookard*, 2013 U.S. Dist. at LEXIS 160845 (W.D. Va. Nov. 12, 2013).

(11) Civil Contempt Order Must be Conditional

Even where a court has found that a party could be held in contempt, it is the court's discretion whether to enter a contempt finding and impose sanctions. *Wells v. Wells*, 12 Va. App. 31, 36, 401 S.E.2d 891, 894 (1991). A suspended sentence can be imposed since the court must use the "*least possible power adequate to the end proposed*." *Hicks v. Feiock*, 485 U.S. 624 (1988) (emphasis added).

Coercive civil contempt sanctions are "imposed to compel a recalcitrant defendant to comply with a court's order" and attempt to coerce the contemner into doing what he is required to do but is refusing to do. *Epperly*, 46 Va. App. at 558. <u>A contemner can avoid</u>

a sanction by complying with the court's order. *Powell v. Ward*, 15 Va. App. 553, 425 S.E.2d 539 (1992). For example, in *Homecare of Virginia v. Jones*, the trial court found the defendant in civil contempt for failing to lower the number of nursing home residents. The Court of Appeals upheld the sentence of six months in jail, with a purge clause for release when three residents were moved. *Homecare of Virginia v. Jones*, No. 3134-03-1, 2004 Va. App. LEXIS 178 (Apr. 20, 2004) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/3134031.pdf.

It is said that the contemner "holds the key to his cell in the jail" because, by committing an affirmative act and complying with the court order, he can purge the contempt and be released. *See Walker-Duncan v. Duncan*, No. 1752-03-1, 2004 Va. App. LEXIS 26 (Jan. 20, 2004) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/1752031.pdf (upholding a civil contempt finding for failure to pay guardian *ad litem* fees where contemner could purge the contempt with monthly payments). A contempt finding for failure to pay court ordered counsel fees can also be purged upon payment. *Frazier v. Commonwealth*, 3 Va. App. 84, 348 S.E.2d 405 (1986). Similarly, the court can impose a sentence of six months in jail for civil contempt unless purged by paying past due insurance premiums. *McCoy v. McCoy*, 55 Va. App. 524, 687 S.E.2d 82 (2010). The contemner has the burden to prove a purge.

The civil contempt order noting the civil coercive contempt sanction must state that the order is conditional and that the sanction will terminate as soon as the contemner purges the contempt. Also, include a review date in the order so that the court can then determine respondent's ability and willingness to purge the contempt.

(12) Judgment Debtor Failing to Answer Interrogatories or Convey Property

Virginia Code Ann. § 8.01-508 sets forth the civil contempt procedure when a judgment debtor fails to answer interrogatories or obey an order to convey property. If any person summoned under Section 8.01-506 fails to appear and answer, or makes any answers deemed by the court to be evasive, or if, having answered, fails to make such conveyance and delivery as is required by Section 8.01-507, the court shall either issue a capias or a rule. If a capias is issued, the person in default shall be entitled to bail if he cannot be brought promptly before the commissioner or court to which the capias is returnable. If the person in default fails to answer or convey and deliver, he may be incarcerated until he makes such answers or conveyance and delivery. Upon making such answers or such conveyance and delivery, he shall be discharged by the court.

(13) Right to Appeal

There is an appeal of right from a civil contempt order to the circuit court, which shall hear the case *de novo*. Va. Code Ann. § 16.1-106. However, the common law bar against appellate review of an order dismissing a rule to show cause or refusing to hold a party in contempt remains in place. *Newton v. Jones*, 781 S.E.2d 759, 760 (2016).

C. Criminal Contempt

(1) Articulate the Criminal Nature of the Proceeding

The court should clearly articulate the criminal nature of the proceeding at the earliest possible moment to eliminate the confusion associated with the types of contempt proceedings. *Powell v. Ward*, 15 Va. App. 553, 425 S.E.2d 539 (1993). In *Powell*, the Court of Appeals held that the trial court erred in imposing criminal contempt sanctions in a civil proceeding.

Clarification also helps ensure that defendants are afforded all of their constitutional rights and are aware of the procedural rules and the standard of proof. *Id.* at 559, 425 S.E.2d 543. For example, in *Powell*, the Court of Appeals of Virginia held that when a criminal contempt issue arose during a civil case proceeding, the judge, "after deciding to conduct a criminal contempt trial, should have clearly articulated the criminal nature of the proceedings, transferred the matter to the law side of the court, and substituted the Commonwealth as the party to prosecute the action." 15 Va. App. at 554, 425 S.E.2d at 540.

(2) Determine Whether the Alleged Criminal Contempt is Direct or Indirect

Where the contempt is committed in the presence of the court, it is classified as direct contempt and the court "is competent to proceed upon its own knowledge of the facts and 'to punish the offender without further proof and without issue or trial in any form.'" *Burdett v. Commonwealth*, 103 Va. 838, 845-45, 48 S.E.2d 878, 880-84 (1904); *Henderson v. Commonwealth*, No. 2383-09-1, 2010 Va. App. LEXIS 451 (Nov. 16, 2010) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/2383091.pdf.

Indirect contempt is not in the presence of the court and the offender must be brought before the court by a rule or some other sufficient process.[3] The power of the court to punish is the same in both cases. *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681, 682 (1978) (citing *Burdett v. Commonwealth*, 103 Va. at 845-46). Direct contempt is always criminal contempt. Indirect contempt may be criminal or civil.

If some of the contemptuous conduct occurs outside "open court," then the case must be treated as indirect contempt and full due process principles apply, including prior notice and an opportunity to be heard. *Scialdone v. Commonwealth*, 279 Va. 422, 689 S.E.2d 716 (2010); *Herrington v. Commonwealth*, No. 0522-09-4, 2010 Va. App. LEXIS 157 (Apr. 27, 2010) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/0522094.pdf.

[3] The Supreme Court of Virginia recognizes that "constructive contempt" is the same thing as "indirect contempt." *Davis v. Commonwealth*, 219 Va. 395 (1978).

(3) Direct Summary Contempt is a Form of Criminal Contempt, not Civil Contempt

Criminal contempt proceedings are punitive and are prosecuted to preserve the power and vindicate the dignity of the court. *United Steelworkers v. Newport News Shipbuilding*, 220 Va. 547, 549-50, 260 S.E.2d 222, 224 (1979). Generally, criminal contempt is an act that is calculated to embarrass, hinder, or obstruct the court in the administration of justice. *Potts v. Commonwealth*, 184 Va. 855, 859, 36 S.E.2d 529, 530 (1946); *Carter v. Commonwealth*, 2 Va. App. 392, 396, 345 S.E.2d 5, 7-8 (1986). If the purpose is punitive and the sentence is to be fixed and imposed retrospectively for a completed act of disobedience, then it is criminal.

(a) Common Law Summary Contempt

(1) Summary Contempt Origins

Summary contempt was a common law offense. Judges in Virginia have always had the power to fine and imprison for contempt in order to protect "the administration of justice, with a promptitude calculated to meet the exigency of the particular case." *Wells v. Commonwealth*, 21 Gratt 500, 503 (1871).

Regarding common law contempt, in 1899 the Supreme Court of Virginia recognized that "[o]ur conception of courts, and of their powers and functions, comes to us through that great system of English jurisprudence known as the 'common law,' which we have adopted and incorporated into the body of our laws." *Carter v. Commonwealth*, 96 Va. 791, 32 S.E. 780, 782 (1899). Under common law, there was a "general recognition" that courts are clothed with the power to punish for contempt. *Nicholas v. Commonwealth*, 186 Va. 315, 321, 42 S.E.2d 306, 309 (1947) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450, 55 L. Ed. 797, 31 S. Ct. 492 (1911)). The Supreme Court of Virginia noted in *Carter v. Commonwealth*, that:

> [T]here was no such court at common law as one with powers beyond the legislative reach … there is an inherent power of self-defence and self-preservation; that this power may be regulated but cannot be destroyed, or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in and to be exercised by the court itself….
>
> *Carter v. Commonwealth*, 96 Va. 791, 816, 32 S.E. 780, 785 (1899).

(2) Virginia General Assembly Enacts First Contempt Statute in 1830-31

The Virginia General Assembly first enacted legislation regarding contempt in 1830-31. The Supreme Court of Virginia in *Carter* noted:

> By an act of Assembly passed in 1830-31 (see Session Acts, p. 48) the Legislature undertook to enumerate and to classify contempts of court, and to prescribe the manner in which they should be punished. This act appears in the Code of 1849 as sections 24 and 25, chapter 194, as follows:
>
> "Sec. 24. The courts and the judges, and justices thereof, may issue attachments for contempts, and punish them summarily, only in the cases following:
>
> *First*. Misbehaviour in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice.
>
> *Secondly*. Violence or threats of violence to a judge, justice or officer of the court, or to a juror, witness or party going to, attending, or returning from, the court, for or in respect of any act or proceeding had, or to be had, in such court.
>
> *Thirdly*. Misbehaviour of an officer of the court, in his official character.
>
> *Fourthly*. Disobedience or resistance of an officer of the court, juror, witness or other person, to any lawful process, judgment, decree or order of the said court."
>
> "Sec. 25. No court shall, without a jury, for any such contempt as is mentioned, impose a fine exceeding fifty dollars, or imprison more than ten days. But in any such case the court may empanel a jury (without an indictment, information or any formal pleading) to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict."

Carter, 96 Va. at 803, 32 S.E. at 780-81.

(3) General Assembly Attempts to Require a Jury Trial at Defendant's Request with Newly Designated "Indirect Contempt" Cases in 1898

The 1830-31 summary contempt statute continued in force until the General Assembly session of 1898, when it was amended on February 26, 1898. 1898 Va. Acts Ch. 513. The Virginia General Assembly believed it was "wise to limit the classes of contempts which could thus be tried" by the judge alone without a jury. *Yoder v. Commonwealth*, 107 Va. 823, 828, 57 S.E. 581, 585 (1907). The resulting 1898 Act of Assembly read as follows:

1. Be it enacted by the General Assembly of Virginia, That section three thousand seven hundred and sixty-eight of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 3768. The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases, which are hereby declared to be direct contempts, all other contempts being indirect contempts:

First. Misbehaviour in the presence of the court, or so near thereto as to obstruct the administration of justice.

Second. Violence or threats of violence to a judge or officer of the court or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court.

Third. Misbehaviour of an officer of the court in his official character.

Fourth. Disobedience or resistance of an officer of the court, juror or witness to any lawful process, judgment, decree or order of the said court.

When the court adjudges a party guilty of a direct contempt it shall make an entry of record, in which shall be specified the conduct constituting such contempt, and shall certify the matter of extenuation or defense set up by the accused, and the evidence submitted by him and the sentence of the court."

Subsection.

Proceedings in Cases of Indirect Contempt. -- Upon the return of an officer on process, or upon an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person may be arrested and brought before the court, and thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt, shall be filed, and the accused required to answer the same, by an order which shall fix the time therefor and also the time and place for hearing the matter. A copy of this order shall be served upon the accused, and upon a proper showing the court may extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt.

> After the answer of the accused, or if he fail or refuse to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed according to the rules governing the trial of criminal cases, and the accused shall be entitled to compulsory process for his witnesses and to be confronted with the witnesses against him.
>
> Such trial shall be by the court, or, upon the application of the accused, a trial by jury shall be had, as in any case of a misdemeanor.
>
> If the jury finds the accused guilty of contempt, they shall fix the amount of his punishment by their verdict.
>
> The testimony taken on the trial of any case of contempt shall be preserved on motion of the accused, and any judgment of conviction therefor may be reviewed on writ of error from the Circuit Court having jurisdiction, if the judgment is by a County Court, or on writ of error from the Supreme Court of Appeals, if the judgment is by a Circuit or Corporation Court. In the Appellate Court the judgment of the trial court shall be affirmed, reversed, or modified as justice may require. If the writ of error to the judgment of a County Court is refused by the Circuit Court having jurisdiction, application may then be made to the Court of Appeals.
>
> 2. All acts and parts of acts, so far as they conflict with this act, are, to that extent, hereby repealed.

1898 Va. Acts Ch. 513.

(4) Supreme Court of Virginia Strikes the New Statute Allowing for a Jury Trial at Defendant's Request with "Indirect Contempt" Cases in 1899

It did not take long for the Supreme Court of Virginia to review the constitutionality of the new law allowing a defendant to demand a jury trial in indirect contempt cases. In *Carter v. Commonwealth*, 96 Va. 791, 32 S.E. 780 (1899), the Supreme Court of Virginia held that the legislature lacked the power to abrogate judges' power to adjudicate contempt cases by allowing for a jury trial in indirect contempt cases. It held:

> [T]here is an inherent power of self-defence and self-preservation; that this power may be regulated but cannot be destroyed, or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in

> and to be exercised by the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury….

Id. at 816, 32 S.E. at 785.

(5) General Assembly Commences Constitutional Amendment Process to Give Itself the Power to Regulate Contempt

After the *Carter* decision holding that the General Assembly cannot deprive the courts of the power to summarily punish for indirect contempt by providing for a jury trial, the Constitution of Virginia was amended to state that the General Assembly "may regulate the exercise by courts of the right to punish for contempt." *Yoder v. Commonwealth*, 107 Va. 823, 829, 57 S.E. 581, 585 (1907).

The resulting contempt statute, as it was amended in 1904, then numbered Virginia Code Section 3768, provided that:

> The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:
>
> First. Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice.
>
> Second. Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness, or party going to, attending, or returning from the court, for or in respect of any act or proceeding had or to be had in such court.
>
> Third. Obscene, contemptuous or insulting language addressed to a judge for or in respect of any act, or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding.
>
> Fourth. Misbehavior of an officer of the court in his official character.
>
> Fifth. Disobedience or resistance of an officer of the court, juror, witness, or other person to any lawful process, judgment, decree or order of the said court.

1887 Code of Virginia, as amended, § 3768 (1904).

As it did in the *Carter* decision in 1899, the Supreme Court of Virginia in 1907, in *Yoder v. Commonwealth*, 107 Va. 823, 827, 57 S.E. 581 (1907), again reviewed the General Assembly's attempt to limit the criminal cases barring a jury trial for

constitutionality. This time the Court held that the contempt statute was "a reasonable regulation of the exercise by the courts of the power to punish for contempt." *Id*. at 830, 57 S.E. at 584.

(b) Current Summary Contempt Statute (§ 18.2-456)

Virginia Code Section 18.2-456, entitled "Cases in which courts and judges may punish summarily for contempt," states:

> The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:
>
> (1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;[4]
>
> (2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;
>
> (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;
>
> (4) Misbehavior of an officer of the court in his official character;
>
> (5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court.

(c) Additional Summary Contempt Statutory Provisions

(1) § 18.2-457. Fine and imprisonment by court limited unless jury impaneled.

> No court shall, without a jury, for any such contempt as is mentioned in the first class embraced in § 18.2-456, impose a fine exceeding $250 or imprison more than ten days; but in any such case the court may, without an indictment, information or any formal pleading, impanel a jury to ascertain the fine or imprisonment proper to be inflicted and may give judgment according to the verdict.
>
> Code 1950, § 18.1-295; 1960, c. 358; 1975, cc. 14, 15; 1999, c. 626.[5]

[4] A mother balling up a child support summons in court in front of the judge is misbehavior in the presence of the court. *Parham v. Commonwealth*, 60 Va. App. 450, 729 S.E.2d 734 (2012).

(2) § 18.2-458. Power of judge of district court to punish for contempt.

A judge of a district court shall have the same power and jurisdiction as a judge of a circuit court to punish summarily for contempt, but in no case shall the fine exceed $250, or the imprisonment exceed ten days, for the same contempt.

Code 1950, § 18.1-293; 1960, c. 358; 1975, cc. 14, 15; 1999, c. 626.[6]

(3) § 16.1-69.24. Contempt of court.

A judge of a district court shall have the same powers and jurisdiction as a judge of a circuit court to punish summarily for contempt, but in no case shall the fine exceed $250 and imprisonment exceed ten days for the same contempt. From any such fine or sentence there shall be an appeal of right within the period prescribed in this title and to the court or courts designated therein for appeals in other cases and the proceedings on such appeal shall conform in all respects to the provisions of §§ 18.2-456 through 18.2-459.

1972, c. 708; 1973, c. 546; 2000, cc. 164, 185.[7]

(4) § 18.2-459. Appeal from sentence of such judge.

Any person sentenced to pay a fine, or to confinement, under § 18.2-458, may appeal therefrom to the circuit court of the county or city in which the sentence was pronounced, upon entering into recognizance before the sentencing judge, with surety and in penalty deemed sufficient, to appear before such circuit court to answer for the offense. If such appeal be taken, a certificate of the conviction and the particular circumstances of the offense, together with the recognizance, shall forthwith be transmitted by the sentencing judge to the clerk of such circuit court, who shall immediately deliver the same to the judge thereof. Such judge, sitting without a jury, shall hear the case upon the certificate and any legal testimony adduced on either side, and make such order therein as may seem to him proper.

Code 1950, § 18.1-294; 1960, c. 358; 1975, cc. 14, 15; 2013, c. 615.[8]

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[5] The 1999 Amendment increased the fine from $50 to $250. According to the Consumer Price Index, $50 in 1830 would be worth $1,282.05 in 2014.

[6] The 1999 Amendment increased the fine from $50 to $250.

[7] The 2000 Amendments increased the fine from $50 to $250.

[8] The 2013 Amendments amended this section as follows: Such judge, *sitting without a jury*, ~~may~~ *shall* hear the case upon the certificate and any legal testimony adduced on either side, and make such order therein as may seem to him proper.

(5) § 1-200. The common law.

The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

Code 1919, § 2, § 1-10; 2005, c.[9]

(6) § 18.2-16. How common-law offenses punished.

A common-law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed.

Code 1950, § 18.1-8; 1960, c. 358; 1975, cc. 14, 15.

(d) Direct Criminal Contempt Procedures and Case Law

(1) A district court judge has the power to punish summarily for direct contempt, which occurs in the presence of the court. Va. Code Ann. §§ 16.1-69.24, 18.2-456 et seq. It is a power essential and inherent to the very existence of our courts to preserve the confidence and respect of the people without which the rights of the people cannot be maintained and enforced. It implicates the trial court itself in both the offense and its adjudication.

(2) Direct contempt requires the contempt to be "actually observed by the court." *Henderson v. Commonwealth*, No. 2382-09-1, 2010 Va. App. LEXIS 451 (Nov. 16, 2010) (unpublished), citing *In re Oliver*, 333 U.S. 257, 275-76 (1948). Contemptuous conduct in the hallway of the courthouse is not in the presence of the court. *Heffenan v. Commonwealth*, No. 2103-13-4, 2014 Va. App. LEXIS 364 (Nov. 4, 2014) (unpublished). *See also Middlebrooks v. Commonwealth*, Record No. 1516-01-1 Va. App. (July 30, 2002) (unpublished) (swearing in court held to be a violation of Subsection 1 of Section 18.2-456). Showing an actual obstruction or interruption of justice is not necessary if the misbehavior is in the presence of the court. *Parham v. Commonwealth*, 60 Va. App. 450, 729 S.E.2d 734 (2012).

"Misbehavior in the presence of the court" occurred when a defendant chose to go to court and ask for a restricted driver's license while "under the influence of drugs." *Graves v. Commonwealth*, Record No. 0148-14-2, Va. App. (Nov. 25, 2014) (unpublished).

A verbal order of the court during court, if violated, can give rise to a subsection (5) contempt offense. *Crandley v. Commonwealth*, Record No. 1694-98-1, Va.

[9] The 2005 Amendments renumbered sections.

App. (Aug. 10, 1999) (unpublished); *Lalik v. Commonwealth*, Record No. 1805-99-3, Va. App. (May 9, 2000) (unpublished).

(3) If the contempt is direct, a summary proceeding is permissible immediately without an attorney representing the accused. In order to "preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance, violence, physical obstruction, or disrespect to the court, when it occurs in open court." *Cooke v. United States*, 267 U.S. 517, 534-35, 45 S.Ct. 390, 394 (1925). There is no need for evidence or assistance of counsel before punishment because the court has seen the offense. *Id.*

The trial judge should notify the person of the conduct observed. The defendant cannot be compelled to testify against himself, and he must be given an opportunity to explain his conduct or state why he should not be punished or why his punishment should be mitigated. *Carter v. Commonwealth*, 96 Va. 791 (1899). Also, the contemner must be given an opportunity to object before or after the contempt finding. *Amos v. Commonwealth*, 61 Va. App. 730, 740 S.E.2d 43 (Va. App. 2013), *aff'd* 287 Va. 301, 754 S.E.2d 304 (2014).

(4) The trial judge does not have to adjudicate a direct criminal contempt committed in his presence at the very instant of the alleged misbehavior or disobedience of the court's ruling. The term "summarily" used in Virginia Code Section 18.2-456 does not refer to the time the contempt finding must be made, but to the form of the procedure, which dispenses with any further proof or examination and a formal hearing. *Higginbotham v. Commonwealth*, 206 Va. 291, 294, 142 S.E.2d 746, 749 (1965). Still, any delay cannot be barred by a statute of limitations, be prejudicial to the defendant, or be unreasonable in duration. *Id.*[10]

If the judge does not proceed immediately, full due process rights must be afforded. *Id.* at 295, 142 S.E.2d at 749. The Court of Appeals of Virginia in *Henderson v. Commonwealth*, Record No. 2383-09-1 (Nov. 16, 2010) (unpublished), citing *Robinson v. Commonwealth*, 41 Va. App. 137, 145-46 (2003), stated that "a court retains the common law authority to employ plenary procedures even for contempt that, by statute, may be punished summarily." A rule to show cause, which specifies the alleged contemptuous acts, must then be served. *Id*. The Supreme Court of Virginia in *Higginbotham* does not mention issuing a capias, but Virginia Code Section 18.2-456 states that the judge "may issue attachments for contempt."[11] The verbal notice given 5 days after the contemptuous behavior in *Higginbotham* was held insufficient.

[10] As criminal summary contempt proceedings are not "criminal prosecutions," statutes of limitation do not apply. *Porter v. Commonwealth*, 778 S.E.2d 549, 553 (2015).

[11] Virginia Code Section 19.2-11 states:

> No court or judge shall impose a fine upon a juror, witness or other person for disobedience of its process or any contempt, unless he either be present in court at the time, or shall have been served with a rule, returnable to a certain time, requiring him to show cause why the fine should not be imposed and shall have failed to appear and show cause.

(5) In cases of direct summary contempt, "in no case shall the fine exceed $250 and imprisonment exceed ten days for the same contempt" in the district courts. Va. Code Ann. § 16.1-69.24; *see also* Va. Code Ann. §§ 18.2-456 and 18.2-458.

(6) Virginia Code Section 18.2-459 requires, in the event of an appeal, that the court provide a "certificate of the conviction and the particular circumstances of the offense." The written decision should set forth sufficient facts to show that the court had jurisdiction to punish for contempt, that the contempt was committed in the presence of the court, that the contempt was committed willfully, and it should recite the facts upon which the court based its final conclusion. *Carter*, 2 Va. App. at 392, 345 S.E.2d at 5 (1986) (quoting 17 Am. Jur. 2d *Contempt* § 100 (1964)). Admission of the certificate in circuit court on appeal does not implicate the confrontation clause of the Constitution. *Gilman v. Commonwealth*, 275 Va. 222, 657 S.E.2d 474 (2008).

(4) Indirect Criminal Contempt

(a) Notice Required and an Opportunity to Prepare and be Heard Required

The substantial difference between a direct and a constructive contempt is one of procedure. *Burdett v. Commonwealth*, 103 Va. 838, 48 S.E. 878 (1904); *Gilman v. Commonwealth*, 275 Va. 222, 657 S.E.2d 474 (2008). Where the contempt is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, "and to punish the offender without further proof, and without issue or trial in any form." *Burdett v. Commonwealth*, 103 Va. at 846, 48 S.E. at 881 (quoting *Ex parte Terry*, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405; *ex parte Wright*, 65 Ind. 504; *State v. Woodfin*, 27 N.C. 199, 5 Ired. Law 199, 42 Am. Dec. 161).

Indirect contempt occurs at least partially outside of open court, and the offender must be brought before the court by sufficient process; but the power of the court to punish is the same for direct and indirect contempt cases. *Id*.

If at least some misconduct is committed outside the court's presence, the contempt is indirect, and the offender must be brought before the court by a rule or some other sufficient process. *Davis*, 219 Va. at 398, 247 S.E.2d at 682 (1978).

If "all the essential elements of the alleged contemptible conduct did not occur in the presence of the … court," full due process rights and a plenary hearing must be afforded. *Scialdone*, 279 Va. at 689 S.E.2d at 719.

(b) Adequate Notice and Opportunity to be Heard

The offender must be given notice of the charge against him. He must also have a reasonable opportunity to prepare for a hearing on whether he should be adjudged in contempt. *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681, 682-83 (1978).

(c) Notice Requirements Must Comply with Due Process

For indirect criminal contempt cases, the alleged offense must be specifically described. The defendant must be served notice that he is being charged with criminal contempt prior to the hearing. Telling the defendant about the charge is insufficient. *Higginbotham v. Commonwealth*, 206 Va. 291, 142 S.E.2d 746 (1965).

Service of contempt proceedings papers on a contemner's attorney, or faxing a letter to only the attorney without personal service on the defendant, is insufficient to meet the actual notice requirements for contempt. Va. Code Ann. § 8.01-314; *Clugston v. Commonwealth*, No. 2186-08-1, 2009 Va. App. LEXIS 344 (Aug. 4, 2009) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/2186081.pdf.

It should be noted that in a protective order violation case, a Russian speaking defendant who had an interpreter had sufficient notice of the order's terms. *Koroshev v. Commonwealth*, Record No. 1235-13-4 Va. App. (Nov. 12, 2014) (unpub'd). The defendant's failure to read the terms does not nullify the existing actual notice. *Id.*

(d) Entitlement to Bail Hearing

A person arrested on a criminal contempt capias or warrant is entitled to a bail determination. The court must inform the alleged contemner of his right to appeal from an order denying or fixing the terms of bond. Va. Code Ann. § 19.2-120.

(e) Defendants are Entitled to Representation by Counsel

Defendants in non-summary direct and all indirect criminal contempt cases are entitled to representation by counsel. Unless waived, counsel must be appointed for indigent defendants. *Steinberg v. Steinberg*, 21 Va. App. 42, 461 S.E.2d 421 (1995). Compensation for appointed counsel is set forth at Virginia Code Section 19.2-163.

District Court Form DC-335, TRIAL WITHOUT AN ATTORNEY, must be used and attached to the case if defendant waives his right to an attorney.

(f) Presumption of Innocence

A person charged with criminal contempt is entitled to the benefit of the presumption of innocence and the burden is on the prosecution to prove the guilt of the accused. The rules of evidence applicable in criminal cases apply. *Carter*, 2 Va. App. at 396, 345 S.E.2d at 8.

(g) Recusal by the Judge

Generally, conducting contempt proceedings against a person does not disqualify a judge from hearing either the case in chief or the ancillary contempt case. *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697 (1974). The form of the contempt proceeding, *i.e.* direct or indirect contempt, affects the decision about disqualification. *United States v. Neal*, 101 F.3d 993 (4th Cir. 1996). In *Neal*, the Fourth Circuit ruled that in indirect contempt cases, the judge cannot assume a prosecutorial role; it vacated and remanded a contempt charge against a witness for failing to appear because the district court judge investigated the incriminating facts through extra-judicial means, introduced evidence against Neal, and otherwise presented the government's case, thereby improperly assuming a prosecutorial role.

Disqualification decisions in contempt proceedings require weighing a number of factors. Considerations include ensuring fairness, avoiding the appearance of impartiality, determining whether setting the case on another judge's docket would result in undue delays in trial, and determining whether the conduct was intended to force disqualification.

(h) Burden of Proof in Criminal Contempt Cases

The burden of proof in criminal contempt cases is guilt beyond a reasonable doubt. *United States v. Neal*, 101 F.3d at 997. *See also Kidd v. Virginia Safe Deposit & Trust Corp.*, 113 Va. 612, 614, 75 S.E. 145 (1912); *Cartier v. Commonwealth*, No. 0960-12-1, 2013 Va. App. LEXIS 68 (Mar. 5, 2013) (*citing Calamos v. Commonwealth*, 184 Va. 397, 404-05, 35 S.E.2d 397, 400 (1945)).

(i) Intent is a Necessary Element of Indirect Criminal Contempt

Intent is a necessary element in criminal contempt, and "no one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it." *Carter*, 2 Va. App. at 397, 345 S.E.2d at 8; 17 Am. Jur.2d *Contempt* § 8 (1964).

To support a conviction under Subsection 1 of Section 18.2-456, if indirect, evidence must be shown of intent to obstruct or interrupt the administration of justice. *Weaver v. Commonwealth*, No. 1056-01-1, 2002 Va. App. LEXIS 170 (Mar. 19, 2002) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/1056011.pdf. In *Weaver*, the lawyer's contempt conviction was reversed where the attorney had said he was not ready for trial and the attorney simply requested a continuance to pursue matters raised in discovery. *See also Cartier v. Commonwealth*, No. 0960-12-1, 2013 Va. App. LEXIS 68 (Mar. 5, 2013).

Similarly, the Supreme Court of Virginia found that an attorney excusing his client and himself from appearing in court because the parties had agreed to continue the

case lacked intent to obstruct or interrupt justice in *Singleton v. Commonwealth*, 278 Va. 542, 685 S.E.2d 668 (2009).

(j) Order Must be Clear

If the contempt allegation is based upon disobedience of an order of the court (Section 18.2-456(5)), then, although a contempt finding could be based upon a willful violation of an "oral pronouncement from the bench," it must be a "clear, coercive judicial order." *Aratoon v. Roberts*, No. 052924, 2015 Va. App. LEXIS 23 (Jan. 27, 2015) (unpublished) (citing Amos v. Commonwealth, 61 Va. App. 730, 739, 740 S.E.2d 43, 48 (2013) (*en banc*), *aff'd*, 287 Va. 301, 754 S.E.2d 304 (2014)).

A request by a judge in court that a lawyer produce evidence is not an order which can be the basis for a contempt finding. *Aratoon v. Roberts*, Record No. 0529-14-4, Va. App. (Jan. 27, 2015) (unpublished).

A lawyer's failure to abide by a judge's repeated warnings and orders in court to stop his sarcastic, disrespectful behavior in court rose to the level of contempt in *Crandley v. Commonwealth*, No. 1694-98-1, 1999 Va. App. LEXIS 498 (Aug. 10, 1999) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/1694981.pdf . The summary contempt finding and $50 fine was affirmed.

(k) Court Must have Authority Over Contemner

A person cannot be held in contempt if the court had no authority to enter the original order. *Bryant v. Commonwealth*, 198 Va. 148, 93 S.E.2d 130 (1956). For example, where the trial court in a criminal case issued an order for the husband of the criminal defendant to assist with the defendant's probation, the husband could not be proceeded against for contempt because the trial court had no authority to make the order initially. *Id.*

(l) Due Process Requirements

A defendant in an indirect contempt case must be given the opportunity to call witnesses, to present other evidence in his own defense, to testify, and to examine the opposing party. The Fourteenth Amendment requires that the alleged contemner "have a reasonable opportunity to meet [the charge of contempt] by way of defense or explanation." *Street*, 24 Va. App. at 14, 480 S.E.2d at 121 (quoting *Cooke v. United States*, 267 U.S. 517, 537, 45 S. Ct. 390, 395 (1925)).

(m) Double Jeopardy

Separate criminal contempt proceedings cannot be subsequently instituted when they focus on the same alleged offense. If a dismissal of a criminal contempt charge was granted pursuant to a factual defense, the "dismissal qualifies as an acquittal for

double jeopardy purposes." *Courtney v. Commonwealth*, 23 Va. App. 561, 478 S.E.2d 336 (1996) (citing *Greenwalt v. Commonwealth*, 224 Va. 498, 500, 297 S.E.2d 709, 710 (1982)).

(n) The Sentence is Determinate and Unconditional

A criminal contempt sentence is determinate and unconditional. The contemner has no opportunity or power to "purge" the contempt. *Steelworkers v. Newport News Shipbuilding*, 220 Va. 547, 260 S.E.2d 222 (1979).

(o) Fine or Jail Time for a Statutory (Section 18.2-456) Contempt Violation

District courts are limited to a fine not to exceed $250 and imprisonment of not more than ten (10) days when punishing summarily for contempt. Va. Code Ann. §§ 16.1-69.24, 18.2-457, 18.2-458; *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007).

(p) Indirect Contempt Cases

An attorney setting multiple cases for the same day in different jurisdictions without moving to continue may be convicted of criminal contempt and not limited under Sections 18.2-456 and 18.2-458. *Robinson v. Commonwealth*, 41 Va. App. 137, 583 S.E.2d 60 (2003).[12]

The court in *Robinson* made clear that the contempt was common law indirect contempt, not Virginia Code Section 18.2-456 contempt.[13] Mr. Robinson received a plenary hearing. Thirty (30) days in jail (higher than the 10 day statutory maximum) for Mr. Robinson was upheld. The Court of Appeals found this non-statutory criminal contempt to be "an act in disrespect of the court or its process, or which obstructs the administration of justice, or tends to bring the court into disrepute." *Robinson*, 41 Va. App. at 142, 583 S.E.2d at 63.

[12] The trial judge in *Robinson* had issued a contempt show cause and emphasized that Mr. Robinson was charged with indirect contempt. District courts' authority "to punish summarily for contempt" is set forth at Section 16.1-69.24 ($250 fine or no more than 10 days imprisonment).

[13] In *Robinson*, the Court of Appeals acknowledged that attorney misconduct was upheld in *Brown v. Commonwealth*, 26 Va. App. 758, 497 S.E.2d 147 (1998), as Section 18.2-456(1), "misbehavior in the presence of the court." The court in *Brown* was constrained to impose statutory punishment of up to ten (10) days in jail and/or a $250 maximum fine. In *Brown*, a contempt finding was upheld where the contemner attorney was 40 minutes late to court because of multiple cases scheduled for the same time. The contemner in *Brown* had been punished summarily under § 18.2-456 and limited to the penalty therein.

An attorney was properly held in contempt when he facsimiled a garnishment summons to a garnishee before it was filed with the court. *Becker v. Commonwealth*, 64 Va. App. 481, 769 S.E.2d 683 (2015).[14]

Under federal contempt law (18 USC § 401), cursing the judge twice and making an obscene gesture gave rise to a single contempt. *United States v. Murphy*, 326 F.3d 501, 504 (4th Cir. 2003).

A contempt finding was upheld under Code Section 18.2-456 subsections (2) and (3) when a Commonwealth's attorney wrote threats and "contemptuous language" to a substitute judge two days after the judge rejected a plea agreement and criticized the Commonwealth's Attorney's office in open court. *Morrissey v. Commonwealth*, 16 Va. App. 172, 428 S.E.2d 503 (1993). The court found that the words constituted an express or implied threat to the judge, or at the very least, "judicial intimidation," and it rejected a claim that the letter was protected by the First Amendment. *Id.*

On the other hand, a contempt conviction was reversed when the defendant loudly said he would not return for jury service on his report dates. *Henderson v. Commonwealth*, No. 2383-09-01, 2010 Va. App. LEXIS 451 (Va. Ct. App. Nov. 16, 2010) (unpublished). The Court of Appeals held that neither subsection (1) (obstructing or interrupting the administration of justice) nor subsection (5) (disobedience of lawful process) of Section 18.2-456 had been violated. *Id.*

A police officer was properly found in contempt after being late to court several times. *Abdo v. Commonwealth*, 64 Va. App. 468, 769 S.E.2d 677 (2015).

(q) Juveniles Can be Found in Contempt in District or Circuit Court

In *Wilson v. Commonwealth*, 23 Va. App. 318, 477 S.E.2d 7 (1996), a juvenile was charged with contempt in circuit court. The Court of Appeals of Virginia, quoting *State v. Tripp*, 36 Ore. App. 141, 583 P.2d 591, 592-93 (1978), held that:

> "[t]he ability of a court to preserve its jurisdiction and orders transcends other concerns, such as the juvenile/adult distinction…. [W]e hold that the (Virginia) Code provision granting exclusive jurisdiction of juveniles to the juvenile court is inapplicable to cases of contempt committed in another court under circumstances like those found in this case."

[14] Court Can Bar Attorney from Practicing in the Court: A court has jurisdiction to revoke an attorney's privilege to practice before that court based upon its inherent constitutional power. Va. Const. Art. III, § 1; Va. Const. Art. VI § 1; *In re Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007), *cert denied, Moseley v. Circuit Court of Arlington County*, 2007 U.S. LEXIS 12391 (Nov. 26, 2007).
Ensure that the attorney receives adequate notice of the alleged misconduct by means of a rule to show cause why the attorney's right to practice before that court should not be revoked. *In re Moseley*, 273 Va. at 699, 543 S.E.2d at 196. Provide the attorney a full hearing. *Id. See also In re Lynch*, 53 Va. App. 351, 672 S.E.2d 115 (2009).

Juveniles sentenced to confinement by the circuit court for contempt must be confined in a secure facility for juveniles rather than in an adult detention center. *Id.* at 325-26, 477 S.E.2d at 10.

D. Appeal of Findings of Contempt

(1) Right to Appeal

Any person convicted in a district court shall have the right to appeal to the circuit court at any time within ten (10) days of such conviction whether or not such conviction was upon a plea of guilty. Va. Code Ann. § 16.1-132. The issue of "whether a district court certificate may be used when indirect contempt involves elements of direct contempt is unresolved. *Unger v. Commonwealth*, No. 2196-14-2, 2015 Va. App. LEXIS 394 (Dec. 22, 2015) (unpublished).

(2) *De Novo* Appeal

If the appeal involves *summary contempt* under Section 18.2-456, there is not a *de novo* trial in circuit court. *Gilman v. Commonwealth*, 275 Va. 222, 231, 657 S.E.2d 474 (2008). Otherwise, the appeal is heard *de novo.*

(3) Appeal of Contempt Cases Charged Under Section 18.2-456

Any person sentenced to pay a fine or confinement under Virginia Code Section 18.2-458 may appeal to the circuit court. If such an appeal is taken, a certificate of the conviction and the particular circumstances of the offense, together with the recognizance, shall be transmitted by the sentencing judge to the clerk of the circuit court. Va. Code Ann. § 18.2-459. The circuit judge "shall hear the case upon the certificate or any legal testimony adduced" by either side. Va. Code Ann. § 18.2-459.

The Virginia Court of Appeals has ruled that the certificate of conviction required by Virginia Code Section 18.2-459 does not violate the Sixth Amendment right to confrontation. *Gilman*, 275 Va. at 231, 657 S.E.2d at 474. Section 19.2-271 prohibits a judge from testifying, and the certificate is presumed to be trustworthy and reliable. *Id.*; *see also Rozario v. Commonwealth*, 50 Va. App. 142, 647 S.E.2d 502 (2007).

Virginia Code Section 19.2-271 states that no judge shall be competent to testify in any criminal or civil case about a matter that came before him in the course of his official duties. This includes indirect contempt. *Commonwealth v. Epps*, 273 Va. 410, 414, 641 S.E.2d 77, 79 (2007). Exceptions are cases involving perjury, obstruction of justice, and violations of Section 19.2-353.3. *See* Va. Code § 19.2-271.

When an appeal is noted by a person sentenced to a fine or to confinement for contempt, that person *shall* enter into recognizance before the sentencing district court judge, "with

surety and in penalty deemed sufficient," to appear before the circuit court to answer for the offense. Va. Code Ann. § 18.2-459.

(4) Appeal of Contempt Finding from Juvenile and Domestic Relations District Court

A party has a right to appeal any final order or judgment of the juvenile and domestic relations district court under Virginia Code Section 16.1-296. Please read this detailed section. Subsection H of § 16.1-296 states:

> No appeal bond shall be required of a party appealing from an order of a juvenile and domestic relations district court except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during pendency of an appeal. In cases involving support, no appeal shall be allowed until the party applying for the same or someone for him gives bond, in an amount and with sufficient surety approved by the judge or by his clerk if there is one, to abide by such judgment as may be rendered on appeal if the appeal is perfected or, if not perfected, then to satisfy the judgment of the court in which it was rendered. Upon appeal from a conviction for failure to support or from a finding of civil or criminal contempt involving a failure to support, the juvenile and domestic relations district court may require the party applying for the appeal or someone for him to give bond, with or without surety, to insure his appearance and may also require bond in an amount and with sufficient surety to secure the payment of prospective support accruing during the pendency of the appeal. An appeal will not be perfected unless such appeal bond as may be required is filed within thirty days from the entry of the final judgment or order. However, no appeal bond shall be required of the Commonwealth or when an appeal is proper to protect the estate of a decedent, an infant, a convict or an insane person, or the interest of a county, city or town.
>
> If bond is furnished by or on behalf of any party against whom judgment has been rendered for money, the bond shall be conditioned for the performance and satisfaction of such judgment or order as may be entered against the party on appeal, and for the payment of all damages which may be awarded against him in the appellate court. If the appeal is by a party against whom there is no recovery, the bond shall be conditioned for the payment of any damages as may be awarded against him on the appeal. The provisions of § 16.1-109 shall apply to bonds required pursuant to this subsection.
>
> This subsection shall not apply to release on bail pursuant to other subsections of this section or § 16.1-298.

E. Other Statutory Violations

(1) Sanctions for Pleadings and Motions Filed in Violation of the Requirements of Va. Code Ann. § 8.01-271.1

The Virginia Supreme Court suspended a lawyer for a year and imposed a $1,000 fine for calling a decision an "absurd result," among other things, in a rehearing brief. *Taboada v. Daly Seven Inc.*, 272 Va. 211, 231, 636 S.E.2d 889, 890 (2006).

An objective standard of reasonableness must be applied in determining whether the facts can support a reasonable belief that a party's claims are well grounded in fact or law. *Northern Virginia Estate, Inc. v. Martins*, 283 Va. 86, 720 S.E.2d 121 (2012).

Filing a laundry list of affirmative defenses may subject a lawyer to sanctions if they are not well grounded in fact and violate Section 8.01-271.1. *Ford Motor Co. v. Benitez*, 273 Va. 242, 639 S.E.2d 203 (2007).

A lawyer cannot be sanctioned if he did not sign a responsive pleading or otherwise make a motion under Virginia Code Section 8.01-271.1. *Shebelskie v. Brown*, 287 Va. 18, 752 S.E.2d 877 (2014).

A court may use its contempt power to enforce an order directing the payment of sanctions. Va. Code Ann. § 8.01-271.1; *Weidlein v. Weidlein*, 50 Va. Cir. 349 (1999).

A district court can impose a pre-filing review requirement according to an Attorney General opinion to The Honorable Barbara J. Gaden, Judge, Richmond General District Court, 10-068, 2010 Va. AG LEXIS 51 (Aug. 30, 2010).

Section 8.01-271.1 applies only to attorneys and parties, not victims or persons analogous to victims. *Johnson v. Woodard*, 281 Va. 403, 707 S.E.2d 325 (2011) (holding that petitioners should not be considered "parties" as residents petitioning for the removal of four county board members).

Also, a lawyer is not subject to sanctions when his client files bankruptcy the night before trial and witness and exhibit lists are filed pursuant to a court's scheduling order. *McNally v. Rey*, 275 Va. 475, 659 S.E.2d 279 (2008).

Nothing in Virginia Code Section 8.01-271.1 gives the trial judge authority to impose monetary sanctions on an attorney for an inadvertent mistake. *Rogland v. Soggin*, ___ Va. ___, 784 S.E.2d 698 (2016).

(2) Failure of a Defendant in a Criminal Case Released on Bond or on a Summons to Appear (Virginia Code Section 19.2-128)

A defendant, having been released on a summons or on bond, who willfully fails to appear before any court shall be treated in accordance with Virginia Code Section 19.2-

128. But, he may not also be sentenced for contempt for the same absence. Virginia Code Section 19.2-128 allows a person charged with a felony and who fails to appear, to be charged with a Class 6 felony. It also allows a person charged with a misdemeanor who fails to appear, to be charged with a class 1 misdemeanor.

The court may elect to issue a show cause or a warrant. 1982 Va. Op. Atty. Gen. 82-83. *See Hunter v. Commonwealth*, 15 Va. App. 717, 27 S.E.2d, 197 (1993) for the elements and standard; s*ee also Poindexter v. Commonwealth*, No. 0457-98-2, 1999 Va. App. LEXIS 238 (Apr. 27, 1999) (unpublished); *Koral v. Commonwealth*, No. 0392-06-3, 2007 Va. App. LEXIS 213 (May 22, 2007) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/0392063.pdf.

The trier of fact cannot assume that the "standard procedure" of telling a defendant in court the next court date was actually followed. *Thomas v. Commonwealth*, 48 Va. App. 605, 633 S.E.2d 229 (2006) (evidence held insufficient to show defendant knew his preliminary hearing date).

The mere fact that the Commonwealth's attorney or defense attorney has advised a defendant or a witness not to appear does not excuse such absence. Lawful process or orders of the court always take precedence over contrary instructions of the Commonwealth's attorney or defense attorney. *See Hunter*, 15 Va. App. at 721, 427 S.E.2d at 200. However, in deciding what action, if any, to take against a person who fails to appear, the court may wish to take into account as a mitigating factor that laymen may not fully comprehend their obligations and may mistakenly believe that instructions of the Commonwealth's attorney or defense attorney are on equal footing with lawful process or a court order.

Defendant willfully failed to appear where defendant was incarcerated out-of-state on his Virginia court date in violation of his bond conditions and knowing "if you don't come to court, you get in trouble," but he still did not contact the court or his counsel. *Deslandes v. Commonwealth*, No. 2033-07-2, 2008 WL 264896, at *1 (Va. Ct. App. July 8, 2008) (unpublished) *available at* http://www.courts.state.va.us/opinions/opncavwp/2033072.pdf.

(3) Defendant's Failure to Appear Under a Violation of Virginia Code Section 18.2-456

If defendant is charged under § 18.2-456 with failure to appear because defendant failed to abide by a court order, then the maximum penalty that can be imposed is up to 10 days in jail or up to a $250 fine. *Daugherty v. Commonwealth*, No. 0297-11-3, 2011 Va. App. LEXIS 326 (Nov. 1, 2011) (unpublished).

(4) Failure of Witness to Appear – Issue Rule

Witnesses in criminal or civil cases under subpoena or a summons are obliged to attend and may be proceeded against for failing to do so. *See* Va. Code Ann. §§ 19.2-267 and 8.01-407 through 8.01-410. In a criminal case, a witness who fails to appear may be

proceeded against for failing to do so although there may not previously have been any payment for attendance, mileage or tolls. In support cases, a summoned person who fails without reasonable cause to appear may be proceeded against for contempt pursuant to Virginia Code Section 20-66.

Section 19.2-11 requires a rule to be served on the subpoenaed person.[15] Substituted service of the rule is sufficient when the person learns of the subpoena before the court date. *Bellis v. Commonwealth*, 241 Va. 257, 402 S.E.2d 211 (1991).

In *Bellis v. Commonwealth*, 241 Va. 257, 402 S.E.2d 211 (1991), the circuit court, by rule to show cause, sought to hold the witness, a physician, in contempt of court under Section 18.2-456(5) for failure to obey a subpoena *duces tecum*. The subpoena *duces tecum* was served on Friday at the doctor's office and directed him to appear and testify at a trial on Monday at 9:00 a.m. The doctor was not at his office on Friday when the subpoena was served, but he learned about the subpoena that afternoon when he called his office. The doctor flew to Texas on Saturday morning to "deliver an airplane," and did not depart Texas until Monday morning at 11:00 a.m. Because of bad weather, he did not arrive in Wise County until Monday night. The trial court found that the doctor "voluntarily absented himself and delayed his return" to the jurisdiction, and his absence did not amount to a lawful excuse. The court held that Dr. Bellis "willfully and knowingly" disobeyed a valid order of the court and fined him $100. On appeal, the Virginia Supreme Court affirmed and held that substituted service of the subpoena at the doctor's office under Section 8.01-298 was sufficient because the doctor found out about it.

There are four elements of contempt for disobedience of process: (1) issuance of lawful process, (2) valid service of process, (3) timely knowledge of the process, and (4) willful disobedience of the process. It found that all elements were met. *Id*. at 262, 402 S.E.2d at 214.

(5) Witness Summons Issued by a Law Enforcement Officer in Misdemeanor Cases

Pursuant to Virginia Code Section 19.2-267.1, a summons to appear and testify in court may be issued to a witness by a law enforcement officer during the immediate course of an investigation of a misdemeanor. Such a witness summons has the same force as if issued by the court. If the person summoned fails to appear after receiving notice of the date, time, and place of the trial at least five (5) days prior to the trial, he can be punished for contempt under Section 18.2-456(5).

[15] Virginia Code Section 19.2-11 states:

> No court or judge shall impose a fine upon a juror, witness or other person for disobedience of its process or any contempt, unless he either be present in court at the time, or shall have been served with a rule, returnable to a certain time, requiring him to show cause why the fine should not be imposed and shall have failed to appear and show cause.

(6) Failure to Appear Pursuant to a Title 46.2 [Motor Vehicles] Summons

See Section 46.2-936 regarding failure to appear in response to a summons issued pursuant to Title 46.2.

(7) Juvenile Witness Failing to Appear in Circuit Court

When a juvenile witness is subpoenaed to appear in a circuit court and fails to do so, the circuit court can find the juvenile in contempt and the contempt proceeding does not have to be referred to a juvenile court. *Wilson v. Commonwealth*, 23 Va. App. 318, 477 S.E.2d 7 (1996).

(8) Failure to Appear Pursuant to a Summons in a Support Case

In cases of nonsupport, Section 20-66 provides that if a person "fails without reasonable cause to appear as herein required, he or she may be proceeded against as for contempt of court…."

(9) Failure of a Witness to Testify

(a) Adverse Party Called as a Witness in Civil Case

An adverse party in a civil case may be called and examined by the other party according to the rules applicable to cross-examination. If the adverse party refuses to testify, he may be punished for contempt, and the court may dismiss the action or any part thereof, or it may strike out and disregard the plea, answer or other defense of such party, or any part thereof, as justice may require. Va. Code Ann. § 8.01-401.

(b) Failure of a Witness to Testify

A witness who refuses to testify can be held in contempt unless the witness has properly asserted a Fifth Amendment right to remain silent. This applies in both civil and criminal cases. *Gowen v. Wilkerson*, 364 F. Supp. 1043 (W.D. Va. 1973).

(c) Witnesses Granted Immunity and Who Refuse to Testify When Called by the Commonwealth

Witnesses called by the court or the attorney for the Commonwealth and giving evidence for the prosecution may not be proceeded against for any offense of giving, or offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify, and for refusing to answer questions may, by the court, be punished for contempt. Va. Code Ann. § 18.2-445.

(10) Refusal to Cooperate with Attorney is Not Contempt

A defendant cannot be held in contempt for refusing to cooperate with his attorney. *Green v. Commonwealth*. 211 Va. 727, 180 S.E.2d 531 (1971).

(11) Failure to Pay Fines, Costs, Restitution or Penalty (§ 19.2-358)

When an individual obligated to pay a fine, costs, forfeiture, restitution, or penalty defaults in the payment or any installment payment, the court, on motion of the Commonwealth's attorney, an attorney for a locality in cases of violation of a local law or ordinance, or upon its own motion, may require him to *show cause* why he should not be confined in jail or fined for nonpayment. A show cause proceeding shall not be required prior to issuance of a capias if an order to appear on a date certain in the event of nonpayment was issued pursuant to Virginia Code Section 19.2-354 (installment payments or deferred payment) and the defendant failed to appear. Va. Code Ann. § 19.2-358.

A "fine" under Section 19.2-358 is a pecuniary penalty if defendant is convicted of a "crime." Va. Code § 19.2-339. An infraction is not a felony or misdemeanor, and thus, it is not criminal. Va. Code Ann. § 46.2-100. *Turnbull v. County of Spotsylvania*, No. 0532-11-2, 2012 Va. App. LEXIS 24 (Jan. 31, 2012) (unpublished).

The defendant may be punished only if the defendant fails to show that the failure to pay was neither:

(a) attributable to an intentional refusal to obey the sentence or the order of the court, nor

(b) attributable to his failure to make a good faith effort to obtain the necessary funds for payment.

According to Virginia Code Section 19.2-358, the court may order the defendant confined for contempt for a term not to exceed sixty (60) days or impose a fine not to exceed $500. The court may provide in its order that payment or satisfaction of the amounts in default at any time will entitle the defendant to his release from such confinement, or after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of such amounts.

Under Virginia Code Section 19.2-305, a defendant on probation may be required to pay fines, costs, or restitution. However, subsection C states:

> No defendant shall be kept under supervised probation solely because of his failure to make full payment of fines, fees, or costs, provided that, following notice by the probation and parole officer to each court and attorney for the Commonwealth in whose jurisdiction any fines, fees, or costs are owed by the defendant, no such court or attorney for the Commonwealth objects to his removal from supervised probation.

(12) Failure of Defendant to Surrender to Sheriff to Serve Sentence

In 2009, the General Assembly addressed the issue of a defendant failing to submit to the custody of a sheriff to serve a sentence. It added the following language to Section 19.2-298:

> Whenever any person willfully and knowingly fails to surrender or submit to the custody of a sheriff as ordered by a court, any law-enforcement officer, with or without a warrant, may arrest such person anywhere in the Commonwealth. If the arrest is made in the county or city in which the person was ordered to surrender, or in an adjoining county or city, the officer may forthwith return the accused before the proper court. If the arrest is made beyond the foregoing limits, the officer shall proceed according to the provision of § 19.2-76, and if such arrest is made without a warrant, the officer shall procure a warrant from the magistrate serving the county or city wherein the arrest was made, charging the accused with contempt of court.

(13) Protective Order Violations

In cases involving violations of protective orders (Sections 19.2-152.8, 19.2-152.9, or 19.2-152.10), Code Section 18.2-60.4 specifically prohibits a separate finding of contempt. *See* Virginia Code Section 18.2-60.4 for the penalties for protective order violations.

(14) Suspended Sentence Terms Violations

Failure to abide by the terms of a suspended sentence may give rise to a show cause or capias pursuant to Virginia Code Section 19.2-306. The enforcement mechanisms of Sections 19.2-306 and 19.2-358 are not mutually exclusive. *Porter v. Commonwealth*, 65 Va. App. 467, 475 (2015).

(15) Local Probation Violations

Violation of an order to complete a local probation program may give rise to a capias under Code Section 19.2-303.3. An officer of the program may seek a warrant from any "judicial officer."

(16) Work Release Violations

Failure to serve a sentence while in a work release program constitutes a Class 1 misdemeanor. *See* Va. Code Ann. § 53.1-131.

(17) Failure to Serve Weekends or Nonconsecutive Days in Jail

If a defendant willfully fails to report to serve a sentence of nonconsecutive days in jail, intermittent confinement shall be revoked and a straight jail sentence imposed. Va. Code Ann. § 53.1-131.1.

(18) Home/Electronic Incarceration Violations

Home/electronic incarceration violations are Class I misdemeanors under Virginia Code Section 53.1-131.2. The court retains authority to remove an offender from this program.

(19) Failure to Comply with Support, Custody, or Visitation Orders

Virginia Code Section 16.1-278.16 authorizes juvenile and domestic relations district court judges to incarcerate a contemner for up to 12 months in jail for failure to comply with a custody, visitation or support order. A defendant under Virginia Code Section 16.1-278.16 can also be confined under Section 20-115 for an indeterminate period not to exceed 12 months. *See Thompson v. Commonwealth*, No. 0390-01-2, 2003 WL 231609 (Va. Ct. App. Feb. 4, 2003) (unpublished), *available at* http://www.courts.state.va.us/opinions/opncavwp/0390012.pdf.

B. CIVIL PROCEDURE

Chapter 1. Civil Jurisdiction

Va. Code §§ 16.1-77, -77.1, -77.2

A. Dollar Amount

1. The general district court has exclusive original jurisdiction over any claim not exceeding $4,500, excluding interest and attorney's fees claimed, including cases brought under the Virginia Tort Claims Act cases as pursuant to Virginia Code § 8.01-195.4.

2. The general district court has concurrent jurisdiction with the circuit court over any claim in excess of $4,500 and up to and including $25,000, excluding interest and attorney's fees claimed, including Virginia Tort Claims Act cases.

3. **Important note: The $25,000 limit does not apply** to

    a. Unlawful Detainer Actions pursuant to § 16.1-77(3) against any person obligated on the lease, or a contract of guaranty on the lease; or

    b. Unlawful Detainer Precipitated Claims, Cross-Claims or Counter-Claims pursuant to § 16.1-77(3); or

    c. Distress Actions Associated with Rent pursuant to § 16.1-77(1) if accrued within five (5) years (pursuant to § 55-230); or

    d. Overweight Vehicle Penalties involving liquidated damages on excess vehicle weights pursuant to § 16.1-77(1); or

    e. Forfeiture of a bond as pursuant to § 19.2-143. *See* § 16.1-77(1); or

    f. **Pursuant to § 16.1-77(5), the 25,000 limit does not apply to any claim, counter-claim, or cross claim in an interpleader action that is limited to the disposition of an earnest money deposit pursuant to a real estate purchase contract. Any such claim must be brought as set forth in § 8.01-364. However, pursuant to § 8.01-364(C), the General District Court does not have injunctive authority (unlike the statutory grant to the Circuit Court).**

B. Interest

The judgment rate of interest is 6% effective July 1, 2004. (§§ 6.1-330.54 and 8.01-332).

C. Subject Matter

1. The general district court generally has jurisdiction in law actions, partition of personality, (§ 16.1-77.2) interpleader and attachment proceedings where title to real estate is not involved. Note the language in § 16.1-77(1) referring to suits in equity. Arguably, this confers equity jurisdiction where only money is sought (e.g., rescission within jurisdictional dollar limits).

2. In particular, pursuant to § 16.1-77 (1) the general district court has jurisdiction to hear claims for:

    a. Specific personal property [detinue];

    b. Any debt, fine or other money;

    c. Damages for breach of contract;

    d. Damages to property, real or personal;

    e. Damages for injury to the person (including a medical malpractice action with procedures followed as set forth in § 16.1-83.1);

3. Pursuant to § 16.1-77 (2), attachment cases;

4. Pursuant to § 16.1-77 (3), unlawful entry or detainer;

5. Pursuant to § 16.1-77 (5), suits in interpleader involving personal property and money (note the unlimited dollar jurisdiction in real estate earnest money interpleader actions);

6. Actions arising under the Virginia Tort Claims Act, § 8.01-195.1;

7. The Virginia Freedom of Information Act (FOIA) (§ 2.2-3700 *et seq*.) may be enforced in the general district court or in circuit court. *See* §§ 16.1-77, -83, -106. Note that certain injunctive powers are given the general district court.

    a. Special time requirements apply to hearings on FOIA actions. Section 2.2-3713 mandates a hearing on a FOIA claim within seven (7) days if the party against whom the FOIA petition has received a copy of the petition at least three (3) working days prior to the filing of the petition.

    b. The Rules against the Unauthorized Practice of Law (UPL) are greatly relaxed as pursuant to § 2.2-3713(B).

8. Adjudicate and restore habitual offenders under §§ 46.2-359, 46.2-360 and 46.2-361 only when the defendant was declared an habitual offender in the general district court where he is seeking restoration;

9. Civil violations of § 18.2-76. *See* § 16.1-77 (8); and

10. Impliedly (*see* § 16.1-83.1) medical malpractice cases are included in the general jurisdiction set forth in number 1 above.

11. Declaration of Dangerous or Vicious Dog

    The General District Court is granted authority to review findings of an animal control officer determining that a dog is "Dangerous" or "Vicious," as defined by § 3.2-6540 of the Code of Virginia or a local ordinance paralleling it as pursuant to § 3.2-6540(M).

    The General Assembly sets forth the right of appeal and the level of proof required for cases involving the General District Court's findings that a dog is "dangerous" or "vicious" in subsection B of §§ 3.2-6540(B) and 3.2-6540.1(B) respectively of the Code of Virginia. The level of proof required is beyond a reasonable doubt.

12. Partition of personal property (pursuant to Va. Code § 16.1-77.2)

    a. valued at more than $20

    b. the court may compel partition

13. Civil Protective Orders issued pursuant to Virginia Code §§ 19.2-152.7:1 through 19.2-152.12

    a. These orders are unlike the traditional protective orders issued based on the relationships involved (often brought in J&DR courts) and sometimes in the general district courts as between unmarried individuals in relationships not covered by the jurisdiction of the J&DR statutes.

    b. These orders are premised upon the proscribed conduct and *are not* premised upon the relationship between the parties.

    c. A warrant is *not* a prerequisite to the protective orders.

    d. A protective order may include a grant of possession of companion animal pursuant to § 19.2-152.8(B)4.

14. Venue for Protective Orders (pursuant to Va. Code § 19.2-152.11)

    Venue is mandated for protective orders as follows:

    a. Where either party has a principal residence;

    b. Where the act of violence, force, or threat occurred;

c. Where a protective order was issued if, at the time the proceeding is commenced, the order is in effect to protect the petitioner or a family or household member of the petitioner.

15. Compensation for Counsel

In cases requiring the appointment of counsel under the Servicemembers Civil Relief Act, if there is no other provision under law for compensation of counsel or a guardian ad litem, the court may pay for services of counsel as permitted by § 19.2-163.

IMPORTANT NOTE: Even though the language of Va. Code § 19.2-152.8 states that "*Any* judge…may issue an order of protection…to protect the health or safety of *any person*," when read in conjunction with § 16.1-241(M) it is clear that *only* Juvenile and Domestic Relations District Court judges may issue orders of protection sought by or issued against a juvenile. The change is effective July 1, 2012 and eliminates the concurrent jurisdiction created when paragraph (M) was not in the text of § 16.1-241.

16. Cases brought pursuant to the Condominium Act (*see* § 16.1-77(9) for specific details)

a. Actions may include damages and abatement issues;

b. Actions in the General District Court default judgment may enter upon the sworn affidavit of the homeowner's association against the unit owner or the lot owner.

c. Injunction powers are granted to the General District Court for enforcement of abatement and remediation orders.

17. Effective July 1, 2016 the General District Court has concurrent jurisdiction with the Circuit Court to submit matters to arbitration where the amount in controversy is within the jurisdictional limits of the General District Court. Any party who disagrees with the order to compel arbitration may appeal the decision to the Circuit Court. Va. Code § 16.1-77 (10).

D. Venue

Va. Code § 16.1-76 (incorporates § 8.01-257 *et seq*.) establishes preferred and permissible venues.

Chapter 2. Small Claims Division

(Va. Code §§ 16.1-122.1 through -122.7)

For *pro se* litigants only

(Expanded definition of *pro se* is set forth in paragraph (d) below)

Required division of all general district courts.

A. Jurisdiction

1. No more than $5,000 (exclusive of interest)

2. Concurrent with general district court

B. Subject Matters (§ 16.1-122.3)

1. As set forth in § 16.1-77 (1) only

2. Does not include attachment, unlawful detainer, interpleader

   NOTE: despite meeting the dollar limit, no suits are permitted against the Commonwealth or its agents or employees (§ 16.1-122.1).

C. How Actions are Commenced (Special Forms Provided to Clerk)

1. By small claims civil warrant; and

2. On a separate docket; and

3. Trial on the return date.

4. Continuances discouraged and granted "only for good cause shown" (§ 16.1-122.3(E))

5. Limited pleadings (§ 16.1-122.3(F)). No pleadings other than:

   a. warrant;

   b. answer;

   c. grounds of defense;

   d. counterclaims not to exceed $5,000.

D. Special Unauthorized Practice of Law Rules (§ 16.1-122.4 (A)(1) AND (2))

1. Corporation or partnership may be represented by owner, general partner, officer or employee who may plead and try the case without an attorney.

2. Attorney may appear *pro se* but not in a representative capacity.

3. A party may have a friend or relative represent someone whom, in the judge's opinion, is unable to understand or participate and is not an attorney.

E. Removal

Defendant may remove the case to general district court at any time prior to rendering of decision by court (§ 16.1-122.4(B)).

An attorney for the defendant may appear for the sole purpose of removing the case to the regular general district court.

F. Rules of Evidence Suspended (§ 16.1-122.5)

1. Sworn Testimony

2. Informal proceeding

3. All relevant evidence may come in (subject to court's discretion)

    a. Except privileged communications

G. Object of Small Claims Division

1. To determine rights on merits

2. To dispense expeditious justice between parties

H. Judgment and Collection

Same as in general district court (§ 16.1-122.6).

I. Appeals (§ 16.1-122.7).

Same as in general district court.

Chapter 3. Process

A. Types

1. Warrant in debt. § 16.1-79, Rule 7B:4(a).

2. Motion for judgment. § 16.1-81, Rule 7B:4(a). Note: motion for judgment pleadings are subject to Rules of Court for Courts of Record (§ 16.1-82).

3. Service of motion for judgment filed with clerk's office.

4. Summons. This method is not mentioned in § 16.1-79 but listed in Rule 7B:4 (a).

5. Electronic filing of civil cases is allowed and General District Courts must accept them under specific requirements set forth in § 16.1-79.1.

B. Return Date

1. "The day named in a writ or process, upon which the officer is required to return it." Black's Law Dictionary, 123 (7th ed.).

2. The return date on a warrant (§ 16.1-79) and motion for judgment (§ 16.1-81) must be within sixty (60) days from the date of service.

C. Service of Process (§§ 16.1-80 and -82 incorporate § 8.01-285 *et seq*.)

1. Time Periods

    a. Service must be made at least five (5) days, but no more than sixty (60) days before the return date. (§§ 16.1-79 to 16.1-82)

    b. All parties may consent to waive the five (5) day period (§ 16.1-83).

2. Resident Defendants

    a. Service is usually accomplished under § 8.01-296 by a person authorized under § 8.01-1-293 and meeting requirements set forth in § 8.01-325 (2), i.e.

        (i) the sheriff (*see* § 8.01-295 for geographic limits) or

        (ii) anyone over eighteen (18) who is not a party and not interested in the subject matter.*

        *Section 8.01-296 added Paragraph 4 in the 2008 amendments to allow any notices required by the rental agreement or by law upon the tenant or occupant under a rental agreement within the purview of Chapter 13 of

Title 55 (Sec. 55-217 *et seq*. covering common law tenancies). It does not appear to allow such method of service for Virginia Residential Landlord and Tenant Act cases, as they are under Chapter 13.2.

NOTE: Only a sheriff or high constable may execute writs of possession or levy upon property, and only a sheriff or high constable or law enforcement officer may serve a capias or show cause. § 8.01-293 (B).

b. Domestic corporations § 8.01-299, § 13.1-637 (stock corporations), § 13.1-836 (non-stock corporations)

NOTE: Proof of Service is to be made on the original *and* the copy (§ 8.01-296(2)(c)).

3. Proof of Service has different legal effects depending upon who served it. (§ 8.01-326). Service in most cases will be pursuant to § 8.01-296. Effective service on natural persons may be:

(Listed in order of preference)

a. Personal service;

b. Substituted service as follows: at party's home, to a family member who is age sixteen (16) or over;

c. If no family members are available, then service is good only if all the following conditions are met:

(i) by posting at main entrance door;

AND

(ii) at least ten (10) days before the return date mailing a copy to the party and filing a certificate of mailing with the clerk, mark original and copy with proof of service. Va. Code § 8.01-296 (b);

d. Only if other methods fail, then by order of publication.

(i) § 8.01-325 sets forth the requirements for filing the return as well as the information required.

(a) § 8.01.326.1-provides that service is not effective unless certificate of compliance is filed with the Clerk of the Court by the State Corporation Commission, the Secretary of the Commonwealth or the Department of Motor Vehicles.

(b) Foreign corporations §§ 8.01-301, 13.1-766

(c) Municipal/county governments § 8.01-300; note also § 8.01-222

(d) Partnerships §§ 8.01-304, 50-8.1

(e) Unincorporated associations §§ 8.01-15, -305, -306

(f) Non-resident defendants

(g) Long arm statute § 8.01-328 *et seq.*

(h) Non-Resident Motorist/Pilot Act § 8.01-307 *et seq.*

(ii) Process Received in Time § 8.01-288.

(a) If the papers were actually received in the Commonwealth in time by the person to whom they were directed, no matter how they got there, service is good.

(b) Note: Returns have different legal effects, depending on *who* served papers. § 8.01-326.

(iii) Late Return Shall Not Invalidate Service

Failure to make a return within the time specified shall not invalidate service or any judgment rendered thereon. (§ 8.01-294).

4. Effective service on corporate persons may be (as pursuant to § 8.01-299):

(Listed in order of preference)

a. Personal service on any officer, director, or registered agent of such corporation;

b. By substituted service in accordance with § 13.1-637 and on non-stock corporations pursuant to § 13.1-836; or

(i) If the registered address of the corporation is a single family residential dwelling, by substitute service on the registered agent of the corporation in the manner of subdivision 2 of § 8.01-296;

AND

(ii) at least ten (10) days before the return date mailing a copy to the party and filing a certificate of mailing with the clerk, mark original and copy with proof of service. Va. Code § 8.01-296(b).

c. Only if other methods fail, then by order of publication

D. Trial Date Information

1. The warrant or motion for judgment must inform the parties how contested cases are set for trial. There is a designated place on the face of the warrant in debt to indicate whether the trial will be held on the initial return date. Some courts expect to try contested cases on the return date, and the parties should come prepared for this. Other general district courts do not try contested matters on the return date but use this as an opportunity to set the matter for a time and date reserved for hearing contested matters.

2. Each general district court is required to adopt a policy on this question and to promulgate it so litigants will know how to complete this portion of a motion for judgment or warrant. Rule 7B:3(c).

3. Va. Code § 16.1-83 prohibits trial within 5 days of service unless all parties consent. But Freedom of Information cases are controlled by § 2.2-3700 *et seq*. and shall be conducted within the time limits set forth in § 2.2-3713 (i.e. within 7 days if proper notice provided).

E. Actions Brought By and Against Persons Under a Disability (PUD)

1. Actions Brought By PUDs: Infants **must** sue by next friend. Other PUDs may sue by next friend. If the PUD is other than an infant, the suit may also be brought in the name of a committee, if there is one. BURK'S PLEADING & PRACTICE § 63 & § 64, (4th ed.); 10 A.M.J. § 24 & § 25. Insane and Other Incompetent Persons.

   When the suit is brought by next friend, the style should be "[name of PUD], who sues by next friend, [name of next friend]." If the suit is by Committee, style should be "_____, Committee of _____, a Person Under a Disability."

   Note: courts do not have authority to order prisoners transported to court for general district court civil cases. *Commonwealth v. Brown*, 259 Va. 697 (2000).

2. Against PUDs: The PUD must have a guardian *ad litem* appointed unless the statutory exception applies. § 8.01-9.

3. Failure by a PUD to sue by next friend or, when sued, failure to appoint a guardian *ad litem*, results in any judgment in favor of the PUD being good and any judgment against the PUD being voidable. § 8.01-678.

F. Amendments to Pleadings, Rule 7A:9

While it is discretionary with the court, leave to amend should be liberally granted in furtherance of the ends of justice.

G. Counsel of Record

1. Except in the case of court-appointed counsel, substitution of counsel must be permitted. (§ 16.1-69.32:1)

    a. No order required (except as to court-appointed counsel).

    b. No appearance required.

    c. Representation of counsel is sufficient.

2. Counsel of Record may not withdraw without leave of court after notice to the client. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(C), Rule 7A:3.

H. Unauthorized Practice of Law

A useful chart prepared by the Honorable Morgan Armstrong, Henry County General District Court, is included in **Appendix A** of this BENCHBOOK.

Note: In 2009 the General Assembly created an exception to the unauthorized practice of law rules so as to allow certain officers of closely held corporations to represent the corporation where:

1. The amount in controversy does not exceed $2,500 (as opposed to the same actions allowed up to $5,000 in Small Claims Court where no lawyers can represent a client. (*See* § 16.1-122.4 (A)(1) AND (2)); and

2. Interest, attorney's fees contracted for, and costs do not count toward the $2,500 limit; and

3. There are no more than 5 stockholders; and

4. The stock is not publicly offered or planned to be offered; and

5. With the unanimous consent of all the shareholders.

If those prerequisites exist, an officer may represent, plead and try the case, and do all other things an individual may do, without an attorney. § 16.1-81.1.

Chapter 4. Pre-Trial Matters

A. Removal, § 16.1-92

Effective July 1, 2007, the General Assembly has eliminated the right of removal to the Circuit Court. The change is substantial and repeals a long-standing option of civil defendants.

B. Venue, § 8.01-257 *et seq*.

1. Class A or Preferred Venue, § 8.01-261

    a. These forums will mostly apply to actions that can be brought only in the circuit court. As to actions brought under the Administrative Process Act, *see* § 2.2-4003.

    b. Unlawful detainer actions *must* be brought where the land is located. (§ 8.01-261(3)(g))

    c. Suits within the dollar limits of the general district court's jurisdiction and arising under the Virginia Tort Claims Act, § 8.01-195.4. Venue for these suits is set under § 8.01-261[18] as:

        (i) the County or City where the claimant resides; or

        (ii) the County or City where the act or omission complained of occurred; or

        (iii) if the claimant resides outside the Commonwealth and the act or omission complained of occurred outside the Commonwealth, the City of Richmond.

2. Class B or Permissible Venue, § 8.01-262 (summary of principal permissible venues)

    a. Where the defendant resides or has a principal place of employment. If a corporation, then where certain officers reside.

    b. Where, by designation of the defendant or by operation of law, there is a statutory agent, where such agent's office is.

    c. Where a defendant regularly conducts substantial business activity.

    d. Where the cause of action, or any part thereof, arose.

    e. In actions to partition personal property:

        (i) where the property is located;

(ii) where evidence of the property is located; or

(iii) if neither (a) nor (b) apply, then where the plaintiff resides.

f. If the action is against a fiduciary, where the fiduciary qualified.

g. In an action for misdelivery of a message, where it was transmitted or accepted or misdelivered.

h. In an action based on delivery of goods, where the goods were received.

i. If no other forum is available under § 8.01-262(1) through § 8.01-262(8), then any county or city where the defendant has debts or property subject to seizure.

j. If all defendants are unknown or non-residents, or if no other forum is available, then where the plaintiff resides.

3. Objections to Venue, §§ 8.01-264, -265, -276

a. Can be made at any time before trial begins by motion to transfer.

b. The motion must state:

(i) why venue is improperly laid,

(ii) where the party believes venue to be proper (§ 8.01-264), and

(iii) what place or places in the Commonwealth would constitute proper venue (§ 8.01-276).

c. The issue must be in writing and filed, but may be raised by formal written motion, by letter, or other written communication.

d. Va. Code § 8.01-264(c) requires the initial pleading in the general district court to advise the defendant of his right to object to venue if brought other than as set forth in §§ 8.01-261, -262 or -263, but does not specify the particular language to be used. The WARRANT IN DEBT is in a form approved by the Committee on District Courts. The court shall ensure that motions for judgment contain similar language. Rule 7B:3(b).

e. If there are multiple defendants, all entitled to the same class of venue, then if venue is proper as to any one of them, it is good as to all of the defendants. § 8.01-263.

f. If a defendant is entitled to several forums as venue, venue is proper as long as the plaintiff selects one of these locations. §§ 8.01-261, -262.

g. Statutory *forum non conveniens*, § 8.01-265. The court is permitted in some circumstances to decline to follow the specific venue provisions of §§ 8.01-261, -262.

h. If the motion to transfer is sustained, the court orders the venue transferred to a proper forum and must notify each party. § 8.01-264.

4. Sanctions for Improper Filing or Objection

a. The court is mandated, upon granting a motion to transfer, to award compensation to the defendant for inconvenience, delay, etc. § 8.01-266.

b. The Court is mandated to award compensation to the plaintiff when denying a frivolous motion to transfer.

c. The Court may award attorney's fees under the same circumstances.

d. Sanctions are required for certain pleadings or motions improperly made. § 8.01-271.1.

e. Federal law(s) may establish or restrict venue and provide for sanctions for violations even though the action is brought in a state court. For example, see the Federal Trade Commission Act and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*., which limit how and where debt collections (including an attorney collecting a debt) can be brought as well as actions under the Fair Labor Standards Act.

5. Appeals of Venue, § 16.1-106

Appeals of venue decisions go to the circuit court in the jurisdiction in which the case was initially filed and not to where the case may have been ordered transferred.

C. Bills of Particulars and Grounds of Defense

1. The general district court can require the plaintiff to file a written bill of particulars. Remedies for failure to follow the order include summary judgment in favor of adverse party or exclusion of evidence as to matters not described in the pleading. Va. Code § 16.1-69.25:1, Rule 7B:2.

Va. Code § 16.1-88.03 permits corporations, partnerships, limited liability companies, limited partnerships, professional corporations, professional limited liability companies, registered limited liability partnerships/limited partnerships and business trusts to file without an attorney specified pleadings in cases under § 16.1-77(1) or (3) only and not

exceeding $25,000. However, with the notable exception set forth below, they may not file bills of particular or grounds of defense or argue motions, issue subpoenas, rules to show cause, or capiases; file or interrogate at debtor interrogatories; or to file, issue or argue any other paper, pleading or proceeding. § 16.1-88.03(B).

Notable Exception: In 2009 the General Assembly created an exception to the unauthorized practice of law rules so as to allow certain officers of closely held corporations to represent the corporation where:

a. The amount in controversy does not exceed $2,500; and

b. Interest, attorney's fees contracted for, and costs do not count toward the $2,500 limit; and

c. There are no more than 5 stockholders; and

d. The stock is not publicly offered or planned to be offered; and

e. With the unanimous consent of all the shareholders.

If those prerequisites exist, an officer may represent, plead and try the case, and do all other things an individual may do, without an attorney. § 16.1-81.1.

See Heading "H" below for help in determining what actions entities may take in court.

2. The general district court can require a defendant to file a written grounds of defense. *See* Rule 7B:2.

3. The court may impose sanctions for failure to comply with an order to file such pleadings.
Rule 7B:2.

Parties not represented by counsel, and who have made an appearance in the case, must keep the clerk informed of any change in the party's address for notice purposes (§ 16.1-88.03-D). Absent such notice, pleadings mailed to the last known address as shown in the court's file, is deemed adequate notice.

D. Discovery

1. Basically there is no discovery in the general district court on a warrant in debt. Part Four of the Rules of Court is expressly applicable to courts of record (presumably excluding application to courts not of record). (Rule 4:0). Under § 16.1-89, a subpoena for certain records, documents, and tangible evidence can be issued using Rule 4:9. However, § 16.1-82 seems to direct that the Rules of Circuit Court apply to *motions for judgment* filed in the District Court. Since statutes trump rules, arguably there is extensive discovery in an action brought in the General District Court by motion for

judgment. But, there are two specific parts of the last sentence that may limit any such right. Namely, the phrase "as nearly as practicable" may allow the judge broad discretion as to what is practicable in his or her court. Also, the technical definition of motion for judgment in this and other statutes is no longer applicable as the General Assembly has eliminated the law and equity distinctions in filing pleadings, and all actions are now labeled "complaints" in courts of record. The Supreme Court of Virginia has modified its rules to reflect the change and so there are no longer any rules in the courts of record applicable to motions for judgment.

2. Filing an objection in and of itself stays the subpoena if it is issued:

    a. by an attorney; and

    b. compliance is required within less than fourteen days after service of the subpoena.

E. Affidavits in Contract Claims, §§ 16.1-88, 8.01-28

1. A plaintiff in a contract claim, express or implied, may attach to the pleadings and have served on the defendant an affidavit as to the validity of the claim along with a copy of any statement of account. If he does so, the plaintiff has a statutory right to a continuance if the defendant denies the debt under oath. If the defendant does not deny the debt under oath, the plaintiff is entitled to judgment.

2. Rule 1:10, if applicable to the general district court, may in some circumstances result in a waiver of the right to have the debt denied under oath. *See Sheets v. Ragsdale*, 220 Va. 322, 257 S.E.2d 858 (1979).

F. Statutes of Limitation, § 8.01-228 *et seq.*

1. Commencement of Action

    a. Every action must be commenced within the period of limitation. § 8.01-228

    b. An action is deemed commenced pursuant to § 16.1-86:

        (i) With a civil warrant when the memorandum required by § 8.01-290 is filed with the clerk, magistrate, or other authorized official and the required fee is paid, or

        (ii) With a motion for judgment when it is filed with the court.

    c. Va. Code § 16.1-86 requires the clerk to stamp the face of any pleading with the date and time of filing.

2. Contracts, § 8.01-246

    a. In actions upon a recognizance (other than on bail on a civil case which is three years not counting certain periods as set forth in § 8.01-246(1)), ten years.

    b. Non-UCC contracts: § 8.01-246 (three years oral) (five years written).

    c. UCC contracts: § 8.3A-118 (notes, commercial paper; three, six, or ten years).

    d. Note the provision in the last paragraph of § 8.01-246 dealing with products liability cases.

3. Torts, § 8.01-243

    a. Personal injury/fraud § 8.01-243A (two years). Va. Code § 8.01-243(C) sets forth several exceptions to the two year general rule.

    b. Injury to property, § 8.01-243 B, including vicarious liability of parents, and parental claims for reimbursement for medical expenses to their infant children (Note: §§ 8.01-43 and -44 for $2,500 limit as to parents) shall be brought within five years.

    c. Drug Dealer Liability Act, § 8.01-227.7 (two years after the parent's child turns eighteen).

    d. Medical malpractice actions (2 years after the last act or omission giving rise to the claim for claims of those 10 years of age or older) § 8.01-243.1.

4. An action for libel, slander or defamation shall be commenced within 1 year after the cause of action accrues. However, the one year is tolled for anonymous or false identity of the tortfeasor in cases arising on the Internet.

5. Other personal actions, § 8.01-248 (two years)

6. Disability saving provisions, § 8.01-229

7. When the period begins to run, § 8.01-230, -233, -249

    Generally from the date a cause of action accrues, but there are a growing number of exceptions, both statutory and case law. *See Farley v. Goode*, 219 Va. 969, 252 S.E.2d 594 (1979); *Wood v. Carwile*, 231 Va. 320, 343 S.E.2d 346 (1986); *Harbour Gate Owners' Ass'n v. Berg*, 232 Va. 98, 348 S.E.2d 252 (1986); *Stone v. Ethan Allen, Inc.*, 232 Va. 365, 350 S.E.2d 629 (1986).

8. Defense of statute of limitations, § 8.01-235

   The defense can only be raised as an affirmative defense as set forth in a responsive pleading. Arguably, this would not apply to the General District Court since there is no general requirement to file any responsive pleadings absent a motion and an order. However, the specific directive of the statute is something to consider.

9. Tolling § 8.01-229

   a. Infancy (in Virginia to age eighteen): all claims are tolled, except for medical malpractice. (*See* § 8.01-243.1.)

   b. Disability tolls claims while condition persists.

   c. Pendency of suit tolls running of limitations clock.

   d. Nonsuit: party has longer of original period remaining, or six months, whichever is longer.

   e. Death of a party.

G. Counterclaims and Cross-Claims §§ 16.1-88.01, -88.02

1. These pleadings can be filed anytime before trial.

2. The claim may be for money or any matter which would entitle him in equity in the nature of damages.

3. It must be in writing, and must be within the jurisdictional limits of the general district court.

4. The subject matter of a counterclaim does not have to be related to that of the initial action. With a cross-claim, its subject matter must arise out of the plaintiff's original claim.

5. Note the reference in § 16.1-88.01 to "relief in equity in the nature of damages."

H. Amendments to Pleadings
Rule 7A:9

While it is discretionary with the court, leave to amend should be liberally granted in furtherance of the ends of justice.

Chapter 5. Trial

A. Guidelines

Virginia Code § 16.1-93

1. Every proceeding shall be tried according to principles of law and equity.

2. Where law and equity conflict, equity shall prevail.

3. No warrant, motion or other pleading shall be dismissed by reason of a mere defect irregularity or omission in the proceeding or form of the pleadings when the same may be corrected by a court order.

4. The court may direct such proceedings and enter such orders as may be necessary to correct such defects, irregularities and omissions to bring about a trial of the merits of the controversy and promote substantial justice to all parties.

5. The court may make such provisions as to costs and continuances as may be just.

B. Order of Interrogation and Presentation

Virginia Code § 8.01-406; Virginia Rules of Evidence, Rules 2:603, 2:604, 2:611

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

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

3. Presentation of 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.

4. Scope of cross-examination in a civil case should be limited to the subject matter of the direct examination and matters affecting the creditability of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. In criminal cases where the defendant testifies and denies guilt, the court may allow cross-examination into any matter relevant to guilt or innocence.

5. 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.

C. Calling and Interrogation of Witnesses by Court
Virginia Rules of Evidence, Rule 2:614

1. 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.

2. 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.

D. Exclusion of Witnesses
Virginia Code § 8.01-375 (For Criminal Cases *see* § 19.2-265.1 and § 19.2-184);
Virginia Rules of Evidence, Rule 2:615

1. Upon its own motion the court may require the exclusion of every witness.

2. Upon the motion of any party, the court shall require the exclusion of every witness.

3. Exceptions to the rule, as a matter of right:

    a. Each named party who is an individual.

    b. One officer or agent of each party which is a corporation or association.

    c. An attorney alleged in a habeas corpus proceeding to have acted ineffectively.

4. Upon the request of all parties, the court may allow one expert witness for each party to remain in the courtroom.

5. In cases pertaining to distribution of marital property (§ 20-107.3) or determination of child or spousal support (§ 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.

E. Impeachment of Evidence and Witnesses

See Virginia Rules of Evidence, Rules 2:607 to 2:610, 2:613

2:607 Impeachment of Witnesses

2:608 Impeachment by Evidence of Character and Conduct of Witness

2:609 Impeachment by Evidence of Conviction of Crime

2:610 Impeachment by Bias

2:613 Prior Statements of Witness

F. Evidence Statutes

1. Relevant Evidence
   Virginia Rule of Evidence 2:401

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

2. Auto Damage Estimates or Diminution in Value
   Virginia Code § 8.01-416

   a. An itemized estimate or appraisal sworn to by a person who makes an oath

      (i) that he is a motor vehicle repairman, estimator, or appraiser qualified to determine the amount of such damage or diminution in value; as to the approximate length of time that he has engaged in such work; and

      (ii) as to the trade name and address of his business or employer.

   b. Admissibility in a civil action, contract, or tort to recover damages to a motor vehicle

      (i) A sworn estimate or appraisal *may* be presented regarding damages of $2,500 or less.

      (ii) A sworn estimate or appraisal shall not be admitted regarding damages in excess of $2,500 unless by consent of the adverse party or his counsel, or unless a true copy is mailed or delivered to the adverse party or his counsel not less than seven days prior to trial date.

   c. Motor vehicle value
      Virginia Code § 8.01-419.1

      Provides for admissibility of retail values of vehicles set forth in National Automobile Dealers Association "yellow" or "black" books or any vehicle valuation service regularly used and recognized in the automobile industry.
      NOTE: Subject to rebuttal evidence that value does not reflect actual condition of vehicle.

3. Medical Reports and Medical Bills
   Virginia Code § 16.1-88.2

   a. Statute applies to a civil suit tried in general district court or appealed to circuit court by any defendant to recover damages for personal injuries or to resolve any dispute with an insurance company or health care provider.

b. Reports from a treating or examining health care provider and the records of a hospital or similar medical facility at which treatment or examination was performed regarding the extent, nature, and treatment of the injury, the examination of the person injured, and the costs of such treatment and examination *shall* be admitted, *if* the party intending to present evidence by use of a report gives the opposing party or counsel a copy of the report and written notice of such intention ten days in advance of trial *and if* attached to the report is a sworn statement of the treating or examining health care provider that:

   (i) the person named was treated or examined by such health care provider;

   (ii) the information contained in the report is true and accurate and fully describes the nature and extent of the injury as sworn to by the provider or the custodian of such report; and

   (iii) that any statement of costs contained in the report is true and accurate.

   (iv) "Health care provider" may include those licensed outside of the Commonwealth.

c. Hospital or other medical-facility records shall be admitted, if attached to a sworn statement of the custodian that it is a true and accurate copy of such record.

d. Medical Opinion Evidence – Chiropractors or physician assistants (§ 8.01-401.1) and Podiatrists (§ 8.01-401.2) may testify as expert witnesses with some limitations when testifying against a doctor of medicine or osteopathic medicine.

e. Authenticity and Reasonableness of Medical Bills – Virginia Code § 8.01-413.01

   In action for personal injury or medical expense benefits payable under a motor vehicle insurance policy pursuant to § 38.2-124 or § 38.2-2201, authenticity of bills for medical services and reasonableness of charges of health care provider shall be rebuttably presumed upon

   (i) Plaintiff identifying bill or authenticated copy; and

   (ii) Plaintiff testifying as to

      - Identity of health care provider
      - Explaining circumstances surrounding receipt of bill
      - Describing services rendered
      - That services rendered were for treatment of injuries at issue

   Requirement: subject medical bills must be provided to opposing party 30 days prior to trial.

House Bill 232 (Chapter 243) (2016) amended Va. Code § 8.01-413.01 to allow a plaintiff's guardian, agent under an advance directive, or agent under a power of attorney to identify a medical bill and provide testimony on the bill to establish a rebuttable presumption of authority and reasonableness of the bill where the court finds the plaintiff is unable to provide testimony.

f. Blood/Alcohol Written Reports from Hospital/E.R. – Va. Code § 8.01-413.02

In any civil proceeding, written reports or records of blood alcohol tests conducted upon persons receiving medical treatment in hospital or E.R. are admissible as a business records exception to the hearsay rule.

4. Self-Authenticating Business Records
Virginia Code § 8.01-390.3

As to any civil proceeding, with 15 days' notice and no objection being made, business record authenticity and foundation requirements are deemed to be satisfied under Virginia Rules of Evidence, Rule 2:803. Proponent needs to send (1) notice of reliance on certification by affidavit or declaration by records custodian or other qualified witness and (2) copy of such business record and certification. Objections must be lodged within 5 days of such notice. If objection made, authenticity and foundation requirements shall be met by witness testimony.

5. Judicial Notice
Virginia Code § 8.01-385 *et seq.*; Virginia Rules of Evidence, Rules 2:201 to 2:203
NOTE: Judicial notice can be taken at any stage of the proceeding (Rule 2:201(b))

a. Definitions, Virginia Code § 8.01-385

b. Judicial Notice of Laws, Virginia Code § 8.01-386; Virginia Rules of Evidence, Rule 2:202

(i) Whenever in a civil action (criminal, *see* § 19.2-265.2) it becomes necessary to ascertain what the law of Virginia, another state, another country or any political subdivision or agency of the same is or was, the court shall take judicial notice.

(ii) The court may consult any book, record or other official document and may consider any evidence or information offered on the subject.

c. Judicial Notice of Signatures, Virginia Code § 8.01-387

Signature of judges or governor to any judicial or official document.

d. Judicial Notice of Official Publications (Virginia Code § 8.01-388; Virginia Rules of Evidence, Rule 2:203).

The court shall take judicial notice of the contents of all official publications of Virginia and its political subdivisions and agencies required to be published pursuant to law and of the same publications of other states, countries and political subdivisions and agencies.

6. Tables of Speed and Stopping Distances
Virginia Code § 46.2-880

a. All courts shall take notice of the tables of speed and stopping distances of motor vehicles.

b. Such tables shall not raise a presumption in such actions in which inquiry thereon is pertinent to the issues.

c. The courts shall further take notice that the above table has been constructed, using scientific reasoning, to provide fact finders with an average baseline for motor vehicle stopping distances for (1) for a vehicle in good condition and (2) on a level, dry stretch of highway, free from loose material.

d. Deviations from these circumstances do not negate the usefulness of the table, but rather call for additional site-specific examination and/or explanation.

e. Site-specific research may be utilized under any circumstances.

7. Judicial or Official Certified Records (Virginia Code § 8.01-389 *et seq.*)

a. Records of any judicial proceeding and any other official records of any Virginia court shall be received as *prima facie* evidence, provided that such records are authenticated and certified by the clerk of the court.

b. Judicial proceedings shall include the review and issuance of a temporary detention order under Virginia Code § 37.2-809 or § 16.1-340.1.

c. Such records of any court of another state, country or the United States shall be received similarly, provided such records are authenticated by the clerk of the court.

d. Any recital in a deed or deed of trust conveying any interest in real property.

e. Every Virginia court shall give such records of non-Virginia courts the full faith and credit given to them in the courts of the jurisdiction "from whence they come." *Exception:* a non-Virginia court entering an injunction regarding access to Virginia courts without notice and a hearing (*see* Virginia Code § 8.01-389(B1)).

f. *See* Virginia Code § 8.01-420.3 concerning admission of transcripts, duly certified in writing by the reporter, without the necessity of the presence of the reporter; and requirement for consent when terminating recordation of proceedings.

8. Testimony in Cases by or Against Incapacitated Person
Virginia Code § 8.01-397; Virginia Rules of Evidence, Rule 2:804(b)(5)

a. 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 such person, no judgment or decree shall be rendered in favor of an adverse or interested party founded on uncorroborated testimony.

b. "From any cause" does not include the situation where the incapacitated party has rendered himself unable to testify by an intentional self-inflicted injury.

c. Whether the adverse party testifies or not, all entries, memoranda, and declarations by the incapacitated party made while he was capable of testifying, relevant to the matter in issue, may be received as evidence in all proceedings, including those to which the person under a disability is a party.

d. If authentication not admitted in requests for admissions, the record must be authenticated by a person who is not the author of the entry and who is not an adverse or interested party to the case.

9. Privilege Generally

See Virginia Rules of Evidence, Rules 2:501 to 2:507.

10. Husband and Wife Privilege
Virginia Code § 8.01-398; Virginia Rules of Evidence, Rule 2:504

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

b. In any civil proceeding, a person has a privilege to refuse to disclose, or to prevent anyone else from disclosing, any confidential communication between his spouse and him during the marriage, regardless of whether he is married to that spouse at the time he objects to the disclosure.

c. Privilege may not be asserted in any proceeding in which 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.

11. Physician-Patient Privilege
    Virginia Code §§ 8.01-399, 8.01-400.2; Virginia Rules of Evidence, Rule 2:505, 2:506

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

    c. No disclosure of diagnosis or treatment plan, facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon 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.

    d. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

    e. Disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice.

    f. Exceptions to the prohibitions: *see* Virginia Code § 8.01-399 D(1-3).

G. Appearance and Non-appearance by Parties
Rules 7B:7, 7B:8 and 7B:9

1. Rule 7B:7. Appearance by Plaintiff

   Except as may be permitted by statute, no judgment for plaintiff shall be granted in any case except on request made in person in court by the plaintiff, plaintiff's attorney, or plaintiff's regular and bona fide employee.

2. Rule 7B:8. Failure of Plaintiff to Appear

   a. If neither the plaintiff nor the defendant appears, the court shall dismiss the action without prejudice to the right of the plaintiff to refile.

b. If the defendant, but not the plaintiff, appears on the return date and the case is not before the court for trial, the court shall dismiss the action without prejudice to the right of the plaintiff to refile.

c. If the defendant, but not the plaintiff, appears on the trial date and:

(i) the defendant admits owing all or some portion of the claim, the court shall dismiss the action without prejudice to the right of the plaintiff to refile; but if

(ii) the defendant denies under oath owing anything to the plaintiff, the court shall enter judgment for the defendant with prejudice to the right of the plaintiff to refile.

3. Rule 7B:9. Failure of Defendant to Appear

Except as may be provided by statute, a defendant who fails to appear in person or by counsel is in default and:

a. waives all objections to the admissibility of evidence; and

b. is not entitled to notice of any further proceeding in the case, except that when service is by posting pursuant to Virginia Code § 8.01-296(2)(b), the ten-day notice required by that section shall be complied with; and

c. on request made in person in court by the plaintiff, plaintiff's attorney, plaintiff's regular and bona fide employee, or any other person authorized by law, judgment shall be entered for the amount appearing to the judge to be due. If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof.

H. Continuances

1. Except where granted by statute, there is generally no right to a continuance.

a. Virginia Code § 30-5. Statutory right to a continuance to members and members-elect of the General Assembly and the Division of Legislative Services during certain time periods.

b. Virginia Code § 8.01-28. In any action at law on a note, contract or account, either expressed or implied, for the payment of money; or unlawful detainer pursuant to Virginia Code § 55-225 or § 55-248.31 which has been filed and served with an affidavit of the debt, the plaintiff may obtain judgment unless the defendant appears and denies the debt under oath or in court. In that event, the plaintiff or defendant shall, on motion, be granted a continuance.

c. Discretionary Continuances

(i) Virginia Code § 8.01-6.1 – Amendment of pleadings; § 8.01-545 – Attachments.

(ii) Virginia Code § 8.01-16 – New parties to action.

(iii) Virginia Code § 8.01-311 – Service made through the Secretary of the Commonwealth.

(iv) Virginia Code § 16.1-122.3 – Small claims court for "good cause."

2. Continuances and Rule 7A:14

a. Continuances Granted for Good Cause.

Continuances should not be granted except by, and at the discretion of, a judge for good cause shown, or unless otherwise provided by law. The judge may, by order, delegate to the clerk the power to grant continuances consented to by all parties under such circumstances as are set forth in the order. Such an order of delegation should be reasonably disseminated and posted so as to inform the bar and the general public.

b. When All Parties Agree to Continuance.

If all parties to a proceeding agree to seek a continuance, the request may be made orally by one party as long as that party certifies to the judge that all other parties know of the request and concur. Such a request should be made as far in advance of the scheduled hearing or trial as is practicable.

If granted, the moving party shall be responsible for assuring that notice of the continuance is given to all subpoenaed witnesses and that they are provided with the new court date. This obligation may be met by (i) an agreement between the parties that each side will notify its own witnesses; or (ii) any other arrangement that is reasonably calculated to get prompt notice to all witnesses.

c. When All Parties Do Not Agree to Continuance

If a request for continuance is not agreed to by all parties, such request should be made to the court prior to the time originally scheduled for the hearing or trial. If the court determines that a hearing on the request should be conducted prior to the time originally scheduled for the trial, all parties shall be given notice of such hearing by the requesting party.

d. When Continuances Requested at the Time of Hearing

Where a continuance request has not been made prior to the hearing and trial and other parties or witnesses are present and prepared for trial, a continuance should be granted only upon a showing that to proceed with trial would not be in the best interest of justice.

Chapter 6. Appeals

Virginia Code §§ 8.01-129, 16.1-106, -107.

A. Appealable Orders

Virginia Code § 16.1-106 speaks of any order being appealable, not just final judgments. However, the Supreme Court has held that only "final orders or judgments" may be appealed from a district court to circuit court under § 16.1-106. *Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 497 S.E.2d 740 (1998) (holding that the denial of a motion for a new trial is not appealable to circuit court), *Architectural Stone, LLC v. Wolcott Ctr., LLC*, 274 Va. 519, 649 S.E.2d 670 (2007) (a final order constitutes one that disposes of the whole subject of the case and gives all relief contemplated).

B. Time Periods

1. The appeal must be noted in writing within ten days of entry of the order or judgment being appealed. Va. Code §§ 8.01-129; 16.1-106; Supreme Court Rule 7A:13.

2. Note: See Va. Code § 16.1-106.1 in regards to requirements for withdrawing appeals.

C. Dollar Amount

1. The amount in controversy must be more than twenty dollars, exclusive of interest, attorney's fees and costs. Va. Code § 16.1-106.

2. Exception to the amount in controversy – if the case involves the constitutionality or validity of

    a. a statute of the Commonwealth; or

    b. an ordinance or bylaw of a municipal corporation; or

    c. the enforcement of rights and privileges conferred by the Virginia Freedom of Information Act; or

    d. a protective order pursuant to Va. Code § 19.2-152.10, but such order shall remain in effect pending appeal unless suspended by a higher court's order; or

    e. an action filed by a condominium unit owners' association or unit owner pursuant to Va. Code §55-79.80:2; or

    f. an action filed by a property owners' association or lot owner pursuant to Va. Code § 55-513.

D. Appeal Bond and Fees

Va. Code § 16.1-107 and § 16.1-112

1. The amount of the appeal bond shall be set by the judge or clerk or be in an amount sufficient to satisfy the judgment and must be posted within thirty days of the date of the order or judgment being appealed to the circuit court.

    a. No appeal bond is required of a plaintiff unless the defendant has asserted a counterclaim.

    b. No appeal bond is required of the Commonwealth or to protect the estate of a decedent, an infant, a convict, or an insane person, or the interest of a county, city, town or transportation district created pursuant to Va. Code § 33.2-1900 *et seq*.

    c. No appeal bond is required if the defendant's liability insurance company provides written irrevocable confirmation of coverage sufficient to satisfy the judgment.

    d. No indigent person shall be required to post an appeal bond in a civil case except trespass, ejectment, unlawful detainer against a former owner based upon a foreclosure against that owner and actions involving the recovery of rent.

2. The appealing party shall pay the writ tax, costs and fees for service of process of the notice of appeal in circuit court within thirty days of the date of the order or judgment being appealed to circuit court.

    a. Note: In unlawful detainer actions, the bond must be posted and writ tax, costs and fees paid within ten days from entry of the order or judgment being appealed. Va. Code § 8.01-129.

    b. In cases of unlawful detainer against a former owner based upon a foreclosure against that owner, a person who has been determined to be indigent pursuant to the guidelines set forth in Va. Code § 19.2-159 shall post an appeal bond within 30 days from the date of judgment.

    c. The amount of the bond must include not only the amount of the judgment, but also the rent that may be expected to accrue while the case is on appeal, up to one year's rent. Va. Code § 8.01-129.

3. Payment of the writ tax is jurisdictional. *Hurst v. Ballard*, 230 Va. 365, 337 S.E.2d 284 (1985).

4. Venue Decisions – Appeal

    a. Appeals of venue decisions go to the circuit court in the jurisdiction where the original general district court sits. Va. Code § 16.1-106.

5. Nonsuit After Appeal

If a case is appealable from general district court to circuit court and nonsuited there, the case may only be refiled in circuit court even if circuit court lacks original jurisdiction to hear the matter. It is the appellate jurisdiction of the circuit court that controls. *Davis v. County of Fairfax*, 282 Va. 23, 710 S.E.2d 466 (2011); Va. Code § 8.01-380 ("…After a nonsuit no new proceedings on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction…"). *See also* Va. Code § 17.1-513.

Chapter 7. New Trials

Virginia Code § 16.1-97.1

A. Time Periods

1. A motion for a new trial must be made within thirty days after the date of judgment or order entered.

2. A hearing must be held and the court must rule on any such motion within forty-five days after the date of judgment or order entered.

B. Grounds

No grounds for awarding a new trial are specified in the statute.

C. Appeals

There is no appeal of a denial of a motion for a new trial. *Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 497 S.E.2d 740 (1998).

D. Relief from Default Judgments, Clerical Mistakes or Other Judgments

Va. Code § 8.01-428

1. Upon a motion by either party, after reasonable notice, the court may set aside a judgment by default or a decree pro confesso, without limitation, on the ground of (a) a void judgment, (b) proof of an accord and satisfaction, (c) fraud on the court, or (d) proof that the defendant was, at the time of service of process or entry of judgment, a person in the military service of the United States for purposes of 50 U.S.C. ___ § 3911.

2. Either party may move the court to set aside a judgment by default or a decree pro confesso on the ground of fraud within two years of the date of entry.

3. Clerical mistakes, errors, or inadvertent omissions may be corrected any time by the court on its own or upon motion by any party.

4. The court may at any time entertain an independent action to relieve a party from any judgment or proceeding.

E. Servicemembers Civil Relief Act

Va. Code § 8.01-15.2

1. The court shall not enter a default judgment unless the affidavit filing requirements, as set out in the above code section, have been complied with. Any default judgment entered that is in violation of the Servicemembers Civil Relief Act (50 U.S.C. ___ § 3901 *et seq*.) may be set aside as provided in the federal act.

2. Note: Failure to file an affidavit shall not constitute grounds to set aside an otherwise valid default judgment against a defendant who was not, at the time of service of process or entry of default judgment, a servicemember for the purposes of 50 U.S.C. § 3911.

Chapter 8. Enforcement of Judgments

A useful reference is Rendleman, ENFORCEMENT OF JUDGMENTS & LIENS IN VIRGINIA, Michie Co., especially Chapters 2 and 3.

A. Writs of Execution

1. The writ may issue at any time after judgment on request of the plaintiff. However, in unlawful detainer actions no writ of execution shall issue on a judgment of possession until the expiration of 10 days except, (i) in cases of default judgment following foreclosure, (ii) nonpayment of rent, or (iii) immediate nonremedial terminations. Va. Code § 8.01-129; § 16.1-98.

2. Upon service of a writ of execution, the debtor must also be served with district court form DC-407, REQUEST FOR HEARING – EXEMPTION CLAIM. If the debtor files a claim of exemption, the hearing on the claim must be held within ten business days. Va. Code § 8.01-546.2. It is important that the clerk's office staff know that the judge must be alerted promptly if an exemption claim is filed. *See* Form DC-407 for a list of exemptions.

3. When a third party claims ownership or some interest in property subject to the lien of a levy under a writ of execution, the general district court may determine the respective claims, provided that the maximum jurisdictional limit is not exceeded. Va. Code § 16.1-119 *et seq.*

B. Garnishments

Va. Code § 8.01-511 *et seq.*

1. Upon service of the garnishment, the debtor must also be served with district court form DC-454, REQUEST FOR HEARING – GARNISHMENT/LIEN EXEMPTION CLAIM. If the debtor files a claim of exemption, the hearing on the claim must be held within seven business days. Va. Code § 8.01-512.4, -512.5. It is important that the clerk's office staff promptly alert the judge if a claim is filed. *See* Form DC-454, which tracks Va. Code § 8.01-512.4, for a list of exemptions.

2. On the return day of the garnishment, the garnishee may respond in person or may file a statement. Va. Code § 8.01-515. If the garnishee's liability is not disputed, then the money is ordered paid to the creditor. Va. Code § 8.01-516.1. Some courts use a "pass through" system whereby the garnishee makes the check payable directly to the creditor, while others have the funds paid directly to the court. Regardless of the system employed, either the funds or the check to the creditor should be held until the return date in case a claim of exemption or dispute is filed.

3. If the garnishee fails to appear, answer or to disclose fully, the court can hear evidence as to the debt of the garnishee to the debtor or summons the garnishee, along with its books and records, to court for a determination. The court can then enter judgment accordingly.

Va. Code §§ 8.01-519, -564, -565. If the garnishee's debt to the debtor is disputed, then, subject to its jurisdictional limits, the general district court, on motion of the creditor, can try the issue.

4. Some courts have the clerk handle garnishments unless there is any dispute. Others call the garnishments as part of the civil docket.

C. Interrogatories

Va. Code § 8.01-506 *et seq.*

1. District court form DC-440, SUMMONS TO ANSWER INTERROGATORIES AND WRIT OF FIERI FACIAS, may be issued against the debtor, or any debtor to the judgment debtor and made returnable before:

    a. The court from which the fieri facias issued or any like court in a jurisdiction contiguous to the one that issued the fieri facias; or

    b. On request of the execution creditor, a like court in the county or city where the debtor resides, or any like court in a county or city contiguous thereto.

2. The creditor can proceed against the debtor only once every 6 months unless the court allows additional proceedings. The issuance of a summons that is not served shall not constitute an act of proceeding against a debtor.

3. Most general district courts put the debtor under oath and instruct him to answer the questions of the creditor or creditor's attorney and send the parties out to a room or hallway with advice to return if there are any problems.

4. The execution debtor can require the court to transfer the proceedings to a forum more convenient to the debtor. Va. Code § 8.01-506 E.

5. The debtor may be required to convey property or to deliver it to the officer holding the writ of execution. Va. Code § 8.01-507.

6. Records and books of account and other writings can be subpoenaed. Va. Code § 8.01-506.1; Rule 4:9A.

7. Under Va. Code § 8.01-508, if the debtor fails to appear and answer, or makes answers deemed by the court to be evasive, or if the debtor fails to make conveyance and delivery as ordered, the court must take action by either (a) issuing a capias requiring the sheriff to take the debtor into custody and deliver him to the court; or (b) issuing a rule to show cause as to why the person should not be jailed for such failure. *Early Used Cars, lnc. v. Province*, 218 Va. 605, 239 S.E.2d 98 (1977). A person who is taken into custody on a capias and cannot be brought directly before the court to which the capias is returnable is entitled to bail pursuant to Va. Code § 19.2-120. The same is true for a person in default who appeals the court's decision.

Chapter 9. Unlawful Entry and Detainer

Virginia Code §§ 8.01-124 *et seq.*, 55-217 *et seq.*, and 55-248.2 *et seq.*

A. Introduction

The Virginia Residential Landlord Tenant Act (VRLTA) was enacted by the General Assembly and became effective July 1, 1974. It incorporated significant portions of the Uniform Residential Landlord Tenant Act, which has been adopted, in whole or in part, in forty-six states. While one of the stated purposes of the VRLTA was to create "a single body of law relating to landlord and tenant relations throughout the Commonwealth," by various statutory exemptions the Act leaves in place Virginia's "common law" for those leasehold transactions not covered by its provisions, including premises leased primarily for business, commercial, or agricultural purposes, § 55-248.5(A)(7); and single family residences whose owners are natural persons (not corporations) or their estates owning no more than two (originally ten, but redefined by the 2014 Legislature) single-family residences subject to a rental agreement. An amendment in 2016 made it clear that the rental properties have to be located in Virginia.

Note: In any city or in any county having either the urban county executive or county manager form of government, the exemption applies to natural persons or their estates owning *no more than four* condominium units or single-family residences, § 55-248.5(A)(10). However, a 2001 amendment to § 55-248 3:1 clarifies that the Act applies to all jurisdictions in the Commonwealth and may not be waived or otherwise modified by the governing body of any locality or by the courts.

Because § 55-248.5(A) of the VRLTA contains ten separate exemptions, it is important to analyze landlord-tenant cases carefully, as there are duties incumbent upon and remedies available to the respective parties embraced by the Act. These duties and remedies do not apply to those parties exempted from the Act.[1] Therefore, this section will examine the common law of landlord-tenant relations both as to commercial/business/agricultural transactions and residential transactions, as well as leasehold transactions[2] covered by the VRLTA.

B. Common Law of Landlord-Tenant Relations in Virginia

The focus of this section is on issues which frequently arise in common law landlord and tenant relations.

[1] It is also important to examine lease provisions carefully because § 55-248.5(B) of the VRLTA allows otherwise exempt landlords to include in their leases a provision to bring the rental premises in question within the coverage of the Act.

[2] Since the General Assembly has frequently codified the "common law," references in this chapter to that term include all landlord and tenant statutes other than the VRLTA, as well as Virginia case law.

1. Lease Terms:

   The parties are free to contract between themselves, and their lease agreement will be upheld as long as the parties' intent is clear. Thus, the parties may agree to waive certain rights or remedies, to pay specific late fees and attorney's fees, or to make certain repairs in the event of damage to the premises. If one of the parties has failed to sign the lease, or to deliver the signed lease to the other party, the court should apply traditional rules of contract interpretation, particularly where at least one of the parties has acted as though the lease has been fully signed and delivered.

2. Assignment

   All leases are assignable unless otherwise limited by their terms. However, a tenant may continue to pay rent to the original landlord until the tenant receives written notice of the assignment and of the obligation to pay rent to the assignee of the lease. Code § 55-201.1. When a tenant has assigned a lease, that tenant remains liable on the original lease contract, even though the new tenant did not release the original tenant from the terms of the lease. *Jones v. Dokos Enterprises*, 233 Va. 555 (1987).

   The landlord-assignor is required to transfer any security deposits and interest accrued on the deposits to the assignee at the time of transfer. Code § 55-507. On the other hand, rights in the security deposit of a tenant-assignor are *not* automatically conveyed to the tenant-assignee, but remain the property right of the assignor unless the assignment specifically includes a reference transferring the deposit to the assignee. *Jones v. Dokos Enterprises*, above. Thus, in the absence of specific language in the assignment, the landlord would return the appropriate amount of the deposit to the original tenant.

3. Sublease

   A sublease differs from an assignment in that the transferor retains an interest in the premises. However, a sublease can operate as an assignment where the sublessor has conveyed his entire term to the sublessee. In such a situation, the subtenant has standing to sue the landlord for breach of the original lease, and the landlord can also sue the subtenant for breach of same. *Tidewater Investors, Ltd. v. Union Dominion Realty Trust*, 804 F.2d 293 (4th Cir. 1986).

4. Security Deposits

   Other than § 55-507, which requires a landlord who is conveying rental property to transfer any security deposit held to the new owner, there are no non-VRLTA statutes covering security deposits. While landlords may deduct unpaid rent, late fees, and damages beyond normal wear and tear from deposits, there are no specific requirements regarding accrual of interest on deposits or move-in or move-out inspection reports.

5. Delivery of Possession

At common law, a landlord has no duty to physically deliver possession of the premises to a tenant, unless the lease so stipulates. The landlord is simply required to give the tenant the right to possess the premises. *Hannan v. Dusch*, 154 Va. 356 (1930). Thus, if a prior tenant holds over, the new common law tenant, not the landlord, must file an unlawful detainer summons to evict the holdover tenant from the premises.

6. Military Tenants

At common law, a transfer does not entitle an active duty member of the military to terminate the lease. However, the military tenant may assert rights protected under the Servicemembers Civil Relief Act of 1940, 50 U.S.C. Section 501 et seq., which was enacted to protect the rights of active duty military personnel with regard to certain civil liabilities, including enforcement of leases and eviction proceedings.

6.1 Tenants of the Owners of Foreclosed Property

After a foreclosure, the new owner, whether it is the original note-holder, an assignee of that note-holder, a federal agency, which insured the loan, or a third party buyer will want possession of the property, and will seek to bring an action to obtain possession. If the property is occupied by the former owner, or, by a family member or guest of the former owner, notices to that owner will generally suffice, and obtaining possession as to that owner, will constitute possession as to all parties claiming under the owner. However, in some cases the former owner was not the resident. Rather, the property was rental property, and was occupied by the tenants of the former owner. Those tenants, particularly those whose payments are up to date, have rights of their own, often rights, which are superior to those of the new owner. At a minimum, the occupants are entitled to separate notices to vacate, sent to them by name, or as occupants. Often they are entitled to substantial notice of termination of the lease, or possession agreement. The notice to which any such party is entitled depends on the nature of the tenancy. The 2012 legislature recognized this, at least in part, with an amendment to § 55-255.10, which states that a post foreclosure tenant up to date on rent, and not in default on the lease, has the "protections" afforded by Federal Law, 42USC 1437 *et seq.* NOTE, under current law, the required notice would be at least a 90 day notice. The Virginia Supreme Court case *Parish v. Federal National Mortgage Association*, decided June 16, 2016, (citation not yet available), presents a new set of rules for the handling, by General District Court judges, of these cases. When a tenant objects to the title of the foreclosing entity, the case makes it clear that General District Court does not have the authority to determine the validity of the title, but does have the obligation to determine whether there might be a valid issue, which might require the Circuit Court to make such a determination. If it finds that there is a valid issue, the case must be dismissed without prejudice, and the landlord must then proceed with its unlawful detainer in the Circuit Court.

This case presents some issues not resolved by the opinion. If the court rules in favor of the defendant, that ruling is not appealable, as a dismissal, without prejudice, is not a

decision on the merits. If it rules for the plaintiff, and the defendant appeals, and posts bond, then the only issue before the Circuit Court is whether there is a justiciable issue. If not, the plaintiff may proceed with eviction, but if there is an issue, the case must be dismissed without prejudice (the Circuit Court has only its appellate jurisdiction here, not its general jurisdiction, and the landlord must start over. Presumably, the bond must be returned to the defendant. Hopefully, there will be a simple legislative solution forthcoming, which will resolve issues of this nature.

7. Habitability of Premises

Code § 55-225 was amended in 2008 to add §§ 55-225.6 through 55-225.9 and 55-248:18.2. Both § 55-225 and § 55-248 were amended, specifically §§ 55-225.3, 55-225.4, 55-248.4, 55-248.6, 55-248.11:2, 55-248.13, and 55-248:16 to incorporate mold provisions involving both landlord's and tenant's responsibilities for mold remediation and the process for notice from tenant to landlord regarding mold. Also, § 8.01-226.12 was added to grant the landlord immunity for mold claims, if in compliance with the Virginia Residential Landlord and Tenant Act, and if the mold condition is caused solely by the negligence of the tenant. Code § 55-225 was amended in 2001 to add §§ 55-225.3 and 55-225.4 to incorporate into <u>all</u> residential landlord-tenant relations the provisions of the VRLTA relating to the maintenance of residential rental units. It imposes obligations on both the landlord and the tenant to maintain the dwelling unit. *See* paragraph C(8) below for a more detailed discussion of habitability issues covered by the VRLTA. There is no common law cause of action on behalf of a tenant for personal injury caused by the failure of the landlord to maintain, in a safe condition, the portion of the premises in the exclusive control of the tenant. *Isbell v. Commercial Investment Associates, Inc.*, 273 Va. 605 (2007).

New Code §§ 55-225.6 through 55-226.9 were added in 2008 to provide for mold remediation and the process for notice from tenant to landlord regarding mold. Code § 55-225.6 provides how the landlord can administer the inspection of the dwelling unit at move in. The landlord may: 1) within 5 days after occupancy, submit his own report to tenant, and the tenant has 5 days to object, 2) adopt a written policy in which the tenant submits a written report to landlord, and the landlord has 5 days to object, or 3) both landlord and tenant prepare written report jointly. Code § 55-225.7 provides that the landlord may disclose in the move-in inspection report whether there is visible evidence of mold in areas readily accessible within the interior of the dwelling unit. If the landlord discloses there is no evidence of mold, then it shall be deemed correct unless the tenant objects within 5 days. If the landlord discloses there is evidence of mold, the tenant can 1) terminate the tenancy and not take possession; or 2) remain in possession and the landlord must remediate within 5 days and confirm thereafter that no visible mold is present on re-inspection. Code § 55-225.8 provides definitions used in the chapter and importantly the requirement of mold remediation in accordance with professional standards. Code § 55-225.9 allows the landlord to relocate a tenant where a mold condition in a dwelling unit materially affects the health or safety of the tenant. This period of relocation shall not exceed 30 days, and shall provide a comparable dwelling unit or a hotel room, both at no expense to the tenant. The landlord shall ensure all costs

of mold remediation, and cost of relocation, unless the mold is a result of the tenant's failure to comply with Code § 8.55-248.16, the tenant's duty to maintain the premises. Code § 8.01-226.12 was added in 2008 to provide the landlord and managing agent with immunity from civil damages in any personal injury or wrongful death action, if the mold condition is caused solely by the negligence of the tenant.

Code §§ 54.1-2131 through -2135 (licensing), and a number of other Code sections deal with defective drywall. Several amendments to the Code require owners, landlords, and agents of each to notify all parties to a contract or lease about the existence of such drywall. Failure to notify a tenant gives that tenant the option to terminate the lease agreement within sixty days of the date on which the tenant received notice of the defective drywall.

8. Access to Premises

At common law a landlord has no right of access to the rental property unless the parties have provided for access in a written lease. As will be discussed in a later section of this chapter, the landlord's right of access has been greatly increased, by several statutory amendments.

9. Abandonment of Premises

Abandonment at common law arises when the tenant vacates the premises with the intent not to be bound by the lease, most typically evidenced by nonpayment of rent. Virginia's codification of the common law is set forth in § 55-224. If a tenant is in default in payment of rent and has abandoned the premises, without sufficient remaining personal property to satisfy the unpaid rent by way of distress, the landlord is required to post in a conspicuous area of the premises, a written notice to the tenant demanding payment of the rent within ten days (for month-to-month tenants) or within one month (for yearly tenants). If the rent is not paid within the appropriate time, the landlord is then entitled to possession of the premises and may re-enter. However, in the absence of a written lease provision to the contrary, the landlord may only recover rent up to the date of re-entry. *See Elderbury of Weber City, LLC v. Living Centers – Southeast, Incorporated*, Fourth Circuit Court of Appeals, Case No. 13-2176, decided July 21, 2015. The opinion cites a number of cases, state and federal. It makes it clear that lease clauses purporting to hold the tenant liable after abandonment of the premises, must be strictly construed against the party providing the lease. The principal Virginia cases cited in the opinion is *Crowder v. Virginian Bank of Commerce*, 103 S. E. 578 (1920).

In interpreting § 55-224, the Fourth Circuit Court of Appeals held that when a tenant abandons leased property during the term of the lease, the landlord has three options: (1) to refuse to accept the tenant's abandonment, do nothing and sue for accrued rents, as the common law landlord had no duty to mitigate damages; (2) to re-enter the property and accept the tenant's abandonment, thereby terminating the lease and releasing the tenant from payment of future rents; or (3) to re-enter the property for the limited purpose of re-letting it without terminating the lease, so that the tenant's obligation to pay rent

continues. *tenBraak v. Waffle Shops, Inc.*, 542 F.2d 919 (4th Cir. 1976). Of course, common law parties may provide in a lease as to the consequences of abandonment of the property, including payment of future rents.

10. Forfeiture, Waiver, and Redemption

At common law, a tenant who fails to pay rent in a timely manner, after having been given a written five-day notice to pay the rent due or surrender possession of the premises, has forfeited his or her right to possession of same. Code § 55-225. The landlord may, at the expiration of the five-day period, deem the tenant's occupancy to be unlawful and proceed to recover possession of the premises through a summons for unlawful detainer in the general district court. Code § 8.01-126. However, if the landlord, or his counsel, accepts all past due rents, late fees, reasonable attorney's fees, and court costs on or before the initial return date of the unlawful detainer summons, the landlord has waived his right to obtain possession of the residential (not commercial) premises and the summons should be dismissed.

11. Code § 55-243(A)

This "right of redemption" may be exercised by a residential tenant no more than one time during a twelve-month period of residency at a particular dwelling unit. Code § 55-243(B). The 2013 amendment makes it clear that the twelve month period is fixed "regardless of the term of the rental agreement or any renewal term thereof."

12. Notices

Unlike the numerous notification requirements of the VRLTA, the common law requires no specific methods of written notice (e.g. regular mail versus certified mail). In most situations, the type of notice and manner of delivery are set forth in a lease agreement. In the absence of any notice provisions in a lease, a yearly lease may be terminated by either party giving written notice to the other party three months prior to the end of leasehold year. A monthly tenancy may be terminated by either party giving written notice to the other party thirty days prior to the next rent due date; (2013 amendment) unless the rental agreement provides for a different notice period. The landlord and the tenant may agree in writing to an early termination of a rental agreement." In addition, as stated previously, a landlord must provide a residential tenant who is in default in payment of rent a written five-day notice requiring either payment of the rent arrearages or surrender of possession of the premises prior to seeking recovery of possession through an unlawful detainer summons. Code § 55-225.

A 2008 Amendment allows for the landlord and tenant to send notices to each other in electronic form, if the rental agreement so provides. If a tenant so requests, he can elect to send and receive notices in paper form. The confirmation of the electronic delivery can be by facsimile or a certificate of service prepared by the sender.

A 2007 amendment allows a landlord to terminate a lease upon 120 days' written notice to tenant for substantial rehabilitation, or for change of use, of a building with four or

more rental units, regardless of the terms of the lease. Code § 55-222. A 2015 amendment adds that in a case of tenancy from month to month, the landlord may give notice of termination thirty days prior to the next rent due date.

A 2013 amendment provides a tenant, who is the victim of family abuse, sexual abuse or criminal sexual assault, with a method of terminating a lease, under the circumstance set forth in Code §§ 55-225-16 and 55-248.21:2.

A 2015 amendment provides that in the event of fire damage a landlord may terminate a lease upon 14 days notice (reduced from 30 days). Code § 55-248.24.

A 2015 notice amendment makes it clear that written notice of termination shall be given in accordance with this chapter, or the Virginia Residential Landlord and Tenant Act, as applicable. Code § 55-222.

13. Self-help

In all residential landlord-tenant situations, a landlord does not have the right of self-help. A person may be evicted only pursuant to "an unlawful detainer action from a court of competent jurisdiction and the execution of a writ of possession issued pursuant thereto. A provision included in a rental agreement for a dwelling unit authorizing action prohibited by this section is unenforceable." Code § 55-225.1 (enacted 1994, and as amended in 2012). The 2012 amendment also redefines dwelling unit, or 'residential dwelling unit', to include any single family unit occupied by one or more person, except such things as dorms, hotels, and business property; thus, making it clear that this amendment applies to all leases, whether or not the property, or the terms of the lease, would otherwise be subject to the terms of the VRLTA. The right of self-help at common law for landlords remains in effect for non-residential landlord-tenant matters. In those business and agriculture situations where the landlord is entitled to use self-help to regain possession of the premises, the landlord may secure possession only by the use of such reasonable force as is necessary to regain possession, short of that which threatens serious bodily harm or death. *Kaufman v. Abramson*, 363 F. 2d 865 (4th Cir. 1966); *Shorter v. Shelton*, 183 Va. 819 (1945). Excessive use of force by the landlord can result in liability for damages by the landlord. *Shorter v. Shelton*, above.

At common law, the tenant has no right to use self-help by withholding rent in order to cause the landlord to make repairs. However, if the condition of the premises is sufficiently substandard, the tenant may be relieved of his or her leasehold obligations through the doctrine of constructive eviction.

14. Constructive Eviction, Ouster, Exclusion or Diminution of Service

While there is no common law warranty that leased premises are habitable or useable for a tenant's particular purposes, a landlord cannot violate a tenant's right to quiet enjoyment of the premises. Where a landlord's actions, or failure to act, deprive a tenant of all or a portion of the use of the leased premises, if the tenant abandons the premises

within a reasonable period of time of the deprivation, the doctrine of constructive eviction applies, and the tenant's obligation to pay future rents may be fully abated. *Buchanan v. Orange*, 118 Va. 511 (1916). The question of what is a reasonable period of time for a tenant to abandon the premises is a factual issue to be determined by the trier of fact. *Atlantic Richfield Co. v. Beasley*, 215 Va. 348 (1974). The doctrine of constructive eviction applies to all common law landlord-tenant transactions, whether residential, commercial or agricultural.

The tenant also has available substantial remedies for unlawful ouster, and for exclusion or diminution of utility or other essential services. Pursuant to Code § 55-225.2, the tenant may "recover possession and obtain an order requiring the resumption of any such interrupted utility service or terminate the rental agreement and, in either case, recover the actual damages sustained by him and reasonable attorney's fees. If the rental agreement is terminated pursuant to this section, the landlord shall return all security given by such tenant." The section was amended in 2013, making it clear that General District Court is the appropriate forum for such actions.

15. Rent Escrow

Prior to 2011 there was no provision under common law, for a tenant to pay rent into escrow, and thereafter secure relief from the court where habitability of, or ability to use, leasehold premises is in question. The procedure set forth in Section 17 of this chapter applied only to leases subject to the provisions of the VRLTA. The 2011 amendments extend this remedy to all residential leases.

a. Code §§ 55-225.11 through 55-225.13 codify the "tenant assertion" procedure for leases that do not fall under the act. The statutes clarify the issues for which the procedure may be used, the steps that the tenant must take, and the time limits given for the landlord to comply.

b. Code § 55-225.11(A) provides that the tenant may assert conditions, which if not corrected will constitute:

   (i) a fire hazard, or

   (ii) a serious threat to life, health or safety of the occupant, including, but not limited to

      – lack of heat or cold running water

      – infestation of rodents if it is not a single-family dwelling

      – lead paint

c. Code § 55-225.11(B) details what the tenant must show prior to a grant of relief, and the manner in which the landlord might answer.

(i) Prior to filing, the landlord must have been served with notice of the condition by the tenant, or a state or municipal agency, and have failed to correct the condition within a reasonable time (rebuttable presumption after 30 days).

(ii) Tenant has paid rent into court within five days of its due date.

(iii) Landlord may show that the conditions do not exist, that the tenant has caused the conditions, that the conditions have been remedied, or, that the tenant has prevented compliance.

d. Code § 55-225.11(C) sets forth a list of possible dispositions, which, by the language of the statute is not meant to be all inclusive.

(i) Terminating the agreement, if requested by the tenant, or ordering surrender to the landlord, if the landlord prevails on a request for possession pursuant to an unlawful detainer properly filed with the court. (A 2016 amendment added the language requiring tenant's request, and the necessity of the filing of an unlawful detainer by the landlord.)

(ii) Distributing the escrow money.

(iii) Ordering a continuation of escrow, pending completion of the work.

(iv) Ordering an abatement of rent.

(v) Ordering a distribution of the money to the tenant, if the repairs are not made by the landlord, or to the landlord, or to a contractor hired to make the repairs.

(vi) Referring the matter to municipal authorities for investigation.

(vii) Ordering payment to a mortgage on the property, or to a creditor, or a material or mechanic lien claimant.

(viii) After six months, if not remedied, paying all of the escrow to the tenant, after which the tenant may set up a new escrow if the lease remains in effect.

e. Code § 55-225.11(D) provides for a hearing within 15 days (less if an emergency exists, with continuances available when needed).

f. Code § 55-225.12 provides for relief if the landlord does not comply, including:

(i) The standard 21/30-day lease termination, after notice.

(ii) Termination, after notice of a breach that is not remediable, after 30 days.

(iii) Thirty-day termination, after notice, of a second, intentional breach.

(iv) Other rights of landlord and tenant:

– Lease cannot be terminated if landlord remedies the breach prior to the notice date.

– Tenant may not terminate, if the condition was caused by tenant or other occupants.

– Tenant may recover damages and obtain injunctive relief for noncompliance with the agreement or the chapter.

– Tenant may recover attorney fees if the landlord acted unreasonably.

g. Code § 55-225.14 provides for rent escrow in contested unlawful detainer cases.

(i) If a tenant seeks to continue an unlawful detainer case, unless the court finds that the tenant has a good faith defense, the tenant must escrow rent to have the case continued or set for trial. If an escrow is required, and the landlord seeks a continuance, no further escrow is required.

(ii) If the court finds that there is not a good faith defense, the defendant must escrow an amount determined by the court, but the court may grant the defendant seven days to raise the money.

(iii) If the defendant fails to pay the required escrow, including future months, when due, the court is to enter a judgment for rent and possession.

(iv) Upon motion of the landlord, the court may disperse money from escrow to pay the landlord's mortgage, or expenses related to the dwelling unit.

(v) No disbursement within ten days of decision, except for those related to D above.

h. In the case of *Cedars Court Unit Owners Ass'n v. Weeks* (Charlottesville Cir. Ct., August, 2013), the plaintiff filed a Tenant's Assertion in Circuit Court, seeking, among other things, to have that Court accept escrow payment of his Homeowner's Association fees. The Court, in denying the plaintiff's petition to escrow the funds, dismissed the case, and held in regard to the escrow funds, that this was not a landlord/tenant situation, and the Tenant's Assertion statute would not apply, and escrow was not authorized. This opinion has not been published.

16. Retaliatory Eviction

At common law a landlord may evict a tenant, regardless of the reason, if based on the tenant's default; or a thirty-day notice to terminate a monthly tenancy; or a three-month notice to terminate a yearly tenancy. Code §§ 55-222 and -225.

17. Damages and Waste

At common law when a tenant has breached a lease, either by failing to pay rent or by abandoning the property, the landlord may only recover rent due at the time suit was filed or from the date the landlord re-entered the premises and reclaimed possession, whichever is sooner, plus damages sustained to the premises beyond normal wear and tear. Code §§ 8.01-128; 55-223 and -224; *tenBraak v. Waffle Shops, Inc.*, above.

"Waste" is the common law doctrine which permits a landlord to recover damages beyond normal wear and tear to rental property caused by a tenant. Code § 55-211. The measure of damages for waste is the difference between the fair market value of the premises before the waste was committed and its fair market value after it was committed. *White Consolidated Industries v. Swiney*, 237 Va. 23 (1989). However, if the cost of restoring the property to its pre-waste condition is less than the aforesaid differences in value, then the measure of damages is the reasonable cost of restoration. *White Consolidated Industries*, supra. If the trier of fact determines that the tenant committed "wanton waste," the landlord may recover double the amount of damages. Code § 55-214.

18. Attorney's Fees

At common law, attorney's fees cannot be awarded to a prevailing party, unless so provided in the parties' lease. However, if a landlord unlawfully removes or evicts a tenant from residential premises, or willfully diminishes essential utility services to the tenant, a court may restore the tenant to possession of the premises, order the resumption of disrupted utility services, and award actual damages sustained by the tenant plus a reasonable attorney's fee. Code § 55-225.2.

19. Utility Allocation Among Tenants

A landlord in a multi-tenant dwelling unit is authorized by Code § 55-226.2 to set up a system to prorate the utilities among the tenants. The Code allows billing for set up costs, and for late fees if the utility bill is not timely paid. In 2010 the legislature added language giving landlords greater freedom in setting up a "ratio utility billing system." The charges to the tenant are expressly deemed rent as defined in § 55-248.4, if the lease is subject to the VRLTA.

C. Leasehold Transactions Covered by the Virginia Residential Landlord Tenant Act

The focus of this section is on issues which frequently arise in leasehold transactions covered by the VRLTA. (Code § 55-248.2 *et seq.*)

1. Using recommendations of the Virginia Housing Study Commission, the General Assembly in 2000 and 2002 amended numerous provisions of the VRLTA to reorganize it in a more logical format, to better identify certain statutory definitions, and to clarify and update certain sections. The overall intent was not to make substantive changes in the law. Those technical amendments to the VRLTA follow:

   a. Code § 55-248.3:1 (formerly § 55-248.10) clarifies the applicability of the Act.

   b. Code § 55-248.4, amended in 2008, modifies the definition of "security deposit" to become an "application deposit" until the effective date of the rental agreement. Also, it distinguishes an "application fee" as a <u>non-refundable</u> fee, whereas an "application deposit" is a <u>refundable</u> fee. The "application fee" cannot exceed $50, exclusive of any actual out-of-pocket expenses paid by the landlord to a third party performing background, credit, or other pre-occupancy checks on the applicant. If the application is for a public housing rental unit or other housing unit subject to regulation by the Department of Housing and Urban Development, the application fee cannot exceed $32, exclusive of the same expenses.

   c. Code § 55-248.4 amended in 2008 adds a definition of "interior of the dwelling unit" to include the interior walls, floor, and ceiling that enclose the dwelling unit as conditioned space from the outside air.

   d. Code § 55-248.4 amends the definition of "tenant" to exclude (1) an "authorized occupant" who is entitled to occupy a dwelling unit with the landlord's consent, but who has not signed the rental agreement; (2) a guest or invitee of the tenant; or (3) any person who co-signs for or guarantees the agreement's financial obligations but has no right to occupy the dwelling.

   e. Code § 55-248.4 amends the definition of "landlord" to include a "managing agent," who is defined as a person authorized by the landlord to act on the landlord's behalf under a management contract, who fails to disclose the name of the owner, lessor or sub-lessor. It has also been amended to expressly exclude from the definition "community land trusts," as defined in § 55-221.1 (2010 Legislature).

   f. Code § 55-248.4 amended in 2007 adds a definition of "processing fee for payment of rent with a bad check", referring to a processing fee specified in the rental agreement, which cannot exceed $50, that a landlord may charge a tenant for making a rental payment by check which is refused by the payor bank for insufficient funds or lack of an account.

g. Code § 55-248.4 also refers to "rental agreements" or "lease agreements" rather than "leases"; and amends the definition of "rent" to include all property or money, other than a security deposit, owed to the landlord under a rental agreement.

h. Code § 55-248.4 amended in 2008 adds a definition of "readily accessible" to mean areas within the interior of the dwelling unit available for observation at time of the move-in inspection that do not require removal of materials, personal property, equipment, or similar items.

i. Code § 55-248.4 amended in 2003 adds a definition of "rental application" and authorizes a landlord to require appropriate identification from a prospective tenant, including a social security number or a taxpayer identification number. A 2015 Amendment allows the landlord, when taking an application, to make a copy of the applicant's driver's license or photo ID, but may not copy a U.S. government issued identification so long as to do so is a violation of U.S.C. Part 1, Chapter 33, Subd. 701.

j. Code § 55-248.4 amends the definition of "security deposit" to <u>exclude</u> damage insurance policy or renter's insurance policy (§ 55-248.7:2) purchased by a landlord to provide coverage for a tenant. Additionally, until the commencement date of the lease, the security deposit is deemed to be an application deposit. (This section was substantially rewritten in 2010).

k. Code § 55-248.4 amended in 2008 adds the definitions of "tenant records" to include all information, whether such information is in written or electronic form, including financial, maintenance, and other records about a tenant or prospective tenant; of "visible evidence of mold" to mean the existence of mold that is visible to the naked eye by the landlord or tenant in areas within the interior of the dwelling unit readily accessible at the time of the move-in inspection; of "written notice" to be any representation of words, letters, symbols, numbers, or figures, given in accordance with § 55-248.6, whether 1) printed in or inscribed on a tangible medium or 2) stored in an electronic form or other medium, retrievable in a perceivable form, and regardless of whether an electronic signature authorized by Chapter 42.1 (§ 59.1-479 et seq.) of Title 59.1 is affixed. It allows a landlord the opportunity, regarding a written agreement, to delegate to a managing agent or other third party the responsibility of providing any written notice required in this chapter to the tenant.

   k.1 Code § 55-248.4 was amended in 2010 to defined "Commencement date of rental agreement" as the date upon which the tenant is entitled to occupy the unit as a resident; and to define "Effective date of rental agreement" as the date upon which the agreement is signed by the landlord and tenant obligating each party to the terms and conditions of the rental agreement.

l. Code § 55-248.6 (Notice) (A) amended in 2008 to revise notice to include writing by either regular mail or hand delivery with sender retaining sufficient proof by either U.S. postal certificate or certification of service. A person shall now be deemed to

have notice of a fact if 1) he has actual knowledge of it, 2) he has received verbal notice of it, or 3) from all the facts and circumstances known to him at the time in question or has reason to know. If notice is not in writing, then the burden of proof is on sender. A person 'notifies' or 'gives' a notice or notification to another by taking steps reasonably calculated to inform, regardless if said person comes to know of it. Also, (B) was amended under the same section, to enable the landlord and tenant to send notices in electronic form, if the rental agreement so provides. However the tenant may elect to send and receive notices in paper form. When electronic delivery is used, the proof of delivery includes 1) electronic receipt of delivery, 2) confirmation that the notice was sent by facsimile, or 3) certificate of service prepared by sender.

m. Code § 55-248.6:1 was amended in 2008 to allow a landlord to require an application fee and a separate application deposit. The landlord shall refund the application deposit to the applicant within 20 days after the applicant's failure to rent or the landlord's rejection occurs.

n. Code § 55-248.7 was amended by adding subsection G to provide that a unilateral change in the terms of a rental agreement is not valid unless (1) notice of the change is given in accordance with the terms of the rental agreement or applicable law and (2) both parties consent in writing to the change. Additionally, a 2012 amendment requires the landlord, within ten days of the request of the tenant, to provide a full written statement of the credits and debits over the term of the lease, or the last twelve months, whichever is shorter.

o. Code § 55-248.7:1 was added to allow a tenant to offer and a landlord to accept prepaid rent, which must be placed in an escrow account by the landlord within 5 business days of receipt and must remain in escrow until such time as the prepaid rent actually becomes due.

p. Code § 55-248.9(A) adds a new subsection (7) to the prohibited provisions of a rental agreement to prohibit the requirement of both a security deposit payment <u>and</u> a bond or commercial insurance policy from the tenant to secure the performance of the terms of a rental agreement.

q. Code § 55-248.9:1 was amended to add additional exceptions to the confidentiality of tenant records, so that such information is made available to third parties if (1) the information is requested pursuant to subpoena in a civil case, or (2) the information is requested by a contract purchaser of the landlord's property; provided the contract purchaser agrees in writing to maintain the confidentiality of such information.

   Other exceptions to confidentiality include: (1) with the tenant's prior written consent, (2) when information is a matter of public record as defined in § 2.2-3701, (3) when information is a summary of tenant's payment record including the amount, (4) when information is a copy of a material noncompliance notice or a termination notice, (5) when information is requested by a local, state, or federal law-enforcement

or public safety officer in the performance of his duties, (6) in the event of an emergency, (7) by a lender financing or refinancing of the property, or (8) the landlord's attorney or collection agency. The 2010 legislature added two additional exceptions: (1) in response to a request by the local commissioner of revenue in accordance with § 58.1-3907; and, (2) in response to a request by the tenant's commanding officer, military housing officer or military attorney. Pursuant to a 2016 amendment, a tenant may request a copy of the tenant's records. The section details the manner in which such copies may be requested, (in paper or electronic form), and the manner in which the landlord must provide the copies to be delivered, and the circumstances under which the landlord may charge for the copies.

r. New § 55-248.10:1 (formerly § 55-248.38), regarding landlord and tenant remedies for abuse of access, was moved to a more logical location in the Act.

s. Code § 55-248.13:A5, regarding the landlord's duty of care in the maintenance of the premises as to prevent the growth of mold and mildew, holds the landlord to a higher duty of care. "Reasonable efforts to maintain" is no longer suitable, the landlord must "maintain."

t. Code § 55-248.13:B, holds that the landlord must perform the duties imposed under subsection A, but is only held liable for those actual damages which a tenant sustains proximately caused by the landlord's failure of duty to exercise ordinary care. Former subsection B is now subsection C and former subsection C is now subsection D.

u. Code § 55-248.13:2, regarding access of tenant to cable, etc. was amended, effective July 1, 2003, to provide that a landlord may be compensated by a television service provider for the use and occupancy of the landlord's property in an amount reasonably related to the value of the property and the services rendered by the landlord.

v. New § 55-248.13:3 (formerly § 55-248.18 (B) and (C)), regarding notice by landlords to tenants for pesticide use was moved to a more logical location in the Act.

w. New § 55-248.15:1 (formerly § 55-248.11), regarding security deposits, was also moved to a different location within the VRLTA. Other significant changes in this section were (1) to delete the reference to 1995 as the effective trigger date for the new annual interest rate; (2) requiring a landlord, in the event damages to the premises exceed the amount of the security deposit and require the service of a contractor, to give the tenant thirty days written notice advising the tenant of that fact, with an additional fifteen days allowed for the landlord to provide the tenant an itemization of damages and the cost of repair; (3) a 2007 amendment authorizes landlords to receive on security deposits an annual interest rate equal to four percentage points below the Federal Reserve Board discount rate, rather than the current one percent; (4) Code § 55-248.15:2 subsection B18 sets the interest rate on security deposits, from January 1, 2008, through December 31, 2008 at 0.75 percent.

The rate for the years 2009 and 2010 is 0.00 percent; and (5) the 2010 amendment permits the landlord to hold a reasonable portion of the deposit to cover the costs of utilities, for which the tenant would be responsible to the landlord; (6) the 2014 amendment eliminated the interest requirement in its entirety; (7) the 2014 amendment also permits the landlord to, at the tenant's request, and pursuant to a provision in the lease, return the security deposit in a period shorter than 45 days, and charge an administrative fee for this action; and amendments from 2013 and 2014 provide that regardless of the number of tenants on a lease, if no forwarding address is supplied to the landlord, after one year the landlord may escheat the security deposit to the state treasury, and discharge any obligation to the tenants. A 2015 amendment makes it clear that the landlord must escheat the deposit within 90 days of the end of this period.

x. Code § 55-248.16, amended in 2008, requires the tenant to not remove or tamper with a properly functioning carbon monoxide detector, including removing any working batteries, so as to render the carbon monoxide detector inoperative. A 2016 amendment requires the tenant to maintain the carbon monoxide alarm installed by the landlord. Code § 55-248.16:9. This is contrary to Code § 55-248.13, which requires the landlord to maintain the device. Your editor cannot resolve this conflict, except by referring to the rule of statutory construction which would have the newer overrule the older, where such conflict exists.

y. Code § 55-248.17, regarding rules and regulations, was amended to make clear that a rule or regulation adopted or changed, or provided to the tenant, by the landlord after the tenant has entered into a rental agreement shall be enforceable against the tenant if (1) reasonable notice of its adoption or changes have been given to the tenant; and (2) it does not work a substantial modification of the tenant's bargain. If the rule or regulation adopted or changed does work a substantial modification of the tenant's bargain, it is not valid unless the tenant consents in writing.

z. Code § 55-248.18(D) allows the tenant to install within the dwelling unit carbon monoxide detection devises, if the tenant believes they are necessary for safety.

aa. Code § 55-248.27, regarding tenants' assertions and rent escrow, consolidates former §§ 55-248.28 to -248.30 into one section so that the conditions necessary for granting relief and remedies available to the court are organized more logically in one section.

bb. Code § 55-248.32 was renamed "remedy by repair, etc. emergencies", and a final paragraph added which provides that, in the event of an emergency, the landlord may enter the premises, make the repairs in a workmanlike manner, and submit an itemized bill to the tenant for the cost of the repair, requesting payment of the bill as rent to be paid on the next date rent is due, or, if the rental agreement has terminated, for immediate payment.

cc. Code § 55-248.34 was amended to clarify that a landlord's acceptance of a rent payment without reservation and with knowledge in fact of a material noncompliance

by the tenant constitutes a waiver of the landlord's right to terminate a rental agreement. Code § 55-248.34.1(A) was amended in 2008 to clarify that the termination notice required to be given by the landlord to the tenant within 5 business days of the tenant's failure to pay rent must be in writing. If the dwelling unit is a public housing unit or other housing unit subject to regulation by the Department of Housing and Urban Development, the landlord shall be deemed to have accepted rent with reservation pursuant to this subsection if the landlord gives the tenant the written notice required herein for the portion of the rent paid by the tenant.

dd. The 2000 amendments to the VRLTA, as set forth in House Bill 1315, repeal former §§ 55-248.10, -248.11, -248.28, -248.29, -248.30 and -248.38.

2. Lease terms

While the parties are free to contract between themselves on a variety of issues, including coverage by the Act where the law would not otherwise apply, the VRLTA mandates that residential leases cannot contain terms "prohibited by this chapter or other rule of law." Code §§ 55-248.5(B), 55-248.7(A). Code § 55-248.9 of the Act enumerates six prohibited provisions in a lease agreement, including any provisions requiring the tenant to waive rights or remedies under the law; authorizing confession of judgment; or payment of any amount above "reasonable" attorney's fees. In addition, § 55-248.13(C) allows the landlord to delegate in writing to the tenant certain statutory responsibilities, such as common-area maintenance and maintenance of trash receptacles, supplying of utilities, and specified repair and remodeling tasks, as long as these delegations are mutually agreed upon and not done for the purpose of evading the landlord's statutory obligations.

In the case of *Newman v. L&H Company*, 23 Cir. CL11131 (Roanoke 2012), the lease carried a provision holding the landlord harmless, and indemnify the landlord for "any and all liability, claims, loss, damages, or expenses" that the landlord might incur, for injury to person or property because of the condition of the premises. As a result of the landlord's negligence, a fire destroyed the premises, and destroyed personal effects of the tenant. Citing Code § 55-248.9(A)(5), the court held that the language in the contract was unenforceable, that the printed lease agreement was a contract of adhesion, against public policy, and unconscionable.

Code § 55-248.8 provides that if a landlord fails to sign a lease which has been signed by the tenant, but nevertheless accepts rent from the tenant without reservation, the lease will be treated as though it had been signed by the landlord. Similarly, if a tenant fails to sign a lease which has been signed by the landlord, but nevertheless accepts possession or pays the rent without reservation, the lease will be deemed to have been signed by the tenant.

Code § 55-248.9:1 was amended in 2003 to protect the confidentiality of tenant records, which may be released with the tenant's written consent; in the event of an emergency; or for other enumerated circumstances.

Code § 55-248.17 allows a landlord to adopt rules and regulations concerning the tenant's use and occupancy of the premises, as long as the tenant has notice of them at the time of entering into the lease or when they have been adopted by the landlord. If the landlord enacts a rule or regulation after the tenant has entered into the lease or has taken possession of the premises, the rule or regulation is enforceable against the tenant unless it works a substantial modification of the tenant's bargain. However, if the tenant does consent in writing to the new rule or regulation, it is enforceable against the tenant, even if it does cause a substantial modification of the lease.

3. Assignment and Sublease

As at common law, all leases are assignable unless limited by their terms. Code § 55-248.12(B) requires a landlord to notify a tenant in the event the leasehold premises are sold, and to inform the tenant of the name, address and telephone number of the new owner. Failure to comply with this section makes the seller-assignor the statutory agent of the purchaser for purposes of receiving notices and demands, including service of process of any lawsuit. Code § 55-248.12 (C). If the landlord complies with § 55-248.12 and the sale or assignment of the property is in good faith, then § 55-248.14 relieves the seller-assignor of liability as to events occurring after notice to the tenant of the conveyance. On the other hand, liability for events arising prior to the notice to the tenant appear to remain the responsibility of the seller-assignor.
The Act does not deal with what happens to the security deposit of a tenant who has assigned the lease. In the event such a situation arises, the analysis found in *Jones v. Dokos Enterprises*, above (see subsection B.2 above), is useful in determining the lawful recipient of any deposit to be refunded.

4. Application Fees

Code § 55-248.6:1 provides that the landlord may charge a (2013 amendment) refundable application deposit in addition to a nonrefundable application fee. If the applicant fails to rent the unit, for which application was made, the landlord shall refund the application deposit within 20 days of the decision not to rent, less the landlord's written itemized list of expenses and damages provided to the applicant. (The appropriate refund and accounting of appropriate deductions must be provided in 10 days where the applicant has paid the fee by cash, money order, certified check, or cashier's check.) An applicant may sue for a wrongfully withheld fee and may recover reasonable attorney's fees. The Act is silent as to the disposition of application fees of $50 or less. Arguably, a landlord may retain application fees that do not exceed $50. Code § 55-248.4 was amended in 2008 to include that where an application is being made for a dwelling unit which is a public housing unit or other housing unit subject to regulation by the Department of Housing and Urban Development, and application fee shall not exceed $32, exclusive of any actual out-of-pocket expenses paid to a third party by the landlord performing background, credit, or other pre-occupancy checks on the applicant.

5. Security Deposits

Code § 55-248.15:1 provides detailed requirements regarding security deposits (which also includes pet deposits, see § 55-248.4):

a. deposits cannot exceed two months' rent;

b. deposits can only be used to cover the tenant's unpaid accrued rent, reasonable late fees, damages to the premises beyond normal wear and tear, and other damages or charges set forth in the lease;

c. the landlord must return the appropriate amount of the deposit to the tenant, together with an itemized statement listing the deductions from the deposit and any amount that the tenant may owe the landlord for deductions exceeding the deposit, within forty-five days after the termination of the tenancy and delivery of possession. In the event that damages to the premises exceed the amount of the security deposit and require the services of a third party contractor to make the repairs, the landlord must give written notice to the tenant advising of that fact within the forty-five day period. If notice is given as prescribed, the landlord shall have an additional fifteen-day period to provide an itemization of the damages and the cost of repair. The 2013 Legislature provided the landlord with a simple manner of dispersing the security deposit when there is more than one tenant. Code § 55-248.15:1. The landlord may draw a single check payable to all of the tenants, and send it to the address furnished by any one of the tenants. If the plaintiff has no address, after one year, the deposit shall escheat to the Commonwealth. This process discharges the landlord from any further liability to the tenants.

d. Prior to 2014, the landlord was required to accrue interest on deposits held for more than 13 months from the date of the lease for the same tenant occupying the same premises. The 2014 legislation eliminates the interest requirement in its entirety. As no interest was required for the previous four (4) years, the landlord would not have any interest obligation for leases which commenced after July 1, 2010. In 2003 the General Assembly added Code § 55-248.15:2 which sets out a schedule of interest rates on security deposits going back to July 1975 to make it easier to calculate interest owed on security deposits. The interest rate for January 1, 2007 through December 31, 2007 is 5.25 percent, and the interest rate for January 1, 2008, through December 31, 2008 is 0.75% and the interest rate for January 1, 2009 through December 31, 2009 is 0.00%. Thereafter the interest rate shall be determined by Subsection B of Code § 55-248.15:1 which allows for an annual percentage rate of four points below Federal Reserve Discount Rate. That rate has remained 0% through the 2010, 2011, 2012 and 2013 legislative sessions.

e. There must be written move-in inspection reports and written move-out inspection reports to ensure that any damages beyond normal wear and tear may be properly assigned to the appropriate tenant; a 2016 amendment makes it clear that if damages are noted in the move-in inspection, the landlord is not required to repair those damages, unless otherwise required by law.

f. The current holder of the original landlord's interest in the property *at the time of the termination of the tenancy* regardless of how the interest was acquired, is required to account to the tenant in writing as to the disposition of the deposit, along with a refund of the appropriate amount, within the aforesaid time frame, whether or not the deposit was actually transferred by the former landlord to the successors in interest.

g. If a tenant has assigned or sublet the premises to another tenant, the landlord is entitled to hold a security deposit from only one party.

h. If a landlord willfully fails to comply with the provisions relating to security deposits, the court shall order the return of the deposit with interest to the tenant, together with actual damages and a reasonable attorney's fee, unless the tenant owes rent to the landlord. In that case, the court must order that the security deposit plus allowable interest be credited against rent due to the landlord.

i. A landlord may obtain damages insurance and/or renter's insurance for a tenant by adding the tenant as a "co-insured" on the landlord's property and casualty insurance contract, and may require the tenant to pay for the actual cost of coverage (i.e., premiums only). The landlord cannot require a tenant to pay both security deposits and insurance premiums if the amount exceeds two months' rent; however, the landlord can add a monthly amount as additional rent to recover the cost of renter's insurance premiums. In addition, the landlord must notify a tenant in writing that the tenant has a right to obtain a separate policy. If the tenant obtains a separate policy, the tenant must provide written proof of coverage to the landlord and maintain the coverage for the term of the rental agreement. If the landlord adds the tenant to the landlord's policy as a co-insured, the landlord must provide the tenant a copy of the policy(ies) and summary of coverage prepared by the insurer. Pursuant to a 2012 amendment, the landlord may also recover from the tenant, the tenant's pro rata share of insurance the landlord has to place, pursuant to the lease, along with administrative costs Code § 55-248.7:2(A)-(C).

6. Delivery of Possession

Pursuant to Code § 55-248.22, if a landlord willfully fails to deliver possession of the premises to the tenant, rent abates until possession is delivered, and the tenant may terminate the lease upon at least 5 days written notice to the landlord, or maintain an action for possession of the premises against the landlord or any person wrongfully in possession of the premises. Additionally, if the failure to deliver possession is willful and not in good faith, the tenant may recover actual damages plus a reasonable attorney's fee.

7. Military Tenants

In addition to the protections provided pursuant to the Servicemembers Civil Relief Act, Code § 55-248.21:1 of the VRLTA allows any member of the U.S. armed forces or the Virginia National Guard to terminate a lease early if the member: (a) has received permanent change of station orders to depart 35 or more miles (radius) from the location of the premises; (b) has received temporary duty orders in excess of 3 months duration to

depart 35 or more miles (radius) from the location of the premises; (c) is discharged or released from active duty; or (d) has been ordered to report to government-supplied quarters resulting in the loss of basic allowance for quarters.

In order to obtain the early termination benefits of this section, the tenant must serve the landlord with written notice of termination, giving the date it is to be effective. This date can be no sooner than 30 days after the first date on which the next rental payment is due and payable after the date on which the written notice is given to the landlord, and no more than 60 days prior to the date of departure, to allow the landlord time to show and re-rent the premises. Prior to the termination date, the tenant must give the landlord a copy of the official orders or a signed letter confirming the orders from his commanding officer.

A 2005 amendment prohibits the landlord from collecting liquidated damages if the tenant is a member of the Armed Forces of the United States or the National Guard. A 2007 amendment deletes the requirement that rent be prorated up to the date of termination.

Finally, it is important to note that the early termination benefits of Code § 55-248.21:1 applies even to those landlords who would otherwise be exempted from the VRLTA by reason of the number of single-family dwellings owned. Code § 55-248.5(A)(10).

8. Habitability

The VRLTA requires landlords covered by its terms to provide fit and habitable premises. Code § 55-248.13 requires landlords to: (a) comply with the requirements of applicable building and housing codes which materially effect health and safety; (b) make all repairs and do whatever is necessary to keep leased premises fit and habitable; (c) keep all common areas shared by two or more dwelling units clean and structurally safe; (d) maintain in good and safe working order all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances; (e) provide and maintain appropriate receptacles for the collection, storage and removal of garbage and other waste where two or more dwelling units are involved, and arrange for removal of same; and (f) supply running water, reasonable amounts of hot water, reasonable air conditioning if provided, and heat in season, except where such facilities are within the exclusive control of the tenant. While the landlord may delegate certain responsibilities to the tenant (e.g., common area maintenance, provision of trash receptacles, trash removal and furnishing of utilities), these delegations must be in writing and be made in good faith, not for the purpose of evading the landlord's statutory obligations. Code § 55-248.13(C). Code § 55-225.3 was amended in 2008 to include the following requirements of a landlord with regard to mold remediation: 1) to maintain the premises in such a condition as to prevent the accumulation of moisture and the growth of mold and to promptly respond to any notices as provided in subdivision A 8 of § 55-225.4, 2) to perform the duties imposed by subsection A in accordance with law. However the landlord is only liable for the tenant's actual damages proximately caused by the landlord's failure to exercise ordinary care. There is no longer a requirement that the notice from the tenant regarding the

accumulation of mold be in writing. Pursuant to a 2014 amendment, Code § 55-248.18 requires the landlord to install, within 90 days of a request by the tenant, a carbon monoxide detector. Code § 55-248.13 requires the landlord to maintain any such carbon monoxide detector.

The common law and/or contractual liability of the landlord was the subject of *Allstate Insurance Co. v. Rosedale Holdings, LLC, et al.*, 13 Cir. CL 124610 (Richmond 2013). The landlord contracted with an independent contractor to repair the roof of the demised premises. Due to the negligence of the contractor, property of the tenant was damaged, and the tenant sued both the contractor and landlord. In ruling on a demurrer by the landlord, the Court held that the landlord could not contract away its duty to keep the common areas of the property in good repair, and, to the extent that the roof might be common area, the landlord could be held liable to the tenant for damages to the tenant's property. **Note:** A year earlier the same court sustained a demurer in the case of *Rookwood v. SJW, LLLP*, 13 Cir. CL 11993 (Richmond 2012). The plaintiff claimed damages from carbon monoxide poisoning cause by exposure to a defective stove and furnace in an apartment leased from the defendant. The court held that failure to repair or maintain could not give rise to tort claims, and that any liability of a landlord to a tenant would have to be those for breach of contract.

New Code §§ 55-225.6 through 55-226.9 were added in 2008 to provide for mold remediation and the process for notice from tenant to landlord regarding mold. Code § 55-225.6 provides how the landlord can administer the inspection of the dwelling unit at move in. The landlord may: 1) within 5 days after occupancy, submit his own report to tenant, and the tenant has 5 days to object, 2) adopt a written policy in which the tenant submits a written report to landlord, and the landlord has 5 days to object, or 3) both landlord and tenant prepare written report jointly. Code § 55-225.7 provides that the landlord may disclose in the move-in inspection report whether there is visible evidence of mold in areas readily accessible within the interior of the dwelling unit. If the landlord discloses there is no evidence of mold, then it shall be deemed correct unless the tenant objects within 5 days. If the landlord discloses there is evidence of mold, the tenant can 1) terminate the tenancy and not take possession; or 2) remain in possession and the landlord must remediate within 5 days and confirm thereafter that no visible mold is present on re-inspection. Code § 55-225.8 provides definitions used in the chapter and importantly the requirement of mold remediation in accordance with professional standards. Code § 55-225.9 allows the landlord to relocate a tenant where a mold condition in a dwelling unit materially affects the health or safety of the tenant. This period of relocation shall not exceed 30 days, and shall provide a comparable dwelling unit or a hotel room, both at no expense to the tenant. The landlord shall ensure all costs of mold remediation, unless the mold is a result of the tenant's failure to comply with § 8.55-248.16, the tenant's duty to maintain the premises. Code § 8.01-226.12 was added in 2008 to provide the landlord and managing agent with immunity from civil damages in any personal injury or wrongful death action, if the mold condition is caused solely by the negligence of the tenant.

The VRLTA attempts to maintain balance between the obligations of the respective parties. Tenants are required to: (a) comply with requirements imposed upon them by applicable building and housing codes materially affecting health and safety; (b) keep their part of the dwelling unit and the part of the premises that they occupy and use clean; (c) remove garbage and other waste and place same in receptacles for collection; (d) keep plumbing fixtures clean; (e) use utilities supplied by the landlord in a reasonable manner; (f) not deliberately or negligently damage the premises; (g) abide by the landlord's reasonable rules and regulations; (h) not remove or tamper with a properly functioning smoke detector, including removing working batteries, so as to render the detector inoperative (1999 amendment); (i) conduct themselves, and have their family members and guests conduct themselves, in a manner that does not disturb their neighbors' peaceful enjoyment of their premises, (j) not remove or tamper with a properly functioning carbon monoxide detector, including removing any working batteries, so as to render the carbon monoxide detector inoperative (2008 amendment). Code § 55-248.16. A 2014 amendment permits the tenant to request that the landlord install a carbon monoxide detector, and requires the landlord to comply within 90 days. A 2011 amendment to § 55-225.4 goes even farther, requiring the tenant to maintain smoke detectors. An additional 2011 amendment prohibits the tenant from disturbing "painted surfaces in pre-1978 buildings, if the tenant has received the required lead paint notices." Code § 55-225.4 was amended in 2008 to require the tenant, in regard to mold remediation, to 1) maintain the dwelling unit and parts of the premises he occupies as to prevent accumulation of moisture and the growth of mold, and 2) promptly notify the landlord of any moisture accumulation that occurs or of any visible evidence of mold discovered.

9. The 2009 legislature shifted the burden of keeping the part of the premises occupied by the tenant free from insects, and the promptly notify the landlord of the existence of any insects to the tenant, or at least made it clear that this was the tenant's responsibility (§ 55-248.16(A)(3)).

10. Access

Code § 55-248.18 requires that a tenant "shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect . . . , make necessary or agreed upon repairs, decorations or improvements, supply necessary or agreed upon services or exhibit the dwelling . . . to prospective or actual purchasers, mortgagees, tenants, workmen or contractors." The landlord may enter the leased premises without the tenant's permission in the event of an emergency. The landlord must give at least 24 hours notice of his intent to enter in order to perform <u>routine</u> maintenance that has not been requested by the tenant, and may enter only at reasonable times. If the tenant makes a request, the landlord is not required to provide notice to the tenant (2009 Legislature).

After a substantial amendment in 2016, the statute now reads as follows (the 2016 language is in italic):

The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen or contractors. *If, upon inspection of a dwelling unit during the term of a tenancy, the landlord determines there is a violation by the tenant of § 55-248.16 or the rental agreement materially affecting health and safety that can be remedied by repair, replacement of a damaged item or cleaning in accordance with § 55-248.32, the landlord may make such repairs and send the tenant an invoice for payment. If, upon inspection of the dwelling unit during the term of a tenancy, the landlord discovers a violation of the rental agreement, this chapter, or other applicable law, the landlord may send a written notice of termination pursuant to § 55-248.31. If the rental agreement so provides and if a tenant without reasonable justification declines to permit the landlord or managing agent to exhibit the dwelling unit for sale or lease, the landlord may recover damages, costs, and reasonable attorney fees against such tenant.* The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen or contractors. *If, upon inspection of a dwelling unit during the term of a tenancy, the landlord determines there is a violation by the tenant of § 55-248.16 or the rental agreement materially affecting health and safety that can be remedied by repair, replacement of a damaged item or cleaning in accordance with § 55-248.32, the landlord may make such repairs and send the tenant an invoice for payment. If, upon inspection of the dwelling unit during the term of a tenancy, the landlord discovers a violation of the rental agreement, this chapter, or other applicable law, the landlord may send a written notice of termination pursuant to § 55-248.31. If the rental agreement so provides and if a tenant without reasonable justification declines to permit the landlord or managing agent to exhibit the dwelling unit for sale or lease, the landlord may recover damages, costs, and reasonable attorney fees against such tenant.*

Code § 55-248.32 provides the procedure for making repairs cause by a tenant's violation of the rental agreement which materially affects health, and which can be remedied by repair, replacement of a damaged item or cleaning. If the breach is remedial, it allows the landlord to give notice, enter and make the repair, then bill the tenant as part of the rent for the following month. If the breach results in lease termination, the landlord may bill the tenant upon completion of the work. The notice requirements and details are a product of the 2009 Legislature.

In the event the landlord, his agent or contractor is applying an insecticide or a pesticide in the premises, the 2008 version of Code § 55-248.13:3 requires a written notice to the tenant no less than forty-eight hours prior to the application, unless the tenant agrees to a shorter time. The 2009 legislature required the landlord to post notice in common areas, and placed a burden on the tenants to prepare the property for the application in accordance with any notice given by the landlord.

11. Abandonment of Premises

Code § 55-248.33 was amended by the General Assembly in 2002 to establish a clearer process to be followed by a landlord to determine whether or not the rented dwelling unit has been abandoned after an extended absence in excess of seven days by the tenant.

12. Waiver of Rights and Remedies; Right of Redemption

As discussed previously, the VRLTA prohibits landlords from inserting in leases provisions in which tenants waive their rights or remedies under the act, or which improperly delegate to tenants the owner's obligation to maintain fit and habitable premises. Code §§ 55-248.9 and -248.13.

In a case where a landlord accepts a tenant's rent with knowledge that the tenant has breached the lease in a material way, the acceptance constitutes a waiver of the landlord's right to terminate the rental agreement. Code §§ 55-248.34 and -248.46:1. However, the landlord may avoid the waiver of the tenant's material noncompliance either by not accepting the rent, or by accepting it "with reservation," with the reservation to be stated in writing, either in the receipt of payment itself or in a written notice given to the tenant within five business days of acceptance of the rent. Acceptance of rent "with reservation" preserves the landlord's right to accept full payment of all arrears in rent, damages and other fees, and to obtain an order of possession terminating the lease. Code § 55-248.34:1 was amended in 2008 to require the landlord to give a separate written notice to the tenant within 5 days of receipt of rent if the landlord continues to accept the rent with reservation. A specific provision was added that no separate written notice is required if the dwelling unit is a public housing unit or other housing unit subject to regulation by the Department of Housing and Urban Development, for the landlord shall be deemed to have accepted rent with reservation if the landlord gives the tenant the written notice required herein for the portion of the rent paid by the tenant.

Query: If a landlord accepts a partial payment of rent due without giving the tenant a written "with reservation" notice, does the landlord's acceptance constitute a waiver of his right to terminate the rental agreement? According to an opinion of the Attorney General (Attached Appendix C), "acceptance of periodic rent payments in Code § 55-248.34 means acceptance…of <u>full payment</u> of the periodic rent due under the rental agreement. If the rent has <u>not</u> been paid in full . . . there has been no acceptance of the 'periodic rent payment' due to the landlord, and no waiver by the landlord." 1991 Op. Va. Att'y Gen. 240 (October 23, 1991) (emphasis added). This opinion is included in Appendix B.

To protect a tenant who has paid all arrears in rent, damages and other fees in full from a landlord who has accepted payment "with reservation" and who still wishes to maintain an action for possession of the premises, Code § 55-243 affords <u>all</u> residential tenants (not just those covered by the VRLTA) the right to redeem their possessory interest in the premises. To exercise this "right of redemption," the tenant must pay to the landlord, his agent or his attorney all of the arrears in rent, applicable late fees, reasonable attorney's

fees if appropriate, court costs and applicable interest, on or before the first court return date.

If the tenant has so paid, and it is the only time in a twelve-month period of continued occupancy in the same dwelling that the tenant has invoked his right of redemption, then the landlord must reinstate the tenancy and the unlawful detainer summons must be dismissed. If redemption is accomplished, no further act is required of the tenant before all proceedings must cease. See *Hubbard v. Henrico Limited Partnership*, 255 Va. 335 (1998) (recognizing the tenant's right of redemption under Code § 55-243; but holding that the tenant had previously invoked her right of redemption in prior unlawful detainer cases that had been dismissed as "paid" within the last year, so that she could not invoke her right in the present case). In cases where a landlord is seeking "possession only" of the premises, some courts will inquire as to whether or not the tenant's right of redemption has been invoked in the last year.

In 2003 the General Assembly sought to clarify the responsibilities of a landlord to a tenant regarding the landlord's acceptance of rent "with reservation" by deleting Code § 55-248.34 and adding § 55-248.34:1. The new section provides that a landlord does <u>not</u> waive the right to terminate a tenancy when rent is accepted with reservation as to a material noncompliance by the tenant during the pendency of any legal action by the landlord, up to and including the eviction proceeding, as long as the landlord has given the tenant a written notice of reservation of rights within five business days of receipt of payment. However, if the landlord accepts a full payment of rent, court costs and attorney's fees during the pendency of a legal action without a written notice of acceptance with reservation the landlord may be deemed to have waived the right to obtain possession of the premises for that particular material noncompliance by the tenant. The 2013 amendment went even further. It provided that if the landlord accepts rent with reservation of rights, even after judgment, and collected in full all rent and other charges due it, including rent which accrued after judgment, the landlord may still proceed with eviction. Only if the landlord enters into a new written rental agreement, after judgment, but before eviction, does the order of possession become unenforceable.

13. Notices

Unlike the limited number of notice requirements at common law, the VRLTA has abundant and specific notice requirements for landlords and tenants covering a variety of issues. Landlords are required to notify tenants of deductions made from their security deposits (§ 55-248.15(A)); of the sale of the premises to a third party (§ 55-248.12(B)); of the adoption of a new or revised rule or regulation after the tenant has signed a lease or has begun occupancy of the premises (§ 55-248.17(B)); of the need to enter the tenant's premises on a non-emergency basis (§ 55-248.18(A)); of a material noncompliance with the lease (§§ 55-248.31 and -248.32); of acceptance of past due rent and other charges "with reservation" (§ 55-248.34); of termination of a weekly or monthly tenancy (§ 55-248.37); and of the disposition of personal property abandoned by the tenant after the lease has been terminated and the tenant has moved out (§ 55-248.38:1). The 2009 legislature required landlords to give the tenants certain notices in the event of

foreclosure or default by the landlord (§ 55-225.10). The landlord is required to give the tenant written notice of mortgage default, notice of mortgage acceleration, of foreclosure sale within five business days after receiving written notice. When the statute passed in 2009, no penalty was designated for failure to comply with its requirement. A 2011 amendment allows a tenant, who has not been properly notified, to terminate the rental agreement upon five days notice. The amendment also requires a landlord, in default, to notify prospective tenants of the default. No penalty is proscribed for failure to provide this notice of default, and there is no statutory period set forth after which the notice is no longer required.

Code § 8.01-296 allows a duly authorized agent or representative of the landlord to serve notices required by the rental agreement or by law upon the tenant or occupant under a tent agreement that is within the purview of Code § 55-217 et. Seq. In 1999 the General Assembly added § 55-248.31.01 to the VRLTA, allowing a landlord to bar a tenant's guest or invitee, as defined in amended § 55-248.4, from the premises upon written notice served personally on the guest or invitee of the tenant for conduct on the premises which violates the terms of the lease, local ordinance, or state or federal law. The notice must also be served on the tenant and describe the acts of the guest or invitee which form the basis of the landlord's action. This new section also allows a landlord to apply to a magistrate for a trespass warrant, provided the guest or invitee was personally served with the landlord's notice; and also allows a tenant to file a tenant's assertion, pursuant to § 55-248.27, requesting the general district court to review the landlord's action to bar the guest or invitee. A 2007 amendment allows a landlord to terminate a lease upon 120 days' written notice to the tenant for substantial rehabilitation or change of use of a building with four or more rental units, regardless of the terms of the lease. Code § 55-222. A 2015 amendment adds that the notice of termination, in the event of a month to month tenant, must be given 30 days prior to the rent due date.

Tenants are likewise required to notify landlords of their desire to be present when the landlord proposes to do an inspection of the premises (§ 55-248.15(C)); of material noncompliance by the landlord with the lease or with the requirements of the Act (§ 55-248.21); of early termination of a lease by military personnel (§ 55-248.21.1); of termination of the lease due to the landlord's willful failure to deliver possession of the premises to the tenant (§ 55-248.22); and of the landlord's wrongful failure to supply heat, water, electricity, gas or other essential services (§ 55-248.23).

In 2008, § 55-248.6 of the Act was amended so that a person 'notifies' or 'gives' notice or notification to another by taking steps reasonably calculated to inform another person, regardless if that other person actually comes to know of it. The burden of proof regarding notice that is not in writing, is on the person giving the notice. Also, if the rental agreement so provides, the landlord and tenant may send notices in electronic form, and the sender shall retain sufficient proof that it was made by 1) electronic receipt, 2) confirmation by facsimile, or 3) certificate of service prepared by the sender confirming the electronic delivery. Code § 55-248.6 becomes important in cases where the landlord or the tenant alleges material non-compliance with the terms of a lease or with the terms of the Act, yet is unable to produce in court copies of the notices which

may have been sent. Subsection D of § 55-248.6 requires that any public housing authority must contain on its first page the name, address and telephone number of the local legal services program, if any, serving the jurisdiction where the premises are located.

14. Notice to Cure

Unlike the common law, which only provides the tenant with a five-day opportunity to cure a nonpayment of rent (§ 55-225), the VRLTA provides landlords and tenants with opportunities to cure defects or problems which constitute material breaches of a lease or which materially affect health and safety.

Code § 55-248.21 provides that if a landlord is in material noncompliance with the terms of a lease or with provisions of the Act materially affecting health and safety, the tenant may serve a written notice on the landlord specifying the acts or omissions constituting the noncompliance, and giving the landlord 21 days from receipt of the notice to remedy the noncompliance or the lease will be terminated by the tenant after thirty days from receipt of the notice. If the noncompliance is remedied by the landlord in a timely manner, the lease is not deemed to be terminated. If the landlord's noncompliance is so serious as to not be remediable, the tenant may provide the landlord a written notice specifying the acts or omissions constituting the material noncompliance, and the lease will be terminated not less than 30 days from receipt of the notice.

Code § 55-248.21 allows the tenant to seek damages for the landlord's noncompliance; injunctive relief in circuit court (see also § 55-248.40); and attorney's fees if the landlord's noncompliance is willful. The tenant is not entitled to relief under this section if the conditions complained of were caused by the deliberate or negligent act of the tenant, the tenant's family or any other person on the premises with the tenant's consent.

Code § 55-248.23 also allows the tenant, upon written notice to the landlord, to recover damages based upon diminished fair rental value of the premises or to procure reasonable substitute housing, if the landlord willfully or negligently fails to supply heat, water, electricity, gas or other essential service. This section requires the tenant to proceed under its provision for relief, or under Code § 55-248.21, but *not* both sections.

Code § 55-248.31 provides that if a tenant is in material noncompliance with the terms of a lease or with the terms of the act materially affecting health and safety, the landlord may serve a written notice on the tenant specifying the acts or omissions constituting the noncompliance and giving the tenant 21 days from receipt of the notice to remedy the noncompliance or the lease will be terminated after 30 days from receipt of the notice. If the noncompliance is remedied by the tenant in a timely manner, the lease is not terminated. If the tenant's noncompliance is so serious as to not be remediable, the landlord may provide the tenant a written notice specifying the acts or omissions constituting the material noncompliance, and the lease will be terminated not less than 30 days from receipt of the notice. However, when the tenant's noncompliance with the lease or the Act involves a *criminal or willful act* which is not remediable *and which*

poses a threat to health and safety, the landlord may move to terminate the lease *immediately, without a prior written notice to the tenant*, or a prior conviction of any criminal offense that may arise out of the same actions, and proceed in general district court by way of an unlawful detainer summons to gain an order of possession. A 2005 amendment clarifies that any illegal drug activity involving a controlled substance, as used or defined by the Drug Control Act (§ 54.1-3400 et seq.), by the tenant, his authorized occupants, guests or invitees, shall constitute such an immediate irremediable violation. Pursuant to the amendment, the landlord must prove any such criminal or willful violations by a preponderance of the evidence.

The landlord's property is not forfeited if conduct giving rise to forfeiture was committed by the tenant and landlord did not know or have reason to know of the tenant's conduct.

The hearing on the landlord's request for immediate possession of the premises must be held within 15 calendar days from the date of service on the tenant. It is within the court's power to order an earlier hearing when the landlord alleges that emergency conditions exist on the premises which constitute an immediate threat to the health or safety of other tenants. It is not a basis for dismissal if the initial hearing is not held within 15 days.

Unlike the 21 days given to a tenant to cure other material noncompliance with a lease, if rent is unpaid when due, and the tenant fails to pay the rent within five days after written notice has been provided notifying him of his nonpayment and of the landlord's intent to terminate the lease if the rent is not paid within the five-day period, the landlord may consider the tenancy to be terminated and proceed to obtain an order of possession of the premises by way of an unlawful detainer summons filed in the general district court. In addition to obtaining an order of possession and any rent and late fees due as of the date of filing of the unlawful detainer summons, the landlord may receive damages caused by the tenant's unlawful detainer of the premises and reasonable attorney's fees if the tenant's noncompliance is willful. If necessary, the landlord may seek injunctive relief in circuit court. Code §§ 55-248.31 and -248.40.

14.1 Redemption Tenders

The 2010 legislature has provided a new procedure, which will enable a tenant to overcome a default, and retain possession of the rental premises. Code § 55-243 has been amended, to provide for a "redemption tender" offer by the tenant. The defendant must present to the court on or before the return date of the case an offer to pay his rent up to date, through the return date, including all charges, late fees, court costs, and attorney fees. Payment is to be made within ten days. The court is to continue the case for ten days, and if payment is made, the lease is reinstated, and the case is to be dismissed. However, if the tenant fails to pay in full, the court is to grant immediate possession on the continuance date. The tenant may use this procedure only once in each lease period. NOTE: This procedure is also repeated in Code § 55-248.34.1, the Code section, governing acceptance of rent with reservation of rights. It would appear that use of the tender offer is superior to the reservation of rights. Additionally, new legislation does not

provide that the redemption tender cannot be used if the tenant has previously exercised the statutory right of redemption. Presumably, it can be so used. Pursuant to a 2012 amendment the payment may be made to the landlord, or to his attorney, or may be paid into court. It must include all past due rent, all late charges, costs and reasonable attorney fees due per the agreement, or as provided by law.

15. Self-Help

The remedy of self-help is prohibited both for the landlord and the tenant by the VRLTA. Code § 55-248.36 prohibits a landlord from gaining possession of leased premises by willful diminution of electrical, gas, water, or other essential service required by the lease, or by refusal to permit a tenant access to his dwelling unless the refusal is pursuant to a court order for possession of the premises. Should the landlord unlawfully exclude the tenant from possession of his premises, the tenant may file suit to regain possession of the premises and recover actual damages plus a reasonable attorney's fee. Code § 55-248.26.

The 2012 amendment to Code § 55-225.1 states this in no uncertain terms: A person may be evicted only pursuant to "an unlawful detainer action from a court of competent jurisdiction and the execution of a writ of possession issued pursuant thereto. A provision included in a rental agreement for a dwelling unit authorizing action prohibited by this section is unenforceable."

Similarly, the Act prohibits a tenant from utilizing self-help remedies, for example by withholding rent from the landlord, rather than giving the landlord written notice of material noncompliance with the lease or the Act; giving the landlord an opportunity to remedy the noncompliance; and then placing the rent into an escrow account of the general district court. Code § 55-248.27. For a tenant to obtain lawful termination of a lease, or an abatement of rent, he must strictly follow the procedures set forth in the Act (e.g., noncompliance by the landlord, § 55-248.21; failure to deliver possession, § 55-248.22); wrongful failure to supply heat, water, electric, gas or other essential services, § 55-248.23).

16. Constructive Eviction

While at common law a tenant must abandon the leased premises within a reasonable period of time of the landlord's conduct causing the tenant to lose all or a portion of the use of the premises in order for future rents to be abated, under the VRLTA the tenant has remedies which allow him to terminate the lease or remain in possession of the premises when violations of the lease or the Act occur. See *Northridge v. Ruffin*, 257 Va. 481 (1999).

Code § 55-248.21 allows the tenant to notify the landlord in writing of a material noncompliance with the lease or the Act; give the landlord 21 days to remedy the noncompliance; and then consider the lease terminated after 30 days if the noncompliance has not been remedied. If the noncompliance is so serious that it is not

remediable, the tenant can give the landlord written notice specifying the actions or in actions constituting the noncompliance and stating that the lease will be deemed by the tenant to be terminated not less than 30 days from receipt of the notice.

Amended Code § 55-248.27, which covers the rent escrow requirements of the VRLTA, is discussed more fully below. For purposes of this subsection, it is important to note that once the tenant has given the landlord proper written notice of conditions constituting a material noncompliance with the lease or the Act, and the landlord has failed to remedy those conditions within a reasonable period of time, the tenant may then file an "assertion" in the general district court where the premises are located and request relief from the court which may include termination of the tenancy, abatement of part or all of the rent to the tenant, or requiring use of the escrowed funds for repairs to remedy the substandard conditions.

17. Rent Escrow

The VRLTA creates an affirmative right of action which a tenant may initiate to terminate a lease, obtain abatement of rent or secure repairs to the leased premises, without having to wait for the landlord to file suit first. This right of action is set forth in amended § 55-248.27 of the Act.

Code § 55-248.27(A) allows a tenant to file an "assertion" or a "declaration" in a general district court where the premises are located, if there exists upon the leased premises a condition or conditions which constitute a material noncompliance by the landlord with the lease or with provisions of the Act, or which, if not corrected promptly, will constitute a fire hazard or serious threat to the health or safety of the residents.

Code § 55-248.27(B) requires that before a tenant may obtain relief under the Act's rent escrow provision, (a) the tenant, or an appropriate state or municipal agency, must have provided written notice to the landlord stating the condition(s) constituting the material noncompliance and giving the landlord a reasonable period of time to remedy the noncompliance; (b) the landlord must have refused to correct the conditions of noncompliance or failed to do so within a reasonable period of time (with the "reasonableness" of the delay to be determined by the court, except that a delay in excess of 30 days from receipt of the notice by the landlord is rebuttably presumed to be unreasonable); (c) the tenant has paid into court the amount of rent called for in the lease within five days of its due date; and (d) the tenant is able to prove by a preponderance of the evidence that the condition(s) of noncompliance exist, have been caused by the landlord's (or his agent's) neglect or willful acts or omissions, and have not been remedied.

Code § 55-248.27(C) allows a court to fashion a number of remedies including:

a. termination of the lease, upon the request of the tenant or ordering possession of the premises to the landlord, if the landlord prevails on a request for possession pursuant to an unlawful detainer properly filed with the court (A 2016 amendment added the

language requiring the request of the tenant for the lease termination, and the filing of an unlawful detainer in order for the landlord to obtain possession.);

b. ordering all moneys held in court escrow to be disbursed wholly or partially to the landlord or the tenant;

c. ordering continuance of the escrow until the conditions complained of are remedied;

d. ordering the abatement of rent in an amount to be determined by the court based upon the condition of the premises found to exist by the court;

e. ordering funds accumulated in escrow to be disbursed to the tenant where the landlord has refused to make repairs after a reasonable time to do so, or to a contractor chosen by the landlord to make the repairs;

f. referring the case to the appropriate state or municipal agency for investigation and report as to the conditions existing on the premises;

g. ordering disbursement of escrowed funds to pay a mortgage on the property to avoid foreclosure; and

h. ordering disbursement of funds to pay a creditor in order to prevent a mechanic's or materialman's lien.

If the conditions which led to the creation of the escrow account are not fully remedied within six months of the establishment of the account, and the landlord has not made reasonable attempts to remedy the conditions, the court has the authority to award all funds accumulated in escrow to the tenant.

Code § 55-248.27(D) requires the initial hearing on the tenant's assertion or declaration to be held within 15 calendar days from the date the landlord or his agent is served with process.

However, an earlier hearing may be ordered if emergency conditions exist upon the premises. Subsequent hearings following the initial hearing may be scheduled as necessary to resolve the situation. This section concludes with the requirement that a tenant may not proceed under any other provision of the Act once the tenant has chosen to proceed by its rent escrow provisions.

In addition to allowing for rent escrow as an affirmative right of action, the VRLTA allows the tenant to utilize rent escrow as part of a tenant's defense to a landlord's claim for rent and for possession of the leased premises. Code § 55-248.25 allows a tenant who is the subject of a landlord's action for nonpayment of rent to assert as a defense that there exists on the premises a condition or conditions which constitute a serious threat to the life, health or safety of the tenant and other occupants, or which constitutes a material noncompliance with the lease or the Act.

In order to assert a defense allowed by this section, the tenant must satisfy the following conditions: (1) the landlord or his agent was served with a written notice of the material lease or statutory violations by the tenant or by an appropriate state or municipal agency, but the landlord has failed to remedy the violations after having a reasonable opportunity (30 days in most cases) to do so and (2) the tenant, if in possession, has paid into court the amount of rent found by the court to be due and unpaid, which amount shall be held by the court pending the issuance of an appropriate order by the court. The remedies available to the court under this section are comparable to those available for affirmative escrow pursuant to Code § 55-248.27. If the court determines that the tenant has asserted the defense in bad faith, or has denied the landlord access to the premises in order to remedy the claimed violations, the court may order the tenant to pay the landlord's reasonable attorney's fees, court costs and even the cost of making repairs where the tenant has caused the violations.

In 1999, the General Assembly added Code § 55-248.25:1 to the rent escrow provisions of the VRLTA. The new section, captioned "Rent escrow required for continuance of tenant's case," is somewhat complicated and must be read carefully. When a landlord files an unlawful detainer action seeking possession of the premises, and the tenant appears and seeks a continuance of the case for any reason, including a contested trial date, the court shall, upon the landlord's request, and as a condition of granting the continuance, order the tenant to pay an amount equal to the rent that is due as of the initial court date into the court's escrow account. Upon payment of the required amount by the tenant, the case may be continued or set for a contested trial date. However, if the tenant asserts a good faith defense to the landlord's claim, and the court finds the defense is in good faith, the court "shall not require the rent to be escrowed."

If the landlord is the party requesting the continuance, the court shall not require the rent to be paid into the court's escrow account. If the court finds that the tenant has not asserted a good faith defense, the tenant must pay "an amount determined by the court to be proper" into the court's escrow account in order for the unlawful detainer case to be continued. However, "to meet the ends of justice," the court may grant the tenant a continuance of no more than 1 week to make full payment of the required amount into the court's escrow account. If the tenant fails to pay the amount ordered into the escrow account, including any future rents, the court shall, upon the landlord's motion, enter a judgment and an order of possession in favor of the landlord.

Finally, upon the landlord's motion, the court may disburse funds held in escrow to the landlord for payment of the mortgage or other expenses related to the leased premises. (Queries: How much evidence must be presented by the tenant to demonstrate a "good faith defense?" Is it the equivalent of a determination on the merits? Will this new rent escrow provision lead to full hearings on the merits on the initial return date for tenants who are unable to pay the required funds into escrow but wish to contest the landlord's claim? What procedural steps, including notice and an opportunity to be heard, are required when the tenant has failed to pay the required funds into escrow or the landlord has moved to have the escrowed funds disbursed?) Answers to some of these questions

are contained in Appendix C, which is an opinion of the Virginia Attorney General, 1999 Op. Va. Att'y Gen. 168 (July 1, 1999). **Note:** In the case of *Cedars Court Unit Owners Ass'n v. Weeks* (Charlottesville Cir. Ct., August, 2013), the plaintiff filed a Tenant's Assertion in Circuit Court, seeking, among other things, to have that Court accept escrow payment of his Homeowner's Association fees. The Court, in denying the plaintiff's petition to escrow the funds, dismissed the case, and held in regard to the escrow funds, that this was not a landlord/tenant situation, and the Tenant's Assertion statute would not apply, and escrow was not authorized. This opinion has not been published.

18. Retaliatory Evictions

Code § 55-248.39 of the VRLTA prevents a landlord from increasing a tenant's rent, decreasing services or bringing or threatening to bring an action for possession if these actions are intended to retaliate against a tenant who has (a) complained to a governmental agency charged with enforcing building or housing codes; (b) complained to or filed suit against the landlord for violating the Act; (c) organized or joined a tenant's organization; or (d) testified in court against the landlord. The burden of proving retaliatory intent is on the tenant. If the tenant successfully proves that the landlord's conduct is retaliatory in nature, the tenant may recover actual damages and assert retaliation as a defense to the landlord's action for possession of the leased premises. The landlord may still bring an action for possession if the tenant is primarily responsible for causing any building or housing code violations; is in default in payment of rent; or has defaulted as to a provision of the lease materially affecting health or safety.

19. Damages

The VRLTA has numerous provisions which allow a landlord or tenant to recover damages, for a variety of reasons.

a. Code § 55-248.6.1 allows a person whose application fee has been wrongfully withheld to recover damages against a landlord who has violated this section.

b. Code § 55.248.15:1 allows a landlord or a tenant to recover damages with regard to the return or withholding of a security deposit. The landlord is entitled to deduct from the deposit damages to the leased premises beyond normal wear and tear and other damages set forth in the lease; and is also entitled to file an action for recovery of damages beyond the amount covered by the deposit. The tenant, on the other hand, may recover actual damages sustained by reason of the landlord's failure to properly account for or return the tenant's deposit.

c. Code § 55-248.20 allows a landlord to recover damages against a tenant who has failed to surrender possession of a dwelling in a timely manner after the tenancy has terminated.

d. Code § 55-248.21 allows a tenant to recover damages (and obtain injunctive relief in circuit court) if the landlord has failed to remedy a material noncompliance with the lease or the terms of the Act.

e. Code § 55-248.22 allows a tenant to recover damages by virtue of the landlord's willful failure to deliver possession of the leased premises to the tenant.

f. The remedies are to be enforced in the General District Court (2013 amendment), and are substantial. Under this section the tenants' remedies for unlawful ouster, or for diminution of utility or essential services include the following. Tenant may "recover possession or terminate the rental agreement and, in either case, recover the actual damages sustained by him and a reasonable attorney's fee. If the rental agreement is terminated the landlord shall return all of the security deposit."

g. Code § 55-248.26 allows a tenant to recover damages if the landlord has unlawfully removed or excluded the tenant from the leased premises or has willfully diminished services to the tenant.

h. Code § 55-248.31 allows a landlord to recover damages (and obtain injunctive relief in circuit court) if the tenant has failed to remedy a material noncompliance with the lease or the requirements of the Act.

i. Code § 55-248.35 allows a landlord to recover actual damages as part of an action for unlawful detainer seeking rent due and late fees, but he may not recover for accelerated rent through the end of the lease term. But see Code § 8.01-128, amended in 2005.

j. Code § 55-248.37 allows a landlord to recover actual damages against a tenant who has willfully remained in possession beyond the termination date of the leased premises after the landlord notified the tenant in writing that the lease was terminated.

k. Code § 55-248.38 allows a landlord to recover actual damages where the tenant refuses to allow lawful access by the landlord to the premises. Similarly, a tenant may recover actual damages, if the landlord makes an unlawful entry, or a lawful entry in an unreasonable or harassing manner.

l. Code § 55-248.40 allows a circuit court to award damages to a prevailing party who has applied for injunctive relief in that court.

m. The VRLTA does not give rise to a statutory personal injury cause of action for a tenant since the General Assembly did not plainly manifest an intention to abrogate the common law rule that a landlord is not liable in tort for a tenant's personal injuries caused by the landlord's failure to repair premises under a tenant's control and possession. *Isbell v. Commercial Associates, Inc.*, 273 Va. 605 (2007).

n. The 2010 legislature amended § 6.1-330.54, by adding the following italicized language: The rate of interest for a judgment shall be the judgment rate of interest in effect at the time of the entry of the judgment *on any amounts for which judgment is entered…*" This amendment was part of an omnibus landlord/tenant bill, and as such, it would appear to be the intention of the legislature that judgment interest apply to such items as late fees and damages to the property, as well as rent. Your editor notes that this is in direct contrast to Code § 8.01-382 which says that interest is applied only to the "principle sum awarded." Your editor also notes that even under the widest possible interpretation of the Code Section, it is unlikely that the legislature intended to apply interest to attorney fees and court costs, which would also be in direct opposition to an Attorney General's opinion to the contrary.

o. If a tenant gives the landlord a check, which is returned for insufficient funds, or if the tenant stops payment on a check in bad faith, the plaintiff may recover damages pursuant to the Bad Check Statutes 8.01-27.1 and 8.01-27.2. A 2013 amendment applies the "Bad Check" rules to "Electronic Transfers." There is a blank of the Official Form in which the plaintiff may request bad check damages.

20. Attorney's Fees

As is the case with damages, the VRLTA has numerous provisions which allow the court to award a reasonable attorney's fee to the prevailing party in a variety of situations, including: (a) application fees (§ 55-248.6.1, but as to applicant only); (b) attempting to enforce lease provisions prohibited by the Act (§ 55-248.9, but as to tenants only); (c) security deposits (§ 55-248.15:1); (d) a tenant's failure to vacate promptly after termination of a lease (§ 55-248.20); (e) a landlord's failure to remedy a material noncompliance with the terms of the lease or the requirements of the Act (§ 55-248.21); (f) willful failure by a landlord to deliver possession of the leased premises (§ 55-248.22); (g) wrongful failure by a landlord to supply heat, water, electricity, gas or other essential services (§ 55-248.23); (h) bad faith assertion by the tenant of the defense of failure by the landlord to remedy a material noncompliance with the terms of a lease or the requirements of the Act (§ 55-248.25(d)); (i) a landlord's unlawful removal of a tenant from the premises or willful reduction of electricity, gas, waste or other essential service to the tenant (§ 55-248.26); (j) a tenant's failure to remedy a material noncompliance with the terms of the lease or the requirements of the Act (§ 55-248.31); (k) termination of the lease due to a breach of same (e.g., nonpayment of rent) by the tenant (§ 55-248.35); <u>and</u> (l) a tenant's willful failure to vacate the premises where the landlord has given the tenant written notice of the termination of the lease (§ 55-248.37). Code § 55-225 was amended in 2008 to include language that nothing will be construed to prohibit a landlord from seeking an award of costs or attorney's fees under Code § 8.01-27.1 or civil recovery under Code § 8.01-27.2 as part of the damages requested in an unlawful detainer summons provided the landlord has given notice which may be included in a 5-day lease termination notice.

Code §§ 55-248.21 and 55-248.31 were amended in 2003 to allow a prevailing landlord or tenant to recover reasonable attorney's fees unless the losing party can prove by a

preponderance of the evidence that the conduct in question (e.g., failure to pay rent or failure to return a security deposit) was reasonable.

21. Disposal of Property Abandoned by Tenants, and Property of Deceased Tenants

Pursuant to Code § 55-248.38:1 of the VRLTA (amended by the General Assembly in 2002), if a tenant has left any items of personal property on the premises, or in any storage area provided by the landlord, after the lease has terminated and delivery of possession has occurred, the landlord may consider that property abandoned. The landlord may then dispose of the abandoned property as he deems appropriate, provided he has given proper written notice to the tenant that the property will be disposed of within one of the various time frames set forth in the statute. The tenant has the right to remove his property from the premises at reasonable times during the time frames established by the statute, and may even obtain injunctive or other appropriate relief against the landlord who fails to allow the tenant reasonable access to remove his property.

If the landlord receives any funds from the disposition of the property, the funds are to be applied to the tenant's account and serve as a credit as to any amounts due to the landlord by the tenant, including the reasonable costs incurred in disposing of or storing the property. If any funds remain after reimbursing these debts, they are to be treated as part of the tenant's security deposit. The provisions of Code § 55-248.38.1 do *not* apply where the landlord has obtained possession of the premises pursuant to a writ of possession executed by the local sheriff's department.

Code § 55-248.38:3 provides that the property of a deceased tenant may be disposed of as if it were abandoned property, after providing notice to the person, if any, identified in the rental application as the person to contact in the event of death or in the event (2010 amendment) of emergency.

22. Unlawful Detainer, Ejectment

When personal property is removed to restore the premises to the person entitled thereto, then the Sheriff must oversee the removal of the property to a storage area designated by the county or city. In the case of a manufactured home, the owner of the real property may request to have it placed in a designated location within the manufactured home park. The Sheriff and the owner of the real property do not have any liability for the loss of any removed personal property. In order to recover personal property, the owner of the personal property must pay all reasonable and necessary costs due to removal and storage within 30 days of the property placement. If the personal property owner fails to pay, the Sheriff shall dispose of the property in a publicly advertised public sale after due notice is given to the owner. The proceeds shall cover all costs incurred, and the balance paid to the owner of said property. If the costs of removal exceed the proceeds of the sale, then the county or city will reimburse the Sheriff. In the case of manufactured homes, the owner is responsible for the removal costs. Code § 55-237.1.

In addition to the standard method of dealing with the tenant's property during an eviction, as set forth above, a 2016 amendment makes it clear that the landlord may use other lawful methods to dispose of a tenant's property:

> *"Nothing herein shall affect the right of a landlord to enforce an inchoate or perfected lien of the landlord on the personal property of a tenant of any leased or rented commercial or residential premises to distress, levy, and seize such personal property as otherwise provided by law."*

23. Expedited Hearings for Unlawful Detainer Summons

Effective July 1, 2000, Code § 8.01-126 was amended to provide that if a summons for unlawful detainer is filed to terminate a tenancy pursuant to the VRLTA, the initial hearing on the summons by the general district court shall occur within 21 calendar days from the date of filing. If the case cannot be heard by the twenty-first day, then it shall be heard as soon as practicable thereafter. The landlord has the option to request that the initial hearing date be set later than 21 days after the date of filing. This amendment also provides that the unlawful detainer summons shall be served at least ten days before the initial return date, rather than five days under the prior law.

D. Common Issues in Landlord-Tenant Cases

Whether cases are decided under the VRLTA or under Virginia's common law, there are several issues which arise frequently in all landlord-tenant cases.

1. Bifurcation: Possession and Rent/Damages

A 2005 amendment permits a landlord to choose to receive a final, appealable judgment for possession of the premises and to continue the case for up to 120 days (amended in 2016 from 90 days) in order to establish a final claim for rent and damages. At least 15 days prior to any authorized continuance date, the landlord must mail a notice to the tenant at the last known address advising of the continuance date, the amounts of final rent, damages, and any additional sums sought by the landlord. Code § 8.01-128 B.

The 2010 legislature added the following language to this section:

If the plaintiff elects to proceed under this section, the judge shall hear evidence as to the issue of possession on the initial court date and shall hear evidence on the final rent and damages at the hearing set on the continuance date, unless the plaintiff requests otherwise or the judge rules otherwise. Nothing in this section shall preclude a defendant who appears in court at the initial court date from contesting an unlawful action as otherwise provided by law. Clearly this new language has some meaning; however, your editor cannot provide further insight as to the legislative intent.

2. Removal of Cases

Effective with cases filed on or after July 1, 2007, the General Assembly eliminated the right to remove a matter from the general district court to the circuit court by repealing §§ 8.01-127, 8.01-127.1 and 16.1-92 of the Code of Virginia.

3. Appeal of Cases

As set forth in the previous paragraph, the 2007 General Assembly eliminated the right of a defendant to remove General District Court cases to Circuit Court. Recognizing that the requirement of an appeal bond would, in many cases, make it difficult, if not impossible for indigent defendants to have their cases heard in Circuit Court, the Legislature exempted indigents from the bond requirements in most cases. However, this exemption was not extended to cases involving trespass, ejectment, or actions for the recovery of rents. Bond must be posted in those cases. Code § 16.1-107. In any such case, bond must still be posted, even by indigents, within the ten-day statutory period. The 2010 Legislature added, "unlawful detainer against a former owner based upon a foreclosure against that owner" to the types of cases requiring bond, but gave the indigent defendant thirty days to post the bond, rather than the usual ten-day period. It would appear that a non-indigent defendant would still have to post bond within 10 days.

In all cases, the writ tax must be properly and timely posted, or the case cannot be sent to Circuit Court; or, if sent, cannot be heard by Circuit Court. This requirement is jurisdictional, whereas errors in posting the bond may be corrected. *Hurst v. Ballard, et al*, 230 Va. 365 (1985).

In *Architectural Stone v. Wolcott Center*, 274 Va. 519, the landlord obtained a judgment in an unlawful detainer case. Several months later, the tenant filed a motion to set aside the judgment pursuant to Va. Code § 8.01-428. The Supreme Court of Virginia held that the order denying the motion did not dispose of the underlying possessory action on its merits, and therefore could not be appealed to circuit court.

In conjunction with eliminating the right of removal as of July 1, 2007, the General Assembly amended § 16.1-107 to exempt indigent persons from having to post an appeal bond except in cases of trespass, ejectment, or any action involving the recovering of rents.

In these nonpayment of rent/default judgment cases, the plaintiff may request from the court *immediate* issuance of a writ of possession upon entry of judgment for possession of the premises. Code § 8.01-129. The court may also authorize immediate execution of the writ of possession in unlawful detainer cases where exigent circumstances are demonstrated (e.g., criminal acts, vandalism, threats to the health or safety of other tenants).

4. Writs of Possession

In 1999 the General Assembly amended Code § 8.01-471 to allow writs of possession in unlawful detainer cases to be issued within one year from the date of judgment for possession, effective July 1, 1999. However, no writ may be issued if, following the entry of judgment, the landlord has accepted rent payments without reservation, as described in Code § 55-248.34:1 (added in 2003 by the General Assembly). In order to ensure that landlords comply with the requirement that, following the entry of judgment, all subsequent rent payments must have been accepted "with reservation," the Supreme Court has amended the "REQUEST FOR WRIT OF POSSESSION IN UNLAWFUL DETAINER/WRIT OF POSSESSION" form (DC-469) to require the landlord to certify that he or she "has not accepted rent payments without reservation following the entry of the judgment for possession, as described in § 55-248.34." A 2006 amendment clarifies that in cases under the VRLTA, after entry of judgment, the landlord cannot accept rent payments without a reservation of rights or a writ of possession will not be issued.

Once issued, the writ of possession must still be made returnable to the court within 30 days from the date of issuance of the writ. In order to allow review of situations where a tenant alleges he or she has paid all rent, late fees, costs, and attorney's fees subsequent to the entry of judgment, but the landlord is still seeking to obtain possession of the premises, courts may require the tenant to file an expedited motion to rehear, with notice to the landlord, and consider staying the execution of the writ of possession, pending the court's determination of the motion to rehear. This procedure allows courts to consider appropriate evidence on the question of acceptance of rent without reservation before deciding whether or not to authorize the landlord to proceed with obtaining possession of the premises.

After the writ of possession has been issued to the local sheriff, Code § 8.01-470 requires the officer to serve a notice of intent to execute the writ on the tenant *at least seventy-two hours* before the actual execution of the writ. A 2007 amendment to § 8.01-470 allows the sheriff to post notice of eviction on the tenant's main entrance door of property addressed in the writ of possession to effectuate service of process. The notice must include the date and time of execution along with a copy of the writ. A 2001 amendment to this statute also requires that the notice of intent to execute the writ must include a statement of the rights afforded to tenants under new §§ 55-237.1 and -248.38:2, which give a tenant the right to remove his property from the public way or the storage area (which may be the former dwelling unit) designated by the landlord within twenty-four hours after the eviction. Please note that new § 55-237.1 applies to non-VRLTA cases; and new § 55-248.38:2 applies to VRLTA cases.

A 2003 amendment to § 8.01-470 makes it clear that a sheriff, acting pursuant to a writ of possession, shall evict all tenants named in the writ along with their authorized occupants, guests or invitees, and any trespassers in the premises.

This section also gives the local sheriff the authority to employ reasonable force to break and enter a locked door in order to put the landlord in possession. In 2000, the General

Assembly amended Code § 8.01-470 to provide that a writ of possession shall be executed by the sheriff within 15 calendar days from the date is received by the sheriff, or as soon as practicable thereafter, but not later than 30 days from the date the writ is issued.

5. Tenant Installation of New Locks

Pursuant to Code §§ 55-223.5 and 55-248.18:1, when a tenant, who has acquired an order from a court of competent jurisdiction pursuant to § 16.1-279.1 or § 20-103(B) (which deals with protective orders involving domestic abuse) granting such tenant possession of the premises to the exclusion of one or more co-tenants or authorized occupants, provides the landlord with a copy of that order, the tenant may request that the landlord either (i) install a new lock or other security devices on the exterior doors of the dwelling unit at the landlord's actual cost or (ii) permit the tenant to do so. Tenant's installation of a new lock or security device cannot cause permanent damage to any part of the dwelling unit and a duplicate copy of all keys and instructions of how to operate all devices must be given to the landlord. At the termination of the tenancy, the tenant is responsible for all expenses incurred removing the devices and repairs to damaged areas. The 2016 Legislature extended this protection to an "authorized occupant."

A landlord who receives a copy of a court order in accordance with subsection A is prohibited from providing copies of any keys to the dwelling unit to any person excluded from the premises by such order. The bill further provides that it shall not apply when the court order excluding a person was issued ex parte (effective July 1, 2005).

The 2016 Legislature also provided relief for victims of domestic violence, said victim having been granted an order of possession against one or more co-tenants, allowing the victim to apply to become a tenant. The statutes cited above fully explain the procedures, and should be consulted if a case arises, pursuant thereto.

6. Who May Recover Rent or Possession

In cases involving rent and possession, the legislature has relaxed Unauthorized Practice of Law rules, as to who may appear on behalf of a plaintiff, and the activities in which those individuals may engage. See Appendix A, pp. 88ff. The rules pertaining to unlawful detainer and rent cases are divided among several of the sections of the appendix. In short, a landlord, and pursuant to a 2015 amendment, a "family trust" may be represented in court by a licensed real estate broker or realtor (§ 54.1-2106.1), or by a property manager, by a managing agent of the landlord (§ 55-248.4), or by an employee authorized by in writing, by the appropriate officials of corporations, partnerships, and other legal forms of business entities. The 2010 legislature greatly increased the scope of this representation. Qualifying non-lawyers may appear on behalf of the landlord in matters in which rent or possession is due, and may sign pleadings, prepare, execute, file and have served on other parties in any general district court an unlawful detainer warrant, a warrant in debt, a suggestion for summons in garnishment, writ of possession, and a writ of fieri facias arising out of a landlord tenant relationship. A 2013 amendment

makes it clear that a writ of possession may be requested by the plaintiff, the plaintiff's attorney or the plaintiff's agent. Code § 55-248.34:1. Additionally, at any trial in General District Court, in an unlawful detainer action, the managing agent cannot be excluded from the courtroom pursuant to a motion to separate the witnesses. Code § 55-248.4 (2016 amendment).

7. Introduction of Documents at Trial

A 2012 amendment to Code § 8.01-126 allows the landlord to introduce at trial, a copy of the lease, in lieu of the original, and a printout of an electronic lease, if accompanied by an affidavit that it is a true copy. A 2013 amendment makes it clear that the affidavit may be presented by the attorney or agent of the landlord, or by the managing agent. A 2013 amendment also added, "An attorney or agent of the landlord, or the managing agent may present such affidavit into evidence." This was further amended in 2015 to allow in person testimony, in addition to an affidavit to make it clear that if rent is due in full at the first of the month, the court may award tent for the full month, without proration. However, if the unit is re-rented before the end of the month, the landlord shall give the tenant appropriate credit to require that the court be apprised and the tenant given credit for any payments received that would create a variance.

8. Recovery of Additional Rent and Damages in When the Tenant is in Default

In connection with the amendment set forth in the preceding section, the 2013 Legislature also added the following:

> Notwithstanding any other rule of court or provision of law to the contrary, when the defendant does not make an appearance in court, the plaintiff or the plaintiff's attorney or agent may include in the affidavit entered into evidence pursuant to subsection B a statement of the amount of outstanding rent, late charges, attorney fees, and any other charges or damages due as of the date of the hearing. Upon request of the plaintiff or the plaintiff's attorney or agent, if the court determines that the affidavit accurately sets for the amount due the plaintiff, the court shall enter a judgment for such amount in addition to entering an order of possession for the premises.

The effect of this section, it would appear, is to allow the plaintiff, without bifurcating the case, and without giving any notice of amendment, to obtain a judgment for far more money than the plaintiff filed suit for, including rent which accrued after filing, damages that had not yet been discovered or quantified by the plaintiff, or at least for which payment had not yet been demanded, attorney fees which may have accrued outside of the action, and any other charge which the plaintiff considers appropriate. The defendant has no opportunity to object to the additional amounts claimed, or to contest any of the charges.

To say the least, this is an advantage given to landlords that is not given to any other class of plaintiffs.

The 2014 legislation clarified this section somewhat, by amending Code § 8.01-126. The amendment permits the landlord, when filing an action for rent, which is returnable in a month subsequent to the month currently due, and in default, to ask for rent through the date of the hearing. The section goes on to allow the landlord, by affidavit, to amend the amount claimed without notice to the tenant, if the tenant does not appear, and recover all rent due at the time of the hearing. Until there is further legislation, or until there is a court decision providing guidance, each judge will have to determine what is meant by all rent due as of the date of the hearing. If rent is due on the first of the month, and the case is returnable on the third, is the plaintiff entitled to rent for the entire month? If the case is continued until the following month, to allow the tenant to catch up, may the plaintiff recover rent for that month in addition? Is that now the date of the hearing? Hopefully, answers will be provided in future revisions.

The 2015 amendments, set forth in the proceeding section, would appear to somewhat limit the application of this section, perhaps limiting additional rent to the full month for which the action is returnable. This, at least, would be the implication of the section, if not the actual intent.

E. Unlawful Detainers and Bankruptcy – The Effect of Bankruptcy on Unlawful Detainer Actions

1. Chapter 7 Bankruptcies

   a. If a bankruptcy proceeding has been filed prior to a Unlawful Detainer Summons having been filed in a General District Court, the landlord may not file an action for unlawful detainer unless it obtains relief of the automatic stay from the Bankruptcy Court, either by specific action in the Bankruptcy Court, or by waiting for the discharge in bankruptcy, or by the closing of the bankruptcy case. Even then, the landlord may not recover, or even sue for, any pre-petition bankruptcy rent, that financial obligation having been discharged by the Bankruptcy Court. The landlord, however, may give the debtor a pay or quit notice for post-petition bankruptcy rent, and evict, but only after the automatic stay has been terminated, as discussed herein.

   b. Whether or not a landlord can evict for the tenant/debtor's failure to pay pre-petition bankruptcy rent, but not ask for a monetary judgment as to the outstanding pre-petition debt is an issue that your author has never encountered, nor had it been encountered by the bankruptcy attorney who has lent their expertise to this material. However, it is their opinion that the Bankruptcy Code does not give rise to such a remedy.

   c. The eviction process may be disrupted when a tenant files a petition for bankruptcy. Prior to April 2005, the post-judgment automatic stay provisions of the Bankruptcy Code prohibited the continuation of any eviction or unlawful detainer proceeding

against a tenant by a landlord of residential property, despite the landlord's procuring a judgment for possession of the leased premises prior to the commencement of the tenant's bankruptcy action. Under the old bankruptcy law, the automatic stay provision stalled eviction proceedings.

d. The revised Bankruptcy Code allows a landlord to enforce pre-petition judgments for possession without first obtaining an order from the Bankruptcy Court modifying the automatic stay. Pursuant to 11 U.S.C. Section 362(b)(22), the automatic stay does not apply to the continuation of eviction actions by a landlord involving residential leased property whereby:

    (i) The debtor resides in the property as a tenant, and

    (ii) The landlord has obtained, before the bankruptcy, a judgment against the debtor/tenant for possession of the property.

e. In these cases, the landlord does not need to file a motion to obtain relief from automatic stay, and the landlord is free to continue pursuing its eviction rights and writ of possession.

f. Limitations on the 11 U.S.C. Section 362(b)(22) relief:

    (i) The provisions of 11 U.S.C. Section 362(l) place conditions on the above referenced relief. The conditions set forth a procedure whereby the tenant may attempt to retain possession of the property.

    (ii) Under 11 U.S.C. Section 362(l), the debtor is allowed to file and to serve, by no later than 30 days after the bankruptcy petition is filed, a certification under penalty of perjury. The automatic stay will apply for the first 30 days of the bankruptcy case if the debtor attests to the following:

        - Under applicable non-bankruptcy law (i.e. Virginia law, etc.), circumstances exist that permit the debtor to cure the entire monetary default giving rise to the judgment for possession (for example, the debtor has a one right of redemption available pursuant to Virginia Code Section 55-248.34:1);

        - The debtor has deposited with the Bankruptcy Court clerk any rent that would become due during the 30-day period after the petition is filed; and

        - Within 30 days after the case is filed, the debtor cures all monetary defaults giving rise to the unlawful detainer action.

g. The landlord may object to the debtor's certification. If the landlord contests the debtor's certification, the Court must hold a hearing within 10-days to determine the

truth of the challenged certifications. If the Court upholds the landlord's objection, the automatic stay is terminated, and the landlord will be entitled to proceed under Virginia law to complete the eviction process and to recover possession of the leased property. 11 U.S.C. Section 362(l)(3)(B).

h. Eviction processes initiated due to endangerment of property or illegal use of controlled substances on the leased premises are less susceptible to an automatic stay under bankruptcy law. Pursuant to 11 U.S.C. Section 362(b)(23), the automatic stay will terminate 15 days after the landlord files a certification, if the landlord certifies under penalty of perjury that:

    - The landlord's unlawful detainer is based on the endangerment of the leased premises, or the illegal use of controlled substances on the leased premises; or

    - The tenant, during the 30-day period preceding the filing of the certification, has endangered the leased premises or illegally used a controlled substance on the leased premises.

i. The tenant may file and may serve an objection to the landlord's certification within 15 days after the certification is filed challenging the truth of the landlord's certification. 11 U.S.C. Section 362(m). Then the automatic stay will prohibit further eviction actions until the Bankruptcy Court conducts a hearing on the objection within 10-days. At the hearing, the Court is required to determine whether "the situation giving rise to the lessor's certification . . . existed or has been remedied." 11 U.S.C. Section 362(m)(2)(B). If the tenant demonstrates to the Court that the situation giving rise to the landlord's unlawful detainer action did not exist, or has been remedied, then the stay will remain in effect. 11 U.S.C. Section 362(m)(2)(C). If the tenant does not prevail at this hearing, the landlord will be entitled to take further action to recover possession of the leased premises under Virginia law. 11 U.S.C. Section 362(m)(2)(D).

j. If a landlord filed a unlawful detainer action after the tenant/debtor files for bankruptcy protection, while the stay is in effect, the unlawful detainer action should be dismissed or at least temporarily stayed. If the landlord filed the unlawful detainer action, with knowledge that a bankruptcy action had previously been filed, the landlord and/or its counsel may be subject to sanctions in the Bankruptcy Court for violation of the automatic stay, unless the landlord had been previously granted relief from the stay, as set forth herein.

    In the case of *Dunn v. Nguyen*, civil action no. 1:15-ev-672 (USDC Alexandria, 2015) the court upheld the granting of relief from the automatic stay, in a case in which the rent was past due, even though there were outstanding issues relating to standing, and despite the tenant's assertion that the landlord had violated the lease by shutting off the utilities. The court found that those issues were irrelevant to the issue lifting the

stay in this case, in which rent was past due. The bankruptcy court did not deal with those issues, leaving them for the state court to decide.

k. Finally, in this regard, if a Warrant in Debt had not yet been filed, and if the debtor had already surrendered possession of the leased premises, future (post-petition bankruptcy rent) due under the lease may also be discharged under the bankruptcy proceeding if the Bankruptcy Court determines that all of the remaining debt constitutes pre-petition debt. Thus, in such a ruling, the landlord may not recover any rent, even if it is claimed due for the period after the bankruptcy filing. For example, if the debtor vacated the leased premises in January, and then filed for bankruptcy protection later in January, even if there were 11 months left remaining on the lease, that outstanding debt could possibly be deemed rent that the landlord could not claim, if such rent is determined by the Bankruptcy Court to be a pre-petition debt. If the debtor remained in possession of the leased property and had not yet surrender possession, however, it would be appropriate for the Court to award post-petition bankruptcy rent, once the stay had been lifted.

2. The Role of the Judge, When the Court is Aware of the Bankruptcy Filing

a. The defense of bankruptcy is not automatic, but rather it is an affirmative defense that must be pled, or brought to the Court's attention in some manner. Most bankruptcy debtors are represented by bankruptcy counsel, and have, or should have, received advice as to the steps necessary to protect the tenant(s)' rights. The creditor may have received relief from the stay. The claim might be for post-petition bankruptcy rent. The landlord may be entitled to possession for other reasons, including, but not limited to, an agreed to (with debtor) disposition of the leased premises. It is not inappropriate for the Court to assume that each party has acted, or failed to act, after consulting with counsel.

b. If the debtor appears, and contests, or defends the case, the court should make inquiry as to the status of the bankruptcy, and the basis on which the landlord has proceeded, and the manner in which the stay was lifted as to the landlord. As set forth above, if the stay is still in effect, the case should be dismissed. If the stay has been lifted or an exemption to the stay exists, the Court then must determine if any of the rent claimed is either pre-petition or post-petition bankruptcy rent, and grant judgment, or withhold it, accordingly.

3. Chapter 13 Bankruptcies

a. Chapter 13 is another matter. Chapter 13 is a re-organization, and a debtor has a right to try and to reorganize contracts, including leases, in the proceeding relative to the pre-petition debt. If a landlord receives a Chapter 13 notice, the landlord needs to consult with its attorney, and follow the matter in the Bankruptcy Court. The debtor will, or at least is supposed to make specific arrangements concerning the lease, and those arrangements must (at least in theory) be set forth in the bankruptcy plan. If the landlord does not agree with the plan, he has to appear before the Bankruptcy Court

to have it modified, and the automatic stay protects the debtor for as long as that process takes. In fact, any issues about the plan, about pre- or post- bankruptcy rent, or about the right to possession, can be litigated in the Bankruptcy Court.

b. The Chapter 13 bankruptcy also protects co-debtors of the bankrupt debtor. The automatic stay applies to joint obligors, in non-commercial matters, including co-tenants. The landlord will have to obtain relief from the stay in order to pursue other tenants obligated on the same lease, or guarantors of the lease. Even then, the landlord may pursue the co-debtors only to the extent that the obligation will not be provided for or addressed within the plan. This might extend the timeframe of the landlord's recovery. Nonetheless, under no circumstances should the landlord ask for possession, or for judgment, until obtaining relief from the automatic stay in a Chapter 13 proceeding.

Chapter 10. Distress for Rent[1]

Virginia Code § 55-230 *et seq.*

A. Nature of Action

This is an *in rem* action against the tangible personal property of a tenant delinquent in rent. Upon meeting the three preconditions listed in Code § 55-230, the landlord can have the sheriff make a pre-trial levy and seizure of the goods of the tenant that are upon the leased premises or have been there within 30 days. BURK'S PLEADING & PRACTICE, 4th ed., Section 397 *et seq.*

B. Jurisdiction

Original jurisdiction over distress actions appears to be vested solely in the general district court irrespective of the dollar amount of the rent claimed. Code § 55-230. The proceeding may also include an action for a money judgment for the rent due. [*But see* subsection J, "Removal," below.]

C. Venue, Statute of Limitations, and Priority of Liens

1. Venue for the action is where the premises or goods are located. Code § 55-230.

2. The statute of limitations is five years. Code § 55-230.

3. The lien of the levy is superior to that of any other lien created after the property is brought on to the leased premises. As to pre-existing liens, their priority is protected. Code § 55-231.

D. Filing Suit

The action is initiated by the filing of a petition. (District court form DC-423, DISTRESS PETITION). The petitioner must allege sufficient statutory grounds for issuance of the distress warrant. Code § 55-230; § 55-232.1. The petitioner may ask for either pre-trial levy or pre-trial levy and seizure.

E. Issuance of Warrant

The warrant can only be issued by the judge or magistrate (§ 55-230); it shall have a return date on it not more than 30 days after issuance; and it shall be tried in the same manner as an action on a warrant. Code § 55-230.1. There are specific requirements for the petition contained in § 55-230 and § 8.01-534. Note that the petition is filed under oath and that the judicial officer considering it is limited to the allegations in writing in considering whether to issue the warrant. Code §§ 55-230, -232.1. A copy of the warrant and any order for pre-trial

[1] Judge Sherman wishes to thank Toni Brown, a 1998 graduate of the William and Mary School of Law, for her invaluable assistance in the research and preparation of this chapter.

seizure must be served on the defendant, or, if no one is at the premises, a copy must be left there. Code § 55-230; Code § 8.01-487.1.

F. Bond

Before the warrant is issued, a bond must be posted by the petitioner in the amounts set forth in Code § 8.01-537.1. A copy of the bond must be served on the defendant or left posted if no one is at the premises. Code § 55-230, Code § 8.01-477.1. This is required whether pre-trial seizure is asked for or not. District court form DC-447, PLAINTIFF'S BOND FOR LEVY OR SEIZURE, can be used. The Commonwealth is exempt from the requirement for posting bond. Code § 8.01-367(B) (2012 amendment.)

G. Notice of Exemptions

District court form DC-407, REQUEST FOR HEARING – EXEMPTION CLAIM, which sets forth the procedure for the defendant to require a hearing, must accompany the distress warrant and be served on the defendant or left at the premises if no one is there. Code § 55-230, Code § 8.01-487.1. If a claim for exemption is made, the court must hear it within ten business days. Code §§ 8.01-546.1 and -546.2. The clerk's office staff should be alerted to notify the judge promptly if a claim is received.

H. Force in Executing the Warrant

Code § 55-235 permits the serving officer to use force in certain circumstances in executing the distress warrant.

I. How Tenant Can Keep Property in Lieu of Seizure

If there is an order for pre-trial seizure under Code § 55-232.1, the tenant may retain possession by (1) giving a forthcoming bond under § 8.01-526; or (2) making an affidavit that he is unable to post the bond under § 8.01-526, and that there is a valid defense to the action.

Chapter 11. Detinue[1]

Virginia Code § 8.01-114 *et seq.*

A. Nature of Action

1. Detinue is an action to recover specific personal property. The property must be identifiable and have some value. The plaintiff can also recover damages for its wrongful detention. This is not the same as damages to the property in question. BURK'S PLEADING & PRACTICE 4th ed., 125 *et seq*; VIRGINIA CIVIL PROCEDURE, Boyd *et al.* § 2.13. The action is used primarily for repossession cases where the creditor cannot or does not want to repossess the secured property, typically located in the debtor's household.

2. BLACK'S LAW DICTIONARY defines detinue as a form of action which lies for the recovery, *in specie*, of personal chattels from one who acquired possession of them lawfully but retains it without right, together with damages for the wrongful detention. Detinue is a possessory action for the recovery of personal chattels due to unjust detention.

3. The plaintiff does not have to be the owner of the property. In order to prevail in a Detinue action, the plaintiff must show only that its right to possession of the property is superior to that of the party actually in possession. Several of the cases in the appendix involve disputes between non-owners. (*See Appendix to Material on Detinue* immediately following this chapter.)

    a. *First Virginia Bank v. Sutherland*, 217 Va. 588 (1977) involved an action between the financing bank (after default) and a company claiming a storage lien.

    b. *Graves Co. v. Rockingham National Bank*, 220 Va. 844 (1980) was an action between a lien holder of the seller of goods and the company to which the goods had been sold and installed as fixtures.

    c. *Vicars v. Atlantic Discount*, 205, Va. 934 (1965) was an action by the original owner of a vehicle, and the current owner of record, a good faith purchaser from a thief. The Court found that Detinue was the correct method of trying title between competing owners, holding for the original owner, as a thief cannot convey good title.

    d. *Peter v. Langley*, Case No. 89241, Loudoun County Circuit Court, 2014, is a dispute over which party is entitled to the engagement ring, when, in absence of allegations of fault, the marriage is called off by the bride to be. The court held that detinue is the proper action to determinate ownership in a dispute of this nature, and held that the ring, or its value, were to be returned to the not-to-be husband, and that the Virginia "Hart Balm Act" did not apply to gifts given in contemplation of marriage.

[1] Judge Sherman wishes to thank T. Wayne Williams, a law student from Regent University School of Law, for his invaluable assistance in the research and preparation of this chapter.

4. The case of *Broad Street Auto Sales v. Baxter*, 230 Va. 1 (1985) was an action to recover specific personal property in the possession of the defendant. The defendant sued in detinue and for breach of contract. The defendant had, prior to the action, repossessed the vehicle and sold it to a third party. The Supreme Court of Virginia reversed a judgment in favor of the plaintiff, pursuant to the breach of contract claim, holding that a plaintiff may not recover damages for breach of contract in a detinue action.

5. Neither may a plaintiff recover damages for tortuous conduct in a detinue action. In *MacPherson v. Green*, 197 Va. 27 (1955), the plaintiff brought a detinue action to recover a letter, which the defendant had obtained improperly, and sought further to recover for damages to his reputation caused by the improper use of the letter. Setting aside a jury verdict for damages to his reputation, the court held that damages for misuse of the property could not be recovered in a detinue action.

B. Jurisdiction

The action may be brought in the general district court when the value of the property or, if a secured transaction, the debt owed, does not exceed the jurisdictional limits of the general district court. Code § 16.1-77, § 8.01-114. The plaintiff may use a motion for judgment or a warrant in detinue.

C. Venue and Statute of Limitations

Venue is set under the general venue provisions of § 8.01-262. The statute of limitations is typically either five years for a written contract or three years for an oral contract, pursuant to §§ 8.01-246 and -248. The statute begins to run when demand is made for return of the property, no matter how long the property had been in the hands of the party from whom the plaintiff seeks to obtain possession. *Gwin v. Graves*, 239 Va. 34 (1985). See also ***Brown University v. Tharpe*, Case No. 4:10 cv167, USDC, E.D. Va. (Newport News, 2010).** The court held that a series of letters exchanged several years before, in an attempt to locate and make a claim to a ceremonial sword, the subject matter of the suit, did not constitute demand. The full decision in that case, published in August 2013, is a primer on Virginia detinue law, dealing with a number of issues, including burden of proof, demand, and laches, among other things.

D. Form of Judgment

Virginia Code § 8.01-121

1. The judgment of the court, if for the plaintiff, will differ in form based on whether or not the suit is to recover property that secures a contract:

    a. If the action is to recover property securing a contract, then the judgment should be for possession of the property *or* the balance due on the contract, plus a judgment for any damages proven for wrongful detention of the property. The election as to whether there shall be a judgment for possession of the property or for the balance due on the contract is the defendant's under § 8.01-121. The time for this election

cannot exceed 30 days. If the creditor gains possession of the property, it must be sold in accordance with the UCC, §§ 8.9-501 and -502 if the creditor wishes to pursue a later judgment for a deficiency balance.

b. If the plaintiff's claim is *not* based on a secured transaction, then the judgment shall be for the possession of the property **or** the alternate value of the property, plus any damages proven for wrongful retention. This option is available to the *plaintiff* when the detinue proceeding does not arise from a secured contract transaction.

c. An Attorney General's opinion, 1997 Op. Va. Att'y Gen. 16 (May 21, 1997), (Appendix D) supports the position that when the plaintiff prevails in a detinue action, the plaintiff may recover the property *or* its value (or the contract balance), not both, plus proven damages for wrongful detention. The opinion points to the fact that § 8.01-121 uses the disjunctive "or" to describe two distinct dispositions that may be entered by the court brought under a verbal or written contract. This wording indicates that two *separate* alternatives were intended by the General Assembly. Thus, a judgment for possession and the alternative value of the property is not contemplated by Code § 8.01-121.

d. It is not unusual in a detinue case involving a secured contract for the defendant to fail to appear. In such a situation, Code § 8.01-121 appears to allow the court the authority to grant the absent defendant the right to make the election for possession of the property or the balance due on the contract for a period of time not to exceed 30 days.

e. The preferred practice among general district court judges in Virginia is to grant the non-appearing defendant the right to make the election within ten days of the return date, a period co-extensive with the period to note an appeal. Thereafter, the election is the plaintiff's, subject to the court's approval. In the default detinue case, the court will hear only the plaintiff's evidence before deciding upon the appropriate remedy.

f. In deciding whether to award possession of the property or the balance due under the contract, the court should consider factors such as how much money has been paid for the item(s), the plaintiff's previous experience with the defendant, and the condition of the property. The objective of the court is to fashion the most logical and appropriate solution, either possession of the property or judgment for the contract balance, but not both. The decision is more difficult when the defendant is not present, but it can be made from the evidence presented to the court.

g. If the property cannot be returned, the court may enter a judgment for its value. In *Meyers v. Hancock*, 185 Va. 454 (1946), the dispute was over a water heater in a home that had been conveyed. The defendant claimed the water heater was a fixture, and could not be severed from the property, even though the contract of sale reserved the water heater to the plaintiff. The Court determined that the plaintiff was entitled to the property, that it had been "constructively severed" from the contract. Since it

could not be moved, the Court awarded the value of the property in the detinue action.

h. The Court may award attorney fees, if provided for in the contract. See *East Texas Salvage v. Duncan*, 226 Va. 160 (1983). See also *U.S. National Bank Assn. v. Leesburg Pizza Buffet, LLC, Civil Action 1:12cv1514 GBL/JFA, USDC, E.D. Va. Aug. 2013.*

i. Despite the language of the Virginia statute, giving judgment in the alternative, the United States District Court in Alexandria affirmed a magistrate's decision, granting a money judgment and a detinue judgment simultaneously, but ordering the application of any proceeds recovered from the disposition of the collateral, to be applied towards the satisfaction of the money judgment. *U.S. National Bank Assn. v. Leesburg Pizza Buffet, LLC, Civil Action 1:12cv1514 GBL/JFA, USDC, E.D. Va. Aug. 2013.*

E. Pre-Trial Seizure

Normally, possession remains with the defendant pending the outcome of the trial. However, Code § 8.01-114 establishes a procedure for the court or magistrate, but not the clerk, to order the sheriff to deliver possession of the property to the plaintiff pending litigation. *J.I. Case Co. v. United Virginia Bank*, 232 Va. 210 (1986) (after getting pre-trial possession of the property, the plaintiff disposed of it and then took a non-suit). Even after the nonsuit, the trial court, and on appeal, the Supreme Court of Virginia found that the court still had the right to dispose of the property, or, here, the bond, as the property was no longer subject to the jurisdiction of the Commonwealth.

1. The pre-trial seizure can be ordered only after an *ex parte* review by the judge or magistrate and a finding, upon review of the petition, that the circumstances listed in Code § 8.01-114 are reasonably present. *Clarence Williams v. D. Brock Matthews*, 248 Va. 277 (1994). Note that the judicial officer can only consider the verified petition, which must be filed with the papers, along with the written report of the action taken.

2. If the order for pre-trial seizure is entered, one copy, along with a copy of the notice of exemptions, must be served on the defendant. If no one is there to be served, the copy must be left at the premises. Code §§ 8.01-114(D), -546.1, -546.2, and -487.1. If a hearing is requested by the defendant on an exemption claim, it must be held within ten business days from its filing. The clerk's office staff should be alerted to tell the judge promptly if an exemption claim is filed.

3. No pre-trial seizure order can be entered unless the plaintiff furnishes a bond in a penalty at least double the estimated value of the property claimed. Code § 8.01-115. Code § 8.01-367(B) exempts the Commonwealth from the requirement of posting bond in the case of a levy, an attachment, or a distress warrant. No such exemption has been granted in detinue cases.

4. Code § 8.01-119 requires the court, where a pre-trial seizure order has been issued, to hold a review-type of hearing no later than twenty-one days after issuance, or promptly on request of the defendant.

F. Judgment

The judgment of the court for possession is enforced by a writ of possession pursuant to Code §§ 8.01 -470 and -472. However, the sheriff has no statutory authority to enter the residence of a defendant, in order to execute the writ. The sheriff cannot be required to do so by a writ of mandamus. See *Williams, Sheriff v. Matthews*, 248 Va. 448 (1994).

APPENDIX TO MATERIAL ON DETINUE

ALL SUPREME COURT OF VIRGINIA CASES SINCE 1946

IMPORTANT CASES FROM US DISTRICT COURT

ALL IMPORTANT CIRCUIT COURT CASES

ALL STATUTORY REFERENCES TO DETINUE FROM ALL SECTIONS OF THE VIRGINIA CODE

VIRGINIA CASES ON DETINUE

Supreme Court of Virginia

***Meyers v. Hancock*, 185 Va. 454 (1946)**

In a contract for the sale of residential real estate, the seller and buyer agreed that the water heater was not to be conveyed with the real estate. After closing, the buyer refused to deliver it, and the plaintiff, seller, filed a detinue warrant. By that time, the owner had affixed the water heater to the real estate, and claimed that it was a fixture, and could not be reached by a detinue warrant.

The Court held that even if the heater were a fixture, by the agreement it had been constructively severed from the land.

> Thus, if the owner of the land sells or agrees to sell the fixture separate from the land, … that mere agreement operates as a constructive severance, and makes the fixture an entity distinct from the land, so that it will not pass with the land upon a conveyance of the latter, if the purchaser of the land have notice of such agreement.

***MacPherson v. Green*, 197 Va. 27 (1955)**

The plaintiff sued in detinue for return of a letter belonging to the plaintiff, and for damages to his reputation for the improper use of the letter. The court held that in a detinue action, damages such as claimed herein could not be recovered. Setting aside a jury award for damages to his reputation, the Court held that:

> in an action for detinue, damages can be had only for detention of the article, and usually are measured by the value of its use or hire while detained. This does not include damages cause by the misuse of the article.

***Vicars v. Atlantic Discount*, 205 Va. 934 (1965)**

Plaintiff's motor vehicle was stolen. It was later sold to the defendant, a good faith purchaser, for value. After some searching, the vehicle was located, and plaintiff brought a detinue action.

The court held that the defendant could not acquire good title from the thief, and that the plaintiff's right to the vehicle was superior, and that the plaintiff should prevail in the detinue action.

> In order to prevail in an action of detinue, the plaintiff must have title to and the right to immediate possession of the chattel sought to be recovered, which must be of some value, and capable of identification, and the defendant must have had possession at some time prior to the institution of the action.

Since his title came through a thief, defendant acquired no right to the vehicle against the true owner, despite his good faith and payment of value.

***First Virginia Bank v. Sutherland*, 217 Va. 588 (1977)**

The vehicle, which was the subject of a detinue action in this case, was deemed by the county to be abandoned. The county had a contract with Sullivan, pursuant to which the vehicle was towed to Sullivan's facility. The owner of the vehicle defaulted on his loan, and the bank sought to recover the vehicle from Sullivan, paying only the statutory fee of $75, pursuant to the version of Code § 43-32 then in existence.

The case is primarily about the lien priorities between the financing bank, and the company claiming a lien for towing and storage. The Court held that the bank was not an "owner." Therefore, the company was only entitled to its statutory amount against the bank.

The case is important, not because of the resolution of the issue of priorities among lien holders, but, rather because the detinue action was the appropriate action to try the issue of the right of possession and dominion over the vehicle, as between two non-owners.

***Graves Co. v. Rockingham National Bank*, 220 Va. 844 (1980)**

Bank financed Electrical's contract to build an addition to a school, taking as collateral all of the inventory or Electrical. Electrical, in turn, sold Graves much of its inventory, which inventory was stored on the school property. The agreement between Electrical and Graves provided that title to the good sold passed upon payment. The parties agreed to allow Graves to finish the project without prejudice to their respective rights, and sued in detinue for the equipment, which by now had been installed and become fixtures. The trial court awarded Bank a judgment for the value of the equipment.

On appeal, the court analyzed the agreements, and the appropriate portions of the UCC, and determined that title passed upon payment, and that Bank had no lien.

Again, the UCC analysis is interesting, but not important. What is important is that, once again, a detinue action was the appropriate means of determining title to the goods, among the competing interests.

***East Texas Salvage v. Duncan*, 226 Va. 160 (1983)**

Duncan towed and stored a wrecked vehicle owned by East Texas. East Texas filed a detinue action, which was settled when East Texas posted a bond. However, East Texas still did not pay Duncan's invoice. When suit was filed, Duncan asked for attorney fees based on the language in the bond agreement, which provided for recovery of such fees as may be "awarded by the court." The trial court awarded attorney fees, and the defendant appealed the award. The Supreme Court of Virginia upheld the award, as it was based upon the clear language of the agreement between the parties in the bond agreement.

***Gwin v. Graves*, 239 Va. 34 (1985)**

In 1956, defendant museum received an antique car on "indefinite extended loan" from its owner. A sign on the car in the museum said "presented by" the owner. The owner died in 1962, and his widow died in 1979. The widow's executor now seeks return of the vehicle, in a detinue action, and demands an accounting of the income derived from the vehicle. Reasonably, enough the museum claimed that the five-year detinue statute of limitations had run. Code § 8.01-243.

The trial court agreed with the defendant, and dismissed the action. The Supreme Court of Virginia reversed the decision, holding as follows:

> Detinue is a possessory action by which a party seeks recovery of a specific item of personal property and any damages occasioned by the wrongful detainer of the property. <The defendant> holding rightful possession of the car under loan was a bailee. Where property is in the possession of a bailee, a cause of action in detinue accrues upon a demand and refusal to return the property, or a violation of the bailment contract by an act of conversion. The evidence in the record is insufficient to establish either demand <by the widow> for return of the automobile, or conversion of the car by Graves.

***Broad Street Auto Sales v. Baxter*, 230 Va. 1 (1985)**

This case is interesting, in that it started in General District Court, was appealed to Circuit Court, and then appealed to the State Supreme Court, all over a $500 judgment. The principal of the case is important, so I guess it was worth the effort (and expense).

Baxter bought a vehicle from Broad Street Auto Sales, which retained title. When Baxter missed a payment, the vehicle was repossessed, the note accelerated, and the vehicle sold to a third party when Baxter did not meet the demands of the accelerated note. Baxter sued in detinue, and was twice awarded the value of the vehicle, which was $500.

On appeal, the Supreme Court of Virginia reversed the trial courts and entered final judgment. Citing *MacPherson vs. Green,* the Court held as follows:

> The object of a detinue action is to recover specific personal property and damages for its detention. The action is employed to recover a chattel from one in possession who unlawfully detains it from either the true owner or one lawfully entitled to its possession. <u>If the specific property cannot be returned, judgment is rendered for its value. However, one cannot sue in detinue, and recover for breach of contract.</u> (Emphasis mine.)

In the present case, Auto Sales had the right to repossess the automobile if Baxter defaulted under the note. Baxter did default, and the automobile was repossessed. Thus, because Auto Sales was in lawful possession of the automobile and Baxter no longer was entitled to its possession, Baxter could not maintain a detinue action.

Final judgment was therefore entered on behalf of Auto Sales.

***J. I. Case Co. v. United Virginia Bank*, 232 Va. 210 (1986)**

This is the only Supreme Court of Virginia case that I was able to find which dealt with pre-judgment detinue. The plaintiff posted bond, and seized the disputed equipment. Before trial, the plaintiff disposed of all of the equipment in its possession by distributing it among retail dealers throughout the United States, without notice to the defendants, and without court authorization. The plaintiff then moved for a nonsuit, to which the defendants objected. The court ruled that the plaintiffs had no right to seize the property outside a motion for judgment in detinue, and that, because they had nonsuited the action and could no longer return the property, the court awarded a money judgment against the plaintiffs.

The trial court and the Supreme Court each had to deal with two issues, the right of nonsuit, and the right of the defendant to have the specific property returned (impossible in this case, because Case had disposed of it, placing it beyond the jurisdiction of the court). Both held that the right to nonsuit was absolute, but that the court still has to dispose of the property in accordance with the rights of the parties. Code § 8.01-121. The right of the defendant to have the property returned (by posting a counter bond) is absolute during the pending litigation. Code § 8.01-116.

> Compliance with these statutes would be frustrated and, in many cases rendered impossible if the plaintiff with impunity could place the seized property beyond the jurisdiction of the trial court, before the rights of the parties have been determined. Therefore, where … the

> plaintiff, after seizing the property under the authority of statute and placing it beyond the jurisdiction of the court decides to manipulate the statutory scheme by exercising the privilege of nonsuit, the detinue statutes contemplate entry of a specific judgment in the detinue proceedings against the plaintiff for the value of the property.

***Williams, Sheriff v. Matthews*, 248 Va. 448 (1994)**

The sheriff of Chesterfield County refused enter, without permission of the residents, the homes of individuals upon whom he was to execute detinue writs of possession of personal property. Brock Matthews, attorney for the various plaintiffs, filed a mandamus against the sheriff. Chesterfield Circuit Court ruled in favor of the plaintiff and the sheriff appealed. The Supreme Court of Virginia held that the detinue statutes do not give the sheriff the right to enter the premises of the homeowners without their permission. Noting that mandamus is an extraordinary remedy, to be granted only where the petitioner has a clear right to the relief sought, when the respondent has a legal duty to perform the act which the petitioner seeks to compel, and there is no adequate remedy at law, the Court held in favor of the sheriff.

Under the common law, it was unlawful for a sheriff to break the doors of a person's house to arrest that person in a civil suit in debt or trespass. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle. This venerable principle underlies the whole law dealing with the right to break and enter a dwelling house for civil recovery of property.

After analyzing the detinue statutes, the Court determined that the legislature had no manifested an intention to abrogate the common law with reference to such orders.

***Brown University v. Tharpe*, Case No. 4:10 cv 167, USDC, E.D. Va. (Newport News, 2010).**

The court held that a series of letters exchanged several years before, in an attempt to locate and make a claim to a ceremonial sword, the subject matter of the suit, did not constitute demand. The case involved locating and making claim to an item which had been stolen over fifty years before the commencement of the suit, and which had been in the hands of several different parties. When the suit was filed, the sword was on loan to the defendant, having been received from the latest "owner," or party in possession.

The full opinion in this case is twenty-six pages long, and is a primer on detinue law in Virginia, dealing with issues of demand, statute of limitations, and burden of proof, among others. The Court ultimately ruled in favor of the University. The final order in the case was entered in August of 2013. The sword, after an absence of at least thirty-five years, has now been returned to Brown University.

U.S. National Bank Assn. v. Leesburg Pizza Buffet, LLC, Civil Action 1:12cv1514 GBL/JFA, USDC, E.D. Va. Aug. 2013.

This detinue action filed in U.S. District Court, was heard by a magistrate judge. While the matter resulted in a default judgment, the magistrate's opinion is important, in that he found that it was appropriate to enter judgment on the contract, for the full amount of the damages claimed, and to enter a simultaneous judgment in detinue for the equipment. However, the opinion clearly stated that the proceeds from the disposition of the collateral were to be applied to the money judgment, reducing the amount due, accordingly. The magistrate also awarded attorney fees, pursuant to the terms of the contract. The District Court affirmed the magistrate judge's opinion as written.

Circuit Court

***Lee v. Park*, 73 Cir. 219 (Fairfax County, 2007)**

The case is a complex landlord/tenant case, one part of which was a detinue action by the landlord to recover certain personal property and fixtures sold to the tenant by the landlord. The case makes two important points.

The court ruled that the detinue statute of limitations is 5 years, basing the ruling on Code § 8.01-243 B, which states: "Every action for injury to property … shall be brought within five years after the cause of action accrues."

The trial court, and the Supreme Court of Virginia in *Gwin v. Graves, supra,* obviously agree, that a detinue action is one for "damage of property."

The trial court also set forth the plaintiff's obligations, in proving a detinue claim. Quoting from *Vicars, supra,* the court held:

> Nevertheless, the Landlords bore the burden of proving facts necessary to make out its detinue claim. In order to maintain an action for detinue, a plaintiff must prove: (1) a right of property in the personal property to be recovered; (2) a right of immediate possession; (3) that the property is capable of immediate possession; (4) the property has some value; and (5) that the defendant had possession at some time prior to the commencement of the action.

The court went on to deny the plaintiff relief, because the "the evidence demonstrates that most of the items, and presumably most of the value paid or promised to be paid, were for fixtures, not personalty. …The remaining items of personal property appear to have been depreciable items, which were never sufficiently identified by <the parties>." The court went on to point out the importance, in a detinue action, of identifying the specific property sought. The court concluded as follows: "After considering all the evidence, I find that Landlords have failed to satisfy their burden of proving a right to return of personal property as most of the items

described by Park constituted fixtures. I further find that the Landlords have failed to prove the items of personal property sought have value and have failed to identify such items of personal property with sufficient and specificity. <Grammar error is the court's, not mine.> The Landlords' detinue action is dismissed."

***Professionals I v. Pathak*, 47 Va. Cir. 476 (Fairfax County, 1998)**

This case also recognizes the five-year statute of limitations.

> Detinue is a possessory action which lies wherever the chattel in question is illegally withheld. [Citing cases] a detinue claim is for an act directed at the plaintiff's property, not against the individual. As a result, the five-year limitations period set forth in Va. Code § 8.01-243(B) applies.

***Comeaux v. First Union Bank*, 25 Va. Cir. 181 (City of Richmond, 2001)**

Husband and wife opened a joint account at the bank. Wife gave an order to the bank not to allow the husband to withdraw funds. The order was ignored, and the husband cleaned out the account. Wife filed suit against the bank, setting forth various theories of recovery, which included conversion, and which included a count in detinue for return of her money.

On the issue of detinue, the court ruled against the wife. "First Union argues that plaintiff has failed to state a cause of action for Detinue, … because the money was the property of the bank. As noted above <when ruling on the conversion action> it is established that upon deposit, money becomes the property of the bank. The demurrer as to <that Count> is sustained."

***Peter v. Langley*, Civil Case No. 89241, Loudoun County, 2014.**

Wife-to-be called off the wedding, and the not-to-be husband sued in dentinue for return of the engagement ring, or for the alternative value of the ring, an amount in excess of $40,000. There was no allegation of fault.

After reviewing conflicting authorities, the court found that the Virginia Hart Balm Act, prohibiting actions for damages upon breach of a promise to marry, did not apply to gifts given in contemplation of marriage. The wedding ring was such a gift, and husband was entitled to its return or to the alternative value.

STATUTORY LAW

The main body of detinue statutes is Title 12, Detinue, of Code § 8.01. The sections are §§ 8.01-114 through 8.01-123. These sections deal almost exclusively with prejudgment detinue, a rare creature indeed in General District Court.

Detinue is also mentioned in the following code sections:

Title 16.1, Courts not of Record

Code § 16.1-69.48:2 is the section setting forth the fees for each type of action. The current base fee of $22 for small matters, and $27 for claims over $200 will be adjusted this year because of the budget increase.

Code § 16.1-88.03 is the section allowing corporations and other business entities to file actions, including detinue, and pursue them in GDC, up to a point.

Commercial Code

Code § 8.2-716 recognizes a buyer's right to specific performance or detinue, where the goods are unique, or under other proper circumstances; and, the section sets forth the circumstances under which that right may be invoked. NOTE: Your editor believes that cases under this Code Section are extremely rare.

Code § 8.2A-521 is entitled "Lessee's right to specific performance or other similar rights." It recognizes the lessee's right to detinue, and other like remedies for goods identified to a lease contract after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing. NOTE: Again, your editor has never had such a case, and did not even know of the statute, until he started working on this project.

Title 59.1, Trade and Commerce

Chapter 8 Timber Brands

Code § 59.1-115 Sheriff's sale of unbranded timber; recovery by owner; disposition of proceeds.

Another special detinue section of the Code. The statute provides that a person finding an unbranded log (whatever that is) must turn it over to the sheriff, who will sell it after giving notice. The section allows the owner to recover the timber by "satisfying the sheriff that he is entitled to it, or by "action of detinue, as provided by law." NOTE: Having no forests in the cities, your editor has never had one of these cases before him; perhaps, the statute is used in the rural areas of the state.

Chapter 12. Attachments

Virginia Code §§ 8.01-533 *et seq.*, § 16.1-105.

A. Jurisdiction

Virginia Code §§ 8.01-535, 16.1-77(2), -105.

1. The general district court can hear attachment proceedings when the amount of the plaintiff's claim does not exceed $25,000 and no real estate is involved. Interest and attorneys' fees claimed are excluded in determining this dollar limit.

2. The proceedings are to conform to the general attachment provisions in Title 8.01 [§ 8.01-533 *et seq.*]. Va. Code § 16.1-105.

3. The claim can be for either a debt owed, contract, or tort or for the recovery of specific personal property.

B. Venue

Virginia Code § 8.01-261(11).

1. With reference to the principal defendant and those liable with or to him, venue shall be determined as if the principal defendant were the sole defendant under any applicable forum set out in Virginia Code § 8.01-262. Va. Code § 8.01-261(11)(a).

2. Where the principal defendant has estate or has debts owing him. Va. Code § 8.01-261(11)(b).

C. Parties

Virginia Code § 8.01-539.

1. The principal defendant is the party against whom the plaintiff is asserting a claim, and shall be made a defendant.

2. The codefendant(s) is a party alleged to either be indebted to the principal defendant or have possession of property belonging to him, and shall be a party.

3. Any person claiming title to, or an interest in, the property, or who is a lienholder in property sought to be attached may be joined. *Eastern Indem. Co. V. J.D. Conti Elec. Co.*, 573 F. Supp 1036 (E.D. Va 1983). Such defendants shall be known as Codefendants.

D. Requirements of Petition for Attachment

Virginia Code §§ 8.01-533, -537.

1. Petition for the recovery of specific property – the petition must state:

    a. The kind, quantity, and estimated fair market value of the property,

b. The character of the estate claimed therein by the plaintiff,

c. The plaintiff's claim with such certainty as will give the adverse party reasonable notice of the true nature of the claim and the particulars thereof,

d. What sum, if any, the plaintiff claims he is entitled to recover for its detention.

2. Petition to recover a debt damages for breach of contract, express or implied, or damages for a wrong. The petition must state:

   a. the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the true nature of the claim and the particulars thereof;

   b. a sum certain that, at the least, the plaintiff is entitled to or ought to recover, and

   c. if based on a contract and if the claim is for a debt not then due and payable, at what time or times the same will become due and payable.

   d. if the claim is for a debt not yet due and payable, no attachment shall be sued out when the only ground for the attachment is that the defendant is a foreign corporation, or is a nonresident, or has estate or debts owing to him within the Commonwealth. Va. Code § 8.01-533.

3. Grounds

   a. Plaintiff must allege at least one of the statutory grounds and shall set forth specific facts in support of the allegations. Va. Code § 8.01-534.

   b. If the debt is not due and payable, plaintiff cannot use as the only ground that the defendant or one of the defendants is a foreign corporation or is a non-resident. Va. Code § 8.01-533.

   c. The petition must be sworn to by the plaintiff, his agent or another cognizant of the alleged facts. The plaintiff may use district court form DC-455, ATTACHMENT PETITION, or may prepare his own version, which should conform to the version approved by the Committee on District Courts.

   d. The petition shall state whether the officer is requested to take possession of the attached personal property.

4. Issuance of the Writ
   Virginia Code § 8.01-540

   a. All costs, fees and taxes must be made to the clerk or the magistrate prior to issuance. Va. Code § 8.01-537(B).

   b. The judge or magistrate reviews *ex parte* the petition and, if it is found to comply with the statutory requirements of §§ 8.01-534, -537 and -538 and that there is reasonable cause to believe that the grounds for attachment may exist, issues the writ.

   c. Property to be attached.

      (i) If plaintiff seeks recovery of specific personal property, the attachment may be (i) against such property and against the principal defendant's estate sufficient to satisfy a judgment for damages for its detention or (ii) at the option of the plaintiff, against the principal defendant's estate for the value of the property and damages for its detention.

      (ii) If the plaintiff seeks to recover a debt or damages for breach of contract or damages for a wrong, the attachment shall be against the principal defendant's estate in the amount sought to be recovered in damages.

   d. Subject to the bond requirements of § 8.01-537.1 being met, the judicial officer must direct that either (1) only a levy be made; or (2) a levy and seizure be made, depending upon which the plaintiff has requested in his petition. Va. Code § 8.01-551.

E. Bonds
Virginia Code §§ 8.01-537.1, -551

1. The petitioner must give a cash, surety or property bond at the time of suing out an attachment.

2. If a levy only is requested, the bond, if cash or surety, must be in an amount at least equal to the estimated fair value of the property, or, if a property bond is being offered, it shall be an amount at least twice the fair value of the property. Va. Code § 8.01-537.1.

3. If levy and seizure is requested by the plaintiff, then the bond shall be in an amount equal at least double the estimated fair value of the property. Va. Code § 8.01-537.1.

4. The bond must be conditioned on paying all costs and damages which may be awarded against the plaintiff or for any person by reason of any wrongful levy or seizure.

5. Plaintiff's bond is district court form DC-447, PLAINTIFF'S BOND FOR LEVY OR SEIZURE.

F. Execution of the Writ
Virginia Code §§ 8.01-541, -546, -557.

1. The writ may be issued on any day, including Sunday and holidays. Va. Code § 8.01-542.

2. The sheriff levies or levies and seizes such property and estate of the principal defendant as is described in the writ. Va. Code § 8.01-541, and -546.

3. The writ also summons the defendant or defendants to appear and answer the petition. Va. Code § 8.01-546.

4. The writ is returnable not more than thirty days from issuance. Va. Code § 8.01-541.

5. The lien is created only upon levy. Va. Code § 8.01-557.

6. Service on the defendant is made at the time of levy, if he be found and also on any party in possession of the principal defendant's property that is being attached. Va. Code § 8.01-550. To the extent that the proceeding is *in rem*, upon proper grounds, an order of publication may issue. If the amount claimed does not exceed $500, a summary procedure for notice is allowed. Va. Code § 16.1-105.

G. Notice of Exemptions
Virginia Code §§ 8.01-546, -546.1, -546.2, -563.

1. Notice of exemptions shall be served on the principal defendant. Va. Code § 8.01-546.

2. The form for requesting an exemption is district court form DC-407, REQUEST FOR HEARING – EXEMPTION CLAIM; Va. Code § 8.01-546.1. If a hearing is requested, it must be held within ten business days from the date of filing the request. The clerk's office staff should be alerted to promptly notify the judge if a claim is filed. Va. Code § 8.01-546.2.

3. The court may also issue a restraining order to insure that the specific property sued for is forthcoming, and so much other estate as will probably be required to satisfy any future judgment, and may also appoint a receiver to safeguard the property. Va. Code § 8.01-549.1.

H. Defendant's Response
Virginia Code § 83.01-536.

1. The principle defendant and any codefendant may file a demurrer, and, if overruled, shall file an answer to the petition in writing, and such answer shall be sworn to by such defendant or his agent.

2. The principal defendant, as well as any co-defendant, may move to quash the attachment on the grounds set forth in the statute. Va. Code § 8.01-568.

3. A codefendant who is alleged to be indebted to the principal defendant, or has in his possession personal property belonging to such principal defendant, shall appear in person and submit to an examination on oath touching such debt or personalty, or he may, with the consent of the court and after reasonable notice to the petitioner, file an answer in writing under oath stating whether or not he was so indebted or has in his possession such personalty. The court may order him to pay or deliver such property to the sheriff or a receiver. The codefendant may, with leave of court, give a retention bond to retain possession of such funds or property. If the codefendant fails to appear or answer, the court may compel him to appear or enter an order after hearing ex parte proof of any debt owing by him or property in his hands belonging to the principal defendant.

4. The property levied upon or seized may be retained by the defendant or co-defendant by posting a retention bond with the officer sending the attachment, with surety, payable to the petitioner in a penalty of double the amount of the attachment or value of the property attached. Va. Code § 8.01-553; District court form DC-448, DEFENDANT'S BOND FOR LEVY OR SEIZURE.

I. Trial

Virginia Code §§ 8.01-569, -570, -571, -573.

1. If the defendant has not appeared generally, nor been served with process and the court finds that none of the grounds for attachment are proven, it may dismiss the attachment. Va. Code § 8.01-569.

2. If the plaintiff prevails on the attachment and the merits of the claim issues, the court shall dispose of the specific property levied on and orders such other property sold by the sheriff and the proceeds applied to the debt. If the court has *in personam* jurisdiction over the defendant, a money judgment can be rendered, too. Va. Code § 8.01-570.

3. If the principal defendant was not served, the court, before ordering any sale, must require the plaintiff to furnish sufficient bond to protect the defendant upon his making a future appearance and defending the claim. Va. Code § 8.01-571.

4. Any other person disputing plaintiff's attachment and stating a claim to such property may file a petition before the property attached is sold and the proceeds of sale paid to the plaintiff.
   Va. Code § 8.01-573.

J. Additional References

Boyd *et al*., VIRGINIA CIVIL PROCEDURE, § 15.1; Rendleman, ENFORCEMENT OF JUDGMENT LIENS IN VIRGINIA, § 1.1; district court forms DC-445, ATTACHMENT PETITION, and DC-447, PLAINTIFF'S BOND FOR LEVY OR SEIZURE.

Chapter 13. Partition of Personality

Virginia Code § 8.01-81 *et seq.*

A. Jurisdiction

The general district court, within its dollar jurisdictional limits, can try partition suits involving only personality if the property has a value of more than twenty dollars. Va. Code § 16.1-77.2.

B. Institution of the Suit

Virginia Code § 16.1-77.2

1. The proceeding is instituted by a petition filed as prescribed by subsection 5 of § 8.01-262 and, apparently, the procedure is the same as in a circuit court partition suit, except that the court may not use commissioners to aid in resolving issues or in partitioning the disputed property.

2. The court must find that partition cannot be conveniently made among the co-owners, or that the entire property cannot be allotted to any one or more of the co-owners who will accept it and pay to the remaining co-owners the value of their interest in the property, before the court can order a sale. Va. Code §§ 8.01-83, -93.

C. Who May Bring

Virtually any co-owner, except a tenant in a tenancy by the entirety, may compel partition; this includes a life tenant and a lien creditor. Va. Code § 8.01-81. However, a life tenant may not compel partition against remaindermen having no coequal right of occupancy with the life tennt. *Maitland v Allen* 267 VA 714 (2004).

D. Judgment

1. If partition cannot conveniently be made, the court can allot the property to one or more parties who will accept it and pay the others their fair share, or the court can order it all sold and divide the proceeds. Va. Code §§ 8.01-82, -83, -84. Upon ordering partition, when the nature of the property is such as not to admit of its use by more than one owner, the evidence proves that one owner has excluded the other from beneficial use, or one owner has received rents for the use of the property without accounting to his co-owner, the court should determine the fair rental value and the actual rents received and an accounting should be made. A judgment, set-off, or credit should be allowed the aggrieved party based on said accounting. *Daly v. Shepherd*, 274 VA 2007 (2007). When partition cannot be made in kind and the court orders the property to be sold, the court may compensate a cotenant for any permanent improvements made to the property. An increase in value, irrevocably realized by the cotenants at the time of the partition sale, render the improvements sufficiently permanent for the court to require compensation for them. *De Benveniste v. Aaron Christensen Family*, LP 278 Va. 317 (2009).

2. If any co-owners or shares are unrepresented by counsel, the court shall allow reasonable attorney's fees to the petitioner's attorney out of the shares of the unrepresented co-owners for brining the action.

E. References

Friend's Pleading and Practice (Matthew Bender) Chapter 27 Property Actions, § 27.04, Partition of Personal Property, by Charles E. Friend. Boyd *et al.*, VIRGINIA CIVIL PROCEDURE, § 2.10.

Chapter 14. Freedom of Information Act

Virginia Code § 2.2-3700 *et seq*.

A. The Virginia Freedom of Information Act ("FOIA").

The general district courts and the circuit courts have concurrent jurisdiction to enforce the Virginia Freedom of Information Act. Va. Code § 2.2-3713.A.

FOIA's purpose is to ensure "ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies." Its policy, as clearly stated in § 2.2-3700, is that it should be "liberally construed" to promote open government. Any exemptions from disclosure of records or the open meeting requirements are to be "narrowly construed." Va. Code § 2.2-3700. In addition, the Code states that "Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter." Va. Code § 2.2-3713.E.

The Code contains numerous exemptions from disclosure of records and the requirements for open meetings, and the exemptions are amended nearly every year by the General Assembly. *See* Va. Code §§ 2.2-3703 and 2.2-3705.1 through 2.2-3705.8. In any FOIA enforcement case, the burden of proof is on the public body or official to establish an exemption by a preponderance of the evidence. However, under a 2016 amendment, "no court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies." Va. Code § 2.2-3713.E.

B. Requests for Disclosure of Public Records. Va. Code § 2.2-3704.

FOIA makes public records available to "citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth." Va. Code § 2.2-3704.A. Note that nonresidents are excluded. The United States Supreme Court affirmed the decision of the Fourth Circuit Court of Appeals holding this provision of FOIA to be constitutional. *McBurney v. Young*, 133 S. Ct. 1709, 2013 U.S. LEXIS 3317 (2013), *affirming* 667 F.3d 454 (4th Cir. 2012).

A request for public records must specify the records with "reasonable specificity." It is not necessary to mention FOIA in a request. Within five working days, the agency must provide the records or make one of the following responses in writing:

1. The records are being withheld, citing the specific exemption by Code section;

2. The records are being provided in part and withheld in part, citing the Code section for the claimed exemption;

3. The records could not be found or do not exist; or

4. It is not practically possible to respond within five days, with an explanation. When a public body provides this response within five days, an additional seven days are allowed.

Public bodies are not required to compile new records, create summaries, make calculations, or answer questions, although "public records maintained by a public body in an electronic data processing system, computer database or any other structured collection of data shall be made available to a requestor." Va. Code § 2.2-3704 (G). Failure to respond is considered a denial and a violation of FOIA.

All state and local public bodies are now required to designate a "FOIA officer" to serve as the "point of contact for members of the public in requesting public records and to coordinate the public body's compliance." The FOIA officer is required to "possess specific knowledge" of FOIA and to receive annual training. He or she must be identified on the public body's website. Va. Code § 2.2-3704.2 (enacted in 2016).

The Supreme Court of Virginia has strictly enforced the five-day requirement to provide the requested documents or one of the four written responses. *See Fenter v. Norfolk Airport Authority*, 274 Va. 524 (2007) (responses that FOIA requests had been referred to legal counsel and a federal agency were not sufficient, and violated FOIA).

C. Public Meetings, Notice, Minutes, and the Three-member Rule.

Section 2.2-3707 requires that public bodies make available a schedule of regular meetings by posting. A person may file an annual request to receive mail or e-mail notifications of all meetings. Agendas and material packets must be made available to the public at the same time they are transmitted to members. Written minutes are required for all open meetings. Under the definition in § 2.2-3701, a "meeting" can mean an informal gathering of as many as three members gathered in one place or present by telephone, even if no votes are taken. Section 2.2-3707.G makes it clear that mere attendance at the same event will not violate FOIA so long as the purpose is not to conduct or discuss public business, and the simultaneous attendance was not pre-arranged.

D. Procedure for Holding a Closed Session to Discuss Certain Topics.

Section 2.2-3711, which is frequently amended, presently allows closed meetings for more than forty different purposes. The members must vote in open session to go into a closed session or hold a closed meeting. The motion must specify the subject matter and purpose, with a specific reference to the paragraph number in § 2.2-3711 that allows a closed meeting. Va. Code § 2.2-3712.A. Immediately after finishing the closed session, the body must reconvene in open session and take a roll call vote to affirm that the members only discussed subjects permitted in closed sessions under FOIA, and that were pre-approved in the original motion. Va. Code § 2.2-3712.D.

E. Jurisdiction for Enforcement.

The general district courts and the circuit courts have concurrent jurisdiction to enforce the Virginia Freedom of Information Act. There is no dollar amount threshold or substantive delineation between the jurisdiction of the general district and the circuit courts. The petitioner is entitled to decide which court to use. Va. Code § 2.2-3713.A. The Committee on District Courts has created a form petition for FOIA proceedings, district court form DC-495, PETITION FOR INJUNCTION OR MANDAMUS – FREEDOM OF INFORMATION ACT.

F. Venue. Va. Code § 2.2-3713.A.

1. If the respondent is a local public body, venue is in the courts of the county or city from which the public body has been elected or appointed and in which the plaintiff's rights and privileges under FOIA have been denied. Va. Code § 2.2-3713.A.1.

2. For "regional public bodies' (defined in Va. Code § 2.2-3701), venue is in the courts of the county or city where the principal business office is located. Va. Code § 2.2-3713.A.2.

3. For boards, commissions, agencies of the state government, including public institutions of higher education, venue is in the courts of the City of Richmond, OR the residence of the aggrieved party. Va. Code § 2.2-3713.A.3.

G. The Seven-Day Hearing Requirement.

Section 2.2-3713.C requires that a hearing on a FOIA petition be held within seven days after filing, "provided the party against whom the petition is brought has received a copy of the petition at least three days prior to filing." This presumably is an effort by the General Assembly to promote settlement of FOIA conflicts, while providing for a quick hearing in the event an injunction is needed. Providing a copy of a petition before filing is not a substitute for service of process after filing.

H. Remedies. Va. Code § 2.2-3713.

There is also an official form for the court disposition of a FOIA petition, district court form DC-496, ORDER FOR PETITION FOR INJUNCTION OR WRIT OF MANDAMUS. The Code provides for the following remedies:

1. Writ of Mandamus. The court may issue a writ to require the agency to do something it is required to do, such as provide requested documents or one of the four responses required by § 2.2-3704.

2. Injunction. An injunction would be appropriate to order an agency to stop doing something in violation of FOIA, such as holding an unlawful closed meeting, a meeting without appropriate notice, or destroying public documents. If a violation is likely to continue, the court may issue an injunction in the form of a "cease and

desist" order. A temporary injunction may be granted, pending a subsequent hearing date.

3. Costs and Attorneys' Fees. "If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position." Va. Code § 2.2-3713.D.

4. Civil Penalties Against Individuals. If the court finds that the violation was "willfully and knowingly made," the court "shall impose" a civil penalty against the responsible individual (if he or she was a named party) a civil penalty from $500 to $2,000 for a first offense, or from $2,000 to $5,000 for a second or subsequent violation. The penalties are to be imposed even if a writ of mandamus or injunction is not ordered. In other words, even if the agency corrects the violation before trial (rendering a writ or an injunction moot), if the violation was willful and knowing when committed, the civil penalties "shall" be ordered. Civil penalties are not damages awarded to the petitioner; such amounts are paid to the Literary Fund. Va. Code § 2.2-3714.

I. Enforcement of Court Orders.

If an order is not obeyed, the petitioner may request enforcement by a show cause for civil contempt. Costs and civil penalties may be collected in the same manner as other fines. *See* Va. Code § 19.2-341.

J. Appeal.

The right of appeal to the circuit court within ten days applies in FOIA cases. Section 16.1-106 provides that "The court from which an appeal is sought may refuse to suspend the execution of a judgment that refuses, grants, modifies, or dissolves an injunction in a case brought pursuant to § 2.2-3713 of the Virginia Freedom of Information Act."

The appealing party must pay the writ tax as required under § 16.1-107. Since any civil penalties awarded pursuant to § 2.2-3714 are not judgments in favor of the petitioner, but are to be paid to the State Literary Fund, they are functionally akin to fines imposed in a criminal manner. Therefore, no bond should be required to assure satisfaction of those civil penalties.

K. Legal Sources.

In addition to the cases cited in the Code, there is a good summary of FOIA entitled "Local Government Officials' Guide to the Virginia Freedom of Information Act" (5th ed. 2012), by Roger C. Wiley, published by Weldon Cooper Center for Public Service at the University of Virginia, and the Local Government Attorneys of Virginia, Inc. There is also a useful

website maintained by the Virginia Coalition for Open Government, which contains a collection of opinions on FOIA, including Attorney General's Opinions and court decisions, including written opinions by circuit and general district court judges. *See* http://www.opengovva.org.

L. To What Extent Does FOIA Apply to the General District Courts?

Not only do the courts adjudicate FOIA petitions, but courts themselves may well receive FOIA requests seeking access to their own records. The court system's website (www.courts.state.va.us) contains a page that directs members of the public to the clerk of each district court as the person to whom requests for public records should be directed. *See* paragraph B, *infra*. Va. Code §§ 2.2-3704.1 and 2.2-3704.2.

Section 2.2-3703.A.5 provides that FOIA does not apply to "the records required by law to be maintained by the clerks of the courts of record … and courts not of record … However, other records maintained by the clerks of such courts shall be public records and subject to the provisions of this chapter".

What records are required to be maintained? Title 16.1 requires that clerks maintain "court records", which are defined to include "case records" ("all documents, dockets and indices"), "financial records" ("all papers and records related to the receipt and disbursement of money by the district court"), and "administrative records." ("all other court papers and records not otherwise defined."). Va. Code §§ 16.1-69.53, 16.1-69.54. The Code specifies various periods of time for retention of different types of records. *See* Va. Code §§ 16.1-69.54 through 16.1-69.58. These definitions cover just about everything in our courts. However, OES has advised district court clerks that their e-mails may be subject to FOIA, depending upon the content. (For example, e-mails dealing with personnel issues may be exempt under a FOIA exemption.) So, while courts are under an obligation to allow records to be inspected and copied, generally court records are not subject to the strictures of FOIA.

There are specific exceptions under FOIA which support the nondisclosure of certain types of documents such as personnel records, courthouse security plans, computer software, and the personal financial information of persons dealing with the courts.

FOIA does not require records to be produced if they are confidential or protected under another provision of law. Va. Code § 2.2-3704.A ("*Except as otherwise specifically provided by law*, all public records shall be open . . ."). For example, communications protected by common law or statutory privilege would not be subject to FOIA. Also, in *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219 (1991), the Supreme Court of Virginia construed FOIA not to apply to the Governor's telephone logs. The Court reasoned that requiring the logs' disclosure would violate the separation of powers by chilling the Governor's communications. A similar argument might be viable in favor of the judicial branch.

Another significant type of record exempt from disclosure is memoranda produced by the attorneys in the Department of Legal Research of the Office of the Executive Secretary of the

Supreme Court, when they are writing to judges, singly or jointly, in their role as law clerks to the trial judges of Virginia. *See, e.g.* Va. Code § 2.2-3705.1 (2) (attorney-client privilege); Judicial Canon 3 (B)(7)(c) (judicial consultation with law clerk is permissible *ex parte* communication). The privilege and confidentiality claimed in such law clerk – judge communications would typically be noted on the communication itself.

The standards for confidentiality are entirely different in the Juvenile and Domestic Relations District Courts. *See* Title 16.1, Chapter 11, Article 12 of the Code (Va. Code §§ 16.1-299 through 16.1-309.1).

M. Other Laws Enforceable in General District Court by Mandamus or Injunction.

The general district courts also have concurrent jurisdiction with the circuit courts to enforce the Government Data Collection and Dissemination Practices Act ("GDCDPA"), Va. Code §§ 2.2-3800 *et seq*., and the Protection of Social Security Numbers Act, Va. Code §§ 2.2-3815 *et seq*. As with FOIA, general district courts may issue writs of mandamus or injunctions and order costs and attorney's fees to the petitioner, and under GDCDPA, civil penalties against individual public officers or employees. Va. Code §§ 2.2-3809, 2.2-3816.

APPENDIX A UNAUTHORIZED PRACTICE RULES

UNAUTHORIZED PRACTICE RULES
2016
SUMMARY PREPARED BY
The Honorable R. Morgan Armstrong, Judge, Retired
21ST JUDICIAL DISTRICT
Henry County, Patrick County and the City of Martinsville

TABLE OF CONTENTS

GENERAL RULES ..... Page A2

INDIVIDUALS T/A SOLE PROPRIETORS ..... Page A3

AGENTS & REPRESENTATIVES (Speical, not found in § 16.1-88.03) ..... Pages A4-5

BUSINESS TRUSTS (Virginia Business Trust Act in § 13.1-1200) ..... Page A6

COMPANY - LIMITED LIABILITY ..... Page A7

CORPORATIONS ..... Page A8

PARTNERSHIPS (Any form, General or Limited) ..... Page A9

SMALL CLAIMS COURTS ..... Page A10

UPL Index ..... Pages A11-18

GENERAL RULES

Part Six, Section I, Introduction
The Code of Virginia, Volume 11, Rules of Court

1. The right of individuals to represent themselves is an inalienable right common to all natural persons.

2. But no one has the right to represent another, it is a privilege to be granted and regulated by law for the protection of the public.

3. The Supreme Court of Virginia has the inherent power to make rules governing the practice of law in the Commonwealth of Virginia.

4. The public is best served in legal matters by lawyers.

5. By statute, any person practicing law without being duly authorized or licensed is guilty of a misdemeanor.

6. The courts of the Commonwealth have the inherent power, apart from statute, to inquire into the conduct of any person to determine whether he is illegally engaged in the practice of law, and to enjoin such conduct.

7. Any fees charged by a person engaged in the unauthorized practice of law are not collectible in court.

8. Any lawyer who aids a non-lawyer in the unauthorized practice of law is subject to discipline and disbarment.

INDIVIDUALS T/A SOLE PROPRIETORS

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
INDIVIDUAL	All: (1) File any pleading. (2) Request judgment. (3) Present facts, figures & factual conclusions. (4) Argue case or law. (5) Examine witnesses. (6) Cross-examine. (7) File any collection document, summons, or request.	[A] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1-7) UPR VI, Introduction, Rules of Court, Part Six. [A] § 16.1-88.03(A) & UPL 204.
ATTORNEY	(1) All.	[A] None.	§ 54.1-3903.
EMPLOYEE	(1) Request Judgment. (2) Present facts, figures & factual conclusions.	[A] No authority to do anything else, including: • Filing pleadings or collection documents, • Examination of witnesses or • Making legal arguments.	(1) Rule 7B:7 & 7B:9. (2) UPR 1-101. [A] UPR VI, Introduction & Practice of Law (B)(3), § 16.1-88.03(B), UPL 154 & UPL 204.

-A3-

AGENTS & REPRESENTATIVES – SPECIAL LIMITATIONS

(Speical, not found in § 16.1-88.03)

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
ADMINISTRATOR OR EXECUTOR	(1) Present facts, figures & factual conclusions.	[A] No authority to do anything else, including: • Filing pleadings or collection documents, • Examination of witnesses or • Making legal arguments.	(1) & [A.]: UPL 156, UPR 1-101(A) UPR 4-104(C.) & UPL 204
LANDLORD'S AGENT (Limited - Unlawful detainer only and only when supported by affidavit, but all are required to be under oath so this is satisfied.)	(1) File unlawful detainer warrant but only when supported by sworn affidavit. (2) Request judgment. (3) Present facts, figures & factual conclusions.	[A] No authority to do anything else, including: • Filing pleadings (other than unlawful detainer) or collection documents, • Examination of witnesses or making legal arguments.	(1) § 8.01-126 (2) § 8.01-126 (3) UPR 1-101(A) [A] UPR 1-101(A) UPL 166 & UPL 204
PARENT	(1) Present facts, figures & factual conclusions	[A] No authority to do anything else, including: • Filing pleadings or collection documents, • Examination of witnesses • Making legal arguments.	(1) & [A]: UPL 173, UPL 62, UPL 156 & UPL 204.
REAL ESTATE (1) Agent, (2) Broker (3) Salesperson under § 54.1-206.1 (4) Property Manager under § 55-248.4 (5) Any Employee appointed under § 55-246.1 (note association is included in this group), Venue must be proper & under contract with Landlord.	(1) Sign & File Pleadings (2) Present facts, figures & factual conclusions (3) **Default judgment only –** may ask for judgment, if no party appears for defendant. **<u>Procedure not clear</u> if defendant appears.**	[A] No authority to do anything else, including: • Filing collection documents, • Examination of witnesses or • Making legal arguments.	(1) § 55-246.1 (2) & [A]: § 55-246.1, formally § 54.1-2106 & UPL 166. (3) § 55-246.1, formally § 54.1-2106 & UPL 166. Special pleading with affidavit under § 8.01-126.

-A4-

AGENTS & REPRESENTATIVES – SPECIAL LIMITATIONS

(Special, not found in § 16.1-88.03)

(CONTINUED)

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
RESIDENT MANAGER employed by person licensed under § 54.1-2106.1 or all business entities (LLC, LLP, corporations, associations, partnerships business trusts listed in § 55-246.1, Venue must be proper & under contract with Landlord.	(1) Sign & File Pleadings (2) Present facts, figures & factual conclusions (3) **Default judgment only -** may ask for judgment, if no party appears for defendant. **<u>Procedure not clear</u> if defendant appears.**	[B] No authority to do anything else, including: • Filing collection documents, • Examination of witnesses or • Making legal arguments.	(1) § 55-246.1 (2) & [A]: § 55-246.1, formally § 54.1-2106 & UPL 166. (3) § 55-246.1, formally § 54.1-2106 & UPL 166. Special pleading with affidavit under § 8.01-126.
AGENT, VIRGINIA DEPARTMENT OF LABOR & INDUSTRY	(1) Commissioner may file pleadings on behalf of the employee owed wages (2) Request judgment. (3) Present facts, figures & factual conclusions.	[A] No authority to do anything else, including: • Filing collection documents, • Examination of witnesses or • Making legal arguments.	(1) § 40.1-29(F). (2) § 40.1-29(F). [A] UPL 145.

BUSINESS TRUST

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
TRUSTEE as defined in the Virginia Business Trust Act (§ 13.1-1202).	(1) May file the following: • Warrant in debt • Motion for judgment • Warrant in detinue • Distress warrant • Summons for unlawful detainer • Counterclaim or cross-claim • Suggestion for garnishment • Garnishment summons • Writ of possession • Writ of fieri facias • Interpleader notice • Civil appeal notice (2) Request judgment (3) Present facts, figures & factual conclusions.	[A] May <u>not</u> file the following: • bill of particulars • grounds of defense • subpoena • rule to show cause • rule for capias • interrogatories • ask questions at interrogatory hearing • **NO OTHER PLEADING OR PAPER NOT SPECIFICALLY GRANTED.** [B] A non-lawyer, regularly employed on a salary basis by a corporation <u>shall not</u>: • Examine witnesses • Prepare or file pleadings • Prepare or file briefs • Present legal conclusions. [C] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1) § 16.1-88.03(A). (2) Rule 7B:7 & 7B:9. (3) UPR 1-101(A). [A] § 16.1-88.03(B). [B] § 16.1-88.03(B), UPR 1-101(B) & UPL 54. [C] § 16.1-88.03(A).
ATTORNEY	(1) All.	[A] None.	§ 54.1-3903.
EMPLOYEE authorized in writing by Trustee. **COMMENT:** Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B:7 or Rule 7B:9.	(1) May file the following: • Warrant in debt • motion for judgment • warrant in detinue • distress warrant • summons for unlawful detainer • counterclaim or cross-claim • suggestion for garnishment • garnishment summons • writ of possession • writ of fieri facias • interpleader notice • civil appeal notice (2) Request Judgment. (3) Present facts, figures & factual conclusions.	[A] **NO OTHER PLEADING OR PAPER** • May not examine witnesses. [B] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1) § 16.1-88.03(A) (2) UPR 1-101(C) & Rule 7B:7 & 7B:9. (3) UPR 1-101(C) [A] § 16.1-88.03(B). [B] § 16.1-88.03(B).

-A6-

COMPANY – LIMITED LIABILITY

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
MANAGER as defined in the Virginia Limited Liability Company Act (§ 13.1-1002)	(1) May file the following: • warrant in debt • motion for judgment • warrant in detinue • distress warrant • summons for unlawful detainer • counterclaim or cross-claim • suggestion for garnishment • garnishment summons • writ of possession • writ of fieri facias • interpleader notice • civil appeal notice (2) Request judgment (3) Present facts, figures & factual conclusions.	[A] May <u>not</u> file the following: • bill of particulars • grounds of defense • subpoena • rule to show cause • rule for capias • interrogatories • ask questions at interrogatory hearing • **NO OTHER PLEADING OR PAPER NOT SPECIFICALLY GRANTED.** [B] A non-lawyer, regularly employed on a salary basis by a corporation <u>shall not</u>: • Examine witnesses • prepare or file pleadings • prepare or file briefs • present legal conclusions. [C] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1) § 16.1-88.03(A) (2) Rule 7B:7 & 7B:9. (3) UPR 1-101(A) [A] § 16.1-88.03(B) [B] § 16.1-88.03(B), UPR 1-101(B) & UPL 54. [C] § 16.1-88.03(A).
ATTORNEY	(1) All.	[A] None.	§ 54.1-3903.
EMPLOYEE authorized in writing by the Manager. **COMMENT:** Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B:7 or Rule 7B:9.	(1) May file the following: • Warrant in debt • motion for judgment • warrant in detinue • distress warrant • summons for unlawful detainer • counterclaim or cross-claim • suggestion for garnishment • garnishment summons • writ of possession • writ of fieri facias • interpleader notice • civil appeal notice (2) Request judgment (3) Present facts, figures & factual conclusions.	[A] **NO OTHER PLEADING OR PAPER** • May not examine witnesses. [B] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1) § 16.1-88.03(A) (2) UPR 1-101(C) & Rule 7B:7 & 7B:9. (3) UPR 1-101(C) UPR 1-101(C) [A] § 16.1-88.03(B). [B] § 16.1-88.03(B).

-A7-

CORPORATIONS

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
CORPORATION OFFICER: President Vice-president Secretary Treasurer or Other officer	(1) May file the following: • warrant in debt • motion for judgment • warrant in detinue • distress warrant • summons for unlawful detainer • counterclaim or cross-claim • suggestion for garnishment • garnishment summons • writ of possession • writ of fieri facias • interpleader notice • civil appeal notice (2) Request judgment (3) Present facts, figures & factual conclusions.	[A] May <u>not</u> file the following: • bill of particulars • grounds of defense • subpoena • rule to show cause • rule for capias • interrogatories • ask questions at interrogatory hearing • **NO OTHER PLEADING OR PAPER NOT SPECIFICALLY GRANTED.** [B] A non-lawyer, regularly employed on a salary basis by a corporation <u>shall not</u>: • Examine witnesses • prepare or file pleadings • prepare or file briefs • present legal conclusions. [C] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1) UPR 1-101(C), § 16.1-88.03(A) & UPL 204. (2) Rule 7B:7 & 7B:9. (3) UPR 1-101(A). [A] § 16.1-88.03(B). [B] § 16.1-88.03(B), UPR 1-101(B) & UPL 54. [C] § 16.1-88.03(A).
CORPORATION OFFICER of CLOSELY-HELD CORPORATION No public offering or intent No more than 5 shareholders Amount of suit $2,500 or less	Rights & privileges as if an individual person to represent, plead, and try a case for the Corporation.	None	§ 16.1-81.1
ATTORNEY	(1) All.	[A] None.	§ 54.1-3903.
EMPLOYEE when authorized in writing by a Corporate Officer, who has been authorized by Board of Directors. **COMMENT:** Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B:7 or Rule 7B:9.	(1) May file the following: • Motion for judgment • Warrant in detinue • Distress warrant • Warrant in debt • Summons for unlawful detainer • Counterclaim or cross-claim • Suggestion for garnishment • Garnishment summons • Writ of possession • Writ of fieri facias • Interpleader notice • Civil appeal notice (2) Request judgment (3) Present facts, figures and factual conclusions.	[A] **NO OTHER PLEADING OR PAPER** • May not examine witnesses. [B] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1) § 16.1-88.03(A) (2) UPR 1-101(C) & Rule 7B:7 & 7B:9 (3) UPR 1-101(A) [A] § 16.1-88.03(B). [B] § 16.1-88.03(B).

PARTNERSHIPS

(Any form, General or Limited)

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
PARTNER FOR HIMSELF OR HERSELF	All: (1) File any pleading. (2) Request judgment. (3) Present facts, figures & factual conclusions. (4) Argue case or law. (5) Examine witnesses. (6) Cross-examine. (7) File any collection document, summons, or request.	[A] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1-7) UPR VI, Introduction, Rules of Court, Part Six. [A] § 16.1-88.03(A) & UPL 204.
ATTORNEY	(1) All.	[A] None.	§ 54.1-3903.
PARTNER FOR THE PARTNERSHIP	(1) May file the following: • Warrant in debt • Motion for judgment • Warrant in detinue • Distress warrant • Summons for unlawful detainer • Counterclaim or cross-claim • Suggestion for garnishment • Garnishment summons • Writ of possession • Writ of fieri facias • Interpleader notice • Civil appeal notice (2) Request judgment (3) Present facts, figures & factual conclusions.	[A] May <u>not</u> file the following: • bill of particulars • grounds of defense • subpoena • rule to show cause • rule for capias • interrogatories • ask questions at interrogatory hearing • **NO OTHER PLEADING OR PAPER NOT SPECIFICALLY GRANTED.** • May not examine witnesses. [B] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1) UPR 1-101(C) & § 16.1-88.03(A). (2) § 16.1-88.03(A). (3) UPR 1-101. [A] § 16.1-88.03(B) [B] § 16.1-88.03(A)
EMPLOYEE when authorized in writing by a General Partner. **COMMENT:** Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B:7 or Rule 7B:9.	(1) May file the following: • Warrant in debt • motion for judgment • warrant in detinue • distress warrant • summons for unlawful detainer • counterclaim or cross-claim • suggestion for garnishment • garnishment summons • writ of possession • writ of fieri facias • interpleader notice • civil appeal notice (2) Request judgment (3) Present facts, figures & factual conclusions.	[A] **ANY PLEADING OR PAPER** • May not examine witnesses. [B] No non-lawyer may appear on a collection matter assigned for collection.	(1) § 16.1-88.03(A) (2) Rule 7B:7 & 7B:9. (3) UPC 1-2 (questionable) [A] § 16.1-88.03(B). & UPL 54. [B] §16.1-88.03(A).

-A9-

SMALL CLAIMS COURTS

(Claim limit = $5,000 exclusive of interest)

APPEARANCE BY:	ACTIONS ALLOWED:	ACTIONS PROHIBITED:	SOURCE:
INDIVIDUAL [OR] NAMED REPRESENTATIVE: • Owner • General Partner • Officer • Employee **Note: LLC Manager not listed in § 16.1-122.4(A)(1).**	All (1) File any pleading. (2) Request judgment. (3) Present facts, figures & factual conclusions. (4) Argue case or law. (5) Examine witnesses. (6) Cross-examine. (7) File any collection document, summons, or request.	[A] No non-lawyer may appear on a collection matter, which was assigned for collection.	(1-7) § 16.1-122.4(1) Rule 7B:7 & 7B:9. [A] § 16.1-88.03(A).
ATTORNEY	(1) None.	[A] MAY NOT APPEAR.	§ 16.1-122.4(1).
NON-LAWYER FRIEND OR RELATIVE (familiar with facts & not a lawyer & party not able to understand or participate on own behalf.	All: (1-7) See above.	[A] No non-lawyer may appear on a collection matter which was assigned for collection	(1-7) § 16.1-122.4(2) [A] § 16.1-88.03(A).

-A10-

INDEX OF UPL OPINIONS WITH SPECIAL APPLICATION TO THE GENERAL DISTRICT COURT

[48] **Fellow inmate** in jail or prison may not prepare legal documents or represent another inmate before the Court.

[51] **Collection agency** may prepare statements of accounts, affidavits and memoranda for civil warrants and file same with the General District Court Clerk. [See: UPL 150 & UPL 151]

[53] **Lay employee** of an individual* or corporation may:

- issue warrants
- testify as to facts
- request judgment.

Lay employee of an individual or corporation may not:

- examine witnesses. [See: UPL 150 and UPL 151]

***= Author's notation: Prior to 7/1/2003 Courts allowed employees to represent any employer under a broad reading of the UPL Sections and § 16.1-88.03. UPL 204 limited representations to only those specifically listed in § 16.1-88.03. Code § 16.1-88.03 was changed in 7/1/2004 to allow employees of a corporation, partnership, limited liability company, limited partnership, professional corporation, professional limited liability company, registered limited liability partnership, registered limited liability limited partnership or business trust to file pleadings. COMMENT: Neither an employee of an individual, an executor or administrator is listed in § 16.1-88.03. Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B: 7 or Rule 7B: 9.**

[54] **Lay employee** of a corporation shall not (unless the same is an attorney):

- represent the corporation in court, except what is allowed under § 16.1-88.03
- examine witnesses which includes examination of witnesses pursuant to direct examination at trial, cross examination at trial and questions at an interrogatory summons hearing
- prepare and file briefs
- prepare and file pleadings except those allowed under § 16.1-88.03
- present legal conclusions.

Note: UPR 1-101(C) and § 16.1-88.03 allows lay employee of a corporation or **partner** of partnership to file the following:

- warrant in debt
- warrant in detinue
- summons for unlawful detainer
- cross-claim
- garnishment summons
- writ of fieri facias
- civil appeal notice [See: UPL 169]
- motion for judgment
- distress warrant
- counterclaim
- suggestion for summons in garnishment
- writ of possession
- interpleader

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

= **Author's notation: § 16.1-81.1 added 7/1/09 to allow corporate officer of closely held corporation to file with limits.**

COMMENT: Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B: 7 or Rule 7B: 9.

[60] **House counsel of liability insurance carrier** may defend suits of the insured for damages including damages in excess of the amount of available coverage.

[62] **Lay person (parent - by implication) representing child** may not represent a child before a tribunal other than to present facts, figures or argue factual conclusions. This opinion is directed to a guardian *ad litem* in Juvenile Court but by implication would include any person including a parent in any court.

[64] **Out of state attorney or lay person** (not licensed in Virginia) may appear for limited purpose of scheduling the trial unless a local rule of the General District Court prohibits the practice.

[68] **Law Student** may appear in General District Court if:
- local rule permits
- client is a patron of a legal aid society
- student under supervision of a staff attorney
- legal aid and client approves.

[72] **Lay person** may appear in court to collect moneys resulting from a garnishment so long as this appearance only involves a ministerial or clerical act.

[82] **Out of state attorney** who has passed the Virginia Bar Examination and who has remained an active member of the bar in good standing may appear in court without resident counsel. [See: UPL 118.].

[87] **Lay employee** who is employed by several employers may appear in court for each of them so long as the employee is a bona fide employee of each of them.
***= SEE DETAILED HISTORY AFTER UPL 53.**

[88] **Collection agency** may not do the following:
- set the fee for an attorney
- limit communication between the client and the attorney

[97] **Collection agency lay employee** <u>may not</u> represent another in court except to testify as to facts and figures. They may prepare statements of accounts, affidavits of facts and present facts, figures or state factual conclusions in court.

= **Author's notation: § 16.1-88.03(B)** prohibits a non-lawyer from appearing on a collection matter assigned for collection.

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

COMMENT: Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B:7 or Rule 7B:9.

[101] **Lay employee** of a corporation may appear to make factual responses to a garnishment summons on behalf of the corporation because this provides no occasion for the employee to argue legal principles or attack the legal efficacy of the process.

[102] **Out of state attorney** may appear and conduct a particular case in court so long as the attorney has

- associated local counsel
- the foreign state reciprocates with the same or similar courtesy or privilege
- practice is done on an occasional basis
- local attorney conducts active supervision
- 25 or more appearances would consider being regular and not occasional but this decision is in the discretion of the court.

[103] **Out of state attorney, employee of a corporation** (attorney licensed in other jurisdiction but not licensed in Virginia) may not do the following for the corporation:

- examine witnesses
- prepare and file briefs
- prepare and file pleadings
- present legal conclusions. [See: UPL 160 and UPL 178]

[110] **Inmate** may not represent or prepare pleading or legal documents for another inmate. Inmate may appear and present facts, figures and draw factual conclusions on behalf of the other inmate.

[119] **Pro Bono Activity** is the unauthorized practice of law if the activity is generally prohibited. No exception for pro bono work since compensation is not required.

[120] **Collection Agency** may not collect on a debt delegated to it for collection, delegation occurs when:

- the assignment is a percentage of the amount collected and thus the
- creditor retains any interest in the assignment.

Collection Agency may collect on a debt assigned to it for collection, assignment occurs when:

- the assignment is a fixed consideration and the
- creditor retains no interest in the assignment. [See: UPL 150 and UPL 151]

= **Author's notation: § 16.1-88.03(B)** prohibits a non-lawyer from appearing on a collection matter assigned for collection.

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

COMMENT: Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B:7 or Rule 7B:9.

[133] **Military lawyers** may practice before military courts. The implication is the military lawyer to appear in a General District Court must have a license in Virginia or another state joined with local counsel.

[137] **Suspended lawyer** may continue cases on the court's docket around the period of suspension but must notify the court, opposing counsel and all clients of the suspension. Employees may not set cases or work during the period of suspension if the suspended lawyer is a sole practitioner because of the requirement that all non-lawyers be supervised by a lawyer at all times.

[138] **Out of state attorney** who has been admitted to a case *pro hac vice* (for this one particular occasion) by a court order may appear without local counsel, if allowed by the Court. All further activity is within the discretion of the Court. The status should be made clear by the Court by local rule, special written order or oral ruling of the Court. Failure to abide by these provisions may result in unauthorized practice allegations and sanctions for both the out of state attorney and local counsel.

[144] **Agents, Automobile Liability Insurance Carrier,** who are not attorneys but who are the officers or full time employees named in § 16.1-88.03, may file the following documents in the General District Court for subrogation or otherwise on behalf of the interests of the Corporation:

> Warrant in Debt, Motion for Judgment, Distress Warrant, Summons for Unlawful Detainer, Counterclaim, Cross-claim, Suggestion for Summons in Garnishment, Garnishment Summons, Writ of Possession, Writ of Fieri Facias, Interpleader and Civil Appeal Notice.

The Corporation officers may not file any pleading on behalf of the insured in an attempt to collect the deductible or other loss of the insured unless the person appearing is an attorney and the non-attorney may not file any of the following prohibited pleadings or acts:

> Bill of Particulars, Grounds of Defense, argue motions, issue a subpoena, issue a rule to show cause, request a capias, file or interrogate at debtor interrogatories or file, issue or argue any other paper, pleading or proceeding not allowed by statute. [See: UPL 154, UPL 166 and UPL 169]

= **Author's notation: § 16.1-88.03(B)** prohibits a non-lawyer from appearing on a collection matter assigned for collection.

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

COMMENT: Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B:7 or Rule 7B:9.

-A14-

[145] **Agents, Virginia Department of Labor**, who are not lawyers, may file warrants in debt for unpaid wage claims on behalf of the employee wage claimant and the Department of Labor and may appear to present facts, figures and make factual conclusions to the court by Code § 40.1-29(F). The agent may not perform any other legal tasks.

[150] **Collection agency, lay employee** may not disrupt the lawyer-client relationship between the attorney and the creditor [UPR 3-101], may not represent another person before a tribunal [UPR 1-101], may not ask for judgment unless the person is pro se, is an attorney or a bona fide employee [Rule 7B:7, § 16.1-88.03 and § 55-246.1]. It is the unauthorized practice of law for a Collection Agency to do the following:

Refer claims without giving freedom of choice regarding an attorney;
Control the claim once it has been referred to an attorney;
Act in any way to disrupt the attorney - client relation;
Prepare warrants in debt or any other pleadings [UPR 3-103(C)].

[151] **Collection agency, lay employee** may not prepare warrants in debt for a client, an attorney or for any employer, other than for the corporation itself on its own case [UPR 3-103(C). This opinion adds to the ruling in UPL Opinion 51 that the new form Warrant in Debt document may not be prepared by a collection agency, lay employee. It may be prepared only by:

(1) creditor directly,
(2) attorney,
(3) employee of attorney under direct supervision.

= **Author's notation: § 16.1-88.03(B)** prohibits a non-lawyer from appearing on a collection matter assigned for collection.

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

[154] **Lay employee** is allowed to do those things allowed in the provisions of § 16.1-88.03 for a corporation or partnership. Question three involves a lay employee of an automobile liability insurance carrier. The Committee ruled the § 16.1-88.03 allows the employee to obtain a judgment for the company in a subrogation claim but the employee may <u>not</u> obtain money for the insured, which includes not being able to collect the deductible on behalf of the insured. "The statute prohibits a non-lawyer from filing a bill of particulars or grounds of defense, or to argue motions, issue a subpoena, rule to show cause, capias, and file or interrogate at debtor interrogatories, or to file, issue or argue any other paper, pleading or proceeding not specifically enumerated."

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

= **Author's notation: § 16.1-81.1 added 7/1/09 to allow corporate officer of closely held corporation to file with limits.**

-A15-

COMMENT: Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B: 7 or Rule 7B: 9.

[156] **Executor, lay person** may present facts, figures and draw factual conclusions but may not do any of the other usual acts at trial which include examination of witnesses, cross examination of witnesses or make legal arguments.

[166] **Realtor or resident manager, lay person** is limited to the actions allowed in § 16.1-88.03 and § 55-246.1. Code § 55-246.1 does authorize a realtor or resident manager to "obtain" a default judgment for possession and for rent or damages when under contract with the landlord. The Committee noted that the statute did not authorize the filing of pleadings by Code § 55-246.1 beyond what § 16.1-88.03 allows but only permits an agent to prepare and file such documents when they meet the requirements enumerated in § 16.1-88.03.

[169] **Lay person, dissolved corporation or partnership** may not represent the interests of another because this is prohibited by UPR 1-101(A) and since the corporation or partnership no longer exists, then, § 16.1-88.03 does not grant permission for the non-lawyer to participate in the trial.

[173] **Parent** (No opinion given because issue decided in UPL 62 and UPL 156.)

[178] **Lay person, who is In-house Counsel,** is permitted to do all things enumerated in § 16.1-88.03, so long as the non-Virginia lawyer meets the definitions of bona-fide, regular employee. The In-house Counsel may not examine witnesses, cross-examine witnesses or make legal arguments in court since the same is prohibited by UPR 1-101(B). [See opinion for details.]

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

= **Author's notation: § 16.1-81.1 added 7/1/09 to allow corporate officer of closely held corporation to file with limits.**

COMMENT: Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B: 7 or Rule 7B: 9.

[182] **Accountant for Commonwealth's Attorney** may prepare accounts for use by the office of the Commonwealth's Attorney in preparing property seizure and property forfeiture cases.

[194] **Attorney in Fact under Power of Attorney** may not prepare, sign or file pleadings with a court or appear in court on the principal's behalf since the practice of law is a privilege conferred only by the state through the issuance of a license to practice law.

= **Author's notation: Above opinion refers to Motion for Judgment. Note Code § 8.01-126 states "the landlord, his agent, attorney, or other person, entitled to the possession" may file an Unlawful Detainer Warrant. Opinion 194 appears not to apply to Unlawful Detainer Warrants.**

[203] **Collection agency** may file pleadings and collect the debts they own outright. If the collection agency does not have a complete assignment or if there is a percentage owed back to the assignor on the debt, then, for the collection agency to file a pleading and collect the debt, this is the unauthorized practice of law.

= **Author's notation: § 16.1-88.03 amended 7/1/03 and employees no longer permitted to file pleadings.**

= **Author's notation: § 16.1-88.03 amended 7/1/04 to allow employee to file with written authority by proper person.**

[204] **Lay person** may only file pleadings in the General District Court under § 16.1-88.03 as allowed by the statute. No other employee or agent may file if they are not granted a statutory privilege. The current statute limits as follows:

- **Corporation** = officer or full time, bona fide employee, who has been authorized by board resolution.
- **Partnership** = general partner.

= **Author's notation: Prior to 7/1/2003 Courts allowed employees to represent any employer under a broad reading of the UPL Sections and § 16.1-88.03. UPL 204 limited representations to only those specifically listed in § 16.1-88.03. Code § 16.1-88.03 was changed in 7/1/2004 to allow employees of a corporation, partnership, limited liability company, limited partnership, professional corporation, professional limited liability company, registered limited liability partnership, registered limited liability limited partnership or business trust to file pleadings.**

COMMENT: Neither an employee of an individual, an executor or administrator is listed in § 16.1-88.03. Once pleading properly filed, any bona fide, regular employee may request judgment under Rule 7B: 7 or Rule 7B: 9.

= **Author's notation: § 16.1-81.1 added 7/1/09 to allow corporate officer of closely held corporation to file with limits.**

Nerri v. Adu-Gyamfi, 270 Va. 28 (June 9, 2005)

The Supreme Court ruled when a pleading was filed in violation of statutes and regulations involving the practice of law, then the pleadings are invalid and have no legal effect. Since no valid proceeding was pending, the trial court was in error to allow a nonsuit.

= **Author's notation: Any case in General District Court filed in violation of the unauthorized practice rule is invalid and raises several issues. It would appear the case could not be amended or corrected in any way to bring it in compliance. Once illegally filled it is forever invalid. A judgment on such a case appears by inference to also be invalid.**

Williamsburg Peking Corporation v. Xianchin Kong, 270 Va. 350 (September 16. 2005)

When a corporation files a pleading in violation of the unauthorized practice of law under UPL 204 and Virginia Code Section 16.2-88.03, the fact that the corporation requests and is granted a non-suit does not prevent the Court from imposing sanction against the party filing in violation of UPL 204.

Kone v. Wilson, 272 Va. 59 (June 8, 2006)
An administrator of a decedent's estate, who was not an attorney, could not file on behalf of the estate. Since the filing was void under UPL 204, no amendments are permitted and there was no valid proceeding before the court. The case must be dismissed and the statute of limitations time deadline was not tolled.

Jones v. Jones, 49 Va. App. 31 (October 24, 2006)
Pleading filed by suspended attorney is a nullity even if the attorney had not received notice of the suspension at the time of the filing.

Shipe v. Hunter, 280 Va. 480 (September 16, 2010)
Pleading not signed by plaintiff and signature by out of state attorney not licensed in Virginia is not a valid substitute.

Aguilera v. Christian, 280 Va. 486 (September 16, 2010)
Pleading not signed by plaintiff or an attorney on behalf of the plaintiff.

[206] **A non-lawyer** representing a corporation in arbitration may do so without being in violation of the unauthorized practice of law because arbitration is not considered to be a hearing before a tribunal under the definition of a tribunal in Virginia.

[207] **A social worker** may not prepare a warrant in debt or any other pleading type of form for a *pro se* litigant in Small Claims Court unless he or she is an attorney. It would be the unauthorized practice of law for a non-attorney social worker to select the forms for the person or advise the person which forms are appropriate based on the facts of the particular case. The social worker may assist the litigant in the completion of the form document so long as the social worker uses the language specifically dictated by the litigant.

[211] **A corporate attorney** whose corporation has authorized time off for *pro bono* service to the community, does not control or influence the work product and the attorney has a complete "separate practice" during the community service is permitted to conduct the work without danger of unauthorized practice of law on the part of the corporation. The fact that the corporation provides support secretary and an office, pays the attorney for the one day per month service while providing the attorney with the day off with pay does not change the fact the practice is "separate" and is not a violation.

[215] **In-house counsel** based outside Virginia providing legal advice to employees in Virginia are bound by various rules. See this UPL for a good laundry list of permitted and prohibited acts.

[216] **A probation officer** rendering a sentencing opinion to the court when requested by the court under Virginia Code § 19.2-299(A) is not the unauthorized practice of law.

APPENDIX B 1991 OP. VA. ATT'Y GEN. 240

1991 Op. Va. Att'y Gen. 240 (1991)

PROPERTY AND CONVEYANCES: RESIDENTIAL LANDLORD AND TENANT ACT.

Landlord must notify tenant that landlord reserves right to pursue claim for possession of property when tenant fails to comply with rental agreement, even when tenant has no responsibility for rent payment, payable by Virginia Housing Development Authority. When rent not paid in full, no waiver of landlord's rights occurs.

DATE: October 23, 1991

REQUESTOR: The Honorable Edgar L. Turlington Jr., Judge, Richmond General District Court, Civil Division

You ask whether a landlord must notify a tenant that the landlord reserves the right to pursue a claim for possession of the property due to the tenant's noncompliance with the rental agreement, when the tenant has no responsibility for the rent payment because all rent is payable by the Virginia Housing Development Authority ("VHDA"). You also ask whether the landlord must give such a "reservation of rights" notice to the tenant when VHDA has failed to pay the rent when due. [Page 241]

I. Applicable Statutes

Section 55-248.4 of the Code of Virginia defines a "tenant" as "a person entitled under a rental agreement to occupy a dwelling unit" and "rent" as "all payments to be made to the landlord under the rental agreement other than security deposits."

Section 55-248.34 provides:

Unless the landlord accepts the rent with reservation, and gives a written notice to the tenant of such acceptance, acceptance of periodic rent payments with knowledge of a material noncompliance by the tenant constitutes a waiver of the landlord's right to terminate the rental agreement. If the landlord has given the tenant written notice that the periodic rental payments have been accepted with reservation, the landlord may accept full payment of all rental payments, damages and other fees and still be entitled to receive an order of possession terminating the rental agreement.

II. Landlord Must Reserve Right to Pursue Claim for Possession Even Where Tenant Has No Responsibility for Payment of Rent

Section 55-248.34 simply provides that the landlord's acceptance of periodic rent payments with knowledge of a material noncompliance by the tenant constitutes a waiver of the landlord's right to terminate the rental agreement unless the landlord accepts the rent with reservation, and

gives a written notice to the tenant of such acceptance. The definition of "rent" in § 55-248.4 includes "all payments to be made to the landlord under the rental agreement," regardless of whether those payments are made by the tenant or by VHDA. In my opinion, therefore, if the tenant has failed to comply with the rental agreement under § 55-248.34, the landlord must reserve the right to pursue a claim for possession of the property by giving notice to the tenant, even when the tenant has no responsibility for payment of the rent.

III. When Rent Not Paid in Full, No Waiver Occurs Under § 55-248.34

YOU ALSO ASK WHETHER THE LANDLORD MUST GIVE NOTICE TO THE TENANT OF THE LANDLORD'S RESERVATION OF THE RIGHT TO TERMINATE POSSESSION FOR NONCOMPLIANCE WITH THE RENTAL AGREEMENT, WHEN THE NONCOMPLIANCE IN QUESTION IS VHDA'S FAILURE TO PAY THE RENT (OR VHDA'S SHARE OF IT) WHEN DUE. BASED ON THE LANGUAGE OF §§ 55-248.4 AND 55-248.34, QUOTED ABOVE, IT IS MY OPINION THAT "ACCEPTANCE OF PERIODIC RENT PAYMENTS" IN § 55-248.34 MEANS ACCEPTANCE OF "ALL PAYMENTS" DUE – I.E., ACCEPTANCE OF FULL PAYMENT OF THE PERIODIC RENT DUE – UNDER THE RENTAL AGREEMENT. IF THE RENT HAS NOT BEEN PAID IN FULL, THEREFORE, THERE HAS BEEN NO ACCEPTANCE OF THE "PERIODIC RENT PAYMENT" DUE TO THE LANDLORD. IN THAT SITUATION, IT IS FURTHER MY OPINION THAT NO WAIVER OF THE LANDLORD'S RIGHTS OCCURS UNDER § 55-248.34, REGARDLESS OF WHETHER THE LANDLORD HAS GIVEN ANY NOTICE TO THE TENANT OF VHDA'S NONPAYMENT OR OF ANY OTHER TYPE OF NONCOMPLIANCE BY THE TENANT HIMSELF.

APPENDIX C 1999 OP. VA. ATT'Y GEN. 168

http://www.oag.state.va.us/media%20center/Opinions/1999opns/jul999.htm

Opinion of the Attorney General, 1999 Op. Va. Att'y Gen. 68 (1999)

PROPERTY AND CONVEYANCES: RESIDENTIAL LANDLORD AND TENANT ACT.

RULES OF SUPREME COURT OF VIRGINIA: GENERAL DISTRICT COURTS-IN GENERAL – PRACTICE AND PROCEDURE IN ACTIONS AT LAW – INTEGRATION OF THE STATE BAR – UNAUTHORIZED PRACTICE RULES AND CONSIDERATIONS.

INDIVIDUAL MEETING STATUTORY DEFINITION OF "LANDLORD" MAY FILE UNLAWFUL DETAINER ACTION IN GENERAL DISTRICT COURT SEEKING PAYMENT OF RENT INTO COURT ESCROW ACCOUNT, JUDGMENT AGAINST TENANT, AND POSSESSION OF LEASED PREMISES; LANDLORD REPRESENTING ONLY HIS INTEREST IN COURT WOULD NOT BE ENGAGING IN UNAUTHORIZED PRACTICE OF LAW. PROCEDURAL REQUIREMENT THAT COURT DETERMINE VERACITY OF TENANT'S GOOD FAITH DEFENSE DOES NOT NECESSARILY REQUIRE SCHEDULING OF EVIDENTIARY HEARING. COURT MAY ACCEPT TENANT'S OATH OF GOOD FAITH DEFENSE ON RETURN DATE, PRIOR TO ACTUAL TRIAL, AND GRANT CONTINUANCE WITHOUT ESCROWED FUNDS OR SET CASE FOR CONTESTED TRIAL.

DATE: July 1, 1999

REQUESTOR: The Honorable William L. Wimbish, Chief Judge, 13th Judicial District

You ask several questions regarding § 55-248.25:1 of the *Code of Virginia*, a new section added by the 1999 Session of the General Assembly[1] to the Virginia Residential Landlord and Tenant Act.[2]

Section 55-248.25:1 provides:

> A. Where a landlord has filed an unlawful detainer action seeking possession of the premises as provided by this chapter[3] and the tenant seeks to obtain a continuance of the action or to set it for a contested trial, the court shall, upon request of the landlord, order the tenant to pay an amount equal to the rent that is due as of the initial court date into the court escrow account prior to granting the tenant's request for a delayed court date. However, if the tenant asserts a good faith defense, and the court so finds, the court shall not require the rent to be escrowed. If the landlord requests a continuance, or to set the case for a contested trial, the court shall not require the rent to be escrowed.
>
> B. If the court finds that the tenant has not asserted a good faith defense, the tenant shall be required to pay an amount determined by the court to be proper into the court escrow account in order for the case to be continued or set for

> contested trial. To meet the ends of justice, however, the court may grant the tenant a continuance of no more than one week to make full payment of the court-ordered amount into the court escrow account. If the tenant fails to pay the entire amount ordered, the court shall, upon request of the landlord, enter judgment for the landlord and enter an order of possession of the premises.
>
> C. The court shall further order that should the tenant fail to pay future rents due under the rental agreement into the court escrow account, the court shall, upon the request of the landlord, enter judgment for the landlord and enter an order of possession of the premises.
>
> D. Upon motion of the landlord, the court may disburse the moneys held in the court escrow account to the landlord for payment of his mortgage or other expenses relating to the dwelling unit.

You first ask who meets the definition of "landlord," as that term is used in § 55-248.25:1, for the purpose of appearing in court to make a request for payment of rent into an escrow account, judgment against the tenant, and possession of the leased premises.

Section 55-248.25:1 is enacted as part of the Virginia Residential Landlord and Tenant Act. Statutes relating to the same subject "'are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement.'" [4] Section 55-248.4 of the Act defines "landlord" to mean "the owner, lessor or sublessor of the dwelling unit or the building of which such dwelling unit is a part, and 'landlord' also means a manager of the premises who fails to disclose the name of such owner, lessor or sublessor." The primary goal of statutory construction "is to ascertain and give effect to the legislative intent." [5] "'[T]ake the words as written'" and determine their plain meaning.[6] I must, therefore, conclude that the General Assembly has clearly and unambiguously determined that "the owner, lessor or sublessor of the dwelling unit or the building of which such dwelling unit is a part"[7] or the manager of such premises may appear in court to make requests for payment of rent into the court escrow account, judgment against the tenant, and possession of the leased premises.

You also ask whether such landlord must retain legal representation when making such requests and/or motions before the court.

The Supreme Court of Virginia has approved rules governing appearances before a court in Virginia. Non-lawyers may represent themselves in court, provided they are not engaging in the unauthorized practice of law.

> A non-lawyer may represent himself, but not the interest of another, before any tribunal. A non-lawyer regularly employed on a salary basis … may present facts, figures, or factual conclusions, as distinguished from legal conclusions, when such presentation does not involve the examination of witnesses or preparation of briefs or pleadings. [8]
>
> A non-lawyer regularly employed on a salary basis by a corporation appearing on behalf of his employer before a tribunal shall not engage in activities involving

> the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions.[9]

These rules clearly provide that a non-lawyer may represent himself before any court. A non-lawyer representing another before a court would be engaging in the unauthorized practice of law, unless such non-lawyer (1) is *appearing on behalf of his employer* and does not engage in "activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions";[10] or (2) is a *regular employee* acting for his employer and prepares notices or contracts incident to the regular course of conducting a business.[11]

An exception to the unauthorized practice of law prohibition applies to "an appeal … noted by a party's *regular and bona fide employee* or by a person entitled to ask for judgment under any statute." [12] In an unlawful detainer action, a landlord normally would be representing only his interest in court. In addition, a manager of leased premises may also be the "landlord" for the purposes of the actions authorized by § 55-248.25:1.[13] Based on this assumption, the landlord and manager would not, therefore, be engaged in the unauthorized practice of law. I must, therefore, conclude that such landlord and manager are not required to retain legal representation when appearing before the court to make the requests and/or motions permitted in § 55-248.25:1.

You next ask whether an evidentiary hearing must be held to determine whether a tenant has asserted a good faith defense, or, in the alternative, whether the court may accept a tenant's oath of a good faith defense on the return date and grant a continuance without escrowed funds.

Section 55-248.25:1(A) provides that if the court finds the tenant has asserted a good faith defense, "the court shall not require the rent to be escrowed." This language is directory.[14] Under well-accepted principles of statutory construction, when a statute contains a specific grant of authority, the authority exists only to the extent specifically granted in the statute.[15] Section 55-248.4 defines "good faith" as "honesty in fact in the conduct of the transaction concerned."

The procedural nature of § 55-248.25:1(A) is underscored by the Supreme Court's "repeated holding that the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent." [16] The General Assembly does not require in clear and unambiguous language that the court conduct an evidentiary hearing on the return date to find that the tenant asserts a good faith defense. When the General Assembly intends to enact a mandatory requirement, it knows how to express its intention.[17] A court, therefore, must determine on a case-by-case basis whether an evidentiary hearing is necessary to prove a tenant's assertion of a good faith defense on the return date. I am of the view that the good faith defense to be found by the court is a procedural requirement that does not necessarily require an evidentiary hearing be held to determine whether a tenant has asserted a good faith defense. Consequently, I am also of the opinion that the court may accept a tenant's oath of a good faith defense on the return date and grant a continuance without escrowed funds.

You also ask that the phrase "good faith" defense in newly enacted § 55-248.25:1(A) and (B) be reconciled with § 55-248.25.

When new provisions are added to existing legislation by amendment, a presumption arises that, "in making the amendment the legislature acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts." [18] It is presumed further that the legislature acted purposefully with the intent to change existing law.[19] The principles of statutory construction also require that statutes be harmonized with other existing statutes, if possible, to produce a consistently logical result that gives effect to the legislative intent.[20]

Section 55-248.25(a) provides that, in an action for the nonpayment of rent,

> the tenant may assert as a defense that there exists upon the leased premises, a condition which constitutes or will constitute, a fire hazard or a serious threat to the life, health or safety of occupants thereof, including but not limited to a lack of heat or running water or of light or of electricity or adequate sewage disposal facilities or an infestation of rodents, or a condition which constitutes material noncompliance on the part of the landlord with the rental agreement or provisions of law.

The assertion of any defense permitted by § 55-248.25(a) must be conditioned upon specific matters set forth therein.[21] Section 55-248.25(b) sets forth that which "shall be a sufficient answer" to the defenses permitted by § 55-248.25(a). Section 55-248.25(c) requires that the court "make findings of fact upon any defense raised under this section or the answer to any defense." The clear language of § 55-248.25 requires that such defenses be asserted for determination by the court at the contested trial that is set in the general district court on the initial return date. "'The manifest intention of the legislature, clearly disclosed by its language, must be applied.'"[22]

SECTION 55-248.25:1, HOWEVER, CLEARLY APPLIES ONLY TO THE PROCEEDINGS THAT OCCUR ON THE RETURN DATE IN THE GENERAL DISTRICT COURT AT WHICH TIME THE MATTER MAY BE CONTINUED OR SET FOR A CONTESTED TRIAL. IT IS CLEAR THAT § 55-248.25:1 CONTEMPLATES PROCEEDINGS THAT OCCUR UPON RETURN TO THE GENERAL DISTRICT COURT, PRIOR TO THE ACTUAL TRIAL ON THE UNLAWFUL DETAINER, WHERE THE TENANT SEEKS TO CONTINUE THE ACTION OR SET THE CASE FOR A CONTESTED TRIAL. THE CLEAR INTENT OF THE GENERAL ASSEMBLY IS TO CHANGE THE EXISTING LAW BY PERMITTING A TENANT TO ASSERT A DEFENSE ON THE RETURN DATE TO AVOID HAVING RENT ESCROWED BY THE COURT WHEN EITHER A CONTINUED OR CONTESTED TRIAL DATE IS REQUESTED.

[1]1999 Va. Acts chs. 382, 506.

[2]Tit. 55, ch. 13.2, §§ 55-248.2 to 55-248.40.

[3]*See supra* note 2.

[4]Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (quoting former edition of 73 Am. Jur. 2d *Statutes* § 188 (1974)); *see also* 1995 Op. Va. Att'y Gen. 69, 70.

[5]Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *see also* 1993 Op. Va. Att'y Gen. 237, 239.

[6]Adkins v. Commonwealth, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998) (quoting Birdsong Peanut Co. v. Cowling, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989) (quoting Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985))).

[7]Section 55-248.4.

[8]Va. Sup. Ct. R. pt. 6, § I, Rule 1, UPC 1-1.

[9]*Id*. UPR 1-101(B) .

[10]*Id*.

[11]*Id*. pt. 6, § I(B)(2). Rule 3:16(a) provides that motions in writing are pleadings. This rule applies only to civil actions at law in a court of record. *See id*. pt. 3, R. 3:1.

[12]*Id*. pt. 7, R. 7A:13 (emphasis added).

[13]*See* § 55-248.4 (defining "landlord").

[14]"A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute." Nelms v. Vaughan, 84 Va. 696, 699, 5 S.E. 704, 706 (1988), *quoted in* Jamborsky, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994); Commonwealth v. Rafferty, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991).

[15]*See* Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938); 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992 & Supp. 1999).

[16]Jamborsky v. Baskins, 247 Va. at 511, 442 S.E.2d at 638; *see also* Commonwealth v. Rafferty, 241 Va. at 324-25, 402 S.E.2d at 20; Fox v. Custis, 236 Va. 69, 372 S.E.2d 373 (1988); Moore v. Commonwealth, 218 Va. 388, 237 S.E.2d 187 (1977); Huffman v. Kite, 198 Va. 196, 93 S.E.2d 328 (1956); Nelms v. Vaughan, 84 Va. at 696, 5 S.E. at 704.

[17]*See* 1998 Op. Va. Att'y Gen. 87, 88.

[18]City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

[19]Cape Henry v. Natl. Gypsum, 229 Va. 596, 331 S.E.2d 476 (1985); Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982).

[20]*See* 2A Norman J. Singer, *supra* note 15, § 46.06; 1995 Op. Va. Att'y Gen. 118, 120.

[21]*See* § 55-248.25(a)(1)-(2).

[22]Barr v. Town & Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

APPENDIX D 1997 OP. VA. ATT'Y GEN. 16

http://www.oag.state.va.us/media center/Opinions/1997opns/may971.htm

CIVIL REMEDIES AND PROCEDURE: ACTIONS - DETINUE.

When final judgment is rendered in detinue proceeding arising from contract between plaintiff and defendant securing payment of monetary judgment to plaintiff or his assignor, court may not require prevailing plaintiff to elect either to recover judgment amount or to receive order for possession of specific property. Defendant has option of paying judgment amount or surrendering specific property within 30 days. When detinue proceeding does not arise from such contract, prevailing plaintiff in detinue proceeding may recover property or proceeds, but not both.

The Honorable Gwendolyn L. Jackson
The Honorable Louis A. Sherman

May 21, 1997

You ask whether, when final judgment is rendered by a court in a detinue proceeding, § 8.01-121 of the *Code of Virginia* permits the court to require the prevailing plaintiff to elect either recovery of the amount due or receipt of an order for possession of the specific property.[1] If not, you ask whether the court may award such plaintiff recovery of both the judgment amount and the specific property.

You relate that when a final judgment is rendered in detinue proceedings, the Norfolk General District Court requires the prevailing plaintiff to elect either recovery of the judgment amount or receipt of an order for possession of the specific property. Such options are subject to the election by the defendant to either pay the judgment amount or surrender the specific property within thirty days. Should the defendant fail to appear or to fulfill the election that is made within the thirty-day period, the plaintiff may seek to execute on the judgment either by a writ of *fieri facias* for a monetary judgment, or by a writ of possession to recover the specific property. If the plaintiff determines the defendant has no recoverable assets or no longer possesses the property sought, the prevailing plaintiff may file a timely motion to rehear following execution of either of these writs.

Finally, you have been advised that other courts interpret § 8.01-121 to allow the court, upon rendering final judgment, to award to a prevailing plaintiff both a monetary judgment for the value of the property and other damages and an order for possession of the specific property.

The action of detinue is brought to recover specific, identifiable tangible personal property wrongfully detained, or, alternatively, its value at the time of final judgment, and in both instances, damages may be imposed for the wrongful detention of the property.[2] If the specific property cannot be returned, judgment is rendered for its value.[3] Pursuant to § 8.01-121, a detinue proceeding may arise from a contract or otherwise.

When the detinue proceeding arises from a contract between the prevailing plaintiff and the defendant "to secure the payment of money to the plaintiff or his assignor," the court "*shall*" enter judgment "for the recovery of the amount due the plaintiff thereunder or for the specific property, and costs." [4] The word "shall" is primarily mandatory in its effect.[5] When judgment is rendered for the plaintiff on the contract, "[t]he defendant shall have the election of paying the amount of such judgment or surrendering the specific property."[6] Thereafter, "[t]he court may grant the defendant a reasonable time not exceeding thirty days, within which to make the election."[7] A prior opinion of the Attorney General interprets this provision in § 8.01-121, and concludes that this language "gives the defendant the *option* of paying the amount of the judgment or surrendering the specific property only when the plaintiff prevails in the final judgment on *a contract made to secure the payment of money* to the plaintiff or his assignor."[8] The opinion also concludes that "[t]he statute gives defendant such option under no other conditions."[9]

The clear language of § 8.01-121 gives such an option to the defendant only when the detinue proceeding arises from a contract between the plaintiff and the defendant securing "the payment of money to the plaintiff or his assignor." An option is clearly not granted to the plaintiff in such a case. When the language of a statute is plain and unambiguous and its meaning is clear and definite, it must be given effect.[10] Therefore, I am of the opinion that, in accordance with § 8.01-121, when final judgment is rendered in a detinue proceeding that arises from a contract between the plaintiff and the defendant securing the payment of monetary judgment to the plaintiff or his assignor, the court may not require the prevailing plaintiff to elect either to recover the judgment amount or to receive an order for possession of the specific property.

Section 8.01-121 also provides that, in its final judgment, "the court shall dispose of the property or proceeds according to the rights" of the parties. When the detinue proceeding does not arise from a contract between the plaintiff and the defendant securing the payment of money to the plaintiff or his assignor, and judgment is rendered in favor of the defendant, the property will be awarded to the defendant, together with any costs or damages to which he is properly entitled by law.[11] When the plaintiff prevails in such a case, he may recover the property or its value, together with damages, if any, for the wrongful detention of the property, and such costs as may be taxed by law or awarded by the court.[12] Section 8.01-121 uses the disjunctive "or" to describe two distinct judgments that may be entered by the court in detinue proceedings brought under a contract or otherwise: (1) recovery of the property; *or* (2) recovery of the proceeds. The use of the disjunctive indicates that two separate alternatives were intended,[13] and reflects the General Assembly's intent that the prevailing plaintiff receive judgment for either the property or the proceeds. Consequently, I am of the opinion that § 8.01-121 does not permit the court to award a prevailing plaintiff recovery of both the amount due and the specific property.

[1]Section 8.01-121 provides, in part: "When final judgment is rendered on the trial of such detinue proceeding, the court shall dispose of the property or proceeds according to the rights of those entitled. When, in any such proceeding, the plaintiff prevails under a contract which, regardless of its form or express terms, was in fact made to secure the payment of money to the plaintiff or his assignor, judgment shall be for the recovery of the amount due the plaintiff thereunder or for the specific property, and costs. The defendant shall have the election of paying the amount of such judgment or surrendering the specific property. The court may grant the defendant a reasonable time not exceeding thirty days, within which to make the election upon such security being given as the court may deem sufficient."

[2]*See, e.g., Broad St. Auto Sales v. Baxter*, 230 Va. 1, 334 S.E.2d 293 (1985); *Gwin v. Graves*, 230 Va. 34, 334 S.E.2d 294 (1985); *Vicars v. Discount Company*, 205 Va. 934, 938, 140 S.E.2d 667, 670 (1965).

[3]*Broad St. Auto Sales v. Baxter*, 230 Va. at 3, 334 S.E.2d at 294.

[4]Section 8.01-121 (emphasis added).

[5]The use of the word "shall" in a statute generally indicates that the procedures are intended to be mandatory, imperative or limiting. *See Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); *Creteau v. Phoenix Assurance Co.*, 202 Va. 641, 643-44, 119 S.E.2d 336, 339 (1961); *Bryant v. Tunstall*, 177 Va. 1, 6, 12 S.E.2d 784, 786-87 (1941); 1989 Op. Va. Att'y Gen. 250, 251-52, and opinions cited therein.

[6]Section 8.01-121.

[7]*Id*.

[8]1967-1968 Op. Va. Att'y Gen. 48, 49 (interpreting § 8-593, former version of § 8.01-121).

[9]*Id*.

[10]*Temple v. City of Petersburg*, 182 Va. 418, 29 S.E.2d 357 (1944).

[11]Section 8.01-119(B).

[12]*MacPherson v. Green*, 197 Va. 27, 87 S.E.2d 785 (1955); *see also* LEIGH B. MIDDLEDITCH, JR. & KENT SINCLAIR, VIRGINIA CIVIL PROCEDURE, § 2.16 (2d ed. 1992 & Supp. 1996).

[13]*See* 1990 Op. Va. Att'y Gen. 223, 224; *see also* 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 21.14 (5th ed. 1993 & Supp. 1996); 1991 Op. Va. Att'y Gen. 205, 207 (use of "or" in statute indicates disjunctive; each statutory provision stands alone and is not modified by others); *id.* at 279, 280 (use of disjunctive "or" indicates intent of General Assembly to provide separate instances justifying waiver of penalties and interest).

C. CRIMINAL PROCEDURE

Chapter 1. Jurisdiction

A. Subject Matter

Each general district court has exclusive original jurisdiction for the trial of ordinance violations, misdemeanors, and traffic infractions. Va. Code § 16.1-123.1(1)(a) and (b).

1. Each general district court established within a city has concurrent jurisdiction with the circuit court of that city for the trial of state revenue and election law violations. Va. Code § 16.1-123.1(2)(a).

2. Each general district court has the power to conduct preliminary hearings. Va. Code § 16.1-127.

3. Each general district court has the power to try misdemeanor offenses which originated as direct indictments or presentments when certified by the circuit court and transferred to the general district court for trial. Va. Code § 16.1-126.

B. Geographical Area

Each general district court has jurisdiction over offenses committed within the city or county, including towns within the county, for which it is established. Va. Code § 16.1-123.1.

1. Either the city or county general district court has jurisdiction to try offenses which are committed on the boundary of two counties or on the boundary of two cities, or on the boundary of the city or county, or within 300 yards of the boundary. Va. Code § 19.2-249.

2. Each general district court established within a city or town has jurisdiction over offenses committed within one mile of the city or town limits. Va. Code § 19.2-250. *Breitbach v. Commonwealth*, 35 Va. App. 604, 546 S.E. 2d 764 (2001).

3. Venue in a homicide preliminary hearing lies in the county or city where the body was found whenever circumstances fail to disclose where the homicide was committed. If the victim was removed from the Commonwealth for medical treatment prior to death and died outside the Commonwealth, then venue lies in the courts of the county or city from which the victim was removed. Venue in a capital murder prosecution lies in any jurisdiction in the Commonwealth in which any of the alleged killings may be prosecuted. Va. Code § 19.2-247.

C. Protective Orders (For additional discussion of Title 19.2 Protective Orders, please *see* Section III(D), Chapter 1 – Domestic Violence.)
Va. Code §§ 19.2-152 et. al.
Va. Code § 18.2-60.4

1. Summary: Effective July 1, 2011, new legislation created significant changes in the issuance and enforcement of protective orders. The major legislative changes that impact the General District Court are set forth below.

2. Name Change: Renames "Protective Orders for Stalking" as "Protective Orders" under Va. Code § 19.2-152.10.

3. Definition Change: Act of violence, force or threat means **any** act involving violence, force or threat that results in bodily injury or places one in *reasonable apprehension* of death, sexual assault or bodily injury. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault *or* any criminal offense that results in bodily injury *or* places one in reasonable apprehension of death, sexual assault, or bodily injury.

   Jurisdictional Changes 2012: During the 2012 session, the General Assembly amended Virginia Code § 16.1-241 M. and granted exclusive original jurisdiction to the Juvenile and Domestic Relations District Court regarding all petitions filed for the purpose of obtaining an order of protection under Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-158.10 if either the alleged victim or respondent is a juvenile. This jurisdictional change clarifies the jurisdiction of the Juvenile and Domestic Relations District Court regarding these petitions.

4. Jurisdictional Changes: No requirement that a warrant charging a specific criminal offense be issued prior to the issuance of a protective order. The issuance of the protective order is dependent upon the conduct alleged as defined above.

5. Penalty changes

   a. A person convicted of a second violation of a protective order within 5 years of a conviction for a prior offense **AND** when either the instant or prior offense was based on an act or threat of violence shall be sentenced to a mandatory minimum jail sentence of 60 days.

   b. Third or subsequent offense when such offense is committed within 20 years of the first conviction AND when either the instant or any of the prior offense was based on act or threat of violence is guilty of a Class 6 felony.

   c. Any person who commits an assault and battery resulting in serious bodily injury upon a person protected by a protective order is guilty of a Class 6 felony.

d. Any person who violates a protective order by furtively entering the home of the protected party while such party is present OR enters and remains in such home until the protect party arrives is guilty of a Class 6 felony.

e. Any person who violates a protective order while knowingly armed with a firearm or other deadly weapon is guilty of a Class 6 felony.

f. Any person who is subject to a permanent protective order for family abuse and who possesses a firearm while the permanent protective order is valid is guilty of a Class 2 felony. The respondent may possess or transport a firearm not to exceed 24 hours after being served with the permanent protective order for the purpose of selling or transporting that firearm to another person.

6. Other notable changes

a. The protective order issued by the General District Court is more consistent with family abuse protective orders. *See* J& DR Benchbook for a discussion of family abuse protective orders.

b. Provides for a rebuttal presumption against bail for a second or subsequent violation of a protective order. *See* Va. Code § 18.2-60.4 and § 19.2-120.

c. Expands the family abuse preliminary protective order and a family abuse protective order to include a condition prohibiting the allegedly abusing person from committing a criminal offense that results in injury to persons or property.

d. Authorizes a law enforcement officer to request an extension of an emergency protective order, not to exceed 3 days, for a person in need of protection who is physically or mentally incapable of filing a petition for a preliminary or permanent protective order.

e. Requires a law enforcement officer with probable cause to believe a violation of a protective order has occurred to arrest the person he believes to be the primary physical aggressor.

f. Provides for the issuance of an emergency protective order, preliminary protective order, or protective order granting the petitioner the possession of any companion animal as defined in Virginia Code § 3.2-6500 if such petitioner meets the definition of owner as defined in Virginia Code § 3.2-6500.

g. Clarifies venue and provides that venue shall be commenced where (i) either party has his principal residence; (ii) the act of violence, force, or threat by the respondent against the petitioner occurred; or (iii) a protective order was issued if, at the time the proceeding is commenced, the order is in effort to protect the petitioner or a family or household member of the petitioner.

h. Clarifies compensation of court appointed counsel or guardian ad litem and provides the court may order compensation pursuant to Va. Code § 19.2-163 whenever an attorney is required under the Servicemembers Relief Act (50 U.S.C. App. Section 501) to represent respondent in a protective order proceeding.

7. Emergency Protective Order
Va. Code § 19.2-152.8

Issued by a judge or magistrate based upon written or oral ex parte statements made under oath by the alleged victim or law enforcement officer that such person is being or has been subjected to an act of violence, force or threat;

a. Scheduling: Best practices suggest the request for an emergency protective order should be heard by the court as soon as practicable.

b. Standard of Proof: *Probable danger* of further such acts of violence, force or threat OR finds a petition or warrant has been issued for the respondent alleging a criminal offense resulting from the commission of an act of violence, force or threat then the emergency protective order shall issue prohibiting acts of violence, force or threat or criminal offenses resulting in injury to person or property.

c. Contents of Order: Order may prohibit acts of violence, force or threat or criminal offenses resulting in injury to person or property; may prohibit contact with alleged victim, victim's family or household members; may impose other conditions deemed necessary to prevent prohibited acts

d. Expiration: Order expires at 11:59 p.m. on the third day following issuance.

Law enforcement may request an extension of the order not to exceed 3 days after expiration of the original order if the person in need of such protection is physically or mentally incapable of filing a petition. May file request in writing or make it orally to the judge or magistrate.

e. Notification: Court or magistrate shall notify forthwith but no later than at the end of the business day on which the order is issued, the Virginia Criminal Information Network (VCIN) of the issuance of the emergency protective order and the respondent's identifying information; etc. Court or magistrate shall notify forthwith the primary law enforcement agency responsible for service and entry of protective orders.

The issuance of the emergency protective order shall not be considered evidence of wrongdoing by the respondent.

f. Service on Respondent: Effective upon personal service; alleged victim receives a copy as well.

g. Motion to Modify: May be filed by respondent at any time prior to hearing on the preliminary protective order.

h. Expansion of Prohibited Contact: Judge or magistrate may order that respondent be prohibited from being in the physical presence of the alleged abused person or such person's family or household members. "Physical presence" is defined to include "(i) intentionally maintaining direct visual contact with the petitioner or (ii) being within 100 feet from the petitioner's residence or place of employment." Va. Code §§ 16.1-253.4 and 19.2-152.8.

8. Preliminary Protective Order
Va. Code § 19.2-152.9

Issued by a judge upon the filing of a petition in which the petitioner alleges the petitioner is or has been within a reasonable period of time subjected to an act of violence, force, or threat OR that a petition or warrant has been issued for the arrest of the respondent for any criminal offense resulting from the commission of an act of violence, force, or threat.

a. Standard of Proof: Order may be issued in an ex parte proceeding upon *good cause* shown when the petition is supported by an affidavit or sworn testimony before the judge.

Good cause is established by a showing that immediate and present danger of any act of violence, force, or threat is apprehended by the petitioner OR petitioner presents evidence sufficient to establish probable cause that an act of violence, force, or threat has recently occurred.

b. Contents of Order: Order may include a condition prohibiting acts of violence, force or threat or criminal offenses that result in injury to person or property; may prohibit contact with the petitioner or members of petitioner's family; may impose other conditions necessary to prevent acts of violence, threat or force, etc.

c. Duration of Preliminary Protective Order: Within 15 days of the issuance of the preliminary protective order the court shall schedule a hearing to determine whether to issue a permanent protective order. If the respondent fails to appear because he was not personally served with the preliminary protective order, the court may extend the preliminary protective order for a period not to exceed 6 months.

For good cause shown and at respondent's request, the court may continue the hearing on the preliminary protective order. The preliminary protective order remains in effect until the hearing date.

d. Service: Effective upon personal service on the alleged perpetrator.

e. Notification: Same requirements regarding notification of VCIN and law enforcement.

9. Protective Order
Va. Code § 19.2-152.10

Issued by the court after a full hearing on the petition.

a. Standard of Proof: Court finds by a *preponderance of the evidence* that petitioner is or has been within a reasonable period of time, subjected to an act of violence, force or threat OR the respondent has been convicted of any criminal offense resulting from the commission of an act of violence, force or threat OR a warrant or petition has been issued against respondent alleging respondent committed any act involving violence, force or threats.

b. Contents of the Protective Order: May include conditions prohibiting acts of violence, force or threat or criminal offenses that may result in injury to persons or property; may prohibit contact by respondent with petitioner, petitioner's family or household members; may impose conditions necessary to prevent further acts of violence, force or threat or criminal offenses that result in injury to persons or property or communication or other contact of any kind by respondent.

c. Duration of Protective Order: The protective order may be issued for a specified period of time not greater than 2 years. Prior to the expiration of the protective order, the petitioner may file a written motion requesting a hearing to extend the order. Proceedings to extend the order shall be given precedence on the docket. After hearing the evidence, the court shall determine whether to grant the petitioner's request and the court may extend the protective order for an additional period of time not to exceed two years. Petitioner may ask for unlimited extensions thereafter. Such requests shall be scheduled for hearings as described above.

d. Service: Personal service on the respondent forthwith.

e. Notification: The court shall forthwith, but no later than the end of the business day on which the order was issued, notify VCIN of the issuance of the order and provide the respondent's identifying information. Local law enforcement shall be notified forthwith.

The court may assess court costs and attorney's fees against either party regardless whether a protective order was issued.

f. Foreign Protective Order: A foreign protective order entered by a court of appropriate jurisdiction shall be accorded full faith and credit and enforced in the Commonwealth as if it were an order of the Commonwealth. The person entitled to such protection may file the order in any appropriate district court and the clerk

shall forthwith forward an attested copy of the order to the primary law enforcement agency responsible for service and entry of protective order.

g. Dissolution or Modification of Protective Order: Either party may file a written motion at any time asking the court for a hearing to dissolve or modify the protective order. Such proceedings shall be given precedence on the docket.

h. Copy: Includes facsimile copy regarding all protective orders.

10. Violation of any Protective Order

For first offense, punishable as a Class 1 misdemeanor under Va. Code § 18.2-60.4 or contempt of court under Va. Code § 18.2-456 but not both. If alleged violation is charged under Va. Code § 18.2-60.4 and no mandatory time to serve is required by statute, then the court must impose a jail sentence to serve and in no case shall the entire term imposed be suspended.

Second or subsequent violations *see Penalty Changes* above or consult Va. Code § 18.2-60.4.

Upon conviction, the court shall, in addition to other penalties, enter a protective order not to exceed 2 years.

11. Appeal: Pursuant to Va. Code § 16.1-106, an appeal as a matter of right if taken within 10 days of entry of the protective order to a court of record. The protective order entered by the district court pursuant to Va. Code § 19.2-152.10, including a protective order required by Va. Code § 18.2-60.4, shall remain in force during the filing of or the pendency of the appeal of such order unless otherwise ordered by the circuit court or the Court of Appeals or the Supreme Court.

Chapter 2. Initiation of Charges

A. Types of Process

1. Warrant or summons in misdemeanor cases. Va. Code § 16.1-129.

2. Warrant in felony cases. Va. Code § 16.1-129.

B. Specificity of Charges

The offense contained in the summons or warrant must be described with reasonable certainty, giving the accused notice of the nature and character of the offense charged. However, the same particularity is not expected or required as in indictments. Va. Code § 19.2-72, 19.2-220; *Zuniga v. Commonwealth*, 7 Va. App. 523, 375 S.E.2d 381 (1988). Use of term "on or about" constitutes sufficient notice to accused. *Marlowe v. Commonwealth*, 2 Va. App. 619, 347 S.E.2d. 167 (1986).

Upon motion of counsel, the court, in its discretion, may direct the filing of a written Bill of Particulars in misdemeanor cases. Va. Code § 16.1-69.25:1.

C. Identity of Accused

The warrant or summons shall contain the name of the accused if known. However, if unknown, the warrant or summons shall describe the accused with reasonable certainty. Va. Code § 19.2-74. *Zuniga v. Commonwealth*, 7 Va. App. 523, 375 S.E.2d. 381 (1988) (Use of name "Pat" and physical description of one Cuban male, 25 years old, 5'4", 150 lbs., constitutes sufficient reasonable certainty).

D. Form of Warrants and Summons

1. Warrant: Va. Code § 19.2-72; Rule 7C:3.

   Arrest warrant charging a misdemeanor or felony offense shall issue upon a sworn written or oral complaint and shall contain the following:

   a. Name the accused or set forth a description by which accused can be identified with reasonable certainty.

   b. Description of offense charged with reasonable certainty.

   c. Command the arrest of the accused.

   d. Directed to appropriate officer.

   e. Signed by the issuing officer.

   f. No time limitation exists as to the execution of an arrest warrant.

2. Warrant: Va. Code § 19.2-72.

   Additional requirement regarding a felony warrant: Arrest warrant charging a felony offense shall not be issued by the magistrate based solely on the complaint of a person other than a law enforcement officer or animal control officer without prior authorization by the attorney for the Commonwealth or by a law enforcement agency having jurisdiction over the alleged offense.

3. Summons: Va. Code §§ 19.2-73 and -74.

   Summons shall contain the information specified above in (1) (a)-(e) and shall be in the same form as the Uniform Summons for Motor Vehicle law violations.

   Va. Code § 19.2-73(B) permits the arresting officer to issue a summons on the premises of a medical facility when the accused has been taken to a medical facility for treatment or evaluation of his medical condition for violation of Va. Code §§ 18.2-266, 18.2-266.1, 18.2-272, or 46.2-341.24 and for refusal of tests in lieu securing a warrant.

   Va. Code § 19.2-74 (A)(1) provides whenever a police officer detains an individual for a Class I misdemeanor the officer shall issue a summons for the defendant to appear at a specified time and place, and upon the giving by such person of his written promise to appear, the officer shall forthwith release him from custody, unless the defendant is subject to one or more of the statutory exceptions contained in Va. Code §§ 19.2-74 or 19.2-82.

   In *Moore v. Commonwealth*, 272 Va. 717, 636 S.E.2d 395 (2006), the defendant was arrested for driving on a suspended operator's license, a Class I misdemeanor. Finding the arrest of the defendant invalid because the officers were authorized to issue a summons and release the defendant, the court suppressed the evidence of cocaine found in the defendant's pocket and refused to expand a Fourth Amendment "search incident to arrest" exception to include a "search incident to citation". *Id*. at 722 and 398. The Supreme Court of the United States reversed, concluding that an arrest in violation of state law may nevertheless be reasonable under the U.S. Constitution. *Virginia v. Moore*, 553 U.S. 164 176 (2008). Therefore, the police did not violate the Fourth Amendment when they made an arrest based on probable cause but in violation of state statute, or when they conducted a search incident to the arrest. *Id*. at 178. *Cf. Knowles v. Iowa*, 525 U. S. 113, 119 (1998) (officers issuing citations do not face the same danger as those making an arrest, and therefore do not have the same authority to search).

E. Arrest Without a Warrant

Va. Code § 19.2-81

1. An officer in uniform or displaying a badge of office may arrest any person without a warrant when:

   a. The crime, felony or misdemeanor, is committed in the officer's presence; officer's presence is defined as direct personal knowledge through officer's

senses, *Penn v. Commonwealth*, 13 Va. App. 399, 412 S.E.2d. 189 (1991), *affirmed*, 224 Va. 218, 420 S.E.2d. 713 (1992).

b. The officer has reasonable grounds or probable cause to suspect the person of having committed a felony not in the officer's presence. *Crowder v. Commonwealth*, 213 Va. 151, 191 S.E.2d. 239 (1972). If the officer who has probable cause to arrest or search orders the arrest or search of an accused, it is not necessary that those officers actually making the arrest or conducting the search have knowledge of the facts which constitute the probable cause. The knowledge of the first officer will be imputed to those officers making the arrest or conducting the search. *White v. Commonwealth*, 24 Va. App. 234, 481 S.E.2d. 486 (1997); "collective knowledge" theory to justify warrantless arrest that is based on probable cause. "Collective knowledge" theory may be limited to felony arrests only. In *White*, the court referenced *Penn v. Commonwealth*, 13 Va. App. 399, 412 S.E.2d. 189 (1991). In *Penn*, an officer observed the defendant litter and conveyed this information to an arresting officer who arrested the defendant for littering. The arresting officer, who had not observed the littering, patted the defendant down and found cocaine in his pocket. Defendant asserted a claim of illegal search and seizure. The court found the arrest was invalid because the arrest violated Va. Code § 19.2-81; however, the cocaine was not suppressed because the court determined the arrest was based upon probable cause and, therefore, did not violate the defendant's constitutional rights as set forth under the Fourth Amendment.

c. The officer has probable cause to suspect that a person operated a boat or other watercraft

    (i) While intoxicated; OR

    (ii) In the officer's presence, operated a motorboat or watercraft in violation of a court order suspending that person's privilege to operate such watercraft or boat.

d. The officer has reasonable grounds to believe, based upon personal investigation and statements obtained from eyewitnesses, that a crime has been committed by any person then and there present at any of the following locations:

    (i) The scene of any accident involving a motor vehicle, watercraft or motor boat: Accident defined as an "event which occurs by chance or from unexpected causes" AND "not limited to a collision between vehicles or property." *Leveroni v. County of Arlington*, 18 Va. App. 626, 445 S.E.2d. 723 (1994); *Smith v. Commonwealth*, 32 Va. App. 228, 527 S.E.2d 456 (2000).

(ii) A hospital or medical facility to which the person has been transported. *Paige v. City of Lynchburg*, 10 Va. App. 162, 390 S.E.2d. 524 (1990).

(iii) On the highways or waterways of the Commonwealth if the person is arrested and charged with the theft of a motor vehicle.

(iv) Additionally, such officer may, within three hours of the occurrence of any such accident involving a motor vehicle, arrest without a warrant at any location any person whom the officer has probable cause to suspect of driving or operating a motor vehicle while intoxicated.

e. The officer has received from another jurisdiction a photocopy of a warrant, telegram, computer printout, facsimile printout, a radio or telephone message, etc., that contains the name and a reasonably accurate description of the person charged. A reasonably accurate description includes age, gender, race, height, weight, hair color and style, and any unique characteristics. *Foote v. Commonwealth*, 11 Va. App. 61, 396 S.E.2d. 851 (1990) ("Rambo-type" suspect operating a suspicious pickup truck is insufficient detail to meet statutory requirements).

f. The officer has received a radio message that a warrant is on file charging that individual with a misdemeanor not committed in the officer's presence. *Foote v. Commonwealth*, 11 Va. App. 61, 396 S.E.2d. 851 (1990).

g. The officer has probable cause to believe, based upon statements from an eyewitness, that the accused allegedly committed one of the following crimes:

(i) Shoplifting. Va. Code § 18.2-96 or Va. Code § 18.2-103. The arresting officer, in his discretion, may issue a summons.

(ii) Carrying a weapon on school property. Va. Code § 18.2-308.1.

(iii) Assault and Battery. Va. Code § 18.2-57.

(iv) Destruction of Property. Va. Code § 18.2-137. If that property is used for business or commercial purposes.

h. The officer has probable cause to believe, based on facts observed by the officer or upon facts based on personal observations or personal investigations or based upon the reasonable complaint of a person who observed the accused allegedly commit one of the following offenses:

(i) assault on a family member or household member;

(ii) stalking, or

(iii) violating the conditions of a protective order

2. A person arrested without a warrant must be brought forthwith before a magistrate or other issuing authority to determine whether probable cause exists to issue a warrant. Va. Code § 19.2-82. The accused may personally appear before the magistrate or other issuing authority through the use of a two way electronic video and audio communication device provided the accused and the arresting officer have the opportunity to simultaneously see and communicate with the magistrate or authority. Failure to bring the accused "forthwith" is merely a procedural violation unless the delay in presentment results in the loss of exculpatory evidence, thereby triggering a possible constitutional due process violation. *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d. 267 (1986).

Chapter 3. Pre-Trial Matters

A. Pre-Trial Motions

No statute grants the general district court the authority to schedule pretrial motions, however, authority may be inferred from the following statutes and Rules of Supreme Court of Virginia:

1. Statutes: Va. Code § 16.1-69.25:1-Motion for Bill of Particulars in criminal cases must be filed seven days prior to trial and prior to defendant entering a plea.

2. Rules of Supreme Court of Virginia:

    a. Rule 7C:4(a): On motion of the prosecuting attorney, the court may, in its discretion, order the trial jointly of defendants charged with related acts or occurrences. Rule 7C:4(d); this Rule applies to preliminary hearings.

    b. Rule 7C:5: Motions for Discovery for misdemeanors carrying possible jail sentences and all felony preliminary hearings must be in writing, delivered by mail, fax, or otherwise to the prosecuting attorney or, if applicable, to the representative of the Commonwealth and filed with the court at least ten (10) days prior to trial or preliminary hearing.

    c. Rule 7C:5(e): This Rule grants the court the authority to enter an order prescribing the time, place, manner and conditions of discovery.

    d. Rule 7C:5(f): Should the prosecuting attorney or the representative of the Commonwealth fail to comply with the discovery order, if "brought to the attention of the Court," this Rule authorizes the court to order compliance and grant a continuance.

B. Arraignments and Appointment of Counsel/Public Defender

1. Procedure

    The court shall inform all persons charged with a criminal offense for which incarceration or death may be imposed of his right to counsel, including charges for revocation of a suspended sentence or probation. Va. Code § 19.2-157. The court shall arraign the accused, who is not free on bail and who is charged with a criminal offense as described in Va. Code § 19.2-157, on the first day on which the court sits after the person is charged. The court shall inform the accused of his right to bail and right to counsel at that proceeding. Va. Code § 19.2-158.

    a. The court shall allow the accused a reasonable opportunity to employ counsel if the accused indicates an ability to do so. Va. Code § 19.2-157. If the accused indicates that he is financially unable to employ counsel and does not waive his

right to counsel, the court shall conduct an oral examination of the accused to determine whether the accused is indigent. Va. Code § 19.2-159.

b. The court shall require the accused to complete a written financial statement under oath. Va. Code § 19.2-159. If the accused qualifies for court-appointed counsel, the court shall appoint counsel. The financial statement and order of appointment of counsel shall be filed with the case documents. Va. Code § 19.2-159.

c. The Supreme Court provides the general district court clerk with a quick reference chart to assist the court in determining whether a defendant satisfies the indigency requirements contained in the Code. This chart should be kept on the bench for easy reference.

d. The accused may waive his right to counsel. Va. Code § 19.2-160. The court must determine that the waiver of counsel is intelligently and voluntarily made. To establish the voluntariness of the waiver, the court should conduct an oral examination of the accused. The court should advise the accused of the perils of going to trial without an attorney. Failure of the court to inquire as to the voluntariness of the waiver or failure to advise the accused of the hazards of a *pro se* defense may constitute a violation of the accused's Sixth Amendment right to counsel. *Van Sant v. Goodles*, 596 F. Supp. 484 (E.D. Va. 1983) *affirmed* 742 F. 2nd 1450 (4th Cir. 1984). "The record must show that an accused was afforded counsel, but intelligently and understandingly rejected the offer. Anything less is not a waiver." *Sargent v. Commonwealth*, 5 Va. App. 143, 149, 360 S.E. 2nd 895, 899 (1987); *Harris v. Commonwealth*, 20 Va. App. 194, 455 S.E. 2nd 759 (1995); *Watkins v. Commonwealth*, 26 Va. App. 335, 494 S.E. 2nd 859 (1998). District Court Form DC-335, TRIAL WITHOUT A LAWYER, should be presented to the accused and the accused should sign the form. The signed waiver should be retained with the court documents.

e. Bearing in mind that there is a general presumption against waiver of fundamental constitutional rights and that for a waiver to be valid the defendant must be fully aware of the nature of the right being abandoned and of the consequences of such abandonment, Va. Code § 19.2-160 provides that if the accused refuses to request counsel or to execute a waiver, the court shall advise the accused that such refusal constitutes a waiver and offer the accused an opportunity to rescind the waiver. If the accused does not rescind the waiver, the court is to record the refusal on district court form DC-337 TRIAL WITHOUT COUNSEL and proceed to try the case.

f. Prior to commencement of trial, upon request of the Commonwealth's attorney or, in the absence of the Commonwealth's attorney, upon its own motion, the court shall announce and reduce to writing that no jail sentence shall be imposed, and then proceed to try the case without appointing counsel. Va. Code § 19.2-160. No sentence of incarceration shall be imposed upon a finding of guilt and conviction.

g. The court shall appoint the Office of the Public Defender to provide defense services for indigents charged with jailable offenses in the cities and counties where the public defender offices are established unless:

(i) The public defender is unable to represent the accused due to a conflict; OR

(ii) The court finds that the appointment of counsel is necessary to obtain the ends of justice. Va. Code § 19.2-163.4.

h. The court should maintain complete documents regarding the appointment or waiver of counsel in the event the validity of the conviction is attacked later on constitutional grounds. *Samuels v. Commonwealth*, 27 Va. App. 119, 497 S.E.2d. 873 (1998) *Sargent v. Commonwealth*, 5 Va. App. 143, 360 S.E.2d. 895 (1987).

2. Selection and Payment of Court-Appointed Counsel

a. Selection: The court shall utilize a fair system of rotation to select members of the bar practicing before the court whose names are on the list maintained by the Indigent Defense Commission pursuant to Va. Code § 19.2-163.01. If no attorney is available whose name appears on the list maintained by the Virginia Indigent Defense Commission, the court may appoint as counsel an attorney not on the list who has demonstrated to the court's satisfaction an appropriate level of training and experience. The court shall provide notice to the Virginia Indigent Commission of the appointment. Va. Code § 19.2-159.

b. Compensation: The maximum fee is determined by the legislature with same fee limitations when there are multiple charges arising out of the same incident and tried together. Va. Code § 19.2-163. If there is more than one charge, counsel should submit a written time sheet. Use District Court Form DC-50, TIME SHEET.

c. Under certain circumstances, the court can allow reimbursement for reasonable expenses which, if the accused is convicted, become part of the court costs assessed against the accused. Va. Code § 19.2-163.

3. Co-Defendants

The court should appoint separate counsel from different firms to represent co-defendants to avoid conflicts. *See* Virginia Rules of Professional Conduct Rule 1.6, Rule 1.7, Rule 1.9 and Rule 1.10; LEO 307, Virginia Code of Professional Responsibility DR 4-101 (A), DR 5-105, DR 7-101 (A), and DR 7-101 (B) (1).

4. Scheduling Arraignment Hearings

There is no constitutional or statutory authority requiring the scheduling of the arraignment for any particular time during the business day.

5. Issues Related to *Padilla*

In *Padilla v. Kentucky*, 130 S.Ct. 1473, 2010 U.S. LEXIS 2928 (2010), the Supreme Court of the United States found that defense counsel's failure to advise defendant of the possible deportation consequences of his guilty plea to drug charges amounted to ineffective assistance of counsel. The decision characterizes the advisement duty solely as a responsibility of defense counsel and does not impute any related responsibility to the trial court.

Although there is no Virginia case law or binding federal case law or a statute or a Supreme Court Rule creating a duty for a Virginia trial court to engage in a *Padilla* advisement or colloquy, judges continue to consider whether some judicial response to *Padilla* is appropriate. Since *Padilla* places the responsibility for advisement on defense counsel, the question remains of how a defendant could be apprised of the potential deportation, naturalization and related immigration consequences if (i) the defendant exercised his or her right to waive representation by counsel or (ii) the court either granted the request of the Commonwealth's Attorney to forego incarceration in the wake of a conviction or made that determination *sua sponte* in the absence of the Commonwealth's Attorney. In addition, questions have arisen about how or whether a judge should ascertain if defense counsel has adequately advised the defendant about the potential immigration and deportation consequences of a conviction.

The Committee on District Courts addressed one issue related to *Padilla* through a November, 2012, revision of district court form DC-335, TRIAL WITHOUT A LAWYER, the form created to memorialize a defendant's waiver of counsel. The language added to the general advisement provisions of the form reads:

> I understand that if I am not a citizen of the United States and if I plead guilty or I am found to be guilty, there may be consequences of deportation, exclusion from admission into the United States, or denial of naturalization pursuant to the laws of the United States.

Another vehicle which plays a role in the *Padilla* issue is district court form DC-337, TRIAL WITHOUT COUNSEL. Among other functions, this form is used to record the determination by the court that no period of active or suspended incarceration will be imposed upon a conviction for a Class 1 or 2 misdemeanor. The statute notes that "either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion" the court may make such a finding in writing, obviating the right to representation. Va. Code § 19.2-160. The court is not bound to accept what the statute describes as "the request of the attorney for the Commonwealth." If that request is not granted, the defendant still retains his or her right to counsel, even if no sentence of incarceration is later imposed after conviction.

One potential option to address questions left unanswered by *Padilla* is to add a *Padilla* advisement to the colloquy that judges use to accept guilty pleas. Although *Padilla* does not require this, judges may conclude that this would be a prudent addition to the

colloquy. The *Padilla* advisement added to district court form DC-335, TRIAL WITHOUT A LAWYER, may prove helpful.

C. Discovery

1. Rule 7C:5

   a. Application of the Rule: This rule applies only to prosecutions for misdemeanors and to preliminary hearings.

   b. Upon motion of the accused, the court shall order the prosecuting attorney to permit the accused to hear, inspect, and copy or photograph the following information or material when the existence of such is known or becomes known to the prosecuting attorney and such material or information is to be offered against the accused in the general district court:

      (i) Any relevant written or recorded statements or confessions made by the accused, or copies thereof and the substance of any oral statements and confessions made by the accused to any law enforcement officer; and,

      (ii) Any criminal record of the accused.

   c. Motion must be made in writing and filed with the court, and a copy thereof mailed, faxed, or otherwise delivered to the prosecuting attorney at least ten (10) days prior to the date fixed for trial or preliminary hearing.

   d. Motion shall include the specific information or material sought.

   e. Order granting relief shall specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

   f. If at any time during the course of the proceedings, it is brought to the attention of the court that the prosecuting attorney failed to comply with the Rule or an Order issued pursuant to the Rule, the court shall order the prosecuting attorney to permit the discovery or inspection of the material not previously disclosed, and may grant a continuance to the accused.

      A Bill of Particulars may be ordered of the prosecution pursuant to Va. Code § 16.1-69.25:1. Motion must be made before a plea is entered and at least seven (7) days before the date fixed for trial.

      A subpoena *duces tecum* may be issued pursuant to Va. Code § 16.1-131, and § 19.2-10.1 for obtaining records concerning banking and credit cards.

2. Electronic Communications

a. Out-of-State Search Warrants Honored

A Virginia corporation or other entity which provides electronic communication services or remote computing services to the general public, (when properly served with a warrant and affidavit in support of the warrant and issued by a judicial officer or court of another state with jurisdiction over the matter, to produce a record or other information pertaining to a subscriber to or customer of such service or the contents of electronic communications, or both) upon request shall produce the record or other information as if that (warrant) had been issued by a Virginia court. The provision applies only to certain sexual criminal offenses, computer fraud and identity theft cases. Va. Code § 19.2-70.3.

b. Foreign Corporation to Disclose Record of Subscriber to Offender

Any provider of electronic communication services or remote computing services shall include a foreign corporation that provides electronic communication services' foreign corporation which shall disclose a record or other information pertaining to a subscriber to or customer of such services, excluding the contents of electronic communications, to an investigative or law-enforcement officer pursuant to (i) a search warrant issued by a magistrate, general district or circuit court judge; (ii) a court order for such disclosure issued as provided by law; or (iii) the consent of the subscriber or customer to such disclosure. Va. Code § 19.2-70.3

c. Provider May Verify the Authenticity of the Reports as Business Record

The provider of the electronic communication services or remote computing services may verify the authenticity of the written reports or records that it discloses pursuant to a search warrant, court order, etc., excluding the contents of electronic communications, by providing an affidavit from the custodian reports or records or immediate custodial supervisor whom certifies that the records are true and complete and that they are prepared in the regular course of business. The written reports and records are admissible in evidence as a business records exception. Va. Code § 19.2- 70.3.

d. Electronic Facsimile of Search Warrant Affidavits

The electronic facsimile of search warrant affidavits are now authorized. Va. Code § 19.2-54.

e. Sexually Violent Predator Civil Commitment Probable Cause Hearings

(i) Hearings may be conducted by using a two-way electronic video and audio communication system. Va. Code § 37.2-906 and § 37.2-915.

(ii) Conducting annual assessment hearings under Virginia Code § 37.2-910 (Violent Predator Act) by video conference did not violate respondent's rights to counsel or due process. *Shellman v. Commonwealth*, 284 Va. 711, 733 S.E.2d 242 (2012).

f. Access of Electronic Evidence to the Department of State Police from an Insurer or Insurance Professionals

Such evidence, documentation and related materials may be accessed, located, and distributed to the state police by insurance professionals conducting business within the Commonwealth. Self-authentication of such records allow evidentiary admissibility as a business record. Va. Code § 52-38.

3. Brady Rule

No duty by Commonwealth to disclose information regarding alleged prior incidents of unprofessional conduct of the victim, where the Commonwealth did not possess any information concerning the prior incidents and the information is available to the defendant from other sources and upon diligent investigation. *Porter v. Warden*, 283 Va. 326, 722 S.E.2d 534 (2012).

D. Statutes of Limitations

1. Generally one (1) year for misdemeanors.

2. Statute of limitations for petit larceny is five (5) years.

3. An attempt to produce abortion is within two (2) years of commission of the offense.

4. *See* Virginia Code § 19.2-8 for exceptions.

E. Bail and Bond

1. Definitions

a. Bail means the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer. Va. Code § 19.2-119.

b. Bond means the posting by a person or his surety of a written promise to pay a specified sum, secured or unsecured, ordered by an appropriate judicial officer as a condition of bail, to assure performance of the terms and conditions contained in the recognizance. Va. Code § 19.2-119.

c. Criminal history means records and data collected by criminal justice agencies or persons consisting of identifiable descriptions, and notations of arrests, detentions, indictments, information or other formal charges, and any deposition arising therefrom. Va. Code § 19.2-119.

d. Recognizance means a signed commitment by a person to appear in court as directed and to adhere to any other terms ordered by an appropriate judicial officer as a condition of bail. Va. Code § 19.2-119.

e. Appropriate Judicial Officer means, unless otherwise indicated, any magistrate within his jurisdiction, any judge of a district court and the clerk or deputy clerk of any district court within their respective cities and counties, etc. Va. Code § 19.2-119.

2. Procedure

a. An accused in custody must be brought before the court on the first day on which the court sits after the person is charged. Va. Code § 19.2-158.

b. The court shall inform accused of right to counsel and amount of bail. The court shall also hear motions relating to bail or conditions of release.

c. A magistrate, clerk, or deputy clerk may not admit a person charged with an (rebuttable presumption against bail) offense unless an Attorney for the Commonwealth concurs or the bail previously was set by a judge. Notice and an opportunity to be heard must be given to the Attorney for the Commonwealth before a judge may set or admit such a person to bail. Va. Code § 19.2-120.

d. "Absent good cause shown," upon motion for bond reduction or conditions of release, a bond hearing shall be had "as soon as practicable but no later than three calendar days, excluding Saturday, Sunday and legal holidays." Va. Code § 19.2-158.

e. Prior to conducting any hearing regarding bail or release, the judge shall, to the extent feasible, obtain the accused's criminal history. Va. Code § 19.2-120.

f. He must be admitted to bail unless there is probable cause to believe either that he will not appear for trial or that his liberty will constitute an unreasonable risk of danger to himself or to the public.

g. However, subject to rebuttal, the accused is presumed to be ineligible for bail if the accused is currently charged with and the judicial officer finds probable cause to believe that the accused committed one of the following offenses:

(i) An act of violence defined in Va. Code § 19.2-297.1. *See* Appendix B.

(ii) Offenses for which the maximum sentence is life imprisonment or death. *See* Appendix B.

(iii) A violation of Va. Code §§ 18.2-248, -248.01, -255, or -255.2 involving a Schedule I or II controlled substance if (i) the maximum term of imprisonment is ten years or more and the person was previously convicted of a like offense or (ii) the person was previously convicted as a "drug kingpin" as defined in Va. Code § 18.2-248. *See* Appendix B.

(iv) A violation of Va. Code §§ 18.2-308.1, -308.2, or -308.4 involving a firearm and which provides for a minimum mandatory sentence. *See* Appendix B.

(v) Any felony, if the accused has been convicted of two or more offenses described above in (i) or (ii) under Virginia law or substantially similar laws of the United States.

(vi) Any felony committed while the accused is on release pending trial, pending imposition or execution of sentence, or pending appeal for a prior felony under state or federal law.

(vii) An offense listed in subsection B of Va. Code § 18.2-67.5:2 and the person had previously been convicted of an offense in § 18.2-67.5:2, or a substantially similar offense under the laws of any state or the United States, and the judicial officer finds probable cause to believe that the person who is currently charged with one of these offenses committed the offense charged.

(viii) A violation of Va. Code §§ 18.2-46.2, 18.2-46.3, 18.2-46.5, or 18.2-46.7.

(ix) A violation of Va. Code §§ 18.2-36.1, 18.2-51.4, 18.2-266, or 46.2-341.24 and the person has, within the past five years of the instant offense, been convicted three times of different dates of a violation of any combination of these Code Sections, or any ordinance of any county, city, or town or the laws of any other state or the United States substantially similar thereto, and has been at liberty between each conviction.

(x) A second or subsequent violation of Va. Code § 16.1-253.2 or § 18.2-60.4 or a substantially similar offense under the laws of any state or the United States.

(xi) A violation of subsection B of Va. Code § 18.2-57.2 or a violation of subsection C of § 18.2-460 charging the use of threats of bodily harm or force to knowingly attempt to intimidate or impede a witness.

(xii) A violation of Va. Code § 18.2-51.6 if the alleged victim is a family or household member as defined in § 16.1-228.

h. The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is being arrested pursuant to Va. Code § 19.2-81.6 (**illegal aliens**).

i. The court shall consider the following factors and such others as it deems appropriate in determining, for the purpose of rebuttal of the presumption against bail described in subsection (e), whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of the public:

(i) The nature and circumstances of the offense charged;

(ii) The history and characteristics of the person;

(iii) The nature and seriousness of the danger to any person or the community that would be posed by the person's release. Va. Code § 19.2-120.

j. The terms of bail are determined by considering:

(i) The nature and circumstances of the offense;

(ii) Whether a firearm is alleged to have been used in the offense;

(iii) The weight of the evidence;

(iv) The financial resources of the accused or juvenile and his ability to pay bond;

(v) The character of the accused or juvenile including his family ties, employment or involvement in education;

(vi) His length of residence in the community;

(vii) His record of convictions;

(viii) His appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(ix) Whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness, juror, or victim;

(x) Membership in a criminal street gang as defined in § 18.2-46.1;

(xi) The defendant's record concerning appearance at court proceedings; and

(xii) Any other relevant information available. Va. Code § 19.2-121.

k. Any person arrested for a felony who has previously been convicted of a felony, or who is presently on bond for an unrelated arrest in any jurisdiction, or who is on probation or parole, may be released only upon a secure bond. This provision may be waived with the approval of the judicial officer and with the concurrence of the prosecutor. Va. Code § 19.2-123.

l. In addition to requiring execution of a secured or unsecured bond, the judicial officer may impose certain conditions or restrictions, including supervision by a pretrial services agency. If the accused has voluntarily submitted to a drug test pursuant to Va. Code § 19.2-123 B, the officer shall view the result only after determining bail eligibility and the amount of bond and for the sole purpose of determining conditions of release. Va. Code § 19.2-123.

m. A secured bond is satisfied, *at the option of the accused*, with cash or sureties (property or bondsman's guarantee). Va. Code § 19.2-123.

n. The defendant has a right to appeal the denial of bail, excessive bond, or unreasonable terms of recognizance. If bail was granted or a term of recognizance fixed over the objection of the Commonwealth's Attorney, he or she may appeal such decision. Va. Code § 19.2-124.

o. On reasonable notice to the accused, the Commonwealth may move the court to increase the amount of bond previously fixed or to revoke bail. However, the accused has been released, the court may grant the motion only if the accused has violated a term or condition of his or her release, has been arrested or convicted of a felony or misdemeanor after release, upon a showing that incorrect or incomplete information was relied upon in fixing the amount of bond, or whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate or attempt to threaten, injure, or intimidate a prospective witness, juror, or victim. Notice must also be given to the surety, if any, but failure to do so does not prohibit consideration of the motion. Va. Code § 19.2-132. *Dorsey v. Commonwealth*, 32 Va. App. 154, 526 S.E.2d 787 (2000).

p. A judicial officer may require as a condition of release on bond that the defendant submit to the arresting officer and the jurisdiction's photographing and fingerprinting facility. The fingerprinting and photographing may be taken there

and wherever the magistrates office may be located. Va. Code §§ 19.2-123 and 19.2-390.

3. Forfeiture of Bond

a. In addition to constituting an offense, willful, nonexcusable failure of the accused to appear is cause for forfeiture of his or her bond. Va. Code §§ 19.2-128, 19.2-143.

b. When the defendant has posted a cash bond and fails to appear, the bond shall be forfeited without notice. If he or she is tried in his absence, fines and costs are first deducted. The granting of a rehearing or the appearance of the defendant within sixty days authorizes the court to remit part or all of the bond. Va. Code § 19.2-143.

c. When the bond is secured, notice must be given to all parties and issued within 45 days of breach of the condition to permit them to show cause why the bond should not be forfeited. If the defendant has not appeared and good cause is not shown, the court makes a finding of default. If, after sixty days the defendant has still not appeared, the court orders forfeiture of the bond. However, if the defendant appears or is delivered to the court within twenty-four months of the finding of default, the court must remit the bond less costs (the cost to the Commonwealth to return him to the court unless he was out of state with permission or incarceration in another state prevented him from appearing within a forty-eight month period). Va. Code § 19.2-143.

d. Note that the forfeiture proceeding is civil. Failure of the surety to appear is not a criminal offense. Use Form DC-482, SHOW CAUSE SUMMONS (BOND FORFEITURE - CIVIL), for notice, for making the appropriate finding and for entering the judgment of forfeiture. Note also that if the defendant fails to appear, but is arrested on a capias, the surety is no longer responsible. Thus, release on the capias results in a subsequent obligation to appear on the underlying charge to be unsecured.

e. Also note that the statute provides for forfeiture only for nonappearance. *See* 1979 Op. Va. Att'y. Gen. 63A (August 1, 1979). Violation of a condition of release can result in a revocation, (*see* 1982 Op. Va. Att'y. Gen. 192 (September 21, 1982) or increase in bond. *See* (2.) (h) *supra*.

f. Finally, note that it is improper when issuing a capias to preset a bond or order that the accused be held without bond. Bail, bond determinations must be made as in any other case. Va. Code § 19.2-80, Op. Va. Att'y. Gen. 192 (September 21, 1982).

4. Appeal Bond

    a. In misdemeanor cases when the defendant does not receive an active jail sentence, the trial court must admit the defendant to bail. Va. Code § 19.2-319.

    b. In other cases, the trial judge must use sound judicial discretion in determining whether or not post-conviction bail should be granted or denied. *See Dowell v. Comm.*, 6 Va. App. 225, 367 S.E. 2d 742 (1988).

    c. No filing or service fees shall be assessed or collected for any appeal of a determination from a General District Court. Va. Code § 19.2-124(D).

    d. If the initial bail decision on a charge brought by a warrant or district court capias is made by a magistrate or clerk, then the appeal lies with the district court in which the case is pending. However, if it was on a charge brought by direct indictment, presentment or circuit court capias, then the defendant seeking an appeal must do so through the circuit court. Va. Code §§ 19.2-124, 19.2-132.

5. Form and Sufficiency of Recognizance. *See* Va. Code §§ 19.2-135, 136, and 146.

    Bonds in Recognizance in Criminal and Juvenile cases are payable to the county or city where the case is being prosecuted rather than the locality where the recognizance was taken. Va. Code §§ 19.2-136, 19.2-143, 46.2-114, and 46.2-1308.

6. Personal appearance by two-way electronic video and audio communications

    If two-way electronic video and audio communications is available for use by a district court for the conduct of a hearing to determine bail or to determine representation by counsel, the court shall use such communication in any such proceeding that would otherwise require the transportation of a person from outside the jurisdiction of the court in order to appear in person before the court. Any documents transmitted between the magistrate, intake officer, or judge and the person appearing before the magistrate, intake officer, or judge may be transmitted by electronically transmitted facsimile process. *See* Va. Code § 19.2-3.1.

7. Bail terms set by a court on a capias to be honored by magistrate

    A magistrate who is to set the terms of bail of a defendant and brought before him on a capias shall do so in accordance with the order of the court that issued the capias, if such an order is affixed to or made a part of the capias by the court. Va. Code § 19.2-130.1.

8. Notification of right to appeal

    A judicial officer shall inform the defendant of his right to appeal from an order denying bail or fixing terms of bond or recognizance pursuant to Virginia Code § 19.2-124.

9. Appeal of General District Court bond decision

   If a bail, bond, or recognizance decision is appealed the court may, for good cause shown, stay the execution of the order to allow the objecting party to obtain an expedited hearing in the next higher court. The stay does not apply when the person granted bail has already been released from custody. Va. Code §§ 19.2-124 and 19.2-132.

Chapter 4. Venue

A. General

In general, venue is where the offense was committed. Ordinarily, a criminal case must be prosecuted in the county or city in which the offense was committed. Va. Code § 19.2-244; *see Cheng v. Comm.*, 240 Va. 26, 393 S.E.2d 599 (1990).

B. Embezzlement and Larceny

For embezzlement and larceny cases, venue is where the offense was committed and any jurisdiction in the state into which the stolen property was taken, or in which the defendant was legally obligated to deliver the embezzled property. Va. Code § 19.2-245. Unauthorized use of a vehicle venue is not a continuing offense as with larceny. *Taylor v. Commonwealth*, 58 Va. App. 185, 708 S.E.2d 241 (2011).

C. Forgery

For forgery cases, venue is where the writing was forged, used or passed or attempted to be used, passed or deposited for collection or credit, or where the writing is found in the possession of the defendant. Va. Code § 19.2-245.1.

D. Homicide

In homicide cases, when it is not known where the offense was committed, the case may be prosecuted in the jurisdiction where the body of the victim was found. When the mortal wound occurs in one county/city and death in another, the case may be prosecuted in either jurisdiction. If the victim is removed from the Commonwealth for medical treatment prior to death, and dies outside the Commonwealth, venue lies in the jurisdiction from which the victim was removed for medical treatment. Va. Code §§ 19.2-247, -248.

E. Boundaries

1. For offenses committed on the boundary of two counties, of a county and a city, or within 300 yards of either, venue may be in either. Va. Code § 19.2-249.

2. When the place of the murder was unknown and the body was found in Richmond, Virginia, and at a place within one mile of the neighboring Chesterfield County, the court held that Chesterfield County was an appropriate jurisdictional venue. *Kirby v. Commonwealth*, 63 Va. App. 665 (1914).

F. Sex Offenses

Certain sex offenses involving the transportation of a person may be prosecuted in any jurisdiction where the transportation occurred. Va. Code § 18.2-359.

G. Identity Theft

Identity theft crimes "shall be considered to have been committed in any locality where the person whose identifying information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in such locality." Va. Code § 18.2-186.3(D). Identity theft is a continuing offense. *See Gheorghiu v. Commonwealth*, 53 Va. 288 (2009).

H. Objections to Venue

1. Rule 7C:2 requires questions of venue to be raised prior to a finding of guilt or venue is deemed to be waived.

2. Venue must be alleged. Va. Code §§ 19.2-220, -221.

3. The burden is on the prosecution to prove venue by evidence is either direct or circumstantial. Venue does not need to be proven beyond a reasonable doubt, but the evidence must create a strong presumption that the offense was committed within the jurisdiction of the court. *See Cheng v. Comm.*, 240 Va. 26, 393 S.E.2d 599 (1990); *Foster-Zahid v. Comm.*, 23 Va. App. 430, 477 S.E.2d 759 (1996).

I. The "Immediate Result Doctrine"

In the case of *Goble v. Commonwealth*, 57 Va. 243, 688 S.E. 2d 263 (2010), the court gave Virginia courts jurisdiction over the illegal sale of wild animal parts, which were delivered in Pennsylvania, because the defendant posted the animal parts for sale on eBay while in the Commonwealth.

J. Venue for Altering Firearm Serial Number

Altering the firearm serial number constitutes a "discrete act" rather than a continuing offense, Va. Code § 19.2-244, and therefore venue is proper where the altercation or removal was done. *Bonner v. Commonwealth*, 61 Va. App. 247, 734 S.E.2d 692 (2012).

K. Conspiracy Venue

"Where acts in furtherance of a conspiracy run through several jurisdictions, the offense is cognizable in each." Venue is established in each jurisdiction. *Chambliss v. Commonwealth*, 62 App. 459, 749 S.E. 212 (2013).

Chapter 5. Preliminary Hearings

A. Presence of the Defendant

Va. Code § 19.2-183 B

The defendant has the right to be present. In felony cases, he shall not be called upon to plead, but he may cross-examine witnesses, introduce evidence, call witnesses and testify in his own behalf.

B. Rules of Evidence

Va. Code § 19.2-183 B
Virginia Rules of Evidence, Supreme Court Rules Part 2 (hereafter 'Rule')

The rules of evidence apply at a preliminary hearing.

C. Sufficiency of the Evidence

Va. Code § 19.2-186

The test is "sufficient cause," defined as reasonable grounds to believe that the crime was committed and that the accused is the person who committed it. *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781 (1968).

D. Judge's Possible Findings

Va. Code § 19.2-186

1. Certify the felony charge or a lesser-included felony charge to the circuit court upon a finding of sufficient cause.

2. Find that there is not sufficient cause for charging the defendant with the offense and discharge the defendant.

3. Find that there is not sufficient cause to charge the defendant with the charged felony, but reduce the charge to a lesser-included misdemeanor. If the felony charge is amended to a misdemeanor, it must be a lesser-included offense. *Rouzie v. Commonwealth*, 215 Va. 174, 207 S.E.2d 854 (1974). In the event that the charge is reduced:

    a. Either party may request a continuance, after the reduction. If the parties are ready to proceed immediately, the defendant should be arraigned on the new charge and shall enter a plea to that charge.

    b. However, the Commonwealth's Attorney is entitled to make a motion to nolle prosse the charge, prior to the defendant's arraignment on the reduced charge. *See Painter v. Commonwealth*, 47 Va. App. 227, 623 S.E.2d 408 (2005). Virginia trial courts properly refuse a nolle prosequi when the "circumstances manifest a vindictive intent resulting in oppressive and unfair trial tactics or other prosecutorial misconduct" or "clearly contrary to public interest." *See Duggins v.*

Commonwealth, 59 Va. App. 785, 722 S.E.2d 663 (2012) and *Moore v. Commonwealth*, 59 Va. App. 795, 722 S.E.2d 668 (2012).

c. The Code provides that the judge "shall" try the accused for the misdemeanor if he concludes that there is sufficient cause only for such offense, but the Virginia Supreme Court has interpreted "shall" in this instance to be directory, not mandatory. *Moore v. Commonwealth*, 218 Va. 388, 237 S.E.2d 854 (1977).

4. Notes on Preliminary Hearings

a. The trial court has no jurisdiction to modify an offense of conviction after 21 days of the sentencing order and any change after that could be deemed "void ab initio." *See Burrell v. Commonwealth*, 283 Va. 474, 722 S.E.2d 470 (2012).

b. The trial judge may adjourn a hearing (trial) no more than 10 days at one time, without the consent of the accused. Va. Code § 19.2-183.

c. Unlike a trial and pursuant to Va. Code § 19.2-183.D, a certificate of analysis or report prepared pursuant to Va. Code §§ 19.2-187 and 19.2-188 shall be admissible at any preliminary hearing without the testimony of the person preparing such certificate or report. Va. Code § 19.2-183.

E. Discovery

The defendant is entitled, on motion, to discovery of certain statements of the defendant and the defendant's prior record when such items will be used in court under Rule 7:C5.

The defendant is not entitled to use the preliminary hearing for discovery, but, pursuant to Va. Code § 19.2-183, he may produce evidence to show that the crime was not committed or that he was not the perpetrator. *Foster v. Commonwealth*, 209 Va. 297, 163 S.E.2d 565 (1968); *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781, cert. den. 393 U.S. 1006 (1968).

F. Certificate of Analysis

At any preliminary hearing, certificates of analysis and reports shall be admissible without the testimony of the person preparing such certificate or report. Va. Code § 19.2-183.D. Nothing in the procedural of Va. Code § 19.2-187.1 "shall prohibit the admissibility of a certificate of analysis when the person who performed the analysis and examination testifies at trial or during a hearing concerning the facts stated therein and of the results of the analysis or examination." Va. Code §§ 17.1-275.5, 19.2-183, 19.2-187.1. At any preliminary hearing under this Section, certificates of analysis and reports prepared pursuant to Va. Code §§ 19.2-187 and 19.2-188 shall be admissible without the testimony of the person preparing such certificate or report. Va. Code §§ 19.2-183, 19.2-187.01, 19.2-187.1, and 19.2-188.3. This is not the same at trial.

G. Certification of Misdemeanor Offenses Along with Felony Certification to Circuit Court

1. An ancillary or an accompanying District Court misdemeanor charge may be certified to the Circuit Court along with the waived felony preliminary hearing charge. The Commonwealth Attorney and the accused must both consent to the joint certification. Va. Code § 19.2-190.1.

2. Any certified misdemeanor offense shall proceed in the same manner as a misdemeanor appeal to the Circuit Court pursuant to Va. Code § 16.1-136.

H. Joint Preliminary Hearings for Multiple Defendants

Rule 7C:4(d) and Va. Code § 19.2-183.1

Rule 7C:4(d) authorizes the court to conduct joint preliminary hearings for persons alleged to have participated in contemporaneous and related acts or occurrences, or a series of such acts or occurrences, on motion of the Commonwealth's Attorney, unless joint preliminary hearing would constitute prejudice to a defendant.

Under Federal law, a joint trial or preliminary hearing can be ordered on any charges that could have been joined in a single indictment. On the other hand, the Virginia Rules and statutes proscribe certain instances where joint trials or hearings can be ordered. So the two schemes do not completely mesh. However, the federal jurisprudence can be of guidance in analyzing instances of prejudicial joinder. Also keep in mind that some of these rulings depend on joint trials with juries and the prejudice from evidence that is only admissible against some but not all defendants. Rulings are not as circumspect with regard to bench trials.

Under federal law there is a presumption in favor of joint trials, and the court's denial of the motion to sever may be overturned only for an abuse of discretion. *United States v. Rusher*, 966 F.2d 868, 877-78 (4th Cir. 1992); *United States v. Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992); *United States v. West*, 877 F.2d 281, 287-88 (4th Cir. 1989).

Under 4th Circuit precedent, in cases in which the motion to sever is based on an asserted need for a co-defendant's testimony, the moving defendant must establish the following four factors:

1. A bona fide need for the testimony of his co-defendant;

2. The likelihood that the co-defendant would testify at a second trial and waive his Fifth Amendment privilege;

3. The substance of this co-defendant's testimony; and

4. The exculpatory nature and effect of such testimony.

See U.S. v. Medford, 661 F.3d 746 (4th Cir. 2011).

I. Joining Preliminary Hearings with Misdemeanor Trials

A defendant will frequently be charged both with one or more felonies and with one or more misdemeanors and/or traffic infractions. Rule 7C:4 does not specifically address the issue of joining the preliminary hearings with the misdemeanor and traffic trials, but presumably the court has authority to conduct a joint preliminary hearing and misdemeanor trial. However, there are inherent differences between the two and possible conflicts can arise, which include:

1. A defendant often testifies in a misdemeanor trial but rarely does so in a preliminary hearing – can a defendant testify only as to the misdemeanor without waiving the right not to be cross-examined as to the felony?

2. Jeopardy attaches as to the misdemeanor upon the swearing of a witness, so that the case must go forward to conclusion, and the Commonwealth generally cannot nolle prosequi the misdemeanor charge in mid-trial and later indict (absent consent to the nolle prosequi), as it can with a felony.

3. Evidence that is admissible in a preliminary hearing may not be admissible in a misdemeanor trial – field test to identify a drug is an example (§ 19.2-188.1).

4. Rulings on evidentiary issues such as suppression of evidence will be final and binding in a misdemeanor trial but not in a preliminary hearing – *see* "J" below.

5. The right of cross-examination or to present evidence may be limited in a preliminary hearing – *see* 5(E) above.

6. Tactics in a preliminary hearing can be very different than those in a trial. For example, the prosecution may desire to present a limited case a preliminary hearing, while defense counsel may wish to conduct as much cross-examination as possible, while in a misdemeanor trial the prosecution will wish to present all evidence, while defense counsel may wish to limit cross-examination to very confined issues such as bias.

7. The standard of proof is very different in a trial and a preliminary hearing.

8. Dismissal or conviction of a lesser included misdemeanor or an offense which blocks conviction of a companion offense (e.g. § 19.2-294.1) could preclude a felony prosecution.[1]

[1] Statutory Bar - *Lawson v. Commonwealth*, 61 Va. App. 292, 734 S.E.2d 714 (2012), where the Court of Appeals held that the trial court erred in not granting defendant's motion to dismiss the indictment charging him with felony DUI based on a General district Court reckless driving conviction arising out of the same acts or act that were the basis of the felony indictment for DUI. Va. Code §19.2-294.1.
Collateral Estoppel - *Davis v. Commonwealth*, 63 Va. App. 45 (2014) (rehearing denied 64 Va. App. 70, 764 S.E.2d 724 (2014)), held that the collateral estoppel doctrine from a misdemeanor conviction in general district court precluded conviction on related felony matters in circuit court. Of particular interest in the Court of Appeals focus on specific findings of fact (specifically finding reasonable doubt) made by the general district court.

As a result of the foregoing, prosecutors frequently elect not to proceed with misdemeanor charges or traffic infractions accompanying felony charges, but rather will *nolle prosequi* such lesser charges prior to trial and directly indict the defendant on those charges which will be proceeded upon in Circuit Court or with the consent of the defendant ask to certify the misdemeanor to the circuit court for trial with the felony (§ 19.2-190.1).

J. Suppression Motions

Va. Code § 19.2-60; § 19.2-266.2

1. A ruling by a general district court at a preliminary hearing or trial on a suppression issue is expressly made non-binding on a court of record. Va. Code § 19.2-60. When constitutional guarantees are invoked under Article 1, Section 10, of the Virginia Constitution, state law does not provide any independent constitutional grounds for suppression of evidence so Virginia analysis tracks and is dependent on the federal case law in interpreting the Fourth Amendment. *Henry v. Commonwealth*, 32 Va. App. 547, 529 S.E.2d 796 (2000) and *Jackson v. Commonwealth*, 39 Va. App. 624, 576 S.E.2d 206 (2003).

2. Va. Code § 19.2-266.2.D (amended 2006) provides that motions to suppress in a criminal proceeding may be made prior to or at the proceeding, and provides further that "in the event such motion or objection is raised, the district court shall, upon motion of the Commonwealth grant a continuance for good cause shown."

3. Where a motion to suppress has been filed, or is made orally prior to commencement of hearing or trial, the court at the outset should be clear as to whether the case is proceeding on the motion to suppress, the hearing or trial, or both. Jeopardy attaches at the commencement of a trial, but not at the commencement of a motion, and the defendant may testify at a motion to suppress where he or she would not in a hearing or a trial.

K. Transcripts

Va. Code § 19.2-166, § 19.2-185

Only a judge of a court of record to which a case may be certified is authorized to appoint and authorize payment for a court reporter for purposes of reporting proceedings in felony and habeas corpus cases. The responsibility for acquiring the presence of a reporter is the defendant's. Failure of the defendant to do so is not necessarily a basis for a continuance and a general district court judge's refusal to grant a continuance is a proper exercise of the court's discretion when witnesses may be inconvenienced. *Lebedun v. Commonwealth*, 27 Va. App. 697, 501 S.E.2d 427 (1998).

L. Waiver

Va. Code § 19.2-183 A, § 19.2-218

After being advised of his right to a preliminary hearing and the consequence of his waiving that right, an accused may waive such right by signing the waiver which is contained on the warrant.

NOTE: some practitioners will "stipulate" that the court could find probable cause and then ask that the matter be bound over to the next term of the grand jury. This has the same effect of waiving the preliminary hearing (in that no hearing need to be held). Pursuant to Va. Code § 19.2-243, either a finding of probable cause made by the court at the preliminary hearing or a stipulation to such probable cause will initiate either the five month or nine month speedy trial limitations. A waiver of the preliminary hearing does not start the speedy trial clock (which instead begins upon indictment by a grand jury).

M. Discharge of Incarcerated Defendant if not Timely Indicated

Va. Code § 19.2-242

A person in jail on a criminal charge shall be discharged from imprisonment if a presentment, indictment or information be not found or filed against him before the end of the second term of the court at which he is held to answer, unless it appear to the court that material witnesses for the Commonwealth have been enticed or kept away or are prevented from attendance by sickness or inevitable accident, and except, also, in the cases provided in §§ 19.2-168.1 and 19.2-169.1. A discharge under the provisions of this section shall not, however, prevent a reincarceration after a presentment or indictment has been found.

N. Bond after Certification

Va. Code §§ 19.2-130, -132(B), -135, -186

1. If the case is certified, an incarcerated defendant's bond status may be reviewed, but generally once bond has been posted it may not be increased or bail revoked absent some violation of the terms of release, or the defendant is convicted of or arrested for a felony or misdemeanor, or the Commonwealth presents information that inaccurate information was given by the defendant or relied upon by the court or magistrates in setting the initial bond. The general district court retains jurisdiction for the purposes of changing/revoking bond until the defendant is indicted.

2. Presumably, the general district court would also have authority to enter orders for mental examination, emergency psychiatric treatment, etc. if the need arises prior to indictment.

Chapter 6. Misdemeanors and Traffic Infractions – Classes and Definitions

A. Misdemeanor Definition
Va. Code § 18.2-8

Any offense not punishable with death or confinement in a state correctional facility.

B. Classes and Maximum Punishment – Misdemeanors
Va. Code §§ 18.2-9, 18.2-11

Class 1 – 12 months in jail and/or $2,500 fine
Class 2 – 6 months in jail and/or $1,000 fine
Class 3 – $500 fine
Class 4 – $250 fine

Unclassified (noted as "U" on Warrants) – Offenses providing for specific punishments, which vary from those in Classes 1-4. Examples – Building Code violations, which generally provide for a $2,500 maximum fine but no jail sentence or first offense possession of marijuana, which carries a fine of up to $500, a jail sentence of up to 30 days, and a 6 month loss of license.

C. Traffic Infraction Definition
Va. Code § 18.2-8

Any violation of public order as defined in Va. Code § 46.2-100 (definitions) and § 46.2-113 and not deemed to be criminal in nature. Motor Vehicle Code (Title 46.2) violations are traffic infractions unless otherwise provided in specific Code sections. Va. Code § 46.2-113.

D. Traffic Infraction Maximum Punishment
Va. Code § 46.2-113

1. Punishable by a fine of not more than that provided for a Class 4 misdemeanor – $250.

2. Some specific traffic infractions carry the possibility of double the otherwise maximum fine of $250: examples are "serious traffic infractions" as defined in § 46.2-341.20 (certain commercial motor vehicle infractions), and moving infractions charged under Chapter 8 of Title 46.2 (regulation of traffic) committed within a "Highway Safety Corridor" as set forth in Va. Code § 46.2-947.

E. Prepayment System for Traffic Infractions
Va. Code § 16.1-69.40:1 and Rule 3B:2

1. The court must allow those offenses not excluded in Va. Code § 16.1-69.40:1 to be prepaid pursuant to Rule 3B:2.

2. Local traffic infraction ordinances which are not parallel to state infractions and otherwise meet the criteria of pre-payable offenses as set forth in the statute may be made pre-payable by order of the circuit court. Va. Code §§ 16.1-69.40:1 D and 16.1-69.40:2. As of July 1, 2011, the Circuit Court order setting forth local pre-payable fines need only be signed by the Chief Judge of the Circuit, as opposed to all of the judges of that Circuit.

Chapter 7. Trial of Misdemeanors and Traffic Infractions

(Note: the subject of "trial" is far too broad to cover in detail in a bench book of this nature. This section attempts instead to deal with the commonly encountered issues in General District Court trials.)

A. Arraignment
Va. Code § 19.2-254

In a misdemeanor case, arraignment shall be conducted in open court, however, it is not necessary when waived by the accused or his counsel, or when the accused fails to appear. In the case of *Simmons v. Commonwealth*, 54 Va. App. 594, 681 S.E. 2d 56 (2009), the court ruled continued silence in the face of repeated references to the charge was the same as a waiver of a right to arraignment.

B. Motions Prior to Trial – Continuance, Discovery, Suppression, Nolle Prosequi

1. Continuances
Va. Code § 16.1-93

a. The court may make such provisions as to continuances as may be just. This vests the court with wide discretion in granting or denying motions for continuances. There is considerable case law regarding continuances in Circuit Court for various causes, such as absence of the defendant, attorney or witness. These cases are not expressly applicable to General District Court, but may provide guidance.

b. A defendant is entitled to a reasonable continuance in order to secure counsel of his choice. Va. Code §§ 19.2-157, -158, -159.1 and -162.

c. Members of the General Assembly, upon request, have an absolute right to continuances within certain time periods and with notice requirements as set forth in Va. Code § 30-5.

d. Va. Code § 19.2-266.3 provides that "When the court grants a continuance in advance of the date of a scheduled trial or hearing, if the defendant acknowledges in writing, on a form provided by the Office of the Executive Secretary of the Supreme Court, that he promises to appear in court on the date and time of the newly scheduled trial or hearing, the court shall not require counsel or the defendant to appear on the date when the trial or hearing was originally scheduled. However, if the defendant is in violation of the terms of his pretrial release or has failed to appear at any court proceeding, the court may require the defendant to appear on the date when the trial or hearing was originally scheduled as a condition of any continuance granted."

2. Discovery
   Rule 7C:5

   This Rule applies the prosecution for a misdemeanor which may be punished by confinement in jail and to a preliminary hearing for a felony. The prosecuting attorney is responsible for providing the discovery or if no prosecuting attorney, then the law enforcement officer, or, if none, such person who appears on behalf of the Commonwealth, county, city or town such as the complaining witness.

   By noticed motion filed at least 10 days prior to trial, the court shall order the prosecuting attorney or representative of the Commonwealth to permit the accused to hear, inspect and copy or photograph the following information or material when the existence of such is known or becomes known to the prosecuting attorney or representative of the Commonwealth and such material or information **is to be offered in evidence against the accused** in a General District Court:

   a. any relevant written or recorded statements or confessions made by the accused, or copies thereof and the substance of any oral statements and confession made by the accused to any law enforcement officer; and

   b. any criminal record of the accused.

   If the prosecutor fails to comply and this is brought to the attention of the court, the court shall order the prosecuting attorney or representative of the Commonwealth to permit the discovery or inspection of the material not previously disclosed, and may grant such continuance to the accused as it deems appropriate.

3. Nolle Prosequi
   Va. Code § 19.2-265.3

   a. An order of nolle prosequi may be entered in the discretion of the court, upon motion of the Commonwealth with good cause shown. The absence of indispensable documents, and the absence of a necessary witness, have been held to be good cause. *See Wright v. Commonwealth*, 52 Va. App. 690, 667 S.E.2d 787 (2008) for general discussion of "good cause" and whether the Circuit Court has the authority to review a lower court's entry of a nolle prosequi.

   b. Note that a motion to nolle prosequi made after the commencement of trial may trigger double jeopardy concerns, and should be considered with extra care. In such situations, a motion to nolle prosequi is in effect a motion for mistrial since it is made after jeopardy has attached. Granting such motion without consent of the defendant may be a bar to further prosecution. Indeed, a nolle prosequi motion made and granted in mid-trial without the defendant's consent has been held to be an acquittal. *See Goolsby v. Hutto*, 691 F. 2d 199 (4th Circuit 1982), *Rosser v. Commonwealth*, 159 Va. 1028 (1933), *Miles v. Commonwealth*, 205 Va. 462 (1964). Therefore, if such a motion is made after a witness is sworn, the

defendant's position should be determined, and if there is consent, this should be noted on the warrant if the motion is granted. If the defendant does not consent, the court may consider whether the good cause relied upon in support of the motion to nolle prosequi amounts to manifest necessity for the granting of a mistrial, rather than a nolle prosequi, as a nolle prosequi will be a dismissal. Note that insufficiency of evidence, lack of a witness, and the like, while good cause for a nolle prosequi prior to trial, is not manifest necessity for the granting of a mistrial, and the granting of a nolle prosequi for such reason after trial commences will bar further prosecution, absent consent of the defendant. *Rosser v. Commonwealth*, supra.

c. *See* 7(H) below for further discussion of jeopardy/mistrial.

4. Motions to Suppress Evidence

See discussion in Section 5(J) above (Motions to Suppress in Preliminary Hearings) regarding suppression motions in General District Court.

C. Special Provisions Applicable to Traffic Infraction Trials

1. Trials of traffic infractions are conducted like criminal trials with the burden of proof being beyond a reasonable doubt. Va. Code § 19.2-258.1. However, traffic infractions are not specific intent crimes so the Commonwealth need not show knowledge or intent to commit the offense. *See Williams v. Commonwealth*, 5 Va. App. 514 (1988).

2. A sworn report of a speedometer calibration must be admitted and considered in "both determining guilt or innocence and in fixing punishment." Va. Code § 46.2-942. But *see Williams v. Commonwealth*, 5 Va. App. 514, 365 S.E. 2nd 340 (1988): "In a speeding case the only issue is whether the defendant's vehicle was in fact exceeding the lawful maximum speed." "There is no language in the code section supporting the argument that an incorrect speedometer reading is an absolute bar for speeding."

3. DMV Point System. Points are assessed by DMV for violations. The number of points ranges from 3 to 6, depending upon the offense. There is a useful matrix listing the infractions/crimes and subsequent demerit points that is available from the DMV. The best practice, however, is to refer defendants to the DMV regarding questions of demerit points since the court has no control over that program.

4. The court may, pursuant to Va. Code § 46.2-505, require a defendant found guilty of "any state law or local ordinance" to attend a driver improvement clinic or, in accordance with the provisions of § 46.2-1314, to attend a local traffic school. Also, *see* § 16.1-69.48:1.A. (iv) which authorizes a withheld finding on traffic cases, upon completion of traffic school or a driver improvement clinic. In each instance, the requirement of traffic school may be in addition to or in lieu of the penalties prescribed by law. Payment of court costs is required under any withheld finding.

Special Note: In no event may the court reduce a charge after conviction or withhold a finding for a driver with a CDL **whether they were driving their work or personal vehicle**, commercial or on-commercial vehicle. Va. Code §46.2-505.B.

5. Mature driver crash prevention. Va. Code § 16.1-69.48:1.A. The law provides for a course in mature driver motor vehicle crash prevention and allows the court to order the course in adjudicating defendants. The law also lowers the age at which drivers are required to appear before the DMV for license renewal from 80 to 75 and requires that licenses issued to persons age 75 or older be valid for no more than five years.

6. Va. Code § 46.2-1158.02. Inspection violations may now be complied with law, regardless of whether the charge is based on an expired inspection or a rejected inspection. All "complied with law" cases continue to require, by statute, the payment of court cost on dismissal. "Complied with law" sections include inspection charges, violations of § 46.2-104 (no license or registration in possession), and certain equipment violations (if proof is presented showing that the violation has been corrected).

7. The court may request DMV to require a motorist to be re-examined to determine his fitness to operate a motor vehicle. DMV form DL-192 is available for this purpose. These examinations may be conducted by a licensed physician's assistant. Va. Code § 46.2-322.

D. Witnesses-Subpoenas, Exclusion, Competency, Privileges, Examination, Impeachment.

This section and the following are only for the purpose of identifying common General District Court trial issues. It is suggested that you refer to the Virginia CLE Publication "A Guide to the Rules of Evidence in Virginia" for the complete text of the Rules of Evidence from the Virginia Supreme Court along with case law and revisers' notes.

1. Issuance of subpoenas.
   Va. Code §§ 19.2-267, 19.2-267.1, Rule 7A:12

   a. The terms subpoena, summons and summons for a witness are used interchangeably. A law enforcement officer may issue a summons for a person he or she believes to be a witness to an offense during the law enforcement officer's immediate investigation of an alleged misdemeanor for which an arrest warrant is not required pursuant to Va. Code § 19.2-81.

   b. A law enforcement officer, in the course of his or her duties in investigating any accident involving a motor vehicle may, at the scene of the accident, issue a summons to any witness concerning a criminal charge arising from the accident. State police officers may issue a summons at any other location within seventy-two hours of the accident. Va. Code §§ 19.2-267.1 and 46.2-939.

c. A summons may be issued in a criminal case by the attorney for the Commonwealth or other attorney charged with prosecuting violations of ordinances, or by the attorney for the defendant. The attorney issuing such a summons shall, when issued, file the names and addresses of the summonsed witnesses with the clerk of the court to which their attendance is sought. Failure on the part of the Commonwealth to file with the clerk of the court the names and addresses of the witnesses summonsed shall not be a bar to the witnesses testifying, unless the defendant can show prejudice from the lack of such a filing. Va. Code § 19.2-267, *Abraham v. Commonwealth*, 32 Va. App. 22, 526 S.E.2d 277 (2000).

2. Exclusion of witnesses – Virginia Rules of Evidence (hereinafter "Rule"), Rule 2:615

Exclusion of witnesses from the courtroom, including police officers, may be ordered by the court but is mandatory upon the request of any party. Va. Code §§ 19.2-184, 19.2-265.1; *Johnson v. Commonwealth*, 217 Va. 682, 232 S.E.2d 741 (1977). The request for a "rule on witnesses" includes an order that witnesses not discuss their testimony or the questions asked of them with other witnesses who are subject to the order. In those misdemeanor cases in which a prosecutor is not present, the complaining witness may remain in the courtroom for the entire trial if necessary for the orderly presentation of witnesses for the prosecution. Va. Code § 19.2-265.5. Crime victims may remain in the courtroom at all times the defendant is present unless the court determines that the victim's presence would impair the conduct of a fair trial. Va. Code §§ 19.2-11.01 and 19.2-265.01.

3. Competency of witnesses – Rule 2:601

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.

a. Judges, magistrates and clerks are not competent to testify as to any matter with which he or she may have been involved in the course of his or her official duties. Magistrates and clerks may testify in proceedings in which the defendant is charged with perjury. *See* Va. Code § 19.2-271 and Rule 2:605.

b. Convicts are competent to testify, but may be impeached by the fact of conviction of a felony or perjury. Va. Code § 19.2-269.

c. Children's competency must be determined by the court. Va. Code § 8.01-396.1. A child need not know the meaning of an oath, but must have the capacity to observe events, to recollect and communicate events, to understand questions and

make intelligent answers to them, and must understand the obligation to tell the truth when testifying. *Durant v. Commonwealth*, 7 Va. App. 454 (1988).

4. Privileges (note – only the most common privileges are mentioned, and these in very summary fashion) – *see* Article V of the Rules of Court at the following link: http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf

   a. Privilege against self-incrimination – no person may be compelled to testify against himself under the 5th and 14th Amendments of the United States Constitution. A defendant waives this privilege by testifying and by pleading guilty. *Drumgoole v. Commonwealth*, 26 Va. App. 783 (1998), *Edmundson v. Commonwealth*, 13 Va. App. 476 (1992), Va. Code § 19.2-268. The privilege extends only to communications, and does not prevent compulsory fingerprinting, DNA sampling, participation in lineups, and other non-testamentary facts or actions. *Schmerber v. California*, 384 U.S. 757 (1966).

   b. Attorney-client privilege –

      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.

      Communications between attorney and client are privileged, subject to certain limited exceptions, such as the intent to commit a crime. The privilege is generally waived by participation by a third party non-client, or by other transmission to a third party – for example, a letter sent by one attorney to another is not privileged, but discussions concerning the letter between attorney and client remains privileged.

   c. Spousal Privileges – Va. Code §§ 8.01-398, 19.2-271.1, 19.2-271.2

      Rule 2:504. SPOUSAL TESTIMONY AND MARTIAL COMMUNICATIONS PRIVILEGES (this Rule is almost 1 page long; please refer to the Rule itself for the specific language).

      Va. Code § 19.2-271.2. Neither spouse may be compelled to testify against the other while married. Neither may, without the other's consent, testify as to any private communication between them while married, regardless of whether they are still married at the time of the proposed testimony. An exception to both prohibitions exists if the prosecution is for an offense by one against the other or against the property or a child of either, or involves a sexual offense against a minor. The privilege does not apply to otherwise confidential statements or letters lawfully overheard or otherwise lawfully in the hands of a third party when the spouse is not called to testify. *Burns v. Commonwealth*, 261 Va. 307, 541

S.E.2d 872 (2001); *Church v. Commonwealth*, 230 Va. 208, 335 S.E.2d 823 (1985); and *Wolfe v. Commonwealth*, 37 Va. App. 136, 554 S.E.2d 695 (2001).

d. Clergy Privilege – Va. Code § 19.2-271.3 – *see* Rule 2:503

The privilege "invests" with the cleric and is one left to his or her conscience to determine whether appropriate or not to disclose. *Nestle v. Commonwealth*, 22 Va. App. 336, 470 S.E.2d 133 (1996).

e. Doctor/Patient Privilege ("Healing Arts Practitioner and Patient Privilege") – *see* Rule 2:505 and Va. Code § 8.01-399.

5. Direct Examination

a. Counsel generally may not ask leading questions on direct examination, except as to preliminary or formal matters, such as name, address, etc. A leading question is one which suggests the expected answer. *Belton v. Commonwealth*, 200 Va. 5 (1958). The court has wide discretion as to when leading questions will be permitted.

b. Leading questions are permitted when the adverse party is called as a witness, or when a witness proves adverse. Va. Code § 8.01-403 (applies to criminal as well as civil cases by case law). A witness expected to be friendly does not "prove adverse," so as to permit leading questions and possible impeachment by prior inconsistent statements, simply because the witness does not give the exact testimony expected on each point. *Smallwood v. Commonwealth*, 36 Va. App. 483 (2001). (*See* (7) below regarding impeachment of your own witness.) *See* Rule 2:611(c).

c. Answers to questions posed on direct examination must be responsive, must state facts based on the witness' personal knowledge as opposed to opinions or matters related by others (unless the witness is an expert), and must be relevant to the issues. Narrative answers may be permitted in the discretion of the court.

6. Cross Examination – *see* Rule 2:611(b) and (c)

a. Counsel is limited in cross-examination to matters raised on direct examination, except with respect to matters which might show bias. However, once a matter is raised in a general way in direct examination, or part of a transaction, conversation, or incident is described, opposing counsel may explore it in fully and in detail on cross-examination, bringing out matters not delved into on direct examination. *Basham v. Terry*, 199 Va. 817 (1958).

b. Bias of a witness is always a proper subject of cross-examination, and counsel is not limited to matters explored on direct examination. Accordingly, prior relations or dealings of the parties which might show bias, such as intimate

relations between the witness and the defendant, or the attempts of the complaining witness to obtain payment in return for dropping charges, are proper subjects for cross examination. *Corvin v. Commonwealth*, 13 Va. App. 296 (1991), *Turner v. Commonwealth*, 13 Va. App. 651 (1992). *See* Rule 2:610.

c. Counsel may lead a witness on cross-examination, but is still limited to asking factual, relevant questions.

7. Impeachment of Witness – General Methods and Rules; Rehabilitation – *see* Rules 2:607 and 2:608

a. The purpose of evidence impeaching a witness is to show that some or all of what the witness said was untrue. Accordingly, the evidence is often collateral to the principal issues in the case, and there are many special rules relating to the admissibility of such evidence which try to balance the probative effect of such evidence with its tendency to confuse the issues. The principal types of impeachment evidence are prior inconsistent statement, conviction of a crime, bad reputation for truthfulness, bias, and contradiction by other evidence.

b. Prior inconsistent statement – Va. Code § 19.2-268.1, and *see* Rule 2:607(a) (vi) and Rule 2:613(b). Under this section, the impeachment of a witness by a prior inconsistent writing or matter reduced to writing (such as a transcript) requires a specific procedure which includes directing the witness's attention to the purport of the statement as well as the occasion on which the statement was made, and inquiring whether the witness made the statement. If the witness denies making the statement, the witness must be shown the writing and allowed to explain it. The court may inspect the writing at any time and permit its introduction for impeachment purposes. This section tracks the case law relating to handling impeachment of inconsistent statements which have not been reduced to writing. In these cases, the witness' attention is drawn to the statement, and if it is denied, the statement may be proven by the testimony of any person who heard it. Note that testimony in a prior hearing may be testified to by witnesses who heard it, and need not be proven solely by transcript unless a transcript exists and the court requires that it be used. *Edwards v. Commonwealth*, 19 Va. App. 568 (1995). In impeaching one's own witness by a prior inconsistent statement, it is first necessary that the statement made be injurious to the case of the party calling the witness and that the witness is, in fact, adverse. Va. Code § 8.01-403, *Smallwood v. Commonwealth*, 36 Va. App. 483, 553 S.E.2d 140 (2001); *Ragland v. Commonwealth*, 16 Va. App. 913, 434 S.E.2d 675 (1993); *Brown v. Commonwealth*, 6 Va. App. 82, 366 S.E.2d 716 (1988). *See* below for limitations on impeachment on collateral issues.

c. Conviction of crime – Va. Code § 19.2-269 and *see* Rule 2:609. Under this section, any witness may be impeached by proof of conviction of a felony or perjury, and by case law may also be impeached by proof of conviction of a misdemeanor involving lying, cheating, or stealing, *Ramdass v. Commonwealth*,

246 Va. 413 (1993). Other misdemeanor convictions may not be shown. *Martin v. City of Harrisonburg*, 202 Va. 442 (1961). Witnesses other than the defendant may be asked the number and nature, but not the details, of their felony convictions. *Sadowski v. Commonwealth*, 219 Va. 1069 (1979). A defendant may be asked the number of felonies, and the number of misdemeanors which involve lying, cheating or stealing, but may not be asked the nature thereof, other than perjury. *McAmis v. Commonwealth*, 225 Va. 419 (1983). If the defendant denies or is inaccurate as to the convictions, the prosecution may introduce evidence showing the correct number, but is still barred from showing the nature thereof except perjury, especially when the nature is prejudicial. *Powell v. Commonwealth*, 13 Va. App. 17 (1991). However, where the defendant "opens the door" by disclosing details on direct examination, or by testifying falsely on direct examination (e.g. on direct in response to his counsel's questions says he did not "use drugs," when his record shows drug convictions), more detailed information about prior convictions may be admitted. *McAmis v. Commonwealth*, 225 Va. 419 (1983), *Santmier v. Commonwealth*, 217 Va. 318 (1976).

d. Bad reputation for truthfulness – *see* Rule 2:608. Any witness may be impeached by the introduction of evidence of bad reputation for truthfulness in his or her community. The issue is general reputation for truthfulness, and not the belief of the impeaching witness or other person or group of persons. Evidence of single acts of untruthfulness are generally inadmissible to show general reputation, though they may be used in cross-examination to test the witness' knowledge. *Bradley v. Commonwealth*, 196 Va. 1126 (1955). Evidence of a witness' bad reputation for truthfulness should be distinguished from evidence of the defendant's character, which is admissible only if the defendant places it in issue by offering character evidence – *see* F(1) below.

For a useful overview on this topic, *see generally, Gardner v. Commonwealth*, Va. Sup. Ct. 131166 (June 5, 2014).

On this issue, also *see Argenbright v. Commonwealth*, 57 Va. App. 94, 698 S.E.2d 294 (2010), holding that character witnesses must testify regarding "the consensus of opinion of the people of the community," and may not offer personal opinion. In the *Argenbright* case, the character witness testified that "he interpreted his neighbors' comments that appellant was a 'good guy' to mean his neighbors believed appellant was truthful and honest. However, the witness admitted that no one told him appellant was truthful and honest. Because the witness's neighbors never discussed appellant's reputation for truthfulness and honesty or for abiding the law, the witness' interpretation constitutes an impermissible personal opinion."

e. Bias – *see* Rule 2:610. Bias of a witness, including the defendant, may generally be shown not only through cross-examination (*see* (6) above), but through independent evidence. Generally a foundation must be laid in cross-examination of the witness by asking the witness concerning the facts which might give rise to

bias, and having the witness deny them, before resorting to independent evidence. *Whittaker v. Commonwealth*, 217 Va. 966 (1977).

f. Contradiction – Evidence given by one witness may tend to impeach that of another witness by contradicting it. So long as the evidence is relevant to material issues, there are no special rules requiring any sort of foundation in cross-examination or the like before the introduction of such evidence.

g. Impeachment of own witness – In general, one may not impeach one's own witness. However, if a witness proves adverse, the witness may be impeached by prior inconsistent statements, but not by evidence of untruthfulness or other bad character. A witness is not "adverse" simply because the witness does not give as favorable testimony as expected; the witness' testimony must be injurious or damaging as well as unexpected before impeachment will be allowed. *Brown v. Commonwealth*, 6 Va. App. 82 (1988), *Smallwood v. Commonwealth*, 36 Va. App. 483 (2001), *Dupree v. Commonwealth*, 272 Va. 496 (2006). *See* discussion under 7b above.

To successfully have a witness made adverse, the proponent must:

(i) Show that the witness has made, at other times, statements that are inconsistent with his present testimony;

(ii) Appraise the witness (while on the stand) of these prior statements;

(iii) Ask the witness whether he made such statements; and

(iv) Upon admission of the statements, the witness must be given an opportunity to explain the inconsistency.

Va. Code § 8.01-403 (made applicable to criminal cases in *Brown v. Commonwealth*, 6 Va. App. 82 (1988).

h. Rehabilitation of impeached witness – A witness whose truthfulness has been attacked by any of the foregoing methods of impeachment may be rehabilitated by introducing evidence of his or her good reputation for truthfulness. *Redd v. Ingram*, 207 Va. 939 (1967). Even if the impeachment is only by the introduction of contradictory evidence, or by argument or inference that the witness' testimony is inherently incredible, rehabilitation by good reputation for truthfulness may be permitted. *George v. Pilcher*, 69 Va. 299 (1877 – still good law), *Fry v. Commonwealth*, 163 Va. 1085 (1935). Evidence of prior consistent statements to rehabilitate a witness is permitted under two circumstances: (1) where the witness has been impeached by evidence of prior inconsistent statements, evidence of any prior consistent statement is permitted; and (2), where a witness has been impeached by evidence of bias, interest or corruption, any consistent statements which were made prior to the time the bias or interest arose are admissible. *Clere*

v. Commonwealth, 212 Va. 472 (1967), *Gallion & Gregory v. Winfree*, 129 Va. 122 (1921). Such prior consistent statements are not hearsay, as they are admitted not as substantive evidence, but to rebut the evidence impeaching the witness.

8. Immunity

   Limited use immunity is given witnesses called to testify. Va. Code § 19.2-270. Other specific immunity provisions occur in Va. Code §§ 18.2-262, 18.2-337, 18.2-437, 18.2-445, 18.2-450. For a discussion on immunity and compelled testimony, *see Murphy v. Commonwealth*, 227 Va. 221, 672 S.E.2d 884 (2009).

9. Hearsay – *see* Rule 2:803 for hearsay exceptions regardless of the availability of the declarant, and Rule 2:804 for hearsay exceptions where the declarant is unavailable. Almost any writing or statement made outside court will be hearsay in a criminal or traffic case. Occasionally, a statement or writing will be admissible for something other than the truth of what it says – prior consistent statements are examples, where admissible – *see* E(7) above. As a general rule, however, an out of court statement or writing by anyone will be hearsay and admissible in evidence only under some exception to the hearsay rule.

10. Common law hearsay exceptions, summary list – The main common law hearsay exceptions are:

    a. Party admissions – generally inapplicable to criminal and traffic cases.

    b. Confessions and admissions by a defendant.

    c. Res Gestae – Excited utterances, statements about mental state and physical condition, present sense impressions. Various rules apply, but the common denominator is that the statement must relate to a present or recent event, and must have been made while under the influence of the event.

    d. Declaration against interest – statements by an unavailable witness that were against that witness' penal, proprietary or pecuniary interest when made, may be admissible. Generally, the statement is made by a co-defendant as part of a "confession". **This practice was substantially curtailed** by the U.S. Supreme Court in *Lilly v. Virginia*, 527 U.S. 116 (1999) during the more hearsay friendly period. Before the *Melendez Dias v. Roberts*, 448 U.S. 56 (1980) only required that the statement bear adequate "indicia of reliability." There are now additional Confrontation Clause considerations. *See Crawford v. Washington*, 541 U.S. 36 (2004) line of cases.

    e. Past recollection recorded, refreshing witness' recollection distinguished –

       "Past recollection recorded" is a doctrine under which a writing made by a witness in the past is admissible in evidence; the witness must have little or no

present recollection of the event, but must be able to state that the writing was made at or near the time of the event and accurately describes it. *See James v. Commonwealth*, 8 Va. App. 98 (1989).

"Refreshing a witness' recollection" (*see* Rule 2:612) is a procedure used when a witness forgets some facts while on the stand. The witness may have his or her recollection refreshed by showing him or her anything (it does not have to be a writing), which may aid his recollection – it need not have been made by the witness, though generally it was. To follow this procedure, the witness' recollection must first be exhausted, at which point the item may be shown to the witness. The writing itself is not admissible at this point, nor may the witness merely read from the writing; the purpose of showing the writing to the witness is to aid the witness so that the witness may testify from the witness' present memory. The item used to refresh a witness' memory may be examined by opposing counsel, who may use it in cross-examination and under some circumstances admit it in evidence as impeachment evidence. *McGann v. Commonwealth*, 15 Va. App. 448 (1992). Under the Rules of Evidence, the adverse party is entitled to have the writing or object produced at trial, hearing, or deposition in which the witness is testifying.

11. Best evidence rule – *see* Article X of the Rules of Evidence "Best Evidence", Rules 2:1001 through 2:1008.

    Where the contents of a document are in issue, the original of the document must ordinarily be offered in evidence, rather than a copy, unless some provision of the law excuses production of the original. This rule comes into play most often in civil cases, where contracts, notes, leases, and the like may be in issue. Also, *see* § 8.01-391 and § 8.01-391.1. In criminal and traffic cases, its most common application is to the admissibility of certificates of analysis, court records, and business records; there are numerous statutory exceptions which can come into play with respect to these, as discussed in G below. The common law exception to the rule which most often comes into play in both civil and criminal cases is the exception which permits a copy to be admitted where the original is unavailable through no fault of the person offering the copy – the original may be have been lost or destroyed, or may be in the possession of someone else. *See* discussion in *Randolph v. Commonwealth*, 145 Va. 883 (1926). There is also the concept of duplicate originals. They are "made at the same time," "by the same [mechanical] impression," and each is an "exact counterpart of the other." A duplicate original is accorded the same dignity as an original and, "if otherwise proper," similarly "admissible in evidence." Charles E. Friend, The Law of Evidence in Virginia § 195 (3d ed. 1988) as cited in *Winston v. Commonwealth*, 16 Va. App. 901 (1993).

12. Authentication of documents – a document must ordinarily be authenticated by a witness before the document is admissible – the witness must identify the document and attest from personal knowledge that it is genuine. The document must of course be relevant and admissible under hearsay, best evidence, and other rules. There are numerous statutes that make an exception to this usual rule – some are discussed in detail under G

below. Where authenticity of a document is contested, proof may be by a variety of methods, including handwriting analysis and the like. A common law rule which may come into play is the "reply" doctrine, under which a document purportedly from a person may be admitted in evidence, even without absolute proof of authorship by the person, where the document is proven to be in reply to an earlier document sent to that person. *See Jewell v. Commonwealth*, 8 Va. App. 353 (1989).

E. Certificates of analysis, court records, DMV transcripts, official reports and records, and other statutory exceptions to hearsay, best evidence, and authentication rules and other documentary evidence.

1. Certificates of Analysis

Va. Code §§ 19.2-187 (general statute), 18.2-267 (DUI blood test), 18.2-268.9 (DUI breath test). There are a number of federal and state cases discussing the *Crawford v. Washington* line of cases, and a defendant's right to confrontation. Those cases should be looked at in conjunction with these statutes.

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) decided by the U.S. Supreme Court on June 25, 2009, also needs to be scrutinized in dealing with Confrontation Clause issues. In the *Melendez-Diaz* case, which was a state prosecution for a drug offense, the prosecution introduced certificates of analysis, in the absence of the analyst, over the objection of the defendant. The U.S. Supreme Court held that the admission of the certificates, which were testimonial in nature and were created for the sole purpose of "establishing prima facie evidence of the substance's composition, quality, and net weight", violated the defendant's 6th Amendment right to confront the witnesses against him, and reversed and remanded the case. In deciding the case, the Court rejected the arguments that the analyst's testimony was "neutral and scientific" in nature and thus outside the scope of the Confrontation Clause; that the defendant also had the power to subpoena the analyst; that the affidavits were a "business record exception to the hearsay rule"; and that requiring the state to have the analysts testify in every case where there is a certificate of analysis would make the prosecution's job unduly burdensome.

The holding is not as far-reaching as it seems on its face, as Justice Scalia, in footnote 1, comments "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or the accuracy of the testing device, must appear in person as part of the prosecution's case." Prior cases have held that test results generated by a machine doing the analysis were not testimonial in nature (*see United States v. Washington* 498 F.3d 225 (2009) & *Wimbish v. Commonwealth* 51 Va. App. 474 (2008)). The distinction seems to be that in a drug analysis there is an actual person doing the testing, who can be subjected to cross-examination, instead of a machine doing the testing.

In *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), the United States Supreme Court found that the victim's statements were non-testimonial, and the opinion clarified several issues left unresolved in earlier confrontation clause cases.

a. The primary purpose inquiry, to determine whether the statement was testimonial, is an objective inquiry, not dependent on the subjective purpose of the particular parties.

b. The statements and actions of both the declarant and interrogators provide objective evidence of the interrogation's primary purpose.

c. Whether an ongoing emergency exists is one factor informing the ultimate inquiry regarding an interrogation's primary purpose. Another factor is the informality or formality of the interrogation [e.g. questioning at the crime scene or at the station house].

d. In assessing an ongoing emergency, the court may not narrowly focus on whether the threat to the first victim has been neutralized because the threat to the first responders and public may continue. This case involved an armed shooter, whose motive for and location after the shooting were unknown.

e. An emergency does not necessarily last the entire time that a perpetrator is on the loose.

Bullcoming v. New Mexico, 564 U.S. ___ 0910876, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). The analyst who completed, signed and certified the blood test report analysis, did not testify at trial, nor was he found to be unavailable. The record only showed that he was on unpaid leave for some undisclosed reason. At trial, in lieu of this analyst, the state called another analyst who worked in the lab, who was familiar with the general testing procedure, but who had not participated in or observed the testing of the samples in the case. Prior to his appeal being heard in state court, the U.S. Supreme Court decided *Melendez-Diaz*. The New Mexico Supreme Court acknowledged that the certificate/report was testimonial, but determined that the analyst who completed, signed and certified the report was a "mere scribner" who simply transcribed test results, and that a substitute witness familiar with the process would therefore be permissible. The U.S. Supreme Court disagreed, finding that the certificate of analysis was more than a machine-generated number, that it was testimonial in nature. As a result, a "substitute witness" ("surrogate testimony") who was not familiar with the testing of this particular sample, who did not handle the evidence at all, and who did not have any knowledge of the particular test or the testing procedures employed in the particular case, was insufficient to comply with the requirements of the Confrontation Clause. The judgment was reversed and remanded.

a. Copy of Certificate as Evidence

The proposed introduction of a copy of the certificate raises a question as to "authentication." If properly authenticated pursuant to § 8.01-391(B) a copy is admissible as an exception to the best evidence rule. *Williams v. Commonwealth*, 35 Va. App, 545, 546 S.E.2d 735 (2001). Va. Code § 19.2-187 itself provides that any certificate purporting to be signed by an authorized person shall be admissible without proof of the seal or signature or of the official character of the person whose name is signed to it.

b. Response to *Melendez-Diaz* – Notice and Demand

Virginia was required to revamp its structure for the admission of certificate of analysis. The statutes appear to comply with the 'notice and demand' recommendations of the U.S. Supreme Court. Failure to timely note an objection has allowed the admission of certificates of analysis over objection at trial, even when the failure to object was that of prior counsel. *See Whitehurst v. Commonwealth*, 63 Va. App. 132 (2014).

While live testimony must be provided in the event of an objection to certificates for 'testimonial' records, case law is developing on what does not constitute such 'testimonial' evidence. If it is not testimonial, it is not subject to the confrontation objection and is admissible under the rules of evidence, such as 'business records' including:

- Blood alcohol Log Books – Business record not developed for this prosecution
- Blood alcohol Calibration Records
- Blood alcohol Quality Assurance Records
- Blood alcohol Annual Inspection Reports
- Blood alcohol Certification Standards
- Blood alcohol Operator's Certificate
- Certificate of Compliance - Blood Test Kit
- Downloaded data/source code
- 911 Call - *Davis v. Washington*, 547 U.S. 813 (2006)

The relevant code sections include §§ 9.1-907, 9.1-1101, 16.1-277.1, 18.2-268.7, 18.2-268.9, 18.2-472.1, 19.2-187, 19.2-187.1, 19.2-243, 46.2-341.26:7, and 46.2-341.26.9. These sections establish a procedure for the attorney for the Commonwealth to notify the defendant no less than 28 days prior to trial of hearing that he intends to introduce a certificate of analysis of laboratory (DNA, blood, drug, etc.) or DUI breath-test results. The same notification procedure will apply when the Commonwealth seeks to introduce an affidavit indicating an accused's failure to register as a sex offender. The defendant has 14 days to object to the admission of the certificate or affidavit and require that the person who performed the analysis or examination or a custodian of the sex offender

registry testify. If the defendant does not object, he waives his objection to the introduction of the certificate or affidavit and it may be offered into evidence without the appearance and testimony of the analyst or custodian.

If the defendant objects and the person who performed the analysis or examination or the custodian of the records is unavailable to testify in the Commonwealth's case-in-chief, the court shall order a continuance, provided that such continuances shall not exceed 180 days for a person who is not incarcerated and 90 days when the person is incarcerated. The speedy trial statute is tolled during such continuances. There is also a provision for a continuance if the defendant did not receive timely notice.

The notice procedure as constructed in this measure applies to criminal trials and hearings but does not apply in preliminary hearings.

Under Va. Code § 19.2-3.1, the Commonwealth may also elect to present testimony of lab personnel by two-way video – if so, that information must be provided to the defendant, by way of a written notice advising him of his right to object. If the defendant does not specifically object, he waives his right to object.

When a certificate is offered into evidence, the defendant's right to call the person who performed the analysis as an adverse witness, at the Commonwealth's expense, is preserved.

Information on breath-test machine tested accuracy is removed as a component of the DUI breath certificate of analysis. This is intended to remove the possible testimonial quality of the calibration of the machine.

Additional requirements for admission of certificates of analysis include:

i. Certificates of analysis from most agencies are admissible under Va. Code § 19.2-187 when filed with the clerk of the court at least seven days prior to the hearing or trial.

ii. A certificate of analysis from a laboratory operated by the Division of Consolidated Services or other specified agencies creates a presumption of the proper chain of custody of the substance being tested while it is in the possession of the lab. Va. Code § 19.2-187.01. *Harris v. Commonwealth*, 261 Va. 185, 541 S.E.2d 547 (2001); and *Johnson v. Commonwealth*, 259 Va. 654, 529 S.E.2d 769 (2000).

iii. The defendant has the right to call as a witness any person performing the analysis or involved in the chain of custody. Va. Code § 19.2-187.01.

iv. To be admissible as an exception to the hearsay rule, the certificate must bear the examiner's signature as part of the attestation clause on the

certificate. *Woolridge v. Commonwealth*, 29 Va. App. 339, 512 S.E.2d 153 (1999); *Anderson v. Commonwealth*, 25 Va. App. 26, 486 S.E.2d 115 (1997); *Frere v. Commonwealth*, 19 Va. App. 460, 452 S.E.2d 682 (1995).

v. Copy of Certificate to Counsel of Record for the Accused

A written request under Va. Code § 19.2-187 must be made at least ten days prior to trial and shall be on a form prescribed by the Supreme Court. The request must be made to the clerk with notice of the request to the attorney for the Commonwealth. The certificate shall be mailed or delivered by the clerk or Commonwealth's Attorney to counsel of record for the accused at least seven days prior to the hearing or trial. If the request is made in a case not yet before the court, the clerk shall advise the requesting party that the request must be resubmitted when the case is properly before the court. Until such time that the case is properly before the court, any request is ineffective. If the certificate has been requested, but not provided, the certificate may be inadmissible, and/or the defendant shall be entitled to a continuance, depending on the posture of the case.

2. Court Records

The admissibility of court records is governed by Va. Code § 8.01-389(A), not by Va. Code § 8.01-391.

a. A court may not take judicial notice of its own records and proceedings in another case. Those records must be certified to be admissible. But *see* (3) *infra* regarding DMV transcripts.

b. In order to prove a prior conviction pursuant to Va. Code § 19.2-295.1, the order of conviction need not be introduced. A properly certified document that constitutes recorded evidence of a conviction is sufficient. *Folson v. Commonwealth*, 23 Va. App. 521, 478 S.E.2d 316 (1996). Note that a warrant form which records a sentence, but is not marked to reflect that the defendant was found guilty, is not proof of a conviction. "A court speaks through its orders and those orders are presumed to accurately reflect what transpired." *McBride v. Commonwealth*, 24 Va. App. 30, 480 S.E.2d 126 (1997). Also, *see* § 19.2-307, requiring that a judgment order (in Circuit Court) shall set forth the plea, the verdict or findings and the adjudication and sentence, whether or not the case was tried by jury, and if not, whether the consent of the accused was concurred in by the court and the attorney for the Commonwealth.

c. Va. Code § 17.1-123.A states that an unsigned order entered into a circuit court's order book is "deemed authenticated when . . . an order is recorded in the order book on the *last* day of each term showing the signature of each judge presiding

during the term." The Court of Appeals therefore found no error, and affirmed his conviction. *Lampkin v. Commonwealth*, 57 Va. App. 726; 706 S.E.2d 51 (2011).

3. DMV Transcripts

Official DMV transcripts are admissible under Va. Code § 46.2-215 as well as the official records exception to the hearsay rule for a variety of purposes:

a. Proof of court action declaring defendant an habitual offender.
The Commissioner of the DMV is presumed to have kept accurate records and that entries in one's record are therefore accurate. *Smoot v. Commonwealth*, 18 Va. App. 562, 445 S.E.2d 688 (1994).

b. Proof of service of notice by Sheriff. *Hall v. Commonwealth*, 15 Va. App. 170, 421 S.E.2d 887 (1992).

c. Proof of prior conviction of DUI. *Nicely v. Commonwealth*, 25 Va. App. 579, 490 S.E.2d 281 (1997).

d. DMV includes not only the fact of notification and the date of notice, but also which department issued the notice and which officer (the officer's badge number is listed).

4. Official Reports

a. Medical Examiner:

Reports of the investigations and the records and reports of the medical examiners or assistants, etc., are admissible when duly attested. There is no filing requirement. Va. Code § 19.2-188. *But* all of the contents of the certificate or report are not necessarily admissible. *See Hopkins v. Commonwealth*, 230 Va. 280, 337 S.E.2d 264 (1985); *Bond v. Commonwealth*, 226 Va. 534, 311 S.E.2d 769 (1984). The reports are only *prima facie* evidence of the facts stated therein. *Quintana v. Commonwealth*, 224 Va. 127, 295 S.E.2d 643 (1982).

b. Pursuant to Va. Code § 19.2-188: "Any statement of fact or of opinion in such reports and records concerning the physical or medical cause of death and not alleging any conduct by the accused shall be admissible as competent evidence of the cause of death in any preliminary hearing."

c. Copies of record, when properly certified or authenticated, are as admissible as the originals. Va. Code § 8.01-391 and § 16.1-69.40. It is important to remember that the copies are usable only to the same extent as the original would be used, which does not necessarily mean for all purposes. *See Williams v. Commonwealth*, 35 Va. App. 545, 546 S.E.2d 735 (2000); *Owens v.*

Commonwealth, 10 Va. App. 309 391 S.E.2d 605 (1990); and *Williams v. Commonwealth*, 213 Va. 45, 189 S.E.2d 378 (1972).

5. Certificates of Calibration

Certificates of calibration for tuning forks and speedometers must comply with Va. Code §§ 8.01-391 and 46.2-882. *Untiedt v. Commonwealth*, 18 Va. App. 836, 447 S.E.2d 537 (1994).

6. Photos of Goods in Larceny Cases

When properly authenticated as required in the statute, photographs of stolen property in shoplifting and other larceny cases are admissible in lieu of bringing the goods to court. Va. Code § 19.2-270.1.

7. Prices of Goods in Larceny Cases

Price tag exception to the hearsay rule articulated in *Robinson v. Commonwealth*, 258 Va. 516 S.E.2d (1999), was expanded to include receipt showing price of items (that had no price tag, but a bar code) that had been scanned by an employee with a receipt being printed out. *Twine v. Commonwealth*, 48 Va. App. 224; 629 S.E.2d 714 (2006). This exception is codified in Rule 2:803(24).

8. Bad Check Cases

Va. Code § 19.2-270.3 makes certain evidence admissible and competent on the issue of the identity of the person who tendered the check. *See Wileman v. Commonwealth*, 24 Va. App. 642 484 S.E.2d 621 (1997). *But see: Edwards v. Commonwealth*, 227 Va. 349, 315 S.E.2d 239 (1984). If such evidence is introduced, it may create an influence for the trial judge to find that the person whose identifying information appears on the check was the person who actually delivered the check.

9. Judicial Notice of Provisions of the Law and of Official Publications
Va. Code §§ 19.2-265.2, 8.01-388

Rule 2:202. JUDICIAL NOTICE OF LAW (derived from Va. 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.

Ordinances, regulations, and other publications of materials having force of law are included. This is mandatory under Va. Code §§ 19.2-65.2 and 8.01-386 ("the court **shall** take judicial notice … whether specifically pleaded or not").

See also Va. Code §§ 8.01-385 through -338. *Oulds v. Commonwealth*, 260 Va. 210, 532 S.E.2d 33 (2000).

> Rule 2:203. JUDICIAL NOTICE OF OFFICIAL PUBLICATIONS (derived from Va. 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 the published within those jurisdictions pursuant to the laws thereof.

Va. Code § 8.01-388 states that the court **shall** take judicial notice of the contents of official publications of this Commonwealth, or its political subdivisions and agencies, other states, and other countries.

Under Va. Code § 18.2-268.3, courts may also take judicial notice of the refusal form. In 2009, that statute was amended to add the following sentence – "The Office of the Executive Secretary of the Supreme Court shall make the form available on the Internet and the form **shall** be considered an official publication of the Commonwealth for the purposes of § 8.01-388."

10. Testimony regarding the Contents of Surveillance Tapes

    The best evidence rule in Virginia applies only to writings. A videotape is not a writing as understood at common law and as defined by Va. Code § 1-257, so the best evidence rule is inapplicable. Also, testimony describing the contents of what was observed on a videotape is admissible. *Brown v. Commonwealth*, 54 Va. App. 107 (2009).

11. Digital Video Recordings and Still Images of Child Pornography on Discs Copied from a Computer's Hard Drive

    Midkiff v. Commonwealth, 280 Va. 216, 694 S.E.2d 576 (2010) further holds that the best evidence rule only applies to writings in Virginia, and thus the video recording and still photos were admissible.

12. Aerial Photos to Measure Distance

    Bynum v. Commonwealth, 57 Va. App. 487, 704 S.E.2d 131 (2011). Police used an aerial photograph to measure the distance between school property and where defendant was

observed with heroin. The photo was not hearsay because "an aerial photograph of a geographic area . . . is not the recordation or compilation of another human being's assertions; it is not a communication of input from another person. Rather, it is simply a technological reproduction of an existing reality." The Court noted that "the trustworthiness of a photograph is established by proper authentication. The test for authenticating a photograph is 'whether the evidence is sufficient to provide an adequate foundation assuring the accuracy of the process producing it.'"

13. "Blue Book" Value of a Motor Vehicle

Va. Code § 8.01-419.1. Applies to civil and criminal cases. Allows for admissibility of tabulated retail values found in NADA publications and similar sources of valuation as evidence of fair market value on the relevant date. *Walker v. Commonwealth*, 281 Va. 227, 704 S.E.2d 124 (2011). The "blue book" listing of the value of an automobile is "created for the administration of affairs generally and not for the purpose of establishing or proving some fact at trial." Therefore, the blue book was not testimonial in character and its admission did not violate the defendant's right to confrontation.

14. Automatically/Computer Generated Telephone Records

Solano Godoy v. Commonwealth, 62 Va. P. 113 (2013). Automatically computer generated telephone records, created contemporaneously with the placement or receipt of a telephone call, were admissible as a computer-generated document and thus fell outside of the ambit of the hearsay rule. Since the reliability of the records had been established, they were properly admitted into evidence.

F. Character of Accused, Other Offenses of Accused – *see* Rule 2:404 and 2:405

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.

1. Character. Evidence of a defendant's character is not admissible in a criminal or traffic trial unless placed in issue by the defendant's introduction of character evidence. If so placed in issue, proof by the defense or prosecution is limited to evidence of reputation for good or bad character with respect to a particular character trait, such as truthfulness, honesty, or law-abiding behavior. *Weimer v. Commonwealth*, 5 Va. App. 47 (1987). Evidence of specific acts, either good or bad, may not be placed in evidence, except for the very limited purpose of testing the knowledge of a witness. See discussion in *Gravely v. Commonwealth*, 13 Va. App. 560 (1992), and *Fields v. Commonwealth* 2 Va. App. 300 (1986) (Reversed on other grounds by the Supreme Court of Virginia).

   NOTE: a defendant is not limited solely to reputation evidence regarding truthfulness, but may offer evidence to prove good character for any trait relevant in the case. *See Barlow v. Commonwealth*, 224 Va. 338 (1982). Further, "a criminal defendant may prove his good reputation for a particular character trait by presenting negative evidence of good character. Negative evidence of good character is based on the theory that a person has a good reputation if that reputation has not been questioned." *Gardner v. Commonwealth*, Va. Sup. Ct. 131166 (June 5, 2014).

2. Other offenses of accused. Few topics have generated more decisions of the Court of Appeals and the Supreme Court than the question of when evidence of other offenses of the accused, including unadjudicated "bad acts," should be admitted for some purpose other than impeachment. A full discussion is beyond the scope of this Bench book. The general rule is that evidence of such bad acts is not admissible unless such evidence is relevant to prove commission of the offense charged, and such relevance outweighs the prejudice injected. Relevance may arise due to the other offense having occurred at or near the same time as that on trial, or due to its showing the accused's motive, identity, modus operandi, common scheme or plan, absence of accident or mistake, or other matter relevant to the offense charged. The court must always weigh the probative effect against the prejudice to the defendant.

G. Case Disposition

1. Satisfaction and Discharge ("Accord and satisfaction")
   Va. Code § 19.2-151

   a. May be used in cases involving charges of assault and battery and other misdemeanors with certain exceptions.

   b. The court, in its discretion, may dismiss the case upon payment of costs by the defendant.

2. First Offense Probation and Deferred Dispositions INCLUDE:

   § 19.2-303.2 (property related crimes, including trespassing)
   § 18.2-251 (possession of drugs)
   § 4.1-305 (underage possession of alcohol)
   § 18.2-57.3 (domestic A&B)
   § 16.1-69.48:1.A.(iv) (traffic infractions)
   N.B.:Assessment of court costs/fees for the statutory deferred dispositions is found as Virginia Code § 16.1-69.48:1(v)

3. Deferred Disposition Discussion

   The code sections listed above specifically authorize such "deferred disposition" and dismissal procedure for these code sections. Without entering a judgment of guilt and with the consent of the accused, the court can defer proceedings, place the accused on probation subject to certain terms and conditions, and eventually discharge the accused and dismiss the charge. Until 2007, the only other remaining authority addressing the authority of the court to defer and dismiss the offenses not specifically enumerated by statute was an opinion of the Attorney General (1996 Op. Va. Att'y Gen. 88), which concluded that this deferral authority is limited to these offenses for which the deferral disposition is provided for by statute.

   In recent years the question of the judiciary's inherent ability to defer dispositions of cases involving crimes beyond those delineated by statute has been a source of extensive litigation, interest from the legislative branch and substantial commentary. Several appellate decisions have sought to refine the understanding in this area, and the jurisprudence continues to evolve.

   The Supreme Court tangentially addressed the issue of deferred findings in the civil case of *Moreau v. Fuller*, 276 Va. 127, 661 S.E.2d 841 (2008). In *Moreau*, an attorney for the Commonwealth, filed a petition for a writ of mandamus requesting that a juvenile court judge be directed to render final judgment in an underlying case and that she desist in taking matters under advisement in the future. The Court noted the determination as to guilt or innocence of the accused was a discretionary function, not a ministerial one, and as such, it was not subject to mandamus. In their holding, the Court stated "Upon hearing the evidence in the criminal proceeding at issue in this case, it was within the inherent authority of the court to "take the matter under advisement" or "continue the case for disposition" at a later date. Such practices involve the essence of rendering judgment. No one contends that the judge must immediately render judgment upon the instant that the presentation of evidence has been concluded." The Supreme Court therefore vacated the writ and dismissed the petition. [**NOTE:** the Court did **not** address the question as to whether a judge could defer disposition on a case, with a disposition later being entered that was contrary to what was statutorily authorized.]

   Hernandez v. Commonwealth, 281 Va. 222, 707 S.E.2d 273 (2011). Hernandez was indicted for feloniously assaulting a police officer. At the conclusion of the evidence at a

bench trial, defense counsel, citing *Moreau*, moved the court to defer disposition of the case for a period of time to be fixed by the court, to continue the defendant's bond in effect for that period, subject to such conditions as the court might prescribe, and at the end of that period to consider dismissal of the case in lieu of a conviction if the defendant complied with all the prescribed conditions. The motion was denied by the trial court ruling that it did not have such an authority which ruling was upheld by the Court of Appeals.

The Supreme Court of Virginia held that "in the present case, during the interval between the conclusion of the evidence and the entry of a written order adjudicating the defendant guilty, the circuit court had the inherent power, in the exercise of its discretion, to take the matter under advisement and to continue the case for future disposition, **subject to such lawful conditions** as the court might prescribe. The circuit court erred in holding that it lacked that power and in denying the defendant's motion for that reason. The Court of Appeals also erred in holding that the circuit court lacked that inherent power and in affirming the judgment accordingly" (emphasis added). The Court then reversed the judgment of the Court of Appeals and remanded the case to that Court with direction to further remand the same to the circuit court for such consideration of the defendant's motion for deferred disposition as the circuit court in its discretion may deem appropriate. A similar ruling was made in *Kelly v. Stamos*, 285 Va. 68 (2013). The district court judge had authority, prior to a finding of guilty but after a plea of guilty, to amend a driving while intoxicated to reckless driving and sentencing pursuant to statute on the latter offense. [**NOTE**: the Court did **not** address the specific issue of whether a judge could defer disposition on a case, with a disposition later being entered that was contrary to what was statutorily authorized.]

Starrs v. Commonwealth, 287 Va. 1 (2014). Starrs was indicted on two counts of felony possession of a controlled substance with intent to distribute, in violation of Code § 18.2-248. Starrs entered pleas of guilty to both felonies pursuant to plea agreements, admitting that he committed the offenses charged, and he further agreed that "the only issue to be decided by the court was punishment. He later asked the court to continue his case subject to certain probationary terms and conditions and then dismiss it. The circuit court declined to do so and Starrs appealed. The Court of Appeals in *Starrs v. Commonwealth*, 61 Va. App. 39 (2012) upheld the lower court's decision under the rationale that acceptance of the guilty plea by way of agreement limited the court's authority to do anything other than adjudicate and sentence. The Supreme Court of Virginia reversed that decision. In doing so, the Court found that ***acceptance*** of a guilty plea is not tantamount to a ***finding*** of guilt. The Court stated, "[w]hile a guilty plea is "a self-supplied conviction," *Kibert*, 216 Va. at 664, 222 S.E.2d at 793 (internal quotation marks omitted), it is only when a trial court has entered "a written order finding the defendant guilty that it has made a "determination of the rights of the parties upon [a] matter submitted to it in a proceeding." The Court acknowledged that, "[o]nce a trial court enters a formal adjudication of guilt, it must impose the punishment prescribed by the legislature; it has no inherent authority to depart from that range of punishment."

Harris v. Commonwealth, 63 Va. App. 525, 759 S.E.2d 29 (2014). The defendant did not contest guilt at his bench trial for a second or subsequent violation of driving after a habitual offender adjudication. Instead, his defense counsel asked the court to withhold any finding and take the matter under advisement pursuant to the decision in *Starrs*. The trial court declined to do so, and that decision was upheld by the Court of Appeals saying that the decisions in *Hernandez* and *Starrs* identify a "narrow authority to defer a disposition…" However, this authority does not allow a trial court to "simply acquit a defendant through an act of judicial clemency (or judicial nullification), where the evidence proves the defendant's guilt beyond a reasonable doubt and where no statutory authority exists to allow the trial court to dismiss the charge." The Court of Appeals further stated, "The narrow authority to take a matter under advisement or defer a disposition is neither a gateway nor a loophole for acquitting or refusing to convict a defendant whose guilt has been established beyond a reasonable doubt."

H. Jeopardy, Mistrial and Collateral Estoppel

Jeopardy attaches in a bench trial when the first witness is sworn and offers some testimony. *Cummings v. Commonwealth*, 24 Va. App. 248, 481 S.E.2d 493 (1997). Following an appeal of a general district court conviction to a circuit court wherein the charge was dismissed by nolle prosequi, the charge could be filed again in the general district court without jeopardy to the defendant, since the appeal to Circuit Court in effect vacated the General District Court conviction, and the matter was set for trial de novo in Circuit Court. *Kenyon v. Commonwealth*, 37 Va. App. 668, 561 S.E.2d 17 (2002).

Once trial commences, it must continue to conclusion under double jeopardy rules. Termination by nolle prosequi or other reason other than conviction or dismissal without the defendant's consent will generally bar further prosecution, unless the court declares a mistrial. A mistrial should be granted only for "manifest necessity," that is, some reason which obviously prevents the trial from proceeding to conclusion, and generally a reason outside of the control of the parties and the court. A mistrial will generally not bar retrial of the defendant, particularly if granted at the request of, or with the consent of, the defendant. Even a mistrial granted due to prosecutorial misconduct will not bar retrial, unless the misconduct was intended to goad a motion for mistrial so as to subvert double jeopardy rules. *Weaver v. Commonwealth*, 25 Va. App. 95 (1997).

Though seldom applied to general district court cases because the case records only show rulings and not the reasons for it, district court decisions have affected manslaughter prosecutions[1] and the validity of prior convictions in felony driving while intoxicated prosecutions[2].

[1] *Simon v. Commonwealth*, 220 Va. 412 (1979). Use of intoxication barred in circuit court manslaughter trial because of dismissal of DWI case in district court.

[2] *Leonard v. Commonwealth*, 66 Va. App. 270 (2016). The improper granting of a "constitutional" collateral attack on a prior DWI for failure to comply with court rules effectively voided the first DWI.

I. Combined Trial with Codefendants
Rule 7C:4(a) and 7C:4(b)

The court in its discretion may order persons who are charged with participation in related acts or occurrences or a series of acts or occurrences to be tried jointly, unless such joint trial would constitute prejudice to a defendant. *See* 5(F) for provisions relating to joint preliminary hearings.

J. Trial of Multiple Charges for One Defendant
Rule 7C:4 (c)

The court may try all related charges pending against a defendant together, if justice does not require separate trials. *See Yellardy v. Commonwealth*, 38 Va. App. 19, 561 S.E.2d 759 (2002) and *Godwin v. Commonwealth*, 6 Va. App. 118, 367 S.E.2d 520 (1988). *See* 5(H) for issues relating to joining preliminary hearings and misdemeanor trials.

The court may try at one time all charges pending against a defendant, whether or not they are related charges with the consent of the accused and the commonwealth's attorney.

Doss v. Commonwealth, 59 Va. App. 435; 719 S.E.2d 358 (2012), in dealing with a motion to sever, held that where evidence showed two drug offenses arose out of two or more acts or transactions connected based on "gradation," the trial court did not err in denying the motion to sever. While witness's testimony implicated defendant in uncharged drug transactions it was highly relevant to charges in that it confirmed informant's relationship with defendant.

Also, *see United States v. Dinkins*, 691 F. 3d 358 (4th Cir. 2012), a conspiracy trial where a non-capital defendant was not entitled to severance from the trial of his death penalty qualified co-defendants.

K. Psychiatric Issues

Under Va. Code § 19.2-169.6, the court with jurisdiction over the inmate's case, if the case is still pending, can hold a hearing to determine if the inmate meets the criteria for hospitalization. In the alternative, a magistrate can issue a temporary detention order for the inmate, which would then require a hearing before the court having jurisdiction over the inmate's case, a district court judge or a special justice to determine if the inmate meets the criteria for hospitalization. Under such a commitment the defendant can be held no longer than 30 days and must have his sentence reduced by the time of such commitment.

Sections to remember:

1. Pre-trial competency examinations
   Va. Code § 19.2-169.1

2. Emergency psychiatric treatment while in jail – may be ordered by the court with jurisdiction over the inmate's case or by the magistrate. When this is ordered, the court,

if the criminal case is still pending, may also order a competency examination and an examination into the defendant's mental state at the time of the defense. Va. Code § 19.2-169.6.

3. Upon motion of the defendant, evaluation of defendant's mental state at the time of the offense (sanity at time of offense) may be ordered pursuant to Va. Code § 19.2-169.5. Once the defendant gives the notice required by Va. Code § 19.2-168, that an insanity defense will be presented, then the prosecution may ask for a court ordered evaluation of the defendant's sanity at the time of the offense pursuant to Va. Code § 19.2-168.1.

4. A defendant who is found to be incompetent pursuant to Va. Code § 19.2-169.1 shall be treated as provided in Va. Code §§ 19.2-169.2 and 19.2-169.3.

5. Determination of Mental Illness after Sentencing. When an inmate of a local correctional facility needs treatment for mental illness, the procedure set forth in Va. Code § 19.2-169.6 should be followed.

OES's forms reflect these changes and can be very helpful to the Court, in determining what the proper procedure is and what statute might apply.

Chapter 8. Amendment of Charges

A. Timing

The warrant or summons may be amended at any time *prior* to a finding of guilty or not guilty. Va. Code §§ 16.1-129.2, 19.2-231.

B. Nature

The amendment must not change the nature or character of the offense charged. *Powell v. Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001). This includes the type of offense (error to amend from failure to yield right of way to reckless driving, *Miles v. Commonwealth*, 205 Va. 462, 138 S.E.2d 22 (1964)) as well as substantially different fact allegations. *Crawford v. Commonwealth*, 23 Va. App. 661, 479 S.E.2d 84 (1996). The offense date on the warrant may be amended to conform to the evidence. *Robinson v. Commonwealth*, 165 Va. 876, 183 S.E.2d 254 (1936). A court may amend a warrant "in any respect in which it appears to be defective" on its own motion and without the consent of the parties. *Raja v. Commonwealth* 40 Va. App.710, 581 S.E.2d 237 (2003).

C. Surprise

If surprised by the amendment, the accused shall be entitled upon request to a continuance for a reasonable time. Va. Code § 19.2-231. If the amendment to correct a defect in the warrant comes after evidence has been heard, the defendant is entitled to a continuance as a matter of right. Va. Code § 16.1-129.2.

D. Pleading

The accused must be given an opportunity to enter a separate plea to the amended warrant. Va. Code § 19.2-231.

Chapter 9. Sentences and Dispositions

A. Plea Bargains

1. Plea bargains may be accepted in the district court like any other plea. If accepted, these agreements may dictate the findings in certain charges, the sentence to be imposed, or a combination of the two. For purposes of denying a motion to withdraw a guilty plea, prejudice may exist where the record reflects that the Commonwealth has partially or fully fulfilled its obligation in a plea agreement by dismissing or amending charges. *Griffin v. Commonwealth*, 65 Va. App. 714, 780 S.E.2d 909 (2016).

2. Although Rule 3A:8 governs plea bargains in circuit court, there is no corresponding rule for the district courts. Rule 3A:8 is useful inasmuch as it sets forth accepted legal principles concerning enforceability, choices of the defendant, and options of the judge. Since there is no governing rule, formalities of plea bargains vary across the state. Some judges conduct a more formal inquiry along the lines of the recommended circuit court colloquy, while others conduct no inquiry at all. There is no requirement that the plea bargain be reduced to writing, but the judge could insist on it as a matter of docket administration. It is the better practice to note on the summons or warrant that the judge's disposition is the result of a plea and recommendation should it become an issue later. Most warrant forms now contain a box to designate whether a plea is the result of a plea and recommendation.

3. Rule 7C:6 governs the acceptance of pleas of guilty or *nolo contendere* to any misdemeanor charge punishable by confinement in jail and requires a judge who rejects a plea agreement to recuse himself from any further proceedings on the same matter unless the parties agree otherwise.

B. Disposition without Conviction

The court may impose punishment on an offender without saddling the offender with a permanent criminal record. Formal statutory procedures exist which allow for deferral of a formal finding of guilt and ultimate dismissal of certain types of charges. These include certain sexual offenses (e.g. Va. Code §§ 18.2-61(C), -67.1(C), -67.2(C)) drug offenses (Va. Code § 18.2-251), underage alcohol possession (Va. Code § 4.1-305), certain property offenses (Va. Code § 19.2-303.2), assault and battery against a family or household member (Va. Code § 18.2-57.3(E)), juvenile dispositions (Va. Code §§ 16.1-278.8, -278.9) and by implication certain traffic offenses (*see* Va. Code §§ 16.1-69.48:1, 17.1-275(12), 17.1-275.7, and 46.2-505).

Va. Code § 19.2-303.2 allows the court in certain misdemeanor property crimes (where the accused has not been previously convicted of a felony and with the consent of the accused) to defer proceedings and place the defendant on probation. Upon successful completion of the terms and conditions of probation, the charges will then be dismissed.

Va. Code § 19.2-303.4 requires the imposition of costs upon the defendant when proceedings are deferred by statute.

A deferred disposition under Va. Code § 4.1-305(F) (underage possession of alcohol) requires the accused to enter a treatment or education program or both, if available. The program may be either a local community-based probation program or an alcohol safety action program.

A deferred disposition under Va. Code § 18.2-251 requires the accused to undergo a substance abuse assessment and to enter a treatment or education program, or both, if available. An § 18.2-251 disposition also requires up to 24 hours of community service for a misdemeanor.

Hernandez v. Commonwealth, 281 Va. 222, 707 S.E.2d 273 (2011), holds that until a court enters a written order finding a defendant guilty of a crime, it has the inherent authority to take a matter under advisement or to continue the case for disposition at a later time. Most recently in *Starrs v. Commonwealth*, 287 Va. 1, 752 S.E.2d 812 (2014) the Supreme Court held that the trial court retains inherent authority to withhold a finding of guilt; until the trial court enters an order adjudicating guilt, it has not yet exercised its authority to render judgment.

The Attorney General opined in 1996 that a deferred disposition may only be used where specifically authorized by the legislature by statute. 1996 Va. Att'y Gen. 88 (1996). While this opinion may not be shared by the Supreme Court, it continues to be shared by many members of the legislature. Additionally, the Virginia Court of Appeals has consistently frowned upon what it considers to be judicial clemency. *See Taylor v. Commonwealth*, 58 Va. App. 435, 710 S.E.2d 518 (2011) and *Harris v. Commonwealth*, 63 Va. App. 525, 759 S.E.2d 29 (2014).

C. Disposition after Formal Conviction

1. Sentence Ranges

   A defendant may be sentenced to a specific term within the following ranges of punishment: Class 1 misdemeanor: jail up to 12 months and/or fine up to $2,500; Class 2 misdemeanor: jail up to 6 months and/or fine up to $1,000; Class 3 misdemeanor: fine up to $500; Class 4 misdemeanor: fine up to $250. *See* Va. Code § 18.2-11. Note: some criminal offenses carry additional sentence requirements, *e.g.*, marijuana possession.

2. Suspended Sentences

   The court can suspend all or a portion of a jail sentence or fine, or both, on any reasonable conditions. Good behavior by the defendant is always an implied condition of the suspension. *Singleton v. Commonwealth*, 11 Va. App. 575, 400 S.E.2d 205 (1991). Most warrant forms have this condition preprinted. Common conditions of suspended sentence include the payment of fines and costs, community service, counseling, as well

as any others which are reasonable given the nature of the offense. Va. Code § 19.2-305. Va. Code § 19.2-356 allows the court to make the payment of fines and costs a condition of probation or suspension of sentence.

The court must include the payment of restitution as a condition of probation or suspended sentence in cases where monetary loss to the victim can be ascertained. The amount fixed should at least partially compensate the victim for direct "property damage or loss" and "actual medical expenses, or funeral or burial expenses incurred by the victim or his estate." Va. Code § 19.2-305.1. Va. Code § 19.2-305.1(E1) makes restitution mandatory to the victim for violations of §§ 18.2-374.1, -374.1:1 and -374.3. *See Howell v. Commonwealth*, 274 Va. 737, 652 S.E.2d 107 (2007), for the finding that indirect expenses are not the subject of restitution orders. Further, the defendant may be compelled to perform community service, and if so ordered, to submit a restitution plan. Additionally, the victim may request that this restitution order be docketed as a civil judgment (Va. Code § 19.2-305.2) and that executions issue thereon as with any other judgment. Va. Code § 8.01-446. Va. Code § 19.2-303.3 allows a court to suspend all or part of a sentence conditional upon the successful completion of a placement with a local community-based probation agency.

D. Revocation of Probation and Suspended Sentences

1. Grounds

The court can revoke a suspended sentence for a violation of the terms of probation or "for any cause the court deems sufficient." Va. Code § 19.2-306. However, *Peyton v. Commonwealth*, 268 Va. 503, 604 S.E.2d 17 (2004) found error in the revocation of a defendant's suspended sentence for failure to complete an alternative sentencing program because of an unforeseen medical condition. Sentences suspended on condition of diversion through community corrections programs may be revoked not only for failures to comply with terms but also for "intractable behavior" that may affect the success of other program participants. Va. Code § 19.2-303.3. [*See also Nunez v. Commonwealth*, 66 Va. 152, 783 S.E.2d 62 (2016): Clarifies *Peyton* as holding that when a defendant, through no fault of his own, cannot "satisfy the conditions" of an alternative sentencing program, the trial court must "consider reasonable alternatives to imprisonment." No requirement that failure to comply must be willful.]

2. Formalities

For due process purposes, the revocation motion is treated as a separate proceeding. The defendant is entitled to notice and, if a jail sentence is possible, an opportunity to retain counsel for the hearing. If the defendant is indigent, he must be offered court-appointed counsel. Va. Code §§ 19.2-157, -159.

3. Appeal

A defendant has the right to appeal from an order revoking a suspended sentence and receive a *de novo* trial in circuit court. Va. Code § 16.1-132; *Barnes v. City of Newport News*, 9 Va. App. 466, 389 S.E.2d 481 (1990).

4. Virginia Alcohol Safety Action Program (VASAP)

VASAP revocations differ from standard criminal revocation proceedings. Noncompliance with a pure VASAP placement results in the loss of restricted driving privileges. License suspension is a civil, not a criminal sanction. *Brame v. Commonwealth*, 252 Va. 122 (1996). Therefore, service of the show cause by first class mail is sufficient notice for the court to revoke both the placement and all driving privileges. Va. Code § 18.2-271.1(F). Note: If the court has also made VASAP compliance a condition of a suspended jail sentence, mail service is not sufficient to revoke the jail term. In such cases, the notice given must meet ordinary due process standards.

E. Probation Supervision Resources

1. Adult Probation and Parole

The services of this department are technically available to the general district court (Va. Code § 53.1-145). However, due to the demands placed on probation officers by the circuit courts, there may be scant opportunity to provide services to the general district court. Presentence reports can be ordered in appropriate cases. Va. Code § 53.1-145 specifically states that probation and parole officers are not required to investigate or supervise cases before general district or juvenile and domestic relations district courts.

2. Community Corrections/Criminal Justice Boards
Va. Code § 9.1-173 *et seq.*

Local community-based probation should be strongly considered if it is available in the area, as it provides parallel services to the general district courts for misdemeanors that Probation and Parole provides to the circuit court for felony cases. Administered in conjunction with local government, this program can provide supervision, drug testing, counseling referrals, work release, community service enforcement and more. Additionally, program personnel can provide bond supervision and drug testing during pretrial release. The court may order a defendant executing a secured bond to be monitored by a GPS device. Va. Code § 19.2-123.

3. Virginia Alcohol Safety Action Program (VASAP)

Virginia's Alcohol Safety Action Program is available in every jurisdiction. Its primary goal is the supervision, monitoring and education of substance abuse offenders under certain statutes.

a. DUI Offenses.

The court *must* refer first and second offenders to VASAP regardless of the desires of the defendant. If, after an assessment, the defendant can show good cause for not participating then the court may decline to order participation. Va. Code § 18.2-271.1. Under no circumstances may a defendant be referred to VASAP if convicted of a third offense. Va. Code § 18.2-271. VASAP also monitors the ignition interlock program for DUI offenders. Ignition interlock shall be required as a condition of a restricted license for all DUI convictions. Va. Code § 18.2-270.1.

b. Underage Drinking/Driving Offenses.

VASAP also provides treatment for underage persons who drink and drive, even though the consumption does not reach DUI levels. Referrals to the program are not mandatory. A restricted license may be issued upon referral. Va. Code § 18.2-266.1.

c. Reckless Driving Offenses.

The court can refer persons convicted of alcohol or drug related reckless driving to VASAP and impose restricted driving privileges as a condition of probation. Va. Code § 46.2-392.

Chapter 10. Supervising Recovery of Fines and Costs

Each jurisdiction is responsible for assuring that the fines and costs imposed are actually paid. As noted earlier, the payment of fines and costs may be made a condition of a suspended sentence and/or probation. Va. Code § 19.2-356. The court may also order the payment of fines and costs independent of a suspended sentence. The obligation may be satisfied through an installment payment agreement consistent with the Rules of the Supreme Court of Virginia (*see* H.B. 572(2) re: installment payments) or through a community service agreement. Va. Code § 19.2-354.

A. Penal Sanction Recovery

If the payment of fines and costs was made a specific condition of a suspended sentence, the court may proceed as with any other revocation. Otherwise, the defendant can be held to answer for contempt of court. Failure to pay in full, or failure to adhere to an agreed payment schedule, may serve as the basis for criminal contempt proceedings. Note: A show cause (not a capias) should issue if the payment schedule is not followed. A show cause proceeding shall not be required prior to the issuance of a capias if an order to appear on a date certain in the event of nonpayment was issued pursuant to subsection A of Va. Code § 19.2-354 and the defendant failed to appear. Va. Code § 19.2-358(A).

In considering the issue of contempt, the court should bear in mind that incarceration for the mere failure to pay costs violates the Thirteenth Amendment prohibition against involuntary servitude. *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968). Thus, the court must affirmatively find that the defendant either (1) *intended* to directly disobey the court order or (2) *willfully* refused to make a good faith effort to secure the funds. Va. Code § 19.2-358.

Upon conviction, the defendant may be sentenced to a jail term of 60 days or a fine of $500. The court may allow the defendant to "buy his way out" by paying the delinquent sums after conviction. Va. Code § 19.2-358.

B. Civil Sanction Recovery

An order to pay fines and costs also constitutes a civil judgment in favor of the government (Va. Code § 19.2-340) which bears interest (Va. Code § 19.2-353.5). The Commonwealth's Attorney or its agent may pursue ordinary civil collection remedies. Va. Code § 19.2-348 *et seq.* These remedies are not limited by the institution of contempt proceedings. Va. Code § 19.2-358.

C. All district courts are required to accept debit cards for the payment of fees, fines, and costs.

D. A defendant convicted of a traffic infraction or violation of a criminal law has thirty (30) days before collection activity can begin or before a driver's license can be suspended. Va. Code § 46.2-395.

E. Each court must post online and in the clerk's office its established guidelines for deferred or installment payment agreements. Va. Code § 19.2-354(A).

Chapter 11. Appeals

A. Scope

A defendant can appeal any conviction or order revoking a suspended sentence. Va. Code § 16.1-132. Motions to reopen are not appealable. *See, e.g., Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 497 S.E.2d 740 (1998).

B. Timing

The appeal must be noted within ten days of the order. Pursuant to Rule 7A:13, the appeal must be noted in writing. (Note: Even though appeal has been noted, within sixty days from the date of conviction a case may be reopened upon application of the defendant for good cause shown. Va. Code § 16.1-133.1. *See Zamani v. Commonwealth*, 26 Va. App. 59, 492 S.E.2d 854 (1997).)

C. Bond

The posting of a bond is not required for appeal. Credit is to be given for bond posted previously. In the court's discretion, however, a new bond may be required to secure the release of the accused who has been sentenced to jail. Under Va. Code § 19.2-124 no filing fees may be assessed for any appeal from an order denying bail or fixing terms of bond or recognizance.

In a matter not governed by subsection B or C of Va. Code § 19.2-120 or § 19.2-120.1, a court granting or denying bond, increasing bond, requiring additional sureties, or revoking bond may, upon appeal, stay execution of its order to allow the appealing party to obtain an expedited hearing before the court to which the order has been appealed. Va. Code § 19.2-124. Va. Code § 19.2-132. Note: The 2016 amendment to Va. Code § 19.2-124(C) limits the circumstances of this stay.

D. Finding a Statute Unconstitutional

Va. Code § 16.1-131.1 outlines the procedures to be followed in a criminal or traffic case upon a finding by a court not of record that a statute or local ordinance is unconstitutional. A locality may appeal if a local ordinance is found to be unconstitutional.

Chapter 12. Re-Hearings

Va. Code § 16.1-133.1

A. Good Cause

For "good cause" the court may reopen a case within sixty days after conviction.

B. Reopen

The decision to reopen must be made within the sixty-day period. Merely filing a motion prior to the sixtieth day is not sufficient.

C. Hearing the Motion

The judge who entered the original order of conviction must hear the motion for rehearing unless he or she is "unavailable."

D. After Appeal

The motion, if timely filed, may be heard even after the defendant has noted an appeal. *Commonwealth v. Zamani*, 256 Va. 391 (1998). If the motion is granted after the appeal is filed with the circuit court, the clerk of that court is directed to return the papers to the district court.

E. No Right of Appeal in Denial of Motion

There is no right of appeal from a denial of the motion to reopen. *Ragan v. Woodcroft Village Apts*. 255 Va. 322, 497 S.E.2d 740 (1998) (construing the civil analog of Virginia Code § 16.1-133.1).

F. Appeal

If the motion is granted and a conviction results upon retrial, that conviction may be appealed.

Chapter 13. Extradition

Va. Code § 19.2-85

A. Introduction

The process most often begins with the stop or arrest of the accused for a Virginia Code violation, and the subsequent discovery of an out of state charge and the issuance and execution of a warrant alleging that he is a fugitive from another state. The accused is arraigned, counsel is usually appointed, bond is fixed or not, and a return date thirty days from the date of arrest is set. On the return date, the case may be continued for an additional sixty days and bond modified, or not. If the accused is still in custody at the end of ninety days, he must be released and the warrant dismissed.

At any time during those ninety days, the accused may waive extradition, *i.e.* permit the requesting state to pick him up without further action. If he does not waive extradition, the demanding state must seek a warrant from the governor of Virginia. The governor determines if the accused is the person charged in the demanding state. If so, a Governor's Warrant is issued. The accused is (arrested if out on bond and) held until the demanding state picks him up.

General District judges may perform all judicial functions pursuant to the Act. Juvenile and Domestic Relations Court judges have more limited authority. Op. Va. Att'y Gen. 183 (March 30, 1987).

B. Arrest Before the Governor's Warrant

1. Arrest Warrant May Issue
   Va. Code § 19.2-99

   a. On oath and appearance of a credible person before any judge, magistrate or other officer authorized to issue criminal warrants in this state that the individual committed a crime in another state, and:

      (i) has fled from justice; (It is not necessary to show that the individual left the state with the intention of avoiding prosecution. *Hogan v. O'Neil* 255 U.S. 52, 41 S.Ct. 222 (1921); *Roberts v. Reilly* 116 U.S. 80, 6 S.Ct. 291 (1885)); or

      (ii) has been convicted of a crime in that state and escaped confinement; or

      (iii) has broken the terms of his bail, probation or parole; or, in the alternative:

   b. On complaint made before a judge, magistrate or other officer in this state, setting forth the affidavit of any credible person of another state that a crime has been committed in such other state and that the accused has been charged in such other state with the commission of such crime, and

(i) has fled from justice; or

(ii) having been convicted of a crime in the other state has escaped confinement, or

(iii) has broken the terms of his bail, probation or parole.

c. In either situation, such judge, magistrate or other officer shall issue a warrant for the accused to be arrested and brought before any judge who may be available when the arrest is made to answer the charge or complaint and affidavit. A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

2. Arrest Without a Warrant
Va. Code § 19.2-100

On reasonable information that the accused is charged in another state with a crime punishable by death or imprisonment for more than one year, any law enforcement officer or private person may arrest the accused without a warrant. The accused must then be brought with all practicable speed before a judge, magistrate, or other person authorized to issue criminal warrants, and complaint made under oath as set forth in Virginia Code § 19.2-99.

3. Hearing After Arrest Warrant Issued
Va. Code § 19.2-101

a. If, from examination before the judge, it appears that:

(i) The person being held is the person charged in the other state; and

(ii) He has fled from justice;

The judge, by a warrant reciting the accusation, shall commit the accused to jail for up to thirty days to await the warrant of the Governor. The thirty-day period is measured from the date of execution of the fugitive warrant. *Speaks v. Pittsylvania County*, 355 F. Supp. 1129 (W.D. Va. 1973).

b. If the Governor's warrant does not arrive by the date set forth in the court's warrant, any judge in this state may discharge him or may recommit him to jail for a period not to exceed sixty days. At the end of the period, if the Governor's warrant has not arrived, the accused must be released. *Speaks v. Pittsylvania County*, *supra*.

4. Bail
   Va. Code § 19.2-102

   Unless charged with an offense punishable by death or life imprisonment in the state in which the charged offense was committed, any judge, magistrate or other person authorized by law to admit persons to bail may admit the accused to bail by bond with sufficient surety.

5. Waiver of Extradition
   Va. Code § 19.2-114

   a. A person may waive extradition by executing or subscribing, in the presence of a judge of a circuit or general district court, a writing consenting to his return to the demanding state; but

   b. Before the waiver is executed, it is the judge's duty to inform such person of his right to the issuance of the Governor's Warrant and his right to seek a writ of habeas corpus. ("A court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.") *Michigan v. Doran*, 439 U.S. 282 (1978).

   c. The waiver is forwarded to the Governor's office and a copy sent with the prisoner to the demanding state.

6. Counsel for the Accused

   If the accused wishes counsel and can not afford to hire his own, counsel should be appointed. 1987 Op. Va. Att'y Gen. 76 (1976).

7. Authority of Various Courts

   A close reading of all the statutes raises questions as to which judges can act in the various steps of extradition. There seems to be some inconsistency about the definition of a judge in the Uniform Criminal Extradition Act, § 19.2-85 *et. seq*. 1987 Op. Va. Att'y Gen 183 (1987).

C. Arrest on the Governor's Warrant
   Va. Code § 19.2-95

1. Upon issuance of the original Governor's Warrant, Va. Code § 19.2-92 requires that "any electronically transmitted facsimile of a Governor's Warrant shall be treated as an original document, provided the original is received within four *working* days of receipt of the facsimile."

2. After the Governor's Warrant is executed, the defendant must be brought before a judge of either a general district court or a circuit court and must be advised:

    a. that demand has been made for his surrender;

    b. of the crime he has been charged with;

    c. of his right to demand and procure legal counsel.

3. If the prisoner states that he desires to challenge the legality of his arrest, the court must fix a reasonable time for him to apply for a writ of habeas corpus.

4. Delivery of the prisoner to the demanding State without complying with Va. Code § 19.2-95 is a Class 1 Misdemeanor. Va. Code § 19.2-96.

5. Once the Governor's Warrant is executed, the fugitive is not eligible for bail. 1995 Op. Va. Att'y Gen 141 (1995).

D. When the Demanding State Fails to Take Custody of the Defendant

The Federal Extradition Act, 18 U.S.C. 3182, provides: "If no such agent [of the demanding state] appears within thirty days from the time of arrest, the prisoner may be discharged." "May" has been construed as mandatory, except where the delay is attributable to the actions of the fugitive. *State v. Hooker*, 626P.2d 1111, 1113 (Ariz. App. 1981); *Hill v. Roberts*, 359 So.2d 911(Fla. App. 1978); *Breckenridge v. Hindman*, 691 P.2d 405 (Kan. App. 1984).

Chapter 14. Animal Cruelty and Neglect Cases

Virginia Code § 3.2-6500 et seq.

I. INTRODUCTION

This chapter covers the most common offenses and procedures in cases arising under Chapter 65 of Title 3.2 entitled "Comprehensive Animal Care." Virginia Code §§ 3.2-6500 *et seq*. This chapter does not address the laws and regulations relating wild animals and fish, or those concerning hunting, fishing, ranching, and aquaculture as regulated activities. As defined in this chapter of the Code, the term "animal" excludes fish. Va. Code § 3.2-6500. Many of the terms used throughout Chapter 65 are defined with great detail in Section 3.2-6500.

II. REMEDIES FOR ABANDONED, NEGLECTED OR CRUELLY TREATED ANIMALS

A. Search and Seizure

Upon receiving a complaint of suspected abandonment, cruelty or neglect of an animal, Section 3.2-6564 allows any law enforcement officer, animal control officer, or State Veterinarian's representative to enter any business property, during business hours, without a warrant to investigate any complaints of a suspected violation. For other types of premises and after business hours, a search warrant is necessary. If the complaint alleges neglect of an animal, the owner or custodian must be given adequate notice of the complaint and what is necessary to comply with the law.

When an officer finds that a violation of the law "has rendered an animal in such a condition as to constitute a direct and immediate threat to its life, safety or health," the officer may impound the animal. Va. Code § 3.2-6565.

B. Procedures Following Impoundment; Civil Responsibility; Disposition Options

1. Upon seizing an animal, the officer must file a petition in the general district court. A hearing must be held not more than 10 days after the animal was seized, "to determine whether the animal has been abandoned, has been cruelly treated, or has not been provided adequate care" (as defined in § 3.2-6500). Va. Code § 3.2-6569.C.

2. The officer must give notice of the hearing to the owner or custodian of the animal, if the person is known and residing in the jurisdiction, at least five days before the hearing. Other methods of service are allowed for nonresidents, and in situations when the animal's owners or custodians are unknown. Va. Code § 3.2-6569.D.

3. Although the proceeding is civil in nature, the Code provides that these cases are to be tried in the same manner as misdemeanors. The Commonwealth is required to prove its case beyond a reasonable doubt. Va. Code § 3.2-6569.E. *See Mosca v. Commonwealth*, 2012 Va. App. LEXIS 379 (Nov. 27, 2012) (conviction reversed for use of preponderance standard of proof, rather than beyond a reasonable doubt).

4. The local government must provide for the care and veterinary treatment of the impounded animal while the case is pending. When the court finds a person responsible for the animal's condition or ill treatment, the court must order the person to reimburse the local government for its expenses in caring for the animal from the date of seizure through the trial date. Va. Code § 3.2-6569.H.

5. If the court finds the animal to have been cruelly treated, deprived of adequate care, or a dog raised for dogfighting purposes, the animal must be (a) sold (if not a "companion animal," as defined in Section 3.2-6500), (b) "disposed of" under Section 3.2-6546, or (c) delivered to another person who has a "right of property in the animal," if the court finds that the other person was not responsible for the neglect or cruelty. If sold, the person found responsible for the neglect or cruelty is prohibited from purchasing the animal. Va. Code § 3.2-6569.F.

6. The court may prohibit future ownership of other "companion animals" (as defined in Section 3.2-6500). If the person found responsible has a prior record of violations, the court may prohibit future ownership of "agricultural animals" (as defined). The respondent has the right to petition to have the court reverse the prohibition after two years have elapsed. Va. Code. § 3.2-6569, paragraphs J and K.

III. CRIMINAL OFFENSES COMMITTED BY HUMANS AGAINST ANIMALS

A. Neglect

Under Section 3.2-6503 of the Code, each *owner* is obligated to provide for each of his *companion animals, adequate feed, water, shelter, space in the primary enclosure, exercise, care, treatment and transportation, and veterinary care when needed.* A violation is a Class 4 misdemeanor. Each of the italicized terms is specifically defined or closely related to one of the definitions contained in Section 3.2-6500.

Before hearing any case under Title 2.2, Chapter 69, it is advisable to review the definitions set forth in Section 3.2-6500. The definition of a term might add to the elements the Commonwealth must prove, in addition to the elements set forth on the face of the Warrant.

Note that an "owner" is defined as "any person who: (i) has a right of property in an animal; (ii) keeps or harbors an animal; (iii) has an animal in his care; or (iv) acts as a custodian of an animal." Va. Code § 3.2-6500. Therefore, anyone who participates in

the care and protection of a companion animal is subject to the duty to provide "adequate care."

B. Abandonment

It is a Class 3 misdemeanor to "abandon" or "dump" any animal. Both terms are defined in Section 3.2-6500.

C. Cruelty to Animals

Section 3.2-6570 contains a long list of prohibited actions against an animal, including beating, torturing, willfully inflicting inhumane injury or pain, carrying in a vehicle or vessel in a manner that causes unnecessary suffering, and deprivation of necessary food, drink, shelter or emergency veterinary care. A first offense is a Class 1 misdemeanor. A second offense involving any animal, within five years after a first conviction, or any offense that causes the death of a dog or cat that was a "companion animal" (as defined), is a Class 6 felony. For a discussion of the meaning of the term "willfully," in an animal cruelty case, *see Pelloni v. Commonwealth*, 65 Va. App. 733 (2016).

The court <u>may</u> prohibit a defendant convicted under this section from "possession or ownership of companion animals." Va. Code § 3.2-6570.G.

D. Maiming, Killing or Poisoning an Animal

Section 18.2-144 is similar to the malicious wounding statute (Va. Code § 18.2-51) in that it makes it illegal to "shoot, stab or wound or otherwise cause bodily injury to" an animal, "with the intent to maim, disfigure, disable or kill." If the animal is a horse or livestock belonging to another (or the defendant's own animal and the purpose was to defraud an insurance company), the offense is a Class 5 felony. If the animal is fowl or a companion animal, a first offense is a Class 1 misdemeanor; a second or subsequent offense is a Class 6 felony.

E. Animal Fighting

It is illegal to attend an animal fight, promote or be employed in or aid or abet any such acts, or authorize or allow an animal fight to be staged on any land a person owns, leases, or is in charge of. A violation is a Class 1 misdemeanor. However, the offense is a Class 6 felony if any of the following aggravating factors is present: (1) when one of the animals is a dog, (2) when performance-enhancing devices or drugs are used, (3) when money is wagered, or an admission fee is charged, (4) when an animal is trained, transported or sold "with the intent that it engage in an exhibition of fighting with another animal," and (5) when a person permits or causes a minor to attend the fight, or take part in one of the prohibited acts. Va. Code § 3.2-6570, paragraphs A and B. An animal control officer is required to confiscate any animal he determines has been or is intended to be involved in animal fighting, plus any equipment used for training or fighting. Va. Code § 3.2-6570.C.

Upon conviction of one of these offenses, the court shall prohibit the defendant from possession or ownership of companion animals or cocks. Va. Code § 3.2-6570.D. The convicted defendant must also be ordered to reimburse the locality for all reasonable costs incurred in housing, caring for, or euthanizing any confiscated animals. Va. Code § 3.2-6570.E.

F. Larceny of an Animal

Stealing animals is governed generally by the law of larceny. However, Section 18.2-97 makes it a Class 5 felony to steal a dog, horse, pony, mule, cow, steer, bull or calf. It is a Class 6 felony to steal "any poultry of the value of $5 dollars or more, but of the value of less than $200, or of a sheep, lamb, swine, or goat, of the value of less than $200".

G. Dogs Running at Large and Leash Laws

The Code authorizes local governments to enact ordinances prohibiting people from allowing dogs to run at large, which means away from its owner's property and not under the "immediate control" of its owner. Va. Code § 3.2-6538. By ordinance, localities may also adopt leash laws. Va. Code § 3.2-6539. A violation of either is a Class 4 misdemeanor. Va. Code § 3.2-6587.

H. Licensing and Rabies Vaccination Requirements; Burden of Proof

Local governments may adopt licensing and rabies control requirements for dogs and cats. When a dog or cat is not wearing a license tag on its collar, it shall be prima facie deemed to be unlicensed, and the burden of proof is on the owner to show that the animal is licensed or is exempt from licensing. Va. Code § 3.2-6533. A violation is a Class 4 misdemeanor. Va. Code § 3.2-6587.

IV. DANGEROUS AND VICIOUS DOGS

General District Courts have jurisdiction over patterns of violent behavior and violent acts committed by dogs. These cases may be initiated by animal control officers or other state or local law enforcement officers. The offending animals are classified either as "dangerous" or "vicious." The procedures are similar for both classifications, but stronger remedies are available and are required for dogs deemed to be "vicious".

A. "Dangerous Dog" Defined

Under Section 2.2-6540, the term "dangerous dog" "means a canine or canine crossbreed that has bitten, attacked, or inflicted injury on a person or companion animal that is a dog or cat, or killed a companion animal that is a dog or cat. When a dog attacks or bites a companion animal that is a dog or cat, the attacking or biting dog shall not be deemed dangerous (i) if no serious physical injury as determined by a licensed veterinarian has

occurred to the dog or cat as a result of the attack or bite; (ii) if both animals are owned by the same person; (iii) if such attack occurs on the property of the attacking or biting dog's owner or custodian; or (iv) for other good cause as determined by the court." There is an exception for dogs engaged in "lawful hunting" or an "organized, lawful dog handling event."

B. "Vicious Dog" Defined

Section 2.2-6541 provides that the term "vicious dog" "means a canine or canine crossbreed that has (i) killed a person, (ii) inflicted serious injury to a person, or (iii) continued to exhibit the behavior that resulted in a previous finding by a court or, on or before July 1, 2006, by an animal control officer as authorized by ordinance that it is a dangerous dog, provided that its owner has been given notice of that finding."

C. Procedures in Dangerous and Vicious Dog Cases

Many of the procedural steps are the same, whether the effort is to declare a dog to be "dangerous" or "vicious." *See* Va. Code §§ 3.2-6540.B and 3.2-6540.1.B.

Any law enforcement officer with reason to believe a dog is dangerous or vicious may seek a summons from a magistrate directed to the owner or custodian of the dog, requiring an appearance in general district court. The officer may request that the local animal control officer seize and confine the dog while the case is pending. If necessary, the court may compel the owner or custodian to produce and surrender the dog to the animal control officer. When the allegation is that the dog is "dangerous", the animal control officer has discretion to leave the dog with its owner or custodian. A dog alleged to be "vicious" must be confined by the local government pending trial.

Hearings on dangerous or vicious dog summonses are tried like misdemeanors. The summons requests that the court declare the dog to be either "dangerous" or "vicious," and proceed to order remedies as allowed under the Code. The burden is on the Commonwealth or the local government to prove its case beyond a reasonable doubt. On appeal to the Circuit Court, the owner is entitled to a jury trial. However, these cases are civil in nature, not criminal. *See O'Malley v. Commonwealth*, 66 Va. App. 296 (2016) (finding that it lacked jurisdiction in a dangerous dog case, the Court of Appeals transferred the appeal to the Supreme Court).

The court may order the owner or custodian to pay restitution to any victim of any injury or damage caused by the dog. The owner or custodian may be ordered to reimburse the local government for all expenses for room, board, and veterinary care while the dog is confined. Va. Code §§ 3.2-6540.B and 3.2-6540.1.B.

D. Defenses and Exemptions

See the exceptions and defenses contained within the definition of "dangerous dog," in Va. Code § 3.2-6540, quoted above. In addition, under both statutes, a dog shall not be deemed dangerous or vicious if:

1. A human victim was committing a crime on the dog's owner's or custodian's premises;

2. The human victim was committing a willful trespass on the dog's owner's or custodian's premises;

3. The human victim was provoking, tormenting or physically abusing the dog, or if it can be shown that the person repeated did such things in the past;

4. The dog was a police dog engaged in the performance of its duties at the time of the incident;

5. The dog, "at the time of the acts complained of, was responding to pain or injury, or was protecting itself, its kennel, its offspring, a person, or its owner's or custodian's property."

Va. Code §§ 3.2-6540.C; 3.2-6540.1.C

E. Disposition of Vicious Dogs; Restitution and Costs of Confinement

Under section 3.2-6540.1.B, if the court finds that dog is a vicious dog, "the court shall order the animal euthanized in accordance with the provisions of § 3.2-6562." This is a mandatory penalty, in contrast to the discretion granted by the more flexible language contained in the last sentence of the definition of a "dangerous dog." In both types of cases, the court may award restitution to the person injured. The costs incurred by the local government in caring for the dog, including standard boarding rates and veterinarian's bills, may be imposed on the owner or custodian of the offending animal. In dangerous dog cases, the court may also order restitution for actual damages to the owner or custodian whose companion animal was killed or injured by the offending animal. Va. Code §§ 3.2-6540.B and 3.2-6540.1.B.

F. Compliance Requirements for Owners of Dangerous Dogs

Once a dog has been declared "dangerous," its owner faces numerous requirements if the dog is going to remain in his or her home, including the following:

1. The owner must obtain a dangerous dog registration certificate within 45 days, and renew the registration by January 31 of each year;

2. Only persons 18 years of age or older may be issued registration certificates;

3. Attach a specially designed dog tag to the dog's collar;

4. Present evidence of the animal's current rabies vaccinations;

5. Present evidence that the dog has been spayed or neutered;

6. Either keep the dog inside, or confined in a "proper enclosure," or muzzled at all times if it remains outside while a proper enclosure is being constructed;

7. Post clearly visible signs at the residence as a warning of a dangerous dog's presence;

8. Have the dog permanently identified with an electronic implantation;

9. Obtain liability insurance coverage that covers dog bites for at least $100,000;

10. While off its owner's property, the dog must be kept on a leash and muzzled;

11. Notify the local animal control officer of "(i) the names, addresses, and telephone numbers of all owners; (ii) all of the means necessary to locate the owner and the dog at any time; (iii) any complaints or incidents of attack by the dog upon any person or cat or dog; (iv) any claims made or lawsuits brought as a result of any attack; (v) chip identification information; (vi) proof of insurance or surety bond; and (vii) the death of the dog";

12. Immediately upon learning of an incident, notify the local animal control officer if the animal "(i) is loose or unconfined; (ii) bites a person or attacks another animal; or (iii) is sold, is given away, or dies";

13. If the owner relocates to a new address, give written notice of the dog's new location within 10 days of relocating to the animal control officers of the old and new localities.

Va. Code § 3.2-6540, paragraphs E through I.

G. Criminal Charges Against the Owner or Custodian of a Dangerous Dog

1. An owner of an animal found to be a dangerous dog who "willfully fails to comply" with the requirements of section 3.2-6540 is guilty of a Class 1 misdemeanor. Va. Code § 3.2-6540, paragraph K.

2. If an animal that has been declared a dangerous dog is involved in a subsequent act of violence, the owner or custodian is guilty of a

    a. Class 2 misdemeanor if the dog "attacks and injures or kills a cat or dog that is a companion animal belonging to another person";

b. Class 1 misdemeanor if the dog "bites a human being or attacks a human being causing bodily injury."

Note that by omitting any wording such as "willfully," "knowingly," or "intentionally," the above offenses are essentially status offenses chargeable against the owner or custodian for acts committed by an animal previously declared a dangerous dog, regardless of the owner or custodian's awareness or personal involvement in the subsequent incident. Va. Code § 3.2-6540, paragraphs J.1 and J.2.

c. An owner or custodian of an animal previously declared a dangerous dog may be charged with a Class 6 felony if the "owner of custodian whose willful act or omission in the care, control, or containment of a canine, canine crossbreed, or other animal is so gross, wanton, and culpable as to show a reckless disregard for human life, and is the proximate cause of such dog or other animal attacking and causing serious bodily injury to any person." Va. Code § 3.2-6540, paragraph J.3.

V. OTHER "OFFENSES" COMMITTED BY DOGS

A. Injuring or Chasing Livestock, Poultry

Section 3.2-6552 makes it the duty of an animal control officer who finds a dog in the act of killing or injuring livestock or poultry "to kill such dog forthwith whether such dog bears a tag or not." Any other person finding a dog in the act of committing any such "depredations" has the right to "kill such dog on sight," as does the owner of livestock or his agent finding a dog chasing livestock on land utilized by the livestock, when "such chasing is harmful to the livestock." When an animal control officer or any person has reason to believe that a dog is a livestock killer, he or she may apply to the Magistrate for s summons requiring the owner or custodian of the dog to appear in general district court for a hearing. If the dog is found to be a livestock killer, the court must either order it killed or euthanized, or sent to a state not bordering on Virginia and prohibiting it from returning to the Commonwealth. If an exiled dog that returns to Virginia after such an order, the court shall order it to be "killed or euthanized immediately." When a dog has only killed poultry, in lieu of killing or euthanizing the dog, the court may order that the dog either (a) be transferred to another owner and fitted with an identifying microchip, or (b) fitted with an identifying microchip and confined either indoors or in a "securely enclosed and locked structure."

SECTION III – JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT

A. GENERAL PROVISIONS

Chapter 1. Jurisdiction and Venue

I. ORIGINAL JURISDICTION (VA. CODE § 16.1-241)

A. Nature of the Case

1. Cases involving the custody, visitation, support, control or disposition of a child:

    a. who is alleged to be abused, neglected, in need of services, in need of supervision, delinquent, or a status offender;

    b. who is alleged to be abandoned or without parental care;

    c. who is at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child;

    d. whose custody, visitation, or support is the subject of controversy (note: jurisdiction concurrent with circuit court);

    e. who is the subject of an entrustment agreement or whose parents for good cause desire to be relieved of his care;

    f. whose parents are parties to a termination of parental rights (note: jurisdiction includes the parents and is concurrent with circuit court);

    g. who is charged with a traffic offense;

    h. who is alleged to have committed a violent juvenile felony under subsection B of § 16.1-269.1 (for purposes of a preliminary hearing);

    i. who is alleged to have committed one of the offenses listed in subsection C of § 16.1-269.1, if the Commonwealth has given appropriate notice (for purposes of a preliminary hearing);

    j. who is the subject of a transfer hearing pursuant to subsection A of § 16.1-269. 1 (Note: if the J&DR court transfers the felony petition and juvenile to the circuit court, the J&DR court loses jurisdiction over the transferred matter but not ancillary petitions. If and when the juvenile is convicted in circuit court, the juvenile court loses jurisdiction over any pending petitions that have not been disposed of. Va. Code §§ 16.1-269.6 and 16.1-271.);

k. who is alleged to have committed a delinquent act.

2. The admission of minors for inpatient treatment in a mental health facility.

3. Judicial consent for such activities of a child as may require parental consent when the child has been separated from his/her parents.

4. Judicial consent for emergency surgical or medical treatment of a child.

5. Proceedings against any person charged with deserting, abandoning or failing to support a person.

6. Proceedings involving any parent, guardian, custodian or person in *loco parentis* of a child who is alleged to be abused, neglected, the subject of an entrustment agreement, or adjudicated delinquent or in need of services or supervision.

7. Petitions to obtain the treatment, rehabilitation or services required by law for a child or parent (note: concurrent jurisdiction with circuit court).

8. Judicial consent for a work permit.

9. Prosecutions of persons charged with ill treatment, abuse, abandonment or neglect of a child, or other offenses against a child and those "tending to cause a child to come within the purview of this law" (note: jurisdiction to conduct a preliminary hearing if the offense is a felony).

10. Offenses by one family or household member against another (note: jurisdiction to conduct a preliminary hearing for an alleged felony) and for violations of custody or visitation orders.

11. Reversal of a court order terminating parental rights where the rights were voluntarily relinquished.

12. Petitions for spousal support by a spouse (note: concurrent jurisdiction with circuit court).

13. Petitions for protective orders in cases of family abuse and under § 19.2-152.8 if either the alleged victim or respondent is a juvenile.

14. Petitions alleging escape from a residential care facility after commitment.

15. Petition for the emancipation of a minor.

16. Petitions for enforcement of administrative support orders.

17. Petitions to determine parentage (note: concurrent jurisdiction with circuit court).

18. Petitions filed by a school board against a parent for failure to participate in programs.

19. Petitions to enforce a subpoena or to request a subpoena in an administrative appeal concerning abuse or neglect.

20. Petitions for parental adoption consent hearings.

21. Petitions by a juvenile seeking judicial authorization for an abortion by a minor.

22. Petitions for the appointment of a standby guardian for a minor.

B. Determination of Age

Jurisdiction is based upon the child's age at the time of the acts complained of in the petition. Va. Code § 16.1-241.

II. CONCURRENT JURISDICTION (VA. CODE §§ 16.1-241, 16.1-244, 16.1-278.12)

A. Circuit Court and Concurrent Jurisdiction

The circuit court has concurrent jurisdiction over matters involving child custody, visitation and support, spousal support, paternity determinations, the termination of parental rights, and petitions to obtain treatment, rehabilitation or services for a child or parent. See Va. Code § 16.1-241.

B. Divorce Actions in and/or Appeals to the Circuit Court

J&DR district courts have original jurisdiction over proceedings involving the custody, visitation, support, control or disposition of a child, including where the termination of residual parental rights and responsibilities is sought. However, when a divorce proceeding is filed in circuit court or a case is appealed from J&DR to circuit court, then the circuit court has jurisdiction to determine custody, guardianship, visitation or support when those issues are incidental to the determination of causes properly pending in the circuit court. *Peple v. Peple*, 5 Va. App 414, 364 S.E. 2d 232 (1988). When a petition is pending in the J&DR court and a suit for divorce is filed in a circuit court in which custody, visitation, guardianship, spousal support, or support of the child(ren) of the parties is raised in the pleadings and the circuit court sets a hearing on any of these issues for a date certain or on a motions docket to be heard within 21 days of the filing, the J&DR court is divested of jurisdiction to enter any further order pertaining to custody, visitation, etc. The circuit court shall determine those matters unless both parties agree to a referral to the J&DR court. See Va. Code § 16.1-244. The circuit court does not have jurisdiction and the J&DR court is not divested of jurisdiction over a particular subject matter (e.g., child support) if the complaint filed in circuit court does not pray for relief as to that particular subject matter. See *Deline v. Baker*, 2010 Va.App. LEXIS 353 (not designated for publication). Furthermore, the J&DR

court may enforce its valid orders for any period during which any valid J&DR court order was in effect.

After the circuit court assumes jurisdiction over a divorce proceeding, the circuit court retains jurisdiction over the matters presented unless and until the circuit court transfers (concurrent) jurisdiction to the J&DR court pursuant to Va. Code § 20-79 C. A pendente lite circuit court order does not nullify a prior J&DR order when the circuit court proceeding is nonsuited. See *Ipsen v. Moxley*, 49 Va. App. 555 (2007). Despite the transfer of jurisdiction back to J&DR, the circuit court retains continuing jurisdiction to reinstate the case on its docket and hear a motion to amend. If reinstated, the J&DR court does not regain concurrent jurisdiction unless and until the circuit court expressly transfers jurisdiction to the J&DR court. See *Crabtree v. Crabtree*, 17 Va. App. 81, 435 S.E. 2d 883 (1993).

C. Inability to Obtain Parental Consent

The J&DR court and the circuit court have concurrent jurisdiction to enter orders to protect the health and welfare of a child by providing judicial consent to emergency surgical or medical treatment and/or to such other activities as may require parental consent when a parent is not available or is unable or unwilling to provide consent. See Va. Code §§ 16.1-278.12 and 16.1-241 C. and D.

D. Habeas Corpus

Virginia Code § 16.1-241 does not deprive any other court of the concurrent jurisdiction to determine the custody of a child on a writ of habeas corpus.

E. Federal Jurisdiction

Jurisdiction for violations of federal law by a child is concurrent but may be assumed by the J&DR court only if waived by the federal court or U.S. Attorney. Va. Code § 16.1-244 B.

III. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT ("UCCJEA")

Va. Code § 20-146.1 et seq.

1. Initial Child Custody Determination (Va. Code § 20-146.12).

   When the parents and/or child have resided in more than one state, a Virginia J&DR court or circuit court have jurisdiction to make an initial child custody determination only if:

   a. Virginia is the child's "home state" at the time of the commencement of the proceeding (or was the child's "home state" within six months of commencement of the proceeding and the child is absent from Virginia but a parent still resides in Virginia); or

b. A court of another state does not have jurisdiction under a. above or a court of the child's home state has declined to exercise jurisdiction pursuant to Va. Code §§ 20-146.18 or 20-146.19 and (1) the child and the child's parents (or at least one parent) have a significant connection with Virginia other than mere physical presence and (2) substantial evidence is available in Virginia concerning the child's care, protection, training, and personal relationships; or

c. All courts having jurisdiction under a. and b. above have declined to exercise jurisdiction pursuant to Va. Code § 20-146.18 or § 20-146.19; or

d. No court of any other state would have jurisdiction under a., b., or c. above; or

e. The child is physically present in Virginia and has been abandoned, or an emergency exists because of mistreatment, abuse, or neglect – affording temporary emergency jurisdiction pursuant to § 20-146.15. Limitations and conditions apply to orders that can be entered pursuant to Va. Code § 20-146.15.

2. Modification of Child Custody Determinations (Va. Code § 20-146.14)

When a court in another state has made a child custody determination, unless temporary emergency jurisdiction exists pursuant to Va. Code § 20-146.15, a Virginia J&DR or circuit court have jurisdiction to modify a child custody determination made by the court of another state only if:

a. The Virginia court has jurisdiction to make an initial determination as set forth above in 1a. or 1b. and

b. The court of the other state determines either (1) that it no longer has exclusive, continuing jurisdiction under Va. Code § 20-146.13 or (2) that a Virginia court would be a more convenient forum under Va. Code § 20-146.18; or

c. Either a Virginia court or a court of the other state determines that neither the child, the child's parents, nor any person acting as a parent presently reside in the other state.

3. Exclusive, Continuing Jurisdiction (Va. Code § 20-146.13)

A Virginia court that has made either an initial child custody determination under § 20-146.12 or modified a determination under § 20-146.14, has exclusive, continuing jurisdiction as long as the child, either of the child's parents, or any person acting as a parent continue to live in Virginia. If the court does not have exclusive, continuing jurisdiction under this section, it may modify its determination only if it has jurisdiction under Va. Code § 20-146.12 to make an initial determination.

For further elucidation on the UCCJEA and the applicability of federal law (The Parental Kidnapping Prevention Act), see the "Custody and Visitation" section elsewhere in this BENCHBOOK.

IV. UNIFORM INTERSTATE FAMILY SUPPORT ACT ("UIFSA")

Va. Code §§ 20-88.32 et. seq.

When a parent seeks to establish, modify or enforce a child support order vis-à-vis the other parent who resides in a different state, jurisdiction to establish, modify, or enforce is governed by UIFSA. Provisions are similar to the UCCJEA; however, an outline or summary of the UIFSA's intricate provisions would be more likely to misled than elucidate. When addressing a proceeding involving a non-resident party or a child support order issued by another state, consult the applicable provisions of Va. Code § 20-88.32 et. seq. in determining jurisdiction.

V. POTENTIAL VS. ACTUAL JURISDICTION

A. Potential Jurisdiction

The J&DR court has subject matter jurisdiction as set forth in Va. Code § 16.1-241, but the filing of a petition or a motion alleging a matter within the jurisdiction of the court does not confer actual jurisdiction over the subject matter or the parties. See, e.g., *Deline v. Baker*, 2010 Va. App. LEXIS 353 (not designated for publication) (where the divorce complaint filed in circuit court did not pray for child support, the circuit court did not have jurisdiction over child support and the jurisdiction of the J&DR court over child support was not divested). In addition, actual jurisdiction is a lawful exercise of potential jurisdiction and requires in addition to subject matter jurisdiction (1) "territorial" jurisdiction (venue), (2) "notice" jurisdiction ("Notice and Service of Process" section elsewhere in this BENCHBOOK), and (3) "the other conditions of fact [that] must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or decree." *Board of Supervisors v. Board of Zoning Appeals*, 271 Va. 336, 343-44, 626 S.E.2d 374, 378-79 (2010).

B. Notice to Parents

Va. Code §§ 16.1-263, 16.1-264

At least one parent must be served with a Petition and a Summons unless the court makes certain findings concerning the parents' identity or location.

C. Court's Obligation

The court should assure subject matter jurisdiction before adjudicating the case. The lack of subject matter jurisdiction can be raised at any time, even sua sponte by the court on appeal.

VI. RETENTION OF JURISDICTION

A. Under Age 21

Va. Code § 16.1-242

Once obtained in the case of any child, the court's jurisdiction continues until such person becomes twenty-one years of age – unless the person is in the custody of the Department of Juvenile Justice or jurisdiction is divested under the provisions of Va. Code § 16.1-244.

B. Over Age 21

When a person reaches twenty-one years of age and a prosecution for a delinquent act has not commenced, the person shall be proceeded against as an adult, even though he or she was a juvenile when the alleged offense occurred.

VII. VENUE

A. Original Venue

Va. Code § 16.1-243 A.

1. Delinquency – the city or county where acts constituting alleged delinquency occurred. Venue can be where the juvenile resides if the juvenile and the Commonwealth's Attorneys in both the city/county where the juvenile resides and in the city/county where the acts allegedly occurred all consent in writing.

2. Custody or visitation – the city or county which, in order of priority,

    a. is the child's home at the time the petition is filed (or had been the child's home within six months before the petition's filing and the child is absent from the city/county because of his removal or retention by a person claiming his custody or for other reason and a parent continues to live in the city/county);

    b. has significant connection with the child and in which there is substantial evidence;

    c. is where the child is physically present and the child has been abandoned, mistreated or neglected; or

    d. it is in the child's best interest for the court to assume venue as no other city or county is appropriate under the preceding provisions.

3. Adoption – in parental placement adoption consent hearings pursuant to §§ 16.1-241, 63.2-1233 and 63.2-1237, where (a) the child to be adopted was born, (b) where the birth parent(s) reside, or (c) where the prospective adoptive parent(s) reside.

4. Support – where either party resides or where the respondent is present when the proceeding commences.

5. Protective orders – where either party has his or her principal residence, where the abuse occurred, or where a protective order was issued and the order is in effect. See Va. Code § 19.2-152.11.

6. In all other cases, venue is proper where the child resides or where the child is present when the proceedings are commended.

B. Transfer of Venue

Va. Code § 16.1-243 B.

1. Custody and visitation – if venue lies in more than one city and/or county, unless the parties agree to the venue, the court shall determine the most appropriate venue based upon the best interests of the child.

2. Support – when a support case is a companion case to a child custody or visitation proceeding, the provisions governing custody and visitation govern its proper venue. Otherwise, if support proceedings were commenced in a city/county other than that of the respondent's residence, the court may transfer the proceeding to the city/county of respondent's residence on its own motion, by agreement of the parties, or on motion of a party for good cause shown. Respondent's residence shall include the city/county in which the respondent is residing at the time the motion for transfer is made or any city/county in which the respondent resided within the last six months before the commencement of the proceeding.

3. In matters other than custody, visitation and/or support – if the proceeding is commenced in a city or county that is not the child's residence, the court may at any time transfer the proceeding to the city or county of the child's residence either on its own motion or on motion of a party for good cause shown. However, in a delinquency proceeding the transfer may occur only after adjudication.

Chapter 2. Service of Process

I. GENERAL CONSIDERATIONS FOR ISSUANCE OF SUMMONSES – VA. CODE § 16.1-263

A. In all cases within the jurisdiction of the Juvenile and Domestic Relations District Court for which a Petition is required, pursuant to Va. Code § 16.1-260, after a Petition has been filed, the court shall direct the issuance of summonses:

1. to the juvenile, if the juvenile is twelve (12) or more years of age;

2. to at least one (1) parent, guardian, legal custodian, or other person standing in *loco parentis*; and

3. to such other persons as appear to the court to be proper or necessary parties to the proceedings.

Va. Code § 16.1-263(A).

B. Notice of proceedings in the form of a summons (DC-510) is a jurisdictional requirement. *Evans v. Cox,* 327 F. Supp. 1057 (E.D. Va. 1971).

C. After a petition has been filed against an adult pursuant to subsection C or D of Va. Code § 16.1-259, the court shall direct the issuance of a summons against the adult. Va. Code § 16.1-263(A).

D. The summons shall require the person to whom it is directed to appear personally before the court at the time fixed to answer or testify as to the allegations of the petition. The summons is a mandate of the court and any willful failure to comply shall subject any person guilty thereof to liability for punishment as for contempt. If a party served with a summons fails to appear as required, the court "shall" issue a Rule to Show Cause. Va. Code § 16.1-263(A).

E. Where the custodian is summoned and such person is not the parent of the juvenile in question, a parent shall also be served with a summons.

F. The parent, guardian, legal custodian, or other person standing in *loco parentis* shall be summoned to appear or be punished for failure to appear in cases of adults who are brought before the court pursuant to subsection C or D of Va. Code § 16.1-259 unless such person is summoned as a witness.

G. The Court may direct that other proper or necessary parties to the proceedings be notified of the pendency of the case, the charge, and the time and place for the hearing. Such notice may be given in the discretion of the Court or pursuant to a statutory provision. Va. Code § 16.1-263(B). For example, the Court may deem it appropriate to serve a person with whom the child is residing or a CASA. Pursuant to Va. Code § 9.1-155,

CASA shall receive notice of hearings and proceedings regarding a case to which an advocate is assigned and that provision specifically requires that the service provisions of Va. Code § 16.1-264 shall apply to such process.

H. The summons shall advise the parties of their right to counsel as provided in Va. Code § 16.1-266. Va. Code § 16.1-263(B).

I. A copy of the petition shall accompany each summons for the initial proceedings. Va. Code § 16.1-263(B).

J. The summons shall include notice that, in the event that the juvenile is committed to the Department of Juvenile Justice or to a secure local facility, at least one parent or other person legally obligated to care for and support the juvenile may be required to pay a reasonable sum for support and treatment of the juvenile pursuant to Va. Code § 16.1-290. Va. Code § 16.1-263(B).

K. Notice of subsequent proceedings shall be provided to all parties in interest. In all cases where a party is represented by counsel and counsel has been provided with a copy of the petition and due notice as to time, date and place of the hearing, such action shall be deemed due notice to such party, unless such counsel has notified the court that he no longer represents such party. Va. Code § 16.1-263(B).

L. The judge may endorse upon the summons an order directing a parent or parents, guardian or other custodian having the custody or control of the juvenile to bring the juvenile to the hearing. Va. Code § 16.1-263(C).

M. A party, other than the juvenile, may waive service of summons by written stipulation or by voluntary appearance at the hearing. Va. Code § 16.1-263(D).

N. No such summons or notification shall be required if the judge shall certify on the record that:

1. the identity of a parent or guardian is not reasonably ascertainable; or

2. in cases in which it is alleged that a juvenile has committed a delinquent act, crime, status offense or traffic infraction or is in the need of services or supervision, the location, or, in the case of a parent or guardian located outside the Commonwealth, the location or mailing address of a parent or guardian is not reasonably ascertainable. Va. Code § 16.1-263(E).

O. An affidavit of the mother that the identity of the father is not reasonably ascertainable shall be sufficient evidence of this fact, provided there is no other evidence before the court which would refute such affidavit. Va. Code § 16.1-263(E).

P. In cases referred to in Va. Code § 16.1-263(E)(ii), in which the child is alleged to be delinquent, a status offender, a child in need of services or supervision, or a traffic

offender, an affidavit of a law enforcement officer or juvenile probation officer that the location of a parent or guardian is not reasonably ascertainable shall be sufficient evidence of this fact, provided there is no other evidence before the court that would refute the affidavit (District Court Form DC-509, AFFIDAVIT/CERTIFICATION OF PARENTAL IDENTITY OR LOCATION).

II. SERVICE OF SUMMONSES IN JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT AND PROOF OF SERVICE – VA. CODE 16.1-264

A. If a party designated in Va. Code § 16.1-263(A) to be served with a summons can be **found within the Commonwealth**, the summons shall be served on him in person or by substituted service as prescribed in subdivision 2 of Code Va. § 8.01-296.

1. Pursuant to Va. Code § 8.01-296, submitted service may be effected as follows:

a. If the person is not found at his or her usual place of abode, he or she may be served by delivering a copy of the summons or other process and giving information of its nature to any person found there who is a family member, 16 years or older, and who is not a temporary guest; or

b. If service cannot be effected by 1.a. above, then service may be effected by posting a copy of such process at the front door or main entrance door of such usual place of abode, **however,** not less than ten (10) days before judgment by default may be entered, the party causing posted service or his attorney or his agent must mail to the party served a copy of such process and file in the office of the clerk of court a certificate of such mailing. District Court Form DC-413, CERTIFICATE OF MAILING POSTED SERVICE.

B. If a party designated to be served in Va. Code § 16.1-263 is **outside the Commonwealth**, service of summons may be made either by delivering a copy to him personally or by mailing a copy to him by certified mail, return receipt requested. Service by these methods must be attempted if the address of the party is known or can be ascertained with reasonable diligence.

Virginia's Attorney General has opined (1990 Op. Atty Gen. Va. 117) that service by certified mail, return receipt requested, pursuant to Va. Code § 16.1-264, may be valid when the receipt is returned marked refused or unclaimed, or signed by a person as agent for the party to be served.

Caution is advised in finding valid service without some proof of actual receipt of the summons and other pleadings in that, if the address is later proven to be wrong, the order may be found to be void.

C. If, after reasonable effort, a party other than the person who is the subject of the petition cannot be found or his post office address cannot be ascertained, whether he is within or

without the Commonwealth, the court may order service of the summons upon him by publication in accordance with the provisions of Va. Code §§ 8.01-316, -317.

D. Service of a summons may be made under the direction of the court by sheriffs, their deputies and police officers in counties and cities, or by any other suitable person designated by the court.

1. "Any other suitable person designated by the court" presumably includes any person 18 years or older, who is not a party or otherwise interested in the subject matter in controversy, as authorized by Va. Code § 8.01-293.

2. In any case in which custody or visitation of a minor child or children is at issue and a summons is issued **for the attendance and testimony** of **a teacher or other school personnel** who is not a party to the proceeding, if such summons is served on school property, it shall be served only by a sheriff or his deputy.

E. If service is made by a person other than a sheriff or police officer, proof of service may be made by the affidavit of the person. If served by a state, county, or municipal officer, his return shall be sufficient without oath.

F. If a law enforcement officer personally provides to a person subject to an **emergency protective order**, a notification of the issuance of the order on a form provided by OES, as long as all of the information and individual requirements of the order are included on the form, such notice shall constitute personal service of the emergency protective order. The officer is also required to enter or cause to be entered the date and time of service and other appropriate information into VCIN and to file a return with the court. Va. Code § 16.1-264.

G. The summons shall be considered a mandate of the court and willful failure to obey its requirements shall subject any person guilty thereof to liability for punishment as for contempt.

III. SERVICE OUTSIDE OF VIRGINIA

A. Procedure for Service Outside of Virginia

1. Va. Code § 16.1-264(A) permits service on a person designated to be served by Va. Code § 16.1-263, if that person is outside of Virginia. This provision specifically prescribes that such service may be effected by delivering the summons in person, presumably as detailed in Va. Code § 8.01-320, or by certified mail, return receipt requested.

2. Va. Code § 8.01-320 also provides for service of process on a non-resident outside of Virginia and states specifically that such service may be made by:

a. any person authorized to serve process in the jurisdiction where the party to be served is located, or

b. any person 18 years of age or older who is not a party or otherwise interested in the subject matter or the controversy.

B. Effect of Service Outside of Virginia

1. Service alone does not confer personal jurisdiction over a party. The court must determine based on the nature of the case whether *in personam* jurisdiction is required and, if so, whether the service effected confers that jurisdiction under the applicable statute(s).

2. When the court can exercise jurisdiction over the nonresident pursuant to the Long Arm Statute, Va. Code § 8.01-328.1, then the service outside of Virginia shall have the same effect as personal service on the non-resident within Virginia. Va. Code § 8.01-320.

   The provision of the Long Arm Statute most relevant to proceedings in the Juvenile and Domestic Relations District Court is Va. Code § 8.01-328.1(A)(8), which confers personal jurisdiction under the following circumstances:

   a. The non-resident executed an agreement in Virginia obligating that person to pay spousal support or child support to a domiciliary of Virginia or to a person who has satisfied the residency requirements in suits for annulments or divorces for members of the armed forces or foreign service officers of the United States pursuant to Va. Code § 20-97 provided proof of service is made by a law enforcement officer or other person authorized to serve process in the jurisdiction where service is effected; or

   b. The non-resident was ordered to pay spousal support or child support by any court of competent jurisdiction in Virginia having *in personam* jurisdiction over the person; or

   c. The non-resident, as shown by personal conduct in Virginia, as alleged by affidavit, conceived or fathered a child in Virginia.

3. If personal jurisdiction is not provided by the Long Arm Statute or by some other specific statutory provision, personal service outside of Virginia shall have only the effect of service by publication. Va. Code § 8.01-320. In addition, substituted service, pursuant to subdivision 2(a) of Va. Code § 8.01-296, effected outside of Virginia shall only have the effect of publication, unless otherwise provided by some other specific statutory provision.

4. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Uniform Interstate Family Support Act (UIFSA) have specific provisions which may grant the court jurisdiction to enter orders permitted by those Acts.

    a. The UCCJEA specifically provides for notice to persons outside of Virginia.

        (i) Notice required to exercise jurisdiction over a person outside of Virginia may be given as provided by the law of Virginia or by the law of the state in which service is attempted or made.

        (ii) Notice may be given by certified mail or registered mail, return receipt requested, addressed to the last known address of the person to be served.

        (iii) Notice must be given in a manner reasonably calculated to give actual notice and an opportunity to be heard but may be by publication pursuant to Va. Code §§ 8.01-316, -317 if no other means are effective.

        (iv) Proof of service may be made in the manner required by Virginia law or by the law of the state where service is made.

        (v) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

    Va. Code § 20-146.7.

    b. UIFSA specifically confers personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

        (i) the individual is personally served in Virginia;

        (ii) the individual submits to jurisdiction by consent, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

        (iii) the individual resided with the child in Virginia;

        (iv) the individual resided in Virginia and paid prenatal expenses or provided support for the child;

        (v) the child resides in Virginia as a result of the acts or directives of the individual;

        (vi) the individual engaged in sexual intercourse in Virginia and the child may have been conceived by the act of intercourse;

(vii) the individual asserted parentage of a child in the putative father registry maintained in Virginia by the Department of Social Services;

(viii) the exercise of personal jurisdiction is authorized under the Virginia Long Arm Statute; or

(ix) there is any other basis consistent with the Constitutions of Virginia or the United States for the exercise of personal jurisdiction.

The basis of personal jurisdiction set forth in this section or any other law of the Commonwealth may not be used to acquire personal jurisdiction for a tribunal of the Commonwealth to modify a child support order issued by a tribunal of another state unless the requirements of § 20-88.76 or § 20-88.77:3 are met.

Va. Code § 20-88.35.

IV. SERVICE BY PUBLICATION – VA. CODE §§ 8.01-316, -317

A. In General

1. An order of publication in the Juvenile and Domestic Relations District Court may be entered against a party in the following manner:

   a. An affidavit is to be filed with the clerk of court by the party seeking service by order of publication, stating one or more of the following grounds that are applicable:

      (i) the party to be served is a nonresident;

      (ii) diligence has been used without effect to ascertain the location of the party to be served; or

      (iii) the last known residence of the party to be served was in the county or city in which service is sought and that a return has been filed by the sheriff that the process has been in his hands for twenty-one (21) days and he has been unable to make service.

2. An order of publication is available in an action such as custody or termination of parental rights when a pleading has been filed that alleges that there is a party whose name, identity or whereabouts are unknown and who may be a party in interest such as a father or mother of a child. An order of publication is not appropriate in a case in which the location of the child is unknown as the child is

the subject of the petition, and the subject of a petition cannot be proceeded against by an order of publication. Va. Code § 16.1-264.

3. The order of publication may be entered by the clerk in most instances. Va. Code § 8.01-316(A)(1) and (2).

4. The cost of such publication shall be paid by the petitioner or applicant. Va. Code § 8.01-317.

5. Every affidavit for an order of publication shall state the last known post office address of the party against whom publication is sought. If the party's address is unknown, the affidavit shall so state. Va. Code § 8.01-316(A)(3).

6. The object of the Virginia statutes authorizing service by publication is to protect parties by giving them notice and an opportunity to present a defense. Because service by publication constitutes constructive notice only, the authorizing statutes must be strictly construed. In that context, the requirement of diligence in searching for the location of the party to be served necessitates "devoted and painstaking" efforts to accomplish the undertaking of locating the party. *Dennis v. Jones*, 240 Va. 12, 393 S.E.2d 390 (1990); *Khanna v. Khanna*, 18 Va. App. 356, 443 S.E.2d 924 (1994).

7. The Court may, in any case where deemed proper, dispense with publication in a newspaper. Va. Code § 8.01-317.

B. Duties of the Clerk on Order of Publication

1. Receive from the petitioner or his attorney an affidavit and petition for order of publication. District Court Form DC-435, AFFIDAVIT AND PETITION FOR ORDER OF PUBLICATION.

2. If the clerk is satisfied that service by order of publication is available and correctly pleaded in the affidavit and petition for order of publication, the clerk or the attorney for the party seeking service by publication prepares the order of publication. The clerk is to insert a hearing date that is no sooner than fifty (50) days after entry of the order of publication. The clerk must match the contents of the order of publication against the requirements of Va. Code § 8.01-317. District Court Form DC-436, ORDER OF PUBLICATION.

3. The order of publication must be mailed or delivered to the newspaper within twenty (20) days after the clerk enters the order of publication. Va. Code § 8.01-317.

4. Within twenty (20) days after entry of the order of publication, the clerk shall send the summons and petition to the party whose address is unknown at the last known address for that party, as stated in the affidavit and petition for order of publication.

5. Within twenty (20) days after entry of the order of publication, the clerk must post a copy of the order of publication at the front door of the courthouse and the clerk shall complete a certificate of compliance. District Court Form DC-436, ORDER OF PUBLICATION.

C. Rehearing and Other Proceedings after Order Entered Upon Service By Publication

Pursuant to Va. Code § 8.01-322, a party who was served by publication and did not appear in Court generally may, within two (2) years after the entry of the Order, request a rehearing, file pleadings or answers to the case and/or take any other action necessary to correct any injustice.

V. RETURNS AND PROOF OF SERVICE GENERALLY

A. Returns – Va. Code §§ 8.01-294, -325

1. Unless otherwise directed by the court, the person serving process shall make return to the Clerk's Office within seventy-two (72) hours of service.

2. When a return would be due on a Saturday, Sunday, or legal holiday, the return is due on the next day following such Saturday, Sunday, or legal holiday.

3. Failure to make return of service within the required time period of seventy-two hours (72) does not invalidate any service of process or any judgment based thereon.

4. In the event a late return prejudices a party or interferes with the court's administration of a case, the court may, in its discretion, continue the case, require additional or substitute service of process, or take such other action or enter such orders as the court deems appropriate under the circumstances.

B. Proof of Service

1. If service is made by sheriff, the form of the return of such sheriff shall be as provided by the Rules of the Supreme Court. Va. Code §§ 8.01-325, 16.1-264(C).

2. Proof of service by any other person is to be made by affidavit of the person's qualifications to serve process under Virginia law, the date and manner of service and name of party served, and an annotation that the service was by a private process server, with his/her name, address and phone number. Va. Code §§ 8.01-325, 16.1-264(C).

3. No return shall be conclusive proof as to service of process. The return of a sheriff shall be *prima facie* evidence of the facts therein stated and the return of a qualified individual under Va. Code § 8.01-293 shall be evidence of the facts stated therein. Va. Code § 8.01-326.

VI. SERVICE OF OTHER PLEADINGS AND NOTICES GENERALLY

A. Since most proceedings in the Juvenile and Domestic Relations District Court are required to be initiated by the filing of a Petition, pursuant to Va. Code § 16.1-260, summonses will usually be required to be issued pursuant to Va. Code § 16.1-263 and served in accordance with Va. Code § 16.1-264 or as otherwise described hereinabove.

B. There are some other proceedings for which the service of a notice may be necessary, i.e.: motions hearings. For those proceedings, service should be effected in accordance with Va. Code §§ 16.1-264, 8.01-296, or as otherwise required by the applicable statute(s).

In a pending case, if an **attorney has entered a general appearance** for a party or a **party has appeared *pro se***, service of notice pursuant to Va. Code § 8.01-314 may be appropriate. Pursuant to that provision, any process, order or other legal papers in the pending proceeding may be served on counsel of record and such service shall have the same effect as if service had been made personally on the party.

In addition, pursuant to Rule 1:12 of the Rules of the Supreme Court of Virginia, such service on counsel of record may be effected by hand-delivery, delivery through a commercial delivery service, transmitting by facsimile, delivering by electronic mail, when provided by Rule 1:17 of the Rules of the Supreme Court of Virginia, or when consented to in writing by the person to be served, or by mailing a copy on or before the day of filing. Rule 1:17 sets forth the requirements for electronic filing and service.

Pursuant to Rule 1:5 of the Rules of the Supreme Court of Virginia and Va. Code § 16.1-88.03, a party who has appeared *pro se* may be considered "counsel of record" and may be able to be served in the pending proceedings with pleadings and notice by mailing or other delivery methods as specified in Rule 1:12 of the Rules of the Supreme Court of Virginia.

VII. SPECIAL SERVICE PROVISIONS FOR CHILD SUPPORT ENFORCEMENT PROCEEDINGS

A. Proceedings to Reduce Arrearages to Money Judgments

1. Pursuant to Va. Code § 16.1-278.18, the Juvenile and Domestic Relations District Court may enter a judgment for money in any amount for arrears of support and maintenance after making certain findings in accordance with the statute. Before entering such a judgment, the motion to enter the judgment must have been served on the person against whom the judgment is sought to be entered. Such service is required to be "in accordance with the applicable provisions of the law relating to notice when proceedings are reopened".

2. Rule 8:4 of the Rules of the Supreme Court of Virginia specifically provides that the service of any motion to enter judgment for arrearages pursuant to Va. Code § 16.1-278.18 shall be as follows:

    a. In accordance with Va. Code § 8.01-296 (in person or substituted service), Va. Code § 8.01-327 (acceptance of service), Va. Code § 8.01-329 (service on the Secretary of the Commonwealth), or

    b. By certified mail, return receipt requested AND first class mail;

    c. Upon sufficient showing of diligent effort to ascertain the location of the party, the party may be served by delivery of notice to the party's residential or business address as filed with the court pursuant to Va. Code § 20-60.3 or the Department of Social Services or, if changed, as shown in the record of the Department of Social Services or the court.

B. Enforcement Proceedings in General

Va. Code § 20-60.6 provides that in any subsequent child support enforcement proceeding between the parties, upon sufficient showing that diligent effort was made to ascertain the location of a party, that party may be served with any required notice by delivery of notice to that party's residential or business address as filed with the court pursuant to Va. Code § 20-60.3 or the Department of Social Services or, if changed, as shown in the record of the Department of Social Services or the court. However, any person served with notice as provided in this section may challenge, in a subsequent judicial proceeding, an order entered based upon such service on the grounds that he did not receive the notice and enforcement of the order would constitute manifest justice.

Chapter 3. Contempt Considerations

Contempt requires careful analysis and deliberation. The judge must consider each of the following in determining contempt cases.

- Is the alleged contempt one over which a Virginia district court has jurisdiction?
- Is the alleged form of the contempt civil or criminal?
- Is the alleged contempt direct or indirect?
- Has the person charged received proper notice?
- Should the person charged be advised of his right to an attorney?
- Should the judge disqualify himself or herself in the case?
- May the trial on contempt proceed presently or be set for hearing on a later date?
- What is the burden of proof?
- If the judge finds the person guilty of contempt:
  - what findings must be written in the court's order, and
  - what sanction does the judge have the authority to order?
    - determinate fine/imprisonment, or
    - indeterminate fine/imprisonment with the ability by the contemnor to purge?
- After the trial is completed, should the court schedule periodic reviews on the docket?
- If the order is appealed, should the judge prepare a certificate of conviction?
- If the order is appealed, should the judge set an appropriate bond?

The following outline is not exhaustive, but identifies necessary considerations for each contempt concern that has significant consequences.

I. CONTEMPT JURISDICTION IN A VIRGINIA DISTRICT COURT

A. Contempt in General

1. Definition: Contempt is an act in disrespect of the court or its processes, or that obstructs the administration of justice, or tends to bring the court into disrepute. *Singleton v. Commonwealth*, 52 Va. App. 665, 667 S.E.2d 23 (2008), rev. 278 Va. 542, 685 S.E.2d 668 (2009).

2. Inherent power: "The power to punish for contempt is inherent in, and as ancient as, courts themselves. It is essential to the proper administration of the law, to enable courts to enforce their orders, judgments and decrees, and to preserve the confidence and respect

of the people without which the rights of the people cannot be maintained and enforced." *Carter v. Commonwealth*, 2 Va. App. 392, 395, 345 S.E.2d 5 (1986) (citations omitted).

3. District court judge's authority: "A judge of a district court shall have the same power and jurisdiction as a judge of a circuit court to punish *summarily* for contempt." Va. Code § 18.2-458 (emphasis added). *See* Va. Code § 16.1-69.24 "It is a power 'essential and inherent . . . . [to] the very existence of our courts,'. . . indispensable to the proper administration of the law . . . [and necessary] to preserve the confidence and respect of the people without which the rights of the people cannot be maintained and enforced' . . . Contempt is a singular proceeding in our jurisprudence which implicates the trial court itself in both the offense and its adjudication and requires treatment suitable to this anomaly." *Baugh v. Commonwealth*, 14 Va. App. 368, 372, 417 S.E.2d 891 (1992) (citations omitted), overruled in part by, *Gilman v. Commonwealth*, 275 Va. 222, 657 S.E.2d 474 (2008).

B. Statutory Authority and Relevant Cases

1. General statutory statement of authority

   Virginia Code §§ 16.1-69.24 and 18.2-458 both give a judge of a district court the same powers and jurisdiction as a judge of a circuit court to punish *summarily* for contempt, but specifically limit the amount of the fine ($250) and the length of imprisonment (ten days) that a district court may impose for the same contempt.

2. Statutory authority for *summary* contempt, Va. Code § 18.2-456.

   The courts and judges may issue attachments for contempt, and punish them *summarily*, only in the cases following:

   a. misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

   b. violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

   c. vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

   d. misbehavior of an officer of the court in his official character;

   e. disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court.

3. Statutory authority for *summary* contempt for juveniles, Va. Code § 16.1-292:

   "Nothing in [Chapter 16.1] shall deprive the court of its power to punish *summarily* for contempt for such acts as set forth in § 18.2-456, or to punish for contempt after notice and an opportunity for a hearing on the contempt." (Emphasis added.) Confinement of a juvenile for contempt of court shall not exceed a period of ten days for each offense and shall be in a secure facility for juveniles rather than in jail. However, if the person violating the order was a juvenile at the time of the original act and is eighteen years of age or older when the court enters a disposition for violation of the order, the judge may order the confinement in jail. (Va. Code § 16.1-284)

   NOTE: Notwithstanding the contempt power of the court, the court shall be limited in the actions it may take with respect to a child violating the terms and conditions of an order, with the sanction dependent upon the underlying case type (delinquency, child in need of services, or child in need of supervision) about which the order was entered. *See* Va. Code § 16.1-292 (C, D, E, and F) and Section I (B)(11)(j) of this outline.

4. Cases relevant to *summary* contempt in the courtroom

   a. A party's refusal to speak with court-appointed counsel

      While clearly disruptive conduct at trial will constitute contempt, refusal to cooperate with court appointed counsel by not speaking to him does not. Such conduct on the proper facts might constitute a waiver of certain rights but not contempt. *Green v. Commonwealth*, 211 Va. 727, 180 S.E.2d 531 (1971).

   b. An attorney late for court – *Direct Contempt*

      An attorney who was forty minutes late for court by reason of scheduling multiple matters in different jurisdictions was held in contempt pursuant to § 18.2-456(1) for direct contempt. Court held that, where an attorney schedules multiple matters in different jurisdictions at the same time, his assertions of good faith "[do] not negate the reasonable inference that he recklessly or willfully failed [timely] to advise the court of his conflicting schedule." Court, in a summary proceeding found defendant's behavior interrupted the administration of justice. Punishment is controlled by § 18.2-457, due to nature of contempt being direct as contemplated by § 18.2-456(1). *Brown v. Commonwealth*, 26 Va. App. 758, 497 S.E.2d 147 (1998).

   c. An attorney late for court – *Indirect Contempt*

      An attorney scheduled multiple matters in different jurisdictions for the same day and failed to make a timely appearance in the Circuit Court of Northampton County. Defendant never notified the Court that he was running late. The trial court issued a contempt show cause for defendant. At a plenary hearing, the defendant was found guilty of indirect contempt, fined $1000, and sentenced to

thirty days in jail suspended. The Court found that "while there are statutory limits on the Court's power to sentence in direct or summary contempt proceedings, these statutes (§§ 18.2-456(1); 18.2-457) do not limit its inherent common law power to punish for indirect contempt. At the outset of the hearing, the court explained that the defendant was charged with indirect contempt rather than direct contempt, and the hearing was a plenary hearing rather than a summary hearing." *Robinson v. Commonwealth*, 41 Va. App. 137, 583 S.E.2d 60 (2003).

d. Attorney's comments construed as personal attacks on the judge during trial

Summary contempt under § 18.2-456(1) was found when, during trial, an attorney made a series of comments construed as personal attacks on the judge. The Court of Appeals rejected the attorney's defense of "good faith pursuit of client's interests." *Baugh v. Commonwealth*, 14 Va. App. 368, 372, 417 S.E.2d 891 (1992).

e. Party balls up summons and court order in presence of court

Courts rightly expect disrespectful litigants to keep insolent thoughts to themselves and to refrain from exhibiting contemptuous behavior in open court. *Parham v. Commonwealth*, 60 Va. App. 450, 459, 729 S.E.2d 734 738 (2012).

f. Defendant who appears in court under the influence of drugs, not merely testing positive for drugs, found guilty of summary contempt. *Graves v. Commonwealth*, 2014 Va. App. LEXIS 389 (November 25, 2014).

g. Court lacks authority to sanction defense counsel under summary contempt because court specifically found that the mistake was inadvertent. Without the element of intent, there can be no contempt. *Ragland v. Soggin*, 291 Va. 282, 784 S.E.2d 698 (2016).

5. Statutory: sanctions for pleadings and motions that do not meet the requirements of Va. Code § 8.01-271.1

Pleadings or motions signed by an attorney or party constitute a certificate that, after reasonable inquiry, it is well grounded in fact and is warranted by existing law or on a good faith argument for modification of existing law and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless cost. If a pleading or motion is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

A court may use its contempt power to enforce an order directing the payment of sanctions pursuant to Va. Code § 8.01-271.1. "Were the court to limit the enforcement of the instant award to the remedies available to collect a money judgment, it would undermine the intent of the legislature to penalize those who would misuse free access to justice to the detriment of others." *Weidlein v. Weidlein*, 50 Va. Cir. 349, 350 (1999).

The trial court erred in sanctioning an attorney pursuant to Va. Code § 8.01-271.1 because he did not sign a brief or present an oral motion to the court and because a second attorney could have believed his arguments were warranted under existing law. *Shebelskie v. Brown*, 287 Va. 18, 752 S.E.2d 877 (2014).

6. Statutory: failure to obey a subpoena or summons

   a. Defendant in a criminal case released on a summons, Va. Code § 19.2-128

      A defendant who has been released on a summons pursuant to §§ 19.2-73 or -74 and who willfully fails to appear in such court shall be treated in accordance with § 19.2-128. However, if that defendant has been sentenced under the provisions of § 19.2-128 for the same absence, he may not also be sentenced for contempt. Va. Code § 19.2-129. (Va. Code § 19.2-128 allows a person charged with a felony and who fails to appear to be charged with a Class 6 felony and allows a person charged with a misdemeanor and who fails to appear to be charged with a Class 1 misdemeanor.) *Williams v. Commonwealth*, 57 Va. App. 750, 706 S.E.2d 530 (2011).

   b. Respondent in a non-support case, Va. Code § 20-66

      In a non-support case under Chapter 6 of Title 20, if the respondent fails without reasonable cause to appear, the court may proceed against him as for contempt of court and may also proceed with the trial of the case or continue the case to some future date.

   c. Witnesses in criminal or civil cases, Va. Code § 19.2-267

      Witnesses in criminal or civil cases are obliged to attend and may be proceeded against for failing to do so. In a criminal case, a witness who fails to appear may be proceeded against for failing to do so although there may not previously have been any payment, or tender to him of anything for attendance, mileage, or tolls. (*See* Va. Code §§ 17.1-611 and 17.1-612 for information on allowances to witnesses.)

      Virginia Code § 18.2-456(5) is the basis for charging criminal contempt of court for failure to obey a summons. Va. Code § 19.2-267.1.

d. Juvenile who fails to appear and is alleged to have committed a delinquent act or is alleged to be a child in need of services or a child in need of supervision, Va. Code § 16.1-248.1

When a juvenile has failed to appear in court after having been duly served with a summons in any case in which it is alleged that the juvenile has committed a delinquent act or that the child is in need of services or is in need of supervision, that juvenile may be detained in a secure facility, pursuant to a detention order or warrant, only upon a finding by the judge, intake officer, or magistrate that there is probable cause to believe that the juvenile committed the act alleged.

NOTE: A juvenile who was alleged to be in need of services or in need of supervision and who fails to appear may be detained for good cause only until the next day upon which the court sits in the county or city in which the charge against the child is pending, and under no circumstance longer than seventy-two hours from the time he was taken into custody.

7. Caselaw: process and witnesses

a. Juvenile witness in a court other than the J&DR district court: When a juvenile witness is subpoenaed to appear in a circuit court and fails to do so, the circuit court may find the juvenile in contempt and the contempt proceeding does not have to be referred to a juvenile court. *Wilson v. Commonwealth*, 23 Va. App. 318, 477 S.E.2d 7 (1996).

b. Four elements of disobedience of process, *Bellis v. Commonwealth*, 241 Va. 257, 262, 402 S.E.2d 211 (1991):

(i) issuance of lawful process (which includes a subpoena directed to a witness);

(ii) valid service of process;

(iii) timely knowledge of the process; and

(iv) willful disobedience of the process.

8. Statutory: failure of a witness to testify

a. Adverse party called as a witness, Va. Code § 8.01-401

An adverse party in a civil case may be examined by the other party according to the rules applicable to cross-examination. If the adverse party refuses to testify, he may be punished for contempt, or the court may dismiss the action or other proceeding of the party so refusing, as to the whole or any part thereof, or may

strike out and disregard the plea, answer, or other defense of such party, or any part thereof, as justice may require.

b. Witnesses granted immunity and who refuse to testify when called by the Commonwealth, Va. Code § 18.2-445

Witnesses called by the court or the attorney for the Commonwealth and giving evidence for the prosecution may not be proceeded against for any offense of giving, offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify, and for refusing to answer questions may, by the court, be punished for contempt.

9. Caselaw: failure of a witness to testify

A witness who refuses to testify can be held in contempt unless the witness has some constitutional right, e.g., Fifth Amendment, to remain silent and has properly asserted that right. This applies in both civil and criminal cases. *Gowen v. Wilkerson*, 364 F. Supp. 1043, 1045 (W.D. Va. 1973).

10. Statutory: failure to pay fines, costs, restitution or penalty. Va. Code § 19.2-358.

a. When an individual obligated to pay a fine, costs, forfeiture, restitution, or penalty defaults in the payment or any installment payment, the court upon the motion of the Commonwealth, or an attorney for a locality in cases of violation of a local law or ordinance, or upon its own motion, may require him to show cause why he should not be jailed or fined for nonpayment. A show-cause proceeding shall not be required prior to issuance of a capias if an order to appear on a date certain in the event of nonpayment was issued pursuant to § 19.2-354(A) (installment payments or deferred payment) and the defendant failed to appear.

b. The defendant may be punished only if the defendant fails to show that the failure to pay was either:

(i) not attributable to an intentional refusal to obey the sentence or the order of the court, or

(ii) not attributable to his failure to make a good faith effort to obtain the necessary funds for payment.

The court may order the defendant confined as for contempt for a term not to exceed sixty days or impose a fine not to exceed $500. The court may provide in its order that payment or satisfaction of the amounts in default at any time will entitle the defendant to his release from such confinement, or after entering the order, may at any time reduce the sentence for good cause shown, including a payment or satisfaction of such amounts.

c. In *Porter v. Commonwealth*, 65 Va. App. 467, 778 S.E.2d 549 (2015), the Court of Appeals held that the restitution plan was enforceable under Va. Code § 19.2-358 even though the defendant's probation had expired more than 12 months before. Such action is not a misdemeanor; therefore, the statute of limitations does not apply.

11. Statutory: disregard of court orders

a. *Summary* contempt, Va. Code § 18.2-456(5)

Contempt proceedings for disobedience to any lawful process, judgment, decree or order of the court are authorized under subsection (5) of Va. Code § 18.2-456. *Stroupe v. Rivero*, 2003 Va. App. LEXIS 630 (2003).

NOTE: *The limitation of the duration of imprisonment for contempt imposed by § 18.2-457 applies only to the first class embraced in § 18.2-456. Stroupe v. Rivero,* No. 1936-02-04, 2003 Va. App. LEXIS 630 (2003), *Yoder v. Commonwealth,* 107 Va. 823, 57 S.E. 581 (1907), *Judicial Inquiry and Review Commission v. Peatross,* 269 Va. 428, 448, 611 S.E.2d 392 (HN17)(2005). *The limitation does not apply to the second, third, fourth, or fifth classes into which [Code § 18.2-456] is divided.*

b. Juvenile and Domestic Relations specific statutory authority, Va. Code § 16.1-292

A J&DR court may proceed to punish for contempt pursuant to § 18.2-456 or § 16.1-69.24, or for violation of an order of the juvenile court entered pursuant to §§ 16.1-278.2 through 16.1-278.19, after notice and opportunity to be heard.

c. Violations of custody, visitation or support orders, Va. Code § 16.1-278.16

J&DR judges may imprison a contemnor for up to twelve months imprisonment, notwithstanding §§ 16.1-69.24 and 18.2-458 relating to punishment for contempt, when the respondent has failed to perform or comply with a court order for custody, visitation, spousal support, child support, or an administrative (DCSE) support order.

Alternatively, in support cases, the court may order the person committed as provided in § 20-115 (*see* e. below).

Also, in cases in which the respondent or defendant is under a duty under existing circumstances to render support or additional support to a child or to pay the support and maintenance of a spouse, the court may order a payroll deduction as provided in Va. Code § 20-79.1, or the giving of a recognizance as provided in § 20-114.

d. Failure to comply with provision of custody or visitation order, Va. Code § 20-124.2

Any willful failure of a party to comply with the provisions of a custody or visitation order may be punished as contempt.

e. Failure to comply with any order or decree for support and maintenance for a spouse or for a child, Va. Code § 20-115

Following a finding of contempt of court for failing or refusing to comply with any order or decree for support and maintenance for a spouse or for a child, or willfully failing or refusing to comply with any order entered pursuant to § 20-103 or § 20-107.3, the court may commit and sentence such party to a local correctional facility and may assign work release or performance of public service work, and the assignment shall be for a fixed or indeterminate period or until the further order of the court. In no event shall the commitment or work assignment be for more than twelve months. The sum or sums as provided for in § 20-63 shall be paid to be used for the support and maintenance of the spouse or the children for whose benefit such order or decree provided.

f. Violation of an order entered under Chapter 5 of Title 20 (Desertion and Nonsupport, §§ 20-61 *et seq.*)

If at any time the J&DR court finds that the defendant has violated the terms of an order entered under Chapter 5 of Title 20 (Desertion and Nonsupport, §§ 20-61 *et seq.*) the court may proceed with the trial of the defendant under the original charge, or sentence him or her under the original conviction, or annul suspension of the sentence and enforce the sentence, or in its discretion may extend or renew the term of probation. The court also has the power to declare the recognizance forfeited, the sum thereon to be paid in whole or in part to the defendant's spouse, or to the custodian of the minor children, or to an organization or individual designated by the court to receive same. Va. Code § 20-80.

g. Uniform Interstate Family Support Act, Va. Code § 20-88.48(B)(5)

Under the provisions of the Uniform Interstate Family Support Act, Virginia courts, as a responding tribunal, may enforce orders by civil or criminal contempt or both.

h. Contempt for violations of orders entered during the pendency of a custody, visitation or support case, Va. Code §§ 20-124.2, -71, and -115

Disobedience of an order entered while a case about custody, visitation, or support is pending may be punished by contempt.

i. Disobedience of an employer who is under a payroll deduction order pursuant to § 20-79.1, and who has failed to comply with such order, Va. Code § 16.1-278.16

If the court finds that an employer who is under a payroll deduction order pursuant to § 20-79.1 has failed to comply with such order after being given a reasonable opportunity to show cause why he failed to comply with such order, then the court may proceed to impose sanctions on the employer pursuant to § 20-79.3(A)(9). Va. Code § 20-79.3(A)(9) provides for a civil fine of not more than $1,000.

j. Disobedience of court orders by juveniles

(i) Necessary findings, Va. Code § 16.1-292

(a) A child may be punished for contempt for violation of a dispositional order in a delinquency proceeding after notice and an opportunity for hearing regarding such contempt, including acts of disobedience of the court's dispositional order which are committed outside the presence of the court.

(b) In order to find that a child in need of supervision violated the court order, the court must find that the violation was willful and material.

(c) In order to find that a child in need of services violated the order of the court, the violation must be willful and material and be a second or subsequent violation.

(ii) Sanctions limited depending on underlying case type

NOTE: The court is limited in the sanction according to the underlying case type (delinquency, child in need of services, or child in need of supervision) about which the order was entered.

Pursuant to Va. Code § 16.1-292(C), the court's actions are limited to those it could have taken at the time of the court's original disposition pursuant to §§ 16.1-278.2 through 16.1-278.10.

(a) Amount of time and place of confinement for juveniles found to have violated a court order, Va. Code § 16.1-292(A)

Confinement of a juvenile for contempt of court shall not exceed a period of ten days for each offense and shall be in a secure facility for juveniles rather than in jail. However, if the person violating the order was a juvenile at the time of the original act and is

eighteen years of age or older when the court enters a disposition for violation of the order, the judge may order confinement in jail.

NOTE: Va. Code § 16.1-291 is a different proceeding than for contempt of court. It provides for proceedings for revocation or modification of an order against a child who has violated an order of the J&DR court entered pursuant to §§ 16.1-278.2 through 16.1-278.10 or who violates the conditions of his parole. If the child is found to have violated a prior order of the court or the terms of parole, the court may modify or extend the terms of the order or parole, including termination of parole or make any other disposition of the child.

(iii) In Child In Need of Services cases, where the child has willfully and materially violated for a second or subsequent time the order of the court pursuant to § 16.1-278.4, the sanctions in § 16.1-278.8(9) shall be available to the court. They are suspending the driver's license or imposing a curfew on the juvenile as to the hours during which he may operate a motor vehicle. *See* Va. Code § 16.1-292(D).

(iv) For a Child in Need of Supervision who has willfully and materially violated an order of the court pursuant to § 16.1-278.5, the courts' dispositional alternatives are limited to (1) suspension of the driver's license of the juvenile, or (2) placing the juvenile in a foster home or a nonsecure residential facility, or (3) after finding that all other treatment options in the community have been exhausted, and that secure placement is necessary in order to meet the child's service needs, detaining the juvenile in a secure facility for a period of time not to exceed ten consecutive days for violation of any order of the court arising out of the same petition. If the juvenile is detained in a secure facility, the court shall direct the interdisciplinary team to review its evaluation and develop further treatment plans. *See* Va. Code § 16.1-292(E).

12. Caselaw: Disregard of court orders

a. Disobedience of orders by adult parties

(i) The order must have been within the court's jurisdiction (subject matter and parties), the order must have been express, and the party must have had actual notice of the order. *Winn v. Winn*, 218 Va. 8, 235 S.E.2d 307 (1977), *Leisge v. Leisge*, 224 Va. 303, 296 S.E.2d 538 (1982).

Disobedience by a party of a court order is contemptuous provided the order was express, the violation is of an express term of the order, the order is not void, the court had jurisdiction of the subject matter and the

parties in the order, and the party had actual notice of the order he is alleged to have disobeyed.

(ii) The court order upon which the contempt show cause is based must expressly impose a duty.

In *Michaels v. Commonwealth*, 32 Va. App. 601, 604, 609-610, 529 S.E.2d 822 (2000), the Court of Appeals reversed a circuit court's criminal contempt conviction of the deputy sheriff for failure to transport an inmate for an inpatient psychological exam. The trial court had entered an order for a continuance "for the defendant to undergo inpatient psychological evaluation at Central State Hospital." No separate order was entered scheduling a psychological evaluation at Central State Hospital or directing the inmate be transported to the hospital. In reversing the contempt conviction, the Court of Appeals held that the order did not expressly impose a duty upon any person in the sheriff's office to transport the inmate and that "at best, the duty to transport is implied." Therefore, there was no violation of the court's order that would constitute contempt.

(iii) In support cases, inability to pay is not a basis for a contempt finding. A trial court may hold a support obligor in contempt for failure to pay where such failure is based on unwillingness, but not on inability to pay. *Barnhill v. Brooks*, 15 Va. App. 696, 704, 427 S.E.2d 209 (1993).

(iv) In contempt charges arising from support orders, the defendant must have voluntarily and contumaciously brought on his disability to obey a court order. *Street v. Street*, 24 Va. App. 14, 22, 480 S.E.2d 118 (1997).

In order to be found in contempt of an order to pay support, the defendant must have voluntarily and contumaciously brought on his disability to obey a court order. Once nonpayment of a support order is established, the burden is on the obligor to provide justification and inability to pay as a defense to a charge of contempt. A payor spouse, who is unable to pay his support obligations due to a good faith, voluntary reduction in income, is unlikely to have his obligation modified. *Therefore, the payor cannot be found in contempt unless evidence shows his reduction in income is "a willful act done for the purpose of frustrating the feasibility or enforceability of the support obligation." Antonelli v. Antonelli, 242 Va. 152, 155, 409 S.E.2d 117 (1991).*

(v) Contempt when non-Virginia decrees are registered in Virginia

When a foreign decree has been registered in Virginia under the provisions of the Uniform Interstate Family Support Act, the question of

whether a party is strictly bound to the payment terms of that foreign decree must be resolved under the law of the jurisdiction that entered the order. *Cass v. Lassiter*, 2 Va. App. 273, 343 S.E.2d 470 (1986).

(vi) Consent orders for custody, visitation may be enforced by contempt.

A trial court has authority to hold an offending party in contempt for acting in bad faith or for willful disobedience of its order. The trial court's authority to enforce its consent order includes the ability to punish as contempt of court any willful failure of a party to comply with provisions of the order entered under Va. Code § 20-124.2 concerning custody and visitation. *Johnson v. Johnson*, 26 Va. App. 135, 153, 493 S.E.2d 668 (1997).

(vii) Attorney's fees for the aggrieved party in court's discretion.

In civil contempt proceedings to enforce orders for support or custody, when the payee retains counsel to enforce a court's order, the court has the discretionary power to award counsel fees incident to the contempt proceeding incurred by the aggrieved party. *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899 (1982).

(viii) Failure to comply with court-issued subpoena

A court may summarily find a person who fails to comply with a court-issued subpoena guilty of contempt. *Greene v. Commonwealth*, 277 Va. 408, 672 S.E.2d 832 (2009).

(ix) Officer repeatedly late for court

Officer arrived nine minutes after court granted Commonwealth's motion for *nolle prosequi*. Court found that officer had prior instances of tardiness, apology, and assurances of timely attendance. "Appellant's repeated tardiness not only disrupted court proceedings but also evidenced his willful and reckless disregard of the obligation to appear on time." *Abdo v. Commonwealth*, 64 Va. App. 468, 479, 769 S.E.2d 677, 682 (2015).

b. Disobedience of order by third parties

In order to find a non-party to an injunction amenable to its terms, the non-party must have had actual knowledge of an injunction and the evidence must show that the non-party violated the terms of the injunction while acting as an agent or in concert with one or more of the named parties in the original injunction. *Powell v. Ward*, 15 Va. App. 553, 556, 425 S.E.2d 539 (1993).

13. Statutory: Family abuse cases

    For preliminary protective orders (§ 16.1-253.1(C)) and for protective orders (§ 16.1-279.1(D)) in family abuse cases, violation of the order shall constitute contempt of court, except as provided in § 16.1-253.2. Virginia Code § 16.1-253.2 makes violations of certain terms (prohibition of going upon land, buildings or premises, further acts of family abuse, or contacts between the respondent and family or household members) a Class 1 misdemeanor, while committing an assault and battery resulting in serious bodily injury or furtively entering the home of the protected person while person is there or while waiting on the person is a Class 6 felony.

14. Statutory: Preliminary removal orders (§ 16.1-252(J)) for a child or emergency removal orders (§ 18.2-456(5)) for a child.

    Violations of preliminary protective orders for a child shall constitute contempt of court (§ 16.1-253(J)), except as provided in § 16.1-253.2. (*See* discussion above in 13.)

15. Statutory: Bond forfeiture for adults and for juveniles. Va. Code §§ 16.1-258.

    The procedure for bond forfeiture is set out in § 19.2-143. Virginia Code § 16.1-258 authorizes the enforcement for terms of the bond even if the principal in the bond is a person under eighteen years of age.

16. Statutory: Physical and mental examinations and treatment or medical care of juveniles. Va. Code § 16.1-275.

    Whenever a juvenile concerning whom a petition has been filed appears to be in need of nursing, medical, or surgical care, the J&DR court may order the parent or other person responsible for the care and support of the juvenile to provide such care in a hospital or otherwise and to pay the expenses thereof. If a parent who is able to do so fails or refuses to comply with the order, the J&DR court may proceed against him as for contempt (or may proceed against him for nonsupport).

17. A conviction of a violation of protective order to protect the health or safety of a person entered pursuant to Va. Code §§ 19.2-152.8, -152.9, or -152.10 bars a finding of contempt for the same act. Va. Code § 18.2-60.4.

18. Caselaw: Contemptuous behavior outside the courtroom, other than violation of a court order

    Contempt was upheld under Va. Code § 18.2-456(2) and (3) when a commonwealth's attorney wrote threats and "contemptuous language" to a substitute judge two days after the judge rejected a plea agreement and criticized the Commonwealth's attorney's office in open court. The court found that the words constituted an express or implied threat to the judge or at least "judicial intimidation," and rejected a claim that the letter was

protected by the First Amendment. *Morrissey v. Commonwealth*, 16 Va. App. 172, 428 S.E.2d 503 (1993).

19. Caselaw: Contemptuous misbehavior as an officer of the court

Contempt was upheld under Va. Code §18.2-456(4) when attorney attempted to use court's own forms to short-cut the garnishment process by having the payroll administrator set up a garnishment before it was filed with the district court. As a result of the intentional acts, the court had to return the improperly withheld checks and issue an order stopping the garnishment of wages that was never ordered. *Becker v. Commonwealth*, 64 Va. App. 481, 769 S.E.2d 683 (2015).

II. FORMS OF CONTEMPT: CRIMINAL OR CIVIL

A. Distinguishing Civil and Criminal Contempt

1. Purpose of contemplated punishment

"Contempt proceedings prosecuted to preserve the power and vindicate the dignity of the court are criminal and punitive; those prosecuted to preserve and enforce the rights of private parties are civil, remedial, and coercive . . . It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order . . . On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." *Steelworkers v. Newport News Shipbldg.*, 220 Va. 547, 549-550, 260 S.E.2d 222 (1979); *Epps v. Commonwealth***,** 46 Va. App. 161, 183 (2005), 47 Va. App. 687 (2006), aff'd, *Commonwealth v. Epps*, 273 Va. 410, 641 S.E.2d 77 (2007).

2. Look to the purpose and the effect of the court sanction.

    a. **NOTE:** The court should clarify at the outset of the hearing whether proceedings are criminal or civil. The same act or omission may constitute both civil and criminal contempt. *Powell v. Ward*, 15 Va. App. 553, 558-559, 425 S.E.2d 539 (1993).

    b. Look to the purpose to be served by the action and to the effect of the action. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. *Leisge v. Leisge*, 224 Va. 303, 307, 296 S.E.2d 538 (1982).

    c. If the purpose is punitive and the sentence is to be fixed and unconditional, then it is criminal contempt. The fact that a party may indirectly benefit from a criminal contempt action does not make it a civil contempt action.

    d. If the purpose is to preserve and enforce the rights of private parties and the punishment is remedial and for the benefit of the complainant, it is civil contempt. When the civil contemnor complies with his obligations under the court order, the contempt is purged and he is released from imprisonment or relieved of any conditional fine.

    e. Criminal contempt sanctions cannot be imposed in a civil proceeding. *Powell v. Ward*, 15 Va. App. 553, 425 S.E.2d 539 (1993).

B. Criminal Contempt

1. Articulate the criminal nature of the proceeding

    The trial judge must clearly articulate the criminal nature of the proceedings at the earliest possible moment. The purpose of this rule is to eliminate the confusion associated with the various types of contempt proceedings. It operates to ensure that the defendants are afforded all their constitutional rights and to inform the defendants what procedural and evidentiary rules will be followed and what standard of proof will be applied to the case. *Powell v. Ward*, 15 Va. App. 553, 559 (1993).

2. The Commonwealth is the appropriate party to prosecute the criminal contempt charge.

3. Notice requirements must comply with Due Process

    Notice requirements to comply with Due Process mandate that the show cause for contempt specifically set forth the details of his alleged offense. The defendant must have notice prior to the hearing that he is being charged with criminal contempt, and the defendant must be personally served. *Steinberg v. Steinberg*, 21 Va. App. 42, 47, 461 S.E.2d 421 (1995). Service of contempt proceedings papers on a contemnor's attorney

without personal service on the defendant is insufficient to meet the actual notice requirements for contempt. Va. Code § 8.01-314.

No judge shall impose a fine upon a juror, witness or other person for disobedience of its process or any contempt, unless he either be present in court at the time, or shall have been served with a rule, returnable to a certain time. Va. Code § 19.2-11.

4. Defendants entitled to representation by counsel

   Defendants in criminal contempt cases are entitled to representation by counsel. Unless waived, counsel should be appointed for indigent defendants. Compensation for appointed counsel is set forth in Va. Code § 19.2-163. Counsel may be waived, but make sure the waiver is supported by the record. *Steinberg v. Steinberg*, 21 Va. App. 42, 461 S.E.2d 421 (1995).

5. Entitlement to bail

   A person awaiting trial or hearing for criminal contempt is entitled to bail under the general provisions of the Code. The court must inform the alleged contemnor of his right to appeal from an order denying or fixing the terms of bond. Va. Code § 19.2-120.

6. Presumption of innocence and rules of evidence

   A person charged with criminal contempt is entitled to the benefit of the presumption of innocence and the burden is on the prosecution to prove the guilt of the accused. The rules of evidence applicable in criminal cases prevail. *Carter v. Commonwealth*, 2 Va. App. 392, 396, 345 S.E.2d 5 (1986).

7. The burden of proof is guilt beyond a reasonable doubt. *Carter v. Commonwealth*, 2 Va. App. 392, 396, 345 S.E.2d 5 (1986).

8. Intent is a necessary element in criminal contempt, and "no one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it." *Carter v. Commonwealth*, 2 Va. App. 392, 397, 345 S.E.2d 5 (1986). *See Singleton v. Commonwealth*, 278 Va. 542, 685 S.E.2d 668 (2009).

9. Due process requirements

   A defendant charged with out-of-court contempt must be given the opportunity to present evidence in his defense, including the right to call witnesses, the right to testify, and the right to examine the opposing party. The Due Process clause of the Fourteenth Amendment requires that alleged contemnors have a reasonable opportunity to meet the charge of contempt by way of defense or explanation. *Street v. Street*, 24 Va. App. 14, 20, 480 S.E.2d 118 (1997).

10. Double jeopardy

    Separate criminal contempt proceedings cannot be subsequently issued when they focus on the same alleged offense. If a dismissal of a criminal contempt charge was granted pursuant to a factual defense, dismissal qualifies as an acquittal for double jeopardy purposes. *Courtney v. Commonwealth*, 23 Va. App. 561, 569, 478 S.E.2d 336 (1996).

11. Record must show actual facts

    "The record in such cases must contain more than the bare conclusion that the defendant's conduct was insolent, insulting, boisterous or the like. The actual facts upon which the court based its final conclusion must be set out . . .The record must show facts to support proof that the contempt was committed willfully." *Carter v. Commonwealth*, 2 Va. App. 392, 397, 345 S.E.2d 5 (1986).

12. The sentence is determinate and unconditional

    Because the sentence is determinate and unconditional, the contemnor has no opportunity or power to "purge" the contempt. *Steelworkers v. Newport News Shipbuilding*, 220 Va. 547, 260 S.E.2d 222 (1979).

13. Amount of fine and length of imprisonment by district court strictly limited

    District courts are limited to a fine not to exceed $250 and imprisonment of not more than ten days for the same contempt when punishing *summarily* for contempt. Va. Code §§ 16.1-69.24 and 18.2-458, -457.

14. Punishment for failure to pay fines or costs

    The punishment for failure to pay fines, costs, forfeitures or restitution may not exceed 60 days confinement or a $500 fine. Va. Code § 19.2-358.

    NOTE: PUNISHMENT FOR CONTEMPT

PENALTY IMPOSED-EVIDENCE OF SERIOUSNESS OF OFFENSE

Virginia does not specify sentencing limits for cases of contempt (other than for summary *contempt, Sections 18.2-456(1) and 18.2-457), therefore, the court must look to the penalty imposed as the best evidence of the seriousness of the offense. Contempt, punishable by more than six months imprisonment or a greater than $500 fine or both, constitute "serious" offenses entitling the contemnor to a trial by jury.* Greene v. Tucker, *375 F. Supp. 892 (E.D. Va. 1974),* Kessler v. Com., *18 Va. App. 14, 441 S.E.2d 223 (1994).* See *AG Opinion, 87-88 Va. AG 288, wherein the Attorney General opined that contempt in violation of Section 18.2-456(2)-(5) constitutes a misdemeanor for which no punishment or no maximum punishment is prescribed by statute (18.2-12) and accordingly shall be punishable as a Class 1 misdemeanor.*

Contempt punishable by imprisonment not exceeding six months and to which no right to trial by jury attaches is "petty" contempt. The unbridled authority of courts to punish for contempt in the absence of a jury is limited to "petty contempt" with a penalty not exceeding six months. Baugh v. Commonwealth, *14 Va. App. 368, 417 S.E.2d 891 (1992),* Kessler v. Commonwealth, *18 Va. App. 14, 441 S.E.2d 223 (1994),* Steinberg v. Steinberg, *21 Va. App. 42, 461 S.E.2d 421 (1995).*

C. Civil Contempt

1. Articulate the civil nature of the proceeding

   The trial judge should clearly articulate the civil nature of the proceedings at the earliest possible moment. The purpose of this rule is to eliminate the confusion associated with the various types of contempt proceedings. The judge should explain that civil proceedings are for the purpose of preserving and enforcing the rights of private parties and that, if contempt is determined, the punishment is remedial and for the benefit of the complainant. When the civil contemnor complies with his obligations under the court order, the contempt is purged and he is released from imprisonment or relieved of any conditional fine. The judge should also inform the defendant what procedural and evidentiary rules will be followed, and what standard of proof will be applied to the case.

2. Entitlement to bail

   A person awaiting trial or hearing for civil contempt is entitled to bail under the general provision of the Code. The court must inform the alleged contemnor of his right to appeal from an order denying or fixing the terms of bond. Va. Code § 19.2-120.

3. Express order must be alleged to have been violated

   "[B]efore a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied." *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307 (1977).

   a. Duty must have been clearly defined

      "If the actions of the alleged contemnor do not violate a clearly defined duty imposed upon him or her by a court's decree, the alleged contemnor's actions do not constitute contempt." *Wilson v. Collins*, 27 Va. App. 411, 424, 499 S.E.2d 560 (1998). The disobedience must be of what is decreed, not of what may be decreed. *Petrosinelli v. PETA*, 273 Va. 700, 643 S.E.2d 151 (2007). "A contempt finding can be based upon a willful violation of an oral pronouncement from the bench [which] must be in the nature of a clear, coercive judicial order - one that allows no reasonable doubt as to whether, how, and why it must be obeyed." *Aratoon v. Roberts*, 2015 Va. App. LEXIS 23 (January 27, 2015).

b. Violation of a void order does not support a judgment of contempt

If a court, which did not have jurisdiction of the parties and of the subject matter, entered a void order the violation of that order will not support a judgment for contempt. The visitation order in *Kogon* had granted visitation to a non-parent over the objection of the parent, and the Virginia Court of Appeals ruled that order void and, therefore, dismissed the contempt judgment, which was based upon a violation of that visitation order. *Kogon v. Ulerick*, 12 Va. App. 595, 599, 405 S.E.2d 441 (1991); *Leisge v. Leisge*, 224 Va. 303, 296 S.E.2d 538 (1982).

c. Contempt only against a person over whom the court had authority to issue the original order

(i) Contempt cannot be found against a person over whom the court had no authority to make the original order. Where the trial court in a criminal case issued an order for the husband of the defendant to assist with the defendant's probation, the husband could not be found guilty of contempt because the trial court had no authority to make that order initially. *Bryant v. Commonwealth*, 198 Va. 148, 151, 93 S.E.2d 130 (1956).

(ii) "A non-party must have actual notice or knowledge of the injunction, and the evidence must show that the non-party violated the terms of the injunction while acting as an agent of or in concert with one or more of the named defendants." *Powell v. Ward*, 15 Va. App. 553, 556, 425 S.E.2d 539 (1993).

4. Right to Counsel

Where a civil contempt involves more than discrete, readily ascertainable acts, the procedural protections normally accorded a civil litigant may be insufficient. If elaborate and reliable fact-finding is required, criminal procedural protections are appropriate to protect the due process rights of the parties. However, the trial judge should advise the defendant of his right to retain counsel. If the threat of incarceration is nominal and the proceeding simple rather than complex, a court may decide to proceed without appointing counsel. However, if the case is complex or if the incarceration is likely or severe, the trial judge should also carefully consider appointing counsel for indigents in civil contempt cases under the authority of Va. Code § 16.1-266(F).

Virginia Code § 17.1-606 gives courts discretion to appoint counsel for indigents in civil cases. "Any person, who is a resident of this Commonwealth, and on account of his poverty is unable to pay fees or costs may be allowed by a court to . . .defend a suit therein . . . whereupon he shall have, from any counsel whom the court may assign him . . . all needful services . . . without any fees, except what may be included in the costs recovered from the opposite party." While this section allows for services without fees, it

does not confer authority for reimbursement through the Criminal Fund or other Commonwealth fund.

In *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011) the Supreme Court held that because the state did not provide clear notice that the father's ability to pay was the critical question in the case and the trial court made no finding concerning such ability, the father who was incarcerated on a civil contempt proceeding for failure to pay child support was entitled to counsel even though Due Process does not require counsel in all civil proceedings.

5. Advisement of right of appeal

   In view of the holdings of the U.S. Supreme Court that contempts punishable by more than six months appear to constitute "serious crimes" that trigger the Sixth Amendment right to jury trial applicable to the states through the Fourteenth Amendment, consider advising the defendant of his right to appeal de novo as is done in first class misdemeanor cases. *Codiposti et al. v. State of Pa.*, 418 U.S. 506, 511-512, 41 L.Ed.2d 912, 94 S.Ct. 2687 (1974).

6. Notice and opportunity to be heard

   a. Civil contempts are usually indirect and must be dealt with after prior notice and opportunity to be heard. The contemnor is entitled to notice and an opportunity to be heard. *UMW v. Bagwell*, 512 U.S. 821, 129 L.Ed.2d 642, 114 S.Ct. 2552 (1994).

   b. A defendant charged with out-of-court contempt must be given an opportunity to present evidence in his defense, including the right to call witnesses. The due process clause of the Fourteenth Amendment requires that alleged contemnors "have a reasonable opportunity to meet the charge of contempt by way of defense or explanation. This due process right includes the right to testify, to examine the opposing party, and to call witnesses in defense of the alleged contempt." *Street v. Street*, 24 Va. App. 14, 20, 480 S.E.2d 118 (1997).

7. Intent of the alleged contemnor

   "The absence of willfulness does not relieve from *civil* contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance . . .Since the purpose is remedial, it matters not with what intent the defendant did the prohibited acts. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents . . ." *Leisge v. Leisge*, 224 Va. 303, 309, 296 S.E.2d 538 (1982).

8. Disability to obey court order must be voluntary by the alleged contemnor

   The defendant must have voluntarily and contumaciously brought on his disability to obey the court order. *Street v. Street*, 24 Va. App. 14, 22, 480 S.E.2d 118 (1997).

9. Burden of proof

   The burden of proof for civil contempt is clear and convincing evidence, according to the United States Fourth Circuit Court of Appeals. There is no definitive precedent from a Virginia state court on the burden of proof in civil contempt actions but the same constitutional constraints are applicable to a consideration of the burden of proof by either federal or state courts. There appears to be a split of authority in the federal courts, but the Fourth Circuit has ruled that civil contempt must be proven by clear and convincing evidence. *In re General Motors Corp.*, 61 F. 3d 256 (4th Cir. 1995).

10. Sanctions for Civil Contempt

    a. Sanctions: either compensatory or coercive

       Civil contempt sanctions are either compensatory or coercive. Compensatory civil contempt sanctions compensate a plaintiff for losses sustained because a defendant disobeyed a court's order. Coercive civil contempt sanctions are imposed to compel a recalcitrant defendant to comply with a court's order. It attempts to coerce the contemnor into doing what he is required to do but is refusing to do. A defendant/respondent can avoid a sanction by compliance with the court's order. *Powell v. Ward*, 15 Va. App. 553, 558, 425 S.E.2d 539 (1993).

    b. "Punishment" must be conditional

       The "punishment" is conditional. It may also be compensatory to compensate a private party for losses sustained due to noncompliance with the court's order. There may be an indefinite jail sentence (subject to the limits on district courts, which do not have juries) until the civil contemnor purges the contempt, i.e., by complying with the court's order. A defendant/respondent can avoid such penalty by compliance with the court's order. It is said that the contemnor "holds the key to his cell in the jail" because by committing an affirmative act and complying with the court order, he can purge the contempt and will be released.

    c. Purging the contempt must be possible

       Purging civil contempt means the contemnor is now obeying the order which the contempt is enforcing. Since the purpose of civil contempt is to coerce obedience, once the contempt is purged no further sanction can be imposed with regard to the civil contempt.

For civil contempt to apply, contemnor must have the ability to comply, with a meaningful opportunity to purge the contempt. *Kessler v. Commonwealth*, 18 Va. App. 14, 441 S.E.2d 223 (1994). The burden of proof with regard to purging a civil contempt rests on the contemnor. Once the contempt is purged, no further sanction can be imposed with regard to the civil contempt. *Drake v. National Bank of Commerce*, 168 Va. 230, 190 S.E. 302 (1937).

Any order holding a respondent in civil contempt for failing to perform or comply with a support order shall expressly provide the manner by which he may purge himself of the contempt. The respondent shall have the burden of proof to show that he lacks the ability to purge himself of the contempt. If the respondent meets his burden, he shall not be held in civil contempt. Va. Code §§ 16.1-278.16, 16.1-292, and 20-115.

d. Order must state the conditional nature of the sanction

The order noting the civil contempt sanction must state that the order is conditional and that the sanction will terminate as soon as the contemnor purges the contempt but in no event later than a date certain as ordered. There is no determinate (fixed) sentence or fine in any civil contempt case.

e. Recall of civil contemnors

If a civil contemnor is imprisoned, it is advisable to recall the contemnor to court from time to time to determine his willingness and ability to purge the contempt.

III. TYPES OF CONTEMPT: DIRECT OR INDIRECT

A. Difference between direct and indirect contempt

"[T]he substantial difference between a direct and a constructive contempt is one of procedure. Where the contempt is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, and to punish the offender without further proof, and without issue or trial in any form. In dealing with indirect contempts – that is, such as are committed not in the presence of the court – the offender must be brought before the court by a rule or some other sufficient process; but the power of the court to punish is the same in both cases." *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681 (1978). *See Gilman v. Commonwealth*, 275 Va. 222, 657 S.E.2d 474 (2008); *Scialdone v. Commonwealth*, 279 Va. 422, 689 S.E.2d 716 (2010).

B. Direct Contempt

1. Summarily "refers not to the time the adjudication must be made, but to the form of the procedure which dispenses with any further proof or examination and a formal hearing." *Higginbotham v. Commonwealth*, 206 Va. 291, 294, 142 S.E.2d 746, 749 (1965).

2. Summary proceeding permissible without an attorney representing the accused

   "To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such *summary* vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law, and the punishment imposed is due process of law." *Cooke v. United States*, 267 U.S. 517, 534, 69 L.Ed. 767, 45 S.Ct. 390 (1925).

3. *Summary* punishment

   Summary punishment for direct contempt is an exception to the general rule that criminal sanctions may not be imposed without affording the accused all the protections of the Bill of Rights. The theory is that where a judge has seen the contempt, there is reliable and trustworthy proof of the wrongdoing, so notice and hearing are not necessary. *Sacher v. United States*, 343 U.S. 1, 7, 96 L.Ed. 717, 72 S.Ct. 451 (1952).

4. J&DR court may punish a juvenile *summarily* for contempt. Va. Code § 16.1-292(C).

   J&DR court judges may punish a juvenile *summarily* for contempt for acts set forth in § 18.2-456.

5. Juvenile in *direct contempt* in general district court

   No caselaw was identified dealing with direct contempt by a juvenile in general district court. However, the *Wilson* case (relating to a juvenile charged with criminal contempt in a circuit court) may be instructive. The Court of Appeals held that "[t]he ability of a court to preserve its jurisdiction and orders transcends other concerns, such as the juvenile/adult distinction . . . We hold that the Code provision granting exclusive jurisdiction of juveniles to the juvenile court is inapplicable to cases of contempt committed in another court under circumstances like those found in this case." The court held further that the juveniles sentenced to confinement by the circuit court for contempt must be confined in a secure facility for juveniles rather than in jail. *Wilson v. Commonwealth*, 23 Va. App. 318, 323, 477 S.E.2d 7 (1996).

6. Notify the person of the conduct that is contumacious

   The trial judge should notify the person of the conduct observed that was contumacious. "Because criminal contempt proceedings are not 'criminal prosecutions,' the protections of the Sixth Amendment do not apply to such proceedings. Instead, the safeguards applicable in such cases are protections of fairness guaranteed by the due process clause of the Fifth and Fourteenth Amendments." *Gilman v. Commonwealth*, 275 Va. 222, 228, 657 S.E.2d 474 (2008) (citations omitted).

7. Defendant may be silent or may explain his conduct

   The defendant cannot be compelled to testify against himself, and he should be advised of his right to make no statement. The defendant should be given an opportunity to explain his conduct or to produce reasons why he should not be punished or why his punishment should be mitigated. "Even where summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution.'" *Taylor v. Hayes*, 418 U.S. 488, 498, 41 L.Ed.2d 897, 907, 94 S.Ct. 2697, 2703 (1974). *Amos v. Commonwealth*, 61 Va. App. 730, 737, 740 S.E.2d 43, 47 (2013), *aff'd*. 287 Va. 301, 754 S.E.2d 304 (2014).

8. Limitation of district court's punishment

   District courts are limited to a fine not to exceed $250 and imprisonment of not more than ten days when punishing summarily for contempt. Va. Code §§ 16.1-69.24 and 18.2-458.

9. Record of the decision should include the facts that were the particular circumstances of the offense

   Generally, a decision in *direct contempt* proceedings should set out sufficient facts to show that the court had jurisdiction to punish for contempt, that the contempt was committed in the presence of the court, and that the contempt was committed willfully, and should recite the facts upon which the court based its final conclusion. *Carter v. Commonwealth*, 2 Va. App. 392, 397, 345 S.E.2d 5 (1986).

C. Indirect Contempt

1. Committed outside the court's presence

   "In dealing with indirect contempts – that is, such as are committed not in the presence of the court – the offender must be brought before the court by a rule or some other sufficient process." *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681 (1978).

2. Due Process of Law: Adequate notice and opportunity to be heard

   "The function of notice is to inform the offender of the charge against him and to afford him a reasonable opportunity to prepare for a hearing . . . to determine whether he should be adjudged in contempt." *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681 (1978). [E]xcept that [contempt] committed [entirely] in open court, [Due Process] requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation…. [T]his includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty.'" *Cooke v. United States*, 267 U.S. 517, 537, 69 L.Ed. 767, 774, 45 S.Ct. 390, 395 (1925).

3. Right to bail

A person awaiting trial or hearing for civil or criminal contempt is entitled to bail under the general provisions of the Virginia Code. The court must inform the contemnor of his right to appeal from an order denying or fixing the terms of bond. Va. Code § 19.2-120.

IV. RECUSAL BY THE JUDGE

A. Hearing a contempt proceeding does not usually disqualify the judge from hearing the case in chief

Generally, conducting contempt proceedings against a person does not disqualify a judge from hearing either the case in chief or the contempt. *Taylor v. Hayes*, 418 U.S. 488, 501, 41 L.Ed.2d 897, 94 S.Ct. 2697 (1974).

B. Type (direct or indirect) of proceeding impacts the decision about disqualification

The form of the contempt proceeding, i.e., direct or indirect contempt, impacts the decision about disqualification. *United States v. Neal*, 101 F.3d 993, 997 (4th Cir. 1996).

1. Direct proceedings

In *summary* proceedings for direct criminal contempt, the "otherwise inconsistent functions of prosecutor, jury and judge mesh into a single individual." Direct contempt involves misconduct under the eye of the court and where immediate punishment is essential to prevent demoralization of the court's authority before the public. *Direct contempt* may be punished *summarily* without notice and a hearing.

2. Indirect proceedings

Indirect contempt does not occur within the presence of the court and must be proven through the testimony of third parties or the testimony of the contemnor, if he chooses to testify. The inherent power of the court to punish indirect contempt is limited because conduct occurring out of the presence of the court does not "threaten a court's immediate ability to conduct its proceedings." Thus, indirect contempt may never be punished *summarily*. When the contumacious conduct at issue occurs out of the presence of the court or does not interfere with an ongoing proceeding immediately before the court, the inherent contempt power does not permit a judge to dispense with a prosecutor altogether and fill the role himself.

In *U.S. v. Neal*, the Fourth Circuit vacated and remanded a contempt charge against a witness for failing to appear, because the district court judge investigated the incriminating facts through extra judicial means, introduced evidence against Neal, and otherwise presented the Government's case, thereby improperly assuming a prosecutorial role. Carefully consider disqualifying in indirect contempt proceedings. Factors to be

considered include fairness, avoiding the appearance of partiality, and whether the conduct was intended to force disqualification. Other factors to be considered include whether setting the case on another judge's docket would result in undue delays in trial and inappropriate inconvenience.

V. APPEAL OF FINDINGS OF CONTEMPT

A. Statutory Right

Any person convicted in a district court of an offense not felonious shall have the right, at any time within ten days from such conviction, and whether or not such conviction was upon a plea of guilty, to appeal to the circuit court. Va. Code § 16.1-132.

Any person sentenced to pay a fine, or to confinement, under § 18.2-458 (power to punish for contempt) may appeal therefrom to the circuit court. If such appeal be taken, a certificate of the conviction and the particular circumstances of the offense, together with the recognizance, shall forthwith be transmitted by the sentencing judge to the clerk of such circuit court. Va. Code § 18.2-459.

B. Caselaw

"Code § 16.1-132 grants to any person convicted of an offense in the district court the right to appeal to the circuit court and § 16.1-136 provides that such an appeal shall be heard *de novo*, as a new trial…The issue before the circuit court is not the disposition of the matter in the lower court, but the defendant's guilt or innocence . . . In this determination, the judgment of the district court must be ignored." *Baugh v. Commonwealth*, 14 Va. App. 368, 373 (1992).

In the appeal of a contempt citation, however, those events which occurred in the district court comprise the evidence of the offense before the court of record. The occurrence, circumstances and perceptions of the district court judge are relevant and necessary direct evidence in the appellate proceeding, the admission of which does not affect the *de novo* nature of the trial.

VI. CERTIFICATE OF CONVICTION

A. Mandated by statute

When an appeal of a contempt finding is made under § 18.2-458, the particular circumstances of the offense and a certificate of conviction, together with the recognizance, shall be transmitted by the sentencing judge to the clerk of the circuit court. Va. Code § 18.2-459.

B. Caselaw

The Virginia Court of Appeals has ruled that the certificate of conviction required by § 18.2-459 did not violate the Sixth Amendment right to confrontation. The court noted that the judge was prohibited from testifying by § 19.2-271, and that the certificate was presumed to be trustworthy and reliable. *Baugh v. Commonwealth*, 14 Va. App. 368, 372, 417 S.E.2d 891 (1992); *Gilman v. Commonwealth*, 275 Va. 222, 657 S.E.2d 474 (2008).

VII. APPEAL BONDS

A. Appearance bond when contempt is found under Va. Code § 18.2-458

When an appeal is noted by a person sentenced to a fine or to confinement for contempt that person shall enter into recognizance before the sentencing district court judge, with surety and in penalty deemed sufficient to appear before the circuit court to answer for the offense. Va. Code § 18.2-459.

B. Statutory: Appeal bond in general

No appeal bond shall be required of a party appealing from an order of a J&DR court except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during pendency of an appeal. Va. Code § 16.1-296(H).

C. Statutory: Va. Code § 16.1-296(H)

In support cases there are three types of bonds (appearance bond, accrual bond, and appeal bond), that must be considered when the court has found civil or criminal contempt for failure to pay support and an appeal is noted.

1. Appearance bond: Upon appeal from a finding of civil or criminal contempt involving a failure to support, the J&DR court may require the party applying for the appeal or someone for him to give bond, with or without surety, to insure his appearance at the circuit court.

2. Accrual bond: The J&DR court may also require bond in the amount and with sufficient surety to secure the payment of prospective support accruing during the pendency of an appeal.

3. Appeal bond: No appeal bond shall be required of a party appealing from an order of a J&DR court except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during pendency of an appeal. An appeal will not be perfected unless such appeal bond as may be required is filed within thirty days from the entry of the final judgment or order. However, no appeal bond shall be required of the Commonwealth or when an appeal is proper to protect the estate of a decedent.

D. Caselaw: Appeal bond

1. The appellant bears the burden of specifying what he is appealing from the juvenile court. McCall did not specify in the notice of appeal that he was appealing only the contempt order. Nor did he advise the circuit court of the limited scope when the circuit court required him to post security for the arrearage. *McCall v. Commonwealth*, 20 Va. App. 348, 352, 457 S.E.2d 389 (1995).

2. When a litigant is appealing the issue of subject matter jurisdiction of the J&DR court from a finding of civil contempt for failure to comply with court-ordered support, appellant's appeal must be dismissed by the circuit court upon failure to post an appeal bond fixed under § 16.1-296(H). Challenging the entry of all orders includes a challenge to the subject of the orders; therefore, a bond covering the arrearage is required. *Mahoney v. Mahoney*, 34 Va. App. 63, 537 S.E.2d 626 (2000).

   In *Forte v. Commonwealth*, 65 Va. App. 1, 772 S.E.2d 303 (2015), the Court of Appeals stated in footnote 1 that *Mahoney* does not overrule the decisions of *McCall* and *Avery*. In *Forte*, the appellant made it clear in an attachment to the notice of appeal that he was not appealing the amount of the arrearage. Rather he was appealing the denial of the motion to reduce child support. The request to reduce his child support is inherently and logically bound up with the arrearages he owes. Thus a bond to cover the arrearages must be posted. Va. Code § 16.1-296(H) requires the posting of an appeal bond for court-ordered support arrearages to perfect an appeal of civil contempt within thirty day of the court order. Circuit court shall return the case to J&DR court to order appellant to post required bond within period not longer than the initial period. Va. Code § 16.1-109 B.

Chapter 4. Discovery

I. GENERAL PROVISIONS

A. Subpoenas Duces Tecum, Form DC-336

1. In civil cases, a subpoena duces tecum may be used for a party as well as a non-party. Va. Code § 16.1-89.

2. Requests for subpoena duces tecum shall be filed at least fifteen (15) days prior to the hearing. Rule 8:13(b)(1).

3. Requests for subpoenas duces tecum not timely filed should not be honored except when authorized by a judge for good cause. Rule 8:13(a)(2).

4. All requests for subpoena duces tecum shall be served by delivery or mailing prior to filing, and evidence that such has occurred shall be at the bottom of the request. Rule 8:13(d).

5. A subpoena duces tecum may also be issued by an attorney-at-law who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. However, attorneys may not issue subpoenas duces tecum in those cases in which they may not issue a summons. Va. Code § 16.1-89.

6. A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five (5) business days prior to the date production of evidence is desired. Va. Code § 16.1-89.

7. Rule 8:13 does not apply to subpoenas duces tecum issued by attorneys in civil cases. Rule 8:13(e).

8. If the time for compliance with an attorney-issued subpoena duces tecum is less than fourteen (14) days after service of the subpoena, the party upon whom the subpoena duces tecum is served may serve written notice of objection upon the issuing party. Once the objection is appropriately made, the party for whom the subpoena duces tecum was issued is not entitled to the requested production until further order of the court. Va. Code § 16.1-89.

B. Bill of Particulars

1. The court may direct the filing of a bill of particulars any time before trial and within a period of time specified in the order so requiring. Motions for bills of particulars in criminal cases before general district courts shall be made before a plea is entered and at least seven days before the day fixed for trial. Va. Code § 16.1-69.25:1.

2. The purpose of a bill of particulars in a criminal case is to state sufficient facts regarding the crime to inform the accused in advance of the nature of the offense. *Hevener v. Commonwealth*, 189 Va. 802 (1949); *Swisher v. Commonwealth*, 256 Va. 471 (1998).

II. CRIMINAL CASES

A. General Provisions

Note: These provisions regarding discovery for criminal cases are current as of the publication of the Benchbook. It should be noted that, at the direction of the Justices of the Supreme Court of Virginia, a special committee on criminal discovery rules was appointed. This committee continues to meet to determine what, if any, changes should be implemented regarding discovery in criminal cases. For further information regarding this ongoing process, please refer to the website listed below.

http://www.courts.state.va.us/news/items/2015_0303_scv_press_release_comments_proposed_amendments.pdf

1. Exculpatory Evidence

   a. The Commonwealth, upon request, must provide evidence to the defendant that might exculpate her or impact upon the severity of punishment. *Brady v. Maryland* 373 U.S. 83 (1963); *Cone v. Bell*, 556 U.S. 499 (2009).

   b. Exculpatory evidence is material where there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. *Cherrix v. Commonwealth*, 257 Va. 292 (1999); *Lovitt v. Warden*, 266 Va. 216 (2003). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine confidence in the outcome of the trial.'" *Smith v. Cain*, ____ U.S. ____, ____, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995)).

   c. The Commonwealth can only disclose information then known to it. *Kasi v. Commonwealth*, 256 Va. 407 (1998). The Commonwealth is charged with the responsibility to interview all government personnel involved in a case in order to comply with its discovery obligations. *Knight v. Commonwealth*, 18 Va. App. 207, 214, 443 S.E.2d 165, 169 (1994) (quoting *Harrison v. Commonwealth*, 12 Va. App. 581, 585, 405 S.E.2d 854, 857 (1991)). It is axiomatic that if personnel of a department of social services are agents of the Commonwealth for the purposes of discovery under Rule 3A:11, they are certainly such for the purpose of providing constitutional due process for a criminal defendant. By participating in a criminal investigation, Dinwiddie

DSS was "acting on the government's behalf," *Kyles*, 514 U.S. at 437, 115 S.Ct. at 1567, and became an agent of the prosecutor for the purpose of Brady and its progeny. *Tuma v. Commonwealth*, 60 Va. App. 273, 726 S.E.2d 365 (Va. App., 2012).

d. The defendant is entitled to evidence that impeaches the credibility of a prosecution witness, including evidence of the prior convictions of a witness. *Bramblett v. Commonwealth*, 257 Va. 263 (1999).

e. The defendant can require disclosure of the exact location of a police observation post only by showing that she needs the evidence to conduct her defense and that there are no other adequate alternative means of getting at the same point. *Hollins v. Commonwealth*, 19 Va. App. 223 (1994); *Davis v. Commonwealth*, 25 Va. App. 588 (1997).

f. Generally, the Commonwealth is required to identify an informant who is an actual participant, but is not required to disclose a tipster who merely provides information. *But see Daniel v. Commonwealth*, 15 Va. App. 736 (1993); *Hatcher v. Commonwealth*, 17 Va. App. 614 (1994).

g. If in doubt about the exculpatory nature of the material, the prosecutor should submit the evidence to the court for an *in camera* review.

2. Article I, Section 8 of the Virginia Constitution provides a criminal defendant the right to view, photograph, and take measurements of the crime scene upon a showing that a substantial basis exists for claiming that the proposed inspection and observation will enable the defendant to obtain evidence relevant and material.

3. In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.), a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or trial, or (ii) the requirements of subsection A of Va. Code § 19.2-187.1 have been satisfied and the accused has not objected to the admission of the certificate pursuant to subsection B of Va. Code § 19.2-187.1.

4. Pursuant to Va. Code § 19.2-187, the defendant may request a copy of any certificate of analysis which is filed in the clerk's office, and at least ten (10) days prior to trial, must send a copy of the request to the Commonwealth's attorney. Va. Code § 19.2-187.

a. If the certificate of analysis is not filed at least seven (7) days prior to trial and is not mailed or delivered to a defendant who has requested a copy seven (7)

days prior to trial, the defendant shall be entitled to continue the hearing or trial. Va. Code § 19.2-187.

b. The Commonwealth does not have to provide the certificate seven days prior to trial if the request for the certificate is made in a Rule 3A:11 motion. *Coleman v. Commonwealth*, 27 Va. App. 768 (1998).

B. Adult Criminal Cases

1. The provisions of Rule 7C:5 shall govern discovery in these cases. Rule 8:15(a).

2. The process

a. A motion for discovery shall be in writing and shall be filed at least ten (10) days before the day set for trial or preliminary hearing. Rule 7C:5(d).

b. Upon motion of the accused, the court shall order the prosecuting attorney to permit the accused to hear, inspect and copy or photograph information when such information is known or becomes known to the prosecuting attorney and is to be offered in evidence against the accused. Rule 7C:5(c).

c. Pursuant to Rule 7C:5(c)(1)-(2), the prosecuting attorney can be required to provide

(i) Relevant written or recorded statements or confessions made by the accused, or copies thereof;

(ii) The substance of any oral statements and confession made by the accused to any law enforcement officer; and

(iii) Any criminal record of the accused.

d. If the Commonwealth's attorney is not going to prosecute the case, the Attorney General has opined that the Commonwealth's attorney cannot be required to reply to a discovery request. However, other representatives who appear on behalf of the Commonwealth or locality are required to respond to such requests. 1998 Op. Atty. Gen. Va. 121 (Sept. 29, 1998); Rule 7C:5.

e. If the Commonwealth has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order the prosecuting attorney or representative of the Commonwealth to permit the discovery or inspection of the material not previously disclosed, and may grant such continuance to the accused as it deems appropriate.

C. Juvenile Delinquency Cases

1. If a juvenile is charged with an offense that would be a misdemeanor if the juvenile was an adult, the court may for good cause order discovery as provided for adults by Rule 7C:5. Rule 8:15(b).

2. If a juvenile is charged with an offense that would be a felony if the juvenile was an adult or in a transfer hearing or preliminary hearing to certify charges under Va. Code § 16.1-269.1, the court may for good cause order discovery in accordance with Rule 3A:11. Rule 8:15(b).

    a. A motion for discovery shall be made at least ten (10) days before the day fixed for trial and shall include all relief sought. A subsequent motion shall only be made for good cause. Rule 3A:11(d).

    b. The court may order the Commonwealth's attorney to provide

        (i) Relevant written or recorded statements or confessions made by the accused, or copies thereof, Rule 3A:11(b)(i).

        (ii) The substance of any oral statements and confessions made by the accused to any law enforcement officer, the existence of which is known to the Commonwealth, Rule 3A:11(b)(i).

        (iii) Written reports, including scientific reports, and written reports of a physical or mental examination of the accused or alleged victim made in connection with the case that are known by the Commonwealth's attorney to be in the possession, custody or control of the Commonwealth. Rule 3A:11(b)(ii).

3. The court may further, upon a showing by the accused that the items sought may be material to the preparation of the defense and that the request is reasonable, order the Commonwealth's attorney to permit the accused to inspect, copy or photograph documents, places, objects, etc., under the control of the Commonwealth. However, this does not authorize the discovery of statements made by prospective Commonwealth witnesses to agents of the Commonwealth, or reports, etc made by agents except as set forth in 2(b)(3), above. Rule 3A:11(b)(2).

4. If the court enters an order requiring the disclosure of information set forth in 2(b)(2) or 2(b)(3) above, the Commonwealth's attorney can request the following:

    a. To inspect, copy, or photograph, not less than ten (10) days before trial, written reports and scientific tests that may be in the accused's possession, custody or control and which the accused intends to introduce into evidence,

b. That the accused disclose whether he intends to establish an alibi and, if so, where he was at the time of the offense,

c. That the accused, if he is going to rely on the defense of insanity or feeblemindedness, permit the inspection, copying, or photographing, etc., of any report of physical or mental examination of the accused made in connection with the case. No statement by the accused in the course of the examination shall be used by the Commonwealth in its case. Rule 3A:11(c).

d. An order for discovery under Rule 3A:11 shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

e. Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Commonwealth, the court may permit the Commonwealth to make such showing, in whole or in part, in the form of a written statement to the inspected by the court in camera. If the court denies discovery or inspection following a showing in camera, the entire text of the Commonwealth's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the accused.

f. All counsel party to an order for discovery have a continuing duty to disclose additional material previously requested or falling within the scope of an order previously entered.

III. CIVIL CASES

A. Civil Support Cases

The judge may require parties to file a statement of gross income together with supporting documentation. Rule 8:15 (d).

B. Discovery by Order of the Court

Discovery in civil cases can occur only by order of the court upon a motion timely made and for good cause shown. Rule 8:15(c).

C. Scope of Discovery

All discovery allowed in Part Four of the Rules except that no depositions may be taken. Rule 8:15(c).

D. General Provisions

1. Parties may discover any matter not privileged which is relevant to the subject matter involved in the pending action. Rule 4:1(b)(1).

2. Work product:

    a. Generally, material such as interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs that are prepared by an adversary's counsel with an eye to litigation are not discoverable. *Commonwealth v. Edwards*, 235 Va. 499 (1988).

    b. Before a party can compel the production of work product, he must show special circumstances as well as relevance. *Rakes v. Fulcher*, 210 Va. 542 (1970).

3. The court may, on its own motion or the motion of counsel, limit the frequency or extent of use of discovery. Rule 4:1(b)(1).

4. The discovery of trial preparation materials is restricted and requires the requesting party to show special circumstances. Rule 4:1(b)(3).

5. A party may discover the facts known or the opinions held by an expert retained or employed especially in anticipation of litigation, but who will not testify at trial, only upon a showing of exceptional circumstances. Rule 4:1(b)(4)(B).

6. The court may enter an order which justice requires to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. Rule 4:1(c).

7. A party is under a duty to supplement responses if additional information is obtained. Rule 4:1(e).

8. Any notice or document required to be served shall be served on any counsel of record by mail, by delivery, by dispatching by commercial delivery service, or by transmitting by facsimile. A certificate of counsel showing the date of delivery, dispatching, transmitting, or mailing shall be at the foot of any request or answer. Rules 4:1(f), 1:12.

E. Interrogatories

1. The party served with the interrogatories shall serve a copy of the answers and any objections on the other party twenty-one (21) days after the service of the interrogatories or twenty-eight (28) days after service of the motion/petition, although the court may allow a shorter or longer period. Rule 4:8(d).

2. The party answering the interrogatories may answer by specifying business records from which the answer may be obtained and providing access to the records. Rule 4:8(f).

3. No party may serve on any party at one time or cumulatively more than thirty (30) interrogatories, including all parts and subparts, without leave of court and for good cause. Rule 4:8(g).

4. A party may ask for the identification of any expert witnesses who will be used at trial, the subject matter which the witness will testify on, the substance of the facts and opinions to which the witness will testify and a summary of the grounds for each opinion. Rule 4:1(b)(4)(A)(i).

F. Production of Documents and Entry on Land

1. A party may serve on another party a request to inspect or produce documents, including electronically stored information, or tangible things as well as a request to enter land for specific purposes. Rule 4:9.

2. When a subpoena for the production of documents and things has been served on a nonparty requiring the production of information stored in an electronic format, the person in control of the requested information shall produce a tangible copy of the information. If a tangible copy is unobtainable, the parties shall have access to the computer or other means of viewing the information during normal business hours. If the information is commingled with the information not requested, the person may file a motion for a protective order or file a motion to quash. Va. Code § 19.2-267.2.

3. A party may request the clerk to issue a subpoena duces tecum to a non-party. Rule 4:9(A)(a)(1) effective January 1, 2009.

G. Physical and Mental Examination of Persons

1. When the mental or physical condition of a party or a person in the custody or under the legal control of a party is in controversy, upon motion of a party the court may order the party to submit to a physical or mental examination. Rule 4:10(a).

2. The report shall be detailed and shall be filed with the court. In an electronically filed case, the report shall be filed in electronic or digital image form as provided in Rule 1:17. Rule 4:10(c)(1). The party who was examined may read the report into evidence. Rule 4:10(c)(2).

3. When the physical or mental condition of the patient is at issue in a civil action, facts communicated to or otherwise learned by a practitioner of any branch of the healing arts in connection with examination or treatment shall be disclosed only by discovery or testimony. 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 located outside the Commonwealth or is a federal facility. Va. Code § 8.01-399.

H. Requests for Admissions

1. A party may serve on another party a written request for the admission of the truth of certain matters related to the pending action only. Rule 4:11(a).

2. The matters are admitted unless the party required to answer files an answer or objection within twenty-one (21) days after service of the request for admissions or within twenty-eight (28) days after service of the motion/petition. Rule 4:11(a).

3. An answering party may not give lack of information or knowledge as a reason for failure to deny or admit unless he has made reasonable inquiry and the information known or available is insufficient to enable the party to deny or admit. Rule 4:11(a).

4. If a party fails to admit a document or a matter which is later proven genuine or true, the party denying the document or fact may be required to pay costs. Rule 4:12(c).

5. Any matter admitted is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Rule 4:11(b).

I. Sanctions for Failure to Make Discovery

1. The party seeking discovery may move for an order compelling a non-complying party to answer the discovery requests. Rule 4:12(a). Such motion must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other party in an attempt to resolve the dispute without court action. Rule 4:12(a)(2).

2. The court can award costs. Rule 4:12(a)(4).

3. The court may also

    a. Order that the matters or designated facts shall be taken as established in the trial,

    b. Order that the non-complying party may not support or oppose certain claims or defenses, or may not introduce certain matters in evidence,

    c. Order that pleadings or portions thereof be stricken, that proceedings be delayed, that claims be dismissed or that default judgments be entered. Rule 4:12(b)(2).

Chapter 5. Records and Confidentiality

The General Assembly has determined the extent to which proceedings involving juveniles, and dockets, records, indices, reports, and identifying information regarding juveniles may be deemed confidential and subject to closure or restricted access.

A. Fingerprints and Photographs

1. All duly constituted police authorities having arrest power shall take fingerprints and photographs of a juvenile who is taken into custody and charged with a delinquent act, an arrest for which, if committed by an adult, is required to be reported to the Central Criminal Records Exchange (CCRE). Va. Code § 16.1-299; Code § 19.2-390(A).

2. Whenever fingerprints are taken, they *shall* be maintained separately from adult records and a copy *shall* be filed with the juvenile court on forms provided by the CCRE.

3. Any juvenile who is (i) convicted of a felony, (ii) is adjudicated delinquent of an offense that would be a felony if committed by an adult, (iii) has a case involving an offense that would be a felony if committed by an adult, that is dismissed pursuant to the deferred disposition provisions of § 16.1-278.8, or (iv) is convicted or adjudicated delinquent of any other offense for which a CCRE report is required by subsection C of Va. Code § 19.2-390 if the offense were committed by an adult *shall* have copies of his fingerprints and a report of the disposition forwarded to CCRE by the clerk of the court which heard the case. So, besides felony cases, fingerprints are needed for conviction of any misdemeanor violation of Title 54.1 of the Code of Virginia, and for convictions of any other jailable misdemeanor (i) under Titles 18.2 or 19.2, except violations of Va. Code § 18.2-119, Article 2 of Title 18.2 (§ 18.1-415, *et seq.*), or any similar local ordinance, (ii) under § 20-61, or (iii) under § 16.1-253.2.

4. If a petition or warrant is not filed against a juvenile after his fingerprints and photographs have been taken, the fingerprint card, all copies of the fingerprints, and all photographs shall be destroyed sixty days after the fingerprints were taken.

5. If a juvenile is found not guilty, or in any other case for which fingerprints are not required to be forwarded to CCRE, the court shall order that the fingerprint card, copies of fingerprints, and all photographs be destroyed within six months from the date of disposition, unless the juvenile is fourteen or older and was charged with a "violent juvenile felony" or an "ancillary crime" as defined in Va. Code § 16.1-228.

B. Blood, Tissue, Saliva Samples for DNA analysis

A juvenile age fourteen or older at the time of the commission of the offense who is convicted of any felony, or found guilty of any offense which would be a felony if committed by an adult shall have a sample of his blood, saliva or tissue taken for DNA analysis. Va. Code § 16.1-299.1; § 19.2-310.2 *et seq.* Note: the recent amendments to Va. Code § 19.2-

310.2 that expanded DNA sampling to certain misdemeanor convictions for adults are not applicable to juveniles.

C. Department of Juvenile Justice Records, Va. Code § 16.1-300

1. The social, medical, psychiatric, and psychological reports and records of children who are or have been (i) before the court, (ii) under supervision (iii) receiving services from a court service unit or (iv) committed to the Department of Juvenile Justice (DJJ) are confidential. They shall be open for inspection *only* to:

    a. The judge, Commonwealth's attorney, probation officers, parole officers, pre-trial services agencies, and professional staff assigned to the court in any current proceeding;

    b. the public agency (or private entity under contract to DJJ) treating the child;

    c. the child's parent, guardian, legal custodian or other person *in loco parentis*, and the child's attorney;

    d. any person previously a ward of DJJ who has reached majority and seeks access to his own record;

    e. the state agency providing funds to DJJ and required by federal regulations to monitor juvenile programs with federal financing;

    f. any person, agency, or institution, including law-enforcement agency, school administration, or probation office by order of the court, having a legitimate interest in the case, the juvenile or the work of the court;

    g. any person, agency or institution, in any state, having a legitimate interest when release of confidential information is (i) for the provision of treatment or rehabilitation of the juvenile or (ii) when the requesting party has custody or is providing supervision for a juvenile and the release of confidential information is in the interest of maintaining security in a secure facility as defined in Va. Code § 16.1-228 if the facility is located in Virginia, or as similarly defined by the law of another state, if the facility is in that other state, or (iii) for consideration of admission to any group home, residential facility, or postdispositional facility (copies obtained for this purpose will be destroyed if the child is not admitted to the facility);

    h. any attorney for the Commonwealth, any pretrial services officer, local community-based probation officer and adult probation and parole officer for the purpose of preparing pretrial investigation, including risk assessment instruments, presentence reports, discretionary sentencing guidelines worksheets, including related risk assessment instruments, or any court-ordered post-sentence investigation report;

i. any person or entity conducting research or evaluation on the work of DJJ, at DJJ's request; or any state criminal justice agency that is conducting research, provided that the agency agrees that all information received shall be kept confidential, or released or published only in aggregate form;

j. law-enforcement officers if the information relates to a criminal street gang, including that a person is a member of such a gang with the exception of medical, psychiatric, and psychological records and reports;

k. the Commonwealth's Attorneys' Services Council and any attorney for the Commonwealth, as permitted under subsection B of § 66-3.2;

l. any state or local correctional facility, as defined in Va. Code § 53.1-1, when such facility has custody of or is providing supervision for a person convicted as an adult who is the subject of the reports or records; these reports or records shall remain confidential and shall be open for inspection only in accord with Va. Code § 16.1-300; and

m. the Office of the Attorney General, for all criminal justice activities otherwise permitted and for the purposes of performing duties required by Chapter 9 of Title 37.2 (Civil Commitment of Sexually Violent Predators).

2. DJJ records may be withheld from inspection when DJJ in its discretion determines that disclosure would be detrimental to the child, provided the juvenile court (i) having jurisdiction over the facility where the child is placed or (ii) that last had jurisdiction over the child if he is no longer in custody, concurs.

3. Any decision to withhold records by DJJ requires DJJ to inform the person seeking the information of the reasons for non-disclosure, provide information regarding the child's progress as deemed appropriate, and give notice in writing of the individual's right to seek judicial review. Judicial review takes place in the circuit court having jurisdiction over the facility where the child is placed.

D. Law-Enforcement Records, Va. Code § 16.1-301

1. Special precautions are required to prevent disclosure to any unauthorized person of law-enforcement records concerning a juvenile. Policing authorities shall keep separate records as to violations of law committed by juveniles, other than traffic offenses.

   Unless a juvenile age fourteen or older is charged with a violent juvenile felony as specified in subsections B and C of Va. Code § 16.1-269.1, such law-enforcement records are not open to public inspection, nor are the contents of such records to be disclosed.

2. The chief of police or sheriff may disclose to the school principal that a juvenile is a suspect or is charged with (i) a violent juvenile felony as specified in Va. Code § 16.1-269.1, B. and C., (ii) a violation of Article of Chapter 5 of Title 18.2, or (iii) a violation of the law involving a weapon listed in Va. Code § 18.2-308, for the protection of the juvenile, other students or school personnel. The chief or sheriff must further report to the principal within specified periods if the juvenile is acquitted, the charges are dismissed or no charges are placed. The principal, in his or her discretion, may disclose this information to a threat assessment team established by the school division. Members of the threat assessment team cannot disclose this information, or use it for any purpose other than to evaluate threats to students or school personnel.

3. Inspection of law-enforcement records shall be limited to:

    a. the court having the juvenile before it in any proceeding;

    b. officers of the institution to which the juvenile is committed and those responsible for supervision after release;

    c. any person or entity, *by order of the court*, having a legitimate interest in the case or the work of the law-enforcement agency;

    d. law-enforcement agents of other jurisdictions, *by order of the court*, when necessary for their official duties;

    e. probation and other court staff in the preparation of a dispositional report, officials of a penal institution to which the juvenile is committed, parole officers;

    f. the juvenile, his parent, guardian or other custodian, his attorney by order of the court;

    g. those enumerated in §§ 19.2-389.1 and 19.2-390.

4. Policing authorities may release information regarding juveniles to one another for investigation purposes only, and not for creation of new files on individual juveniles by the receiving authority. This includes release to the police and sheriff's departments of cities, towns, and counties, to state and federal law-enforcement agencies, and to law-enforcement agencies in other states.

5. Policing authorities may release information regarding juveniles to a court service unit-authorized diversion program, as contemplated by Virginia Code §§ 16.1-227 and 16.1-260, provided that neither the diversion program nor its participants shall further disclose such information. Further, law enforcement may prohibit such disclosure to a diversion program to protect a criminal investigation or intelligence information.

E. Dockets, Indices, Order Books, Hearings, Va. Code § 16.1-302

1. Juvenile courts shall keep a separate docket of cases arising under the juvenile law.

2. Every circuit court shall keep a separate docket, index and order book for cases appealed from the juvenile court, except for: (a) criminal non-support; (b) custody; (c) visitation; (d) civil support actions; (e) criminal offenses committed by adults; (f) cases involving civil commitment of adults; and (g) cases involving the parent, custodian or guardian or person *in loco parentis* of an abused or neglected child, an entrusted child, a child in need of services or supervision, or a delinquent child if the court finds the adult has contributed to the child's conduct complained of; and cases involving spousal support. Va. Code § 20-61; §§ 16.1-241(A)(3), -241(F), and -241(L).

3. The general public shall be excluded from all juvenile hearings, with only such persons admitted by the court as the judge deems proper, except cases where an adult is charged with a crime subject to the juvenile court's jurisdiction or proceedings on a petition or warrant charging a juvenile age fourteen or older with an offense which would be a felony if committed by an adult.

4. In any criminal or traffic proceeding the juvenile or adult shall have the right to be present and the right to a public hearing unless expressly waived. The court *may*, *sua sponte*, or on motion of the accused or the Commonwealth's attorney, close the proceedings, provided, however, that the court shall state in writing the reasons for closing the hearing and the reasons become public record.

5. The chief judge may promulgate local rules regarding the waiver of court appearances by juveniles in traffic infractions. An emancipated juvenile has the same right as an adult to waive.

6. In custody proceedings regarding children of tender years, the court may waive the appearance of such children at any stage of the proceedings.

F. Notice of Hearings; victims' rights to be present, Va. Code § 16.1-302.1

1. In delinquency proceedings, including appeals, a victim may remain in the courtroom. The court may permit an adult chosen by a minor victim to be present in addition to or in lieu of the minor victim's parent or guardian. However, if the minor victim or the adult designated by the minor victim is a material witness, such individual may be subject to a motion for exclusion of witnesses. Va. Code §§ 19.2-265.1, -265.01.

2. The Commonwealth's attorney shall give prior notice of any proceedings and changes in scheduling to any known victim or adult chosen by a minor victim in accordance with the above procedure, at the victim's address or telephone number, or both, as provided by such person.

G. Reports of Court Officials and Employees, Va. Code § 16.1-303

All information obtained in the discharge of official duties by court officials or employees of the court is privileged and shall not be disclosed to anyone other than the judge, except if ordered to do so by the judge or the judge of a circuit court. If the information reveals commission of an offense that would be a felony if committed by an adult, there exists a duty to disclose it to the Commonwealth's attorney or police of the jurisdiction where such offense occurred.

H. Court Records, Va. Code § 16.1-305

1. All juvenile cases shall be filed separately from adult files and records of the court.

2. Social, medical and psychiatric or psychological records, reports, preliminary inquiries, predisposition studies, supervision records of children shall be filed with the other papers in the child's file.

3. Case files may be inspected and copied only by:

    a. judge, probation officers, and professional staff assigned to the juvenile courts;

    b. public or private agency representatives providing supervision or having legal custody of a child or furnishing evaluation or treatment of the child by court order or request;

    c. the attorney for any party in the case, including the Commonwealth's attorney;

    d. adult probation and parole officers (including officers of a pretrial services agency or a local community based probation services agency), preparing pre-sentence reports upon a finding of guilt in the circuit court or for preparation of a background report for the parole board;

    e. the Commonwealth's attorney and any pretrial services or probation officer preparing sentencing guideline worksheets (a confidential copy of a juvenile disposition order may be made available for their use in calculating such sentencing guidelines) Va. Code § 19.2-298.01; and

    f. The Office of the Attorney General, for all criminal justice activities otherwise permitted and for purposes of performing duties required by Chapter 9 of Title 37.2 (Civil commitment of sexually violent offenders); and

    g. any other person or entity, *by order of the court*, having a legitimate interest in the case or the work of the court.

4. The court may impose restrictions, conditions or prohibitions on the copying of those records that may be inspected.

5. Records enumerated above or information therefrom *shall* also be available to parties to the proceedings and their attorneys.

6. A licensed bail bondsman shall be entitled to know the status of a bond he has posted or provided surety on.

7. Records of a proceeding wherein a juvenile age fourteen or older at the time of the offense who is adjudicated delinquent on the basis of an act which would be a felony if committed by an adult *shall be open to the public*. The available records include the docket, petitions, motions, and other papers filed with a case, transcripts of testimony, findings, verdicts, and decrees. Social, medical and psychiatric or psychological records are not open to the public and shall be available for inspection by the persons enumerated above in paragraph 3 of this section. However, only records of the felony adjudication and subsequent adjudication are available, not prior records.

8. Attested copies of traffic records and filed papers where a juvenile is found guilty of an offense for which an abstract to Department of Motor Vehicles (DMV) is required shall be furnished to the Commonwealth's attorney upon her certification that the same is needed for evidentiary purposes only in a pending criminal, traffic, or habitual offender proceeding. Va. Code § 46.2-383.

9. Attested copies of records of an adjudication of guilt of a delinquent act that would be a felony if committed by an adult shall be furnished to the Commonwealth's attorney upon his certification that the papers are needed to prosecute a violation of Va. Code § 18.2-308.2, and are only to be used for evidentiary purposes.

10. Copies of disposition orders in delinquency actions shall, upon request, be provided to the Virginia Workers' Compensation Commission solely for purposes of determining whether to make an award to a crime victim; information therefrom shall not be disseminated or used for any other purpose, including an action under Va. Code § 19.2-368.15 (subrogation).

11. Notice of disposition in a case involving a juvenile committed to state care after adjudication for criminal sexual assault shall be provided by the court services unit or the Commonwealth's attorney to the victim (or to the parent of a minor victim) upon request. Upon written request from a victim or parent of a minor victim, the Department of Juvenile Justice shall provide the victim with notice of the offender's anticipated release from commitment. Va. Code § 16.1-305.1.

12. Electronic submission of juvenile records maintained in an electronic format by the court and authorized for inspection by Department of Juvenile Justice professional staff is permitted.

13. Within fifteen days of final disposition when a juvenile has been adjudicated delinquent or convicted of the offenses set forth in 14 below, the clerk shall forward written notice

of the disposition and the nature of the offense to the superintendent of schools where the juvenile is enrolled at the time of disposition or if the juvenile is not enrolled, where he was enrolled at the time of the commission of the offense. The superintendent's disclosure of any information so provided is controlled by the applicable provisions of Title 22. Va. Code § 16.1-305.1.

14. The offenses invoking the notice provision in 13. above, are:

    a. possession or use of a weapon (Va. Code § 18.2-279 *et seq.*)

    b. homicide (Va. Code § 18.2-31 *et seq.*)

    c. felonious assault and bodily wounding (Va. Code § 18.2-51 *et seq.*)

    d. criminal sexual assault (Va. Code § 18.2-61 *et seq.*)

    e. manufacture, sale, gift, distribution or possession of Schedule I or II controlled substances or marijuana (Va. Code § 18.2-247 *et seq.*)

    f. arson and related crimes (Va. Code § 18.2-77 *et seq.*)

    g. burglary and related crimes (Va. Code § 18.2-89 *et seq.*)

15. Petitions alleging commission of the offenses set out above immediately trigger a notice to the superintendent of schools under Virginia Code § 16.1-260. The school official receiving notice of the filing of such petitions shall immediately notify the intake officer if the juvenile is not enrolled as a public school student in his division. Contents of the petitions are not to be disclosed except as necessary to ensure safety of the juvenile, other students or school personnel. Va. Code §§ 16.1-260, -305.2.

I. Expungement of Court Records, Va. Code § 16.1-306.

1. On January 2 of each year, or some other date designated by the court, the clerk shall destroy all files, paper, and records, including electronic records, of any juvenile who has reached the age of nineteen years and five years have elapsed since the last hearing involving such juvenile, with only the following exceptions:

    a. If the file involves a traffic conviction for which a DMV abstract is required, then the records shall be destroyed when the juvenile has reached age twenty-nine. Va. Code § 46.2-383.

    b. If the juvenile was found guilty of a delinquent act that would be a felony if committed by an adult, all the records shall be retained; and

    c. If the file involves an offense that is ancillary to (i) a delinquent act that would be a felony if committed by an adult or (ii) an offense for which a DMV abstract is

required and contains findings of not innocent as to other acts, all records are to be retained for the same period as required for the felony or the offense reportable to DMV and to be open for inspection under § 16.1-305; and

d. In all cases involving sexually violent offenses as defined in § 37.2-900, and misdemeanor cases under §§ 18.2-67.4, 18.2-67.4:1, 18.2-67.4:2, 18.2-346, 18.2-347, 18.2-349, 18.2-370, 18.2-370.01, 18.2-370.1, 18.2-374, 18.2-386.1, 18.2-387 and 18.2-387.1, all documents shall be retained for 50 years. Va. Code § 16.1-69.55.C.4.

2. If found innocent of a delinquency action or a traffic proceeding, or if the action or proceeding was otherwise dismissed, a juvenile may file a motion for destruction of all records of the such charge. Notice of the filing of the motion shall be given to the Commonwealth's attorney. The court shall grant the motion, except for good cause shown why the destruction should not occur.

3. Notice of the rights of expungement shall be given at the time of the juvenile's disposition hearing.

4. Upon destruction, the violation of law shall be treated as if it never occurred. All index references shall be deleted; court and law-enforcement persons or agencies and the person may reply to inquiry that no record exists.

5. All docket sheets shall be destroyed in the sixth year after the last hearing recorded on such sheet.

J. Retention and Destruction of Adult Records, Va. Code §§ 16.1-69.55, 16.1-69.57

1. All adult misdemeanor and traffic files shall be retained for 10 years, including cases sealed in expungement proceedings, except for (a) misdemeanor cases under § 16.1-253.2 or § 18.2-57.2, which shall be retained for 20 years, and (b) sexually violent offenses as defined in § 37.2-900, and misdemeanor cases under §§ 18.2-67.4, 18.2-67.4:1, 18.2-67.4:2, 18.2-346, 18.2-347, 18.2-349, 18.2-370, 18.2-370.01, 18.2-374, 18.2-386.1, 18.2-387 and 18.2-387.1, which shall be retained for 50 years. Documents in misdemeanor and traffic cases for which an appeal has been filed shall be filed with the Circuit Court.

2. In all cases involving support arising under Titles 16.1, 20 or 63.2, all documents shall be retained until the last juvenile involved has reached 19 years of age, and 10 years have elapsed since the dismissal or termination of the case by court order or by operation of the law.

3. When the retention period for a case has passed, the clerk shall destroy the court records. Va. Code § 16.1-69.57.

4. The chief judge of the court can direct the clerk to destroy papers and documents pertaining to civil or criminal cases that have ended for a period of three years or longer

if such records have been microfilmed or converted to an electronic format, and are deemed to no longer have any administrative, fiscal, historical or legal value. The microfilm or other electronic storage must meet state standards, as described in this statute, and this will destruction discretion will not apply to misdemeanors required to be retained for 50 years, as described above.

K. Circuit Court Records of Juveniles, Va. Code § 16.1-307

1. In circuit court proceedings where that court deals with a juvenile in the same manner as a juvenile court case, the clerk shall preserve all records of the proceedings separate from other files and court records. The files and records shall be open to inspection and subject to expungement as in the juvenile court.

2. Where the circuit court proceeding involves a juvenile age fourteen or older who is adjudicated delinquent of an act that would be a felony if committed by an adult or convicted of a felony in circuit court, any court records (other than those specified in § 16.1-305 (A)) regarding that adjudication or conviction and any subsequent adjudication or conviction shall be treated as adult criminal records.

L. Effect of Adjudication on Status of Child, Va. Code § 16.1-308

A finding of guilt in a delinquency proceeding shall not impose on a juvenile any civil disabilities or disqualify the juvenile for employment by any state or local government agency with one exception: a juvenile convicted of a felony in circuit court where the case is disposed of as an adult criminal case.

This statute is also cited to support the general proposition that adjudication of delinquency is not synonymous with a criminal conviction, unless statutes referring to prior offenses specifically include juvenile adjudications. *Conkling v. Comm.*, 45 Va. App. 518 (2005); *United States v. Walters*, 359 F.3d 340 (4th Cir. 2004).

However, this section does not prohibit the State Police or a police or sheriff's department from denying employment to a person adjudicated as a juvenile, provided the denial is based on the nature and gravity of the offense, the time since adjudication and the completion of any sentence, and the nature of the job sought.

M. Penalty

1. It is a Class 3 misdemeanor for a person to violate the confidentiality provisions of Title 16.1. Va. Code § 16.1-309.

2. The penalty is not applicable where a law-enforcement officer or school employee discloses to school personnel identifying information regarding a juvenile

    a. who is alleged to have committed an act which meets the reporting criteria of Virginia Code § 16.1-260;

b. on school property or to or from a school activity;

c. if disclosure is made to enable school disciplinary action or to take appropriate actions within the school setting regarding the juvenile or any other student.

N. Confidentiality Exceptions, Va. Code § 16.1-309.1

1. Where public interest so requires, the judge shall make available identifying information and the nature of the offense of a juvenile adjudicated delinquent for:

   a. an act that would be a Class 1, 2, or 3 felony;

   b. forcible rape;

   c. robbery or burglary or related offense; or

   d. any case where the juvenile is sentenced as an adult in circuit court.

2. Prior to disposition, where a juvenile charged with a delinquent act which would constitute a felony, if committed by an adult, or held in custody by law-enforcement or in a secure facility pursuant to such charge, becomes a fugitive, upon petition by the Commonwealth's attorney, the Department of Juvenile Justice, or the court services unit, with notice to the Commonwealth's attorney and the juvenile's attorney of record, and a showing of good cause the court shall order release of identifying information which may expedite apprehension.

3. Prior to disposition, if a juvenile charged with a delinquent act which would constitute a misdemeanor, if committed by an adult, or held in custody by law-enforcement or in a secure facility pursuant to such charge, becomes a fugitive from justice, the Commonwealth's attorney may, with notice to the juvenile's attorney of record, petition the court to authorize public release of the juvenile's name, age, description and photograph, the charge for which he is sought, and any other information which may expedite apprehension. The court may order such disclosure upon a showing the juvenile is a fugitive and for good cause. If the juvenile becomes a fugitive at a time when court is not in session, the Commonwealth's attorney may authorize the same release of information, with notice to the juvenile's attorney of record.

4. If, after disposition, a juvenile found to have committed a delinquent act or committed to DJJ pursuant to Virginia Code §§ 16.1-278.8 or 16.1-285.1 becomes a fugitive or escapes from custody, DJJ may release identifying information that may expedite apprehension.

5. Upon request of a victim as defined in Virginia Code § 19.2-11.01 of an act that would be a felony or that would be a misdemeanor violation of §§ 16.1-253.2, 18.2-57, 18.2-57.2, 18.2-60.3, 18.2-67.4, or 18.2-67.5 if committed by an adult, the court *may* order that the

victim be informed of the charges brought, the findings of the court, and the disposition of the case.

6. Upon request, the judge or clerk *may* disclose entry of an order of emancipation, provided the same has not been appealed, terminated or judicially determined to be void *ab initio*.

7. Any court order imposing a curfew or similar restriction may be provided to the chief law-enforcement officer of the jurisdiction where the juvenile resides. However, the chief law-enforcement officer may only discuss the contents of any such order with officers engaged in "official duties."

8. There are other times the judge *may* release under § 16.1-309.1(C): felony involving a weapon; violation of any section in Article 2, Chapter 4 of 18.2; felony violation of Article 1, Chapter 7 of Title 18.2. Whenever a juvenile aged fourteen or older is charged with a delinquent act that is an "act of violence" as set forth in § 19.2-297.1, the court *may*, where public interest requires, release to the public identifying information regarding such juvenile.

9. For the protection of public safety, DJJ or court services shall release information of gang involvement or gang-related activity by a juvenile identified as gang-affiliated or related to a specific criminal act to State Police, local police or sheriff's department.

10. An intake officer shall report to the Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security any juvenile who is held in a secure facility for a violent juvenile felony and who the officer has probable cause to believe is in the United States illegally.

Chapter 6. Closed-Circuit Television Testimony

I. GENERAL CONSIDERATIONS

Any ruling on the child's unavailability to testify in open court in the presence of the defendant shall be supported with written findings that are specific to the case, for any of the reasons recited in §§ 18.2-67.9 and 63.2-1521. The constitutionality of limiting the Confrontation Clause of the Sixth Amendment in certain cases was upheld in *Maryland v. Craig*, 110 S. Ct. 3157 (1990). The constitutionality of the procedure for closed-circuit, two-way testimony in Virginia was upheld in *Johnson v. Commonwealth*, 40 Va. App. 605, 580 S.E.2d 486 (2003).

II. CRIMINAL CASES

A. Permissible Cases

Closed-circuit, two-way testimony may be permitted in any criminal proceeding, including preliminary hearings, involving an alleged offense against a child, relating to a violation of the laws pertaining to kidnapping (§ 18.2-47 et seq.), criminal sexual assault (§ 18.2-61 et seq.) or family offenses pursuant to Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2, or involving an alleged murder of a person of any age, to take the testimony of a victim who was fourteen years of age or younger at the time of the offense, and is sixteen years of age or under at the time of the trial, or of a witness who is fourteen years of age or under at the time of the trial. Va. Code § 18.2-67.9(A).

B. Pre-Trial Requirements

1. The prosecution or defense must ask the court for an order allowing for the use of closed-circuit television at least seven days before the trial date or preliminary proceedings. Va. Code § 18.2-67.9(A).

2. The court must find that the child is unavailable to testify for any of the following reasons:

    a. The child's persistent refusal to testify despite judicial requests to do so;

    b. The child's substantial inability to communicate about the offense; or

    c. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.

    These findings and the Court's ruling must be documented in writing by the Court. Va. Code § 18.2-67.9(B).

3. Illustrative Cases

   a. Defendant appealed his conviction for various sex crimes against children. Court of Appeals affirmed trial court ruling and held that the testimony and demeanor of the child witnesses showed an inability to communicate about the offense, thereby permitting them to testify via closed circuit television. *Civitello v. Commonwealth*, No. 1963-01-2, 2003 Va. App. LEXIS 2 (Ct. of Appeals Jan. 7, 2003).

   b. Defendant appealed his conviction for a sex crime against a child. Court of Appeals held the following: (1) the evidence supported a finding that the child would suffer emotional trauma if she testified in open court and (2) under the closed circuit statute, the child qualified as "unavailable". As a result, the child witness could testify via closed circuit television. *Parrish v. Commonwealth*, 38 Va. App. 607, 567 S.E.2d 576, 2002 Va. App. LEXIS 487 (2002).

4. The requesting party should contact the State Police, or their local Department of Information Technology, in writing to request the service.

C. Presence During Trial

1. The Commonwealth's attorney and defense attorney shall be present with the child, as well as persons the court deems necessary for the well-being and welfare of the child. Va. Code § 18.2-67.9(C).

2. Individuals needed to operate the closed-circuit television equipment may also be present.

3. The child shall be subject to direct and cross-examination.

D. Permitted Communication During Trial

The defendant shall be provided with a means of private, contemporaneous communication with defense counsel during the testimony. Va. Code § 18.2-67.9(D). This is typically provided in the form of a telephone direct line between the room where the child-witness is testifying and the courtroom.

E. Costs

None of the cost of the two-way closed circuit television shall be assessed against the defendant. Va. Code § 18.2-67.9(E).

III. CIVIL CASES

A. Permissible Cases

Closed-circuit two-way testimony may be permitted in a civil proceeding involving alleged abuse or neglect of a child to take the testimony of child victim who was under fourteen years of age on the date of the alleged offense and is under sixteen years of age at the time of trial or of a child witness who is under fourteen years of age at the time of trial. Va. Code § 16.1-252; § 63.2-1521.

B. Pre-Trial Requirements

1. The procedures for obtaining permission to use closed circuit two-way testimony are the same as those provided for criminal cases in Va. Code § 18.2-67.9, discussed above, except for preliminary removal hearings. Va. Code § 63.2-1521(A), (B) and (C).

2. For preliminary removal hearings, the child's attorney, guardian *ad litem*, or the local department of social services' representative (if the child has been committed to the custody of the local department) must ask the court for an order permitting the use of closed-circuit television at least forty-eight hours prior to the hearing, unless the court, for good cause shown, allows the application to be made at a later time. Va. Code § 16.1-252(D).

3. In all other civil proceedings, the seven-day rule is applicable.

C. Presence during Trial

The attorney for the child, guardian *ad litem*, defendant's attorney, or representative of the local department of social services (if the child has been committed to the custody of the local department) shall be present with the child, as well as those persons necessary to operate the equipment and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child. Va. Code § 63.2-1521(D).

D. Permitted Communication during Trial

The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony. Va. Code § 63.2-1521(E).

IV. OBTAINING CLOSED-CIRCUIT EQUIPMENT

The Virginia State Police have a Technical Support Unit that can install and operate the closed circuit equipment. When a court order for two-way testimony has been entered, call (804) 674-2669 to advise of the initial request, or concerning cancellations or rescheduling. The call needs to be followed by a written request on the Request for

Closed-Circuit Equipment form, with a copy of the court order, sent to the Technical Support Unit of the Virginia State Police Bureau of Criminal Investigations. Requests are serviced on a first-come, first-served basis. Installation will not be scheduled until the court order is entered. The request for service should be sent to:

Department of State Police
Bureau of Criminal Investigation
Criminal Intelligence Division
P.O. Box 27472
Richmond, VA 23261

When time is critical, requests can be faxed to: (804) 674-2198.

The request form and motion may not be e-mailed.

V. MISCELLANEOUS

A. Determination of Bail and Legal Representation

If two-way electronic video and audio communication is available for a hearing to determine bail or to determine representation by counsel, the district court shall use such communication in any such proceeding that would otherwise require the transportation of a person from outside the jurisdiction of the court in order to appear in person before the court. Va. Code § 19.2-3.1(A).

B. JUVENILE DELINQUENCY PROCEEDINGS

Chapter 1. Delinquency Proceedings In General

I. DEFINITIONS

A. Delinquent Act

Means a crime under federal, state, or local law, including a violation of Va. Code § 18.2-308.7 *or* a violation of a court order as provided for in Va. Code § 16.1-292. Refusal to take a blood or breath test is also a delinquent act. Va. Code §§ 16.1-228, -292; 18.2-308.7.

B. A Delinquent

Means a child who has committed a delinquent act OR an adult who has committed a delinquent act before his or her 18th birthday, except where the jurisdiction of the juvenile court has been terminated under the provisions of Va. Code § 16.1-269.6. The ages referred to in Title 16.1 mean age at the time of offense. Va. Code §§ 16.1-269.6, -241, -228.

C. Violent Juvenile Felony

Murder, felonious injury by mob, abduction, malicious wounding, felonious poisoning, adulteration of products, robbery, carjacking, rape, forcible sodomy, or object sexual penetration when committed by a juvenile 14 years or older. Additionally, possession of a controlled substance, methamphetamine, or anabolic steroids with the intent to distribute, if the juvenile has been adjudicated delinquent on two or more occasions provided that adjudication was after 14 years of age. *See* Va. Code §§ 16.1-269.1(B), (C), -228.

II. JURISDICTION

A. Over Juveniles

Exclusive to J&DR district courts in all cases, but limited to preliminary hearings for *violent juvenile felony* cases. If the juvenile court certifies the charge to a grand jury, the juvenile court will be divested of jurisdiction over the violent juvenile felony charge *and* any ancillary charge arising from the same set of events as the *violent juvenile felony*. *See* Va. Code §§ 16.1-241; 16.1-269.1; *Hughes v. Com.*, 39 Va. App. 448, 459, 573 S.E.2d 324, 329 (2002).

B. Over Adults

When the adults are guardians, legal custodians, or *in loco parentis* of any child who has been abused or neglected, adjudicated in need of services, in need of supervision, or delinquent. Va. Code § 16.1-241(F).

III. VENUE

A. Adjudication

In the city or county where the delinquent acts occurred or may, with the *written* consent of the child and the attorney for the Commonwealth *for both jurisdictions,* be commenced in the city or county where the child resides. Va. Code § 16.1-243(A)(1)(a).

B. Disposition

Where adjudication occurred OR may be transferred to the city or county where the child resides. Va. Code §§ 16.1-243(A)(1)(a) and (B)(1).

C. Transfer of Supervision

After disposition, the court may transfer a case to another jurisdiction for supervision when the person on probation moves into that jurisdiction. Va. Code § 16.1-295.

IV. THE ROLE OF INTAKE

A. Petitions: The Rule

Generally, all delinquency matters must be commenced by the filing of a petition with intake *or* the Commonwealth's attorney may file a petition directly with the clerk. The form and content of the petition shall comport to § 16.1-262. Va. Code §§ 16.1-259 (adult offenders), -260.

B. Exceptions To The Rule

The filing of a petition is not necessary for: traffic violations (including offenses involving bicycles, hitchhiking and other pedestrian offenses), game and fish laws, alcohol-related offenses, curfew violations, animal control violations, violations of any city ordinance regulating surfing or littering violations. A petition is also not necessary for Class 3 and Class 4 misdemeanors (unless the court so directs, and a copy of the summons is mailed by the police officer to the juvenile's parent or guardian within five days of issuance.) Va. Code §§ 16.1-260(H); 18.2-266; 29.1-738.

C. Appearance Before An Intake Officer

Must be in person *or* by two-way electronic video and audio communication (*see* Va. Code § 19.2-3.1(B) for standards). If two-way electronic video and audio communication is available for use by a district court for the conduct of a hearing to determine bail or to determine representation by counsel, the court shall use such communication in any such proceeding that would otherwise require the transportation of a person from outside the jurisdiction of the court in order to appear in person before the court. The court has the same authority during video proceedings that it has when a person is present. Va. Code § 19.2-3.1.

D. Diversion

May be used at the discretion of the court service unit, without the filing of a petition, so long as a *violent juvenile felony* is not alleged or the juvenile has not previously been proceeded against informally or adjudicated delinquent for an offense that would be a felony if committed by an adult. Va. Code §§ 16.1-241, -260.

Marijuana Diversion

When a violation of § 18.2-250.1 is charged by summons, the juvenile shall be entitled to have the charge referred to intake. When the alleged summons is served, the officer **shall also serve upon the juvenile written notice of the right to have the charge referred to intake** on an approved form and make return of such service to the court. *If the officer fails to make such service or return*, the **court shall dismiss** the summons without prejudice.

E. Refusals and Appeals

Refusal by intake to authorize the filing of a petition is appropriate when probable cause is lacking. A refusal may be appealed by applying to the magistrate for a warrant only if the alleged offense is as least as serious as a Class 1 misdemeanor. If the magistrate issues a warrant, intake shall accept and file a petition founded upon a warrant. Va. Code § 16.1-260(E).

F. Notice Of Felonies

Intake must notify the attorney for the Commonwealth if a juvenile petition alleges a felony offense. Va. Code § 16.1-260(F). Intake must also notify the superintendent of schools in certain felony, drug-related, or gang-related cases. Va. Code § 16.1-260(G).

V. ARREST, DETENTION AND SHELTER CARE

A. The General Rule

No child may be taken into custody without a warrant from a magistrate, or a detention order from a judge, an intake officer, or a clerk when authorized by a judge. Va. Code § 16.1-246(A).

B. Exceptions to the General Rule

Va. Code § 16.1-246

1. Child alleged to be in need of services or supervision, but only when custody is necessary to protect the child from a clear and substantial danger to life or health or secure the child's appearance in court. Va. Code § 16.1-246(B).

2. Where the child committed a crime in the presence of the arresting police officer and the officer believes that taking the child into custody is necessary to protect the public interest. Va. Code § 16.1-246(C).

3. When an officer has probable cause to believe that the juvenile has committed a felony offense, has run away from home or run away from the Department of Juvenile Justice or the Department of Social Services, or is in danger and without any discernible adult supervision; Va. Code § 16.1-246(D)-(G).

4. When the juvenile has committed a misdemeanor offense of assault and battery, shoplifting, or carrying a weapon onto school property and, even though the offense was not committed in the presence of the arresting officer, there is probable cause based on the reasonable complaint of an observer. Va. Code § 16.1-246(C)(1); *see also* Va. Code § 18.2-308.1.

5. When a child is believed to be in need of inpatient mental illness treatment. Va. Code §§ 16.1-246(H), -340.

C. When Court Is Open

Pursuant to Va. Code § 16.1-247, any juvenile in custody must be brought before the judge or intake officer in the most expeditious manner or released to the parent, guardian, custodian, or person *in loco parentis* with either

1. oral counsel and a warning, or

2. a promise to bring the child to court when directed.

D. When Court Is Closed

Va. Code § 16.1-247(D)-(G)

A juvenile in custody must be:

1. released to a parent, etc., as in C., above;
2. held in a detention home or in shelter care;
3. released on bail or recognizance pursuant to Va. Code § 19.2-119; or
4. held in jail pursuant to Va. Code § 16.1-249.

VI. PLACES OF CONFINEMENT FOR JUVENILES

A. Pending A Court Hearing

Va. Code § 16.1-249(A)

Before a court hearing, a juvenile may be housed or detained in

1. an approved foster home;
2. a facility operated by a licensed child welfare agency;
3. if the juvenile is alleged delinquent, a detention home or group home approved by the Department of Juvenile Justice;
4. a "suitable place" designated and approved by both the court and the Department of Juvenile Justice; or
5. a separate juvenile detention facility located on the site of an adult regional jail facility approved by the Department of Juvenile Justice and permitted by federal law. Va. Code § 16.1-249(A).

B. Confinement in Jail

No juvenile shall be detained or confined in any jail or other facility for the detention of adult offenders or persons charged with a crime *except:*

1. when the juvenile's case has been transferred or certified to circuit court in accordance with the transfer/certification statute and the court determines that the juvenile is a threat to the security or safety of other juveniles or the staff of the facility (Va. Code § 16.1-249(D)); or

2. when a profoundly dangerous or disruptive juvenile must be transferred to an adult facility, as a safety or security measure, with court approval, in accordance with the specific requirements of Va. Code § 16.1-249(E), (F); or

3. when a juvenile fourteen or older is charged with a felony or a Class I misdemeanor and secure detention is needed for the safety of the juvenile or the community (limited to six hours before and after court). Va. Code § 16.1-249(G); or

4. if the child is eighteen and is being held pre-disposition for an offense other than violating the terms and conditions of confinement in a juvenile correctional facility. Va. Code § 16.1-249(H).

VII. THE DETENTION HEARING

A. When and How Juvenile Must Appear

After being taken into custody, the juvenile must appear before a judge within the county or city the charge is pending the next day that the court sits. In the event the court does not sit the following day, the juvenile shall appear before a judge within a reasonable time, not to exceed 72 hours. The court may conduct the hearing in another county or city, but only if two-way electronic video and audio communication is available, with pertinent documents (petitions, waivers, etc.) served and received by fax. Va. Code § 16.1-250(A).

B. Extensions

If the seventy-two hours expires on a Saturday, Sunday, or legal holiday, the deadline extends to the next day which is not a Saturday, Sunday, or legal holiday. Va. Code § 16.1-250(A).

C. Notice

Oral or written notice must be given to the child if 12 years of age or older, to the child's attorney, to the Commonwealth's attorney and to the juvenile's parent, guardian, custodian, or person *in loco parentis*. Va. Code § 16.1-250(C).

D. Right to Counsel

The judge must appoint counsel prior to the detention hearing. The child is presumed indigent for purposes of appointment of counsel for the detention hearing. The judge must advise the juvenile of the right to remain silent. Va. Code §§ 16.1-266(B), 16.1-250(D).

E. Purpose of the Hearing

The purpose of the hearing is to determine whether there is probable cause that the child committed the delinquent act alleged and whether it is necessary to hold or restrain the juvenile. Va. Code § 16.1-250(E).

F. Review

If the juvenile was not released and if the juvenile's parent/guardian did not have notice to appear at the hearing, an immediate review as a matter of right may be requested by defense counsel or the parent/guardian. Va. Code § 16.1-250(H).

VIII. APPOINTMENT OF COUNSEL

A. Advisement (Arraignment)

Prior to any detention review, adjudicatory hearing, or transfer hearing, the juvenile and his or her parents or guardian must be informed of the right to counsel by either the court, the clerk, or a probation officer. The advice should include an explanation of the parents' liability for the cost of legal services. Va. Code §§ 16.1-266, -267.

The court must appoint an attorney to represent the child for a detention hearing unless the child has retained counsel. Va. Code § 16.1-266(B).

B. When the Juvenile is Indigent

If the juvenile is indigent, as defined in Va. Code § 19.2-159, and the right to counsel is not waived, then counsel must be appointed. Va. Code § 16.1-266(B).

C. Waiver

Counsel may be waived with consent of the parent, guardian, or other person standing in loco parentis if the interest of the juvenile and the guardian is not adverse and a written waiver is completed. The Court must find that any such waiver is consistent with the interests of the child. Code § 16.1-266(C); Form DC-515. A child charged with a felony must consult with an attorney, either retained or appointed, before he or she may waive the right to counsel. Va. Code § 16.1-266(C)(3).

D. Cost

The cost of appointed counsel may be assessed, in whole or in part, against a parent or guardian, based upon the ability to pay. Va. Code § 16.1-267.

IX. TIME LIMITATIONS

A. Secure Detention

A maximum of twenty-one (21) days from the date first detained to the adjudication or transfer hearing; thirty days from the date of the adjudication to the date of the disposition hearing. Va. Code § 16.1-277.1(A), (C).

B. Before Adjudicatory or Transfer/Certification Hearing

An adjudicatory or transfer/certification hearing shall be held within 120 days from the date the petition is filed if juvenile is not held in secure detention. Va. Code § 16.1-277.1(B).

C. Tolling of Time Limitations

Limitations must be tolled during any period when the whereabouts of the child are unknown, the child has escaped from custody, or the child has failed to appear pursuant to a court order. Va. Code § 16.1-277.1(D).

D. Extensions

Time limitations may be extended by the court for a reasonable time for good cause shown. The extension must be acknowledged and explained in the court's record. Va. Code § 16.1-277.1(D).

X. SOCIAL HISTORIES AND VICTIM IMPACT STATEMENTS

A. Social History Report

This report is prepared by the court services unit after adjudication and before disposition. The report may, and for the purposes of commitment to DJJ under A14 and A17 of § 16.1-278.8 shall, include a social history of the physical, mental, and social conditions of the juvenile, including an assessment of any affiliation with a criminal street gang as defined in Va. Code § 18.2-46.1, and the facts and circumstances of the alleged delinquent acts along with the personality of the child. The results of a drug screening must also be included. Va. Code §§ 16.1-273, -278.7.

B. Additional Subjects

These may be investigated and reported upon, and the Court may order additional inquiries such as psychological evaluations, physical examinations and evaluations of substance abuse or learning disabilities.

C. Victim Impact Statement

A victim impact statement shall be included if the Commonwealth moves for same and the victim consents. Also, the court may order a statement *sua sponte* in accordance with § 19.2-299.1 if the court determines the victim may have suffered significant harm as a result of the violation of law. Va. Code § 16.1-273(B).

D. Filing the Report

The social history report must be filed and copies furnished to all attorneys representing parties seventy-two hours before the disposition hearing. The report may be amended. It may not be copied, and the attorneys must turn their copies in to the clerk after disposition. Va. Code § 16.1-274(A).

XI. REVOCATION OR MODIFICATION OF PROBATION OR PAROLE

A. Commencement of the Proceeding

The proceeding is commenced by a petition which must state the terms of parole, probation, or other supervision and when the individual or juvenile was placed on those terms. It must also include the nature of the violation and any facts that support a showing of that violation. Va. Code § 16.1-291(A).

B. Procedural Safeguards, Due Process

There is no constitutional requirement that a court apply a reasonable doubt standard or exclude hearsay evidence in a juvenile revocation proceeding. *See Commonwealth v. Pannell*, 263 Va. 497 (2002).

C. Juvenile Found in Violation

If the juvenile is found to have violated parole or the terms of a probation order, the court may modify or extend the terms, including termination of parole/probation and order any disposition which could have been imposed originally. Va. Code § 16.1-291(B).

XII. APPEALS

A. From the Final Order

Appeals can be taken from any final order, but must be taken to the circuit court within ten days of entry of final judgment and shall be heard *de novo*. For example, appeal is not possible for an adjudication of guilt until after final disposition. Va. Code §§ 16.1-278.8, -278.9, -296(A).

B. When Order is Suspended

The juvenile court order is suspended by the taking of an appeal in a number of instances, including fines, restitution, suspension of driver's license, traffic violations, commitments to the Department of Juvenile Justice, and when the person is sentenced as an adult. Va. Code §§ 16.1-278.8, -298(B).

XIII. DNA SAMPLES

A. Juveniles Adjudicated Guilty

A DNA sample of blood, saliva, or tissue must be taken from every juvenile convicted or adjudicated guilty of a felony level offense. Va. Code §§ 16.1-299.1; 19.2-310.3.

B. Commitment to the Department of Juvenile Justice

Juveniles committed to DJJ have their sample drawn by DJJ. Va. Code §§ 19.2-310.2, -310.3.

Chapter 2. Dispositions

I. GENERAL DELINQUENCY

A. Dispositional Options

Under Virginia Code § 16.1-278.8, if a juvenile is found to be delinquent, except when such finding involves a refusal to take a blood or breath test in violation of the implied consent as set forth in § 18.2-268.2 or a similar ordinance, the juvenile court may make any of the following dispositions:

1. Enter an order pursuant to Code § 16.1-278;

2. Permit juvenile to remain with his parent subject to such conditions as court may order;

3. Order parent of juvenile living with him to participate in programs, cooperate in treatment, or be subject to such conditions and limitations as the court may order for the rehabilitation of juvenile and parent;

4. Defer disposition for a specific period of time established by the court with due regard for the gravity of the offense and the juvenile's history, after which time the charge may be dismissed by the judge if the juvenile exhibits good behavior;

    a. Provides for attendance at Boot Camp, however, this option is not available at this time.

5. Without entering a judgment of guilty and with the consent of the juvenile and his attorney, defer disposition of the charge for a period of time established by the court with due regard for the gravity of the offense and the juvenile's history and place the juvenile on probation under such conditions and limitations as the court may prescribe. Upon fulfillment of the terms and conditions, the court shall discharge the juvenile and dismiss the proceedings against him. Discharge and dismissal shall be without an adjudication of guilt.

6. Order the parent of a juvenile with whom the juvenile does not reside to participate in such programs, cooperate in such treatment, or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the juvenile where the court determines that this participation will be in the best interests of the juvenile and the other parties concerned and where it is reasonable to expect the parent to be able to comply.

7. Place the juvenile on probation under such conditions and limitations as the court may prescribe.

    a. Place a juvenile on probation and order treatment for the abuse or dependence on alcohol or drugs in a program licensed by the Department of Behavioral Health

and Developmental Services for the treatment of juveniles for substance abuse provided that:

(i) the juvenile has received a substance abuse screening and assessment pursuant to Code § 16.1-273 that indicates a correlation between substance abuse and the commission of the offense and that the child is in need of treatment,

(ii) the juvenile has no prior or current conviction for a violent felony, and

(iii) such facility is available.

The court shall review such placements at 30-day intervals.

8. Impose a fine not to exceed $500 upon such juvenile.

9. Suspend the motor vehicle and driver's license of such juvenile or impose a curfew on the juvenile as to the hours during which he may operate a motor vehicle. Should the Court impose a curfew, the juvenile is required to surrender his driver's license to the court to be held in the physical custody of the court during any period of curfew restriction. The Court shall send an abstract of any order issued to DMV as set forth in § 16.1-278.8(A)(9):

   a. court may refer any juvenile whose license has been suspended to be assessed for appropriate services, upon such terms and conditions as court may order.

   b. court may, upon a demonstration of hardship, authorize the use of a restricted permit by any juvenile who enters such program for any of the purposes set forth in subsection E of § 18.2-271.1 or for travel to and from school. (*See* Loss of License Chapter for restricted license to travel to and from school.) A copy of the court order, upon which shall be noted all curfew restrictions, shall be provided to the juvenile and shall contain such information regarding the juvenile as is reasonably necessary to identify him. The juvenile may operate a motor vehicle under the court order in accordance with its terms.

10. Require the juvenile to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense. For certain offenses, restitution order is mandatory. Virginia Code § 16.1-278.8(B) requires at least partial restitution or reparation for any property damage, for loss caused by the offense, or for actual medical expenses incurred by the victim as a result of the offense in charges under §§ 18.2-51, 18.2-51.1, 18.2-52, 18.2-53, 18.2-55, 18.2-56, 18.2-57, 18.2-57.2, 18.2-121, 18.2-127, 18.2-128, 18.2-137, 18.2-138, 18.2-146, or 18.2-147 or for any violation of a local ordinance adopted pursuant to § 15.2-1812.2. The court shall further require the juvenile to participate in community service project under such conditions as the court prescribes.

11. Require the juvenile to participate in a public service project.

12. In the case of traffic violations, impose only those penalties which are authorized to be imposed on adults for such violations. However, for those violations punishable by confinement if convicted by an adult, confinement shall be imposed only as authorized by Title 16.1.

13. Transfer legal custody to any of the following:

    a. a relative or other individual who, after study, is found by the court to be qualified to receive and care for the juvenile;

    b. a child welfare agency, private organization, or facility that is licensed or otherwise authorized by law to receive and provide care for such a juvenile. The court shall not transfer legal custody of a delinquent juvenile to an agency, organization or facility outside of the Commonwealth without the approval of the Director; or

    c. the local board of social services of the county or city in which the court has jurisdiction or, in the court's discretion, to the local board of the county or city in which the juvenile has residence. Must give reasonable notice to the local board and provide them an opportunity to be heard. However, in an emergency in the county or city in which the court has jurisdiction, such local board may be required to temporarily accept a juvenile for a period not to exceed 14 days without prior notice or an opportunity to be heard if the judge entering the placement order describes the emergency and the need for such temporary placement in the order. The board to which the juvenile is committed shall have the final authority to determine the appropriate placement for the juvenile. Any order authorizing placement of custody with any local board may be entered only upon a finding by the court that reasonable efforts have been made to prevent removal from the home and that continued placement in the home would be contrary to the welfare of the juvenile and the order shall so state.

14. Commit the juvenile to the Department of Juvenile Justice, but only if he is eleven years of age or older, and after consideration of an investigation and report prepared by a court services officer, unless waived by mutual agreement between the Commonwealth , the juvenile and his legal representative, and the current offense is:

    a. an offense which would be a felony if committed by an adult;

    b. an offense which would be a Class 1 misdemeanor if committed by an adult and the juvenile has previously been found delinquent based on an offense which would be a felony if committed by an adult; or

    c. an offense which would be a Class 1 misdemeanor if committed by an adult and the juvenile has at least three prior Class 1 misdemeanor adjudications and each such offense was not a part of a common act, transaction or scheme.

15. For an adult who is being sentenced for an offense which was committed while he was a juvenile, impose the penalty authorized by Virginia Code § 16.1-284.

    Order the juvenile to be confined in a secure facility for juveniles as authorized by Virginia Code § 16.1-284.1.

16. Commit the juvenile as a serious offender as authorized by Virginia Code § 16.1-285.1.

17. Impose the penalty authorized by Virginia Code § 16.1-278.9. (*See* chapter on loss of driving privileges for juveniles convicted of alcohol, firearm, and driving offenses.)

18. Require juvenile to participate in a gang-activity prevention program when the juvenile has been found delinquent of any of the following violations: Virginia Code §§ 18.2-51, 18.2-51.1, 18.2-52, 18.2-53, 18.2-55, 18.2-56, 18.2-57, 18.2-57.2, 18.2-121, 18.2-127, 18.2-128, 18.2-137, 18.2-138, 18.2-146, or 18.2-147 or any violation of a local ordinance adopted pursuant to § 15.2-1812.2.

II. DISPOSITION OF ADULTS FOR OFFENSES COMMITTED WHILE A JUVENILE

A. General

Applies to the dispositional hearing of any adult who is before the court after having been found guilty of an offense which was committed as a juvenile. Va. Code § 16.1-284.

B. Specifics of Statute

1. In order for this section to apply, conviction must have been for an offense which would have been a crime if committed by an adult.

2. Virginia Code § 16.1-284 authorizes the court to impose the same penalties an adult could receive (including jail time) for each offense, 36 continuous months, and the total fine shall not exceed $2,500. In the alternative, the court may order disposition as provided in subdivision 4, 5, 7, 11, 12, or 14 of Va. Code § 16.1-278.8, as above.

3. A person sentenced to jail pursuant to this section shall be entitled to good time credit as authorized by Va. Code § 53.1-116.

III. PLACEMENT IN SECURE LOCAL JUVENILE FACILITY

A. General

1. Virginia Code § 16.1-284.1 creates two categories of offenders for whom two separate dispositional options exist. The first limits the period of incarceration in a secure local facility to thirty days and the second can be for a maximum of six months.

2. Both categories apply to juveniles fourteen or older who have been found to have committed an offense which if committed by an adult would be punishable by confinement in a state or local correctional facility.

3. The Court must determine (i) that the juvenile has not previously been and is not currently adjudicated delinquent of a violent felony or found guilty of a violent juvenile felony, (ii) that the juvenile has not been released from the custody of the Department within the previous eighteen months, (iii) that the interests of the juvenile and the community require that the juvenile be placed under legal restraint or discipline, and (iv) that other placements authorized by this title will not serve the best interests of the juvenile.

4. A juvenile confined under this section must be in a facility which is in compliance with standards established by the state board for such placements. Va. Code § 16.1-284.1(D).

B. Thirty-Day Placement

A juvenile who meets the criteria set forth above may be confined in a detention home or other secure facility for juveniles for a period not to exceed thirty calendar days from the date of disposition. Va. Code § 16.1-284.1(A).

C. Six-Month Placement

A juvenile who meets the criteria set forth above and below may be confined in a detention home or other secure facility for juveniles for a period not to exceed six months from the date of disposition for a single offense or multiple offenses, or up to twelve months if the offense resulted in the death of any person Va. Code § 16.1-284.1(A).

1. Criteria:

    a. prior to order of confinement in excess of thirty days, an assessment of the appropriateness of the placement must be completed by the secure facility;

    b. in order for the juvenile to be placed in a secure local facility for more than thirty days, the court is required to commit the juvenile to the Department of Juvenile Justice if he is eligible pursuant to subdivision A14 of Virginia Code § 16.1-278.8, to suspend that commitment, and to condition the suspension on the condition that the juvenile participate in one or more community or facility based

treatment programs as may be appropriate for the juvenile's rehabilitation. Va. Code § 16.1-284.1(B).

D. Review Hearings
Va. Code § 16.1-284.1(C)

1. Required for periods of confinement that exceed thirty days. The Court shall conduct a mandatory review hearing at least once during each thirty days and at such other times upon the request of the juvenile's probation officer, for good cause shown.

2. If it appears that the purpose of the confinement has been achieved, the juvenile shall be released on probation for such period and under such conditions as the court may specify and remain subject to the order suspending the commitment to the Department of Juvenile Justice.

3. If the child is subject to a suspended commitment and if the court determines at the first or any subsequent review hearing that the juvenile is consistently failing to comply with the conditions specified by the court or the policies and requirements of the facility, the court shall order that the juvenile be committed to the Department of Juvenile Justice.

4. If the court determines at the first or any subsequent review hearing that the juvenile is not actively involved in any community facility based treatment program through no fault of his own, then the court shall order that the juvenile be released under such conditions as the court may specify subject to the suspended commitment.

IV. SERIOUS OFFENDERS

A. General Applicability

1. Juvenile fourteen years or older (Va. Code § 16.1-285.1).

2. Found guilty of an offense which would be a felony if committed by an adult and:

    a. the juvenile is on parole for an offense which would be a felony if committed by an adult; or

    b. within the preceding twelve months, the juvenile was committed to the state for an offense which would be a felony if committed by an adult; or

    c. the felony offense is punishable by a term of confinement of greater than twenty years if the felony was committed by an adult; or

    d. the juvenile has previously been adjudicated delinquent for an offense which if committed by an adult would be a felony punishable by a term of confinement of twenty years or more,

and the court finds that commitment under this section is necessary to meet the rehabilitative needs of the juvenile and would serve the best interests of the community. Va. Code § 16.1-285.1(A).

B. Prior to committing any juvenile as a Serious Offender the Court must consider the following:
Va. Code § 16.1-285.1(B)

1. The juvenile's age;

2. The seriousness and number of present offenses, including:

    a. whether the offense was committed in an aggressive, violent, premeditated or willful manner;

    b. whether the offense was against persons or property, with greater weight being given to offenses against persons, especially if death or injury resulted;

    c. whether the offense involved the use of a firearm or other dangerous weapon by brandishing, displaying, threatening with or otherwise employing such weapon; and

    d. the nature of the juvenile's participation in the alleged offense.

3. The record and previous history of the juvenile in this or any other jurisdiction, including:

    a. the number and nature of previous contacts with courts;

    b. the number and nature of prior periods of probation;

    c. the number and nature of prior commitments to juvenile correctional centers;

    d. the number and nature of previous residential and community-based treatments;

    e. whether the previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury; and

    f. whether the offense is part of a repetitive pattern of similar offenses.

4. The length of stay estimated by the Department of Juvenile Justice.

The commitment order must be supported by a determination that the interests of the juvenile and community require that the juvenile be placed under legal restraint or discipline **and that the juvenile is not a proper person to receive treatment or rehabilitation through other juvenile programs or facilities.**

C. Length of Confinement

Va. Code § 16.1-285.1(C)

1. The court shall specify a period of commitment not to exceed seven years or until the juvenile's twenty-first birthday, whichever shall occur first.

2. The court may also order a period of determinate or indeterminate parole supervision to follow the commitment.

3. Total period of commitment and parole supervision shall not exceed seven years or the juvenile's twenty-first birthday, whichever occurs first.

4. No juvenile may be released at a time earlier than that specified by the court in its dispositional order except as provided for in § 16.1-285.2. Va. Code § 16.1-285.1(F).

5. The Department of Juvenile Justice (DJJ) may petition the committing court for earlier release pursuant to Virginia Code § 16.1-285.2 when good cause exists for earlier release.

D. Continuing Jurisdiction

A court that commits a juvenile has continuing jurisdiction over the juvenile throughout the juvenile's commitment. Va. Code § 16.1-285.1(E).

E. Release and Review Hearing

Va. Code § 16.1-285.1(F), § 16.1-285.2

1. DJJ shall petition the committing court for a determination as to continued commitment of each juvenile sentenced under this section at least sixty days prior to the second anniversary of the juvenile's date of commitment and sixty days prior to each annual anniversary thereafter. Va. Code § 16.1-285.1(F)

2. Upon receipt of a petition, the court is required to schedule a hearing within thirty days.

3. The court shall appoint counsel for the juvenile pursuant to § 16.1-266.

4. A copy of the petition, the progress report required by this section, and notice of the time and place of the hearing must be provided to:

    a. the juvenile;

    b. the juvenile's parent, legal guardian or person standing *in loco parentis*;

    c. the juvenile's guardian *ad litem*, if any;

    d. the juvenile's legal counsel; and

e. the attorney for the Commonwealth who prosecuted the juvenile during the delinquency proceeding.

5. The Commonwealth's attorney shall provide notice of the time and place of the hearing by first-class mail to the last known address of any victim of the offense for which the juvenile was committed if the victim has submitted a written request for notification to the attorney for the Commonwealth.

6. The petition must be accompanied by a progress report from DJJ, and must describe:

   a. the facility and living arrangement provided for the juvenile by the Department;

   b. the services and treatment programs afforded the juvenile;

   c. the juvenile's progress toward treatment goals and objectives which shall include a summary of his educational progress;

   d. the juvenile's potential for danger to either himself or the community; and

   e. a comprehensive after-care plan for the juvenile. Va. Code § 16.1-285.2(B).

7. Appearance of the juvenile may be in person or by two-way video and audio communication. *See* Va. Code § 16.1-285.2(B1) for specific requirements.

8. At the hearing, the court shall consider the progress report and may consider additional evidence from (i) probation officers, the juvenile correctional center, treatment professionals, and the court service unit; (ii) the juvenile, his legal counsel, parent, guardian or family member; or (iii) other sources the court deems relevant. The hearing and all records relating thereto shall be governed by the confidentiality provisions of Article 12 of this chapter. Va. Code § 16.1-285.2(C).

9. At the conclusion of the hearing, the court shall order:

   a. continued commitment of the juvenile to DJJ for completion of the original determinate period of commitment or such lesser time as the court may order ; or

   b. release of the juvenile under such terms and conditions as the court may prescribe. Va. Code § 16.1-285.2(D).

10. In making a determination under this section, the court shall consider:

    a. the experiences and character of the juvenile before and after commitment;

    b. the nature of the offenses that the juvenile was found to have committed;

    c. the manner in which the offenses were committed;

d. the protection of the community;

e. the recommendations of the Department of Juvenile Justice; and

f. any other factors the court deems relevant.

11. The order of the court is final and not subject to appeal.

F. Review of order of commitment.

The juvenile court of its own motion may reopen any case and may modify or revoke its order. Before modifying or revoking such order, the court shall grant a hearing after notice in writing to the complainant, if any, and to the person or agency having custody of the child; provided however, that this section shall not apply in the case of a child committed to the Department after sixty days from the date of the order of commitment. Va. Code § 16.1-289.

Chapter 3. Competency

I. RAISING THE ISSUE

A. How Raised

Competency to stand trial in a delinquency proceeding may be raised by the Commonwealth, the defense, or by the court *sua sponte* at any time during the trial after the juvenile obtains an attorney. Va. Code 16.1-356(A). Court may use district court form DC-522, ORDER FOR EVALUATION TO DETERMINE COMPETENCY TO STAND TRIAL – JUVENILE, which is available at: http://www.courts.state.va.us/forms/district/dc522.pdf.

For a list of the forensic coordinators at each of the state psychiatric facilities, please check the Forensic Expert Directory distributed yearly by the Department of Behavioral Health and Developmental Services or call the Institute of Law, Psychiatry and Public Policy at (804) 924-5435. Instructions for the juvenile forensic information and form are available at http://www.ilppp.virginia.edu/PublicationsAndPolicy/Index/Policy.

B. Initial Evaluations

To order an evaluation, there must be probable cause that the juvenile lacks substantial capacity to understand the judicial proceedings or to assist his attorney in his own defense. Va. Code § 16.1-356(A).

Evaluations must be performed by at least:

1. One psychiatrist,
2. Clinical psychologist,
3. Licensed professional counselor,
4. Licensed clinical social worker, or
5. Licensed marriage and family therapist.

The Commissioner of Behavioral Health and Developmental Services ("Commissioner") shall provide courts with qualifications guidelines for these persons.

Evaluations are to take place on an outpatient basis at a detention home, a CSB or behavioral health authority or a juvenile justice facility (e.g. group home) *unless* the court determines that the juvenile requires hospitalization *or* the juvenile is already hospitalized. The court *may* order hospitalization of the juvenile at a hospital designated by DBHDS evaluation of juveniles subject to a delinquency petition. Va. Code § 16.1-356(B).

II. EVALUATION AND REPORTS

A. Information to Evaluators

All relevant information must be supplied to the evaluator by the Commonwealth's attorney or the attorney for the juvenile within 96 hours of the evaluation order. The court shall require the attorney for the juvenile to provide to the evaluator only those psychiatric records deemed relevant to the determination of the juvenile's competency. The party requesting evaluation shall provide the evaluator with a summary of the reasons for the request. Va. Code § 16.1-356(C).

B. If Juvenile is Hospitalized

If the juvenile is hospitalized, the evaluation must be completed within 10 days from the date of the admission, and the report of the evaluation must be filed with the court within 14 days of the evaluator's receipt of the relevant information. Va. Code § 16.1-356(D).

C. Report Contents

The evaluator's report must be filed within 14 days of the evaluator's receipt of the relevant information, and the report shall address:

1. The juvenile's capacity to understand the proceedings against him;

2. The juvenile's ability to assist counsel; and

3. The services needed if the juvenile is found incompetent.

No statements of the juvenile related to the alleged offense shall be included in the report. Va. Code § 16.1-356(E).

D. After Receipt of Report

When the report is received, the court shall promptly determine competency. A formal hearing is not mandatory unless requested by either party or directed by the court. Va. Code § 16.1-356(F).

III. COMPETENCY HEARINGS

A. Competency Hearings, Va. Code Section 16.1-356(F)

The elements of a competency hearing include all of the following:

1. The juvenile is entitled to notice, and has the right to participate personally and present evidence;

2. The party alleging incompetency has the burden of proof, by the preponderance of the evidence;

3. If the juvenile is otherwise able to understand the charge(s) and assist counsel, then incompetency *may not* be based solely upon

    a. Age or development;

    b. Claimed lack of memory; or

    c. The influence of medication.

B. If the Juvenile is Incompetent

If the juvenile is found incompetent, the court shall order restoration of competency for up to 3 months in a non-secure community setting or at a secure facility as defined in § 16.1-228, which may be a detention home. Restoration services are provided by the Commissioner. Va. Code § 16.1-357(A) & (B). Use district court form DC-523, ORDER FOR PROVISION OF RESTORATION SERVICES TO INCOMPETENT JUVENILE, and send to Jeanette Duval, director, Juvenile Competency Restoration Services, Va. Department of Behavioral Health and Developmental Services, P. O. Box 1797, Richmond, VA. 23219; Facsimile 804-786-0197.

C. If the Juvenile is Restorable to Competency

After providing restoration services to a juvenile, if restoration provider believes the juvenile's competency is restored, the provider shall forward a report within 14 days to the court and attorneys as prescribed in § 16.1-356(E) and the court shall make a ruling on the juvenile's competency pursuant to § 16.1-356(F). Va. Code § 16.1-357(C).

Additional 3 month periods may be added if necessary to restore the juvenile provided that a § 16.1-356(F) hearing is held at the end of each period to determine progress. Va. Code § 16.1-357(B).

D. If the Juvenile is Unrestorable

If the juvenile is not restorable to competency and is likely to remain incompetent for the foreseeable future, the restoration agent must so report to the court, which must again hold a § 16.1-356(F) hearing. If the court finds that the juvenile is not likely to be restored to competency in the foreseeable future, it shall order one of the following (taking the agent's recommendations into consideration):

1. Civil commitment pursuant to § 16.1-335 *et seq*. (or § 37.2-814 *et seq.* if the juvenile has turned 18);

2. Certification of admission to a facility for the mentally retarded pursuant to § 37.2-806;

3. Have a child in need of services petition filed on his behalf pursuant to § 16.1-260(D), or;

4. Release the juvenile.

   If not dismissed without prejudice at an earlier time, charges against an unrestorably incompetent juvenile shall be dismissed:

   a. 1 year from the date of arrest for a misdemeanor, or

   b. 3 years from the date of arrest for a felony. Va. Code § 16.1-358.

Chapter 4. Certification or Transfer to Circuit Court

I. CERTIFICATION

A. Juvenile (Age Fourteen or Over) Charged with Felony

If charged with a felony level delinquent act and at least fourteen at the time of the alleged offense, the juvenile is within the transfer/certification statute. The seriousness of the alleged offense determines the nature of proceedings. Va. Code § 16.1-269.1.

When a delinquency charge has been transferred to Circuit Court pursuant to Va. Code § 16.1-269.1, the Commonwealth can seek a direct indictment of the juvenile-defendant for ancillary charges that were not originally charged by petition in the JDR Court. The JDR Court is divested of jurisdiction over all ancillary charges including those not brought once the JDR Court certifies the transferrable charge. *Holliday v. Commonwealth*, 64 Va. App.168 (12/30/2014).

B. Murder or Aggravated Malicious Wounding

If murder (Va. Code §§ 18.2-31, 18.2-32 or 18.2-40) or aggravated malicious wounding (Va. Code § 18.2-51.2) are alleged, then the court is limited to conducting a preliminary hearing. Va. Code § 16.1-269.1(B); Form DC-520.

C. Serious Felonies

An allegation of one of the twelve serious felonies listed in Code § 16.1-269.1(C) allows the Commonwealth's attorney the discretion to

1. seek certification by giving notice and proceeding to preliminary hearing, essentially in the same manner as a proceeding under Part (B); or

2. decline to give notice and decline to seek certification or transfer, leaving the case to be handled as a transfer case as in Section II below; or

3. subsequently decline or waive certification, even after giving notice, leaving the case to be handled as a transfer case as in Section II below.

D. Notice

The notice pursuant to Virginia Code § 16.1 -269.1(C) must be filed with the court and mailed or delivered to defense counsel, or the child and a parent/guardian when counsel has been waived, at least seven days before the preliminary hearing.

E. Summonses to Parents

As a result of the decision in *Commonwealth v. Baker*, 258 Va. 1, 516 S.E.2d 219 (1999), and resulting legislation, the best practice is for the court to make a specific inquiry as to the whereabouts and efforts to secure the presence of any absent parent or guardian. *See also Moore v. Commonwealth*, 259 Va. 431, 527 S.E.2d 406 (2000).

For cases in which the alleged delinquent act took place *after July 1, 1999*, the presence of one parent or guardian at all proceedings is sufficient. However, the changes to Virginia Code § 16.1-263 do not preclude a juvenile from requesting a continuance or delay to secure the presence of an absent parent or guardian, if the identity and location of the absent parent or guardian is reasonably ascertainable and if the absent parent or guardian was not previously summoned or given adequate notice of the proceedings. Va. Code § 16.1-253(E); *Commonwealth v. Baker*, 258 Va. 1, 516 S.E.2d 219 (1999).

F. Preliminary Hearing and Ancillary Charges

At the preliminary hearing conducted pursuant to paragraph B or C of Virginia Code § 16.1-269.1, the juvenile court should make a finding as to whether the juvenile is indeed 14 years of age or older and probable cause for the felony. If the juvenile court finds probable cause, the court shall certify the charge, and all ancillary charges, to the grand jury. Va. Code § 16.1-269.1(D); District court form DC-520, CERTIFICATION OF JUVENILE FELONY CHARGE.

G. Jurisdiction Divested

Jurisdiction is divested upon finding probable cause in any preliminary hearing pursuant to Part (B) or Part (C). The juvenile court is not divested of jurisdiction over any matters unrelated to the charge(s) certified and ancillary charges which may otherwise be properly within the jurisdiction of the juvenile court.

II. TRANSFER

A. Prerequisites

Va. Code § 16.1-269.1(A)

1. Juvenile age 14 years of age or older charged with felony level delinquent act.

2. Notice pursuant to §§ 16.1-263, -264. *See also* Section I.E., Summonses to Parents, above.

3. Motion by Commonwealth's attorney prior to judicatory hearing.

B. Part (A)

A transfer hearing pursuant to Part (A) of Code § 16.1-269.1 is a two-step process. First, a hearing to determine if probable cause exists; then, a second hearing to review the

transfer report, and all other relevant evidence, on the issue of transfer. *See* district court form DC-518, TRANSFER/RETENTION ORDER.

C. The Transfer Report

This report, with copies to all counsel of record, must be prepared for all transfer hearings pursuant to Va. Code § 16.1-269.2.

D. The Standard for Transfer Under Part (A)

Transfer should not be ordered unless the court finds by a preponderance of the evidence at the transfer hearing that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court. The court must consider all of the factors listed in Part (A)(4) Va. Code § 16.1-269.1(A); District court form DC-518.

E. When Jurisdiction is Retained

If jurisdiction is retained, and transfer is denied, the case should be set for trial/adjudication. The judge presiding over the transfer hearing should not preside over the subsequent trial without the consent of all parties. Va. Code § 16.1-269.3.

F. Appeal After Transfer Hearing

1. By Commonwealth pursuant to § 16.1-269.3.

2. By defendant pursuant to § 16.1-269.4.

3. Written order setting forth juvenile court's forth reasons for transfer decision forwarded to circuit court with case papers. Va. Code § 16.1-269.6(A); District court form DC-518.

G. Subsequent Offenses by Juvenile

Conviction of a juvenile as an adult pursuant to § 16.1-269.1 et al. shall preclude the juvenile court from taking jurisdiction of such juvenile for subsequent offenses committed by that juvenile. Va. Code § 16.1-271.

H. Places of Confinement for Juveniles

There is a presumption that a juvenile whose criminal case has been transferred or certified to the Circuit Court and who requires pretrial confinement shall be placed in a juvenile facility instead of an adult jail, unless the court determines that he is a threat to the security or safety of the other juveniles detained or the staff of the facility, in which case the court may transfer the juvenile to an adult facility.

Chapter 5. Loss of Driving Privileges

A. General Considerations for mandatory suspension under § 16.1-278.9

1. Age Requirement: Child must be at least age 13 at time of offense

2. Court must find facts sufficient for finding of guilt.

3. Offense involves:

    a. § 18.2-266 or similar ordinance driving under the influence of alcohol;

    b. § 18.2-266.1 persons under 21 driving after illegally consuming alcohol;

    c. § 18.2-268.2 violation of implied consent to take blood or breath test;

    d. the following felonies:

        - § 18.2-248 manufacturing, selling, giving or distributing or possessing with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance;

        - § 18.2-248.1 sale, gift, distribution or possession with intent to sell, give or distribute marijuana;

        - § 18.2-250 possession of controlled substance;

    e. the following misdemeanors:

        - § 18.2-248 manufacturing, selling, giving or distributing or possessing with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance;

        - § 18.2-248.1 sale, gift, distribution or possession with intent to sell, give or distribute marijuana;

        - § 18.2-250 possession of controlled substance;

        - § 18.2-250.1 possession of marijuana

    f. § 4.1-305 purchase or possession or consumption of alcohol or § 4.1-309 unlawful drinking or possession of alcohol on public school grounds;

    g. § 18.2-388 or similar ordinance; public intoxication;

h. § 18.2-308, et. seq. unlawful use or possession of handgun or possession of "streetsweeper"

i. § 18.2-83 communicate existence of bomb

B. Types of Offenses

4.1-305	Unlawful purchase, possession or consumption of alcohol
4.1-309	Unlawful drinking or possession of alcoholic beverages in or on public school grounds
16.1-278.5(B)(2)	Chinsup (failure to comply with school attendence)
16.1-278.8(A)(9)	Delinquent juveniles
16.1-278.9	Delinquency – alcohol, drug, handgun
16.1-278.9(A)(1)	Fail to comply with compulsory school attendance and meeting requirements as provided in § 22.1-258.
16.1-292(E)(1)	Violate chinsup order
18.2-83	Communicate existence of bomb
18.2-248	Manufacturing, selling, giving, distributing or possessing with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance
18.2-248.1	Sale, gift, distribution or possession with intent to sell, give or distribute marijuana
18.2-250	Possession of controlled substances
18.2-250.1	Possession of marijuana
18.2-266	Driving under the influence of alcohol
18.2-266.1	Persons under 21 driving after illegal consumption
18.2-268.3	Violation of implied consent; Refusal to take blood or breath test
18.2-388	Public intoxication
46.2-301(B)	Drive while suspended
46.2-334.001	Minor who has 10 or more unexcused absences from school
46.2-334.01(D)	Initial license issued to persons younger than 18 deemed provisional driver's license. Violations of restrictions set forth in (B), (C) or (C1) constitutes traffic infraction. Second or subsequent infraction, Court may suspend license for a period not to exceed six months
46.2-390	Motor vehicle theft & unauthorized use of motor vehicle
46.2-392	Reckless Driving (§ 46.2-868) & Aggressive Driving (§ 46.2-868.1)
46.2-393	--Speed – in excess of 20 miles per hour over speed limit
46.2-396	--Resulting in Death of any person

46.2-396.1	Serious Driving Offenses
46.2-817	Elude Law Enforcement Officer
46.2-819.2	Driving without paying for fuel
46.2-865	Racing
46.2-901	Suspension of driver's license for failure to report certain accidents

C. Duration of Suspension or Revocation

4.1-305	No less than six months and no more than twelve months. However, the license to operate a motor vehicle in the Commonwealth for any juvenile shall be handled in accordance with § 18.2-278.9 not § 4.1-305 which provides for a mandatory suspension of 6 months unless the offense is committed by a child under the age of 16 years and 3 months in which case the child's ability to apply for a driver's license shall be delayed for a period of 6 months following the date on which the child reaches the age of 16 years and 3 months.
4.1-309	Mandatory 6 months unless the offense is committed by a child under the age of 16 years and 3 months in which case the child's ability to apply for a driver's license shall be delayed for a period of 6 months following the date on which the child reaches the age of 16 years and 3 months.
16.1-278.5(B)(2)	Mandatory minimum of 30 days (see § 16.1-278.9(A1))
18.2-266	Mandatory 1 year or until the juvenile reaches age 17, whichever is longer, for first offense, or for a period of 1 year or until the juvenile reaches age 18, whichever is longer for second or subsequent such offense.
18.2-266.1	Mandatory six months from the date of conviction. § 16.1-278.9 does not apply.
18.2-268.3(D)	For a mandatory suspension of one year or until the juvenile reaches age 17, whichever is longer, for a first offense, or for a period of one year or until the juvenile reaches age 18, whichever is longer for a second or subsequent such offense.
46.2-301(D)	For the same period previously suspended or if previously suspended for an indefinite period, privilege shall be suspended for a period not to exceed 90 days.
46.2-334.001	Any period of time until the minor is 18 years old
46.2-334.01(D)	May suspend for up to six months for second or subsequent violation
46.2-390	Mandatory for 60 days to six months (first offense). Note however that suspension is not required if theft is one for which license is revoked by Commissioner as set forth in § 46.2-389. Subsequent offense shall suspend for 60 days to 1 year.

46.2-392	May suspend for not less than 10 days nor more than six months
46.2-393	May suspend for not less than 60 days nor more than six months
46.2-396	May suspend for no more than 12 months
46.2-396.1	May suspend for no more than 12 months
46.2-817	Mandatory not less than 30 days nor more than one year. However, if speed was over 20 mph over speed limit, minimum mandatory is not less than 90 days.
46.2-819.2	May be suspended for up to 30 days for first offense and shall be suspended for 30 days for second and subsequent offenses.
46.2-865	Mandatory not less than 6 months nor more than two years.
46.2-901	May be suspended not to exceed 6 months

D. Issuance of Restricted License

1. The court may, in its discretion and upon a demonstration of hardship, authorize a restricted permit to operate a motor vehicle by any child who has a driver's license at the time of the offense for any purpose set forth in Virginia Code § 18.2-271.1(E) or for travel to and from school EXCEPT THAT no restricted license shall be issued for travel to and from home and school when school-provided transportation is available and no restricted license shall be issued if the finding, as to the child, involves an offense involving a felony violation of §§ 18.2-248, 18.2-248.1 or 18.2-250 or a misdemeanor violation of §§ 18.2-248, 18.2-248.1 or 18.2-250 or a violation of § 18.2-250.1, or if it involves a second or subsequent violation of § 18.2-266 or similar ordinance, §§ 18.2-268.2, 18.2-248, 18.2-248.1, 18.2-250, 18.2-250.1, 4.1-305, 4.1-309, 18.2-388 or a similar ordinance, unlawful use or possession of a handgun or possession of a "streetsweeper," and § 18.2-83. No restricted license shall be issued if the finding involves a second violation of failure to comply with school attendance and meeting requirements.

2. Virginia Code § 18.2-271.1(E) allows a person to be issued a restricted permit to operate a motor vehicle for any or all of the following purposes:

    a. Travel to and from his place of employment;

    b. Travel to and from an alcohol rehabilitation or safety action program;

    c. Travel during the hours of such person's employment if the operation of a motor vehicle is a necessary incident of such employment;

    d. Travel to and from school if such person is a student, upon proper written verification to the court that such person is enrolled in a continuing program of education;

e. Travel for health care services, including medically necessary transportation of an elderly parent or, as designated by the court, any person residing in the person's household with a serious medical problem upon written verification of need by a licensed health professional;

f. Travel necessary to transport a minor child under the care of that person to and from school, day care and facilities housing medical service providers;

g. Travel to and from court-ordered visitation with a child of such person;

h. Travel to a screening, evaluation and education program entered pursuant to § 18.2-251 or subsection H of § 18.2-258.1; or

i. Travel to and from court appearances in which he is a subpoenaed witness or a party and appointments with his probation officer and to and from any programs required by the court or as a condition of probation.

j. Travel to and from a place of religious worship one day per week at a specified time and place;

k. Travel to and from appointments approved by the Division of Child Support Enforcement of the Department of Social Services as a requirement of participation in a court-ordered intensive case monitoring program for child support for which the participant maintains written proof of the appointment, including written proof of the date and time of the appointment, on his person.

l. Travel to and from jail to serve a sentence when such person has been convicted and sentenced to confinement in jail and pursuant to § 53.1-131.1 the time to be served is on weekends or nonconsecutive days; or

m. Travel to and from the facility that installed or monitors the ignition interlock in the person's vehicle.

3. Upon petition made at least 90 days after issuance of the order suspending the license, the court may review and withdraw any order of denial if for a first offense. For a second or subsequent offense, the order may not be reviewed and withdrawn until one year after its issuance.

C. NON-DELINQUENCY JUVENILE PROCEEDINGS

Chapter 1. Child in Need of Services and Supervision, Status Offenders, and School Board/Parental Responsibility Petitions

A. CHILD IN NEED OF SERVICES

Virginia Code § 16.1-228 defines a child in need of services (CHINServices) as one whose behavior, conduct or condition presents or results in a serious threat to his or her well-being and physical safety or, if under 14, to the well-being and physical safety of another.

In accordance with the recommendations of the State Executive Council Retreat held on June 20, 2014, the Office of Children's Services recognizes a "clarification" of the definition of the condition of the child to include the home environment.

CHINServices may include a child who is absent from school. Virginia Code § 22.1-262 provides that a parent who fails to enroll a child in school may be proceeded against for failure to comply with state law and that the child may be proceeded against as a CHINServices or a CHINSupervision.

See also *Disher v. Dinwiddie DSS*, Record No. 1266-09-2, 2010 Va. App. LEXIS 62 (2010) (not designated for publication). The GAL filed a CHINServices Petition against the child because the child had excessive absences from school. The child was removed from the home 3 times because of the absences and placed in foster care. In an unpublished opinion, the Court of Appeals ruled that the parent failed to remedy the conditions that brought the child into foster care and terminated parental rights under Va. Code § 16.1-283(c).

1. The Process
   Va. Code § 16.1-266

   a. Parents and child are served with a petition.

   b. Child has a right to counsel.

   c. The court may appoint a guardian *ad litem* in addition to the appointment of counsel.

   d. The court has jurisdiction over the parents of a child who has been found to be a CHINServices.

2. The Proof
   Va. Code § 16.1-228

   a. The court must find that intervention of the court is essential to provide the treatment, rehabilitation, or services needed by the child or his family.

b. The court must also find that the conduct complained of presents a clear and substantial danger to the child's life or health, or to the life or health of another, and that the child or his family is in need of treatment, rehabilitation or services not presently being received.

See Minor Child, by GAL v. Ellis, Record No. 1167-10-2, 2011 VA. App. LEXIS 82 (2011) (not designated for publication). The child was an excellent student, well liked by peers and teachers and was involved in extra-curricular activities. The Court found mother and the child had an "adjustment disorder" which was characterized as the "lowest of all disorders" but had received counseling. No evidence of a "clear and substantial danger," especially in light of the Protective Order which controlled abusive father's access to the child.

c. The burden of proof is clear and convincing. *See Grigg, et. al. v. Commonwealth*, 224 Va. 356 (1982).

3. Dispositions Available to the Court
Va. Code 16.1-278.4

a. Enter an order requiring the cooperation of agencies,

b. Set conditions and limitations for the parents and child,

c. Order the parent with whom the child is living to participate in certain programs/treatment,

d. Release a child over fourteen years of age from compulsory school attendance, or authorize the child, subject to other laws, to work.

e. Permit the local DSS or FAP Team to place the child, with legal custody remaining with parents. The court must make a finding prior to placing the child that reasonable efforts have been made to prevent an out-of-home placement and that continued placement in home would be contrary to the welfare of the child. The Court may order DSS to accept noncustodial entrustment of a child. *See* 2004 Op. Va. Att'y Gen. (3-22-04).

f. Transfer custody to a relative or other person who has been found qualified to care for the child.

See Gibson v. Kappel, Record No 0180-11-4, 2011 Va. App. LEXIS 352 (not designated for publication). DSS filed a CHINServices petition and grandparents filed for custody the same day. Temporary custody was awarded to the grandparents on the CHINS petition. The Circuit Court ultimately awarded custody to the grandparents with a *Bailes v. Sours* analysis. Parent had argued parental presumption.

g. Transfer custody to a child welfare agency or private organization for placement of the child.

h. Transfer legal custody of the child to DSS **only if** the court finds that reasonable efforts have been made to prevent removal and that continued placement in the home is contrary to the best interests of the child.

NOTE: The local DSS must be given reasonable notice prior to placement. If an emergency exists, DSS may be required to accept the child for up to fourteen days without notice or opportunity to be heard.

i. Require the child to participate in a public service project.

B. CHILD IN NEED OF SUPERVISION

As set forth in Section 3 of Article VIII of the Virginia Constitution, "[t]he General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such age and eligibility to be determined by law."

Virginia Code § 16.1-228 defines a child in need of supervision (CHINSupervision) as one who, while required to attend school, is habitually and without justification absent from school, or who remains away from or habitually deserts or abandons his family on more than one occasion or runs away from a residential care facility in which the court placed the child.

Is the burden of proof clear and convincing? *See Grigg, et. al. v. Commonwealth*, 224 Va. 356 (1982), for CHINService case.

1. The Process
   Va. Code § 16.1-266

   a. A school seeking a CHINSupervision Petition must demonstrate to the Intake Officer compliance with the provisions of § 22.1-258. This Section requires the following:

      (i) after 5 absences, for which the school has received no indication that the parent is aware of and supports the child's absences, the school shall make a reasonable effort to notify the parent by phone to obtain an explanation of the absences and to jointly prepare a plan,

      (ii) within 10 days after the next absence, for which the school has received no indication that the parent is aware of and supports the child's absence, the school shall schedule a conference with the parents and child,

(iii) upon the next absence, for which the school has received no indication that the parent is aware of and supports the child's absence, the school shall file against the child and/or the parent.

The Sheriff's Department is permitted to assist a local school division with enforcing attendance laws by serving notice of an upcoming meeting to the parents or custodians. *See* 2010 Op. Va. Att'y Gen. (11-19-2010).

See CSA Office of the City of Richmond v. J.M., Record No. 1620-98-2, 1999 Va. App. LEXIS 473 (1999) (not designated for publication). It appears that a GAL filing a CHINS needs to go through Intake procedures.

b. The petition is issued and served on the parents and child.

c. The child has a right to counsel.

d. The court may appoint a guardian *ad litem* in addition to the appointment of counsel.

e. The court has jurisdiction over parents of a child who has been found to be a CHINSupervision. Va. Code § 16.1-228.

f. Form DC-548 is combined adjudication and disposition.

2. The Proof
Va. Code § 16.1-228

a. The court must find that:

(i) the **truant** has been offered an adequate opportunity to receive the benefit of any and all educational services and programs, <u>and</u>

(ii) the school has made a reasonable effort to effect the child's regular attendance, <u>and</u>

(iii) the school system has provided certain documentation that it has complied with the provisions of Va. Code § 22.1-258. *See Commonwealth v. May*, 62 Va. Cir. 360 (2003). The failure of the school to comply with Va. Code § 22.1-258 cannot be collaterally attacked in a contempt proceeding. The errors must be addressed by the J&DR District Court on a Motion to Reconsider or by the Circuit Court on a direct appeal.

See 2005 Va. AG LEXIS 3 (2005) for a discussion by the Attorney General of whether a parent's awareness and support of his child's absence excuses the absence thereby precluding enforcement action. "Not only does a parent's

support of his child's chronic absenteeism fails [sic] to excuse the pupil's absences, the parent himself is subject to civil and criminal liability."

b. The court must find that:

(i) the **runaway** exhibits conduct which presents a clear and substantial danger to the child's life or health, and

(ii) the child or his family is in need of treatment, rehabilitation or services, and

(iii) the intervention of the court is necessary.

3. Disposition
Va. Code § 16.1-278.5

a. Before final disposition, the court shall refer the case to the appropriate public agency, which may be the FAP Team (no referral necessary if report available from an interdisciplinary team that met not more than ninety days before the finding of CHINSupervision).

b. The court has implied powers to require the child to attend school, to require the parents and child to participate in programs already in place, etc., pending final disposition.

c. At final disposition and after review of the report the court may

(i) enter any order which may be entered on disposition for a CHINServices child,

(ii) place the child on probation and suspend the child's license to drive (but *see* Va. Code § 16.1-278.9 (A1) – the Court shall suspend or deny a license for at least 30 days),

(iii) order the child and/or parents to cooperate in treatment or be subject to terms, and

(iv) require the child to participate in a public service project.

d. A copy of the written order of the court along with notice of the consequences of a violation of the court's order shall be provided to the child, the parents, and the attorney. Va. Code § 16.1-278.5(C).

C. FAILURE OF PARENT OR CHILD TO COMPLY WITH THE CHINS ORDER

If the child or the parent fails to comply with a disposition order, the matter can be brought before the court by petition or show cause alleging contempt of the court's order.

1. The Process
   Va. Code § 16.1-266

   a. A petition is filed against the child and/or a show cause is filed against the parent.

   b. The person alleged to have violated the order has a right to an attorney.

   c. The child may need a guardian *ad litem*, particularly if foster care is contemplated.

2. Failure to comply with a CHINServices order

   a. The child or parent may be required to show cause why the order was not complied with or may be found in contempt. Va. Code §§ 16.1-69.24, -292, 18.2-456.

   b. Upon a finding that the child has willfully and materially violated for a second time the CHINServices disposition order, the court may suspend the child's license to drive or may limit the period during which the child may drive. Va. Code §§ 16.1-292(D), -278.8(9).

3. Failure of a child to comply with a CHINSupervision order

   a. The child may be required to show cause why the order was not complied with or may be found in contempt. Va. Code §§ 16.1-69.24, -292(A), 18.2-456.

   b. Contempt proceedings under Subsection 16.1-292(A) do not have to meet the requirements of Subsection (E). *See B.P. v. Commonwealth*, 38 Va. App. 735 (2002); *Commonwealth v. May*, 62 Va. Cir. 360 (2003). The court

      (i) may give the child detention time not to exceed 10 days for each offense and

      (ii) upon entering an order for detention shall send the case back to the interdisciplinary team for an updated report to be filed with the court. Va. Code § 16.1-292(E). *See* the use of the words "section" and "subsection" in Subsection (E)(2).

   c. Upon a finding that the child has willfully and materially violated the CHINSupervision order, pursuant to Va. Code § 16.1-292(E) the court

      (i) may suspend the child's license to drive (but *see* the *shall* language in Va. Code § 16.1-278.9(A1), and

(ii) may order a child fourteen years of age or over to be

- placed in foster care, or
- detained for not more than ten consecutive days for violation of any order arising out of the same petition, when foster care will not likely meet the child's needs, when other treatment options have been exhausted and when secure placement is necessary to meet the child's service needs.

See Aylor v. Madison DSS, 2006 Va. App. Lexus 496, Record No. 3110-05-2 (2006). The Court may place a child in detention under Va. Code § 16.1-292(E)(2)(ii)), suspend the detention time and at the same time place the child in a non-secure residential facility under (2)(i). In *Aylor*, the parents were appealing the Circuit Court decision. The opinion is unpublished.

(iii) upon entering an order for detention, shall send the case back to the interdisciplinary team for an updated report to be filed with the court. Va. Code § 16.1-292(E).

d. An order entered in accordance with Va. Code § 16.1-292(E)(2) is a final order and may be appealed to the circuit court.

4. Failure of a Parent to Comply with a CHINSupervision Order

a. The parent may be required to show cause why the order was not complied with or may be found in contempt. Va. Code §§ 16.1-69.24, -292(A), 18.2-456.

b. The court may order the parent with whom the child lives to participate in programs, cooperate in treatment, or be subject to terms and conditions. Upon a failure to comply the court may impose a fine not to exceed $100 for each day the parent fails to comply. Va. Code § 16.1-278.5(B)(5)(a).

c. The court may impose up to twelve months in jail when the court finds the parent has willfully disobeyed an order requiring compliance with compulsory school attendance. Va. Code §§ 16.1- 278.5(B)(5)(b), 18.2-371.

d. The court may impose under Va. Code § 22.1-263 or § 22.1-265 the penalty for a class 3 misdemeanor. A second violation of Va. Code § 22.1-265 is a class 2 misdemeanor.

D. FAILURE OF PARENT TO ENROLL OR SEND A CHILD TO SCHOOL

1. Virginia Code § 22.1-254(A) requires every parent, guardian or other person having control of a child, who turns 5 before September 30 of a school year and who is not 18, to send such child to school, to have the child tutored or to provide home instruction for the child. *See Blake v. Commonwealth*, 288 Va. 375 (2014) – "send" means to enroll and does not include attendance issues like absences and tardies.

2. If the parent, guardian or other person fails to send (defined by *Blake* to mean enroll) the child to school in violation of Va. Code § 22.1-254, it is the duty of the attendance officer to file in the J&DR District Court. Va. Code § 22.1-262. A violation is a Class 3 misdemeanor for the first offense and a Class 2 misdemeanor for the second offense. *See* Va. Code § 22.1-263.

   See 1988 Va. AG LEXIS 77 (1988). The Attorney General opined that parents can be prosecuted for failing to send their children to school under either Va. Code § 22.1-263 or § 18.2-371. However, "when a parent merely fails to send his or her child to school in violation of § 22.1-254 or § 22.1-255, that parent is properly prosecuted pursuant to § 22.1-263…"

3. Any person who induces a child to be absent unlawfully from school or harbors such a child while school is in session is guilty of a Class 3 misdemeanor. A second offense is a Class 2 misdemeanor. Va. Code § 22.1-265.

4. Any person, including a parent, who willfully contributes to, encourages, or causes any act, omission or condition which renders a child in need of supervision is guilty of a Class 1 misdemeanor. *See* Va. Code § 18.2-371.

5. Virginia Code § 22.1-267 provides that a child permitted by a parent to be habitually absent from school contrary to the provisions of §§ 22.1-254 to -269.1 may be proceeded against as a CHINSupervision. Section 22.1-263 provides that any <u>person</u> violating § 22.1-267 is guilty of a Class 3 misdemeanor.

6. Virginia Code § 22.1-267 provides that any person violating the parental responsibility provisions relating to compulsory school attendance included in § 22.1-279.3 is guilty of a Class 3 misdemeanor.

7. Virginia Code § 22.1-258 sets forth the requirements the school must comply with once a child fails to report on a regularly scheduled day. Once the number of absences exceeds the specified amount, the school may enforce the provisions of the articles by instituting proceedings against the parent pursuant to Va. Code § 18.2-371 or § 22.1-262.

E. STATUS OFFENDERS

1. Status Offense

   A "status offense" is an act prohibited by law which would not be an offense if committed by an adult. These offenses include but are not limited to curfew violations and tobacco charges. Va. Code §§ 16.1-228, -278.6.

2. Disposition

   The court may use the same dispositional alternatives as for CHINServices. Va. Code §§ 16.1-278.4, -278.6.

F. SCHOOL BOARD-PARENTAL RESPONSIBILITY PETITIONS

The juvenile court has exclusive original jurisdiction over petitions filed by school boards against parents.

1. Parental responsibility and involvement requirements, Va. Code §§ 16.1-241.2, 22.1-279.3

   a. Each parent of an enrolled student has a duty to assist in enforcing the standards of conduct and attendance. Va. Code § 22.1-279.3(A).

   b. The principal may request that the student's parents meet with the school to review the standards of conduct and the parents' duty to help the school discipline the student and to discuss improvement of the student's behavior, attendance and educational progress. Va. Code § 22.1-279.3(D).

   c. The school may notify the parents of any student who violates a school board policy when such violation could result in the suspension of the student. Va. Code §§ 22.1-277, -279.3(E), -278.

   d. Unless otherwise approved by the principal, no suspended student shall be admitted to the regular school program until the student and his parents have met with the school. Va. Code § 22.1-279.3(F).

2. Failure of the parents to comply, Va. Code § 22.1-279.3

   a. If the court finds that the parent has willfully and unreasonably failed to meet with the school to review the matters in (1) (b), the Court may order the parent to so meet.

   b. If the court finds that the parent has willfully and unreasonably failed to accompany a suspended student to meet with the school, or upon the student receiving a second suspension or being expelled, it may order the student and/or parent to participate in programs or treatment. The court may also assess a civil penalty against the parent not to exceed $500. The venue for cases involving a civil penalty shall be the jurisdiction where the school is located.

Chapter 2. Custody and Visitation

I. SOURCES OF LAW

A. Generally

The primary law governing custody and visitation is found in Va. Code Title 20, § 20-124.1, *et seq.*; § 16.1-227 *et seq.*; § 16.1-241 *et seq.*; § 16.1-278.15(A)-(I).

B. Title 20 Domestic Relations Provisions of the Code

1. Transfers from circuit court to juvenile court, Va. Code § 20-79(c).

2. Orders pending disposition, Va. Code § 20-103.

3. Custody/visitation in divorce decrees, Va. Code § 20-107.2.

4. Revision of decrees as custody and visitation, Va. Code § 20-108.

5. Custody and visitation arrangements for minor children (definitions, substantive standards, mediation, relocation notices and access to child's records), Va. Code §§ 20-124.1 to -124.6.

6. Virginia Military Parents Equal Protection Act, deployment considerations, Va. Code §§ 20-124.7 to -124.10.

7. Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") (jurisdiction, notice to parties, mandatory affidavits, interstate jurisdictional conflicts), Va. Code § 20-146.1 *et seq*.

C. Juvenile Court Title 16 Provisions of the Code

1. Purpose and intent, Va. Code § 16.1-227.

2. Definitions, Va. Code § 16.1-228.

3. J&DR jurisdiction, Va. Code § 16.1-241(A).

4. Venue, Va. Code § 16.1-243.

5. Concurrent jurisdiction with circuit court; exceptions, Va. Code § 16.1-244.

6. Intake, petitions, investigation, summonses, Va. Code §§ 16.1-260 to -265.

7. Appointment of counsel and guardians *ad litem*, standards for GALs, Va. Code §§ 16.1-266 to -266.1.

8. Court-ordered investigations, Va. Code §§ 16.1-273, -274.

9. Physical and mental examinations of child, Va. Code § 16.1-275.

10. Use of telephonic communication systems or electronic…systems… Va. Code § 16.1-276.3.

11. Ordering services of various agencies, Va. Code § 16.1-278.

12. Custody and visitation, Va. Code § 16.1-278.15.

13. Protective orders in cases of family abuse, Va. Code § 16.1-279.1.

II. GENERAL PRINCIPLES

A. Standard

In any case in which custody or visitation is at issue, the court shall provide prompt adjudication, upon due consideration of all the facts, of custody and visitation arrangements. In determining custody, the court shall give primary consideration to the best interests of the child. The court must give due regard to the primacy of the parent-child relationship, but the child's best interest is controlling. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. Va. Code § 20-124.2.

B. Procedures

Procedures in custody cases "shall insofar as practical . . . preserve the dignity and resources of family members." Va. Code § 20-124.2.

III. CASE INITIATION

A. Pleadings

1. New petitions in juvenile and domestic relations district courts:

   A new case is initiated by petition. Generally, both custody and visitation petitions are filed as to each child. Petitions must initially be processed through an intake officer, who must file a petition upon request, when a complainant alleges that custody or visitation requires determination. Petitions must be verified and include the child's name, age, date of birth, address, and names and addresses of the following: parents, guardian, legal custodian or other person standing *in loco*

parentis, spouse if any, and nearest known relatives if no parent or guardian can be found. If the required information is unknown, the petition shall so state. Va. Code §§ 16.1-260, -262; Form DC-511, PETITION.

2. Motions to amend, rehear, or modify:

   If the court has previously entered a custody or visitation order, a new hearing may be initiated by a new petition or a motion to amend or rehear, which should list names and addresses for all the parties and set out the grounds for the motion. Va. Code § 20-108; Form DC-630, MOTION TO AMEND OR REVIEW ORDER.

B. Who May Initiate

A petition for custody or visitation or a motion to amend may be filed by "any party with a legitimate interest" in the child's custody. This is broadly construed and includes, but is not limited to, parents, legal guardians, grandparents, step-grandparents, stepparents, former stepparents, blood relatives, and family members, provided any such party has intervened in the suit or is otherwise properly before the court. It does not include (i) any person whose parental rights have been terminated or (ii) any person whose interest in the child derives through such person, if the child has subsequently been adopted; or (iii) anyone who has been convicted of rape or incest when the child, whose custody is in dispute, was conceived as a result of such crime. Va. Code § 16.1-241(A).

C. Where To Initiate; UCCJEA Affidavit Required

1. Venue generally lies in the city or county that is the child's home at the time of filing, or had been within six months before filing and the child has been removed therefrom but a parent continues to live there. Alternative venues and provisions for transfer of venue are enumerated in the statute. Va. Code § 16.1-243.

2. The petitioner, or moving party on a motion to amend, must in all cases complete an affidavit containing information required by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The required information includes the child's address for the last five years and other information designed to enable the court to determine if it has jurisdiction, e.g., whether another court has previously awarded custody or whether proceedings are pending in another court. Va. Code § 20-146.20; Form DC-620, AFFIDAVIT (UNIFORM CHILD CUSTODY JURISDICTION ACT).

D. Mediation

In any appropriate case, the court shall refer the parents or persons with a legitimate interest to a dispute resolution evaluation by a certified mediator. In some courts, custody matters are routinely screened for appropriateness for mediation referral at the time of filing. *See* discussion of mediation under "Available Tools" in Section V below. Va. Code § 20-124.4.

E. Who Must Be Given Notice

Once filed, a petition or motion to amend should be set for an initial hearing and summonses must be issued to the child (if 12 or older), the parents, guardian, legal custodian or other person standing *in loco parentis*, and any other necessary parties. Notice must be given to anyone who has physical custody of the child, both parents, and anyone else who claims a right to custody or visitation, to provide them the requisite "reasonable notice and opportunity to be heard." Va. Code §§ 16.1-263; 20-146.7, 20-146.16; Form DC-510, SUMMONS.

IV. INITIAL HEARING

A. Jurisdiction

At the initial hearing, the court must review the UCCJEA affidavit and other available information to ensure proper jurisdiction. If the child has lived in Virginia for more than six months preceding the date of filing and the affidavit does not indicate any prior or pending proceedings in other courts, jurisdiction is generally appropriate. Otherwise, see the discussion below regarding matters involving more than one state. Va. Code §§ 20-146.12, -146.21.

B. Confirming Service

The court should also review the UCCJEA affidavit and service returns to ensure there is proper service on any necessary, but absent, party (including both parents unless rights have been terminated, legal custodian, anyone having physical custody, and the juvenile if twelve or over). Va. Code §§ 16.1-263, -264; 20-146.7, -146.16.

C. Missing Parties

1. Notice may be given in a manner prescribed by the Commonwealth for service of process; if a person is outside the Commonwealth, notice may be given in like manner or in accordance with the law of the state where service is attempted or is made. Notice may be by certified or registered mail, return receipt requested, addressed to the last known address. Notice must be given in a manner reasonably calculated to give actual notice and an opportunity to be heard, but may be by publication pursuant to Va. Code §§ 8.01-316 and -317, if other means are not effective. Va. Code § 20-146.7.

2. Alternatively, the court may request a search of the Federal Parent Locator Service to obtain an address for a missing parent. Such requests from the court should be directed to the Virginia Department of Child Support Enforcement and must be honored if the request is made for the purpose of "making or enforcing a child custody or visitation determination." A sample request is included in Appendix A. *See* 42 U.S.C 663.

3. No summons or notice shall be required if a parent's identity cannot reasonably be ascertained and if the court certifies such on the record. A mother's affidavit reflecting that the father's identity cannot be reasonably ascertained shall be sufficient evidence of this fact, provided that there is no other evidence before the court that refutes such an affidavit. Va. Code § 16.1-263.

D. The Merits

1. If the parties have reached a custody agreement, the court may enter a final custody order if appropriate, but the court is not bound by the parties' agreement if it is not in the child's best interest, except if the parents are reunited and are otherwise suitable. *Buchanan v. Buchanan*, 170 Va. 458 (1938); *Featherstone v. Brooks*, 220 Va. 443 (1979); *Edwards v. Lowry*, 232 Va. 110 (1986).

2. If custody is in dispute, the court may hear evidence and decide the matter or, alternatively, issue a temporary custody order and set the matter out for a contested hearing at a later date. If the latter, the court may wish to make preliminary orders as to home studies, GALs, etc. *See* "Available Tools" in Section V below. Temporary orders shall be made in accordance with the standards set out in Va. Code § 20-124.1 et seq. Va. Code § 20-103(D). A temporary custody order has no presumptive effect at a hearing on the merits. Va. Code § 20-103(E).

E. Emergency Hearings; *Ex Parte* Orders

1. In cases of family abuse, a court may issue a temporary custody order at a hearing on a final protective order. Va. Code § 16.1-279.1(A)(9).

2. At an *ex parte* hearing on a preliminary protective order, the court may order the respondent to have no contact with family members, as appropriate. The court may also order removal of a parent from the home, but the court has no authority to make orders as to custody, except as may be necessary for the protection of the Petitioner and family or household members of the Petitioner. Va. Code § 16.1-253.1(A)(8).

3. The law frowns upon *ex parte* orders generally. The UCCJEA specifically mandates that "reasonable notice and opportunity to be heard" be given to all parties before the court decrees on custody matters. Va. Code § 20-146.16. However, temporary emergency jurisdiction, *ex parte*, appears available under Va. Code § 20-146.15.

F. Virginia Military Parents Equal Protection Act

1. Applies to a parent or guardian who is a member of the United States Armed Forces, Coast Guard, National Guard, or any reserve component thereof who has been deployed or received written orders to deploy. Va. Code § 20-124.7.

The Virginia Military Parents Equal Protection Act is only applicable when deployment takes place. This Act is not applicable when a service member's family can accompany him/her to the location where he/she is stationed by an order. Va. Code § 20-124.7; *Rubino v. Rubino*, 2015 Va. App. LEXIS 18 (Jan. 20, 2015).

2. Any court order limiting previously ordered visitation or custody due to deployment must be entered as a temporary order. Va. Code § 20-124.8(A). On a motion to amend by the deployed parent or guardian upon return from deployment, the matter shall be set for a hearing within 30 days of filing. The non-deploying parent has the burden of proving that the order in effect before deployment is no longer in the child's best interest. Va. Code § 20-124.8(C).

3. A deploying parent or guardian, who has court ordered visitation, may move the court to delegate said visitation to any family member, which includes a stepparent, with whom the child has a close and substantial relationship, if it is in the child's best interest. Va. Code § 20-124.8(B)(1). Where the deploying parent or guardian had physical custody prior to deployment, and due to deployment custody is awarded to the non-deploying parent or guardian, or family member thereof, the court may also order visitation to family members of the deploying parent or guardian. Va. Code § 20-124.8(B)(2).

   It is important to note that no separate right to visitation is created by this statute, and the deploying parent or guardian may file a motion to rescind the visitation at any time, and the non-deploying parent or guardian may file a motion to rescind the visitation upon a change in material circumstances. Va. Code § 20-124.8(B)(2).

4. If no order is in place for custody or visitation at the time of deployment, the petition shall be expedited on the court's docket in accordance with Va. Code § 20-108. Va. Code § 20-124.9(A). In any hearing where the deploying parent or guardian is reasonably unable to appear, the hearing may, for good cause shown, be conducted by audio or video. Va. Code § 20-124.9(B).

5. Any temporary order entered pursuant to Va. Code § 20-124.8 shall provide that the non-deploying parent reasonably accommodate the leave schedule of the deploying parent and facilitate telephone and email contact during the deployment. Va. Code § 20-124.10.

V. AVAILABLE TOOLS

A. Guardian *Ad Litem* in Custody and Visitation Proceedings

Va. Code § 16.1-266; 2002 Op. Va. Att'y Gen. S-58 (July 16, 2002)

1. In cases, which in the discretion of the court require counsel or a GAL, or both, to represent the child, discreet and competent attorneys-at-law may be appointed. However, in cases involving custody or visitation where each parent or other person

claiming custody is represented by counsel, the court shall not appoint a GAL, unless at any stage in the proceedings in a specific case, the court finds that the interests of the child are not otherwise adequately represented. Va. Code § 16.1-266(E).

2. The GAL should be appointed from the list approved by the Supreme Court, unless no such attorney is available, in which event a judge, in his discretion, may appoint any discreet and competent attorney who is admitted to practice law in Virginia. Va. Code § 16.1-266.1(B).

3. A GAL is compensated by the Commonwealth, upon approval of his or her time by the court. The cost of the GAL must be apportioned against the parents, unless the court specifically finds that they are unable to pay. Va. Code § 16.1-267(A).

4. The Standards of Performance promulgated through Va. Code § 16.1-266.1 and Rule 8:6 of the Rules of Supreme Court of Virginia must be followed by GALs in fulfilling their duties in custody and visitation cases. Generally, a GAL should interview the child, visit the child in each parent's home, investigate the child's school situation and home situation, investigate facts relating to the parents to the extent relevant to the child's custody, report to the court the outcome of such investigations, question and/or subpoena witnesses if needed, etc. The GAL is entitled to access to the child and the child's records, and the order of appointment should so state. Va. Code §§ 16.1-266, -266.1; Form DC-514, ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM.

B. Home Studies

1. The court may order a home study conducted on the homes of any and all parties seeking custody, and such an order may direct the home study to be conducted by the local Court Service Unit or Department of Social Services. Va. Code §§ 16.1-237(A), -273, -274; Form DC-542, ORDER FOR INVESTIGATION AND REPORT.

2. The agency conducting the home study may charge a fee for the service, on a sliding-scale fee basis, if a fee schedule has been established. In some localities, a fee is routinely charged; other localities routinely do not charge a fee. Va. Code §§ 16.1-274(B); 63.2-314(B).

C. Psychological Evaluations

The court may order a physical or psychological examination of the child and treatment at a local mental health center if appropriate. The Commonwealth may provide payment if needed. Va. Code § 16.1-275.

D. Parenting Classes

The parties to any petition where custody, visitation or support is contested shall show proof that they attended, within the 12 months prior to their court appearance or that they

shall attend within 45 days thereafter, an educational seminar approved by the court. Parties may be granted an exemption from attendance for good cause or if no program is reasonably available. In uncontested cases, the parties may be required to attend such a seminar for good cause. Fees for the seminar are based on ability to pay, but shall not exceed $50. Va. Code § 20-103(A).

E. Mediation

1. Any appropriate case shall be referred to a dispute resolution evaluation session, and a certified mediator, at no cost, shall conduct this session. A factor to be considered, as to determine the appropriateness of such a referral, is whether there is a history of family abuse. Statements made in the mediation process are not generally admissible in court, and a party filing a written objection within fourteen days of being ordered to mediation shall be excused therefrom. Referred cases must be set for further hearing, irrespective of the referral, and if not resolved, the referred cases are to be heard on the regularly docketed date. If the parties agree to further mediation after the evaluation session, the fee of a mediator appointed in any custody, support, or visitation case shall be $100 per appointment and shall be paid by the Commonwealth. When mediation is used in custody and visitation matters, the goals of the mediation may include development of a proposal addressing the child's residential schedule, care arrangements, and how disputes between the parents will be handled in the future. Va. Code §§ 20-124.2(A), -124.4; 8.01-576.4, -576.6, -576.10.

2. The court has the authority to refer matters routinely to mediation before the first hearing, or mediation may be ordered at a hearing. The court shall excuse the parties if within 14 days of the entry of the order any party objects to the referral through a signed written document. Va. Code § 8.01-576.6.

F. Evaluation of Parents; Other Services

1. If the evidence suggests a substance abuse or mental health problem relevant to the parenting abilities of one or more of the parties, the court may wish to refer the party or parties to evaluation or treatment. The court has the authority to cooperate with and make use of the services of public or private entities which seek to protect or aid children or families and has the authority to order governmental agencies to render such services as may be mandated by law. The court may also order drug testing of a parent. The GAL should not administer drug tests, and the Commonwealth will not reimburse the GAL for the costs of administering drug tests. Va. Code §§ 16.1-278; 16.1-278.15(H)-(I).

2. The results of such tests, or a party's failure to avail themselves of such services upon the court's referral, may be relevant evidence in the custody dispute because the physical and mental conditions of the parents are among the statutory factors to be considered in deciding custody disputes. Va. Code § 16.1-278.15(H).

3. The court may order a mental health, custody, or psychological evaluation for any parent, guardian, legal custodian or person standing in loco parentis if such would assist the court in making its custody decision. The court may enter such orders as it deems appropriate for the payment of the costs of the evaluation by the parties. Va. Code § 16.1-278.15(H).

G. Court Appointed Special Advocates

The Court Appointed Special Advocate (CASA) programs provide for appointment of specially trained volunteers to investigate and report to the court in judicial proceedings involving allegations that a child is abused or neglected. If a custody proceeding involves such allegations, the court may wish to consider appointing a CASA volunteer if locally available. Va. Code §§ 9.1-151-157.

VI. HEARING ON THE MERITS

A. Evidence

1. Any home studies or other investigative reports ordered by the court must be filed and made available to counsel at least 15 days in advance of the hearing. The court shall grant a continuance if the ends of justice so require, if the report is filed late, or if an amended report is filed. Reports shall not be copied and shall be returned to the clerk's office at the conclusion of the hearing. Va. Code § 16.1-274.

2. A GAL's recommendation as to custody and visitation is entitled to consideration and should be heard, even if the GAL's does not follow the promulgated standards of conduct to a letter or the GAL's investigation could have been more thorough. *Bottoms v. Bottoms*, 249 Va. 410 (1995), *see also Wiencko v. Takayama*, 62 Va. App. 217 (2013).

3. Parties often seek to introduce testimony from a child in custody proceedings. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age, and experience to express such a preference, is a factor to be considered by the court in any custody/visitation proceeding. Va. Code § 20-124.3(8).

4. The court may, in its discretion, in an appropriate case, question the child in chambers with or without counsel or the parties present. If a GAL has been appointed, the GAL should be present in chambers. If a court reporter is present and either side motions for the child's in chambers testimony be on the record, such motion should be given due consideration. *Haase v. Haase*, 20 Va. App. 671 (1995); *accord Brown v. Burch*, 30 Va. App. 670 (1999).

5. In cases involving alleged sexual abuse, special provisions regarding statements or testimony of a child may apply. Va. Code § 63.2-1522.

B. Standard: Between Natural Parents

As between natural parents, if no final custody order has previously been entered, the standard for determining custody is "the best interests of the child." There shall be no presumption or inference of law in favor of either parent. Va. Code §§ 16.1-278.15(G); 20-124.2(B).

In determining the child's best interest, the court shall consider the following factors pursuant to Va. Code § 20-124.3:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

2. The age and physical and mental condition of each parent;

3. The relationship between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members;

5. The role that each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether the parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. Any history of family abuse or sexual abuse as those terms are defined in Va. Code § 16.1-228. If the court finds such a history, the court may disregard the factors in subdivision 6; and

10. Any other factors as the court deems necessary and proper to the determination.

Va. Code § 20-124.3.

The judge shall communicate the basis of the decision orally or in writing. Except in cases of consent orders, the judge shall set forth the findings on relevant factors. Va. Code § 20-124.3.

The court is not bound by an agreement between the parties as to custody. *Hammers v. Hammers*, 216 Va. 30 (1975); Va. Code § 20-108. But natural parents who are reunited are presumptive custodians unless otherwise unsuitable. Va. Code § 20-31.1.

The well-reasoned preference of an older child should be considered and given weight, although these preferences are not conclusive. *Hall v. Hall*, 210 Va. 668 (1970); Va. Code § 20-124.3.

A child's exposure to a parent's involvement in an adulterous relationship is entitled to great weight but must be considered along with all other factors. *Brown v. Brown*, 218 Va. 196 (1977); *Haase v. Haase*, 20 Va. App. 671 (1995).

A homosexual parent is not *per se* unfit to have custody. However, the child's exposure to an active, non-marital, homosexual relationship, in the home, is an "important consideration." *Bottoms v. Bottoms*, 249 Va. 410 (1995). In sum, Virginia requires judges, in custody disputes, to consider the extent to which a child is exposed to a parent's romantic relationship and whether that relationship has an adverse effect on the child. *Piatt v. Piatt*, 27 Va. App. 426 (1998). The nature of a parent's romantic relationship, not specifically the type (e.g. heterosexual or homosexual), may be considered to the extent that it adversely affects the child or is demonstrative of the best interests of the child. *Piatt v. Piatt*, 27 Va. App. 426 (1998). The recent legalization of same-sex marriage signals to the court a shift away from the *Bottoms* approach. *Obergefell v. Hodges*, 192 L.Ed.2d. 609 (US 2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bostic v. Schaefer*, 760 F. 3d 352 (4th Cir. 2014) *aff'g Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va 2014); *Martin v. Ziherl*, 269 Va. 35 (2005).

C. Standard: Between Parent and Non-Parent

The court shall give due regard to the primacy of the parent-child relationship but may, upon clear and convincing evidence that the best interest of the child would be served thereby, award custody to anyone with a legitimate interest, which term is to be broadly construed to accommodate the best interest of the child. The court may award joint or sole custody to anyone with a legitimate interest. Va. Code §§ 20-124.2; 16.1-278.15(B).

To overcome the strong presumption favoring a natural parent, a party must show by clear and convincing evidence that

1. the parents are unfit;

2. the parents voluntarily relinquished custody or abandoned the child; or

3. special facts and circumstances constitute extraordinary reasons to take the child from the parents *Bottoms v. Bottoms*, 249 Va. 410 (1995*); Brown v. Burch*, 30 Va. App. 670, (1999).

Grandparents and other persons with a legitimate interest may petition for visitation but have no presumptive right thereto if the parents object. Grandparent visitation may be ordered over the parents' united objection only if the court finds that denying such visitation would be detrimental to the child's welfare. *Williams v. Williams*, 256 Va. 19 (1998). *See* the latest in a long line of cases on this issue: *accord Surles v. Mayer*, 48 Va.App. 146 (2006).

If *one* parent supports the grandparent's petition for visitation, then the court must give due regard to the primacy of the parent-child relationship but may award such visitation upon clear and convincing evidence that it is in the best interest of the child. Va. Code § 20-124.2; *Dotson v. Hylton*, 29 Va. App. 635 (1999).

There is a presumption that fit parents act in the interest of their children. The federal constitution permits a state to interfere with a fit parent's fundamental right to raise his/her child only to prevent harm or potential harm to the child. *Troxel v. Granville*, 530 U.S. 57 (2000).

But *Troxel* does not define the burden of proof to be applied when the court is faced with a custody dispute between a grandparent and a parent, both of whom have custodial rights. In that case, the standard is the best interest of the child. *Denise v. Tencer*, 46 Va. App. 372 (2005).

Non-biological boyfriend of mother had standing as a person with a "legitimate interest" to seek custody or visitation of mother's child where they had lived together for 2 ½ years and was the functional equivalent of a former stepparent. However, there must be a showing that an absence of visitation would cause "actual harm." Since there was no such showing, visitation was properly denied. *Surles v. Mayer*, 48 Va. App. 146 (2006).

Sufficient evidence of actual harm, if visitation to a stepparent is denied, include expert testimony indicating that the child would have emotional scars and suffer aggressive behavior if visitation were denied to the stepparent to whom the child was very bonded. *O'Rourke v. Vutoro*, 49 Va. App. 139 (2006).

A former cohabitating lesbian partner of the mother of a child, that was conceived by artificial insemination and whose father was unidentifiable, was a person with a legitimate interest for visitation purposes. However, the trial court below did not abuse its discretion when it did not find "actual harm" when the only evidence before it that supported a finding of harm was an expert testimony from a doctor that had not interviewed the child and based his opinion on documentary evidence and a transcript from a prior hearing. *Stadter v. Siperko*, 52 Va. App. 81 (2008).

D. Standard: Visitation

The court must assure frequent and continuing contact with both parents, if appropriate. Unless the best interest of the child dictates otherwise, non-custodial parents should be granted reasonable visitation rights. Va. Code §§ 20-124.2(B), -124.3(6).

A non-custodial parent is entitled to access to the child's academic and health records, unless the court finds good cause to order otherwise. Va. Code § 20-124.6(A). If furnishing academic or health records would cause substantial harm to the child, the treating provider may deny access. Va. Code § 20-124.6(B).

E. Standard: On Motions To Amend or Rehear

Custody is always subject to modification, and anyone with a legitimate interest may petition to amend the custody award at any time. Va. Code §§ 20-108; 16.1-241(A).

The party seeking the change must establish that (1) there has been a change in material circumstances since the most recent custody award and (2) a change of custody is in the child's best interest. Positive changes in the non-custodial party's situation may suffice as well as negative changes in the custodial parent's. *Keel v. Keel*, 225 Va. 606 (1983).

F. Relocation

If the custodial parent wishes to relocate with the child, the other parent must be given 30 days advance written notice per Va. Code § 20-124.5. Under a long line of cases, it has been established that (1) the relocation must be in the child's best interest, (2) generally a relocation provides a better economic or stable environment for the custodial parent will be viewed favorably, (3) the mere fact that the non-custodial parent will have greater difficulty maintaining the parental relationship will not preclude the move, and (4) the non-custodial parent needs to provide specific evidence of how the relationship will be adversely affected. However, the instructive cases should be examined individually as each case was decided on its specific facts. *See Scinaldi v. Scinaldi*, 2 Va. App. (1986); *Simmons v. Simmons*, 1 Va. App. 358 (1986); *Gray v. Gray* 228 Va. 696 (1985); *Carpenter v. Carpenter*, 220 Va. 299 (1979).

VII. FINAL ORDERS

A. Communicating Basis of Decision

In determining a child's custody, the court "shall communicate to the parties the basis of the decision either orally or in writing." Va. Code § 20-124.3. The court must provide more than a reference to the code section, it must identify the primary reasons for the decision. *Artis v. Jones*, 52 Va. App. 356 (2008).

B. Mandatory Terms in Final Custody Orders

All final custody orders must include a condition that each party give the other parties and the court thirty days' advance written notice of any intended change of address, unless the court, for good cause shown, orders otherwise. Va. Code § 20-124.5; Form DC-573, ORDER FOR CUSTODY/VISITATION ORDER GRANTED TO INDIVIDUALS(S).

C. Other Terms in Final Custody Orders

The court may also include such other provisions as the best interest of the child may dictate, including, for instance, provisions that the child not be taken out of state, or that the parents not make derogatory remarks about each other to the children. Generally, the court may make such disposition as between the parties as the child's best interest requires. For instance, it may make provision for supervised visitation if unsupervised visitation with the non-custodial parent would not be in the child's best interest, may decree who is to transport the children for visitation, may make arrangements for telephone contact between the child and either parent, etc. *Gray v. Gray*, 228 Va. 696 (1985).

D. Findings When Child is in Foster Care

When a child is in foster care, the court may award custody on a petition filed by a relative or other interested party only after the court makes both the best interests findings of Va. Code § 20-124.3 and the written findings required by Va. Code § 16.1-278.2(A1). *Lynchburg Division of Social Services v. Cook*, 276 Va. 465 (2008).

VIII. SPECIAL CIRCUMSTANCES

A. Disputed Paternity

If a question of parentage arises in the course of a custody action, the court may, on its own motion or upon proper motion of a party, order genetic testing and make determinations as to paternity. (*See* Chapter 3, *Parentage* in Section III, J&DR District Court – Part D, Adult Proceedings of this BENCHBOOK.) Va. Code § 20-49.3 *et seq.*

B. Custody Disputes Involving More Than One State: UCCJEA and PKPA

1. Scope of UCCJEA and PKPA:

   The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) governs custody disputes involving more than one state, except that the federal Parental Kidnapping Prevention Act (PKPA), overrides where applicable. The UCCJEA has international application, in which a foreign country is treated as a state, while the PKPA does not. Va. Code § 20-146.4.

The PKPA applies only if there has been a previous custody or visitation determination in another state, which state had proper jurisdiction when the previous determination was made, which state continues to have jurisdiction under its own laws to modify its prior determination, and the child subject to the determination or at least one contestant still resides in that state. If these conditions are met, then a Virginia court is foreclosed from any action other than enforcing the foreign order, unless the other state has expressly declined jurisdiction over the proposed modification. 28 U.S.C. Section 1738(A).

2. Jurisdiction Under UCCJEA and PKPA:

If the PKPA does not apply, the UCCJEA may still apply. A Virginia court has jurisdiction to entertain an initial custody petition or a motion to amend a prior Virginia order if Virginia is the child's "home state." The home state is where the child last lived with a parent or person acting as a parent for six consecutive months immediately prior to the time of filing. Virginia also has jurisdiction if it was the home state within six months prior to filing and a parent still lives in Virginia. Va. Code §§ 20-146.1 to -146.12.

Alternative grounds for jurisdiction may exist in circumstances in which substantial evidence is available in Virginia, and the parties have a significant connection to Virginia. Further, jurisdiction may be proper in Virginia if the child is in Virginia and no other court has jurisdiction under the UCCJEA or if other courts with potential jurisdiction have declined in favor of Virginia as a more appropriate forum. A Virginia court may also have temporary emergency jurisdiction if the child is in Virginia and has been abandoned or subjected to threat of abuse or neglect. Va. Code §§ 20-146.12(2); 20-146.12(3); 20-146.15; 20-146.18.

All the UCCJEA grounds for jurisdiction are subject to restrictions. If a court of another state has already issued a custody decree, Virginia cannot modify that decree unless the Virginia court has jurisdiction to make an initial custody determination and finds that the foreign court appears now to lack jurisdiction pursuant to the UCCJEA over the proposed modification, or the foreign court has declined to assume jurisdiction concerning the matter. Va. Code § 20-146.14; 28 U.S.C. Section 1738 (A).

If initial petitions are pending in two states simultaneously, both appearing to have grounds for jurisdiction, and the proceeding in the foreign state was commenced first, the Virginia action must be stayed pending communication with the foreign court if the foreign action was filed first, and dismissed if the foreign state having jurisdiction does not determine that Virginia is a more appropriate forum. If the Virginia action was filed first, it need not be stayed, but the court is still to communicate with the foreign court to determine the most appropriate forum. Likewise, if an *enforcement* proceeding is commenced in Virginia and a modification proceeding is pending in another state, the enforcement court must immediately communicate with the modifying court. Va. Code §§ 20-146.28; 20-146.17.

A Virginia court may decline jurisdiction if it is an inconvenient forum and a more appropriate forum exists, or if the petitioner has engaged in wrongful conduct affecting the court's jurisdiction (e.g. wrongfully taken the child from another state). Va. Code §§ 20-146.18-19.

3. General UCCJEA and PKPA Provisions:

   The UCCJEA includes provisions for registering a foreign decree in Virginia and enforcing the same as if it were a Virginia decree. Va. Code §§ 20-146.26-27.

   The UCCJEA also provides for the sharing of information and records between courts of different states and the taking of testimony in other states. Va. Code §§ 20-146.10-11.

   In all custody disputes, whether or not involving more than one state, the initiating party must file an affidavit in conformance with the statute containing information necessary to ascertain if the party has been involved in proceedings in other courts regarding the child(ren) who are the subject(s) of the current proceeding. Va. Code § 20-146.20; Form DC 620, AFFIDAVIT (UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT).

4. Developments in the UCCJEA and PKPA:

   Under the PKPA, a Virginia court was disallowed from extending jurisdiction over a petition for custody when a different state had properly taken jurisdiction, dissolved a civil union between a same-sex couple, and then entered an order regarding custody and visitation of the parties' child. *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88 (2006), *aff'd* 276 Va. 19 (2008). Further, the PKPA required that Virginia courts give full faith and credit to the custody and visitation order entered in another state that has proper jurisdiction. *Miller-Jenkins v. Miller-Jenkins*, 2007 Va. App. LEXIS 158 (Va. Ct. App. Apr. 17, 2007), *aff'd*, 276 Va. 19 (2008).

   Under the UCCJEA, it was proper for a Virginia court to register a custody order from a foreign country – even if the foreign court acquired jurisdiction retroactively – because the parties were afforded due process, nothing in the record indicated that the child custody law of the foreign country would violate the child's fundamental human rights, the foreign order, on its face, was fit to be registered in Virginia, and the foreign order had been upheld on appeal in in the foreign country. *White v. White*, 2015 Va. App. LEXIS 58 (Feb. 24, 2015).

C. Disputes Involving Circuit And Juvenile Court Proceedings

See Chapter 1, *Jurisdiction and Venue* in Section III, J&DR District Court – Part A, General Provisions of this BENCHBOOK; Va. Code § 16.1-244(A).

D. Assisted Conception

The Virginia Code addresses who is considered the mother and father of children born as a result of assisted conception, and the effect of divorce or death of a party on such determinations. Va. Code § 20-156 *et seq*.

The provisions of assisted conception § 20-156 of the Code of Virginia are not applicable when a mother does not utilize conventional medical and surgical treatment under the plain meaning of the term "medical technology" to become pregnant, even if the conception was assisted and achieved through artificial insemination. *Bruce v. Boardwine*, 64 Va. App. 623 (2015).

E. Stand-by Guardians

A parent, who has been diagnosed with a progressive or chronic medical condition, from which the parent is unlikely to recover, can petition the court to appoint a stand-by guardian who will take over custody of the child when the parent becomes incapacitated or dies. *See* Va. Code § 16.1-349 *et seq.*

IX. ENFORCEMENT

A party alleging that another party has failed to comply with a court's order in a custody proceeding may request that a show cause summons be issued for the offending party's failure to obey the court's order. *See* Section II, Part A, Forms of Contempt, of this BENCHBOOK.

Alternatively or in addition, a party may move to amend a custody order on grounds that the other party has failed to support the child's relationship with the moving party. Va. Code § 20-124.3(6).

X. APPEALS

An appeal may be taken to the circuit court from any final order of the juvenile court. In custody matters, the appeal must be noted within ten days, and no bond is required. Va. Code § 16.1-296. The juvenile court order remains in effect pending appeal and the juvenile court retains the authority to enforce (but not modify) its prior orders, unless the circuit court has subsequently entered a conflicting order. Va. Code §§ 16.1-298; -244(A).

Chapter 3. Emancipation

GENERAL PROVISIONS

A. Petition
Va. Code § 16.1-331

1. The process is begun by the filing of a petition.

2. The petition may be filed by a minor if sixteen years old and resides in the Commonwealth of Virginia, or by a parent or legal guardian of that minor.

3. The petition must contain all of the information generally required by Va. Code § 16.1-262 and state the gender of the minor, and, if the minor is not the petitioner, the name of the petitioner and the relationship of the petitioner to the minor. Va. Code § 16.1-262.

4. Should the basis for the petition be the minor's desire to enter into a valid marriage, the petition shall also include the name, age, date of birth, if known, and residence of the intended spouse. Copies of criminal records, if any, of each individual intending to be married shall be attached to the petition. Copies of any protective order issued between the individuals to be married, if any, shall also be attached to the petition.

B. Venue
Va. Code § 16.1-331

Venue for the filing of the petition is the county or city where either the minor or legal guardian resides.

C. Appointment of Counsel
Va. Code § 16.1-332

1. The court must appoint a guardian *ad litem* for the minor.

2. The court may appoint counsel for the child's parent or guardian.

D. Report or Investigation
Va. Code § 16.1-332

1. Prior to making a decision as to the appropriateness of the request, the court <u>may</u> require the local board of social services or any other agency or person to investigate the allegations in the petition and to file a report with the court.

2. The court may also make any other orders it deems appropriate to the resolution of the petition.

E. Necessary Findings
Va. Code § 16.1-333

After a hearing, the court may enter an order declaring the minor emancipated, if it finds that:

1. the minor entered into a valid marriage, whether or not it was terminated by dissolution,

2. the minor is on active duty with any of the armed forces of the United States of America, or

3. the minor willingly lives separate and apart from the parents/guardian with their consent and is capable of supporting himself and managing his own financial affairs.

F. Written Findings Necessary for Intent to Marry
Va. Code § 16.1-333.1

The court may enter an order declaring such a minor who desires to get married emancipated if, after a hearing where both individuals intending to marry are present, the court makes written findings that:

1. It is the minor's own will that the minor enter into marriage, and the minor is not being compelled against the minor's will by force, threats, persuasions, menace, or duress;

2. The individuals to be married are mature enough to make such a decision to marry;

3. The marriage will not endanger the safety of the minor. In making this finding, the court shall consider (i) the age difference between the parties intending to be married; (ii) whether either individual to be married has a criminal record containing any conviction of an act of violence, as defined in Va. Code § 19.2-297.1, or any conviction of an offense set forth in Va. Code § 63.2-1719 or § 63.2-1726; and (iii) any history of violence between the parties to be married; and

4. It is in the best interest of the minor petitioning for an order of emancipation that such order be entered. Neither a past or current pregnancy of either individual to be married or between the individuals to be married nor the wishes of the parents or legal guardians of the minor desiring to be married shall be sufficient evidence to establish that the best interests of the minor would be served by entering the order of emancipation.

G. Effects of the Order of Emancipation

Va. Code § 16.1-334

An order that a minor is emancipated shall have the following effects:

1. The minor may consent to medical, dental or psychiatric care, without parental consent, knowledge or liability. Va. Code § 16.1-334.

2. The minor may enter into a binding contract or execute a will. *See* Va. Code § 64.1-47.

3. The minor may sue or be sued in his own name.

4. The minor is free to keep all income without control by parents or guardian.

5. The minor may establish his own residence.

6. The minor may buy or sell real property.

7. The minor may not be the subject of a petition alleging that he or she has been abused, neglected, abandoned, or in need of services or supervision.

8. The minor may not be held in violation of a curfew ordinance.

9. The minor may enroll in any school or college without consent of a parent/guardian.

10. The minor may get a driver's license without consent of a parent/guardian.

11. Parents are no longer responsible for complying with compulsory school attendance.

12. Parents are no longer responsible for providing support.

13. Parents are no longer guardians of the minor.

14. Parents are no longer responsible for the minor's acts.

15. A minor may execute releases.

16. A minor loses the right to have a guardian *ad litem* appointed, if the guardian *ad litem* would be appointed solely because of the minor's age. Emancipation alone, however, is not sufficient reason to transfer a juvenile charged with delinquency for trial as an adult. *Kluis v. Commonwealth*, 14 Va. App. 720, 418 S.E.2d 908 (1992).

17. A minor may marry without any other's consent.

18. Attorney General recently opined that a minor who has been emancipated may seek a protective order. *See* opinion of Attorney General to the Honorable Charniele Herring, Member, House of Delegates, 10-116, 2011 Va. AG Lexis 2 (01/21/11).

H. Effect if Order is Ever Declared Void or Terminated

Va. Code § 16.1-334

Any act done during the time the order is or is purported to be in effect shall be valid, regardless of whether a later order is entered, reversing the emancipation or declaring that the emancipation order was void ab initio.

I. DMV ID Card

Va. Code § 16.1-334.1

Once the court order of emancipation is entered, a minor must be given a copy.

A minor may then go to DMV and apply for an identification card. Upon application and submission of the order, DMV shall issue an identification card containing the minors photograph, a statement that the minor is emancipated, and a listing of all effects of the emancipation order as set forth in Va. Code § 16.1-334.

J. Common Law Emancipation

In *Ware v. Ware*, 10 Va. App. 352, 391 S.E.2d 887 (1990) the Virginia Court of Appeals found a child to be "emancipated" within the meaning of a property settlement agreement because she was working full time and supporting herself.

Virginia Code § 16.1-241(W) describes an emancipation as occurring through entry of an order under the statute or by marriage, active duty in the military or willingly living separate and apart from the parents or guardian with their consent or acquiescence.

The statutes on emancipation do not claim exclusivity; as of yet, no cases have addressed the issue. *Ware* and §16.1-241(W) could be taken to argue that the facts of a child's living condition may serve as evidence of emancipation without any action by a court.

Chapter 4. Judicial Authorization of Abortion for Minors

Va. Code § 16.1-241(W).

A. General

1. Filing of petition

    a. Process is begun by the filing of a petition.

    b. Hearing must be held on petition.

    c. No filing fee required.

B. Venue

Petition may be filed in any county or city where the child resides or is present when the proceedings are commenced.

C. Confidentiality

Court proceedings under this subsection and records of such proceedings shall be confidential.

D. Appointment of Counsel

1. A minor may participate in the court proceedings on her own behalf.

2. Court may appoint a guardian ad litem.

3. Court **shall** advise minor of her right to counsel and shall appoint such counsel if one is requested.

E. Time Requirements

1. Time frames within which court must act

    a. Court proceedings **shall** take precedence over all other pending matters

    b. Court proceedings **shall** be heard and decided as soon as practicable but in no event later than four days after petition is filed.

2. Failure to act within time frame

    If the court fails to act within the time period required by this subsection, the court **shall** immediately authorize a physician to perform the abortion without consent or notice to an authorized person.

3. Nothing in code section shall be construed to authorize a physician to perform an abortion on a minor in circumstances or in a manner that would be unlawful if performed on an adult woman.

F. Findings of Court

1. Findings of Court

    a. If the court finds that the minor is "mature enough and well enough informed, in consultation with her physician," independent of the wishes of any authorized person the court **shall** authorize a physician to perform an abortion without notice to an authorized person.

    b. If the court does not believe that the minor is mature, it must decide whether an abortion without notification is in her best interests.

2. Characteristics of Maturity as Reflected in Reported Decisions from Courts in Other States

    a. The factors to be considered in determining maturity/immaturity include perspective, experience, and judgment. *HB v. Wilkinson*, 639 F.Supp. 952, 953-54 (D. Utah 1986).

        (i) Perspective in the relevant context refers to a minor's ability to "appreciate and understand the relative gravity and possible detrimental impact of available options, as well as the potential consequences of each." When evaluating a minor's perspective on her decision, the court can examine steps the minor took to explore her options and the extent to which she considered and weighed the potential consequences of each option. In re B.S., 205 Ariz. 611, 617, 74 P.3d 285, 291 (Ct. App. Div.1 2003); In re Anonymous 2, 253 Neb. 485, 488, 570, N.W.2d 836, 839 (1997).

        (ii) Experience – refers to all that has happened to the minor during the course of her lifetime including things she has seen and done. Some pertinent inquiries include the minor's prior work experience, experience in living away from home, handling personal finances, age, travel and other significant decisions made in the past. *HB v. Wilkinson* at 954; In re B.S. 205 Ariz. at 616, 74 P.3d at 290.

        (iii) Judgment – is of great importance in determining maturity. The exercise of good judgment requires being fully informed so as to be able to weigh alternatives independently and realistically. Among other things, the minor's conduct is a measure of good judgment. Factors such as stress

and ignorance of alternatives have been recognized as impediments to the exercise of proper judgment by minors. *HB v. Wilkinson*, at 954.

b. In determining whether a minor is mature, a trial judge observing testimony may draw inferences from the minor's composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her ability to articulate her reasoning and conclusions. "In fact, no list of the inquiries or considerations pertinent to an assessment of maturity could purport to be exhaustive." Ex Parte Anonymous, 806 So.2d 1269, 1274 (Ala. 2001).

c. The very fact that the minor voluntarily decided to seek a judicial wavier of parental consent for an abortion and specifically requested the advice of appointed legal counsel may, of itself, indicate maturity. In re Anonymous, 782 So.2d 791, 793 (Ala.Civ.App. 2000).

d. Intellectual capacity, *HB v. Wilkinson*, 639 F. Supp. 952 (D. Utah 1986).

e. Experience and knowledge necessary to understand the situation, *In the matter of the Petition of Doe*, 866 P. 2d 1069, 1074 (Kan. App. 1994).

f. Understanding of the consequences of the choice at hand, *In the matter of Anonymous*, 515 So. 2d 1254 (AK. Civ. App. 1987).

g. Involvement in school activity

h. Reliance on advice of teenagers

i. Expectations regarding the reasonableness/likelihood of keeping the abortion a secret from parent(s)

j. Purposeful failure to use contraceptives

k. Plans for the future (college, etc.)

l. "Thoughtfulness" of decision (i.e., whether the decision was made after consulting a counselor or others)

m. Age

n. Work history

3. "Best Interests"

a. If the court finds that the minor is **not** mature, the court must determine whether the abortion would be in her best interests. If so, the court **shall** authorize a physician to perform the abortion. *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979).

b. If the judge authorizes abortion based on the best interest of the minor, the order shall expressly state that the authorization is subject to the physician/his agent giving notice of intent to perform the abortion.

But such notice is **not** required if the judge finds that such notice would not be in the best interest of the minor. In determining whether notice is in the minor's best interest the judge shall consider the totality of the circumstances but shall find that notice is **not** in the best interest of the minor if:

(i) one or more authorized persons with whom the minor regularly/customarily reside is abusive or neglectful, AND

(ii) every other authorized person is either abusive or neglectful or has refused to accept responsibility as parent, legal guardian, custodian or person standing in loco parentis.

4. Factors in Determining "Best Interests"

a. The minor's emotional and mental needs. In re *Doe* 2, 19 S.W.3d 278, 282 (Tex. 2000).

b. The minor's relationship with the parent and the effect of notification on that relationship.

c. Minor's physical needs for support and shelter

d. History of previous abortions with parental consent

e. Length of pregnancy

G. Appeal

1. An expedited, confidential appeal is available to the circuit court if the minor is **denied** the order authorizing abortion without notice or consent.

2. The appeal shall be heard and decided by the circuit court and decided no later than five days after the appeal is filed.

3. The order **authorizing** abortion without notification is **not** appealable to the circuit court.

4. If the circuit court fails to act within the time frame required, authorization is deem to have been given for the physician to perform abortion without notice to any authorized person.

5. Any physician who performs an abortion in violation of this subsection shall be guilty of a Class 3 misdemeanor.

Definitions are located at the end of Va. Code § 16.1-241(W).

Chapter 5. Abuse and Neglect

I. GENERAL CONSIDERATIONS

The protection of a child who is the subject of abuse and/or neglect by his/her caretakers is governed by the statutory authority given to juvenile courts.

A. Definition of Abused or Neglected Child

Va. Code § 16.1-228

1. Any child whose parent(s) or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child, a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental functions, including, but not limited to, a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II controlled substance, or (ii) during the unlawful sale of such substance by that child's parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony violation of § 18.2-248;

2. Any child whose parent(s) or other person responsible for his care neglects or refuses to provide care necessary for his health; however, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;

3. Any child whose parent(s) or other person responsible for his care abandons such child;

4. Any child whose parent(s) or other person responsible for his care commits or allows to be committed any sexual act upon a child in violation of the law;

   (NOTE: The sexual act must not have been a child involved in the case nor must the party have been criminally convicted for this provision to be satisfied. *Cumbo v. Dickenson County Department of Social Services*, 620 Va. App. 124 (2013)).

5. Any child who is without parental care or guardianship caused by the unreasonable absence or the physical or mental incapacity of the child's parent, guardian, legal custodian or other person standing *in loco parentis* or;

6. Whose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child alone in the same dwelling, including an apartment as defined in § 55-79.2, with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902.

7. Who has been identified as a victim of sex trafficking or severe forms of trafficking as defined in the Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102 et seq., and in the Justice for Victims of Trafficking Act of 2015, 42 U.S.C. § 5101 et seq.

    a. "The term 'severe forms of trafficking in persons' means:

        (i) Sex trafficking in which a commercial sex act is induced by force, fraud, coercion, or in which the person induced to perform such act has not attained 18 years of age; or

        (ii) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

    b. "The term 'sex trafficking' means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act."

If a civil proceeding under this chapter is based solely on the parent having left the child at a hospital or rescue squad, it shall be an affirmative defense that such parent safely delivered the child to a hospital that provides 24-hour emergency services or to an attended rescue squad that employs emergency medical technicians, within 14 days of the child's birth. For purposes of terminating parental rights pursuant to § 16.1-283 and placement for adoption, the court may find such a child is a neglected child upon the ground of abandonment.

NOTE: Virginia Code § 63.2-100 also defines what constitutes an "abused and neglected child." The 2007 General Assembly amended § 63.100 to specify that a decision by parents or another person with legal authority over a child to refuse a particular medical treatment for a child with a life-threatening condition shall not be deemed a refusal to provide necessary care if (i) such decision is made jointly by the parents or other person with legal authority for the child, AND the child; (ii) the child has reached 14 years of age and is sufficiently mature to have an informed opinion on the subject of his medical treatment; (iii) the parents or other person with legal authority and the child have considered alternative treatment options; and (iv) the parents or other person with legal authority and the child believe in good faith that such decision is in the child's best interests. The statutory change is known as "Abraham's Law." The statutory change stipulates that this test shall not be construed to limit the provisions of § 16.1-278.4, which pertains to children in need of services. It is unknown why the General Assembly did not amend the definition of "abused and neglected child" in § 16.1-228 to include this language.

B. Immediate Custody of Children

Va. Code § 63.2-1517

1. Under certain circumstances, a physician, a child protective services worker of a local department, or law enforcement official investigating a report or complaint of abuse and neglect may take a child into custody for up to seventy-two hours without approval of parents or guardians, *provided*:

    a. continuing the child in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the child's care, presents an imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result or if evidence of abuse is perishable or subject to deterioration before a hearing can be held;

    b. a court order is not immediately obtainable;

    c. the court has established procedures for placing such children;

    d. following taking the child into custody, the parent(s) or guardian(s) are notified as soon as is practicable. Every effort shall be made to provide such notice in person;

    e. a report is made to the local department; and

    f. the court is notified and the person or agency taking custody of such child obtains, as soon as possible, but in no event later than seventy-two hours, an emergency removal order pursuant to § 16.1-251; however, if a preliminary removal order is issued after a hearing held in accordance with § 16.1-252 within seventy-two hours of the removal of the child, an emergency removal order shall not be necessary. Any person or agency petitioning for an emergency removal order after four hours have elapsed following taking custody of the child shall state the reasons therefore pursuant to § 16.1-251.

2. If the seventy-two hour period expires on a Saturday, Sunday, legal holiday or day on which the court is lawfully closed, the seventy-two hours shall be extended to the next day that is not a Saturday, Sunday, or other legal holiday, or day on which the court is lawfully closed.

C. Emergency Removal Hearing and Order

Va. Code § 16.1-251

1. A child who is alleged to have been abused or neglected may be taken into immediate custody pending a final hearing on the petition and placed in shelter care pursuant to an emergency removal order if it is established that:

a. the child would be subjected to an imminent threat to life or health with the likely result of severe or irremediable injury if returned to or left in the custody of his parents, guardian, legal custodian, or other person standing in *loco parentis* and

b. reasonable efforts have been made to prevent removal of the child from his home, and there are no less drastic alternatives which can reasonably protect his life or health pending a final hearing.

2. An affidavit pursuant to the UCCJA must be filed with each petition. Va. Code § 20-146.20.

3. The court *may* issue such an order *ex parte* upon a petition supported by affidavit or sworn testimony before the judge or intake officer:

a. when there is not a reasonable opportunity to provide preventive services, reasonable efforts *shall* be deemed to have been made.

b. whenever an emergency removal order is entered, there shall be a preliminary removal hearing held as soon as practicable but no later than five business days after the removal. Va. Code §§ 16.1-251(B), -252.

4. The court *shall* give consideration to temporary placement with a relative or other interested individual, including grandparents, until the preliminary removal hearing is held. If such a placement is made, it is required to be under the supervision of the local department of social services until the preliminary removal hearing is held.

D. Preliminary Removal Hearing and Order
Va. Code § 16.1-252

1. The hearing is to be held as soon as practicable, but not later than within five business days after the emergency removal of the child.

2. The hearing is in the nature of a preliminary hearing and is not a final determination of custody.

3. Notice of at least twenty-four hours *shall* be given to:

a. the guardian *ad litem* for the child;

b. the parents, guardian or legal custodian(s), or other person standing in *loco parentis*; and

c. the child if he is age twelve or older.

4. Notice *shall* include:

a. date, time, and place of hearing;

b. statement of facts necessitating removal; and

c. notice that a child support request will be considered if the child is removed.

5. If notice cannot be given, despite diligent efforts, the hearing *shall* be held, with the right to a later hearing reserved to those entitled to notice.

6. All parties to the hearing *shall* be advised of their right to counsel and a guardian *ad litem* must be appointed for the child. Va. Code § 16.1-266.

7. The parties *shall* have the right to confront and cross-examine witnesses and to present evidence.

8. If the child was fourteen years of age or under on the date of the alleged offense and is sixteen or under at the time of the hearing, the request may be made for the court to order the child's testimony by way of closed circuit testimony. Va. Code § 16.1-252(D).

9. A request for closed circuit testimony may be made by the child's attorney or guardian *ad litem* or the Department of Social Services, if the child is in their custody.

10. The provisions of § 63.2-1521 apply in full to the use of closed circuit testimony (*see* Part II, Section A, Chapter 6 of this BENCHBOOK) except that the party seeking the order for closed circuit television must apply for the order at least 48 hours before the hearing. The court may, for good cause, allow the request to be made at a later time.

11. For the preliminary removal order to issue or for an existing order to continue, the petitioning party or entity *must* prove:

    a. child would be subjected to imminent threat to life, or health such that severe or irremediable injury would be likely to result without removal pending a final hearing; and

    b. reasonable efforts have been made to prevent removal and no less drastic alternatives to removal exist. Less drastic alternatives include, but are not limited to, the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to § 16.1-253.

12. Where there is no reasonable opportunity to provide preventive services, reasonable efforts *shall* be deemed to have been made.

13. If the court determines removal is proper, the court *shall*:

    a. place the child in the temporary care and custody of a suitable person under the supervision of the local department of social services, with consideration given to

placement in the temporary care and custody of a relative or other interested individual, including grandparents until such time as the court enters an order of disposition pursuant to § 16.1-278.

b. if placement with a relative or other interested party is not available, the child shall be placed with a suitable agency.

c. Prior to the temporary placement of a child with a relative or other interested individual, including grandparents, the court must consider whether the persons are:

(i) willing and qualified to receive and care for the child;

(ii) willing to have a positive, continuous relationship with the child; and

(iii) willing, and have the ability, to protect the child from abuse and neglect. Va. Code § 16.1-252(F)(1).

d. order visitation if such will not endanger the child's life or health; and

e. enter an order of child support pursuant to § 16.1-290.

f. Any order of temporary custody to a relative or other interested individual should provide for compliance with any protective order issued in the case and should provide for the ongoing provision of social services to the child and temporary caretaker, if appropriate.

14. The court *may* enter a preliminary protective order for the protection of the child pursuant to § 16.1-253.

15. At the conclusion of the hearing, the court *shall* determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence, unless there is an objection made by one of the following prior to such a finding being made:

a. a person responsible for the care and custody of the child;

b. the child's guardian *ad litem*; or

c. the local department of social services.

Va. Code § 16.1-252(G).

16. Any finding of abuse or neglect *shall* be stated in the order.

17. If there is an objection to entry of a finding, the court *shall* schedule an adjudicatory hearing to be held within thirty days of the initial preliminary removal hearing. Va. Code § 16.1-252(G).

18. The preliminary removal order and any preliminary protective order *shall* be in effect pending an adjudication on the allegations of abuse or neglect.

19. If a finding of abuse or neglect is made and the child is removed or a preliminary protective order is issued, the court *shall* schedule a dispositional hearing to be held within sixty days of the preliminary removal order hearing. Va. Code § 16.1-252(H).

20. If an objection is made to the finding of abuse or neglect at the preliminary removal hearing and it is necessary for the court to schedule an adjudicatory hearing at a later date (to be held within thirty days of the preliminary removal hearing), the court must also schedule the dispositional hearing (to be held within sixty days of the preliminary removal hearing. Va. Code § 16.1-252(H).

21. All parties present at the initial preliminary hearing shall be given notice of the date scheduled for the final disposition hearing. Parties not present shall be summoned. Va. Code § 16.1-252(H).

22. Violation of any order issued pursuant to this section of the Code *shall* constitute contempt of court. Va. Code § 16.2-252(J).

E. Dispositional Hearing
Va. Code § 16.1-278.2

1. The dispositional hearing must be held within sixty days of a preliminary removal order hearing or a hearing on a preliminary protective order if the court found the child was abused or neglected and:

    a. removed the child from his home, or

    b. entered a preliminary protective order. Va. Code § 16.1-278.2(A).

2. Notice of the hearing, pursuant to § 16.1-263 shall be given to:

    a. the child's parent, guardian, legal custodian or other person standing in *loco parentis*;

    b. the local department of social services;

    c. the guardian *ad litem*;

    d. the court-appointed special advocate, if one has been appointed.

3. The court may proceed with the dispositional hearing in the absence of a parent, guardian, legal custodian or other person standing in *loco parentis* if:

    a. personal or substitute service was made on the person or

    b. the court determines that such person cannot be found after reasonable effort, or in the case of a person who is without the Commonwealth, the person cannot be found or his post office address cannot be ascertained after reasonable effort.

4. If the child is in foster care at the time of the dispositional hearing, the court must also review the foster care plan. Va. Code § 16.1-278.2(B). (*See* section on foster care review elsewhere in this BENCHBOOK.)

F. Dispositional Orders
Va. Code § 16.1-278.2

1. The court may make any of the statutorily allowed orders of disposition if the child is found to have been

    a. abused or neglected;

    b. at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in his care; or

    c. abandoned by his parent or other custodian or is without parental care and guardianship because of his parents' absence or physical or mental incapacity.

2. Statutorily allowed orders of disposition include:

    a. enter an order pursuant to § 16.1-278;

    b. permit the child to remain with the parent, subject to such conditions and limitations as the court may order with respect to such child and his parent or other adult occupant of the same dwelling.

    c. prohibit or limit contact between the child and parent or other adult occupant of the same dwelling whose presence tends to endanger the child's life, health or normal development.

    The court may exclude any individual from the home under conditions prescribed by the court but not for longer than 180 days. The hearing must be held within 150 days to determine further need for exclusion. The court may prohibit or limit contact for another 180 days.

    d. Permit the child to be placed in suitable family home, child-caring institution, residential facility, or independent living arrangement when legal custody remains

with the parents or guardians. The local board or public agency placing the child shall enter into an agreement with the parents or guardians regarding the responsibilities of each for the care and control of the child.

The board or public agency which places the child has the final authority to determine the appropriate placement for the child.

If the court enters an order allowing a local board or public agency to place a child and legal custody is going to remain with the parents or guardians, the court must find that reasonable efforts have been made to prevent the out-of-home placement and must further find that continued placement in the home would be contrary to the welfare of the child.

e. Transfer legal custody to any of the following after finding that there is no less drastic alternative:

(i) A relative or other individual only if the court makes a finding, by a preponderance of the evidence that such person is willing and qualified to care for the child, is willing to have a positive, continuous relationship with the child; is committed to providing a permanent suitable home for the child; and is willing and able to protect the child from abuse and neglect. The court should also impose other terms and conditions which would promote the welfare of the child including the ongoing provision of social services to the child and custodian.

(ii) A child welfare agency, private organization or facility which is licensed or authorized by law to receive and care for the child (cannot transfer legal custody of an abused or neglected child to an agency, organization or facility outside of the Commonwealth of Virginia without the approval of the Commissioner of Social Services).

(iii) A local board of public welfare or social services in the jurisdiction in which the court sits or in the jurisdiction in which the child has residence.

f. Transfer legal custody pursuant to e. above and order the parent to participate in services and programs or to refrain from conduct;

g. terminate the rights of the parents pursuant to § 16.1-283.

3. Placements with local boards of public welfare or social services – if a child is placed in the custody of a local board of public welfare or social services, it is important to remember the following:

a. the local board is required to accept the child only if it has been given reasonable notice and an opportunity to be heard;

b. if placement is made on an emergency basis and there has been no opportunity to provide notice, the local board may still have to accept custody for up to fourteen days. The judge must enter an order describing the emergency and the need for such temporary placement;

c. the local board, even without notice, may always consent to placement; and

d. the local board has final authority to determine the child's placement.

4. Preliminary protective orders may be incorporated into the dispositional order. Va. Code § 16.1-278.2(C).

5. Dispositional orders are final orders which may be appealed in accordance with Va. Code § 16.1-296. Va. Code §16.1-278.2(D).

G. Authority to Speak with Children

Any person required to make a report or investigation or conduct a family assessment is authorized to speak to any child suspected of being abused or neglected or to any of his/her siblings. The conversation may take place out of the presence of the parent(s) and may be without their consent. Va. Code § 63.2-1518.

H. Evidentiary Privileges Not Applicable

Statutory husband-wife and physician-patient privileges against testifying do not apply in abuse and neglect cases. Va. Code § 63.2-1519.

I. Photographs and X-rays

Photographs and X-rays may be taken of a suspected abused or neglected child without parental or caretaker consent, as part of the medical evaluation or as part of the investigation or family assessment of the case by the local department or the court. They may be introduced into evidence in any subsequent proceeding; but they may not be used in lieu of a medical evaluation. The court may impose restrictions regarding the confidentiality of photographs of a child as it deems appropriate. Va. Code § 63.2-1520.

J. Court Ordered Evaluations

The court may order psychological, psychiatric and physical examinations of a child alleged to be abused or neglected and of the parent(s), guardian(s) caretaker(s) or sibling(s) of a suspected abused or neglected child. Va. Code § 63.2-1524.

K. Physician Evidence

Competent evidence of a physician that a child has been abused or neglected shall be prima facie evidence to support a petition for removal of a child from his parent(s) or caretaker(s). Va. Code § 63.2-1525.

L. Admission of Evidence of Sexual Acts With Children

Va. Code § 63.2-1522

In civil proceedings involving alleged abuse or neglect, an out-of-court statement by a child, describing any act of a sexual nature performed with or upon the child by another, not otherwise admissible by statute or rule, may be admitted to evidence, *provided*:

1. the child victim is age twelve or under at the time the statement is offered into evidence; and

2. the child testifies in person, by videotaped deposition, or by closed circuit television and is subject to cross-examination, or is found to be unavailable, based on any of the following grounds:

    a. death;

    b. absence from the jurisdiction, providing such absence is not for the purpose of preventing testimony;

    c. total failure of memory;

    d. physical or mental disability;

    e. existence of a privilege involving the child;

    f. child is incompetent, because of fear or a similar reason, including the inability to communicate about the offense;

    g. likelihood that the child would suffer severe emotional trauma from testifying. (This must be shown through expert testimony.)

3. The child's out-of-court statement is found to possess particularized guarantees of trustworthiness and reliability. The proponent of the statement must notify the adverse party of the intention to introduce the statement and the substance of the statement sufficiently in advance of the proceedings to allow defense against the statement and the opportunity to subpoena witnesses.

4. In determining whether a statement possesses particularized guarantees of trustworthiness and reliability under subsection B2, of Virginia Code § 63.2-1522, the court shall consider, but is not limited to, the following factors:

    a. The child's personal knowledge of the event;

    b. The age and maturity of the child;

c. Certainty that the statement was made, including the creditability of the person testifying about the statement and any apparent motive such person may have to falsify or distort the event including bias, corruption or coercion;

d. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

e. The timing of the child's statement;

f. Whether more than one person heard the statement;

g. Whether the child was suffering pain or distress when making the statement;

h. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

i. Whether the statement has internal consistency or coherence, and uses terminology appropriate to the child's age;

j. Whether the statement is spontaneous or directly responsive to questions;

k. Whether the statement is responsive to suggestive or leading questions; and

l. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

5. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the out-of-court statement.

M. Admission of Medical Evidence in Juvenile and Domestic Relations District Court
Va. Code § 16.1-245.1

1. Any party may present medical reports documenting the extent, nature and treatment of any physical condition or injury as evidence in an abuse or neglect proceeding provided:

   a. the party intending to present such evidence gives the opposing party or parties a copy of the evidence and written notice of the intention to present it at least ten days (in case of preliminary removal hearing at least twenty-four hours) prior to the trial or hearing and

   b. a sworn statement of the treating or examining health care provider or laboratory analyst who made the report is attached and certifies that the information is true, accurate, and fully describes the nature and extent of the physical condition or injury, and the patient named was the person treated or in the case of laboratory analysis, that the information contained therein is true and accurate.

Chapter 6. Preliminary Child Protective Orders

I. GENERAL CONSIDERATIONS

A. Purpose

To protect a child's life, health, safety, or normal development pending the final determination of any matter before the court. Va. Code § 16.1-253(A).

B. Who may file

1. Any person

2. Court on its own motion

C. What court's order may require

Form DC-527, PRELIMINARY CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT
Form DC-545, PRELIMINARY CHILD PROTECTIVE ORDER

1. Abstention from offensive conduct against the child, a family or household member of the child or any person to whom custody of the child is awarded.

2. Cooperation in the provision of reasonable services or programs designed to protect the child's life, health or normal development.

3. Access to the child's home at reasonable times designated by the court to visit the child or inspect the fitness of the home and to determine the physical and emotional health of the child.

4. Visitation with the child as determined by the court.

5. Refraining from acts of commission or omission which tend to endanger the child's life, health or normal development.

6. Refraining from such contact with the child or family or household members of the child, as the court may deem appropriate, including removal of such person from the residence of the child. Prior to the issuance by the court of an order removing such person from the home of the child, the petitioner must prove by a preponderance of the evidence that such person's probable future conduct would constitute a danger to the life or health of such child, and that there are no less drastic alternatives which could reasonably and adequately protect the child's life or health pending a final determination on the petition.

7. Granting the person on whose behalf the order is issued of any companion animal as defined in Va. Code § 3.2-6500 if such person meets the definition of owner in § 3.2-6500.

D. Who is subject to court's order

1. Parents
2. Guardian
3. Legal custodian
4. Any person acting *in loco parentis*
5. Any other family or household member of the child

E. How Initiated
Va. Code § 16.2-253(B)

1. By motion or petition
    a. may be in any matter before the court
    b. may be on the court's own motion or on motion of any person
2. Affidavit or sworn testimony required before the judge or intake officer.

F. Virginia Criminal Information Network
Va. Code § 16.1-253(G) & (K)

When a preliminary protective order is issued, the district court must forthwith, but no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network (VCIN), the respondent identifying information and the name, date of birth, sex and race of each protected person. Upon entry of the order, a copy of the order and an addendum containing identifying information must be forwarded forthwith to the primary law-enforcement agency responsible for service. Upon effecting service, the agency must enter the date and time of service into VCIN. If the entering agency determines that any identifying information is incorrect, it must enter the corrected information in VCIN.

Virginia Code § 18.2-308.1:4 amended. This act makes the prohibition on purchasing and transporting a firearm applicable *only* to persons subject to preliminary child orders and final child protective orders where a petition alleging *abuse and neglect* has been filed.

II. THE *EX PARTE* ORDER

A. When and how can the order be issued?

1. An *ex parte* preliminary protective order may be issued when it is established that the child would be subjected to an "imminent threat to life or health to the extent that delay for the provision of an adversary hearing would be likely to result in serious or irremediable injury" to child's life or health. Va. Code § 16.1-253(B).

2. *Ex parte* order may be issued

    a. on the court's own motion or motion of any party in any matter before the court.

    b. upon petition.

3. The motion or petition must be supported by an affidavit or sworn testimony before a judge or intake officer.

4. If an *ex parte* order is issued without an affidavit, the court's order shall state the basis upon which the order was entered. Such basis shall include a summary of the allegation made as well as the court's findings.

B. What the court's order may require

1. Same as for a preliminary protective order issued in a non-*ex parte* fashion. See Section I, General Considerations, C (above). Effective July 1, 2014, the court may grant the petitioner the possession of any companion animal as defined in Va. Code § 3.2-6500 if such petitioner meets the definition of owner in § 3.2-6500 **and** any other relief necessary for the protection of the petitioner and family or household members of the petitioner.

2. The court cannot under a PPO remove a child from the custody of his or her parents, guardian, legal custodian or other person standing *in loco parentis*, except as provided in Va. Code § 16.1-278.2, and no order hereunder shall be entered against a person over whom the court does not have jurisdiction. Va. Code § 16.1-253(H).

C. Adversary hearing required

1. Time – must be held within the shortest practicable time not to exceed five business days after the issuance of the *ex parte* order.

2. Notice, Va. Code § 16.1-253(C)

    a. must be given at least twenty-four hours in advance to *all* parties, including the child, if twelve years of age or older;

    b. must contain time, date and place of hearing; and

    c. must contain a specific statement of the facts which give rise to the issuance of a preliminary protective order

3. Right to counsel – all parties to be advised, Va. Code § 16.1-253(D)

    a. appoint, if indigent;

    b. retain;

    c. waive.

4. If abuse or neglect is alleged then the court shall appoint a guardian *ad litem* (GAL) for the child at the issuance of the *ex parte* order. Va. Code § 16.1-266(A) (Form DC-514).

5. If at the hearing a finding of abuse or neglect is found by the court and there is an objection to a finding then an adjudicatory hearing shall be held within 30 days of the date of the initial preliminary protective order (PPO) hearing. Also, the court shall schedule a dispositional hearing within 60 days of the PPO hearing. Va. Code § 16.1-253(F)(G). (2013 Va. Ch. 130, 2012 Va. HB 2117, effective July 1, 2014.)

D. Child Protective Order

Form DC-532, CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT or
Form DC-546, CHILD PROTECTIVE ORDER

If at the dispositional hearing a child is found to be (a) abused or neglected; (b) at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in his care; or (c) abandoned by his parent or other custodian, or without parental care and guardianship because of his parent's absence or physical or mental incapacity, the juvenile court or the circuit court may enter a final child protective order to protect the welfare of the child as outlined in Va. Code § 16.1-278.1(A). The court may enter said order for any duration as appropriate to protect the child's life, health, and normal development. *Altice v. Roanoke County Dep't of Soc. Servs. 45 Va. App. 400, 611 S.E.2d 628, (2005)*. The child protective order shall set forth the precise date the order expires, so that it can automatically be cleared from VCIN. By statute the order will expire at 11:59 p.m. on the date specified.

III. VIOLATION OF PRELIMINARY PROTECTIVE ORDER

A. Contempt of Court

1. Violations are punishable by the contempt power of the court. Va. Code § 16.1-253(J).

2. In addition to any other penalty, a person who violates any provision of a protective order is guilty of a Class 1 misdemeanor. Upon conviction, the person shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended. If an assault and battery is committed upon the protected individual, resulting in serious bodily injury then the person shall be guilty of a Class 6 felony. If the protective order is violated by the entering in and remaining on the protected persons home then the person is guilty of a Class 6 felony. Upon conviction of violating a protective order, a new order shall be issued. Va. Code § 16.1-253.2.

3. Any person convicted of a second violation of a protective order, when the offense is committed within five years of a conviction for a prior offense and when the instant offense was based on an act or threat of violence, shall include a mandatory minimum term of confinement of 60 days. If convicted of a third offense, then the mandatory minimum term of confinement is six months. The mandatory minimum terms of confinement prescribed for violations of this section shall be served consecutively with any other sentence. Va. Code § 16.1-253.2.

B. Purchase or Transportation of Firearms by Persons Subject to Protective Orders

A person who is subject to a protective order is prohibited from carrying any firearm, even if that person holds a concealed-handgun permit issued by a circuit court. Any person subject to a protective order who holds such a concealed-handgun permit must surrender that permit to the court entering the protective order for the duration of the protective order. A violation of this subsection is a Class 1 misdemeanor. Va. Code § 18.2-308.1:4.

FORMS
*make sure the current form is being used.

DC-527- PRELIMINARY CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT
DC-545- PRELIMINARY CHILD PROTECTIVE ORDER
DC-561- ADJUDICATORY ORDER FOR ABUSE OR NEGLECT CASES
DC-553- DISPOSITIONAL ORDER FOR UNDERLYING PETITION; FOSTER CARE PLAN
DC-532- CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT
DC-546- CHILD PROTECTIVE ORDER

Chapter 7. Relief of Custody

I. GENERAL CONSIDERATIONS

Va. Code § 16.1-277.02

A. Filing of Petition

1. The process is begun by the filing of a petition with the court requesting to be relieved of the care and custody of the child.

2. A referral must be made to the local department of social services for investigation as soon as the petition is filed.

   The local department should assess whether or not there are services that could be provided which would prevent the necessity of an out-of-home placement. Va. Code §§ 63.2-319, -410.

B. Appointment of Counsel

1. Once the petition is filed, the court must appoint a guardian *ad litem* for the child.

2. If it appears as if the court is heading in the direction of termination of parental rights, the parents should be notified of the right to counsel pursuant to Va. Code § 16.1-266(C).

C. Notice and Hearing

1. A hearing must be scheduled once the petition is filed.

2. The hearing may include the partial or final disposition of the issues at hand.

3. Notice of the hearing and a copy of the petition must be given to:

   a. the child, if he/she is twelve or older;

   b. the guardian *ad litem* for the child;

   c. the child's parents, custodian or other person standing *in loco parentis*; and

   d. the local board of social services.

4. Notice is not required if the judge certifies that the identity of a parent is not reasonably ascertainable.

5. The hearing may be held in the absence of a parent provided the parent received personal or substituted service of hearing date or the court determines that the parent cannot be found after reasonable efforts are made to locate.

6. If the hearing is to grant permanent relief of custody and termination of parental rights, notice must be given pursuant to Va. Code §§ 16.1-263 and 16.1-264.

7. All parties who are entitled to notice are also entitled to confront and cross-examine witnesses and are entitled to present evidence in their own behalf.

D. Burden of Proof

1. If the request is for nonpermanent relief of custody, the request for relief must be established by a preponderance of the evidence. Va. Code § 16.1-277.02(C).

2. If the request is for permanent relief of custody and termination of parental rights, the finding must be based upon clear and convincing evidence as to whether termination of parental rights is in the best interest of the child.

E. Relief the Court May Grant at the Initial Hearing

1. If the court is satisfied that the burden of proof has been met and relief should be granted, the court may enter any of the following orders:

    a. preliminary protective order pursuant to Va. Code § 16.1-253;

    b. require the local board of social services to provide services to the family;

    c. enter any order of disposition permitted in an abuse/neglect case (Va. Code § 16.1-278.3);

    d. any combination of the above.

2. If the Court transfers legal custody of the child, the order shall be made in accordance with the provisions of subdivision A5 of Va. Code § 16.1-278.2 and shall be subject to the provisions of subsection C1 of this section. This order shall include, but need not be limited to, the following findings: (i) that there is no less drastic alternative to granting the requested relief; (ii) that reasonable effort have been made to prevent removal and that continued placement in the home would be contrary to the welfare of the child, if the order transfers legal custody of the child to a local board of social services.

II. DISPOSITIONAL HEARING

A. Scheduling

If the court does not enter a final order of disposition at the initial hearing on the relief of custody petition, a dispositional hearing must be scheduled to be held within sixty (60)

days of the initial hearing which granted the relief of custody. If the child is placed in foster care, the Court shall schedule a hearing within sixty (60) days of the initial hearing which granted the relief of custody to review a foster care plan to be filed pursuant to Va. Code § 16.1-281.

B. Notice

The same notice is required for dispositional hearing as on the initial petition requesting relief.

C. Relief that may be granted at the Dispositional Hearing

1. The court can enter any order of disposition which could be entered in an abuse/neglect case pursuant to Va. Code § 16.1-278.2. Va. Code § 16.1-278.3(C).

2. If the court enters an order transferring custody from the parent or legal guardian, the court must make a finding that:

    a. there is no less drastic alternative to doing so and, if granting custody to DFS;

    b. reasonable efforts have been made to prevent removal of the child and that continued placement of the child in the home would be contrary to the welfare of the child.

3. If the child is placed in foster care, the foster care plan shall be filed and reviewed by the court in accordance with Va. Code § 16.1-281. The court must schedule a foster care review pursuant to Virginia Code § 16.1-282 within four (4) months of the dispositional hearing on the initial foster care plan.

4. If the court entered any preliminary protective orders at the adjudicatory hearing, they must be reviewed at the dispositional hearing. They may be included in the dispositional order.

5. Pursuant to Va. Code § 16.1-278.3C1, the court may transfer custody of the child to a relative or other interested individual only if, after a proper investigation, the court believes that:

    a. the person is willing and qualified to receive and care for the child;

    b. the person is willing to have a positive, continuous relationship with the child;

    c. the person is committed to providing a permanent home for the child; and

    d. the person is willing and able to protect the child from abuse and neglect.

6. If the court transfers custody to a relative or other interested individual, the court's order should also address any other conditions/services which would promote the child's welfare.

7. The court may terminate parental rights. If only one parent has petitioned the court for this permanent relief of custody, the remaining parent's rights may be terminated in accordance with Va. Code § 16.1-283.

III. IF TERMINATION OF PARENTAL RIGHTS IS ORDERED

A. Entering the Order

If the court enters an order terminating parental rights, the order must be accompanied by an order:

1. continuing custody with or placing custody with the local board of social services or other licensed child-placing agency; or

2. giving custody to a relative or other interested party.

B. Placing Custody

If the court places custody with a local board of social services or with a licensed child-placing agency, the court order must address whether or not such board or agency has the authority to place the child for adoption.

C. Placing the Child for Adoption

If the authority is given to place the child for adoption, the board or agency having the authority to do so must file an adoption progress report with the court every six months from the date of termination until a final order of adoption has been entered. The court must schedule a date for receipt of the adoption progress report while the parties are present at the dispositional hearing.

IV. APPEAL

The dispositional order is a final order and is appealable. Va. Code § 16.1-278.3(F).

Chapter 8. Foster Care

I. GENERAL CONSIDERATIONS

The placement of children in the care and custody of the Commonwealth is governed by the statutory authority given to juvenile courts. The collaboration of agencies with the oversight authority of the courts has as its mandate the protection of children, and permanency planning for those entrusted or committed to the care of the state.

A. Foster Care Services and Placement Defined

1. Foster care services, defined in Code § 63.2-905, means the full range of casework, treatment, and community services for a planned period of time for a child where the child is found to be abused or neglected or is found to be in need of services, and for his family when the child:

    a. has been identified as needing services to prevent or eliminate the need for placement; or

    b. has been placed in state care with legal custody remaining with his parents or guardian; or

    c. has been committed or entrusted to a department of social services; or

    d. is over the age of 18 but has not yet reached the age of 21, and is being provided or restored to independent living services.

2. Foster care placement, as defined by Va. Code § 63.2-100, means

    a. placement of a child through an agreement between parents/guardians and the local board of social services or agency designated by the community policy and management team where custody remains with the parents/guardians, often referred to as non-custodial foster care; or

    b. an entrustment or commitment of the child to the department of social services.

B. Foster Care as a Dispositional Alternative

1. A child may be placed in foster care as a result of the court's finding that the child is

    a. an abused or neglected child, Va. Code § 16.1-278.2

    b. the subject of a petition for approval of an entrustment agreement, Va. Code § 16.1-277.01

    c. the subject of a petition for relief of custody, Va. Code §§ 16.1-277.02, -278.3

d. a child in need of services, Va. Code § 16.1-278.4

e. a child in need of supervision, Va. Code § 16.1-278.5

f. a status offender, Va. Code § 16.1-278.6

g. a delinquent child, Va. Code § 16.1-278.8

C. Foster Care Plan

1. Within forty-five days following transfer of custody to the agency or, in accordance with the provisions of § 16.1-277.01, with a petition for approval of an entrustment agreement, the department of social services or agency *shall* file with the juvenile court a foster care service plan. The time for filing may be extended, for good cause shown, not more than an additional sixty days. Va. Code § 16.1-281.

2. The plan *shall* describe

   a. programs, care, services and other support to be offered to the child and his parents/other prior custodians;

   b. the participation and conduct sought from the parents/other prior custodians;

   c. the visitation and other contacts to be permitted between the child and the parents/prior custodians and his or her siblings;

   d. the nature of the placement(s) to be provided for the child;

   e. for school-age children, the school placement of the child;

   f. for children 14 years of age and older, the child's needs and goals in the areas of counseling, education, housing, employment, and money management skills along with specific independent living services that will be provided to the child to help him reach these goals;

   g. for children 14 years and older, an explanation of the child's rights with respect to education, health, visitation, court participation, and the right to stay safe and avoid exploitation; and

   h. all documentation specified in 42 U.S.C. § 675(5)(1) and § 63.2-905.3.

3. Documents provided to foster care youth, Va. Code § 63.2–905.3

   When a child is leaving foster care upon reaching 18 years of age, unless the child has been in foster care for less than six month, the local department shall ensure that the child

has, if eligible to receive, (i) a certified birth certificate, (ii) a social security card, (iii) health insurance information, (iv) a copy of the child's health care records, and (v) a driver's license or identification card issued by the Commonwealth.

4. The shortest practicable time frame for reunification *shall* be specified.

5. The plan *shall* have as its paramount concern the health and safety of the child throughout the placement, case planning, service provision, and review process.

6. For a child 14 years of age and older, the plan shall include a signed acknowledgement by the child that the child has received a copy of the plan and that the rights contained therein have been explained to the child in an age-appropriate manner.

7. Where the department or agency determines that it is not reasonably likely that the child will be returned to his prior family within a practicable time, the plan *shall* include:

    a. reasons for this conclusion;

    b. information on the opportunities for placement with a relative or an adoptive home and, if such is available, a plan must be presented for how to achieve this successful placement as soon as possible;

    c. explanation of why permanent foster care or independent living is the plan for the child in cases involving children admitted to the United States as refugees or asylees who are 16 years of age or older and for whom the goal is independent living (set forth by Va. Code § 63.2-100), the plan shall also describe the programs and services which will help the child prepare for the transition from foster care to independent living.

8. The plan may include a petition seeking termination of residual parental rights.

9. Reasonable efforts to reunify the child with a parent *shall not* be required if the court finds that:

    a. parental rights as to a sibling have already been involuntarily terminated;

    b. parent has been convicted of

        (i) murder, voluntary manslaughter or felony attempt, conspiracy or solicitation to commit such an offense where the victim was a child of the parent, a child with whom the parent resided at the time of the offense, or the other parent;

        (ii) felony assault or felony bodily wounding resulting in serious bodily injury; or

(iii) felony sexual assault where the victim was a child of the parent or a child with whom the parent resided at the time of the offense.

c. based upon clear and convincing evidence, the parent has subjected any child to "aggravated circumstances" or abandoned a child under circumstances which would justify the termination of parental rights pursuant to section D of Va. Code § 16.1-283.

10. Within thirty days of finding that reasonable efforts are not required as stated above, a permanency planning hearing *shall* be held pursuant to Va. Code § 16.1-282.1.

11. If court achieves permanence at this hearing by terminating parental rights, placing child in permanent foster care, or by providing child with services to achieve independent living, the order shall state whether or not reasonable efforts have been made to place the child in a timely manner.

12. A copy of the foster care plan *shall* be sent by the court to the:

    a. child, if s/he is twelve years of age or older;

    b. guardian *ad litem* for the child;

    c. attorney for the parent(s) or person *in loco parentis*;

    d. parents, if their rights have not been terminated by a separate order; and

    e. other persons appearing to the court to have a proper interest.

13. A copy of the plan, without the section describing why the child cannot be returned home and the alternative chosen, must be sent by the court to the foster parents.

14. A hearing on the plan *shall* be held within sixty days of

    a. child's initial placement in foster care if placement is through parental agreement or

    b. in accordance with the provisions of § 16.1-277.01 with a petition for approval of an entrustment agreement;

    c. original preliminary removal order hearing (Va. Code § 16.1-281(C));

    d. the hearing on the petition for relief of custody if child placed in foster care (Va. Code § 16.1-277.02)

    e. dispositional hearing at which child was placed in foster care.

15. Any changes made by the court to the foster care plan must be sent by the court to everyone entitled to receive a copy of the original part of the plan.

16. The court *shall* have the authority to review the status of children in foster care. A guardian *ad litem shall* represent the child whenever the plan or the child's foster care status is reviewed by the court. Va. Code § 16.1-281 (F).

17. The court must be notified immediately if the child is returned to his parents or guardian. Va. Code § 16.1-282(D).

18. At the conclusion of a hearing where the plan is reviewed, the court *shall* schedule a foster care review of the child's status within four months, and parties present *shall* be given notice of the date set and parties not present *shall* be summoned.

19. If court has entered an order achieving a permanent goal of permanent foster care or independent living, the court shall schedule a foster care review hearing to be held within twelve months. Va. Code § 16.1-281 E.

D. Foster Care Review
Va. Code § 16.1-282

1. If a child was the subject of a foster care plan, a foster care review hearing must be held within four months of the dispositional hearing at which the foster care plan was reviewed if the child:

    a. was placed through an agreement between the parents or guardians and the local social services agency with legal custody remaining with the parents or guardian and such agreement has not been dissolved by court order; or

    b. is under the legal custody of a local board of social services or child welfare agency.

2. Any interested party (which may include the parent, guardian or person *in loco parentis* prior to the assumption or transfer of custody) may file a petition for foster care review at any time after the initial foster care placement. The department *shall* file a petition for review within three months of the dispositional hearing at which the foster care plan was reviewed.

3. The petition *shall*:

    a. be filed in the court where the foster care plan was reviewed and approved; or, upon order of the court, may be filed in the jurisdiction where the child-placing agency has its principal office or the child resides;

    b. state, if reasonably ascertainable, the current address of the child's parents, or the person(s) *in loco parentis* at the time of transfer of custody;

c. describe placement(s) of child while in foster care and the services or programs offered to the child and parents and/or person(s) previously *in loco parentis*;

d. describe the nature and frequency of contact between the child and parents and/or person(s) previously *in loco parentis*;

e. detail the manner in which the previous plan was or was not complied with, and the extent to which the prior goals have been met; and

f. set forth the disposition requested. If a continuation of foster care is requested, a plan shall also be filed which sets forth the extent to which the foster parents or other care providers will play in the future planning for the child and, where the child is age sixteen, the services needed to assist him in a transition from foster care to independent living.

4. The court *shall* schedule a hearing within thirty days of receipt of the above petition, if a hearing date was not previously set. Within six months (4 months effective July 1, 2014) of a dispositional hearing the court *shall* hold a review hearing.

5. Notice of the hearing(s) and a copy of the petition *shall* be given to:

   a. the child, if age twelve or older;

   b. the child's guardian *ad litem*;

   c. the parents or prior custodian standing *in loco parentis*;

   d. the foster care parents or other care providers of the child;

   e. the petitioning department or agency;

   f. such other persons as the court may direct.

6. No notice is required if the judge certifies on the record that the identity of the parent or guardian is not reasonably ascertainable. An affidavit of the mother that the identity of the father is not reasonably ascertainable is sufficient provided there is nothing presented to rebut the claim.

7. The court may proceed with the hearing in the absence of the parent or guardian if court has obtained personal or substituted service or the parent or the court determines that the parent could not be located after reasonable efforts to do so.

8. At the conclusion of the evidentiary review hearing, the court *shall* enter an order of disposition consistent with the dispositional alternatives available at the original hearing.

9. The court must state whether reasonable efforts have been made to reunite the child with his parent(s), guardian or other standing in loco parentis.

10. If the court achieves permanence by terminating parental rights, placing the child in permanent foster care or by providing the child with services to achieve independent living, court order shall state whether or not reasonable efforts have been made to place child in a timely manner and to finalize a permanent placement.

11. Any order transferring custody to a relative other than the child's prior family must be accompanied by written findings based on preponderance of the evidence that the relative is:

    a. willing and qualified to care for the child;

    b. willing to have positive, continuous relationship with the child;

    c. committed to providing permanent, suitable home for the child; and

    d. willing and able to protect the child from abuse/neglect.

    The court's order transferring custody to a relative should further provide for, as appropriate, any terms and conditions which would promote the child's interest and welfare; ongoing provisions of social services to the child and the child's custodian; and court review of the child's placement.

12. The court *shall* have continuing jurisdiction over cases under this section of the law for as long as the child remains in foster care; or, if returned to his prior family subject to conditions, for as long as the conditions are operative.

13. At the conclusion of the review hearing, the court *shall* schedule a permanency planning hearing to be held five months thereafter, except as to children in permanent foster care.

14. If child has been the subject of an order achieving a permanent goal by terminating parental rights, by placing the child in permanent foster care or by directing that the child receive services to achieve independent living, a permanency planning hearing shall not be required and court shall schedule a foster care review hearing to be held within twelve months of the entry of such order.

E. Permanency Planning

1. Where a child is the subject of a foster care plan, Code § 16.1-282.1 requires that a permanency planning hearing shall be held within ten months of the dispositional hearing if the child:

    a. was placed with social services through an agreement between the parents or guardian where legal custody remains with the parent or guardian and such agreement has not been dissolved by the court; or

b. is under the legal custody of a social services or child welfare agency and has not had a permanent goal achieved (termination of parental rights or placement in either permanent foster care or independent living.)

2. The petition for permanency planning hearing shall be filed thirty days prior to the date of the hearing.

3. The purpose of the hearing is to establish a permanent goal for the child and to either achieve that goal or to approve an interim plan.

4. To achieve the permanent goal, the petition shall seek to:

   a. transfer custody of the child to prior family or dissolve placement agreement and return child to prior family;

   b. transfer custody to a relative other than prior family;

   c. terminate parental rights;

   d. place child in permanent foster care who is age 16 or older;

   e. if the child has been admitted to the United States as a refugee or asylee and has attained the age of 16 or over and the plan is to achieve independent living status, direct the board as agency to provide the child with services to transition from foster care;

   f. place the child in another planned permanent living arrangement.

5. For approval of an interim plan, the petition for permanency planning shall seek to:

   a. continue custody or placement with the board or agency through a parental agreement; or

   b. transfer custody to the board or agency from the parents or guardian where the child has been in foster care through an agreement that allowed the parents to retain custody.

6. The board shall petition for an interim plan only if all other permanent options have been explored and it has been determined that none are in the best interests of the child.

7. If board petitions for approval of an interim plan, such plan may only be approved for a maximum of six months and board or agency must file a foster care plan that:

   a. identifies a permanent goal for the child; and

b. includes provisions for accomplishing this goal within six months with a summary as to the investigation of the other permanency alternatives and an explanation as to why they cannot be achieved at this time and are not presently in the best interests of the child.

8. Before approving an interim plan for the child, the court shall find that:

   a. where the goal is to return home, that the parent has made progress toward reunification; the parent has remained in close and positive relationship with the child; and the child is likely to return home shortly though it is premature to set an exact time for return; or

   b. where the goal is not to return home, there must be a finding that the agency is making progress toward achieving a permanent plan, but that it is premature to set an exact time for accomplishment of the plan.

9. Upon approval of the interim plan, the court shall schedule a hearing to be held within six months to determine that one of the following occurs:

   a. custody is transferred to the prior family or the placement agreement is dissolved and the child is return to prior family;

   b. custody is transferred to a relative;

   c. parental rights are terminated;

   d. child is placed in permanent foster care;

   e. child is placed in independent living.

10. Prior to approving the transfer of custody of the child to a relative other than the child's family, the court must find, by a preponderance of the evidence that relative is:

    a. willing and qualified to receive and care for the child;

    b. willing to have a positive, continuous relationship with the child;

    c. is committed to providing a permanent, suitable home for the child; and

    d. is willing and able to protect the child from abuse and neglect.

11. If the department or agency has asked the court to place the child in "another planned permanent living arrangement," they may do so only if:

    a. the child has a severe and chronic emotional, physical or neurological disabling condition which requires long-term residential treatment; and

b. the feasibility of all other permanent living arrangements (return home, custody to a relative, adoption, independent living, or permanent foster care) have been thoroughly investigated and have been found not to be in the best interests of the child. Va. Code § 16.1-282.1(A)(2).

12. The foster care plan that is filed requesting approval of "another planned permanent living arrangement" must document:

    a. efforts made to investigate the feasibility of other permanent goals and the reasons why those goals are not in the child's best interest;

    b. a compelling reason why another permanent goal cannot be achieved for the child;

    c. the identity of the long-term residential treatment provider;

    d. the nature of the child's disability;

    e. the time it is anticipated it will take to address the child's treatment needs; and

    f. the current status of the child's eligibility for admission and long term treatment.

13. Prior to approving "another planned permanent living arrangement for the child, the court must make the following specific findings, that:

    a. the child has a severe and chronic emotional, physical or neurological disability condition;

    b. the child requires long-term residential treatment for the disabling condition; and

    c. none of the other permanent living arrangements (return home, custody to a relative, or adoption) is achievable at this time, despite documentation of the department's intensive, ongoing efforts to make such placement.

14. Approval of another planned permanent living arrangement is only for six months at a time.

15. The court must schedule a review hearing every six months for as long as the child remains in the department's or agency's custody.

16. Every time the department or agency petitions for the six-month review, the plan filed must document each of the things listed in 12. above.

17. At the six-month review hearing of a child placed in "another planned permanent living arrangement," the court must also specifically state whether or not reasonable efforts

have been made to place the child in a timely manner in accordance with the plan, and monitor the child's status.

18. If at any time during the six-month intervals, the treatment provider determines that the child no longer needs long-term residential care, the department or agency must immediately make plans for the child's discharge. The department or agency must file a new permanency planning petition within thirty days of making the determination that the child no longer needs long-term residential care and the court shall schedule a hearing on this petition within thirty days.

19. Upon receipt of the permanency planning petition, the court *shall* schedule a hearing (if not already scheduled following a prior proceeding) within thirty days. The permanency planning hearing is to be held within ten months of the dispositional hearing where the foster care plan was approved. Va. Code § 16.1-282.1(C).

20. At the conclusion of the permanency planning hearing, whether a permanent goal is achieved or deferred, the court shall enter an order that states whether or not:

    a. reasonable efforts have been made to reunite the child with his family if returning home remains the permanent plan for the child;

    b. whether reasonable efforts have been made to achieve the permanent goal, when returning home is not the plan for the child.

F. Annual Foster Care Review

1. The court *shall* review a foster care plan annually for any child who remains in agency custody and on whose behalf a petition to terminate parental rights has been granted, filed or ordered, is placed in permanent foster care, or who is receiving services to achieve independent living status, for so long as the child remains in the department or agency's custody, upon petition for review filed by the department or agency. Va. Code § 16.1-282.2.

2. Board or agency shall file the petition for a foster care review hearing and notice shall be provided in accordance with Virginia Code § 16.1-282.

3. At the conclusion of the hearing, court must state whether or not reasonable efforts have been made to place child in a timely manner and to complete steps necessary to finalize permanent placement of the child.

4. At the foster care review hearing for a child in permanent foster care, the court shall give consideration to the appropriateness of the services being provided to the child and the permanent foster parents, to any change in circumstances since the entry of the order placing the child in permanent foster care and to other such factors as the court deems proper.

G. Permanent Foster Care

1. A department or agency, by court order, *shall* have authority to place a child who is 16 years of age or older in permanent foster care until the age of majority, or until age twenty-one if such a placement is necessary to provide funds for the child's care so long as he participates in an approved educational, treatment or training program. Legal custody is retained by the agency. Va. Code § 63.2-908.

2. No child may be removed from the physical custody of permanent foster parents except by *court order*, or *emergency removal*. Va. Code § 63.2-908.

3. The court *shall* not order permanent foster care unless it finds that

    a. diligent efforts to place with parents have been unsuccessful;

    b. diligent efforts to place child for adoption have been unsuccessful or adoption is not a reasonable goal.

4. Permanent foster parents, unless modified by court order, *shall* have the authority to

    a. consent to surgery;

    b. consent to entrance into the armed services;

    c. consent to marriage;

    d. consent to application for a motor vehicle and driver's license;

    e. consent to application for admission into college; and

    f. consent to any other activities requiring parental consent.

5. The permanent foster parent *shall* also have the responsibility to notify the department or agency of any of these decisions.

6. The court order *shall* specify contact, if any, between child and natural parents.

7. Any change in permanent foster care placement or the responsibilities of permanent foster parents *shall* be made *by court order* pursuant to petition filed by the permanent foster parents or agency.

H. Support Obligations for Children in Foster Care

Va. Code §§ 16.1-290, 63.2-909,

1. Whenever a child is placed in foster care by the court, the court *shall* order the parent(s) or other legally obligated person to pay support to the Department of Social Services.

2. The court may proceed against a responsible person for contempt where there is willful failure or refusal to pay support; or the support order may be filed and have the effect of a civil judgment.

3. A juvenile's separate estate in the hands of a guardian or trustee may be required for his education and maintenance.

4. The commencement date of the support obligation *shall* be the date custody was awarded to the agency.

5. The support order *shall* state the names of the person(s) obligated and establish the amount pursuant to guidelines or indicate that the Division of Child Support Enforcement (DCSE) will establish the amount.

6. In establishing the amount, the court or DCSE *shall* consider the extent to which the payment of support by the responsible person may affect his ability to accomplish the goal of a foster care plan.

   Responsible person(s) *shall* pay support where the child placed in foster care remains in the physical custody of a parent or guardian from the date the child was placed. Any agreement *shall* include support provisions. The agency or DCSE *shall*, in establishing the amount, consider the extent to which payment of support by the responsible person(s) *shall* affect his ability to accomplish the goal of a foster care plan. If the party fails to pay, the agency may petition the court to enter a support order.

Chapter 9. Termination of Residual Parental Rights

I. GENERAL CONSIDERATIONS

A. Petition

1. The petition must be filed specifically seeking termination as relief. Va. Code § 16.1-283(A).

2. There must be a separate petition filed for each parent since the court has the authority to terminate the residual parental rights of one parent without affecting the rights of the other parent. *Harris v. Lynchburg Division of Social Services*, 223 Va. 235 (1982).

3. No petition seeking termination of parental rights shall be accepted by the court prior to the filing of a foster care plan documenting that termination of parental rights is in the best interests of the child. The court may hear and adjudicated a petition for termination in the same proceeding in which the court has approved a foster care plan as long as the petition for termination has been processed and served as a separates pleading from the foster care plan. *Strong v. Hampton DSS*, 45 Va. App. 317 (2005), *Stanley v. Fairfax County Department of Social Services*, 10 Va. App 596 (1990), *affirmed*, 242 Va. 60 (1991).

B. Appointment of Counsel and Guardian *ad litem*

Va. Code § 16.1-266

1. Prior to the hearing, the court must appoint a guardian *ad litem* for the child.

2. Prior to the hearing, the parent or guardian must be advised of their right to counsel and must be given an opportunity to

    a. retain counsel;

    b. seek court-appointed counsel;

    c. waive the right to counsel.

C. Standing to File Petition

The local department of social service or licensed child placing agency having custody, by an attorney on behalf of the agency or by the guardian *ad litem* for the child may file a petition seeking termination of residual parental rights. *Stanley v. Fairfax County Department of Social Services*, 10 VA. App 596 (1990), *affirmed*, 242 Va. 60 (1991).

D. Identification of Adoptive Home Prior to Termination

The local board or child-placing agency does not have to have an identified adoptive family prior to entry of the termination order. Va. Code § 16.1-283(A).

E. Termination Order

Va. Code § 16.1-283
DC-531, ORDER FOR INVOLUNTARY TERMINATION OF RESIDUAL PARENTAL RIGHTS
DC-534, ORDER FOR VOLUNTARY TERMINATION OF RESIDUAL PARENTAL RIGHTS

The termination order must be accompanied by an order of custody. If custody is to continue with or be given to the local board of social services or to a licensed child-placing agency, the order must indicate whether or not the board or agency shall have the authority to place the child for adoption.

If custody is transferred to a relative or other interested individual, certain findings and orders are necessary.

F. Notice

DC form-535-Notice

1. Notice of termination must state consequences of termination and must be provided to:

    a. the child, if the child is twelve or more years of age;

    b. the guardian, legal custodian or other person standing in *loco parentis*, or

    c. other persons as appear to the court to be proper or necessary parties to the proceedings.

2. Written notice must also be provided to the foster parents, any relative providing care for the child or any pre-adoptive parents. Notice must inform them that they may appear in court as witnesses and participate in the proceeding. Va. Code §§ 16.1-283(A), -263, -264.

G. Burden of Proof

1. The petition must be proven by clear and convincing evidence and the court must find that termination is in the best interests of the child. See Va. Code § 16.1-283(B), (C), (D), (E), *Banes v. Pulaski Dept. of Social Services*, 1 Va. App. 463 (1986); *Padilla v. Norfolk Div. Of Social Servs*., 22 Va. App. 643 (1996).

2. Due process requires strict compliance with the statute.

H. Objection of the Child

Residual parental rights shall not be terminated if it is established that the child, if fourteen years of age or older or otherwise of an age of discretion, objects to the termination. However, the court may terminate parental rights over the child's objection if the court finds that any disability of the child reduces the child's developmental age and that the child is not otherwise of an age of discretion. See Va. Code 16.1-283(G) *Deahl v. Winchester Department of Social Services*, 224 Va. 664 (1983); *Hawks v. Dinwiddie Department of Social Services*, 25 Va. App. 247, (1997).

I. Termination of Parental Rights Where Child is Abused or Neglected and in Foster Care

Va. Code § 16.1-283(G)

1. If an abused or neglected child is in foster care as the result of a court commitment, an entrustment agreement or other voluntary relinquishment, parental rights may be terminated, if:

    a. neglect or abuse suffered by a child presented a serious and substantial threat to the child's life, health or development; and

    b. it is not reasonably likely that the conditions causing neglect or abuse can be substantially corrected or eliminated within a reasonable period of time. *Wright v. Alexandria Div. of Social Servs.*, 16 Va. App. 821, *cert. denied*, 115 S.Ct. 651(1994).

2. In deciding whether or not conditions can be substantially corrected or eliminated, the court is required to consider the efforts made to rehabilitate the parents prior to the child's placement in foster care. Va. Code § 16.1-283(B)(2).

3. Proof of any of the following will be considered prima facie evidence of fact that it is not reasonably likely the conditions causing neglect or abuse can be substantially corrected:

    a. parent(s) suffering from a mental or emotional illness or mental deficiency of such extreme severity that it would prevent them from assuming care for the child;

    b. parent(s) are habitual drug or alcohol addicts and have not responded to or followed through with treatment which could have improved parental functioning; or

    c. parent(s) have not responded to or followed through with appropriate, available and reasonable rehabilitative efforts designed to reduce, eliminate or prevent the neglect or abuse of the child. Va. Code § 16.1-283(B)(2)(a).

J. Other Grounds for Termination of Parental Rights Where Child is in Foster Care
Va. Code § 16.1-283(C)

If a child is in foster care as the result of a court commitment, an entrustment agreement, or other voluntary relinquishment, parental rights may be terminated if:

1. the parent(s) have failed to maintain continuing contact with the child and have failed to provide for or plan for the future of the child for six months after the child's placement in foster care;

2. the parent(s) have been unwilling or unable, within a reasonable time, not to exceed twelve months from date of placement in foster care, to remedy the conditions which led to foster care placement.

K. Grounds for Termination Where the Child is Abandoned
Va. Code § 16.1-283(D)

If a child is found to be abused or neglected as the result of being abandoned, parental rights may be terminated if:

1. circumstances of abandonment are such that identity or whereabouts of parent(s) cannot be determined; and

2. no one has come forward to identify the child and claim a relationship with the child within three months following placement of the child in foster care; and

3. efforts have been made to locate parent(s) to no avail.

L. Grounds for Termination of Parental Rights where the Child is in Foster Care
Va. Code § 16.1-283(E)

1. In addition to the grounds listed above, the parental rights of a child in foster care may be terminated if:

    a. parental rights of a sibling have been involuntarily terminated;

    b. parent has been convicted of murder or voluntary manslaughter or a felony attempt, conspiracy or solicitation to commit murder or manslaughter if the victim was a child of the parent or was a child with whom the parent resided or was the other parent of the child;

    c. the parent has been convicted of felony assault or felony sexual assault resulting in serious bodily injury if the victim was a child of the parent or a child with whom the parent resided at the time of the offense;

    d. the parent has subjected the child to "aggravated circumstances."

2. Serious bodily injury is defined as bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

3. Reasonable efforts to reunite the child with a parent convicted of one of the felonies listed above or who has been found by the court to have subjected any child to "aggravated circumstances" shall not be required.

M. Written Progress Report Required
Va. Code § 16.1-283(F)

1. The local board or licensed child-placing agency to which authority is given to place the child for adoption after an order terminating parental rights is entered shall file a written report with the juvenile court on the progress being made to place the child in an adoptive home.

2. The report shall be filed every six months from the date of the final order terminating parental rights until a final order of adoption is entered on behalf of the child.

3. The court may schedule a hearing on the report with or without the request of a party.

N. Appeal

1. Circuit court is required to hold a hearing on the merits of the case within ninety days. Va. Code § 16.1-296(D).

2. The Virginia Court of Appeals is required to give precedence on its docket to termination of parental rights cases.

O. Restoration of Parental Rights
Va. Code §16.1-283.2

1. This section is a completely new addition to the Code of Virginia (2013 Virginia Laws Ch. 338 (HB 1637)). It provides a mechanism to restore the rights of parents whose rights have been previously terminated. There are several requirements outlined in this Section.

    a. The child is at least 14 years of age;

    b. The child was previously adjudicated to be an abused or neglected child, a child in need of services, child in need of supervision, or delinquent child;

    c. The parent's rights were terminated under a final order pursuant to subsection B, C, or D of § 16.1-283 at least two years prior to the filing of the petition to restore parental rights;

d. The child has not achieved his permanency goal or the permanency goal was achieved but not sustained; and

e. The child, if he is 14 years of age or older, and the parent whose rights are to be reinstated consent to the restoration of the parental rights. 2013 Virginia Laws Ch. 338 (HB 1637).

2. Who can file a petition?

If a child is in the custody of the local department of social services and a pre-adoptive parent or parents have not been identified and approved for the child, the child's guardian ad litem or the local board of social services may file a petition to restore the previously terminated parental rights of the child's parent.

3. Petition process

a. The court shall set a hearing on the petition and serve notice of the hearing along with a copy of the petition on the former parent of the child whose rights are the subject of the petition, any other parent who retains legal rights to the child, the child's court-appointed special advocate, if one has been appointed, and either the child's guardian ad litem or the local board of social services, whichever is not the petitioner.

b. Even when the child is not at least 14 years of age, the court has the ability to restore parental rights if:

i. A petition involving a child younger than 14 years of age if

- The child is the sibling of a child for whom a petition for restoration of parental rights has been filed and the child who is younger than 14 years of age meets all other criteria for restoration of parental rights set forth in subsection A, or

- The child's guardian ad litem and the local department of social services jointly file the petition for restoration; or

ii. A petition filed before the expiration of the two-year period following termination of parental rights if the child will turn 18 before the expiration of the two-year period, and the court finds that accepting such a petition is in the best interest of the child.

4. Standard of Proof

If the court finds, based upon clear and convincing evidence, that the parent is willing and able to (i) receive and care for the child; (ii) have a positive, continuous relationship

with the child; (iii) provide a permanent, suitable home for the child; and (iv) protect the child from abuse and neglect, the court may enter an order permitting the local board of social services to place the child with the former parent whose rights are the subject of the petition.

5. Role of a Special Advocate

This bill also provides that the juvenile and domestic relations court *may appoint a special advocate to provide services to a child who is the subject of judicial proceedings for the restoration of parental rights*. Amends § 9.1-151.

FOR CASES SEE: http://www.courts.state.va.us/courtadmin/aoc/cip/resources/tpr_table.pdf

FORMS
*make sure the current form is being used.

DC-511, PETITION
DC-531, ORDER FOR INVOLUNTARY TERMINATION OF RESIDUAL PARENTAL RIGHTS
DC-534, ORDER FOR VOLUNTARY TERMINATION OF RESIDUAL PARENTAL RIGHTS
DC-535, NOTICE OF TERMINATION OF RESIDUAL PARENTAL RIGHTS

Chapter 10. Parental Placement Adoption

GENERAL CONSIDERATIONS

A. Petition for Consent to Proposed Adoption

Va. Code § 16.1-262

The following information must be included:

1. Statement of child's name, age, date of birth, if known and residence,

2. Statement of names and residence of his parents, guardian, legal custodian or other person standing *in loco parentis* and spouse, if any.

3. Statement of names and residence of the nearest known relatives if no parent or guardian can be found.

4. Statement of the specific facts which allegedly bring the child within the purview of this law. If the petition alleges a delinquent act, it shall make reference to the applicable sections of the Code which designate the act a crime.

5. Statement as to whether the child is in custody, and if so, the place of detention or shelter care, and the time the child was taken into custody, and the time the child was placed in detention or shelter care.

If the subject of the petition is an adult, the petition shall not state or include the name of or any information concerning parents, guardians, legal custodian of the adult subject of the petition except as needed to state the conduct alleged in the petition.

If any of the facts herein required to be stated are not known by the petitioner, the petition shall so state.

B. Close Relative Adoption

Va. Code § 63.2-1242.1

A "close relative" is the child's grandparent, great-grandparent, adult nephew or niece, adult brother or sister, adult uncle or aunt, or adult great uncle or great aunt. Va. Code § 63.2-1242.1(A).

The court may accept the written and signed consent of the birth parent(s) that is signed under oath and acknowledged by an officer authorized by law to take such acknowledgements. Va. Code § 63.2-1242.1(B).

1. Child in home less than three years (Va. Code § 63.2-1242.2)

   When a child has continuously resided in the home or has been in the continuous physical custody of the prospective adoptive parent(s) who is a close relative for **less than** three years, the adoption proceeding, including court approval of the home study, shall commence in the juvenile and domestic relations district court pursuant to the parental placement adoption provisions of this chapter with the **following exceptions:**

   a. The birth parent(s)' consent does not have to be executed in juvenile and domestic relations district court in the presence of the prospective adoptive parents.

   b. The simultaneous meeting specified in § 63.2-1231 is not required.

   c. No hearing is required for this proceeding.

   Upon the court issuing an order accepting consents or otherwise dealing with the birth parents rights and appointing the close relative(s) custodians of the child, the close relative(s) may file a petition in the circuit court as provided in Article 1 (§ 63.2-1200 et seq.) of this chapter.

2. Child in home more than three years (Va. Code § 63.2-1242.3)

   When the child has continuously resided in the home or has been in the continuous physical custody of the prospective adoptive parent(s) who is a close relative for **three or more** years, the parental placement provisions of this chapter shall not apply and the adoption proceeding shall commence in the circuit court.

C. Filing of Petition and UCCJEA Affidavit
Va. Code §§ 16.1-262, -260(A)

1. Petition must be verified. Va. Code § 16.1-262.

2. Complaints, requests, and the processing of petitions shall be the responsibility of the intake officer. However, the following may file:

   a. An attorney for the Commonwealth may file a petition;

   b. Designated non-attorney employees of the Department of Social Services may file petitions and motions relating to the establishment, modification, or enforcement of support;

   c. Designated non-attorney employees of local department of social services may complete and file on forms approved by the Supreme Court of Virginia, petitions for foster care review, permanency planning, to establish paternity, motions to establish and/or modify support, motions to review an order, and show cause motions;

d. Any attorney may file a petition on behalf of his client except for petitions alleging child in need of services, child in need of supervision, or delinquency. Va. Code § 16.1-260(A).

3. A UCCJEA affidavit must be filed and the Clerk is to verify that Virginia is the home state of the child.

4. UCCJEA affidavit is required because the court will be granting custody of the child pending the adoption proceeding in the event the court accepts the consent of the birth parents. This proceeding qualifies as a UCCJEA "custody proceeding."

D. Scheduling of Hearing on Petition
Va. Code §§ 16.1-241(U), 63.2-1233

Consent proceedings shall be advanced on the docket so as to be heard within 10 days of filing of the petition, or as soon as practicable so as to provide the earliest possible disposition.

E. Appointment of Guardian *ad litem*
Va. Code § 16.1-266(A), (D)(2)

The court should appoint a guardian *ad litem* for the child and for any parent who is under the age of eighteen (18) or under a disability and forward the pleadings to the GAL(s).

F. Venue
Va. Code § 16.1-243(A)(1)(c)

Venue in parental placement adoption consent hearings shall be proper:

1. In the city or county where the child to be adopted was born;

2. In the city or county where the birth parents reside; or

3. In the city or county where the prospective adoptive parents reside.

In cases where the hearing is commenced in a city or county other than the one described in clauses (1) – (3), the petitioner shall certify in writing that diligent efforts were made to commence a hearing in a proper city or county, but proven ineffective.

If the birth parent does not reside in Virginia, consent should be executed before a court having jurisdiction over child custody matters in the jurisdiction where the birth parent or legal guardian resides. Va. Code § 63.2-1230.

G. Home Study

Va. Code § 63.2-1231

Prior to a consent hearing, a Home Study on the prospective adoptive parent(s) shall be completed by a licensed or duly authorized child-placing agency and the prospective adoptive parents shall be informed that information about shaken baby syndrome, its effects and resources for help and support for caretakers is available on website maintained by the Department.

The Home Study shall make inquiry as to:

1. Whether the prospective adoptive parents are financially able, morally suitable, and in satisfactory physical/mental health to care for the child;
2. The physical/mental condition of the child;
3. The circumstances under which the child came to live in the prospective adoptive home;
4. What fees have been paid by the prospective parents or on their behalf;
5. Whether subsections A1,A2,A3, and A5 of 63.201232 have been met; and
6. Any other matters specified by the circuit court.

During the Home Study, the social worker or other qualified worker, shall meet at least once with the birth parent(s) and prospective adoptive parent. Upon agreement of both parties, such meetings may occur simultaneously or separately. Such Home Study shall be valid for a period of 36 months from the date of completion of the study. However, the Board may require an additional state criminal background check before finalizing the adoption is more than 18 months have passed from the completion of the Home Study.

H. Requirements of the Parental Placement Adoption; Exceptions

Va. Code § 63.2-1232

1. J&DR Court shall not accept consent until it determines that:

    a. Birth parents are aware of alternatives to adoption, adoption procedures, and opportunities for placement with other adoptive families, and their consent is informed and not coerced.

    b. A licensed or duly authorized) child-placing agency has counseled the prospective adoptive parents with regard to alternatives to adoption, adoption proceedures, including the need to address the parental rights of the birth parents, procedure for terminating parental rights, and the opportunities for adoption of other children; and that they intend to file an adoption petition and proceed toward final adoption.

    c. Birth parents and prospective adoptive parents have exchanged identifying information including, but not limited to, full names, addresses, physical, mental, social, and psychological information and any other information for the welfare of the child; unless both parties agree in writing to waive the disclosure of full names.

d. Any financial arrangements or exchange of property have been disclosed to the court.

e. There has been no violation of Va. Code § 63.2-1218 (improper fee for placement or adoption); however, if there appears there was a violation, the court shall not reject the consent of the birth parent for that reason alone but shall report the alleged violation as required by § 63.2-1219.

f. Home Study of the adoptive home has been completed and such report is provided to the court.

g. Birth parents were advised of their right to counsel.

2. If the above requirements are not met, the court shall refer the birth parent to a licensed or duly authorized child-placing agency for investigation and recommendation in accordance with Va. Code §§ 63.2-1208 and 63.2-1238. If any of the parties is financially unable to obtain the required services, it shall refer the matter to the local director.

3. When the birth parent resides in the Commonwealth and adoptive parents in another state, the laws of that receiving state govern the proceeding for adoption. The birth parent may elect to waive the execution of consent pursuant to Va. Code § 63.2-1233 and instead execute consent to the adoption pursuant to the laws of the receiving state.

4. When consent to a parental placement adoption is sought pursuant to this article and the prospective adoptive parents have had continuous physical and legal custody of the child for five or more years, the J&DR court may, in its discretion, accept consent without (i) a Home Study and (ii) the meeting and counseling requirements as they relate to the prospective adoptive parents. All other provisions of the parental placement adoption statutes shall apply.

I. Execution of Consent

Va. Code § 63.2-1233

When the J&DR Court is satisfied that all above requirements have been met with respect to at least one birth parent and the adoptive child is at least 3 days old, the birth parent or parents shall execute consent in court.

The execution of consent before the court by a birth father shall not be required if:

1. The birth father consents under oath and in writing to the adoption. (NOTE: In the event the birth mother does not execute her consent in court this consent of the birth father must be executed in court); Va. Code § 63.2-1233 (1)(a)-(c)

2. The identity of the birth father is ascertainable, and he is given notice of the proceedings by registered mail or certified mail to his last known address and he fails to object to the proceedings within fifteen (15) days of the mailing of such notice; or he files an objection but fails to appear at the consent hearing; Va. Code § 63.2-1233 (1)(b)-(c).

3. The putative birth father named by the birth mother denies under oath and in writing that he is the birth father of the child. Va. Code § 63.2-1233 (1)(b).

4. The putative father did not register with the Putative Father Registry. If the identity of the birth father is known but his whereabouts are not, compliance with the Putative Father Registry shall be provided to the Court. Va. Code § 63.2-1233 (1)(b).

5. The birth father denies his paternity in writing and under oath. Such denial may be withdrawn no more than 10 days after its execution. Once the child is 10 days old, any execution of such a denial will be final. A final execution of denial constitutes a waiver of all rights as the birth father. Va. Code § 63.2-1233(7).

The birth father may consent to the adoption prior to the child being born. Va. Code § 63.2-1233(8).

Except as provided in § 63.2-1233(4) and (5), if consent cannot be obtained from at least on birth parent, the court shall deny the petition and determine custody of the child pursuant to § 16.1-278.2.

J. Child Born to Married Birth Mother

Va. Code § 63.2-1233(1)(f)

A child born to a married birth mother is presumed to be the child of her husband, but this presumption may be rebutted. The clerk should serve the husband with notice of the proceeding and his consent is required unless the court finds withholding of such consent is contrary to the child's best interests. Va. Code § 63.2-1233 (1)(f).

K. Notice and Hearing

Va. Code § 63.2-1233(2)

1. A birth parent whose identify is known and whose consent is required as set forth in Va. Code § 63.2-1202 and who has not executed a consent or a denial of paternity shall be given notice of the proceedings.

2. A hearing involving this parent may be held after the hearing regarding consent by the consenting birth parent.

3. The hearing involving this non-consenting birth parent shall not be held sooner than 15 days after personal service or 10 days after the completion of an order of publication. The court may appoint counsel for the birth parent(s).

4. If the court finds that consent is withheld contrary to the best interests of the child, as set forth in Va. Code § 63.2-1205, or that consent is unobtainable, it may grant the petition without this parent's consent and enter an order transferring custody of the child to the prospective adoptive parents, which order shall be effective 15 days thereafter. If the court does not make such finding and denies the petition for parental placement, the court shall order that any consent given by the consenting parent for the purpose of the petition for parental placement shall be void and, if necessary, the court shall determine custody of the child as between the birth parents.

L. Birth Parents Fail to Appear
Va. Code § 63.2-1233(4)

If a child has been under the physical care and custody of the prospective adoptive parents and if then both birth parents have failed, without good cause, to appear at a hearing to execute consent for which they were given proper notice, the court may grant the petition without the consent of either birth parent and enter an order waiving consent and transferring custody of the child to the prospective adoptive parents, if the court finds by clear and convincing evidence that:

1. The birth parents were given proper notice of the hearing(s) to execute consent and of the hearing to proceed without their consent;

2. The birth parents failed to show good cause for their failure to appear at such hearing(s); and

3. Pursuant to Va. Code § 63.2-1205, the consent of the birth parents is withheld contrary to the best interests of the child or is unobtainable.

M. Birth Parents – Deceased
Va. Code § 63.2-1233(5)

If both birth parents are deceased, the court may grant the petition without the filing of any consent.

N. Consent of Birth Father if Birth Father Convicted of Va. Code §§ 18.2-61(A) or 18.2-366(B)
Va. Code § 63.2-1233(6)

No consent of a birth father nor notice to a birth father is required if the child was conceived under circumstances wherein the father is convicted of Va. Code §§ 18.2-61, -63, or -366(B), or an equivalent offense of another state, the United States, or any foreign jurisdiction, nor shall the birth father be entitled to notice of any of the proceedings under this section.

O. Annual Review
Va. Code § 63.2-1233(9)

The court must review the case annually until a final order of adoption if entered by the Circuit Court.

P. Interstate Transfer of Child
Va. Code § 63.2-1233(10)

When there has been an interstate transfer of the child in a parental placement adoption in compliance with Chapter 10 (§ 63.2-1200 *et seq.*), custody and parentage shall be determined in the court of appropriate jurisdiction in the state that was approved for finalization of the adoption by the interstate compact authorities.

Q. Revocation of Consent
Va. Code § 63.2-1234

Consent shall be revocable as follows:

1. By any consenting birth parent for any reason within 7 days from its execution, provided that the revocation must be in writing, signed by the revoking party or his/her counsel, and filed in the juvenile and domestic relations district court where the petition was filed. The 7 day revocation period may be waived in writing and will not affect the 7 day revocation period of the other parent.

2. By any party prior to the final order of adoption

    a. Upon proof of fraud or duress or

    b. After placement of the child in the adoptive home, upon mutual written consent of the birth parent(s) and adoptive parent(s).

Chapter 11. Psychiatric Treatment of Minors

I. GENERAL APPLICABILITY (Va. Code § 16.1-337)

A. Admission Generally

A minor may be admitted to a mental health facility for inpatient treatment only pursuant to Va. Code §§ 16.1-338, 16.1-339, or 16.1-340.1 or in accordance with an order of involuntary commitment entered pursuant to Va. Code §§ 16.1-341 through 16.1-345.

B. Health Care Disclosure to Court and Other Officials from Facility

Any provider rendering services to a minor under this article *shall*, upon request, disclose to a magistrate, the juvenile intake officer, the court, the minor's attorney, the minor's guardian ad litem, the evaluator, the community services board (CSB), or law enforcement officer any information necessary for each to perform his/her duties.

Law-Enforcement: Information disclosed to a law-enforcement officer *shall* be limited to information only necessary to protect the officer, minor, or public from physical injury or to address the health care needs of the minor.

Parents: Any health care provider providing services under this article may notify the minor's parent of information which is directly relevant to such individual's involvement with the minor's healthcare, unless the provider is aware that the parent is currently prohibited by court order from contacting minor.

Immunity: Any health care provider disclosing records pursuant to this section *shall* be immune from civil liability and the Federal Health Insurance Portability and Accountability Act, *unless* the provider disclosing such records acted in bad faith.

Contents and Effect: Any order entered where a minor is the subject of proceedings under this article shall provide for the disclosure of health records pursuant to the above sections. Disclosures so ordered shall not preclude any other disclosures as required or permitted by law.

II. PARENTAL ADMISSION OF MINORS YOUNGER THAN 14 AND NON-OBJECTING MINORS 14 YEARS OF AGE OR OLDER (Va. Code § 16.1-338)

A. Procedure

1. **Younger than 14:** May be admitted for inpatient treatment upon application and with consent of a parent.

2. **14 or older:** May be admitted upon joint application of parent and minor and consent of the minor.

B. Criteria for Admission and Evaluation Requirements

The minor must be personally examined within 48 hours of admission by a qualified evaluator who must make a written finding that:

1. The minor appears to have a mental illness serious enough to warrant inpatient treatment and is likely to benefit from treatment;

2. The minor has been provided with a clinical explanation of the nature purpose of treatment;

3. If the minor is 14 or older, that he/she has been provided with an explanation of rights and that he has consented to admission under this Act, and;

4. All available methods of less restrictive treatment have been considered, and that no less restrictive alternative would be comparatively beneficial.

If admission is sought to a state hospital, CSB serving the area in which the minor resides shall provide, in lieu of the examination required by this section, a preadmission screening report. A copy of the written findings shall be provided to the consenting parent and the parent shall have the opportunity to discuss the findings with CSB.

C. Treatment Plan

Within 10 days after admission, the director or director's designee of the health care facility *shall* ensure that:

1. An individualized plan has been prepared with the involvement of the minor and family

2. The plan has been explained to the parent consenting to the admission;

3. The plan includes specific goals and specific methods of measurement of such goals; and

4. A copy of the plan shall be provided to the minor and his parents.

D. Revocation of Consent

If the parent or minor 14 years of age or older who consented under this section revokes consent at any time, the minor *shall* be discharged within 48 hours to the custody of the consenting parent, *unless* continued hospitalization is authorized pursuant to Va. Code §§ 16.1-339, 16.1-340.1 or 16.1-345.

If the 48 hour period expires on a day that the court is lawfully closed, the period shall extend to the next day that the court is not lawfully closed.

E. Limitations on Duration of Treatment

Inpatient treatment may not exceed 90 consecutive days unless the medical staff approve of such an extension based upon written findings.

F. Minors Reaching 14 Years Old During Treatment

Any minor admitted under this section while younger than 14 and his consenting parent shall be informed orally and in writing by the director of the facility within 10 days of his fourteenth birthday that continued voluntary treatment under the authority of this section requires his consent.

G. Access to Health Information

Any minor 14 years of age or older who joins in an application and consents to admission pursuant to subsection A, shall, in addition to his parent, have the right to access his health information.

H. Minors in Custody of the Court

A minor who has been hospitalized while properly detained by a juvenile and domestic relations district court or circuit court shall be returned to the detention home or other approved facility within 24 hours following completion of a period of inpatient treatment, unless the court having jurisdiction over the case orders that the minor be released from custody.

III. PARENTAL ADMISSION OF AN OBJECTING MINOR 14 YEARS OF AGE OR OLDER (Va. Code § 16.1-339)

A. Initial Detainment Period

A minor 14 years of age or older who objects to admission or is incapable of making an informed decision, may be admitted to a willing facility for up to 120 hours, pending the review pursuant to Va. Code § 16.1-339(B)-(C) upon the application of the parent.

If admission is sought to a state hospital, all requirements of § 16.1-338(B) must still be met, except the consent of the minor.

B. Evaluation Requirements

The minor *shall* be examined within 24 hours by a qualified evaluator. If the 24-hour time period expires on a day which the court is lawfully closed, the 24 hours shall extend to the next day the court is open.

Evaluator *shall* prepare a report to include written findings determining whether:

1. The minor appears to have a mental illness serious enough to warrant impatient treatment and is reasonably likely to benefit from the treatment;

2. The minor has been provided with a clinically appropriate explanation of the nature and purpose of treatment;

3. All available modalities of less restrictive treatment have been considered as no less restrictive alternative is available that they would offer comparable benefits to the minor.

4. The minor is in need of inpatient treatment and is likely to benefit from such treatment, and

5. Inpatient treatment is the least restrictive alternative.

C. Judicial Approval

Upon admission of a minor under this section, the facility shall file a petition for judicial approval no sooner than 24 hours and no later than 120 hours after admission with the court. Upon receipt of the petition and evaluator's report submitted pursuant to Va. Code § 16.1-339(B) and containing the information required in § 16.1-339.1, the judge *shall* appoint a guardian ad litem for the minor and counsel to represent the minor, unless the minor has already retained counsel. Copies of the petition and report shall be delivered to the minor's consenting parent, counsel and guardian ad litem.

D. Review and Dispositions

The Court and the guardian ad litem shall review the petition and evaluator's report and shall ascertain views of the minor, the minor's consenting parent, the evaluator, and the attending psychiatrist. Based on its review and the recommendations of the guardian ad litem, and the court *shall* order one of the following dispositions:

1. Court finds minor **does not meet** criteria for admission

   The court *shall* issue an order directing the facility to release the minor into the custody of the parent who consented to the minor's admission.

2. Court finds minor **meets** criteria for admission

The court *shall* issue an order authorizing continued hospitalization of the minor up to 90 days, with parental consent.

Within 10 days after admission, a facility director or director's designee *shall* ensure that a treatment plan has been prepared by the provider responsible for the minor's care and explained to the consenting parents. A copy of the plan *shall* be provided to the consenting parent, guardian ad litem, and to counsel for the minor.

3. Court finds information is **insufficient**

   The court shall schedule a commitment hearing that *shall* be conducted in accordance with Va. Code §§ 16.1-341 to -345. The minor may be detained in the hospital for up to 120 additional hours pending the commitment hearing.

E. Minor Rescinding Objection and Parental Revocation

A minor who rescinds his objection may be retained pursuant to Va. Code § 16.1-338. If a parent revokes consent, the minor *shall* be released within 48 hours to the parent's custody *unless* the minor's continued hospitalization is authorized pursuant to Va. Code § 16.1-340.1 or § 16.1-345.

IV. RELEASE OF MINOR PRIOR TO COMMITMENT HEARING ON INVOLUNTARY ADMISSION (Va. Code § 16.1-340.3)

If a judge or director of the psychiatric facility determines that the minor does not meet the criteria for commitment in Va. Code § 16.1-345, the minor may be released prior to the commitment hearing authorized in § 16.1-341.

A. Preadmission Screening Report (Va. Code § 16.1-340.4)

The CSB where the minor resides or where the minor is located shall provide a report, which states:

1. Whether the minor has mental illness and whether, because of mental illness, the minor:

   a. Presents a serious danger to himself or others to the extent that severe or irremediable injury is likely to result, as evidenced by recent acts or threats, or;

   b. Is experiencing a serious deterioration of his ability to care for himself in a developmentally age-appropriate manner, as evidenced by delusionary thinking or by a significant impairment of functioning in hydration, nutrition, self-protection, or self-control.

2. Whether the minor is in need of compulsory treatment for a mental illness and is reasonably likely to benefit from the proposed treatment.

3. Whether inpatient treatment is the least restrictive alternative that meets the minor's needs.

4. The recommendations for the minor's placement, care, and treatment including, where appropriate, recommendations for mandatory outpatient treatment (MOT).

The CSB shall provide the preadmission screening report to the court prior to the hearing, and the report shall be admitted into evidence and made part of the record of the case.

B. Petition Procedure (Va. Code § 16.1-341)

Timing: Upon filing of petition, the hearing *shall* occur no sooner than 24 hours and no later than 96 hours from the time the petition was filed or the issuance of a temporary detention order, whichever occurs later, or from the time the hearing was conducted if pursuant to Va. Code § 16.1-339(C). Notice prior to the hearing shall be given to the counsel for minor, guardian ad litem, attorney for the Commonwealth, and the court.

Notice: If the petition is not dismissed or withdrawn, copies of the petition and written notice of the hearing shall be served upon the minor and the minor's parents if they are not petitioners.

GAL and Counsel: No later than 24 hours before the hearing, the court *shall* appoint a guardian ad litem for the minor and counsel to represent the minor, unless the minor retains his own counsel.

Continuances: Upon request of minor's counsel for good cause shown, and after notice to petitioner and notice to all parties, the court *may* continue the hearing once for a period not to exceed 96 hours.

Admissibility of Recommendations: Any recommendations made by a state mental health facility or state hospital regarding the mental health of the minor may be admissible during the course of the hearing.

C. Clinical Evaluation (Va. Code § 16.1-342)

Upon the filing of a petition, the court shall direct the CSB to arrange for a private evaluation by a qualified evaluator who must be present at the hearing physically or by audio-visual communication. The evaluator *shall* issue a written opinion within 24 hours of the hearing stating whether the minor meets the criteria for commitment in Va. Code § 16.1-345. A copy of the evaluation shall be provided to the minor's GAL & counsel.

The evaluation shall consist of the following:

1. A clinical assessment;

2. A substance abuse screening, when indicated;

3. A risk assessment that included an evaluation of the likelihood of serious danger to himself or others;

4. For a minor 14 years of age or older, an assessment of the minor's capacity to consent to treatment;

5. If prior to the examination the minor has been temporarily detained pursuant to this article, a review of the temporary detention facility's records for the minor;

6. A discussion of treatment preferences expressed by the minor or his parents;

7. An assessment of alternatives to involuntary inpatient treatment;

8. Recommendations for the placement, care, and treatment of the minor.

D. Criteria for Involuntary Commitment (Va. Code § 16.1-345)

1. After observing the minor and considering the following:

    a. The recommendation of any treating or examining physician or psychologist licensed in Virginia, if available;

    b. Any past actions of the minor;

    c. Any past mental health treatment of the minor;

    d. Any qualified evaluator's report;

    e. Any medical records available;

    f. The preadmission screening report; and

    g. Any other evidence that may have been admitted,

2. the court shall order involuntary commitment of the minor for a period not to exceed 90 days if it finds by *clear and convincing* evidence that:

    a. Because of mental illness the minor presents a serious threat to himself or others, to the extent that severe or irremediable injury is likely to result, as evidenced by recent acts or threats; or

b. Because of mental illness the minor is experiencing serious deterioration of his ability to care for himself in a developmentally age-appropriate manner, as evidenced by delusionary thinking or by a significant impairment of functioning in hydration, nutrition, self-protection, or self-control;

c. The minor is in need of compulsory treatment for mental illness and reasonably likely to benefit from treatment;

d. If the court finds that inpatient treatment is not the least restrictive treatment, it shall consider entering an MOT order pursuant to § 16.1-345.2.

3. If the **order expires**, the minor is to be released unless there is another court order, the parent's consent, or he is committed to MOT.

4. The judge may **order transportation** of an involuntary committed minor by either the sheriff's office or an alternative transportation provider depending upon the minor's dangerousness.

5. If the **parent(s) are not willing to approve** the proposed commitment, the court shall order inpatient treatment only if it finds that such treatment is necessary to protect the minor's life, health, safety, or normal development. If the court so find this necessity, it may order the opposing parent(s) to comply.

E. Involuntary Commitment Hearing (Va. Code § 16.1-344)

Minor 14 Years of Age or Older: The court shall inform the minor of his right to be voluntarily admitted for inpatient treatment pursuant to § 16.1-338 and shall allow the minor to have the opportunity to agree, as long as his/her agreement is consented to by the parent(s).

Attendance: All material witnesses and the CSB member that arranged for the evaluation shall be in attendance at an involuntary commitment hearing. The CSB member has the option of participating in person or via electronic communication.

F. Discharge Plans (Va. Code § 16.1-346.1)

1. Prior to the discharge of any minor admitted to inpatient treatment, a discharge plan shall be formulated and provided to:

   a. The minor's parents, and/or;

   b. Social Services, if applicable;

   c. The court, if applicable.

2. The plan shall, at minimum:

a. Specify the services required;

b. Specify any applicable income subsidies;

c. Identify all local and state agencies providing treatment and support;

d. Specify appropriate services that are currently unavailable.

A minor in detention or shelter care prior to inpatient treatment shall be returned there unless the court provides prior written authorization for the minor's release.

V. EMERGENCY CUSTODY ORDERS (ECO) (Va. Code § 16.1-340)

A magistrate may issue an emergency custody order pursuant to Va. Code § 16.1-340 based on probable cause that a situation exists that meets the criteria of grounds for commitment laid out in Section III(B) of this chapter.

A. Emergency Order Based Upon Officer Observation

A law-enforcement officer may take into custody and transport the minor for treatment without prior authorization only when he has probable cause to believe that a minor meets the criteria for emergency custody. The period of custody, however, shall not exceed eight hours from the time the law-enforcement officer takes the minor into custody.

B. Period Minor Must Remain in Custody

The minor shall remain in custody until a temporary detention order is issued, until the minor is released, or until the emergency custody order expires. An emergency custody order shall be valid for a period not to exceed eight hours from the time of execution.

VI. TEMPORARY DETENTION ORDERS (TDO) (Va. Code §§ 16.1-340.1-2)

A. Issuance

A magistrate shall issue a temporary detention order after an evaluation by the CSB and a probable cause finding by the magistrate that commitment criteria from Section III(B) of this chapter exists.

A TDO may be issued without an ECO and without a prior evaluation if there was an evaluation by the CSB or its designee within the last 72 hours or there is significant risk with conducting such evaluation.

B. Facility

An employee of CSB shall determine the facility for temporary detentions; however, no minor shall be detained in jail or detention unless they have been detained by the J&DR district court for a criminal offense and require hospitalization.

C. Duration

The length of a TDO shall not exceed 96 hours prior to the hearing. If the TDO is not executed within 24 hours (or shorter period if therein specified) of its issuance, it is void.

VII. MANDATORY OUTPATIENT TREATMENT (MOT) (Va. Code § 16.1-345.2)

If the factors in section IV(D) above have been met, the court has the option of ordering mandatory outpatient treatment (MOT) that includes an appropriate course of treatment as recommended by CSB.

An order for MOT shall:

1. State an initial treatment plan;

2. Require CSB to monitor the implementation of the MOT plan and report any material noncompliance to the court;

3. Be developed by CSB with the participation of the minor and his parents to the extent of their abilities;

4. Be given to the minor, his parents, his attorney, his GAL, and CSB upon entry.

Services Unavailable: If CSB determines that services for treatment of the minor's mental illness are not available or cannot be provided in accordance with the order for MOT, it shall notify the court within 5 business days of the entry of the order for the MOT plan. Within 5 business days of receiving such notice, the judge, after notice to the minor, the minor's attorney, and CSB, shall hold a hearing pursuant to Va. Code § 16.1-345.4.

A. Monitoring (Va. Code § 16.1-345.3)

The CSB where the minor resides shall monitor the minor's compliance with the MOT plan ordered by the court pursuant to Va. Code § 16.1-345.2

Failure to Comply: If CSB determines that the minor materially failed to comply with the order, it must file within 3 business days (or 24 hours for a temporary detention order), a motion for review of the MOT order as provided in Va. Code § 16.1-345.4 as well as a recommendation for an appropriate disposition. Copies of the motion for review shall be sent to the minor, his parents, his attorney, and his guardian ad litem.

ECOs and TDOs: The CSB shall immediately request that the magistrate issue an emergency custody order pursuant to Va. Code § 16.1-340, or a temporary detention order pursuant to Va. Code § 16.1-340.1 if they determine the minor is not materially complying with the MOT order and presents a serious danger to himself (or others) or is experiencing a serious deterioration of his ability to care for himself in a developmentally age-appropriate manner.

Continued Treatment No Longer Necessary: If CSB determines at any time prior to the expiration of the MOT order that the minor has complied with the order and that continued MOT is no longer necessary, it shall file a motion to review the order with the juvenile and domestic relation district court for the jurisdiction in which the minor resides. The court shall schedule a hearing and provide notice of the hearing in accordance with subsection A of Va. Code § 16.1-345.4.

B. Court Review (Va. Code § 16.1-345.4)

When Held: The judge shall hold a hearing within 15 days after receiving the motion for review of the MOT plan. The clerk shall provide notice of the hearing to the minor, his parents, CSB, all treatment providers listed in the comprehensive MOT order, and the original petitioner for the minor's involuntary treatment. The court shall appoint counsel to the minor if he does not have one and appoint a guardian ad litem for the minor.

Request for an Evaluation: The court shall order an evaluation and appoint a qualified evaluator in accordance with Va. Code § 16.1-342 if requested. The evaluator's report may be admitted into evidence without the appearance of the evaluator at the hearing if not objected to by the minor or his attorney.

Minor Fails to Appear: If the minor fails to appear for the hearing, the court may reschedule the hearing, issue an ECO, or issue a TDO after the consideration of any evidence regarding why the minor failed to appear at the hearing.

Material Noncompliance: After hearing the evidence regarding the minor's material noncompliance with the MOT order and the minor's current condition, and any other relevant information, the court shall make one of the following dispositions:

1. Order the minor's involuntary admission to a facility designated by the community services board for a period of treatment not to exceed 30 days;

2. Renew the order for MOT;

3. Rescind the order for MOT.

C. Continuation (Va. Code § 16.1-345.5)

At any time within 30 days prior to the expiration of a MOT order, CSB may file with the juvenile and domestic relations district court for the jurisdiction in which the minor resides a motion for review to continue the order for a period not to exceed 90 days.

The court shall **grant** the motion for review and enter an appropriate order without further hearing if it is joined by:

1. The minor's parents **and** the minor if he is 14 years of age or older, or;

2. The minor's parents if the minor is younger than 14 years of age.

Upon receipt of the motion for review, the court shall **appoint** a qualified evaluator who shall personally examine the minor pursuant to Va. Code § 16.1-342. The CSB shall provide a preadmission screening report as required in § 16.1-340.4.

After observing the minor, reviewing the preadmission screening report, and considering the appointed qualified evaluator's report and any other relevant evidence (See Va. Code §§ 16.1-345, -345.2(A)), the court shall make one of the **dispositions** specified in subsection D of Va. Code § 16.1-345.4

VIII. AVAILABILITY OF JUDGE (Va. Code 16.1-348)

The Chief Judge of each court shall ensure that a judge is available at all times to perform the duties of this chapter. "Judge" includes a juvenile and domestic relations district court judge, a retired judge sitting by designation, a substitute judge or special justice authorized by Va. Code § 37.2-803 who has completed an OES training program.

IX. APPEAL OF FINAL ORDER (Va. Code § 16.1-345.6)

The minor has a right to file an appeal of a final order committing or ordering the minor to mandatory outpatient treatment or hospitalization before the circuit court in whatever jurisdiction the minor was committed. Venue is within the territory of the court which issued the final order.

Minor has 10 days from issuance of the order to appeal and the circuit court must place the case above all other matters and hear it as soon as possible.

The Juvenile and Domestic Relations District Court shall appoint an attorney and Guardian Ad Litem to any minor who appeals and is not already represented.

Chapter 12. Entrustment Agreements

I. JURISDICTION

A. Jurisdiction over child

Virginia Code § 16.1-241(A)(4) creates jurisdiction over a child who is the subject of an entrustment agreement entered into pursuant to Va. Code §§ 63.2-903, or 63.2-1817, or whose parent(s) for good cause desires to be relieved of his care and custody.

B. Jurisdiction over parent

Virginia Code § 16.1-241(F)(2) creates jurisdiction over a parent, guardian, legal custodian, or person acting *in loco parentis* of a child who is the subject of an entrustment agreement entered into pursuant to Va. Code §§ 63.2-903, or 63.2-1817.

C. Authority to accept child by local boards

Virginia Code § 63.2-900 authorizes local boards of public welfare to accept for placement minors that are entrusted to the board by a parent, guardian, or committed by the court, or placed under an agreement but where legal custody remains with the parent or guardian. If the child is of school age the agency shall notify the principal of the school in which the child is to be enrolled within 72 hours.

When the board accepts a child under an entrustment agreement, a petition for approval of the agreement shall be filed by the board within a reasonable time after execution of the agreement; however, there are time limits. If the entrustment is for less than ninety days and the child is not returned home within that period, the petition has to be filed within eighty-nine days. If the entrustment is for more than ninety days or for an unspecified period and does not provide for termination of all parental rights, the petition has to be filed within thirty days. If the entrustment provides for the termination of all parental rights, the petition may be filed. Va. Code §§ 63.2-903, 16.1-277.01(A).

A parent under eighteen has the legal capacity to execute an entrustment agreement including one terminating all parental rights.

D. Authority to accept child by licensed child-welfare agencies

Virginia Code § 63.2-1817 authorizes licensed child-welfare agencies to accept and have custody of children entrusted to them by parents, guardians, relatives, legal custodians or committed by a court.

When the child-welfare agency accepts custody under an entrustment agreement, a petition for approval of the agreement shall be filed by the agency within a reasonable time after execution of the agreement; however, there are time limits. If the entrustment is for less than ninety days and the child is not returned home within that period, the

petition shall be filed within eighty-nine days. If the entrustment is for more than ninety days or for an unspecified period and does not provide for termination of all parental rights, the petition shall be filed within thirty days. If the entrustment provides for the termination of all parental rights, the petition may be filed. Va. Code §§ 63.2-903, 16.1-277.01(A).

II. VENUE

A. Priority for venue

Cases involving entrustment shall be commenced in the court, which in order of priority: is the home of the child at the time of the filing or had been within six months before the filing and the child is absent; which has a significant connection with the child and in which there is substantial evidence concerning the child; the child is physically present and abandoned or an emergency exists; it is in the child's best interests and no other county or city is an appropriate venue. Va. Code § 16.1-243(A)(1)(b).

III. APPROVAL OF ENTRUSTMENT AGREEMENTS

Form DC-511, PETITION
Form DC-620, AFFIDAVIT (UNIFORM CHILD CUSTODY JURISDICTION ACT)

A. Time for Filing

Virginia Code § 16.1-277.01 creates the same time requirements as set forth above in Va. Code § 63.2-903 for filing a petition for the approval of an entrustment agreement. The board or agency is required to file a foster care plan (Va. Code § 16.1-281) and it is to be heard along with the petition for approval of the entrustment agreement. (The petition for approval shall be filed within no later than 89 days after execution of the entrustment agreement for less than 90 days, if the child is no returned to the caretaker. The petition shall be filed within 30 days after execution of an entrustment agreement for 90 days or longer.)

B. GAL, Time for Hearing, and Notice

1. GAL. This subsection requires the appointment of a GAL upon the filing of a petition. (Note that Va. Code § 16.1-266(A) also refers to appointment of GAL; see Chapter 13, Section V of this BENCHBOOK.) Form DC-514.

2. Time for hearing. The hearing is held within forty-five (45) days of the filing of the petition or within seventy-five (75) days if an order of publication is necessary. Va. Code § 16.1-277.01(B).

3. Notice. Notice of the hearing along with the petition is to be given to: the local board or agency, the child if over age twelve, the GAL, the child's parents, guardian, legal

custodian, or other person acting *in loco parentis*. A birth father shall be given notice of the proceedings if he is acknowledged as the father, adjudicated, presumed or has registered with the Putative Father Registry. No notice is required if the judge certifies that the identity of the parent or guardian is not reasonably ascertainable. An affidavit of the mother is sufficient evidence if there is no other evidence that refutes the affidavit. Va. Code § 16.1-277.01(B)(1)-(4). Failure to register with the Putative Father Registry shall be evidence that the identity of the father is not reasonably ascertainable.

4. The hearing may be held although a parent, guardian, etc. fails to appear and is not represented by counsel, provided that *personal* or substituted service was made on the person <u>or</u> the court determines such person cannot be found after reasonable effort <u>or</u> if the person is out of state, the person cannot be found or his post office box cannot be ascertained after reasonable effort. If the petition seeks the approval of an agreement which provides for the termination of all parental rights, a summons shall be served upon the parent(s) and the other parties specified in Va. Code § 16.1-263. The summons or notice must include the statement regarding the consequences of termination. Service must be made under Va. Code § 16.1-264.

   The parent, guardian, legal custodian or other person standing in *loco parentis* shall not be summoned to appear or be punished for failure to appear in cases of adults who are brought before the court pursuant to subsection C or D of Va. Code § 16.1-259 unless such person is summoned as a witness.

   The remaining parent's parental rights may be terminated without an entrustment agreement if based upon clear and convincing evidence the court finds it is in the best interests of the child <u>and</u>

   a. the identity of the parent is not reasonably ascertainable;

   b. the identity and whereabouts of the parent are known or reasonably ascertainable, and the parent is personally served with notice of the termination proceeding under Va. Code §§ 8.01-296 or 8.01-320;

   c. the whereabouts of the parent are not reasonably ascertainable and the parent is given notice of the termination proceeding by certified mail or registered mail to the last known address and the parent fails to object to the proceedings within fifteen (15) days of the mailing; or

   d. the whereabouts of the parent are not reasonably ascertainable and the parent is given notice of the termination proceeding through an order of publication pursuant to Va. Code §§ 8.01-316 and 8.01-317, and that parent fails to object to the proceedings.

C. Hearing

The court shall hear evidence on the petition and shall review the foster care plan.

D. Finding

The court shall make a finding based upon a preponderance of the evidence whether approval of the agreement is in the best interests of the child. If the agreement provides for termination of parental rights, the finding must be made based upon clear and convincing evidence.

If either finding is made, the court may make any disposition as provided in Va. Code § 16.1-278.2 for an abused and neglected child. An order transferring custody shall be made in accordance with the provisions of Va. Code § 16.1-278.2 A5. The order shall include, but is not limited to findings that

1. there is no less drastic alternative to granting the relief; and

2. reasonable efforts have been made to prevent removal and continued placement in the home would be contrary to the welfare of the child, if the transfer of custody is to a local board of social services.

Not all approvals will result in termination. The effect of approval of a permanent entrustment agreement is termination of parental rights. The order shall continue or grant custody to a local board, a child-placing agency, a relative, or other interested individual. The order shall indicate whether the board or agency has authority to place the child for adoption and consent thereto. At any time subsequent to the transfer of legal custody of the child, a birth parent or parents of the child and the pre-adoption parent(s) may enter into a written post-adoption contract and communication agreement in accordance with Va. Code § 16.1-283 (repealed by Acts 2010, c. 331). The court shall not require a written post-adoption agreement as a precondition to entry of an order in any case involving the child.

If custody is transferred to a relative or other interested individual, certain findings and orders are necessary. Appeals are as provided in Va. Code § 16.1-296. Va. Code § 16.1-277.01(D)(1).

E. Progress Report

Where the order terminates parental rights and gives the board or agency authority to place the child for adoption, the board or agency shall file a written adoption progress report with the court every six months from the date of the final order and every six months thereafter until a final order of adoption is entered. The court **is required** to schedule the date for the first report upon entry of the final order. The court shall send the GAL a copy of the report and a hearing on the report may be scheduled with or without the request of a party.

IV. FOSTER CARE

[for more detail, see Section III, Part C, Chapter 8 of this BENCHBOOK]

A. Foster Care Plan

A foster care plan is to be reviewed on the same day that the court hears the petition for approval of an entrustment agreement. Va. Code §§ 16.1-277.01, -281.

In cases where a placement of a child has been made and a foster care plan shall be prepared by the local department of social services or child welfare agency, a child who is 14 years of age or older shall be involved in the development of the plan and, at the option of the child, up to two members of the case planning team who are chosen by the child and who are not a foster parent of, or caseworker for, the child. The foster care plan shall include a signed acknowledgement by the child that they received a copy of the plan and that their rights were explained. Va. Code § 16.1-281.

B. Foster Care Review.

This section provides that a petition for foster care review **shall** be filed within five months of the hearing held under Va. Code § 16.1-277.01 if the child has not been returned to the prior family or placed in an adoptive home within five months of the hearing. A hearing should be held within thirty days of filing a petition for foster care review hearing. Va. Code § 16.1-282.

C. Permanency Planning

This section provides that a petition for a permanency planning hearing **shall** be filed within ten (10) months of the hearing held under Va. Code § 16.1-277.01 if the child has not been returned to his prior family, or is not placed in an adoptive home, is not in permanent foster care, or is not receiving services to achieve independent living ordered prior to July 1, 2011. A hearing should be held within thirty days of filing a petition for permanency planning hearing. Va. Code § 16.1-282.1.

Only a child who is 16 years of age or older may have the goal of permanent foster care or another planned permanent living arrangement.

The court shall ensure that the local department of social services has documentation and unsuccessful efforts made to return the child home or secure placement for the child with a relative or adoptive parents.

The court shall ask the child about the child's desired permanency outcome and made a judicial determination, accompanied by and explanation of the reasons that the alternatives listed in clauses (i) through (iii) of subsection A continue to not be in the best interest of the child.

V. FORMS

*make sure the current form is being used.

DC-511, PETITION
DC-620, AFFIDAVIT (UNIFORM CHILD CUSTODY JURISDICTION ACT)
DC-510X, SUMMONS
DC-535, NOTICE OF TERMINATION OF RESIDUAL PARENTAL RIGHTS
DC-509, AFFIDAVIT/CERTIFICATION OF PARENTAL IDENTITY OR LOCATION
DC-435, AFFIDAVIT AND PETITION FOR ORDER OF PUBLICATION
DC-436, ORDER OF PUBLICATION
DC-514, ORDER FOR APPOINTMENT GUARDIAN *AD LITEM*
DC-334, REQUEST FOR APPOINTMENT OF A LAWYER
DC-333, FINANCIAL STATEMENT – ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES
DC-536, TRIAL WITHOUT A LAWYER
DC-553, DISPOSITIONAL ORDER FOR UNDERLYING PETITION; FOSTER CARE PLAN

Chapter 13. Driver's License Ceremony

I. ISSUANCE OF DRIVER'S LICENSES TO MINORS

A. DMV's Role

The Virginia Department of Motor Vehicles (DMV) is required to forward all original licenses of juveniles to the Juvenile and Domestic Relations District Court judge in the city or county of the juvenile's residence. Va. Code § 46.2-336.

B. Ceremony

The court shall conduct a formal, appropriate ceremony in which the judge or substitute judge shall illustrate to the licensee the responsibility attendant to the privilege of driving a motor vehicle. If the applicant for a driver's license is under the age of 18 at the time this ceremony is held, then a parent, guardian, spouse, or other person in loco parentis must accompany the juvenile to the ceremony. Va. Code § 46.2-336.

C. Issuance to Out-of-State Juvenile

For good cause shown, the judge may mail or otherwise deliver the driver's license to any person who is a student at any educational institution outside of the Commonwealth of Virginia at the time such license is received by the judge. Va. Code § 46.2-336.

D. Other Content Requirements

The statute does not prescribe other content requirements of the ceremony.

II. CONTENTS OF A FORMAL, APPROPRIATE CEREMONY

A. Location

1. Utilize a large courtroom within the courthouse facility. Some courts have moved their ceremonies to schools or other locations to accommodate a large driver's license ceremony.

2. Open court formally and wear your judicial robe.

3. Require appropriate dress of both juveniles and adults.

4. Courthouse security procedures should be utilized during the ceremony.

B. Scheduling

1. Many courts try to utilize a time after school for ceremonies. However, it is often difficult to schedule a time that meets with everyone's approval and accommodates a court's regular docket. Some courts conduct their ceremonies in the morning before school while other courts utilize the early afternoon time frame.

2. Consider limiting the size to ensure enough seating and comfort for the students while allowing for an equal number of accompanying adults.

3. The students and their parent/legal guardian should be encouraged to arrive early to ensure their timely appearance and participation.

C. Participants

1. A judge or substitute judge is to issue the license. Many courts utilize the clerk's office and the sheriff's office to assist the judge in the ceremony.

2. No other participants are required under statute. Many courts invite local law enforcement officers to officially welcome new drivers. The law enforcement officer should review any special local issues for new drivers and what juveniles may expect if stopped while driving by a law enforcement officer.

   The judge may wish to utilize other traffic safety officials, lawyers or other appropriate speakers in the ceremony, such as a representative from the local Commonwealth's Attorney, the Public Defender, or a community leader.

3. A Commonwealth Attorney serving in the jurisdiction where the ceremony is to take place may request, in advance and in writing, to participate in the ceremony. Upon receiving such written request, the presiding judge <u>must</u> afford the Commonwealth Attorney the opportunity to address <u>all</u> participants as to matters of enforcement, prosecutions, applicable punishments, and the responsibility of drivers generally. Va. Code § 46.2-336.

D. Content

1. No specifics are required by statute; however, consider the following:

   a. Review the legal responsibilities of driving as it pertains to both the student and the parent/legal guardian including a discussion involving the fact that driving is a privilege within the Commonwealth of Virginia.

   b. Review statistical information regarding local, state and national driving statistics involving teen drivers, including a discussion regarding:

(i) distracted drivers, such as texting or loud music (Va. Code § 46.2-334.01 (C1) prohibits *any* cell phone use, regardless of whether the device is hand-held) (*see* Va. Code § 46.2-341.20:5 for definition of texting and using a handheld mobile telephone);

(ii) teenage driver crash rates;

(iii) fatality rates of teen drivers;

(iv) common types of crashes involving teen drivers;

(v) the dangers of driving at high rates of speed;

(vi) driving while under the influence; and

(vii) other driving behavior that places a driver and the public at risk of a crash, an injury or death.

c. Explain Virginia law regarding passengers, curfews and cellular telephones (or any other wireless telecommunications device), restrictions applicable to drivers who are under the age of eighteen and mandatory use of safety/seat belts.

d. Explain the three ways that juveniles may lose driving privileges:

(i) by the parent/legal guardian;

(ii) by DMV because of points; and

(iii) by the court because of delinquent or CHINS behavior.

e. Explain the "use and lose" provisions under Virginia law regarding underage use or possession of illegal drugs or alcohol and mandatory revocation of driving privileges.

f. Explain court procedures in the event that the juvenile receives a traffic summons, including resources such as a local driver improvement program.

g. Review the license, opportunity to designate as an organ donor, requirement to notify the DMV of address changes, and requirement to carry the license at all times.

h. Outline the work of the Juvenile and Domestic Relations District Court, along with its resources, including speaker presentations by the judge or staff at schools, community and civic groups.

i. Some courts show appropriate videos or power point presentations about the dangers of irresponsible and unsafe driving.

2. Consider a special focus for the ceremony, such as juvenile alcohol consumption or other important issues. Examples are available through the Traffic Safety Division of the Virginia Department of Motor Vehicles. Other resources may be obtained from the Virginia Department of Transportation (VDOT); the Virginia Department of Alcoholic Beverage Control (ABC); the Virginia Alcohol Safety Action Program (VASAP) and the National Highway Traffic Safety Administration (NHTSA), as well as from your local law enforcement agency.

3. Some courts **only** distribute or issue the driver's license to the parent/guardian and request that the parent/guardian discuss with the juvenile the issues covered within the driver's license ceremony ***before*** the parent/guardian gives the license to the student. Some courts have developed teen driving contracts for distribution at the ceremony.

4. In designing a driver's license ceremony, keep in mind the following benefits:

   a. It is a showcase to your community of your Juvenile and Domestic Relations District Court in a non-threatening atmosphere to students and parents.

   b. By involving law enforcement officers, or other presenters, it reinforces to young drivers the importance of youth traffic safety issues.

5. The ceremony can be a springboard for setting community norms attendant to the responsibilities of a driver's license. Invite community participation and consider it one of your court's best public relations tools.

6. The Virginia Supreme Court has offered unique resources prepared by the Century Council for use during the licensing ceremony. The Century Council's "I Know Everything" program provides the latest national data and relevant safety messages for teenage drivers and their parents. This program can supplement information presented by judges, and can also provide some valuable information to ceremony attendees, available at www.IKnowEverything.com.

D. ADULT PROCEEDINGS

Chapter 1. Domestic Violence

I. DEFINITIONS

A. Family Abuse

"Family abuse" is defined as any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such person's family or household member. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault in violation of Article 7 (§ 18.2-61 *et seq*.) of Chapter 4 of Title 18.2, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury. Va. Code § 16.1-228.

B. Stalking

"Stalking" is defined by the statute that makes it a crime. "Any person who, on more than one occasion, engages in conduct directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member is guilty of a Class 1 misdemeanor." Va. Code § 18.2-60.3. Contacting or following or attempting to contact or follow the person at whom the conduct is directed after being given actual notice that the person does not want to be contacted or followed, shall be prima facie evidence that the person intended or reasonably should have known that the other person was placed, in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member.

Any person who is convicted of a second offense occurring within five years of a prior conviction of such an offense or for a substantially similar offense under the law of any other jurisdiction is guilty of a Class 6 felony.

C. Family or Household Member

"Family or household member," as used in statutes and form orders under the jurisdiction of the Juvenile and Domestic Relations District Court means:

1. the person's spouse, whether or not he or she resides in the same home with the person;

2. the person's former spouse, whether or not he or she resides in the same home with the person;

3. the person's parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents, and grandchildren, regardless of whether such persons reside in the same home with the person;

4. the person's mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person;

5. any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time; or

6. any individual who cohabits or who, within the previous twelve months, cohabited with the person, and any children of either of them then residing in the same home with the person.

   Va. Code § 16.1-228.

D. Cohabitation and Same Sex Relationships

In a 1994 Opinion, the Attorney General of Virginia defined cohabitation:

> General district courts typically have jurisdiction in criminal matters involving adults. Va. Code § 16.1-241(J), however, gives juvenile courts jurisdiction over offenses committed by one family or household member against another family or household member. Va. Code § 18.2-57.2 makes it a criminal offense to assault and batter a family member. Both Code §§ 18.2-57.2 and 16.2-228 define "family or household member" the same way.
>
> The General Assembly uses the term "cohabits" in defining who would be considered a "family or household member" to establish jurisdiction under Code §§ 16.1-228 and 18.2-57.2. The use of the term "cohabit" connotes living together as husband and wife, and does not encompass persons of the same sex living together. Accordingly, General District Courts, rather than Juvenile and Domestic Relations District Courts, have jurisdiction to try criminal warrants alleging assault and battery when the defendant and the victim are unrelated persons of the same sex sharing the same residence.
>
> 1994 Va. AG 60 (July 22, 1994).

However, in 2006, a group of legislators requested an Attorney General Opinion as to whether the Virginia constitutional amendment to ban same-sex marriages and civil unions would affect the rights of unmarried persons. The inquiry included a specific request for an opinion as to whether the marriage amendment would support a defense to the criminal charge of family assault and battery, pursuant to Va. Code § 18.2-57.2. The Opinion focused on the applicable definition of "family or household member", which is relevant to criminal cases involving family assault and battery, civil cases involving Protective Orders for family abuse, as well as a determination as to jurisdiction as

between the District Courts related to other criminal and civil proceedings. In this Opinion, the Attorney General concludes:

> It is my opinion that "cohabitation" is determined by a variety of factors, and that the institution of marriage may be used as an illustrative and objective standard to determine whether unmarried parties are cohabiting. Applying this standard pursuant to § 18.2-57.2 does not confer upon the cohabiting relationship any of the "rights, benefits, obligations, qualities, or effects of marriage," nor is it a recognition of a relationship "that intends to approximate the design, qualities, significance, or effects of marriage." Passage of the amendment, therefore, would not prevent prosecution of an individual cohabiting in a same-sex or other unmarried relationship for assault and battery of the other individual pursuant to § 18.2-57.2.
>
> 2006 Va. AG 55 (September 14, 2006).

The 2006 Attorney General Opinion describes the 1994 Attorney General Opinion as being "superceded by the *Cowell* opinion [*Cowell v. Commonwealth*, Record No. 3198-03-1, 2005 LEXIS 42 (Va. Ct. App. 2005)] and customary legal usage of the term 'cohabitation.'" 2006 Va. AG 55 fn. 57. The portion of that Court of Appeals opinion cited by the Attorney General identified the two elements for determining "cohabitation" as the "sharing of familial or financial responsibilities" and "consortium" and indicated that the trier of fact should employ a "'totality-of-the-circumstances analysis' to determine whether the victim of the assault and battery and the defendant cohabited."

The Judge may have recourse to the 2006 Attorney General Opinion in determining whether the parties are "family or household members", whether they are cohabitants, and whether the Juvenile and Domestic Relations District Court or the General District Court has jurisdiction.

II. PROTECTIVE ORDERS IN CASES OF FAMILY ABUSE

A. Emergency Protective Orders (EPO) in Cases of Family Abuse – Va. Code § 16.1-253.4

1. <u>Jurisdiction</u>

   Any Juvenile and Domestic Relations District Court judge, General District Court judge, Circuit Court judge, or magistrate may issue a written or oral ex parte emergency protective order.

2. <u>Purpose</u>

   An EPO may be issued to protect the health or safety of any person, in the case of family abuse.

3. Procedure and Criteria – Va. Code § 16.1-253.4(B), (D), (F), (G)

   a. An EPO shall be issued when a law-enforcement officer or an allegedly abused person asserts under oath to a judge or magistrate, and on that assertion or on other evidence, the judge or magistrate finds that:

      (i) a warrant for a violation of Va. Code § 18.2-57.2 has been issued or issues a warrant for a violation of § 18.2-57.2 and finds that there *is* probable danger of further acts of family abuse against a family or household member by the respondent; or

      (ii) reasonable grounds exist to believe that the respondent has committed family abuse and there is probable danger of a further such offense against a family or household member by the respondent.

   b. Va. Code § 18.2-57.2 also sets forth the requirement that the magistrate issue an EPO when a warrant for assault and battery of a family or household member is issued.

   c. Pursuant to Va. Code §§ 16.1-253.4 and 18.2-57.2, if the respondent is a minor, an EPO shall not be required.

   d. When a judge or magistrate considers the issuance of an EPO pursuant to clause (i) above, he shall presume that there is probable danger of further acts of family abuse against a family or household member by the respondent unless the presumption is rebutted by the allegedly abused person.

   e. A law enforcement officer may request an EPO orally, in person or by electronic means.

   f. A judge or magistrate may issue an oral EPO which shall be verified by the judicial officer when reduced to writing by the law enforcement officer requesting the order or the magistrate on a preprinted form approved and provided by the Supreme Court of Virginia. The completed form shall include a statement of the grounds for the order asserted by the officer or allegedly abused person. If the order is in writing initially and signed by the judicial officer, then no further verification is necessary.

   g. The availability of an EPO shall not be affected by the fact that the family or household member left the premises to avoid the danger of family abuse by the respondent.

   h. The issuance of an EPO shall not be considered evidence of any wrongdoing by the respondent.

i. A judge or magistrate issuing an EPO shall provide the protected person or the law-enforcement officer seeking the EPO with the form for use in filing with the Court petitions for Preliminary Protective Orders and also shall provide written information regarding protective orders that shall include telephone numbers of domestic violence agencies and legal referral sources on a form provided by the Supreme Court. If the judge or magistrate provides the required information to the law-enforcement officer, the officer **may** provide the form and information to the person protected by the EPO when the officer provides him or her with a copy of the EPO.

4. Terms of an EPO – Va. Code § 16.1-253.4(B)

Upon a finding that the criteria for the issuance of an EPO have been met, the judge or magistrate shall issue an *ex parte* EPO imposing one or more of the following conditions on the respondent:

a. prohibiting acts of family abuse or criminal offenses that result in injury to person or property;

b. prohibiting such contacts by the respondent with the alleged victim or the alleged victim's family or household members, including prohibiting the respondent from being in the physical presence of the alleged victim or the alleged victim's family or household members. The term "physical presence" includes (i) intentionally maintaining direct visual contact with the petitioner or being within 100 feet from the petitioner's residence or place of employment;

c. prohibiting such other contacts by the respondent with the allegedly abused person or family or household members of the allegedly abused person as the judge or magistrate deems necessary to protect the safety of such persons; and

d. granting the family or household member possession of the premises occupied by the parties to the exclusion of the respondent; however, no such grant of possession shall affect title to any real or personal property; and

e. granting the petitioner possession of a "companion animal" as defined in § 3.2-6500 if the petitioner is an "owner" as defined in that same section.

5. Duration – Va. Code § 16.1-253.4(C), (D)

a. An EPO expires at 11:59 p.m. on the third day following issuance. If the order expires at a time the Juvenile and Domestic Relations District Court is not in session, the duration of the EPO is extended until 11:59 p.m. on the next business day that the court is in session.

b. The respondent may at any time file a motion with the court requesting a hearing to dissolve or modify the order. A hearing on such a motion shall be given precedence on the docket.

c. If the person to be protected by the EPO is physically or mentally incapable of filing a petition for a preliminary protective order or a protective order, a law enforcement officer may request an extension for an additional period of time not to exceed three days after expiration of the original order. That request for an extension of the EPO may be made orally, in person or by electronic means.

6. Service/VCIN/Copies of Order – Va. Code § 16.1-253.4(E)

a. The court or magistrate shall immediately, and in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex and race of each protected person.

b. Immediately upon receipt of the order by a local law enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network system (VCIN).

c. A copy of the EPO shall be served on the respondent as soon as possible, and, upon service, the agency making service shall enter the date and time of service and other appropriate information required by the Department of State Police into VCIN.

d. The person to be protected by the EPO shall be given a copy of the order when it is issued.

e. A copy of the EPO shall be filed by the law enforcement officer with his department along with the written report required by Va. Code § 19.2-81.3(D).

f. The original copy of the order shall be filed with the Clerk of the Juvenile and Domestic Relations District Court within five business days of the issuance of the order.

g. If the order is later dissolved or modified, a copy of the dissolution or modification order shall also be attested, forwarded, and entered in the VCIN system.

h. Upon request, the Clerk shall provide the person protected by the EPO with information regarding the date and time of service.

7. Violation of EPO

A violation of an EPO constitutes contempt of court.

8. Family Abuse EPO Sought by Unemancipated Minor

In a 2011 Opinion, the Attorney General of Virginia concluded that although "an emancipated minor may filed petitions for protective orders pursuant to the applicable statutes, … a minor who has not been emancipated, however mature that individual may be, can seek a protective order only through a next friend."

2011 Va. AG 93 (January 21, 2011).

B. Preliminary Protective Orders in Cases of Family Abuse (PPO) – Va. Code § 16.1-253.1

1. Venue

Proceedings shall be commenced where (i) either party has his or her principal residence, (ii) the abuse occurred, or (iii) a protective order was issued if at the time the proceeding is commenced, the order is in effect to protect the petitioner or a family or household member of the petitioner. Va. Code § 16.1-243(A)(3).

2. Jurisdiction

Pursuant to Va. Code § 16.1-241(M), the judges of the Juvenile and Domestic Relations District Court have jurisdiction to issue preliminary protective orders in cases of family abuse.

3. Purpose

To protect the health and safety of the petitioner or any family or household member of the petitioner who has been subjected to family abuse.

4. Procedure and Criteria – Va. Code § 16.1-253.1(A)

a. The petitioner must file a petition alleging that the petitioner is or has been, within a reasonable period of time, subjected to family abuse.

b. The preliminary protective order may be issued to protect the health and safety of the petitioner or any family or household member of the petitioner.

c. The order may be entered *ex parte* upon a showing of good cause. Immediate and present danger of family abuse or evidence sufficient to establish probable cause that family abuse has recently occurred shall constitute good cause. Evidence to support an ex parte order may be presented in any of the following manners:

(i) an affidavit;

(ii) sworn testimony before an intake officer; or

(iii) sworn testimony before the judge.

d. Either party may at any time file a motion with the court requesting a hearing to dissolve or modify the order. The hearing on the motion shall be given precedence on the docket of the court.

5. Terms of a PPO – Va. Code § 16.1-253.1(A) and (B)

a. A PPO may include any one or more of the following conditions to be imposed on the allegedly abusing person:

(i) prohibiting acts of family abuse or criminal offenses that result in injury to person or property.

(ii) prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such person.

(iii) granting the petitioner possession of the premises occupied by the parties to the exclusion of the allegedly abusing person; however, no such grant of possession shall affect title to any real or personal property.

(iv) enjoining the respondent from terminating any necessary utility service to a premises that the petitioner has been granted possession of pursuant to the PPO or, where appropriate, ordering the respondent to restore the utility services to such premises.

(v) granting the petitioner temporary possession or use of a motor vehicle owned by the petitioner alone or jointly owned by the parties to the exclusion of the allegedly abusing person; however, no such grant of possession or use shall affect title to the vehicle.

(vi) requiring that the allegedly abusing person provide suitable alternative housing for the petitioner and any other family or household member and, where appropriate, requiring the respondent to pay deposits to connect or restore necessary utility services in the alternative housing.

(vii) granting the petitioner possession of a "companion animal" as defined in § 3.2-6500 if the petitioner meets the definition of "owner" in that same section; and

(viii) any other relief necessary for the protection of the petitioner and family or household members of the petitioner.

Va. Code § 16.1-253.1(A).

b. The PPO shall specify a date for the full hearing which shall be held within fifteen days of the issuance of the PPO, unless

(i) the hearing is continued for good cause upon motion of the respondent during which extended period the PPO shall continue in effect.

(ii) the respondent fails to appear because the respondent was not personally served. In that case, the court may extend the PPO for a period of no more than six months and the extended PPO must be served on the respondent as soon as possible.

(iii) the respondent was personally served but was incarcerated and not transported to the hearing.

Va. Code § 16.1-253.1(B).

6. Effective Date – Va. Code § 16.1-253.1(C)

A PPO is effective upon personal service on the allegedly abusing person.

7. Service/VCIN/Copies of Order – Va. Code § 16.1-253.1(B)

a. The court shall immediately, and in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex, and race of each protected person.

b. Service may be made under the direction of the court by the primary law enforcement agency responsible for service and entry of protective orders. Service by a police officer of a city, county, or town is specifically authorized in Va. Code § 15.2-1704. Immediately upon receipt of the order by a local law enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into VCIN.

c. A copy of a preliminary protective order shall be served as soon as possible on the allegedly abusing person (respondent) in person as provided in Va. Code § 16.1-264, and upon service the agency making service shall enter the date and time of service into VCIN. Va. Code § 16.1-253.1.

d. Upon request after the order is issued, the clerk shall provide the petitioner with a copy of the order and information regarding the date and time of service.

e. Upon receipt of the return of service or other proof of service pursuant to Va. Code § 16.1-264(C), the clerk shall forward forthwith an attested copy of the PPO to the primary law enforcement agency which shall forthwith enter into VCIN any other information required by the state police that was not previously entered. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested by the clerk and forwarded as previously set forth.

8. Family Abuse PPO Sought by Unemancipated Minor

See Section II, A.8., above.

C. Protective Orders in Cases of Family Abuse (PO) – Va. Code § 16.1-279.1

1. Venue

Where (i) either party has his or her principal residence, (ii) the abuse occurred, or (iii) a protective order was issued if, at the time the proceeding is commenced, the order is in effect to protect the petitioner or a family or household member of the petitioner. Va. Code § 16.1-243(A)(3).

2. Jurisdiction

Pursuant to Va. Code § 16.1-241(M), the judges of the Juvenile and Domestic Relations District Court have jurisdiction to issue protective orders.

3. Purpose

In cases of family abuse, including any case involving an incarcerated or recently incarcerated respondent against whom a preliminary protective order has been issued pursuant to Va. Code § 16.1-253.1, the court may issue a protective order to protect the health and safety of the petitioner and family or household members of the petitioner.

4. Procedure

a. There shall be a full hearing, which shall be set by the PPO. Va. Code § 16.1-253.1(D).

b. The petitioner must prove the allegation of family abuse by a preponderance of the evidence. Va. Code § 16.1-253.1(D).

c. If a PPO was issued, the hearing for the PO may only be continued on motion of the respondent and for good cause shown and, if granted, the PPO shall remain in effect until the hearing. Va. Code § 16.1-253.1(B). If the hearing is continued, the respondent should be served with a copy of the order continuing the hearing and continuing the PPO in effect, and the new date must be recorded in VCIN.

d. If a PPO was issued, and the respondent fails to appear because the respondent was not personally served, or if personally served was incarcerated and not transported to the hearing, the court may extend the PPO for a period of no more than six months and the extended PPO must be served on the respondent as soon as possible.

In such a case, the judge should set a new date for the hearing on the Petition for Protective Order and include that new date in the extended PPO.

5. Terms of a PO – Va. Code § 16.1-279.1(A), (A1)

a. A PO may include any one or more of the following conditions to be imposed on the respondent:

(i) prohibiting of acts of family abuse or criminal offenses that result in injury to person or property;

(ii) prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary to protect the health or safety of such persons;

(iii) granting the petitioner possession of the residence occupied by the parties to the exclusion of the respondent; however, no such grant of possession shall affect title to any real or personal property;

N.B. A person, who is not a tenant or authorized occupant in the dwelling unit and who has obtained a protective order from a court of competent jurisdiction granting such person possession of the premises to the exclusion of one or more co-tenants or authorized occupants, may provide a copy of such order to the landlord and submit a rental application to become a tenant in such dwelling unit within 10 days of entry of such order. If such person's rental application meets the landlord's tenant selection criteria, such person may become a tenant in such dwelling unit under a written rental agreement. If such person submits a rental application and does not meet the landlord's tenant selection criteria, such person shall vacate the dwelling unit no later than 30 days after the date the landlord gives such person written notice that his rental application has been rejected. If such person does not provide a copy of the protective order to the landlord and submit a rental application to the landlord within 10 days as required by this section, such person shall vacate the dwelling unit no later than 30 days after the entry of such order. Such person shall be liable to the landlord for failure to

vacate the dwelling unit as required in this section. Any tenant obligated on a rental agreement shall pay the rent and otherwise comply with any and all requirements of the rental agreement (§§ 55-225.5 and 55-248.18:1);

(iv) enjoining the respondent from terminating any necessary utility service to the residence to which the petitioner was granted possession of pursuant to the PO or, where appropriate, ordering the respondent to restore the utility services to that residence;

(v) granting the petitioner temporary possession or use of a motor vehicle owned by the petitioner or jointly owned by the parties to the exclusion of the respondent, enjoining the respondent from terminating the insurance, registration or taxes on the vehicle, and requiring the respondent to maintain such insurance, registration and taxes, if appropriate; however, no such possession or use shall affect title to the vehicle;

(vi) requiring that the respondent provide suitable alternative housing for the petitioner, and, if appropriate, any other family or household member, and, where appropriate, requiring the respondent to pay deposits to connect or restore necessary utility services in the alternative housing;

(vii) ordering the respondent to participate in treatment, counseling or other programs as the court deems appropriate;

(viii) granting the petitioner possession of a "companion animal" as defined in Va. Code § 3.2-6500 if the petitioner meets the definition of "owner" as defined in that same section; and

(ix) any other relief necessary for the protection of the petitioner and family or household members of the petitioner, including a provision for temporary custody or visitation of a minor child.

b. In addition, if a PO is entered, the court may also enter a temporary support order for any children of the petitioner whom the respondent has an obligation of support. Any such support order shall terminate upon a determination of support pursuant to Va. Code § 20-108.1.

6. <u>Duration – Va. Code § 16.1-279.1(B)</u>

a. The PO may be issued for a specific period; however, unless otherwise authorized by law, a PO may not be issued for a period longer than two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified.

b. The PO may be extended for a period not longer than two years if, prior to the expiration of the protective order, a petitioner files a motion requesting a hearing

to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. If the petitioner was the respondent's family or household member at the time the initial protective order was issued, the court may extend the protective order to protect the health and safety of the petitioner or persons who are the petitioner's family or household members at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. There is no limit to the number of extensions that may be requested or issued.

7. Modification – Va. Code § 16.1-279.1(G)

   Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Such a hearing must take precedence over other proceedings.

8. Attorneys' Fees – Va. Code § 16.1-279.1(E)

   The court may assess costs and attorneys' fees against either party regardless of whether a PO has been issued as a result of a full hearing. Va. Code § 16.1-278.19 authorizes the award of attorneys fees and costs by the Juvenile and Domestic Relations District Court in any matter before the Court and requires that any such award be based on the relative financial ability of the parties. The fees and costs award language set forth in Va. Code § 16.1-279.1 does not refer to Va. Code § 16.1-278.19 and does not require that an award of fees and costs under that provision be based on the relative financial ability of the parties. Therefore, it may be argued that the limitation on such awards does not apply in cases involving protective orders.

9. Service of Order/Entry into VCIN – Va. Code § 16.1-279.1(C)

   a. The court shall immediately, and in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to VCIN the respondent's identifying information and the name, date of birth, sex, and race of each protected person.

   b. A copy of the PO shall be served on the respondent and provided to the petitioner as soon as possible. If the respondent is present at the hearing, it is best to have the respondent served immediately at the conclusion of the hearing.

   c. The clerk shall forward forthwith an attested copy of the order to the local police department or sheriff's office which shall, on the date of receipt, enter into VCIN any other information required by the state police which was not previously entered. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested by the clerk and forwarded as previously set forth.

10. Medical Evidence – Va. Code § 16.1-245.1

Under certain circumstances, a party in a protective order case may seek to present medical evidence in support of his or her position. Va. Code § 16.1-245.1 provides a mechanism by which such evidence may be presented in the absence of the testimony of a health care provider.

In any civil case heard in a Juvenile and Domestic Relations District Court involving allegations of child abuse or neglect or family abuse, any party may present evidence, by a report from the treating or examining health care provider as defined in Va. Code § 8.01-581.1 or the records of a hospital, medical facility or laboratory at which the treatment, examination or laboratory analysis was performed, or both, as to the extent, nature, and treatment of any physical condition or injury suffered by a person and the examination of the person or the result of the laboratory analysis.

However, as such evidence would otherwise be subject to a hearsay objection, the specific conditions of that provision must be met before the evidence may be admitted in evidence. If the following conditions are met, the medical record shall be admitted:

a. Ten days in advance of the trial or hearing, the party intending to present the evidence must give the opposing party or parties a copy of the evidence and written notice of intention to present it at the trial or hearing (except in the case of a preliminary removal hearing when twenty-four hours notice is sufficient);

b. Attached to the evidence must be a sworn statement of the treating or examining health care provider or laboratory analyst who made the report that the information contained therein is true and accurate, and fully describes the nature and extent of the physical condition or injury, and that the person named in the report was the person treated or examined, or, in the case of a laboratory analyst, that the information contained therein is true and accurate.

c. If the record to be admitted is a report of a hospital or other medical facility a sworn statement of the custodian of the records shall be attached attesting to the truth and accuracy of the copy of the record of such hospital or other medical facility.

d. Either party may subpoena the health care provider or custodian of the records to testify at the hearing or at a *de bene esse* deposition and the court shall determine which party or parties shall pay the fees and costs for such appearance or deposition, as the ends of justice may require. If the health care provider or custodian of the records is not subject to subpoena for purposes of cross-examination, the court shall allow a reasonable opportunity for the party seeking the subpoena to obtain the testimony as the ends of justice may require.

11. Family Abuse PO Sought by Unemancipated Minor

See Section II, A.8., above.

D. Violation of a Family Abuse EPO, PPO, PO

1. Criminal Proceedings for Violations – Va. Code § 16.1-253.2

a. Class 1 Misdemeanor

In addition to any other penalty provided by law, any person who violates a family abuse EPO, PPO or PO, when such violation involves a provision of the protective order which prohibits such person from going or remaining upon land, buildings or premises or from further acts of family abuse, or from committing a criminal offense, or which prohibits contacts between the respondent with the allegedly abused person as the court deems appropriate is guilty of a Class 1 misdemeanor.

b. Class 6 Felony

(i) Third Offense

The respondent shall be guilty of a Class 6 felony if the instant case is a third or subsequent violation of a protective order and

- the instant offense was committed within twenty years of the first conviction; and

- the instant offense or one of the prior offenses was based on an act or threat of violence.

(ii) Violations Involving Assault and Battery, Stalking, Entering Furtively, or Remaining in the Home

In addition to any other penalty provided by law, if a respondent commits an assault and battery upon any party protected by a family abuse EPO, PPO, or PO, resulting in bodily injury to the party, or stalks any party protected by the PO in violation of Va. Code § 18.2-60.3, he is guilty of a Class 6 felony. If a respondent violates such an EPO, PPO, or PO by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, the respondent is guilty of a Class 6 felony.

(iii) While Knowingly Armed with a Firearm or Other Deadly Weapon

In addition to any other penalty provided by law, a respondent who, while knowingly armed with a firearm or other deadly weapon, violates any provision of a protective order with which he has been served, is guilty of a Class 6 felony.

c. Mandatory Sentence

(i) Second Offense

Any person convicted of a second offense of violation of a protective order, when the instant offense is committed within five years of the prior conviction and the instant or prior offense was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of sixty days. This minimum mandatory sentence must be served consecutively with any other sentence.

(ii) Third Offense

In addition to being charged with a Class 6 felony, any person convicted of a third violation of a protective order, when the instant offense is committed within twenty years of the first conviction and the instant offense or any of the prior offenses was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of six months. This minimum mandatory sentence must be served consecutively with any other sentence.

(iii) First and All Other Offenses

Upon conviction for any offense of violation of protective order for which a mandatory sentence is not otherwise provided, in addition to any other appropriate sentence, the respondent shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended.

d. Required Entry of Protective Order

Upon conviction, the court shall enter a protective order pursuant to Va. Code § 16.1-279.1 for a specified period not exceeding two years from the date of the conviction.

e. Presumption Against Bail

Subject to rebuttal, it shall be presumed that, in relation to a person who is charged with a second or subsequent violation of a protective order pursuant to

Va. Code § 16.1-253.2, no condition or combination of conditions could reasonably assure the appearance of the respondent or the safety of the public.

2. Contempt

Va. Code § 16.1-253.1 (PPO) and Va. Code § 16.1-279.1 (PO) both provide that, except as otherwise provided in Va. Code § 16.1-253.2, a violation of a PPO or PO shall constitute contempt of court.

E. Confidentiality in Family Abuse EPO, PPO and Proceedings

No law-enforcement agency, attorney for the Commonwealth, court, clerk, or any employee of them may disclose, except among themselves, the residential address, telephone number, or place of employment of the person protected by the EPO, PPO, or PO or that of the family of such person, except to the extent that disclosure is (i) required by law or the Rules of the Supreme Court, (ii) necessary for law-enforcement purposes, or (iii) permitted by the court for good cause. Va. Code §§ 16.1-253.1(E), -253.4(I), -279.1(I).

The Clerk of Court should use Forms DC-621, NON-DISCLOSURE ADDENDUM, and DC-622, SEALED DOCUMENTS, to maintain the confidentiality of the information in the court file. Procedures for maintaining that information separately or in a manner not susceptible to public disclosure should be developed by the Court. Care to maintain confidentiality must also be taken when providing information to the Sheriff for service on the petitioner, in relation to any other case in which the address of the petitioner might otherwise be disclosed (e.g. a subpoena for the criminal case).

F. Firearm Issues Related to Family Abuse Orders of Protection

1. Virginia Law: State Prohibition Against Purchase or Transport of Firearms

   a. Va. Code § 18.2-308.1:4 prohibits any person who is subject to an EPO, PPO, or PO issued pursuant to Title 16.1 or Title 19.2 from purchasing or transporting any firearm while such order is in effect. In addition, any person who is subject to an EPO, PPO, or PO specified in the statute who holds a concealed handgun permit, is prohibited from carrying a concealed handgun while any such order is in effect, and is required to surrender his or her permit to the court upon entry of the order for the duration of the order. Any violation of Va. Code § 18.2-308.1:4 is a Class 1 misdemeanor.

   b. Any person who is subject to a protective order entered pursuant to Va. Code § 16.1-279.1, or an order issued by a tribunal of another state pursuant to a substantially similar statute, may continue to possess and transport any firearm for a period of 24 hours after being served with a protective order for the purposes of selling or transferring any such firearm to any person who is not otherwise

prohibited by law from possessing such firearm. A violation of this section is a Class 6 felony.

2. Federal Gun Control Act: Federal Prohibition Against Possessing Firearms or Ammunition When Subject to a Qualifying Protective Order

a. Qualifying Protective Orders

Pursuant to the Gun Control Act, 18 U.S.C. 922(g)(8), it is unlawful for a person subject to any order of protection to ship, transport or possess any firearm or ammunition or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, if:

(i) The order was entered after a hearing at which such person had actual notice and opportunity to participate;

(ii) The order restrains such person from harassing, stalking or threatening an "intimate partner" or child of such "intimate partner" or engaging in other conduct that would place those persons in reasonable fear of bodily injury, and

(iii) The order either includes a finding that such person represents a credible threat to the physical safety of such "intimate partner" or child, or, by its terms, specifically prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily harm. 18 U.S.C. § 922(g)(8).

b. "Official Use" Exemption

While subject to the § 922(g)(8) prohibition in their personal capacities, government personnel in their official capacities are exempt from the § 922(g)(8) firearm prohibition. 18 U.S.C. 925(a)(1). Although exempt from the § 922 (g)(8) federal prohibition, government personnel in their official capacities would be subject to Va. Code § 18.2-308.1:4.

c. The Requisite Domestic Relationship Under § 922(g)(8): Intimate Partner or Child of Intimate Partner

As used in the foregoing provisions, the term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person. 18 U.S.C. § 921(a)(32). The requisite domestic relationship does not cover all relationships protected under Virginia's family abuse protective order status. In addition to "intimate partners" and children of "intimate partners," a Virginia family abuse protection order can be granted to protect persons related by blood, affinity ("in-laws"), or adoption.

d. Prohibition for the Life of the Protective Order

The federal firearms prohibition under § 922(g)(8) is be effective until the qualifying protective order expires or is dismissed.

e. Penalties

A knowing violation of these provisions of the Gun Control Act is punishable by a maximum penalty of ten years incarceration, or a maximum fine of $250,000, or both. 18 U.S.C. § 924(a)(2), 3571. Actual knowledge of the prohibition is not required to demonstrate a violation.

3. Notification of Firearm Prohibitions on Qualifying Protective Orders

a. Warnings regarding Va. Code § 18.2-308.1:4 should be included in any EPO, PPO, or PO and are set forth in the following district court forms: DC-382, EMERGENCY PROTECTIVE ORDER; DC-384, PRELIMINARY PROTECTIVE ORDER; DC-385, PROTECTIVE ORDER; DC-532, CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT; DC-527, PRELIMINARY CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT; DC-626, EMERGENCY PROTECTIVE ORDER – FAMILY ABUSE; DC-627, PRELIMINARY PROTECTIVE ORDER – FAMILY ABUSE; and DC-650, PROTECTIVE ORDER – FAMILY ABUSE.

b. Virginia district court protective orders that are likely to meet the federal criteria set forth in 18 U.S.C. § 922(g)(8) include district court forms DC-532, CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT and DC-650, PROTECTIVE ORDER – FAMILY ABUSE. Virginia district court protective orders that may meet the criteria set forth if the requisite domestic relationship exists and if not issued *ex parte* include DC-385, PROTECTIVE ORDER; DC-527, PRELIMINARY CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT; and DC-627, PRELIMINARY PROTECTIVE ORDER – FAMILY ABUSE. Finally, by the plain language of 18 U.S.C. § 922(g)(8), the federal firearm prohibition would be triggered upon certain probationary "no contact" orders if the requisite domestic relationship exists. Warnings regarding the § 922 (g)(8) firearm provisions should be included in these orders of protection.

4. Concealed Weapon Permit

At the end of the hearing at which an order of protection is entered, the judge should inquire as to whether the respondent possesses any firearms and should request the surrender of any concealed weapon permit.

G. Full Faith and Credit for Out-of-State Family Abuse Orders of Protection

1. Foreign Protective Orders

   Va. Code § 16.1-279.1(F) permits a person entitled to protection under a temporary or permanent order of protection issued by another state or the District of Columbia to file an attested or exemplified copy of that order of protection with the clerk of the Juvenile and Domestic Relations District Court in family/household member cases. Foreign POs are entitled to full faith and credit in Virginia, provided reasonable notice and opportunity to be heard were given by the issuing jurisdiction to the person against whom the order is sought to be enforced sufficient to protect such person's due process rights and consistent with federal law.

2. Foreign Protective Orders to be Entered into VCIN

   Upon filing in accordance with Va. Code § 16.1-279.1(F), the clerk shall forward forthwith an attested copy of the Order to the local police department or sheriff's office which shall, on the date of receipt, enter the name of the person subject to the order and other appropriate information required by the State Police into VCIN. Va. Code § 16.1-279.1(F).

3. Copies of Foreign Protective Orders and Law Enforcement Officer's Reliance

   Upon inquiry by any law-enforcement agency of the Commonwealth, the clerk shall make a copy available of any foreign order filed with that court. A law-enforcement officer may, in the performance of his duties, rely upon a copy of a foreign protective order or other suitable evidence which has been provided to him by any source and may also rely upon the statement of any person protected by the order that the order remains in effect. Va. Code § 16.1-279.1(F).

4. Full Faith and Credit to be Granted to Virginia Orders

   An order of protection granted by a court in Virginia is to be enforced by the courts of any state, the District of Columbia, or any U.S. Territory, and may be enforced by Tribal Lands. 18 U.S.C. § 2265.

H. Appeal of a PO

An order of protection for family abuse is not required to be suspended pending appeal, and the Juvenile and Domestic Relations District Court judge may choose to continue such an order in effect. Va. Code § 16.1-298(B). Pursuant to that provision, the Circuit Court, or the Court of Appeals or Supreme Court in a writ of supersedeas, may suspend such an order pending appeal.

III. TITLE 19.2 PROTECTIVE ORDERS IN CASES OF ACTS OF VIOLENCE, FORCE OR THREAT

A. General

A court may enter an Emergency Protective Order (EPO), a Preliminary Protective Order (PPO), or a Protective Order (PO) if a petitioner is being or has been subjected to an act of violence, force or threat. Va. Code §§ 19.2-152.8, -152.9, -152.10. The orders issued under these provisions are applicable where the petitioner and respondent are not family and household members.

B. "Act of Violence, Force or Threat" Defined

1. "Act of violence, force or threat" is defined as any act involving violence, force or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury.

2. In protective order cases, "stalking" is conduct that:

   a. occurs on more than one occasion, and

   b. is directed at the petitioner with the intent to place, or with the knowledge that the conduct places the petitioner in reasonable fear of death, criminal sexual assault, or bodily injury to the petitioner or to the petitioner's family or household member; or

   c. is directed at the petitioner and the respondent *reasonably should have known* that the conduct places the petitioner in reasonable fear of death, criminal sexual assault, or bodily injury to the petitioner or to the petitioner's family or household member.

   Va. Code § 18.2-60.3

C. Title 19.2 Emergency Protective Orders (EPO) Va. Code § 19.2-152.8

1. <u>Jurisdiction</u>

   Any judge of the Circuit Court, General District Court or Juvenile and Domestic Relations District Court or magistrate has the authority to issue a written or oral *ex parte* EPO, pursuant to Va. Code § 19.2-152.8, to protect the health or safety of a person.

2. Criteria – Va. Code § 19.2-152.8(B)

   A judge or magistrate shall issue an *ex parte* EPO when a law-enforcement officer or an alleged victim asserts under oath to a judge or magistrate that such person is being or has been subjected to an act of violence, force or threat, and when on that assertion or other evidence, the judge or magistrate finds that:

   a. there is probable danger of a further such act being committed by the respondent against the alleged victim; or

   b. a petition or warrant for the arrest of the respondent has been issued for any criminal offense resulting from the commission of any act of violence, force or threat.

3. Title 19.2 EPO Conditions – Va. Code § 19.2-152.8(B)

   An EPO may impose one or more of the following conditions on the respondent:

   a. prohibiting acts of violence, force, or threat or criminal offenses that may result in injury to person or property;

   b. prohibiting such contacts by the respondent with the alleged victim or the alleged victim's family or household members, including prohibiting the respondent from being in the physical presence of the alleged victim or the alleged victim's family or household members. The term "physical presence" includes (i) intentionally maintaining direct visual contact with the petitioner or (ii) unreasonably being within 100 feet from the petitioner's residence or place of employment;

   c. prohibiting such other contacts by the respondent with the alleged victim or the alleged victim's family or household members as the judge or magistrate deems necessary to protect the safety of such persons;

   d. granting the petitioner possession of a "companion animal" as defined in Va. Code § 3.2-6500 if the petitioner is an "owner" as defined in that same code section; and

   e. such other conditions as the judge or magistrate deems necessary to prevent (i) acts of violence, force or threat, (ii) criminal offenses resulting in injury to person or property, or (iii) communication or other contact of any kind by the respondent.

4. Duration – Va. Code § 19.2-152.8(C)

   a. Any EPO expires at 11:59 p.m. on the third day following issuance. If the expiration of the time period occurs when the court is not in session, the EPO shall be extended until 11:59 p.m. on the next business day that the court issued the order is in session.

b. The respondent may at any time file a motion with the court requesting a hearing to dissolve or modify the order. The hearing on the motion shall be given precedence on the docket.

c. If the person to be protected by the EPO is physically or mentally incapable of filing a petition for a preliminary protective order or a protective order, a law enforcement officer may request an extension for an additional period of time not to exceed three days after expiration of the original order. That request for an extension of the EPO may be made orally, in person or by electronic means.

5. Procedure – Va. Code § 19.2-152.8(D), (E), and (F)

a. A law enforcement officer may request an EPO orally, in person or by electronic means.

b. A judge or magistrate may issue an oral EPO that shall be verified by the judicial officer when reduced to writing by the law enforcement officer requesting the order or the magistrate, on a preprinted form approved and provided by the Supreme Court of Virginia. The completed form shall include a statement of the grounds for the order asserted by the officer, or by the alleged victim of stalking or a criminal offense resulting in serious bodily injury. If the order is in writing initially and signed by the judicial officer, then no further verification is necessary.

c. The issuance of an EPO shall not be considered evidence of any wrongdoing by the respondent.

d. No fee shall be charged for the filing or service of a petition under this statute.

6. Service/VCIN/Copies of EPO – Va. Code § 19.2-152.8(E)

a. Upon receipt of the order by a local law-enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into VCIN.

b. A copy of an EPO shall be served on the respondent as soon as possible, and upon service the agency making service shall enter the date and time of service into VCIN.

c. The person protected by the EPO shall be given a copy of the order when it is issued.

d. The original copy shall be filed with the clerk of the appropriate district court within five business days of the issuance of the order.

e. If the order is later dissolved or modified, a copy of the dissolution or modification order shall be attested, forwarded, and entered into VCIN.

f. Upon request, the clerk shall provide the alleged victim with information regarding the date and time of service.

7. Prohibition Regarding Law Enforcement Officers – Va. Code § 19.2-152.8(K)

A 2012 amendment to this section added a new subsection (K) which prohibits the issuance of an emergency protective order against a law enforcement officer for any action arising out such officer's lawful performance of his duties.

8. Title 19.2 EPO Sought by Unemancipated Minor

See Section II, A.8., above.

D. Title 19.2 Preliminary Protective Orders (PPO) Va. Code § 19.2-152.9

1. Jurisdiction

Unlike Va. Code § 19.2-152.8 which grants authority to both types of District Courts and the Circuit Courts to grant Title 19.2 EPOs, Va. Code § 19.2-152.9, related to Title 19.2 PPOs, does not identify specifically the appropriate court for the filing of petitions. That section only uses the word "court." Va. Code § 19.2-5 provides that the word "court", as used in that title, shall mean any court vested with appropriate jurisdiction under the laws of the Commonwealth.

The substantial 2011 changes to Title 16.1 and Title 19.2 PO provisions occurred as the result of two comprehensive, identical legislative enactments. 2011 Acts of Assembly, Chapters 445 (SB 1222), 480 (HB 2063). The two types of protective orders are predicated on the same behavior, with the only difference being that if the petitioner and respondent are family or household members, the PO proceedings are under Title 16.1. Therefore, there is a plausible legal argument that whereas all PO proceedings between family or household members are under Title 16.1 in J&DR district court, Title 19.2 PO proceedings between adult parties are in general district court, while Title 19.2 proceedings when at least one of the parties is a juvenile are in J&DR district court. *See* Va. Code § 16.1-241(I) ("any violation of law that causes or tends to cause a child to come within the preview of [Chapter 11 of Title 16.1].").

2. Procedure and Criteria – Va. Code § 19.2-152.9(A)

a. The court may issue a PPO against the alleged perpetrator in order to protect the health and safety of the petitioner and family or household members of the petitioner, upon the filing of a petition alleging the following:

(i) the petitioner is or has been, within a reasonable period of time, subjected to an act of violence, force or threat; or

(ii) a warrant or petition has been issued for the arrest of the alleged perpetrator for any criminal offense resulting from the commission of any act of violence, force or threat.

b. An *ex parte* PPO may be issued upon good cause shown. Evidence of immediate and present danger of any act of violence, force, or threat, or evidence sufficient to establish probable cause that any act of violence, force, or threat has recently occurred, shall constitute good cause for the issuance of an *ex parte* PPO. Evidence to support a petition for an *ex parte* PPO may be presented in any of the following manners:

(i) an affidavit;

(ii) sworn testimony before the judge; or

(iii) sworn testimony before the intake officer.

3. Terms of a PPO – Va. Code § 19.2-152.9(A) and (B)

a. A Title 19.2 PPO may include any one or more of the following conditions to be imposed on the respondent:

(i) prohibiting acts of violence, force, or threat, or criminal offenses that may result in injury to person or property;

(ii) prohibiting such other contacts by the respondent with the petitioner or the petitioner's family or household members as the court deems necessary for the health and safety of such persons;

(iii) granting the petitioner possession of a "companion animal" as defined in Va. Code § 3.2-6500 if the petitioner is an "owner" as defined in that same section; and

(iv) such other conditions as the court deems necessary to prevent (i) acts of violence, force or threat, (ii) criminal offenses that may result in injury to person or property, or (iii) communication or other contact of any kind by the respondent.

Va. Code § 19.2-152.9(A).

b. The PPO shall specify a date for the full hearing, which shall be held within fifteen days of the issuance of the preliminary order, unless that hearing is continued for good cause on a motion of the respondent during which extended period the PPO shall continue in effect. Va. Code § 19.2-152.9(B).

c. If the respondent fails to appear at the hearing because he or she was not personally served, the court may extend the PPO for up to six months.

d. The extended PPO must be served as soon as possible on the respondent.

e. The order shall specify that either party may at any time file a motion with the court requesting a hearing to dissolve or modify the order. The hearing on the motion shall be given precedence on the docket of the court. Va. Code § 19.2-152.9(B).

4. Effective Date – Va. Code § 19.2-152.9(C)

A PPO is effective upon personal service on the alleged perpetrator.

5. Service/VCIN/Copies of Order – Va. Code § 19.2-152.9(B)

a. Upon receipt of the order by a local law-enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into VCIN.

b. A copy of a PPO shall be served as soon as possible on the alleged perpetrator in person and, upon service, the agency making service shall enter the date and time of service into VCIN.

c. Upon request after the order is issued, the clerk shall provide the petitioner with a copy of the order and information regarding the date and time of service.

d. Upon receipt of the return of service or other appropriate proof of service, the clerk shall forward forthwith an attested copy of the PPO to the local police department or sheriff's office which shall, on the date of receipt, enter into VCIN any other information required by the State Police which was not previously entered. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested, forwarded and entered into VCIN.

6. Title 19.2 PPO Sought by Unemancipated Minor

See Section II, A.8., above.

E. Title 19.2 Protective Orders (PO) Va. Code § 19.2-152.10

1. Jurisdiction

See Section III, D.1., above.

2. Procedure and Criteria

   a. A title 19.2 PO may be issued by the court to protect the health and safety of the petitioner and family or household members of the petitioner, upon:

      (i) the issuance of a petition or warrant for, or a conviction of, any criminal offense resulting from the commission of any act of violence, force or threat; or

      (ii) a hearing held pursuant to Va. Code § 19.1-152.9(D).

      Va. Code § 19.2-152.10(A).

   b. The hearing referred to above shall be a full adversarial hearing, the occasion for which shall be specified by a PPO. Va. Code § 19.2-152.9(B) and (D).

   c. The petitioner must prove the allegation that the petitioner is, or has been, within a reasonable period of time, subject to an act of violence, force, or threat by a preponderance of the evidence. Va. Code § 19.2-152.9(D).

   d. If a PPO was issued, the hearing for the PO may only be continued on motion of the respondent and for good cause shown and, if granted, the PPO shall remain in effect until the hearing. Va. Code § 19.2-152.9(B). If the hearing is continued, the respondent should be served with a copy of the order continuing the hearing and continuing the PPO in effect, and the new date must be recorded in VCIN.

   e. If a PPO was issued, and the respondent fails to appear because the respondent was not personally served, the court may extend the PPO for a period of no more than six months and the extended PPO must be served on the respondent as soon as possible.

   f. No fees shall be charged for filing or serving any petition pursuant to this section. Va. Code § 19.2-152.10(I).

3. Terms of a PO – Va. Code § 19.2-152.10(A)

   A PO may include any one or more of the following conditions to be imposed on the respondent:

   a. prohibiting acts of violence, force or threat or criminal offenses that may result in injury to person or property;

   b. prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons;

c. granting the petitioner possession of a "companion animal" as defined in Va. Code § 3.2-6500 if the petitioner is an "owner" as defined in that same section; and

d. any other relief necessary to prevent (i) acts of violence, force or threat, (ii) criminal offenses that may result in injury to person or property, or (iii) communication or other contact of any kind by the respondent.

4. Duration – Va. Code § 19.2-152.10(B)

a. The PO may be issued for a specific period; however, unless otherwise authorized by law, a PO may not be issued for a period longer than two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified.

b. The PO may be extended for a period not longer than two years if, prior to the expiration of the protective order, a petitioner files a written motion requesting a hearing to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. The court may extend the protective order to protect the health and safety of the petitioner or persons who are the petitioner's family or household members at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. There is no limit to the number of extensions that may be requested or issued.

5. Modification – Va. Code § 19.2-152.10(G)

Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Such a hearing must take precedence over other proceedings.

6. Attorneys' Fees – Va. Code § 19.2-152.10(E)

The court may assess costs and attorneys' fees against either party regardless of whether a PO has been issued as a result of a full hearing.

7. Service of Order/Entry into VCIN – Va. Code § 19.2-152.10(C)

a. A copy of the Protective Order shall be served on the respondent and provided to the petitioner as soon as possible.

b. The court shall immediately, but in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to VCIN the respondent's identifying information and the name, date of birth, sex, and race of each protected person. The court shall also forward forthwith an attested copy of

the order to the local police department or sheriff's office which shall, on the date of receipt, enter into VCIN any other information required by the state police which was not previously entered.

c. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested by the clerk and forwarded as previously set out.

8. Medical Evidence – Va. Code § 19.2-245.1

See Section II, C.10., above.

9. Title 19.2 PO Sought by Unemancipated Minor

See Section II, A.8., above.

10. Compensation for Required Representation of Respondents – Va. Code § 19.2-152.12

In a proceeding for a protective order under Title 19.2, when the respondent is subject to the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et. seq.) or a guardian ad litem is required by law, compensation for counsel or the guardian ad litem may be ordered pursuant to Va. Code § 19.2-163 absent any other provisions to the contrary.

F. Violation of a Title 19.2 EPO, PPO, PO

1. Criminal Proceedings for Violations – Va. Code § 18.2-60.4

a. Class 1 Misdemeanor

In addition to any other penalty provided by law, any person who violates a Title 19.2 EPO, PPO or PO is guilty of a Class 1 misdemeanor.

b. Class 6 Felony

(i) Third Offense

The respondent shall be guilty of a Class 6 felony if the instant case is a third or subsequent violation of a protective order and

– the instant offense was committed within twenty years of the first conviction; and

– the instant offense or one of the prior offenses was based on an act or threat of violence.

(ii) Violations Involving Assault and Battery, Stalking, Entering Furtively, or Remaining in the Home

In addition to any other penalty provided by law, if a respondent commits an assault and battery upon any party protected by a EPO, PPO, or PO, resulting in bodily injury to the party, or stalks any party protected by the PO in violation of Va. Code § 18.2-60.3, he is guilty of a Class 6 felony. If a respondent violates such an EPO, PPO, or PO by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, the respondent is guilty of a Class 6 felony.

(iii) While Knowingly Armed with a Firearm or Other Deadly Weapon

In addition to any other penalty provided by law, a respondent, who, while knowingly armed with a firearm or other deadly weapon violates any provision of a protective order with which he has been served, is guilty of a Class 6 felony.

c. Mandatory Sentence

(i) Second Offense

Any person convicted of a second offense of violation of a protective order, when the instant offense is committed within five years of the prior conviction and the instant or prior offense was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of sixty days. This minimum mandatory sentence must be served consecutively with any other sentence.

(ii) Third Offense

In addition to being charged with a Class 6 felony, any person convicted of a third violation of a protective order, when the instant offense is committed within twenty years of the first conviction and the instant offense or any of the prior offenses was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of six months. This minimum mandatory sentence must be served consecutively with any other sentence.

(iii) First and All Other Offenses

Upon conviction for any offense of violation of protective order for which a mandatory sentence is not otherwise provided, in addition to any other appropriate sentence, the respondent shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended.

d. Required Entry of Protective Order

Upon conviction, the court shall enter a protective order pursuant to Va. Code § 19.2-152.10 for a specified period not exceeding two years from the date of the conviction.

e. Presumption Against Bail

Subject to rebuttal, it shall be presumed that, in relation to a person who is charged with a second or subsequent violation of a protective order pursuant to Va. Code § 18.2-60.4, no condition or combination of conditions could reasonably assure the appearance of the respondent or the safety of the public.

2. Contempt Proceedings for Violations

a. Va. Code § 19.2-152.9(C) provides that, except as otherwise provided, a violation of a Title 19.2 PPO issued under that section shall constitute contempt of court. However, if the respondent is convicted in criminal proceedings based on allegations of the same act or acts alleged in the contempt proceedings, a finding of contempt is barred. Va. Code § 18.2-60.4.

b. Va. Code § 19.2-152.10(D) provides that, except as otherwise provided, a violation of an acts of violence PO issued under that section shall constitute contempt of court. However, if the respondent is convicted in criminal proceedings based on allegations of the same act or acts alleged in the contempt proceedings, a finding of contempt is barred. Va. Code § 18.2-60.4.

G. Confidentiality in Title 19.2 EPO, PPO and PO Proceedings

No law-enforcement agency, attorney for the Commonwealth, court, clerk, or any employee of them may disclose, except among themselves, the residential address, telephone number, or place of employment of the person protected by the EPO, PPO, or PO or that of a family member of such person, except to the extent that disclosure is (i) required by law or the Rules of the Supreme Court, (ii) necessary for law-enforcement purposes, or (iii) permitted by the court for good cause. Va. Code §§ 19.2-152.8(H), -152.9(F), -152.10(H).

The Clerk of Court should use district court forms DC-621, NON-DISCLOSURE ADDENDUM, and DC-622, SEALED DOCUMENTS, to maintain the confidentiality of the information in the court file. Procedures for maintaining that information separately or in a manner not susceptible to public disclosure should be developed by the Court. Care to maintain that confidentiality must also be taken when providing information to the Sheriff for service on the petitioner, in relation to any other case in which the address of the petitioner might otherwise be disclosed (e.g. a subpoena for the criminal case).

H. Firearm Issues Related to Domestic Violence, Stalking, and Other Acts of Violence

1. Virginia Law

Any person convicted of any assault, assault and battery, sexual battery, or stalking who holds a concealed handgun permit must forfeit the permit and surrender it to the court. Va. Code § 18.2-308(E), (J).

2. Federal Gun Control Act: Federal Prohibition Against Possessing Firearms or Ammunition by Domestic Violence Misdemeanants

a. Qualifying Misdemeanor Crime of Domestic Violence Conviction

Pursuant to § 922(g)(9) of Title 18, United States Code, it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence [MCDV]" to possess any firearm or ammunition. The term "misdemeanor crime of domestic violence" is defined as any state or federal misdemeanor that "has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shared a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 922(a)(33)(A).

(i) *Any Misdemeanor Involving Use or Attempted Use of Physical Force or Threatened Use of Deadly Weapon.* While the U.S. Supreme Court has not yet weighed in on the interpretation of MCDV, a majority of federal circuits have construed MCDV to include "any misdemeanor conviction that has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, and, at the time of commission, the victim was the perpetrator's current or former domestic partner, parent, or guardian." The Fourth Circuit, however, has interpreted that "the relationship status between the perpetrator and the victim must be an element of the predicate misdemeanor offense." *United States v. Hayes*, 482 F.3d 749, 760 (4th Cir. 2007). In other words, in most federal circuits, a conviction under a general assault and battery statute would qualify as an MCDV if the evidence demonstrates that the requisite domestic relationship existed between the perpetrator and the victim at the time of commission. In contrast, applying the Fourth Circuit's MCDV interpretation, conviction under a general assault and battery statute would not meet the MCDV definition because the requisite domestic relationship is not an expressed element of the crime.

b. No "Official Use" Exemption

There are no exemptions for government personnel (e.g., law enforcement) from the MCDV firearm restriction. 18 U.S.C. § 925(a)(1). They are subject to the prohibition in both their personal and official capacities.

c. The Requisite Domestic Relationship Under § 922(g)(9)

(i) At the time of the commission of the qualifying misdemeanor, the convicted offender must be a:

- current or former spouse, parent or guardian of the victim;
- person with whom the victim shares a child in common;
- person who is cohabiting with or has cohabited with the victim as a spouse, parent or guardian; or
- person who is similarly situated to a spouse, parent, or guardian of the victim. 18 U.S.C. § 921(a)(33).

(ii) The scope of relationships protected by § 922(g)(9) in misdemeanor criminal cases is different from the scope of relationships protected under § 922(g)(8) in protective order cases. As cited in *Hayes*, the plain meaning and legislative history of 18 U.S.C. § 922(g)(9) indicates that MCDV was intended to encompass child abuse. *See Hayes*, 482 F.3d at 757. The act of cohabitation does not create a qualifying relationship unless one cohabits with another "as a spouse, parent or guardian."

d. Procedural Requirements

The MCDV firearm ban does not apply unless:

(i) the defendant was represented by counsel, or knowingly and intelligently waived the right to counsel; and

(ii) if the defendant is entitled to have the case tried by a jury, the case was actually tried by a jury or the defendant knowingly and intelligently waived the right to have the case tried by a jury; and

(iii) the conviction was not expunged or set aside and the defendant was not pardoned for the offense. 18 U.S.C. § 921(a)(33).

e. Date of Prior MCDV Conviction

The federal MCDV prohibition on firearms applies to persons who were convicted of misdemeanor crimes of domestic violence at *any* time, even before passage of the law in September 1996. *See, e.g., U.S. v. Denis*, 297 F.3d 25, 32 (1st Cir. 2000).

f. Penalties

A knowing violation of these provisions of the Gun Control Act is punishable by a maximum penalty of ten years incarceration, or a maximum fine of $250,000, or both. 18 U.S.C. § 924(a)(2), 3571. Actual knowledge of the prohibition is not required to demonstrate violation.

3. Notification of Firearm Prohibitions to Qualifying Domestic Violence Misdemeanants

The Virginia Department of Criminal Justice Services (DCJS), with the assistance of the Supreme Court of Virginia, Office of the Executive Secretary (OES), has developed a pamphlet concerning the federal MCDV firearms law. As qualifying convictions may be difficult to identify or track, the district courts will be provided with a recommended policy of distribution when certain misdemeanor convictions involve current or former members of the same household or related individuals, for example: simple assault, assault and battery, assault against a family/household member, marital sexual assault, sexual battery, or stalking.

More specifically, Virginia "misdemeanor crimes of domestic violence" that are likely to meet the criteria set forth in 18 U.S.C. § 922(g)(9) (by definition set forth in 18 U.S.C. § 921(a)(33)(A)(i)) include: general assault and battery, Va. Code § 18.2-57; assault against family/household member, Va. Code §§ 18.2-57.2, -57.3; simple assault, Va. Code § 18.2-57; marital sexual assault, Va. Code § 18.2-67.2:1; sexual battery, Va. Code § 18.2-67.4; attempt to commit misdemeanor (previously listed), Va. Code § 18.2-27; and attempted sexual battery, Va. Code § 18.2-67.5(C).

I. Full Faith and Credit for Out-of-State Orders of Protection

1. Foreign Protective Orders

Va. Code § 19.2-152.10(F) permits a person entitled to protection under a temporary or permanent order of protection issued by another state or the District of Columbia to file an attested or exemplified copy of that order of protection with the clerk of the appropriate district court. Foreign POs are entitled to full faith and credit in Virginia, provided reasonable notice and opportunity to be heard were given by the issuing jurisdiction to the person against whom the order is sought to be enforced sufficient to protect such person's due process rights and consistent with federal law.

2. Foreign Protective Orders to be Entered into VCIN

Upon filing in accordance with Va. Code § 19.2-152.10(F), the clerk shall forward forthwith an attested copy of the Order to the local police department or sheriff's office which shall, on the date of receipt, enter the name of the person subject to the order and other appropriate information required by the State Police into VCIN. Va. Code § 19.2-152.10(F).

3. Copies of Foreign Protective Orders and Law Enforcement Officer's Reliance

Upon inquiry by any law-enforcement agency of the Commonwealth, the clerk shall make a copy available of any foreign order filed with that court. A law-enforcement officer may, in the performance of his duties, rely upon a copy of a foreign protective order or other suitable evidence which has been provided to him by any source and may also rely upon the statement of any person protected by the order that the order remains in effect. Va. Code § 19.2-152.10(F).

4. Full Faith and Credit to be Granted to Virginia Orders

An order of protection granted by a court in Virginia is to be enforced by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands. 18 U.S.C. § 2265.

J. Appeal of Family Abuse or Title 19.2 PO

A family abuse PO or a Title 19.2 PO is not required to be suspended pending appeal and the district court judge may choose to continue such an order in effect. Va. Code § 16.1-298(B) (applicable to family abuse POs); Va. Code § 16.1-106 (applicable only to protective orders issued under Va. Code § 19.2-152.10). Pursuant to those provisions, the circuit court, or the Court of Appeals or Supreme Court, on writ of supersedeas, may suspend such an order pending appeal.

IV. ADULT CRIMINAL CASES INVOLVING DOMESTIC VIOLENCE

A. Law Enforcement Officers and Domestic Violence Charges – Va. Code § 19.2-81.3

1. Arrest Without a Warrant – Va. Code § 19.2-81.3(A)

Any law enforcement officer may make an arrest without a warrant for violations of Va. Code § 18.2-57.2 (assault and battery of a family or household member); Va. Code § 18.2-60.4 (violation of any Title 19.2 protective order) and Va. Code § 16.1-253.2 (violation of any family abuse protective order), regardless of whether the violation of law was committed in the presence of the officer, based on probable cause or upon the reasonable complaint of a person who observed the alleged offense or upon personal investigation.

2. Mandatory Arrest in Domestic Assault and Battery and Violation of Protective Order Cases – Va. Code § 19.2-81.3(B), (C)

   a. A law enforcement officer having probable cause to believe that a violation of Va. Code § 18.2-57.2 or § 16.1-253.2, or that a violation of § 18.2-60.4 involving physical aggression, has occurred shall arrest and take into custody the person he has probable cause to believe, based on the totality of the circumstances, was the predominant physical aggressor, unless there are special circumstances which would dictate a course of action other than arrest.

   b. The standards for determining who is the predominant physical aggressor shall be based on the considerations set forth in § 19.2-81.3(B) and (C), including, but not limited to, (i) who was the first aggressor, (ii) the protection of the health and safety of family and household members, (iii) prior complaints of family abuse by the allegedly abusing person involving family or household members, (iv) the relative severity of the injuries inflicted on persons involved in the incident, (v) whether any injuries were inflicted in self-defense, (vi) witness statements, and (vii) other observations.

3. Required Report – Va. Code § 19.2-81.3(D)

   Regardless of whether an arrest is made, the officer shall file a written report with his department, which shall state whether any arrests were made, and if so, the number of arrests specifically including any incident in which he has probable cause to believe family abuse has occurred, and, where required, including a complete statement in writing that there are special circumstances which would dictate a course of action other than arrest. Upon request of the allegedly abused person or person protected by the order, the department shall make a summary of the report available to the allegedly abused person or person protected by the order.

4. Family Abuse EPO Required – Va. Code § 19.2-81.3(E)

   a. In every case in which a law-enforcement officer makes an arrest under Va. Code § 18.2-57.2, the officer shall petition for an EPO when the person arrested and taken into custody is brought before a magistrate.

   b. Regardless of whether an arrest is made, if the officer has probable cause to believe that a danger of acts of family abuse exists, the law enforcement officer shall seek a family abuse EPO under Va. Code § 16.1-253.4.

   c. If the person arrested or the potential perpetrator of family abuse is a minor, an EPO shall not be required.

5. Assistance to the Victim – Va. Code § 19.2-81.3(D) and (F)

   a. The officer shall also provide the allegedly abused person, both orally and in writing, information regarding the legal and community resources available to the allegedly abused person. Va. Code § 19.2-81.3(D).

   b. A law enforcement officer investigating any complaint of family abuse, including but not limited to assault and battery against a family or household member may, upon request, transport, or arrange for the transportation of an abused person to a hospital, safe shelter, or magistrate. Any local law enforcement agency may adopt a policy requiring the same. Va. Code § 19.2-81.3(F).

B. Assault and Battery Against a Family or Household Member – Va. Code § 18.2-57.2

1. Misdemeanor – Va. Code § 18.2-57.2(A)

   Any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor.

2. Felony – Va. Code § 18.2-57.2(B)

   Where it is alleged in the warrant, petition, information, or indictment that a person has been previously convicted of two offenses against a family or household member of assault and battery in violation of Va. Code § 18.2-57.2, malicious or unlawful wounding, aggravated malicious wounding, malicious bodily injury by means of a substance, strangulation, or an offense under the law of any other jurisdiction which has the same elements of any of the above offenses, in any combination, within the past 20 years, each occurring on a different date, such person is guilty of a Class 6 felony.

3. Magistrate Must Issue an EPO – Va. Code § 18.2-57.2(C)

   Whenever a warrant for a violation of this section is issued, the magistrate shall issue a family abuse EPO, except if the defendant is a minor in which case an ERO is not required.

4. Deferral of Proceedings for First Time Offenders – Va. Code § 18.2-57.3

   a. Decision to Defer

      If a defendant charged with simply assault or assault and battery of a family or household member pleads guilty, nolo contendere, or not guilty and the court finds that the facts are sufficient to justify a finding of guilt, without entering a judgment of guilt, the court may defer further proceedings and place the defendant on probation upon terms and conditions, if:

      (i) the defendant was an adult at the time of the offense;

(ii) the defendant has not previously been convicted of any offense under the laws of Virginia, the United States, or any local government relating to assault and battery against a family or household member or has not previously had a proceeding against him for violation of such an offense dismissed as provided in Va. Code § 18.2-57.3; and

(iii) the defendant consents to a ruling under this provision. (It must be noted that by proceeding under this deferral provision, the defendant would waive his or her right to an immediate appeal as a final judgment in the case would be deferred for two years, or earlier upon a violation of the deferral conditions.)

b. Terms and Conditions

(i) The court shall order that the defendant be placed with an available local community-based probation services agency for an assessment and require, as a condition of local community-based probation, the defendant to successfully complete all treatment, education programs or services, or any combination thereof if such are available; or require the defendant to successfully complete treatment, education programs or services, or any combination thereof, such as, in the opinion of the court, may be best suited to the needs of the defendant.

(ii) The court shall order the defendant to be of good behavior for a period of not less than two years following the deferral of the proceedings, including the period of supervised probation, if applicable.

c. Violation of Terms or Conditions

Upon violation of a term or condition of supervised probation or of the period of good behavior, the court may enter an adjudication of guilt and proceed as otherwise provided.

d. Fulfillment of Terms and Conditions

Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the defendant. The discharge and dismissal of the proceedings pursuant to Va. Code § 18.2-57.3 shall be without a finding of guilt and is a conviction only for the purposes of applying the provisions of Va. Code § 18.2-57.3 in any subsequent proceedings. No charges dismissed pursuant to Va. Code § 18.2-57.3 shall be eligible for expungement.

e. Any Deferrals or Dismissals Must Comply with the Provisions of Va. Code § 18.2-57.3

Due to the enactment of Va. Code § 18.2-57.3, the court has no authority to use any other method or conditions to defer or continue for dismissal a charge of assault and battery of a family or household member. Strict compliance with that statutory provision is required.

Opinion of the Virginia Attorney General, March 31, 2005.

5. Protective Order and Other Conditions and Limitations in Addition to Sentence

Va. Code § 16.1-278.14 provides that in cases of violation of any law involving offenses committed by one family or household member against another, the Juvenile and Domestic Relations District Court, in addition to any penalty, may impose conditions and limitations upon the defendant to protect the health and safety of family or household members, including, but not limited to, a protective order as provided in Va. Code § 16.1-279.1, treatment and counseling for the defendant and payment by the defendant for crisis shelter care for the complaining family or household member.

6. Reporting to the Military

Va. Code § 18.2-57.4 requires the court to report the conviction of any active duty member of the United States Armed Forces to family advocacy representatives of the United States Armed Forces.

C. Stalking When Family and Household Members are Victims

1. Misdemeanor – Va. Code § 18.2-60.3(A)

Any person who on more than one occasion engages in conduct directed at a person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member is guilty of a Class 1 misdemeanor.

Contacting or following or attempting to contact or follow the person at whom the conduct is directed after being given actual notice that the person does not want to be contacted or followed, shall be prima facie evidence that the person intended or reasonably should have known that the other person was placed, in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member.

2. Felony – Va. Code § 18.2-60.3(B)

A second or subsequent conviction of stalking occurring within five years of a conviction of stalking or for a similar offense under the law of any other jurisdiction shall be a Class 6 felony.

3. Cases Involving Family and Household Members to be Heard by the Juvenile and Domestic Relations District Court

   Pursuant to Va. Code § 16.1-241(J), the Juvenile and Domestic Relations District Court shall have jurisdiction over all stalking or other criminal cases in which one family or household member is charged with an offense in which another family or household member is the victim. In such cases, the trial of the misdemeanor or the preliminary hearing of the felony will be heard in the Juvenile and Domestic Relations District Court.

4. Location of Criminal Conduct – Va. Code § 18.2-60.3(C)

   If the defendant engaged in stalking conduct as described in Va. Code § 18.2-60.3(A) on at least one occasion in the jurisdiction where the defendant is tried, the defendant may be convicted irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct occurred. Evidence of incidents of such conduct that occurred outside of the Commonwealth may be admissible, if it is relevant and the case is based on conduct occurring within the Commonwealth.

5. Protective Order and Other Conditions and Limitations in Addition to Sentence

   a. Mandatory No Contact Order

      Va. Code § 18.2-60.3(E) requires that an order prohibiting contact between the defendant and the victim or the victim's family or household members be entered by the court upon a finding of guilt in addition to any sentence imposed.

   b. Protective Order and Other Conditions and Limitations in Addition to Sentence

      Va. Code § 16.1-278.14 provides that in cases of violation of any law involving offenses committed by one family or household member against another, the Juvenile and Domestic Relations District Court, in addition to any penalty, may impose conditions and limitations upon the defendant to protect the health and safety of family or household members, including, but not limited to, a protective order as provided in Va. Code § 16.1-279.1, treatment and counseling for the defendant and payment by the defendant for crisis shelter care for the complaining family or household member.

6. Notice to Victim of Release or Escape from Incarceration – Va. Code § 18.2-60.3(F)

   Notice shall be given to any stalking victim or other person designated to receive notice of the release or escape of any defendant incarcerated for stalking, if the victim requests such notice in writing and keeps the relevant authority informed of the current mailing address and telephone number of the person to be notified. The notice is to be given by the Department of Corrections, sheriff or regional jail director

depending on the institution in which the defendant is incarcerated. Notice of release for a sentence of more than thirty days shall be given at least fifteen days prior to release. Notice of release for a sentence of at least forty-eight hours but no more than thirty days shall be given at least twenty-four hours prior to release. Notice of escape shall be given as soon as practicable following the escape.

7. Confidentiality – Va. Code § 18.1-60.3(F)

All information regarding a person to receive notice pursuant to Va. Code § 18.2-60.3(E) shall remain confidential and shall not be made available to the defendant.

D. Violations of Family Abuse and Title 19.2 Protective Orders

Criminal charges for violations of family abuse and Title 19.2 protective orders are discussed previously in relation to those particular orders. *See* Sections II, D.1. and III, G.1., above.

E. Other Adult Criminal Charges Involving Domestic Violence

1. Types of Offenses

There are many other criminal charges that may involve domestic violence or family abuse, including, but not limited to, murder, malicious wounding, rape, sexual battery, abduction, weapons offenses (e.g., brandishing), telephone abuse, and property crimes (e.g., destruction of property, unlawful entry, unauthorized use of a vehicle).

2. Considerations for Sentencing

When determining the appropriate sentence to impose in cases involving domestic violence, special consideration must be given to the nature of the relationships of the parties, the potential for further domestic violence, the impact on any children in the household, and any motive or cause for the conduct involved in the offense.

3. Protective Order and Other Conditions and Limitations in Addition to Sentence

Va. Code § 16.1-278.14 provides that in cases of violation of any law involving offenses committed by one family or household member against another, the Juvenile and Domestic Relations District Court, in addition to any penalty, may impose conditions and limitations upon the defendant to protect the health and safety of family or household members, including, but not limited to, a protective order as provided in Va. Code § 16.1-279.1, treatment and counseling for the defendant and payment by the defendant for crisis shelter care for the complaining family or household member.

V. FACTORS TO CONSIDER IN ALL DOMESTIC VIOLENCE CASES

A. Domestic Violence is About Power and Control

1. Domestic violence is a learned behavior and is rarely caused by substance abuse, genetics, stress, illness, or problems in the relationship. However, those factors are often used as an excuse for the behavior and may exacerbate the violence.

2. Domestic violence is usually a part of a pattern of assaultive or controlling behaviors, which may vary depending on the circumstances.

B. Factors to Consider as to the Level of Danger Posed by a Particular Respondent

1. Suicidal or homicidal ideation, whether threatened or attempted.

2. Escalation in frequency or severity of behaviors.

3. Prior criminal behavior or injunctions, or prior similar activities (although evidence of prior acts and behaviors may be objected to as not relevant; such evidence may be relevant to assess the current danger and risk, as well as provide evidence of intent, identity, lack of accident, motive, knowledge, plan or pattern of behavior).

C. Common Attitudes and Conduct Exhibited by Perpetrators of Domestic Violence

1. Consistent attempts to control victim.

2. Minimization and denial of own behavior; placement of blame on victim or others.

3. Low self-esteem.

4. Jealousy and possessiveness.

5. Intimidation.

6. Dependency on victim.

7. Appearance of being very amiable and likeable in Court.

8. Promises that the behavior will never recur.

Chapter 2. Child and Spousal Support

I. JURISDICTION

A. General Jurisdiction

1. Va. Code § 16.1-241(A)(3) confers jurisdiction upon the juvenile and domestic relations district court over child support cases (civil). This is concurrent jurisdiction except as in Va. Code § 16.1-244.

2. Va. Code § 16.1-241(E) grants J&DR courts jurisdiction over any person charged with deserting, abandoning or failing to provide support for any person in violation of law.

3. Va. Code § 16.1-241(L) grants the J&DR courts jurisdiction over spousal support cases. This is concurrent jurisdiction with the Circuit Court and any J&DR decision shall not be res judicata in any subsequent case in Circuit Court.

4. Va. Code § 16.1-241(P) confers the J&DR courts with jurisdiction to enforce administrative support orders entered in Virginia or another state.

5. Va. Code § 16.1-279.1(A1) provides the J&DR courts with authority to enter temporary child support orders in cases of family abuse.

6. Va. Code § 20-61 provides the basis for criminal prosecution of nonsupport of a child. See *Williams v. Commonwealth*, 57 Va. App. 750 (2011).

B. Concurrent Jurisdiction

Pursuant to Va. Code § 16.1-244, J&DR and circuit courts have concurrent jurisdiction to determine child support. However, once a suit for divorce has been filed in a circuit court, in which the custody, guardianship, visitation or support is raised by the pleadings and a hearing is set on any such issue for a date certain within twenty-one days of the filing, the J&DR court shall be divested of the right to enter any further decrees or orders. This may include a hearing set in the Circuit Court on a motions docket. Such matters shall be determined by the circuit court unless both parties agree to a referral to J&DR court.

Supplemental *pendente lite* relief, including debt allocation, is available in J&DR court under Va. Code § 20-103 in cases where:

1. there is a pending divorce annulment or separate maintenance action between the parties in the circuit court;

2. a petition for child custody, visitation or support (Va. Code § 16.1-241(A)(3)) has been filed; or

3. a petition seeking spousal support (Va. Code § 16.1-241(L)) has been filed.

C. Venue/Transfer of Venue

Va. Code § 16.1-243(A)(2) provides that child and/or spousal proceedings shall be commenced in the city or county where either party resides or where respondent is present.

Va. Code § 16.1-243(B)(3) contemplates transfer of support proceedings to the city or county of the respondent's residence; however, if companion cases addressing custody or visitation are pending therein, the venue provisions of the Code pertaining to the custody/visitation case govern.

II. CHILD SUPPORT GUIDELINES

A. Award/Retroactivity

1. Va. Code § 20-108.2 establishes a rebuttable presumption in any judicial or administrative proceeding for child support, including cases involving split or shared custody, that the amount of the award resulting from application of the guidelines set forth in this section is the correct amount of child support to be awarded. *Hiner v. Hadeed*, 15 Va. App. 575 (1993).

2. On an initial petition, the award shall be retroactive to the date of filing provided that the petitioner exercised due diligence in the service of the respondent *or* if earlier, the date an order of the Department of Social Services entered pursuant to Title 63.1 and directing payment of support was delivered to the sheriff or process server for service on the obligor. Va. Code §§ 20-108.1(B) and 63.2-1903, see also *Cirrito v. Cirritto*, 44 Va. App. 287 (2004). Under Va. Code § 20-60.3(6), the first monthly payment shall be due the first day of the month following the hearing date and the first day of each month thereafter. In addition, an amount shall be assessed for the full and partial months between the effective date the date the first payment is due. The assessment for the first partial month shall be prorated from the effective date through the end of that month based on the amount of the monthly obligation.

NOTE: In cases in which retroactive liability for support is being determined, the court or administrative agency may use the gross monthly income of the parties averaged over the period of retroactivity. Va. Code § 20-108.2(C).

B. Factors Necessary To Make The Computation

1. Mother's and father's gross income as defined in Va. Code § 20.108.2(C): spousal support should be added or deducted, as appropriate from gross income but only when paid pursuant to a pre-existing order or written agreement.

2. Costs for health care coverage (Va. Code § 20-108.2(E), as defined in Va. Code § 63.2-1900), when actually paid by a parent or by a parent's spouse:

    a. Must be added to the basic support obligation. The amount is determined by the cost per person being applied to the child(ren) covered by the child support order. If a per person cost is not provided by the insurer, the cost per person is determined by subtracting the cost of individual coverage for the policyholder from the total cost and dividing the remaining amount by the number of remaining covered persons. Va. Code § 20-108.2(G)(1) provides for the non-custodial parent's monthly obligation to be reduced by the cost of such coverage if paid directly by said parent or that parent's spouse. The cost of dental care coverage and vision coverage should be included with the cost of health care coverage.

    b. Health care coverage provisions shall be included in all support orders. "Reasonable cost" pertaining to health insurance means insurance available at a cost to the parent responsible for providing it which does not exceed five percent of the combined gross incomes of the parties and accessible to the parent through employment or other group insurance or Department of Social Services-sponsored health care coverage unless the court deems otherwise in the best interests of the child or by agreement of the parties. The Department of Social Services must use the National Medical Support Notice to help facilitate the process of enrolling children in group health plans, unless the court order stipulates alternative health care coverage to an employer-based coverage. Va. Code § 63.2-1900; 45 CFR 303.3(a)(3); Form DC-628, ORDER OF SUPPORT (CIVIL); see also *Frazer v. Frazer*, 23 Va. App. 358 (1996).

3. Cost for employment-related child care incurred by the custodial parent (Va. Code § 20-108.2(F)):

    a. The cost shall be limited to the amount required to provide quality care from a licensed source.

    b. Where appropriate, the court shall consider the willingness and availability of the non-custodial parent to provide child-care personally in determining whether child-care costs are necessary or excessive.

    c. On request of either party, tax consequences shall be factored into the court's calculation of the child-care cost if the court is shown the savings derived from child-care cost deductions or credits.

    NOTE – When requested by the non-custodial parent, the court may require the custodial parent to present documentation to verify childcare costs.

4. Number of children

   Provides for an adjustment to parent's income under the support guidelines for support paid for other children and in the guideline amount based on the parent's income for other children residing in the home of either parent who are not the subject of the current proceeding. However, such an adjustment to gross income shall not create or reduce a support obligation to an amount that seriously impairs the custodial parent's ability to maintain minimal adequate housing and provide other basic necessities for the child. See Va. Code § 20-108.2(C)(4).

5. Va. Code § 20-108.2(G) allows a reduction in gross income for half of the self-employment tax paid in determining support obligations.

C. Deviation From Guidelines

The court must first compute the presumptively correct amount of basic child support pursuant to the statutory guidelines based on the actual gross incomes of the parties before contemplating a deviation, including imputation of income to a party who is voluntarily unemployed or underemployed. *Buchanan v. Buchanan*, 14 Va. App. 53 (1992) and *West v. West*, 53 Va. App. 125 (2008).

1. Factors to consider

   In any proceeding on the issue of determining child support, the court shall consider all evidence presented relevant to the issue. In order to rebut the presumptively correct child-support award contemplated by Va. Code § 20-108.2, the court shall make written findings in the order as mandated by Va. Code § 20-108.1(B), which states:

   a. the amount of support that would have been required under the guidelines;

   b. the reason that the application of such guidelines would be *unjust or inappropriate* in that particular case;

   c. the justification for the variation from the guidelines was determined by relevant evidence pertaining to the ability of each party to provide child support, the best interests of the child and

   d. why and to what extent the following factors set forth in Va. Code § 20-108.1(B) justified the nonconforming award;

      (i) actual monetary support for other family members or former family members. (*see Zubricki v. Motter*, 12 Va. App. 999 (1991) and *Farley v. Liskey*, 12 Va. App. 1 (1991));

(ii) arrangements regarding custody, including the cost of visitation travel, (see *Alexander v. Alexander*, 12 Va. App. 691 (1991));

(iii) imputed income to a party who is voluntarily unemployed or under-employed, except where a custodial parent has child(ren) not in school, child care is unavailable and such costs are not included in the computation, and provided further, that any consideration of imputation of income based on a party's change in employment shall be evaluated considering the good faith and reasonableness of the employment decisions made by that party, including to attend and complete an educational or vocational program likely to maintain or increase the party's earning potential (see *Broadhead v. Broadhead*, 51 Va. App. 170 (2008) and *Murphy v. Murphy*, 65 Va. App. 581 (2015);

(iv) any child care costs incurred on behalf of child(ren) due to the attendance of a custodial parent in an educational or vocational program likely to maintain or increase the party's earning potential;

(v) debts of either party arising during marriage for benefit of child;

(vi) court-ordered direct payments for maintaining life insurance, education expenses or other court-ordered direct payments for benefit to the child (Va. Code §§ 20-108.1 (D), -60.3(7), -124.2, see also *Princiotto v. Gorrell*, 42 Va. App. 253 (2004)); *Solomond v. Ball*, 22 Va. App. 385 (1996) and *Oley v. Branch*, 63 Va. App. 681 (2014);

(vii) extraordinary capital gains such as capital gains from sale of the marital abode;

(viii) any special needs of the child resulting from any physical, emotional or medical condition;

(ix) independent financial resources of the child(ren); (see *Rinaldi v. Dumsick* (2000);

(x) standard of living for the child(ren) established during the marriage; (*see L.C.S. v. S.A.S.*, 19 Va. App. 709 (1995));

(xi) earning capacity, obligations, financial resources and special needs of each parent;

(xii) provisions made with regard to marital property under Va. Code § 20-107.3, where said property earns income or has an income-earning potential;

(xiii) tax consequences to the parties including claims for exemptions, child tax credit, and child care credit for dependent children;

(xiv) a written agreement, stipulation, consent order, or decree between the parties that includes the amount of child support; and

(xv) such other factors as are necessary to consider the equities for the parents and children.

Any deviation from the guidelines must be calculated by adding or subtracting a *just and appropriate* amount from the presumptive guideline amount, not to or from a previously determined child support award. *Richardson v. Richardson*, 12 Va. App. 18 (1991).

D. Computation of the Award

1. Pursuant to Va. Code § 20-108.2, a monthly child support obligation shall be established, except in cases involving split or shared custody, by adding:

   a. the monthly basic child support obligation;

   b. costs for health care coverage;

   c. work-related child care costs;

   and taking into consideration all the factors set forth in Va. Code § 20-108.1(B) – the total monthly child support obligation shall be divided between the parents in the same proportion as their monthly gross incomes bear to their monthly combined gross income. The monthly obligation of each parent shall be computed by multiplying each parent's percentage of the parents' monthly combined gross income by the total monthly child support obligation. The monthly obligation of the noncustodial parent shall be reduced by the cost for health care coverage to the extent allowable by Va. Code § 20-108.2(E).

2. Minimum Support

   Unless one of certain statutory exemptions to the minimum obligation exists under the provisions of Va. Code § 20-108.2(B), there shall be a presumptive minimum child support obligation of the statutory minimum per month contained in the child support schedule payable by the payor parent. However, if the payor parent's income is equal to or less than 150 percent of the federal poverty level, the court may set an obligation below the presumptive statutory minimum provided the court finds there is

no ability to pay the presumptive statutory minimum **and** deviation below the minimum does not create or reduce the obligation to an amount which seriously impairs the custodian's ability to provide minimal adequate housing and provide other basic necessities for the child. Va. Code § 20-108.2(B).

3. Term of Support, Va. Code § 20-124.2

   a. The court shall order that support will continue to be paid for any child over the age of eighteen who is:

      (i) a full-time high school student;

      (ii) not self-supporting; and

      (iii) living in the home of the party seeking or receiving child support until such child reaches the age of nineteen or graduates from high school, whichever first occurs.

   b. The court may also order a support obligation or the continuation of support for any child over the age of eighteen who is

      (i) severely and permanently mentally or physically disabled;

      (ii) unable to live independently and support himself; and

      (iii) resides in the home of the parent seeking or receiving child support,

      provided the disability arose prior to the child emancipating from an obligation by attaining the age of 18 or under the provisions of 3.a. above.

      NOTE: The Court of Appeals has held that a trial court has jurisdiction to order continuing support based on these circumstances upon a petition filed after the child has attained the age of eighteen and earned her G.E.D. *Mayer v. Corso-Mayer*, 62 Va. App. 713 (2014).

   c. The court may confirm a stipulation or agreement of the parties that extends a support obligation beyond when it would otherwise terminate as provided by law.

      NOTE: The court may *modify* such agreements only to the extent of its jurisdiction, which would end upon a child graduating from high school or attaining his nineteenth birthday, whichever first occurs. *Cutshaw v. Cutshaw*, 220 Va. App. 638, 641 (1979). However, if the parties' agreement is for an award for two children, while the court cannot later modify the amount for the parties' grown son, it can apportion the award between the children and

modify the portion for the minor daughter. *Everett v. Carome*, 65 Va. App. 177 (2015).

4. Split Custody

The amount of child support to be paid is equal to the difference between the amounts owed by each parent as a noncustodial parent. The noncustodial parent owing the larger amount pays the difference to the other parent. Va. Code § 20-108.2(G).

5. Shared Custody

a. Exceptions

Where a party has custody or visitation of child(ren) for more than ninety days of the year, as defined in Va. Code § 20-108.2(G)(3), a shared custody child support amount based on the ratio in which the parents share the custody and visitation of any child(ren) shall be calculated in accordance with this subdivision. The presumptive support to be paid shall be the shared custody amount, subject to the following exceptions:

(i) Where a party affirmatively shows that the sole custody support amount is less. If so, the lesser amount shall be the support to be paid.

(ii) Pursuant to Va. Code § 20-108.2(G)(3)(d), if the gross income of the payee is equal to or less than 150 percent of the federal poverty level promulgated by the U.S. Department of Health and Human Services ***(see attached)***, the court shall perform both sole and shared custody guideline calculations and determine which should apply. *See Milam v. Milam*, 65 Va. App. 439 (2015).

NOTE: This subsection further establishes a minimum standard of support providing that any calculations under this subdivision shall not create or reduce a support obligation to an amount which seriously impairs the custodial parent's ability to maintain minimal adequate housing and provide other basic necessities for the child(ren).

b. The amount of shared custody support is calculated as follows:

(i) multiply the guideline amount for the combined income of the parents and the number of shared child(ren) by 1.4;

(ii) multiply this amount by the other parent's "custody share" (number of days that parent has physical custody per year, divided by 365);

(iii) to each parent's support obligation, add the other parent's cost of health care coverage and employment-related child care costs;

(iv) multiply this support obligation by each parent's percentage of the combined monthly gross income;

(v) subtract one from the other and the difference shall be the shared custody support one parent owes the other;

c. Support Modification, Va. Code § 20-108.2(3)(e)

When there has been an award of child support based on the shared custody formula and one parent consistently fails to exercise custody or visitation in accordance with the parent's custody share upon which the award was based, there shall be a rebuttable presumption that the support award should be modified.

d. Day Defined

Va. Code § 20-108.2(G)(3)(c) defines day to be a period of twenty-four hours; however, where the parent who has the fewer number of overnight periods during the year has an overnight period with a child, but has physical custody of the shared child for less than twenty-four hours during such overnight period, there is a presumption that each parent shall be allocated one-half day for that period. *Ewing v. Ewing*, 21 Va. App. 34 (1995)

NOTE: Va. Code § 20-108.2(G)(3)(ii) grants the court the discretion to determine when the year may begin and what time the day may begin.

E. Uninsured Medical or Dental Expenses/Cash Medical Support

In addition to providing for the amount of periodic support to be paid, every support order shall presumptively provide that the parents pay in proportion to their gross incomes used for the guideline calculation any reasonable and necessary un-reimbursed medical and dental expenses. Va. Code § 20-108.2(D). This is defined as "cash medical support" under Va. Code § 63.2-1900.

The court may deviate from this presumption for good cause shown or based on the agreement of the parties.

III. SPOUSAL SUPPORT GUIDELINE, VA. CODE § 16.1-278.17:1

A. Presumption

In any judicial proceeding for pendente lite spousal support in the Juvenile and Domestic Relations District Courts, there shall be a presumption that the amount of support determined by application of the formula in Va. Code § 16.1-278.17:1 shall be the correct amount of spousal support to be ordered. If the court is making a determination of child and spousal support, the amount of spousal support owed shall be determined first.

B. Exception

This presumption shall not apply in cases where the parties; combined gross monthly income exceeds $10,000.00.

C. Formula

1. If the parties have minor child in common, the presumptive amount is the difference between 28% of the payor spouse's gross monthly income and 58% of the payee spouse's gross monthly income.

2. If the parties have no minor child in common, the presumptive amount is the difference between 30% of the payor spouse's gross monthly income and 50% of the payee's gross monthly income.

3. For purposes of this formula, gross monthly income is defined the same as in Va. Code § 20-108.2.

4. If the Court is determining both child support and pendente lite spousal support, the court shall first determine the amount of spousal support.

D. Deviation

The court may deviate from the presumptive amount for good cause shown, including relevant evidence concerning the parties' current financial circumstances indicating the presumptive amount is inappropriate. There is no requirement that the court make written findings concerning deviation as required for deviation from the child support guideline.

IV. MODIFICATION OF THE AWARD

A. Generally

1. The court may review and revise or alter an order regarding child support and enter a new decree relative to such child support upon:

    a. petition of either parent;

    b. motion of the court;

    c. petition of the Department of Social Services, pursuant to Va. Code §§ 20-60.3(13) and 63.2-1921.

2. No support order may be retroactively modified (Va. Code § 20-108). However, such an order may be modified with respect to any period during which there is a pending petition for modification from the date that notice of the petition has been given to the responding party. S*ee Goodpasture v. Goodpasture*, 7 Va. App. 55 (1988); *Taylor v. Taylor*, 10 Va. App. 681 (1990) and *Rose v. O'Brien*, 14 Va. App. 960 (1992). Under Va. Code § 20-60.3(6), the first monthly payment shall be due the first day of the month following the hearing date and the first day of each month thereafter. In addition, an amount shall be assessed for the full and partial months between the effective date of the modification and the date the first payment is due. The assessment for any first partial month shall be prorated from the effective date through the end of that month based on the amount of the monthly obligation.

3. A very restricted exception to this rule exist for situations where:

    a. the custodial parent has, by his/her own volition, agreed to relinquish custody to the other parent on a permanent basis and further agreed to termination of support payments;

    b. the other parent has fully performed the agreement; and

    c. enforcing the agreement will not adversely affect the support award. *Acree v. Acree*, 2 Va. App. 151 (1986). (However, see also *Jones v. Davis*, 43 Va. App. 9 (2004) and *Zedan v. Westheim*, 60 Va. App. 556 (2012)).

4. Requirements for modification

    a. The primary requirement for modification is establishing a material change in the circumstances of one or both of the parents that justifies altering the amount of support. A party seeking modification in support must establish a material change in condition and circumstances by a preponderance of the evidence. *Yohay v. Ryan*, 4 Va. App. 559 (1987); *Featherstone v. Brooks*, 220 Va. 443 (1979); *Milligan v. Milligan*, 12 Va. App. 982 (1991).

b. The burden of proof in a motion to amend child support is that there be a material change of circumstances which has occurred since the last hearing in which the child support guideline was used by the court in setting child support. *Hiner v. Hadeed*, 15 Va. App. 575 (1993).

c. A substantive amendment to the child support guidelines, Va. Code § 20-108.2, which results in disparity in a party's support obligations is a material change in circumstance warranting review of existing order. *Head v. Head*, 24 Va. App. 166 (1997); *Cooke v. Cooke*, 23 Va. App. 60 (1996) and *Slonka v. Pennline*, 17 Va. App. 662 (1994).

d. A party seeking a reduction in support payments must, in addition to satisfying the general burden of proof relative to a material change in circumstances

(i) make a full and clear disclosure relative to his ability to pay; (see *Hammers v. Hammers* 216 Va. 30 (1975) and

(ii) show that his inability to pay is not due to his own voluntary act or his neglect. *Edwards v. Lowry*, 232 Va. 110 (1986).

e. Voluntary unemployment or underemployment does not constitute a change in circumstances warranting a reduction of child support obligation. *Antonelli v. Antonelli*, 242 Va. 152 (1991).

f. Voluntary unemployment is not an absolute bar to modification of child support obligation *if* other material changes in circumstances have occurred that are not the fault of the movant. It is but one of several factors to be considered. *Barnhill v. Brooks*, 15 Va. App. 696 (1993); Va. Code § 20-108.1(B).

5. As opposed to spousal support, the court may increase child support even though the only motion to modify filed requests a decrease in child support as the best interests of the child(ren) are of paramount concern. *See Milam v. Milam*, 65 Va. App. 439 (2015).

B. Incarceration

A parent's incarceration may constitute voluntary unemployment so as to preclude a reduction of the support obligation. *Layman v. Layman*, 25 Va. App. 365 (1997); *Edwards v. Lowry*, 232 Va. 110 (1986).

V. INCORPORATION OF PARTIES' AGREEMENT

The court must (i) consider an agreement of the parties on child support that addresses the factors of Va. Code § 20-108.1, and (ii) if the agreement is determined to be in the best interest of the child(ren), deviate from the guideline amount. *Watson v. Watson*, 17 Va. App. 249 (1993).

Parents cannot contract away their children's right to support, nor can the court be precluded by agreement from exercising its power to decree child support. *Kelly v. Kelly*, 248 Va. 295 (1994); *Featherstone v. Brooks*, 220 Va. 443 (1979).

Agreements containing modification provisions are effective without further court order, but remain subject to the provisions of Va. Code § 20-108. Va. Code § 20-109.1.

VI. MISCELLANEOUS

A. Deceased Party

The court shall not decree support payable by the estate of a deceased party, *unless* stipulated in a preexisting agreement. Va. Code § 20-124.2(C).

B. Variable Award

The court may not enter an award of child support that automatically adjusts from time to time, i.e., an award indexed to the rate of inflation, cost of living index, or future income. Every award shall be determined on the basis of current circumstances and modified subsequently upon proof of a material change in circumstance. *Keyser v. Keyser*, 2 Va. App. 459 (1986).

C. Interest

A child support order constitutes a final judgment by operation of law upon becoming due and payable. All payments in arrears accrue interest at the judgment interest rate established in Va. Code § 6.1-330.54, *unless* the obligee, in writing submitted to the court, waives collection of interest. The commissioner, except in the case of a minor obligor during his minority, shall collect interest on any arrearage pursuant to an order being enforced by the Department of Social Services or the Department of Child Support Enforcement. Va. Code § 20-78.2; Va. Code § 63.2-1952.

D. Appeal

From any final order or judgment of the court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be taken within ten days from the entry of a final judgment, order, or conviction. However, in a case arising under Uniform Interstate Family Support Act (UIFSA) (Va. Code § 20-88.32 *et seq.*), a party has thirty days from entry of a final order of judgment to note an appeal. Va. Code § 16.1-296.

E. Appeal Bond

Va. Code §§ 16.1-107, -296(H).

A civil appeal bond is required to be posted within thirty days from the entry of the final judgment or order establishing a support arrearage or suspending payment of support during pendency of an appeal. The appeal bond shall be in an amount and with sufficient surety approved by the court or clerk to abide by such judgment as may be rendered on appeal, if perfected, and if not, to satisfy the judgment of the court in which it was rendered. *McCall v. Commonwealth, Dept. of Social Servs.*, 20 Va. App. 348 (1995).

The Attorney General had opined that *Mahoney v. Mahoney*, 34 Va. App. 63 (2000), and *Commonwealth ex rel. May v. Walker*, 253 Va. 319 (1997), overrule the decision in *Avery v. Dept. of Social Servs. ex rel. Clark*, 22 Va. App. 698 (1996) and that appeal of a finding of civil contempt for failure to pay court-ordered child support may not be bifurcated. The issues of civil contempt and the establishment of an arrearage are both part of one proceeding. However, the Court of Appeals more recently opined that "… an appellant who challenges an issue that is not intrinsically and logically related to the arrearages, such as a finding of contempt, may do so without posting a bond-but he must make clear to the court that his appeal does not challenge the support arrearage." *Forte v. Department of Social Services*, 65 Va. App. 1, 9 (2015). Effective July 1, 2016, district court form DC-602, NOTICE OF APPEAL – SUPPORT PROCEEDINGS, reflects the option of just appealing the civil contempt finding without posting an arrearage bond in this circumstance. For application of the bond requirement to modification proceedings where the arrearage is created by the retroactive nature of an increased support order, see *Sharma v. Sharma*, 46 Va. App. 584 (2005). The court may order release of the appeal bond to the support recipient to satisfy the arrears. *Zedan v. Westheim*, 62 Va. App. 39 (2013).

Pursuant to Va. Code § 16.1-109, if the district court fails to require the bond or security required under Va. Code § 16.1-296(H), the district court shall order the defect or failure to be cured within no longer a time frame that the appellant had for initially posting the bond. If the defect is not discovered until after the case has been sent to circuit court, then the circuit court shall return the case to the district court for that court to order the appellant to cure the defect or post the required bond within a time frame no longer than the initial time frame for posting the bond. Failure to comply with the order shall result in dismissal of the appeal.

F. Appearance Bond

Upon appeal from a conviction for failure to pay support or from a finding of civil or criminal contempt involving a failure to pay support, the court may require the appealing party to give bond, with or without surety, to insure his appearance. Va. Code § 16.1-296(H).

G. Accrual Bond

The court may require bond in an amount and with sufficient surety to secure the payment of prospective support accruing during the pendency of the appeal. Va. Code § 16.1-296(H). Support payments are not suspended pending any appeal pursuant to Va. Code § 16.1-298 *unless* so ordered by the court *and* a bond is posted pursuant to Va. Code § 16.1-296.

H. Mandatory Parent Education Seminar

The parties in a contested support proceeding must show they have attended a mandatory parent education seminar within the prior twelve months or be required to attend a seminar within 45 days. The court may require attendance in uncontested cases only for good cause shown. Once one seminar has been attended the court has the discretion to order completion of additional programs. The court may exempt parties from attendance for good cause shown or if there is no program reasonably available. See Va. Code §§ 16.1-278.15 and 20-103.

Chapter 3. Parentage

I. HOW PARENTAGE ESTABLISHED

A. Of A Woman, Va. Code § 20-49.1(A)

Established prima facie by evidence of her having given birth to the child, or as otherwise provided in Chapter 3.1 of Title 20.

B. Of a Man, Va. Code § 20-49.1(B)

1. By scientifically reliable genetic tests, including blood tests which affirm at least a ninety-eight percent probability of paternity. Such test results shall have the same legal effect as a judgment entered pursuant to Va. Code § 20.49.8.

2. By voluntary written statement of paternity of the father and mother made under oath acknowledging paternity and confirming that prior to signing the acknowledgement, the parties were provided with a written and oral description of the rights and responsibilities of acknowledging paternity and the consequences arising from a signed acknowledgement, including the right to rescind.

    a. Right to rescind – either party may rescind an acknowledgement within sixty days from the date on which it was signed unless a judicial or administrative order relating to the child in an action to which the party seeking rescission was a party is entered prior to the rescission.

    b. Effect of acknowledgement – a written acknowledgement shall have the same legal effect as a judgment entered pursuant to Va. Code § 20-49.8.

C. Of Adoptive Parent, Va. Code § 20-49.1(C)

The parent and child relationship is established by proof of lawful adoption.

II. COMMENCEMENT OF PROCEEDINGS

A. Petition

Proceedings may be by a petition, verified by oath or affirmation. Va. Code § 20-49.2.

B. Who May File

A child, a parent, a person claiming parentage, a person standing in loco parentis to the child or having legal custody of the child or a representative of the Department of Social Services or the Department of Juvenile Justice may file the petition. Va. Code § 20-49.2.

C. Parties

The child may be made a party to the proceeding. If the child is a minor and made a party, he shall be represented by a guardian *ad litem* appointed by the court. The child's mother or father may not represent the child as guardian or otherwise. The determination of parentage shall not be binding upon any person who is not a party. A child must be made a party to the proceeding and be represented by a guardian *ad litem*; the child also must be given adequate opportunity to litigate the issue in order for the determination of parentage to be binding upon the child. Va. Code §§ 20-49.2, 16.1-266, 8.01-9; *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614 (1989).

D. Jurisdiction

Circuit courts and juvenile and domestic relations district courts have concurrent original jurisdiction over proceedings to determine parentage only when the parentage of a child is at issue in any matter otherwise before the circuit court. In all other cases, the juvenile and domestic relations district court has exclusive original jurisdiction over parentage proceedings. Va. Code § 20-49.2.

III. GENETIC TESTING

A. Motion for Testing

In any trial in which the question of parentage arises, the court, upon its own motion or upon the motion of either party may, and in cases in which child support is in issue, shall direct and order that the alleged parents and the child submit to scientifically reliable genetic tests including blood tests. The motion of a party shall be accompanied by a sworn statement either (i) alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties, or (ii) denying paternity. Va. Code § 20-49.3(A); Forms DC-623, MOTION FOR GENETIC TESTING and DC-624, PARENTAGE TEST ORDER.

B. Cost of Testing

The court shall require the person requesting such genetic test, including a blood test, to pay the cost. However, if that person is indigent, the Commonwealth shall pay the cost of the test. The court may, in its discretion, assess the costs of the test to the party or parties determined to be the parent or parents. Va. Code § 20-49.3(B).

C. Admission of Test Results, Va. Code § 20-49.3(C)

1. The results of a scientifically reliable genetic test, including a blood test, may be admitted into evidence when contained in a written report prepared and sworn to by a duly qualified expert, provided the written results are filed with the clerk of the court hearing the case at least fifteen days prior to the hearing or trial.

2. Verified documentary evidence of the chain of custody of the blood specimens is competent evidence to establish the chain of custody.

3. Any qualified expert performing such a test outside the Commonwealth shall consent to service of process through the Secretary of the Commonwealth by filing with the clerk of court the written results.

4. Upon motion of any party in interest, the court may require the person making the analysis to appear as a witness and be subject to cross-examination, provided the motion is made at least seven days in advance of trial. The court may require the person making the motion to pay into court the anticipated costs and fees of the witness or adequate security for the same.

IV. EVIDENCE RELATING TO PARENTAGE, VA. CODE § 20-49.4

A. Standard of Proof

The standard of proof in any action to establish parentage shall be by clear and convincing evidence.

B. Relevant Evidence

All relevant evidence is admissible and may include, but not be limited to, the following:

1. evidence of open cohabitation or sexual intercourse between the known parent and the alleged parent at the probable time of conception;

2. medical or anthropological evidence relating to the alleged parentage of the child based on tests performed by experts. If a person has been identified by the mother as the putative father of the child, the court may, and upon the request of a party shall, require the child, the known parent and the alleged parent to submit to appropriate tests.

3. the results of scientifically reliable genetic tests, including blood tests, if available, weighted with all the evidence;

4. evidence of the alleged parent consenting to or acknowledging, by a general course of conduct, the common use of such parent's surname by the child;

5. evidence of the alleged parent claiming the child as his child on any statement, tax return or other document filed by him with any state, local or federal government or any agency thereof;

6. a true copy of an acknowledgment of paternity pursuant to Va. Code § 20-49.5;

7. an admission of a male between the ages of fourteen and eighteen pursuant to Va. Code § 20-49.6.

C. Testimony Under Oath, Va. Code § 20-49.5

Whenever a man voluntarily testifies under oath that he is the father of a child whose parents are not married, or are not married to each other, the court may require that he complete an acknowledgment of paternity on a form provided by the Department of Social Services. The clerk of the court shall send this acknowledgment to the Department of Social Services within thirty days.

D. Admissibility of Acknowledgment, Va. Code § 20-49.5

In any parentage proceeding, the petitioner may request a true copy of the acknowledgment of paternity form from the Department of Social Services and the Department shall remit the form to the court where the petition has been filed. The true copy shall then be admissible in any proceeding to establish parentage.

V. SUPPORT PROCEEDINGS INVOLVING MINOR FATHERS, VA. CODE § 20-49.6.

A. Representation by a Guardian *ad Litem*

In any proceeding to establish or enforce an obligation for support and maintenance of a child of unwed parents, a male between the ages of fourteen and eighteen who is represented by a guardian *ad litem* under Va. Code § 8.01-9 and who has not otherwise been emancipated shall not be deemed to be under a disability as provided in Va. Code § 8.01-2.

B. Evidence

The court may establish the paternity of the child based upon an admission of paternity made by such a male under oath before the court or upon such other evidence as may be sufficient to establish paternity.

C. Effect of Order

The order establishing paternity of such a male may require that he provide for support and maintenance of the child and shall be enforceable as if the father were an adult.

VI. EVIDENTIARY CONSIDERATIONS, VA. CODE § 20-49.7

A. Civil Actions

An action brought to establish parentage is a civil action.

B. Competency of Witnesses

The natural parent and the alleged parent are competent to testify.

C. Testimony of Physician

Testimony of a physician concerning the medical circumstances of the pregnancy and the condition and characteristics of the child at birth shall not be privileged.

D. Admissibility of Medical Bills

Bills incurred for pregnancy, childbirth and genetic testing shall be admissible as prima facie evidence of the facts stated therein, without requiring third-party foundation testimony if the party offering such evidence is under oath.

VII. JUDGMENT OR ORDER ESTABLISHING PARENTAGE, VA. CODE § 20-49.8(A)

A. Provisions Included

A judgment or order establishing parentage may include any provision directed against the appropriate party to the proceeding, concerning the duty of support, including:

1. An equitable apportionment of the expenses incurred on behalf of the child from the date the proceeding was filed with the court or, if earlier, the date an administrative support order of the Department of Social Services was delivered to the sheriff or process server for service upon the obligor. The judgment or order may be in favor of the natural parent or any other person or agency who incurred such expenses provided the complainant exercised due diligence in serving the respondent.

2. Provisions for the custody and guardianship of the child, visitation privileges with the child, or any other matter in the best interest of the child.

3. In circumstances where the parent is outside the jurisdiction of the court, the court may enter a further order requiring the posting of bond or other security for the payment required by the judgment or order.

4. Direction that either party pay the reasonable and necessary unpaid expenses of the mother's pregnancy and delivery or equitably apportion those unpaid expenses

between the parties. However, when the Commonwealth, through the Medicaid program, has paid such expenses, the court may order reimbursement to the Commonwealth.

B. Full Faith and Credit, Va. Code § 20-49.8(B)

A determination of paternity made by any other state shall be given full faith and credit, whether established through voluntary acknowledgment or judicial or administrative process. However, full faith and credit shall be given only for the purposes of establishing a duty to make support payments and other payments as set forth in Va. Code § 20-49.8(A).

Paternity may be established through a Uniform Interstate Family Support Act (UIFSA) petition whether or not support is at issue. Va. Code § 20-88.78.

C. Order Establishing Parentage, Va. Code § 20-49.8

1. State Registrar of Vital Statistics

   The clerk is required to forward a certified copy of each order determining parentage to the State Registrar of Vital Records within thirty days after the order becomes final. If the judgment or order is for a person born outside the Commonwealth, the state registrar shall forward that order to the appropriate registration authority in the state of birth or the appropriate federal agency.

2. Contents of the order (*See* Form DC-644, ORDER DETERMINING PARENTAGE)

   The order shall set forth:

   a. the full name and date and place of birth of the person whose parentage has been determined;

   b. the full names of both parents, including the maiden name, if any, of the mother; and

   c. the name and address of an informant who can furnish the information necessary to complete a new birth record.

3. New Birth Record

   A new birth record shall be completed when the State Register of Vital Records receives a document signed by a man indicating his consent to submit to scientifically reliable genetic tests to determine paternity and the genetic test results affirm at least a ninety-eight percent probability of paternity. *See also* Va. Code § 32.1-261.

VIII. DISESTABLISHMENT OF PATERNITY, VA. CODE § 20-49.10

A. An individual may file a petition for relief from any legal determination of paternity

The court may order paternity testing and set aside a previous determination of paternity if a scientifically reliable genetic test establishes the exclusion of the individual named as father. The court may order any appropriate relief, including setting aside (prospectively) an obligation to pay child support. Va. Code § 20-49.10.

B. Exceptions to relief of legal determination of paternity

Relief from paternity will not be granted if the individual named as father:

1. acknowledged paternity knowing he was not the father;

2. adopted the child; or

3. knew that the child was conceived through artificial insemination.

IX. HOSPITAL ESTABLISHMENT PROGRAMS

A. Opportunity to Legally Establish Paternity

Since January 1, 1995, each public or private birthing hospital in the Commonwealth is required to provide unwed parents with the opportunity to establish paternity of a child prior to the child's discharge from the hospital following birth. Establishment of paternity shall be by means of a voluntary acknowledgment of paternity signed by the mother and the father, under oath. Va. Code § 63.2-1914.

B. Requirements of Hospital Staff

Designated staff members of such hospitals shall furnish to the mother and, if present at the hospital, the alleged father:

1. written materials regarding paternity establishment;

2. the forms necessary to voluntarily acknowledge paternity;

3. a written and oral description of the rights and responsibilities of acknowledging paternity; and

4. the opportunity, prior to the child's discharge, to speak with hospital staff trained to provide information and answer questions about paternity establishment.

Provision of the information required, consistent with federal regulations, by designated staff members shall not constitute the unauthorized practice of law. Va. Code § 54.1-3900 *et seq*.

C. Duties - Paternity Acknowledgments Obtained

The hospital shall send the original acknowledgment of paternity containing the social security numbers of both parents, if available, to the State Registrar of Vital Records so that the birth certificate issued includes the name of the legal father.

D. Duties of the Department of Social Services

The Department of Social Services shall:

1. provide to birthing hospitals all necessary materials and forms, and a written description of the rights and responsibilities related to voluntary acknowledgment of paternity;

2. provide the necessary training, guidance and written instructions regarding voluntary acknowledgments of paternity;

3. annually assess each birthing hospital's paternity establishment program;

4. pay to each hospital an amount determined by the regulation of the State Board of Social Services for each acknowledgment of paternity signed under oath by both parents; and

5. determine if a voluntary acknowledgment has been filed with the State Registrar of Vital Records in cases applying for paternity establishment services.

X. ADMINISTRATIVE ESTABLISHMENT OF PATERNITY

Pursuant to the provisions of the Federal Welfare Reform Act, DCSE is authorized to make administrative determinations of paternity without the necessity of court action. Va. Code § 63.2-1913.

XI. PARENTAGE OF CHILD FROM ASSISTED CONCEPTION

1. The husband of the gestational mother is the child's father. However, this is not the case if the husband files an action within two years after he discovers or with due diligence should have discovered the child's birth and the court finds he did not consent to the assisted conception. Va. Code § 20-158(A)(2).

2. A sperm donor is not the parent of a child conceived through assisted conception, unless he is the husband of the gestational mother. Va. Code § 20-158(A)(3). However, this provision does not bar the establishment of paternity through a petition to establish parentage under Va. Code § 20-49.2. *L.F. v. Breit*, 285 Va. 163 (2013). Also, use of a turkey baster for insemination does not render the father "a donor" under the assisted conception statute and he may establish paternity and visitation with the child so conceived. *Bruce v. Boardwine*, 64 Va. App. 623 (2015).

3. *Death of Spouse:* If a wife is inseminated with the consent of her husband with his sperm, the resulting child is the child of the husband and wife notwithstanding either of them dying during the ten month period immediately prior to the child's birth. Va. Code § 20-158(B).

4. *Divorce:* If a wife is inseminated with the consent of her husband with his sperm, the resulting child is their child notwithstanding either of them filing for divorce or annulment during the ten month period immediately prior to the child's birth. Va. Code § 20-158(C).

APPENDIX RULES OF EVIDENCE

RULES OF SUPREME COURT OF VIRGINIA
PART TWO

VIRGINIA RULES OF EVIDENCE

(Also available at http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf)

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 OF 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*. Except as provided in Rule 2:413 or by statute, 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

(a) *Prohibited Uses.* Evidence of the following is not admissible on behalf of any party in a civil case – either to prove or disprove the validity or amount of a disputed claim, or to impeach by a prior inconsistent statement or by contradiction:

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or any statements made during compromise negotiations about the claim.

(b) *Exceptions.* The court may admit such evidence for another purpose, such as proving a witness's bias or prejudice or negating a contention of undue delay.

(c) *Pre-existing documents or physical evidence.* Otherwise admissible evidence that existed prior to the commencement of compromise negotiations, including pre-existing documents or electronic communications, is not excludable under this Rule merely because such evidence was disclosed, produced, or discussed by a party during such negotiations.

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 STATEMETNS

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.

Rule 2:413 EVIDENCE OF SIMILAR CRIMS 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 shall 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 shall 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 shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce.

(c) This Rule shall 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 shall be subject to exclusion in accordance with the Virginia Rules of Evidence, including but not limited to Rule 2:403.

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 PRIVILEGE (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 married 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) Except as otherwise provided in this Rule, 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, 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 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, 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 REFREACH 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 WITNESS 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 specific statements shall 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 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.

(d) *Prior statements*. When a party or non-party witness testifies either live or by deposition, a prior statement (whether under oath or not) is hearsay if offered in evidence to prove the truth of the matters it asserts, but may be received in evidence for all purposes if the statement is admissible under any hearsay exception provided in Rules 2:803 or 2:804. In addition, if not excluded under another Rule of Evidence or a statute, a prior hearsay statement may also be admitted as follows:

(1) *Prior inconsistent statements*. A prior statement that is inconsistent with the hearing testimony of the witness is admissible for impeachment of the witness's credibility when offered in compliance with Rule 2:613.

(2) *Prior consistent statements*. A prior statement that is consistent with the hearing testimony of the witness is admissible for purposes of rehabilitating the witness's credibility, but only if

(A) the witness has been impeached using a prior inconsistent statement as provided in Rule 2:607, Rule 2:613 and/or subpart (d)(l) of this Rule 801, or

(B) (i) the witness has been impeached based on alleged improper influence, or a motive to falsify testimony, such as bias, interest, corruption or relationship to a party or a cause, or by an express or implied charge that the in-court testimony is a recent fabrication; and

(ii) the proponent of the prior statement shows that it was made before any litigation motive arose for the witness to make a false statement.

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 DECARANT (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:

(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) *Records of a Regularly Conducted Activity.* A record of acts, events, calculations, or conditions if:

(A) the record was made at or near the time of the acts, events, calculations, or conditions by--or from information transmitted by-- someone with knowledge;

(B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making and keeping the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(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.

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 shall 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 2:805 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 (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:

(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.

(6) *Certified Records of a Regularly Conducted Activity.*

(a) In any civil 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 shall (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 shall 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 shall 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 shall be made by witness testimony unless the objection is withdrawn.

(c) A certified business record that satisfies the requirements of this section shall be 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 2:903 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.